

**THE ENVIRONMENTAL LIABILITY OF THE PARENT COMPANY  
EXTENDED BY THE GRENELLE 2 LAW**

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**France recently adopted a new environmental law, the "Grenelle 2", which contains several provisions extending the environmental liability of corporate groups. While some of the mechanisms remain optional, others can create a genuine legal risk which must now be taken into account. The Grenelle 2 law was published in the French Official Gazette of July 13, 2010.**

The French law on environmental commitments, better known as the “Grenelle 2” law was passed on June 28 and 29, 2010 by the French Senate and National Assembly and was published on July 13, 2010. It intends to complete the implementation of the *Grenelle de l’environnement*<sup>1</sup> and to enforce the goals outlined by the Act of August 3, 2009, known as the “Grenelle 1” law<sup>2</sup>.

Among the law's various provisions, three of them will be of particular interest for the corporate world because they extend the environmental liability of the parent company vis-à-vis the activities of its subsidiaries. A first mechanism, based on voluntary participation, is focused on “environmental damages”; a second concerns the rehabilitation of classified installations (“*installations classées*”). Lastly, a third mechanism focuses more closely on operators of wind turbines.

**1. A voluntary participation for environmental damages**

The “Grenelle 2” law introduces a new article L. 233-5-1 into the French commercial code, which provides that a parent company can decide to uphold, in whole or in part, the obligations of a related company, when the latter has caused environmental damages it cannot remedy. This mechanism is wide-reaching since a parent company can make commitments with respect to not only its subsidiaries (art. L. 233-1 of the commercial code), but also the companies in which it has a shareholding (art. L. 233-2) and the companies over which it has control (art. L. 233-2). Such a commitment will be subject to either the approval of the board of directors of the subsidiary, or its supervisory board, or its shareholders, depending on the legal form of the

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<sup>1</sup> Report of the Council of ministers of July 7, 2009.

<sup>2</sup> Act n° 2009-967 of August 3<sup>rd</sup>, 2009: Frame law regarding the implementation of the *Grenelle de l’environnement*.

company in application of articles L. 223-19, L. 225-38, L. 225-86, L. 226-10 or L. 227-10 of the commercial code.

Only in the event of a default by the subsidiary, particularly insolvency or liquidation, will the parent company intervene. Its commitment can cover all or a portion of the preventive and remediation measures imposed by articles L. 162-1 to L. 162-9 of the French environmental code.

These articles from the Act of August 1<sup>st</sup>, 2008 on environmental liability<sup>3</sup> are enforceable with respect to environmental damages caused by certain activities, such as industrial installations falling under the IPPC Directive or waste management operations<sup>4</sup>, and with respect to endangerment of protected species and habitats<sup>5</sup> when such damages are caused by activities other than the aforementioned ones.

The required remediation measures can be quite significant. In the case of environmental damages affecting water or species and habitats, article L. 162-9 requires companies to “*restore these natural resources and their ecological services in their initial state [...]*”. It is necessary not only to restore the environment as if no damage had been done (or take identical measures on another site when *in situ* remediation is not possible), but also to compensate the losses in resources or ecological services until the remediation has been completed . Article L. 162-9 is too recent for case law to be available, but there is no doubt that courts conviction could be severe.

One can only wonder if this new article L. 233-5-1 of the commercial code will ever be used. Unless they are forced for insurance purposes or corporate image, it is likely that groups will not make a voluntary commitment with respect to environmental damages caused by their subsidiaries.

## **2. The extension of responsibility for the rehabilitation of classified installations**

The second mechanism introduced by the “Grenelle 2” law creates a significant legal risk for groups. In fact, the new article L. 512-17 of the environmental code can make the parent company of the operator of a classified installation wholly or partly liable for financing the rehabilitation measures after the termination of the activities. Under French law, the last operator of a classified installation is responsible for dismantling equipment, rehabilitating the site and taking the necessary measures for environmental inspection after the closure. (It should be noted that the classified installation category includes, in particular, the majority of industrial activities.) However, up until now, as illustrated by the *Métaleurop* case, a thick corporate veil

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<sup>3</sup> Act n° 2008-757 of 1 August 2008: the law on environmental liability and various provisions on the adaptation of community law with respect to environmental matters.

<sup>4</sup> The complete list of these activities is set forth in article R. 162-1 of the environmental code.

<sup>5</sup> Article L. 161-1 refers to several lists of bird species, vertebrate and invertebrate animals, wildlife and marine life, and numerous plants, described in appendix of Directives 79/409 of April 2, 1979 and 92/43 of May 21, 1992.

under French law prevented from pursuing the liability of the parent company, except in the case of “de facto management”<sup>6</sup> (“*gestion de fait*”), which is very difficult to prove.

The conditions of application of article L. 512-17 are nevertheless limited. First, the article only refers to parent-subsidiary relations and not to controlled companies or joint venture companies. Second, the article does not cover the entirety of possible environmental damages nor does it cover the entirety of activities, but only the remediation of installation sites. In addition, the subsidiary must be facing a liquidation. This procedure gives the liquidator, the district attorney or the French *préfet* the possibility to refer to the court in order to establish that the parent company of the operator acted negligently (“*faute caractérisée*”) [...] that contributed to a loss of assets by the subsidiary”. This provision has been the subject of debates and last minute negotiations. The Members of Parliament and the government have the view that “acting negligently” lies somewhere between ordinary negligence (“*faute simple*”) and intentional misconduct (“*faute intentionnelle*”). It is therefore not required to prove the wrongful intent of the individual or company causing the damage, but only that the parent company contributed to the loss of assets by the subsidiary, without it being necessarily the sole cause.

If the court finds the parent company at fault, it can be held responsible “in whole or in part” for the financing of rehabilitation measures. The sentence can only be financial and the parent company cannot be asked to take practical measures by itself.

Finally, article L. 512-17 allows, in identical conditions, to establish the responsibility of the “grandparent company” of the operator and even of the “great-grandparent company”, if their respective subsidiaries cannot finance the measures for which they have been sentenced. Authorities will now be able to go up the corporate chain of a group to pursue the responsible party - and the financing - where it can be found.

### **3. The dismantling of wind turbines**

The third mechanism is introduced by the new article L. 553-3 of the environmental code. The article requires that the parent company be liable for the dismantling and rehabilitating the site at the end of the operation if its subsidiary fails to do so. No condition other than the “failure” by the operator is provided for. However, article L. 512-17 and its above-mentioned provisions (liquidation, offense, etc.) will also be applicable to wind turbines that the “Grenelle 2” law has assigned to the classified installation regime. Will the more severe, specific clause be applied at the expense of the more accurate, general clause? It is very likely that in the event of litigation, operators of wind turbines will point out the contradiction between the two texts.

The dismantling and rehabilitation costs should be covered by the financial guarantees imposed on wind turbines operators by the Act of 2 July 2003<sup>7</sup>. But this solution is still theoretical, since the decree that should have set the amount of the guarantees and their implementation conditions

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<sup>6</sup> See article L. 651-2 of the commercial code.

<sup>7</sup> Act n° 2003-590 of July 2<sup>nd</sup>, 2003 introducing article L. 553-3 of the environmental code – For offshore wind farms, the requirement was introduced by Act n° 2005-781 of July 13, 2005.

has never been published. The “Grenelle 2” law promises to fill in this seven-year loophole with a decree before December 31<sup>st</sup>, 2010.