Compliance & Ethics Professional®

October
2017

A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

www.corporatecompliance.org

Meet Waleed Alghosoon

Counsel
Saudi Basic Industries Corporation (SABIC)
Riyadh, Saudi Arabia

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by Maria Lancri

The French duty of care

» Supply chain management, an important issue to take care of to protect the reputation of international companies.

» The California Transparency in Supply Chains Act, the UK's Modern Slavery Act 2015, and France's duty of care law: three different ways to see supply chain issues.

» The French duty of care is a demanding law, the application of which involves external stakeholders.

» The Conseil Constitutionnel aimed at limiting the involvement of said stakeholders.

» Now, apply it using soft law standards.

First printed in France by Journal des sociétés, n° 151—avril 2017 (http://www.jss.fr/JdS-catalogue.awp) and reprinted with their authorization.

The law on the duty of care has now been passed in France.[1] What must one do to comply with it?

The debates surrounding the parliamentary bill on the duty of care gave way to heated exchanges between both sides of the French parliament and senate. This was not because one side would be opposed to the implementation of a control and did not understand the importance of this issue, while the other side would be advocates of a law that ensures ethical conduct from French businesses. The debate was more centered on the approach taken with the adoption of the law so that the obligations imposed on French companies could be carried out effectively and profitably.

Lancri

But before coming to methodologies of implementation, it is necessary to define the concept of duty of care and to look at how companies already implement it.

The industrial world has greatly developed in recent decades on a global scale. Schematically, and principally for cost reasons, the production and manufacturing industries have left western countries in order to relocate to countries in which the working conditions are less regulated and the workforce more flexible.

Businesspeople are undoubtedly aware of these weaknesses and have for many years taken measures to better control their supply sources. They have improved their selection of subcontractors, requiring that they comply with codes of conduct and subjecting them to audits prior to or throughout the establishment of a contractual relationship. They adhere to codes of good conduct, from organizations such as the United Nations, and publish an annual report detailing the measures taken in this regard.

The context of the law and pre-existing norms

Much regulation, whether at an international or European level, already covers the issue.

At the international level, the International Labour Organisation (ILO) has for many years implemented international conventions limiting working hours, to which many countries adhere. It is worth noting that the ILO has recently revised its tripartite declaration of principles concerning the social policies of multinational corporations in

order to respond to, it states, "new economic realities, notably the increase of international investments in commercial exchanges, and the growth of global supply chains."

At the European level, consider the example of the General Product Safety Directive,[2] which provides that products sold on the EU market must contain information that would allow for them to be traced, such as the identity of the manufacturer and the reference of the product or the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) regulation, adopted to better protect human health and the environment against risks associated with chemical substances. As always, European texts are transposed and applied in France.

This French parliamentary bill was introduced in a post-Rana Plaza context. Rana Plaza was a building in Bangladesh housing workshops that collapsed in 2013, resulting in approximately 1,130 deaths and many injured.

All these norms create an obligation to implement control procedures regarding subcontracted manufacturers in order to ensure the conformity of products, whether by way of questionnaires, visits, audits, or controls of the quality of products.

At French domestic law level, the Commercial Code already provides, in article L. 225-102-1, reporting obligations on companies subjected to the rules of the "Social Responsibilities of Companies," which should be reinforced with the transposition of the above directive.

This French parliamentary bill was introduced in a post-Rana Plaza context. Rana Plaza was a building in Bangladesh housing workshops that collapsed in 2013, resulting in approximately 1,130 deaths and many injured. The security rules had not been respected, and the workshops in question described themselves as "sub-subcontractors" of large European brands, whose reputations were immediately tarnished. These companies found themselves under international scrutiny and saw their image and their reputation attacked for the fact that they did not have control of their supply chain. Thereafter, under the auspices of the ILO, they took part in an indemnity fund of over $30 million and communicated around their participation in these funds, all while recalling that they had no contractual relationship with the workshop. It was their direct subcontractors who had contractual relationships with the workshops.

In the context, the UK adopted the Modern Slavery Act 2015. Article 54 of this Act imposes on those (providers of goods and services, realizing a turnover of £36 million, and having a company where some of the activity is carried out on UK soil) who place orders entering into the scope of annual obligations to declare the controls carried out on their supply chain.

California had already adopted a similar text to limit supply chains.[3]

The text of the law adopted by the Assemblée Nationale

The French law as adopted by the Assemblée Nationale at final reading was challenged

before the Conseil Constitutionnel. The nature and content of this challenge merit examination.

Through article 1, the scope of the law is relatively limited because it only affects "every company which employs, at the end of two consecutive financial years, at least five-thousand employees within the main company and its direct and indirect subsidiaries, where the headquarters are located on French or foreign soil." Also, along the lines of the recently passed Sapin II Law, this law provides for the adoption of a compliance program entitled "plan de vigilance," designed to "identify the risks and to foresee serious attacks against human rights and fundamental liberties, health and security of people, as well as of the environment."

This identification is as important in regards to the activities of companies subjected to the obligation as it is to those which the company controls, directly or indirectly, as well as to activities of subcontractors or suppliers with which a commercial relationship is established.

This plan de vigilance, which is intended to be prepared with the stakeholders of the company and potentially in the scope of multi-party initiatives within the procedures, must comprise the following measures:

- A risk assessment whose objective is to identify, analyze, and classify the risks;
- Evaluation procedures of subsidiaries, subcontractors, or suppliers;
- Actions to mitigate risks and prevent serious risks;
- An alert mechanism to collect alerts relating to the existence or materialization of risks, set up in cooperation with the works council; and
- A monitoring of said measures to evaluate their efficiency.

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Note that this duty of care law, like the Sapin II Law, is implementing a whistleblowing line. The Sapin II Law already implements two different systems: (i) the general one (article 6 and 8 of the law) and (ii) the anti-corruption one (article 17). However, it is only at article 8 and in the subsequent decree that the actual system to be put in place is being described. Consider that it is this system on which the company should base its whistleblowing procedure. A decree[4] was then published to complete the law and detail the practical requirements the procedure should follow. It is generally considered that only one whistleblowing line should be set up by companies, a line that should receive the alerts described by the three legal provisions.

The duty of care program is to be rendered public within the annual financial report specified by article L. 225-202 of the Commercial Code. Note that the law does

not request that a separate publication of the report, written in plain French, be published on the company's website, such as it is requested both by the Californian law and the UK Modern Slavery Law.

The same article 1 of the law provided for the following control measures to ensure the implementation of duty of care programs: (i) a notification to comply is sent to a company falling under the scope of the law; (ii) if the company does not comply within three months of the notice, a judge—in an interim procedure at the request of any person with an interest in the matter—may order said company to comply with the measures and has the power to subject them to a daily fine; and (iii) a monetary penalty of up to €10 million could be ordered by the judge. The amount is to be determined by the judge, taking into account the seriousness and the circumstances of the failure and also the personality of the offender.

Article 2, as adopted by the Assemblée Nationale, provides that businesses are liable for any failure to comply with the duty of care obligation and are responsible for repairing the harm that the proper execution of its obligations would have avoided. For that purpose, an action can be filed by any person with interest in the matter, and the decision may be published.

A complementary sanction was added to that text allowing the judge to pronounce a monetary penalty amounting to three times the penalty of €10 million provided for in article 1, depending on the seriousness of the failure and on the damage suffered.

The Conseil Constitutionnel decision

The Conseil Constitutionnel, on the basis of referrals made by 60 deputies and 60 senators, ruled in a decision dated March 23, 2017,[5] that the law was to be partially censored. It also took that opportunity to interpret the other provisions of the law in a restrictive manner, thereby limiting their scope.

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As a consequence of the terms used in the law being too general, the principle of legality of offenses and penalties in the following articles were considered to be frustrated and thereby in breach of the constitution: the last paragraph of article 1 relating to the monetary penalty of €10 million, the third paragraph of article 2 relating to the increase by three times the monetary penalty, and article 3 allowing to collect the monetary penalty in local currency.

The Conseil Constitutionnel also usefully interpreted some of the provisions that it has decided to validate. As such, the Conseil considers that the text does not affect the principle of free enterprise, as though the duty of care program has to be made public, companies do not have to make public their industrial and commercial strategies under that obligation.

The requirement that the duty of care program must take into account the suppliers and subcontractors with which a company has an established commercial relationship was not considered by the Conseil to be

illogical. For the Conseil, the concept of an "established commercial relationship," very specific to French law, must be understood in view of articles L. 420-2 and L. 442-6 of the Commercial Code, and the provisions that implicate that the duty of care program has to be established together with the stakeholders are only an incentive.

Article 2 of the law provides that a failure to comply with the duty of care obligations must be sanctioned with regard to the harm suffered. The Conseil specifies that the liability of a company is analyzed in view of the usual principles of liability in French law, meaning that there should be a direct link of causality between the failure to comply and the damage suffered. It thus specifies that no specific liability regime is being implemented by the law. A result of this is that the law does not allow a person to file a petition on behalf of a victim, who is the sole party to have an interest in the matter.

It is interesting to note that in the Conseil Constitutionnel's guiding principles, it is clearly stated that the legal authority attached to its decisions applies both to the reasoning and to the ruling. This interpretation shall therefore bind all the judicial and administrative authorities. The text is therefore not entirely censored, but its application is significantly limited. The law was executed by the president on March 27, 2017, and published in the official journal the following day.

The implementation of the law on the duty of care

In light of this, the conditions of the implementation of the duty of care program are somewhat clarified. However, even if the meaning and scope of the law are certain, it remains difficult to implement.

The duty of care program should be implemented with the consultation of the stakeholders of a company. However, "stakeholders" are not defined in the law, and the law does not cover issues relating to confidentiality when it seeks to involve stakeholders.

The scope (companies of more than 5,000 employees) is not the same as that of the Sapin II Law or of the CSR obligations. In any event, considering that companies have to apply their program to their subcontractors, agreements that they will enter into with smaller companies shall provide for comparable obligations. As a consequence, smaller companies are most likely to have implemented some duty of care "contractual" program.

The duty of care program should be implemented with the consultation of the stakeholders of a company. However, "stakeholders" are not defined in the law, and the law does not cover issues relating to confidentiality when it seeks to involve stakeholders. Many issues arise from this: what are the consequences of a failure of the discussions with the stakeholders? Would a stakeholder who is not satisfied with the discussions be able to file a petition against the company? Could said stakeholder use the whistleblowing alert provided for by this law, or the one provided for in the Sapin

II Law,[6] if it considers that the duty of care program was not going far enough and that, as a consequence, there is a duty of care risk?

Also, if the duty of care program is inspired by the Sapin II Law, it was not provided that any authority should overview this law and would have the ability to issue guidelines on the scope of the powers granted to the French anticorruption authority, nor to guide any action implemented by the stakeholders.

It is worth noting that the California Transparency in Supply Chains Act and the Modern Slavery Act provide more of a step-by-step implementation with a clear objective to provide consumers with better information on the products they buy. The British Home Office undertook several consultations with companies prior to publishing its guidelines on the supply chain.[7] Also, the State of California published in 2015 a methodology to be followed to implement compliance programs.[8]

It is worth noting that the California Transparency in Supply Chains Act and the Modern Slavery Act provide more of a step-by-step implementation with a clear objective to provide consumers with better information on the products they buy.

In the French senate, the legislation commission conducted a comparative analysis of the text and concluded that the French proposition was excessive and likely to harm the competitiveness of French companies that have to comply with it. This is why the Commission proposed[9] (and the Senate agreed upon) a redrafting of the law that would allow the implementation of the duty of care through the transposition of the directive on non-financial information[10] and thereby ensure a uniformity of the rules at the European level. The legislation commission proposed that the annual report of the board of directors to the shareholders should reflect the main social, environmental, and corruption risks of the company and its subsidiaries both in France and overseas in view of the applicable law locally, and the reasonable measures of care implemented by the company in order to prevent said risks.

This proposition was, however, not retained by the Assemblée Nationale when it reviewed the law for the last reading. On its side, the government has planned to harmonize the directive into French law by way of a governmental order, and article 216 of the law relating to equality and citizenship[11] grants such authorization to the government.

Duty of care programs

Although the law does not provide for a sanction in the case of noncompliance, duty of care programs must be implemented. Some recent examples have shown that any harm to the image and the reputation of a company can be more damaging than the cost of a monetary penalty.

For that purpose, companies may find it useful to consider the recommendations aiming to assist companies to implement

anticorruption compliance programs, which are due to be issued by the French anticorruption agency created by the Sapin II Law in the coming months. And although the risks covered are not as wide as those covered by the French duty of care law, companies may learn from studying how the UK law has been implemented. The first reports from companies subject to the Modern Slavery Act are now available on the website of the Business & Human Rights Resource Centre,[12] and this center also proposed recommendations of the conception and content of programs.[13]

The most difficult problem that remains for any compliance issue is the necessity to document any action conducted by companies and to determine how thorough audits and investigations of third parties (suppliers and subcontractors) must be to be able to consider that, if a difficulty or a failure is later discovered, the corporate representative of the company would not be found liable.

We must hope that the implementation of the two laws (the duty of care law and the harmonization of the directive on non-financial information) will, in view of the Conseil Constitutionnel's decision, be made in a harmonious manner and will allow French companies both to fulfill their obligations and to ensure their business development together with the safety of the consumers. ✳

1. "Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre" *Journal officiel de la République,* March 27, 2017. Available at http://bit.ly/2sIU5Cy.
2. "Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (Text with EEA relevance)." *Journal officiel de la République,* December 3, 2001. Available at http://bit.ly/2t6r1EC. This directive is currently under review after the European Commission proposed to replace it by a regulation.
3. The California Transparency in Supply Chains Act. Available at http://bit.ly/2u6eTHV.
4. Décret n° 2017-564 du 19 avril 2017 relatif aux procédures de recueil des signalements émis par les lanceurs d'alerte au sein des personnes morales de droit public ou de droit privé ou des administrations de l'Etat. Available at http://bit.ly/2sIR4Cs.
5. Décision n°2017-750 DC du 23 mars 2017. Available at http://bit.ly/2tALdC6.
6. If it meets the criteria laid down in Article 8 of that law.
7. *Transparency in Supply Chains etc.: A practical guide.* Available at http://bit.ly/1PLqJvh.
8. Kamala Harris: *The California Transparency in Supply Chains Act: A Resource Guide,* 2015. Available at http://bit.ly/1Z6rzbT.
9. Proposition de loi adoptée avec modifications par l'assemblée nationale en deuxième lecture, relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, texte de la commission. Available at http://bit.ly/2sXXAcG.
10. Directive 2014/95/Eu of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. Available at http://bit.ly/2ubighA.
11. Loi n° 2017-86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté. Available at http://bit.ly/2u1EWQV.
12. Available at http://bit.ly/2u1nDzf.
13. Beyond Compliance: Effective Reporting under the Modern Slavery Act February 2016. Available at http://bit.ly/2uaNJQR.

Maria Lancri *(lancri@gg-v.net) is an attorney at GGV in Paris, France.*