

The Tribunal Judiciaire of Paris has sole jurisdiction to hear duty of vigilance lawsuits

Parent companies and large companies acting as principals may be held liable in the event of a breach of their duty of vigilance (also called due diligence duty).

This duty of vigilance takes into account *inter alia* the risks of environmental damage associated with the operations of these companies, as well as those of their subsidiaries, subcontractors or suppliers.

The debate as to which court is competent to assess a vigilance plan has just been definitively settled: The Paris Judicial Court (*Tribunal Judiciaire de Paris*) has exclusive jurisdiction to hear disputes over the duty of vigilance.

It should first be recalled that it is Law No. 2017-399 of March 27, 2017 that imposed a duty of vigilance on some parent companies and large companies acting as principals. This Law had been drawn up in response to various human and environmental disasters involving multinational companies, and in particular the collapse of the Rana Plaza in Bangladesh in 2013.

This duty of vigilance takes the form of an obligation (i) to draw up a vigilance plan to identify risks and prevent serious violations of human rights and fundamental freedoms, serious harm to human health and safety and to the environment, and (ii) to implement it effectively and publish it. We recently discussed in another article the changes brought about by the Climate and Resilience Law with respect to the duty of vigilance.^[1]

Regarding the applicable sanctions and penalties for non-compliance with this duty, in accordance with Article L. 225-102-4 of the French Commercial Code, wherever a company is formally requested to comply with the obligations set forth in this Article but fails to do so, the matter may be referred to a court at the request of

any person with an interest in acting. The matter can equally be brought before the president of the court, ruling in summary proceedings. Article L. 225-102-5 of the same Code provides that those responsible for breaches of the duty of vigilance may be held liable on the basis of extra-contractual civil liability, as provided for in Articles 1240 and 1241 of the French Civil Code, for the purpose of compensating the damage that the performance of these obligations would have prevented. These provisions are not accompanied by any specific jurisdictional rules.

It is in this context that the first disputes relating to the implementation of these obligations raised the issue of jurisdiction in the event of summary proceedings, following a formal notice which remained unsuccessful:

- *In a first case, known as the “Total in Uganda” case:*

Six associations filed an application for interlocutory injunction before the summary judge against the oil company Total for failure to comply with its duty of vigilance in connection with its activities in Uganda. They claim that Total’s oil development project had significant social and environmental impacts that were not taken into account in the company’s vigilance plan.

In an order dated January 30, 2020, the president of the Judicial Court of Nanterre, ruling in summary proceedings, declined jurisdiction and held that the matter ought to be brought before the Commercial Court. This order was upheld by a judgment of the Versailles Court of Appeals on December 10, 2020. In order to rule that the Commercial Court had exclusive jurisdiction, the Versailles Court of Appeals held that the vigilance plan, the preparation and implementation of which are directly related to the management of the company, constitutes a commercial transaction (*acte commercial*), not a mixed transaction (*acte mixte*) which would give the plaintiffs a so-called right of option, i.e., an option of jurisdiction allowing to choose to bring the matter either before a Civil Court or a Commercial Court.

- *In a second case, known as the “Total for climate inaction” case:*

This time, the dispute was between five associations and 14 local authorities on the one hand and Total on the other hand. The plaintiffs claimed that Total had made insufficient climate commitments, as expressed in its vigilance plan, in view of the objectives set by the Paris Agreement.

In a procedural issue raised *in limine litis* (i.e., before any defense on the merits), Total challenged the jurisdiction of the Nanterre Judicial Court, as it had done in the previous case.

In an order dated February 11, 2021, the Case Management Judge of the Nanterre Judicial Court dismissed Total’s objection to the Court’s jurisdiction. He found that while the dispute relating to the vigilance was indeed a matter for the Commercial Court, the option of jurisdiction between the Judicial Court and the Commercial Court was open to the non-trading party. According to him, the purpose of the plan goes beyond the commercial dimension of management and falls under the company’s corporate social responsibility.

In December 2021, the issue was settled in two steps that rapidly followed one another:

- Firstly, by the decision rendered on December 15, 2021 by the Commercial Chamber of the *Court of Cassation* (French Supreme Court) in the “Total in Uganda” case: The *Cour de cassation* ruled that the vigilance plan does not constitute a commercial transaction (*acte commercial*) and that, while the preparation and implementation of such a plan has a direct link with the management of a company, justifying the jurisdiction of the Commercial Court, the non-trading plaintiff has the choice of bringing the matter either before the Judicial Court or before the Commercial Court.
- Secondly, by Law No. 2021-1729 of December 22, 2021 on confidence in the judiciary: A new Article L. 211-21 was introduced on December 24, 2021 in the French Code of Judicial Organization according to which “*The Paris Judicial Court hears actions relating to the duty of vigilance based on Articles L. 225-102-4 and L. 225-102-5 of the [French] Commercial Code*”.

Obviously, the issue at stake is not only symbolic. The question is whether a commercial judge, rather than a civil judge, should assess a vigilance plan. The French legislator has decided that the Judicial Court should be competent, in line with a general trend towards the specialization of courts for the most technical disputes.

It is true that the increasing technical complexity of environmental litigation has already led to the special designation of judicial courts with jurisdiction over ecological damage, civil liability actions based on the French Environmental Code, and offences under said Code.

In the present case, it was considered that the purpose of legal actions relating to the vigilance plan exceeded the scope of corporate litigation – a type of litigation over which the Commercial Court has exclusive jurisdiction – since the purpose of the duty of vigilance is nothing more and nothing less than “*identify[ing] risks and serious violations of human rights and fundamental freedoms, serious harm to human health and safety and to the environment*”.

[1] See article entitled [French Climate and Resilience Law: What impact on corporate law?](#) published on our Blog in December 2021

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