

法國「企業警戒法」研究

1. 立法背景

2013年4月，位於孟加拉的 Rana Plaza 大樓發生倒塌，造成超過千人死亡的慘劇，主因係大樓內製衣廠機械的沉重重量以及運作中產生的振動使樑柱不堪重負。

由於這些製衣廠主要是為眾多國際品牌生產服裝，使得此次事件引發各界強烈關切全球供應鏈中複雜且不受監管的外包模式及所造成的風險，更促使各界加強倡議母公司應承擔其供應鏈營運產生之法律責任¹。

於此背景下，法國於2017年通過遭暱稱為「Rana Plaza 法」的「企業警戒法」(Corporate Duty of Vigilance law)，突破公司獨立法人格，完成對於跨國企業集團母公司進行咎責的立法。除此之外，該法律要求法國的大型公司對其營運行為可能引發的人權或環境影響進行盡職調查及防範，並制定公開的預警方案。這樣的強制責任也及於其海內外之供應商、子公司及分公司，使得它們不再被視為獨立於母公司的法人實體。

2. 適用對象

(1) 規範主體

依據法國「企業警戒法」第1條規定，該法的規範主體為：至少連續兩個財務年度(1) 母公司本身與受其直接、間接控制的子公司合計擁有超過5,000名員工，且均設立於法國，或是(2) 母公司

¹ Eda Güçlü.(2020, June, 18).THE FRENCH “CORPORATE DUTY OF VIGILANCE” LAW: AN EXAMPLE OF BOTTOM-UP VIGILANCE? Retrieved from <https://vigilanz.hypotheses.org/321>.

本身與受其直接、間接控制的子公司合計擁有超過 10,000 名員工，而僅有母公司設立於法國²。

(2) 適用範圍

法國「企業警戒法」適用於公司的營運活動以及法律所定義的商業關係。包括：1. 母公司本身的營運活動；2. 依據法國商法典第 L.233-16 II 條規定，直接或間接受母公司所控制的子公司（例如：直接或間接握有多數的投票權利；連續兩個財政年度指定多數的管理層級成員、管理或是監督團隊，或是透過契約或是法律明文條文對該公司具有支配的影響力），其營運活動；3. 母公司的承包商或是供應商，且兩者之間的關係該當法國法上所謂的「商業關係」（established business relationship），包括在有契約或是無契約之下建立穩定且常態化的商業關係，擁有一定程度的交易數量，從而能夠合理預期這種商業關係之持續。

3. 法定義務

法國「企業警戒法」是法國第一部要求法國企業必須針對他們的商業行為進行人權盡職調查（human rights due diligence）的法律，而這項法定義務不僅擴及至子公司和供應鏈，同時亦與「聯合國工商企業與人權指導原則」（UN Guiding Principles on Business and Human Rights）之精神相符。依據法國企業警戒法第 1 條之規定，符合條件的公司必須每年公開其「警戒計畫」（Vigilance Plan）及計畫執行報告，且該計畫之草擬需經利害關係人或子公司參與。

² Stéphane Brabant, Elsa Savourey. (2017, December, 14). Scope of the Law on the Corporate Duty of Vigilance - Companies Subject to the Vigilance Obligations. *Revue Internationale de la Compliance et de l'Éthique des Affaires*. N° 50.p.2

「警戒計畫」的內容包括：(1)風險地圖（A risk mapping）；(2)評估程序（Assessment procedures）；(3)減低風險行動計畫（Risk mitigation actions）；(4)警戒或陳報機制（An alert or reporting mechanism）；(5)評估警戒計畫中所採取措施有效性之監督機制（A monitoring mechanism to evaluate the effectiveness of measure taken under the plan）。

4. 救濟途徑

受法國「企業警戒法」規範的公司若未履行制定、執行或公布其警戒計畫之法定義務，經正式通知履行三個月後仍未履行時，任何利害關係人得向法院提出訴訟，請求法院命公司必須遵守法律，必要時得處以罰金。

此外，依據法國「企業警戒法」第2條之規定，若公司未依法提出警戒計畫，則公司營運發生損害時，需要承擔若提出警戒計畫即能避免之損害賠償責任。

5. 參考案例

(1) 案例背景

依據法國「企業警戒法」提起的第一起訴訟是由法國及烏干達的六個非政府組織於2019年對法國能源公司 Total 提起的訴訟，原因是該公司被指控未能履行其在烏干達的大型石油開發計畫中的環境及人權義務。

該大型石油開發計畫係 Total、英國 Tullow Oil 公司及中國海洋石油集團有限公司（CNOOC）共同合作，預計於位於烏干達的6個油田鑽探400餘口井，並建設一條通往坦尚尼亞、長達1,445公

里的管道。而這項計畫可能會使烏干達西部及中部地區約 50,000 名農民流離失所，並影響烏干達及坦尚尼亞的自然環境³。

2019 年 6 月，有六個非政府組織向 Total 提出正式要求，要求其應修改並將烏干達石油開發相關之內容納入警戒計畫。在三個月的法定期限後，Total 拒絕這些非政府組織的要求，使得這些非政府組織依法將 Total 告上位於法國楠泰爾（Nanterre）的地方法院（tribunal de grande instance）。

(2) 雙方主張及法院之判斷

原告即非政府組織主張 Total 應解決其警戒計畫中的缺陷，並採取緊急措施來解決位於烏干達的侵犯人權行為。被告即 Total 則主張，其警戒計畫清楚表明該公司營運活動可能對人權及環境造成的風險，並已針對這些風險制定預防措施，且警戒計畫屬於管理報告之部分，應由商業法院（tribunal de commerce）管轄。地方法院最終接受 Total 的立場，於 2020 年 1 月裁定此案應由商事法庭管轄⁴。原告方不服並於同年 3 月提出上訴，本案仍在進行中。

(3) 後續影響

雖然地方法院的裁定並未對實體上的法律主張進行判斷，該裁決仍對「企業警戒法」的實際效用造成打擊。原告方即表示，地方法院之裁定等同間接表明需在損害發生後，才能對公司要求損害賠償，而不是積極防止將來可能的違法行為，更將涉及危害環境

³ Portia Crowe.(2020, January, 10). Ugandan farmers take on French oil giant in game changer case for multinationals. Retrieved from <https://www.pri.org/stories/2020-01-10/ugandan-farmers-take-french-oil-giant-game-changer-case-multinationals>

⁴ Ed Reed. (2020, January, 31). Win for Total in French case over duty of vigilance. Retrieved from <https://www.energyvoice.com/oilandgas/africa/221363/win-for-total-in-french-case-over-duty-of-vigilance/>

或人權的事項納入商業爭議的範疇⁵。同時，商業法官是由商業法院管轄地區範圍之選舉團選舉產生，並非完全由專業的職業法官組成，亦包含許多工、商會成員⁶，經常因專業性不足及潛在利益衝突而飽受抨擊。

● 附錄：法國「企業警戒法」（英譯版）

Article 1

After Article L. 225-102-3 of the Trade and Industry Code, an Article L. 225-102-4 shall be inserted reading as follows:

“*Art. L. 225-102-4. – I. – Any company that at the end of two consecutive financial years, employs at least five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad, must establish and implement an effective vigilance plan.*

“The controlled subsidiaries or companies that exceed the thresholds mentioned in the first paragraph are deemed to satisfy the obligations laid down in this Article from the moment that the company which controls them, within the meaning of Article L. 233-3, establishes and implements

⁵ Cécile Barbière. (2020, January, 31). Oil giant Total's 'corporate vigilance' in Uganda to be vetted by commercial peers. Retrieved from <https://www.euractiv.com/section/climate-environment/news/oil-giant-totals-corporate-vigilance-in-uganda-to-be-vetted-by-commercial-peers/>

⁶ 其餘有關法國司法制度或商業法官之選任請參：黃嘉烈、江翠萍、蔡如琪、陳正儀，法國及德國司法制度考察報告，頁 20，司法院，2010 年 12 月 17 日。

a vigilance plan for the company's operations, as well as the operations of all the subsidiaries or companies that it controls.

“The plan shall include the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls within the meaning of Article L.233-16, II, as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship.

“The plan shall be drafted in association with the company stakeholders involved, and where appropriate, within multiparty initiatives that exist in the subsidiaries or at territorial level. It shall include the following measures:

“1° A mapping that identifies, analyses and ranks risks;

“2° Procedures to regularly assess, in accordance with the risk mapping, the situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship;

“3° Appropriate action to mitigate risks or prevent serious violations;

“4° An alert mechanism that collects reporting of existing or actual risks, developed in working partnership with the trade union organizations representatives of the company concerned;

“5°A monitoring scheme to follow up on the measures implemented and assess their efficiency.

“The vigilance plan and its effective implementation report shall be publicly disclosed and included in the report mentioned in Article L. 225-102.

“A Council of State decree can add to the vigilance measures laid down in 1° to 5° of this Article. It can specify the modalities for elaborating and implementing the vigilance plan, within multiparty initiatives that exist in the subsidiaries or at territorial level where appropriate.

“II. – When a company does not meet its obligations in a three months period after receiving formal notice to comply with the duties laid down in I, the relevant jurisdiction can, following the request of any person with legitimate interest in this regard, urge said company, under financial compulsion if appropriate, to comply with its duties.

“An application may be made to the president of the court, ruling in interlocutory proceedings, for the same purpose.

Article 2

After the same Article L. 225-102-3, an Article L. 225-102-5 shall be inserted reading as follows:

“*Art. 225-102-5.* – According to the conditions laid down in Articles 1240 and 1241 of the Civil Code, the author of any failure to comply with the duties specified in Article L. 225-102-4 of this code shall be liable and

obliged to compensate for the harm that due diligence would have permitted to avoid.

“The action to establish liability shall be filed before the relevant jurisdiction by any person with a legitimate interest to do so.

“The court may order the publication, distribution or display of its decision or an extract thereof, in accordance with its procedures. The costs shall be paid by the person convicted.

“The court may order its decision to be carried out under financial compulsion.”

Article 3

{Non conformed}

Article 4

Articles L. 225-102-4 and L. 225-102-5 of the Trade and Industry Code, in their current wording resulting from this Law, shall apply from the report mentioned in Article L. 225-102 of the same Code on the first open financial year after the publication of this Law.

Notwithstanding the first paragraph of Article 4, for the financial year during which the present Law has been published, article L. 225-102-4, I of said Code shall apply, with the exception of the report provided for in its second to last paragraph.