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Duty of Vigilance: The claims brought by several associations against TotalEnergies dismissed!

In two judgments handed down on February 28, 2023[1][2], the summary judge of the Paris Judicial Court declared inadmissible the claims of several environmental protection associations seeking that TotalEnergies be ordered to comply with its duty of vigilance obligations under the Law No. 2017-399 of March 27, 2017.

It should be preliminarily recalled that Law of March 27, 2017 on the Duty of Vigilance (also known as the Corporate Due Diligence Duty) imposed on some parent companies and contractors the obligation to establish a so-called "vigilance plan" whenever they employ at the close of two consecutive financial years:

- at least 5,000 employees in France, within the company itself or within their direct or indirect subsidiaries;
- at least 10,000 employees worldwide.

Pursuant to Article L. 225-102-4 of the French Commercial Code, this vigilance plan must identify risks and prevent "***serious violations of human rights and fundamental freedoms, serious harm to human health and safety and to the environment***" which result from the activities of the company itself and from the activities of its subcontractors and suppliers.

This vigilance plan must be drawn up in association with the company's stakeholders and include the following measures:

> *"1° "A risk map to identify, analyze and prioritize risks;*

2° Procedures to regularly assess the situation of subsidiaries, subcontractors or suppliers with whom an established business relationship is maintained, based on the risk map;

3° Appropriate actions to mitigate risks or prevent serious infringements or harm;

4° A mechanism for issuing alerts and collecting reports on the existence or occurrence of risks, established in consultation with the representative trade unions within the company;

5° A system to monitor the implemented measures and assess their effectiveness."

Compliance with these provisions is guaranteed firstly by means of a formal notice to comply with these obligations which can be served by "*any person having an interest in acting for this purpose*", and secondly, if the company fails to comply, by a legal action to have the company ordered to take the necessary measures.

It is at the time these provisions came into force that six environmental protection associations applied to the summary judge of the Judicial Court to request that TotalEnergies be ordered to fulfill its duty of vigilance obligations, subject to a fine of 50,000 euros per day of non-compliance, after having sent in 2019 a formal notice to TotalEnergies regarding alleged shortcomings in its 2018 vigilance plan.

These associations accused TotalEnergies of having carried out two major projects in Uganda that reportedly resulted in serious violations of human rights and serious harm to the environment. One of these projects concerned the development of a crude oil processing plant called Tilenga and the other was the construction of a buried pipeline to transport hydrocarbons.

In two particularly well-reasoned judgments, which recalled what the duty of vigilance is about – everal well-known scholars were heard during the pleading hearing – the summary judge dismissed the associations' claims on the ground that such claims were inadmissible because the associations had failed to serve a formal notice on TotalEnergies to comply with its obligations under its vigilance plan published in 2021, which was the subject-matter of the discussions. He further ruled, for the sake of completeness, that it was not within his remit to assess the reasonableness of the measures put in place under the vigilance plan.

I/ The vagueness of the content of the measures implemented under the vigilance plan

The judgments first recalled the principle of the duty of vigilance and the content of the measures provided for by the Law of March 27, 2017, but pointed out that the Decree that was supposed to provide further details on the content of these measures had not yet been published.

It recalled that the Law of March 27, 2017 does not directly refer to any guiding principle or pre-established international standard and that it does not include any nomenclature or classification of the duty of vigilance imposed on the relevant companies.

It finally recalled that the Law of March 27, 2017 did not create any independent control body nor provided for any performance indicators to assess the vigilance plan, and that the control carried out by the judge is solely aimed at verifying the "*reasonableness*" of the vigilance measures included in the plan, which, according to the summary judge, remains an "*imprecise, vague and flexible notion*".

II/ The dialogue with stakeholders

Article L. 225.102-4 of the French Commercial Code expressly provides that the vigilance plan must be drawn up in association with the company's stakeholders.

However, the summary judge noted that it was not specified who the stakeholders were and how they were designated, but recalled that the legislator had expressed his intention to have the vigilance plan drawn up in the context of a dialogue with the stakeholders and that it was in pursuit of this objective of consultation that the legislator had introduced the prior formal notice mechanism.

The purpose of this prior formal notice is to enable the company to comply.

III/ The absence of prior formal notice concerning the vigilance plans published in 2019, 2020 and 2021

The associations did serve notice on TotalEnergies with respect to its 2018 vigilance plan, which was the first mandatory plan under the Law of March 27, 2017 which came into force in 2019. However, the discussions actually focused on the 2021 vigilance plan for which not prior formal notice had been served.

The summary judge, therefore, held that the claims concerning a vigilance plan that had not been the subject of a prior formal notice were inadmissible. It should be noted that the associations had refused to enter the mediation process proposed by the judge.

IV/ The lack of power of the summary judge to make an in-depth examination of the case

The summary judge considered, for the sake of completeness, that the disputed vigilance plan included the five measures mentioned above, which were sufficiently detailed not to be considered as basic measures.

Consequently, it did not fall within the remit of summary judge to control the tools implemented under the vigilance plan and to assess their effectiveness with regard to the respect of human rights and the environment in the absence of a finding of a manifest unlawfulness, as per Article 835 of the French Code of Civil Procedure.

The summary judge added that the assessment of the reasonableness of the measures under the vigilance plan was the sole responsibility of the judge ruling on the merits.

As such, the procedural mechanism provided for under Article 235-104 II of the French Commercial Code

proves to be cumbersome and shows its limits, since the summary judge is not able to assess the tools put in place under the vigilance plan.

The associations will, therefore, have no other choice but to turn to the judge ruling on the merits for an effective control of the vigilance measures put in place.

V/ Towards an extension of the duty of vigilance

Finally, it should be recalled that the obligation to set up a vigilance plan should be extended to a greater number of companies, as the European Commission has adopted a proposal for a directive on corporate due diligence[3] that would apply to:

- large companies with more than 500 employees and a net worldwide turnover in excess of EUR 150 million;
- companies with more than 250 employees and a net worldwide annual turnover in excess of EUR 40 million, provided that at least 50% of this net turnover is generated in one or more specific business sectors (textile and footwear industry, agriculture, fisheries, manufacture of food products, extraction of mineral resources (petroleum, gas, coal), manufacture of metal products, etc.). For these companies, the new rules would start applying two years after their entry into force;
- companies organized and operating under the laws of a third country when they generate a net annual turnover in excess of EUR 150 million in the European Union, or in excess of EUR 40 million in the European Union when at least 50% of this turnover is generated in one or more of the aforementioned specific business sectors.

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[1] Paris Judicial Court, February 28, 2023, No. 22/53942, judgment available upon request at info@soulier-avocats.com

[2] Paris Judicial Court, February 28, 2023, No. 22/53943, judgment available upon request at info@soulier-avocats.com

[3] See article entitled Towards a European corporate due diligence duty published on our Blog in March 2022