Business and Human Rights Journal (2025), 1–6
doi:10.1017/bhj.2025.22

Business and Human Rights Journal

DEVELOPMENTS IN THE FIELD

A (So Far Unlikely) Day in Court: An Overview of the First Judicial Decisions under the French Duty of Vigilance Law

Théa Bounfour[1] and Lucie Chatelain[2]

[1]Senior Litigation and Advocacy Officer, Sherpa and [2]Litigation and Advocacy Manager, Sherpa
Corresponding author: Lucie Chatelain; Email: lucie.chatelain@asso-sherpa.org

Abstract

The 2017 French Law on the Duty of Vigilance of Parent and Lead Companies has been hailed as a pioneering national legislation to hold corporations accountable for human rights and environmental abuses. Most lawsuits brought under this law have faced a plethora of admissibility objections, and so far, only one case has resulted in a decision on the merits. Initial formalistic court decisions on admissibility have now been mostly dismissed. However, critical questions around the role and powers entrusted to judges under the law remain contested.

Keywords: admissibility; civil liability; duty of vigilance; judicial control

I. Introduction

The 2017 French Law on the Duty of Vigilance of Parent and Lead Companies (Duty of Vigilance Law) has been hailed as a pioneering national legislation to hold corporations accountable for human rights and environmental abuses.[1] Since it entered into force in 2018, large French companies have been required to take measures to prevent human rights violations and environmental harms resulting from their foreign operations and value chains. The law requires those companies to draw up, publish and effectively implement a 'vigilance plan' containing adequate and reasonable vigilance measures.[2]

The Duty of Vigilance Law provides for two complementary judicial mechanisms, which result from a two-fold objective: prevention on the one hand, and access to remedy for victims on the other hand. First, any person with legal standing may request a judge to order a company to comply with the law, provided it first sent a formal notice to the company and the company failed to comply within three months. This mechanism aims, through judicial injunctions, to force compliance and avoid potential violations. Second, a company is required to remedy any harm that, due to respect for its duty of vigilance, could have been prevented. The law therefore creates a new standard of conduct which, if not satisfied, may give rise to civil liability.

[1] Sandra Cossart, Jérôme Chaplier, Tiphaine Beau de Loménie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalisation Work for All' (2017) 2 *Business and Human Rights Journal* 317.

[2] Articles L. 225-102-4 and L. 225-102-5 of the French Commercial Code.

Given the Duty of Vigilance Law's broad substantive scope, the dozen proceedings initiated pursuant to these provisions relate to a variety of issues.[3] For example, oil major *TotalEnergies* has been facing several lawsuits, including summary proceedings relating to the company's participation in two oil projects in Uganda and Tanzania,[4] and a climate change claim requesting the company to curb its greenhouse gas emissions in alignment with the Paris Agreement.[5] *Electricité de France* (EDF) has been sued for its alleged failure to respect indigenous people's rights in the development of a wind farm in Mexico.[6] *La Poste* has been sued for its failure to address the risks relating to the outsourcing of parcel delivery services to undocumented workers.[7]

While most of these cases rely on the injunctive mechanism mentioned above, some also deal with the company's liability for past violations. For example, in a lawsuit initiated against supermarket *Casino*, indigenous groups and non-governmental organizations (NGOs) request the company to exclude beef linked to deforestation, violations of indigenous rights and forced labour from its supply chains in Brazil and Colombia, but they also seek damages for the harm caused by the company's failure to respect its obligations.[8] This case is still ongoing.

So far, there have been no decisions on civil liability under the Duty of Vigilance Law, and only requests for injunctions have led to judicial decisions. However, of these, only the case against *La Poste* has resulted in a decision on the merits.[9] As discussed in Section 2, this is due to a host of preliminary objections raised by defendant companies, delaying proceedings. Notwithstanding these delays, we argue in Section 3 that the first decisions shed some light on questions around judges' powers to scrutinize corporate measures. This, in turn, has a bearing on the future of civil liability claims.

II. Requests for Injunctions: The Preliminary Objections Conundrum

All defendant companies initially raised the same jurisdictional objection to claims filed against them before civil courts, arguing that commercial courts had exclusive jurisdiction because of the direct link between a company's vigilance plan and corporate management. In France, commercial courts are specialized jurisdictions composed of corporate actors, dealing with disputes between companies or relating to corporations, with no expertise in human rights or environmental matters.

Decisions on this matter diverged,[10] giving rise to political debates which were eventually settled with the adoption of a new provision which expressly designated the Paris Judicial Tribunal as having exclusive jurisdiction over cases brought under the Duty of Vigilance Law.[11] All pending cases were therefore transferred to the Paris Judicial Tribunal, but the procedural hurdles did not end there.

[3] Sherpa, CCFD Terre Solidaire, Business and Human Rights Resource Center, 'Duty of Vigilance Radar', https://vigilance-plan.org/court-cases-under-the-duty-of-vigilance-law/ (accessed 10 September 2024).

[4] Amis de la Terre, Survie, *Total Uganda: A First Lawsuit Under the Duty of Vigilance Law* (2020).

[5] Sherpa, 'TotalEnergies Case', https://www.asso-sherpa.org/totalenergies-case-climate-change (accessed 15 December 2023).

[6] ECCHR, 'Wind Park in Mexico: French Firm Disregards Indigenous Rights', https://www.ecchr.eu/en/case/wind-park-in-mexico-french-firm-disregards-indigenous-rights/ (accessed 10 September 2024)

[7] SUD PTT, 'Devoir de vigilance et sous-traitance à La Poste', 15 September 2023.

[8] Sherpa, 'Casino Case', https://www.asso-sherpa.org/casino-case-brazil-colombia (accessed 15 December 2023).

[9] Paris Judicial Tribunal, 5 December 2023, No. 21/15827.

[10] Nanterre Judicial Tribunal, 30 January 2020, No. 19/02833 and Versailles Court of Appeal, 10 December 2020, No. 20/01692 in the *Total Uganda* case, and Nanterre Judicial Tribunal, 11 February 2021, No. 20/00915 in the *Total Climate Change* case.

[11] Article L. 211-21 of the Code on the Organisation of the Judiciary, created by Loi No. 2021-1729 of 22 December 2021.

https://doi.org/10.1017/bhj.2025.22 Published online by Cambridge University Press

Firstly, in most cases, the pre-trial judges found that the disputes met the conditions for amicable settlement. They suspended interlocutory proceedings and ordered the parties to meet with designated mediators. While this was welcomed by the defendant companies, it baffled the majority of claimants. For them, the very purpose of the Duty of Vigilance Law was to enable access to justice for claims that, until then, had resulted in unbalanced negotiations or mediations. In the *Casino* case, the indigenous groups and NGOs refused to enter into mediation with the company, explaining that 'because these issues are of public interest, this case must be subjected to a public debate and give rise to a judicial decision, in accordance with the law. It cannot be resolved through negotiations happening behind closed doors, in opaque confidentiality.'[12]

Secondly, several defendant companies argued that the lawsuits were inadmissible because, despite having received a formal notice more than three months before the case was filed, they had not been duly informed of all the claims. This argument was first upheld in the *EDF Mexico* case.[13] The pre-trial judge found that the formal notice letter sent by the claimants related to the vigilance plan published by the company in 2019. Since the company had published a new vigilance plan in 2020, the claimants were still required to send a new formal notice letter relating to the new vigilance plan before they could file their lawsuit. A similar reasoning was relied upon in the *Suez Chile* case.[14]

The two cases brought against *TotalEnergies* were also judged inadmissible in the first instance for lack of sufficient prior notice. This time, the judges found that the requests initially included in the formal notice to the company differed from the requests later put to the judge. In the *Total Uganda* case, the Tribunal found that the NGOs' claims had substantially evolved between the formal notice and the hearing, so it could not be considered that the company had been sufficiently notified in advance.[15] In the *Total Climate Change* case,[16] the pre-trial judge went further in considering that 'the requests contained in the formal notice must be the same as those mentioned in the writ of summons, since parties must have the possibility to discuss each of them before the beginning of the proceedings'. He found that the formal notice was insufficiently precise and that the claims submitted to the Tribunal were not identical to those mentioned in the formal notice, making particular mention of the claimants' request for quantified emission reduction objectives.

The *Total Climate Change* and the *EDF Mexico* cases were overturned on appeal in June 2024 by a new specialized chamber specifically created within the Paris Court of Appeal to rule on duty of vigilance cases.[17] In those two cases, the Court of Appeal recalled that the vigilance plan was not a mere 'formal obligation'[18] and that the formal notice was a 'request for compliance within three months'[19] the purpose of which was 'to allow the company, if it considers it necessary, to bring its plan into line with the measures set out in the formal notice, in order to avoid a lawsuit.'[20] As a result, the Court of Appeal stated that requests for judicial injunctions must only 'relate in substance to the same obligations as those that were

[12] Sherpa *et al*, 'Deforestation in the Amazon: Organisations Refuse the Mediation Proposal in the Legal Action Against Casino' (2 December 2022), https://www.asso-sherpa.org/deforestation-in-the-amazon-organisations-refuse-the-mediation-proposal-in-the-legal-action-against-casino (accessed 15 December 2023).

[13] Paris Judicial Tribunal, 30 November 2021, No. 20/10246.

[14] Paris Judicial Tribunal, 1 June 2023, No. 22/07100.

[15] Paris Judicial Tribunal, 28 February 2023, No. 22/53942.

[16] Paris Judicial Tribunal, 6 July 2023, No. 22/03403.

[17] A couple of months later, the Paris Judicial Tribunal also created a similar specialized chamber.

[18] In the *Suez* case, the Court of Appeal even found that the obligation was 'the particular, formal and public expression of the general and continuous duty of care imposed on private persons [by French tort law provisions and Constitutional case law]' (Paris Court of Appeal, 18 June 2018, No. 23/10583).

[19] Paris Court of Appeal, 18 June 2024, No 21/22319 (EDF).

[20] Paris Court of Appeal, 18 June 2024, n°23/14348 (Total Climate Change).

https://doi.org/10.1017/bhj.2025.22 Published online by Cambridge University Press

the subject of the formal notice, with a sufficiently close link, which means that the court must be referred to the same categories of risk, serious harms and obligations to be complied with. [...] In the absence of a specific legal provision, it cannot be required as a condition of admissibility that the formal notice and the writ of summons refer to exactly the same plan of vigilance in terms of date.'[21]

Legal commentators have criticized the first instance inadmissibility decisions for their 'excessive formalism.'[22] There is no compulsory out-of-court negotiation phase under the Duty of Vigilance Law. In addition, an order to engage in further dialogue with the company is at odds with the way stakeholder engagement has been conceptualized in soft law, where it falls on the company to proactively identify relevant stakeholders and involve them in the elaboration of due diligence measures. These standards never require right-holders to negotiate with the company before seeking judicial remedies. Preventing stakeholders from accessing the courts on the basis of an alleged lack of stakeholder engagement is a wholly misguided interpretation of this concept. Such an interpretation was overturned by the Court of Appeal, which rightly noted that the formal notice was not 'a prerequisite for the opening of negotiations between the company concerned and stakeholders.'[23]

The requirement that a prior notice be sent with regard to the company's latest plan reduces the companies' duty of vigilance to a mere periodic publication of a plan, as opposed to a continuous obligation to develop and implement adequate measures. Such a requirement could also lead to absurd consequences: companies could prevent court cases against them simply by publishing a new plan just before the expiration of the three-month period following a formal notice. Fortunately, the Court of Appeal put an end to the first instance judges' formalistic reading of the procedural requirements.

III. Sufficient and Effective Vigilance Plans: Who Decides?

Questions regarding the nature and extent of judges' ability to scrutinize vigilance plans have been at the core of many of the discussions. Are judges expected to scrutinize or, on the contrary, show deference to corporate decisions? Will judges be able to order a company to implement specific vigilance measures? Some commentators argue that the Duty of Vigilance Law is based on co-regulation and gives companies broad discretion. A judicial review of companies' vigilance measures would be an undue interference in corporate management. Others maintain that the law requires a concrete examination of the sufficiency and effectiveness of companies' vigilance measures, which must be 'reasonable,' 'appropriate' and 'effectively implemented.'

This question is important because many companies have interpreted their duty of vigilance restrictively and have relied on existing corporate practices to discharge their obligations, such as the negotiation of contractual provisions with suppliers, the reliance on third-party audits, and the participation in industry and multi-stakeholder initiatives.[24] For example, *TotalEnergies* argues that it has set climate 'targets' in its vigilance plan and other reporting documents.[25] The company further claims that it has set itself the 'ambition' to achieve carbon neutrality by 2050, 'together with society,' even though it continues to invest in the development of new oil and gas projects,[26] and the group's emissions reduction

[21] Ibid.

[22] Jean-Baptiste Barbiéri, Antoine Touzain, 'Devoir de vigilance, la porte se referme', Dalloz Actualités (17 July 2023).

[23] Paris Court of Appeal, 18 June 2024, No 21/22319 (EDF).

[24] Forum Citoyen, 'European Directive on Corporate Sustainability Due Diligence and Legal Actions in France: Lessons Learned and Recommendations' (October 2023).

[25] TotalEnergies Sustainability & Climate Report 2022 Progress Report.

[26] Oil Change International, 'Big Oil reality Check 2023' (2023).

https://doi.org/10.1017/bhj.2025.22 Published online by Cambridge University Press

trajectory appears to be incompatible with the 2015 Paris Agreement goals. To what extent can judges assess the adequacy of the measures implemented by *TotalEnergies* to reduce its greenhouse gas emissions in relation to the company's declared climate ambitions?

The risk of cosmetic compliance, disconnected from companies' actual respect for human rights and the environment, has been rightly pointed out by legal commentators.[27] The formalistic interpretations of some of the first court decisions under the Duty of Vigilance Law were a source of concern. For instance, in the *Total Climate Change* case, the first instance pre-trial judge noted that the judicial action was aimed at 'publishing a document.'[28] In contrast, the first instance decision on jurisdiction and the appeal decision on admissibility in the same case suggest that the duty of vigilance 'requires judicial control' and is likely to require fundamental changes in the company's business model and practices:

> The development and implementation of the vigilance plan directly and significantly affect the activity of Total SE by requiring it [...] to take action to mitigate or prevent risks previously mapped out, which have a direct impact on the strategic choices of Total SE, which can no longer be made according to a strict economic logic but by integrating elements previously conceived as exogenous: [...] it must integrate into its strategic orientations the risks of human rights and environmental violations, and, in fact, in view of the nature of its activity, proceed to substantial abandonment or reorientation.[29]

In the decision on admissibility in the *Total Uganda* case, the Tribunal noted the lack of 'benchmark,' 'performance indicators' or 'typology' of relevant measures in the law, adding that the requirement that vigilance measures be 'reasonable' is an 'imprecise, blurry and flexible' notion. These references not only denote a clear corporate influence on the understanding of legal concepts, but they are also at odds with French tort law's reliance on general standards. In the same judgement, the Tribunal, however, recognized that the judges deciding on the merits will ultimately have to scrutinize the company's vigilance measures 'by evaluating their efficiency and effectiveness.'[30]

The decision on the merits in the *La Poste* case gave a more complete answer to these questions.[31] In that case, a trade union (*Sud PTT*) challenged the sufficiency of the company's vigilance plan and requested an injunction to adopt certain measures regarding the company's subcontracting policy, as well as harassment risks. The first instance judges recognized that the law provided for a 'judicial control of the integration of concrete, adequate and effective measures into the plan, consistently with the risk mapping.' They stressed that vigilance measures 'cannot be limited to general statements of intent' and 'must be sufficiently specific to be effective in preventing the most serious risks and limiting the impact of the other risks identified.' They found that the company's risk mapping was overly generic, that its vigilance measures did not result from the risks previously identified and that the company had failed to properly consult trade unions.

Yet, the judges found that the Duty of Vigilance Law did not empower them to order the company to adopt specific measures:

> [the Law] gives the court the power to order the company to draw up, as part of a self-regulation process, vigilance measures that the company must define in association

[27] Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20:1 Melbourne Journal of International Law 238.

[28] Paris Judicial Tribunal, 6 July 2023, No. 22/03403.

[29] Nanterre Judicial Tribunal, 11 February 2021, No. 20/00915.

[30] Paris Judicial Tribunal, 28 February 2023, No. 22/53942.

[31] Paris Judicial Tribunal, 5 December 2023, No. 21/15827.

https://doi.org/10.1017/bhj.2025.22 Published online by Cambridge University Press

> with stakeholders, as well as additional, more concrete and effective actions linked, where appropriate, to an identified risk. However, this provision should not lead the judge to take the place of the company and its stakeholders in requiring them to introduce precise and detailed measures.

Far from ordering 'precise and detailed measures,' the judges limited themselves to ordering the company to comply with existing legal provisions, without even imposing a penalty payment. This finding seriously puts into question the usefulness of the injunctive mechanism under the Duty of Vigilance Law. The judges' reluctance to intervene in corporate policies is not something shared by judges in other jurisdictions. For example, in the climate lawsuit brought against *Shell* before the Hague District Court, the court ordered the company to reduce its worldwide CO_2 emissions by 45 per cent by 2030 (compared to 2019 levels).[32] This decision was overturned on appeal,[33] as the Court of Appeal found no basis for a specific reduction target. However, it clearly stated that Shell's planned investments in new oil and gas fields might constitute a breach of its duty of care, a point that is currently being debated in the *Total Climate Change* case.

The first ever judgment on the merits in a Duty of Vigilance law claim did not lead to an order of specific measures. However, by recognizing the courts' powers to scrutinize vigilance measures, this judgement shows promise for future liability cases, as companies' vigilance failures can result in damages for the victims.

IV. Conclusion

Judicial enforcement of the Duty of Vigilance Law appears to be at a crossroads. On the one hand, the restrictive vision initially adopted by first instance judges on jurisdiction and admissibility has been resolved by law or overturned on appeal. At the same time, the *La Poste* judgment has recognized judges' power to assess the adequacy and effectiveness of vigilance measures put forward by companies. This paves the way for future decisions scrutinizing companies' substantive compliance with their obligations, which, in turn, can result in favourable damages awards for claimants.

On the other hand, there is a visible, powerful corporate effort to limit their Duty of Vigilance obligations to existing risk-management systems, subject to the business judgement rule and outside the remit of judicial review. It remains to be seen whether the judges' refusal to order any specific injunction in the *La Poste* case—despite having recognized the company's violation of its obligations—will remain isolated, or whether this limitation of judges' injunctive powers will prevail in future decisions. The recent creation of dedicated chambers within the courts for Duty of Vigilance cases appears promising in this regard.

Competing interests. French NGO Sherpa is one of the claimants in the lawsuits initiated against Casino, Yves Rocher and TotalEnergies (Climate Change) pursuant to the Duty of Vigilance Law.

Financial support. The authors have no funding to report on this submission.

[32] Hague District Court, 26 May 2021.
[33] The Hague Court of Appeal, 12 November 2024.

Cite this article: Théa Bounfour and Lucie Chatelain, 'A (So Far Unlikely) Day in Court: An Overview of the First Judicial Decisions under the French Duty of Vigilance Law' (2025) *Business and Human Rights Journal,* 1–6. https://doi.org/10.1017/bhj.2025.22