BNP Paribas sued in France for financing fossil fuel companies

This post was written bu Begüm Kilimcioglu, PhD candidate at the University of Antwerp

On 23 February 2023, one of the biggest commercial banks in the Eurozone, BNP Paribas (BNP) was sued by Oxfam, Friends of the Earth and Notre Affaire à Tous for having allegedly provided loans to oil and gas companies in breach of the vigilance duty enshrined in la Loi de Vigilance (2017) of France. This case constitutes an important hallmark for the business and human rights world as it is the first climate action case against a commercial bank and so timely considering that the European Union (EU) is currently discussing whether or not to include the financial sector within the scope of the proposed Corporate Sustainability Due Diligence Directive (CSDDD) (see here).

Article 1 of la Loi de Vigilance imposes a duty to establish and implement an effective vigilance plan on any company whose head office is located on French territory and complies with the thresholds stated. This vigilance plan is supposed to include vigilance measures for risk identification and 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, its subcontractors and suppliers with whom the company has an established commercial relationship. As such, there is no distinction under the French law regarding the sector in which the company is operating which is in line with the United Nations Guiding Principles. Thus, it was surprising to see that France was quite vocal about not including the financial sector within the scope of CSDDD, as France was the first Member State to adopt a law on the duty of vigilance of the multinational companies and la Loi de Vigilance itself does not make distinctions based on the sector in which the company is operating.

According to la Loi de Vigilance, companies are required to conduct human rights and environmental due diligence which includes the following steps: identification and the analysis of the risks, regular assessment of the situation (in accordance with the previously identified risks) of the subsidiaries, subcontractors or

suppliers with whom the company has an established commercial relationship, mitigation and prevention of serious violations through appropriate means, establishment of an alert mechanism which collects reports of existing or actual risks, establishment of a monitoring scheme to follow up on the measures implemented and assessment of their efficiency. This plan must be publicly disclosed.

In case the company does not comply with its vigilance obligations, a court can issue a formal notice, ordering the company to comply with la Loi de Vigilance. Furthermore, la Loi de Vigilance also provides for a civil remedy when a company does not meet its obligations. If damage caused by non-compliance with la Loi de Vigilance, any person with legitimate interest can seek reparation under tort law. Consequently, as a company headquartered in France and complying with the thresholds in Article 1 of la Loi de Vigilance, BNP has the duty to effectively establish, implement and monitor a vigilance plan to prevent, if not possible mitigate and bring an end to its adverse impacts on human rights and the environment.

The case against BNP before the French courts is a reminiscent of the case against Shell before the Dutch courts in 2019 where the environmental group (Milieudefensie) and co-plaintiffs argued that Shell's business operations and sold energy products worldwide contributes significantly to climate change (and also much more than it has pledges to in its corporate policies and to the levels internationally determined by conventions) was a violation of its duty of care under Dutch law and human rights obligations. It is important here to highlight that the plaintiffs took Shell to the Dutch courts based on the environmental damage caused in the Netherlands, due to Shell's operations worldwide.

In the said case, the applicable law to the dispute was determined by Rome II Regulation on non-contractual obligations, article 7. Article 7 presents an additional venue to the general rule for determining the applicable law (article 4) and grants the victims of environmental damage an opportunity to base their claims on the law of the country in which the event giving rise to the damage occurred. As such, the claimant primarily chose to base its claims on the law of the country in which the even giving rise to the damage occurred, as they claimed that the corporate policies for the Shell group were decided in its headquarters in the Netherlands. The Court considered the adoption of the corporate policy of the Shell group as an independent cause of the damage which may contribute to

environmental damage with respect to Dutch residents. Thus, the Court considered that the choice of Dutch law by Milieudefensie was in line with the idea of protection of the victims behind the applicable law clauses in Rome II Regulations and upheld the choice to the extent that the action aimed to protect the interests of the Dutch residents (see paragraphs 4.3-4.4 of the decision).

In 2021, the Hague District Court ordered Shell to reduce both its own carbon emissions and end-use emissions by 45% by 2030 in relation to the 2019 figures. Naturally, the legal basis in the Dutch case was different than the legal basis in the French case, considering that the Netherlands does not yet have a national law like la Loi de Vigilance. Consequently, the core of the arguments of the applicants lied on the duty of care in Article 6:162 of the Dutch Civil Code and Articles 2 (right to life) and 8 (rights to private life, family life, home and correspondence) of the European Convention on Human Rights.

In contrast, the BNP case has a more preventive nature and aims to force BNP to change and adapt its actions to the changing climate and scientific context. The NGOs primarily request an injunction for BNP to comply with the obligations provided for in the French Vigilance Law, as BNP falls within the scope of the French Law. More specifically, the NGOs request that BNP publishes and implements a new due diligence plan, containing the measures explained in the writ of summons. Therefore, the obligations arising from the French Vigilance Law are of a civil nature. Consequently, the law applicable to this dispute should also be determined by Rome II Regulation on non-contractual obligations. As explained above, Rome II Regulation gives an additional option for the plaintiffs to choose the applicable law in cases of environmental damage as either the country of damage or the country where the event that gives rise to the damage occurred. In the BNP case, the plaintiffs' claim was based on French law. Applying Rome II Regulation, France can be considered as the country of the event which gives rise to the damage because it is where the corporate policies are prepared. Alternatively, it is also where the environmental damage occurs, as well as the rest of the world. Moreover, the plaintiffs relied on the general obligation of environmental vigilance as enshrined in the Charter of the Environment, which is considered an annex to the French Constitution and thus has the same authoritativeness. Invoking the constitution might bring in an argument on the basis of Article 16 Rome II, namely overriding principles of mandatory law.

If we rewind the story a little bit, the non-governmental organizations (NGOs)

stated above, firstly, served a formal notice to BNP on 26 October 2022 to stop supporting the development of fossil fuels. In the formal notice, the NGOs state that, to achieve the Paris Agreement trajectories, no more funding or investment should be given to the development of new fossil fuel projects, either directly or to the companies that carry out such operations (see p 3). They also draw attention to the fact that BNP has joined the Race to Zero campaign which aim for the inclusion of the nonstate actors in the race for carbon neutrality (p 3).

Basic research into BNP's publicly available documents reveals that it, indeed, has committed to sustainable investment, acknowledging that air pollution and climate change deplete many resources. BNP further claims that it only supports companies that contribute to society and the environment and exclude coal, palm oil and nonconventional hydrocarbons. Moreover, as can be seen from its 2021 activity report, BNP presents itself as organizing its portfolios in a way that upholds the aims of the Paris Agreement. Lastly, BNP's code of conduct, states that it commits to limiting any environmental impact indirectly resulting from its financing or investment activities or directly from its own operations (p 31). Furthermore, BNP also presents combatting climate change as its priority while stating that they finance the transition to a zero-carbon economy by 2050 by supporting its customers in energy and ecological transitions (p 31).

However, the NGOs claim that contrary to these commitments, through various financing and investment activities, BNP becomes one of the main contributors to the fossil fuel sector by supporting the big oil and gas companies (p 4 of the formal notice). In this regard, BNP allegedly provides funds for the companies that actually put fossil fuel projects into action rather than financing these projects directly. As such, the NGOs aver that BNP's vigilance plan is not in compliance with la Loi de Vigilance or its obligations to limit the climate risks resulting from its activities (p 6 of the formal notice). In this regard, the report draws attention to BNP's prior public commitments to strengthen its exclusion policies regarding coal, oil and gas sectors (see pp 8-9 of the formal notice). Consequently, claiming that BNP has failed to comply with the notice, NGOs have referred the matter to the court.

In a bid to address the negative allegations on its behalf, BNP stated that it is focused on exiting the fossil fuel market, accelerating financing for renewable energies and supporting its clients in this regard. Furthermore, BNP also stated its regret in the advocacy groups choosing litigation over dialogue and that it was

not able to stop all fossil-fuel financing right away.

In the course of these proceedings, the applicants will have to prove that if BNP were able to establish, implement and monitor a vigilance plan, the damage caused by these fossil fuel projects put into motion by different energy companies could have been avoided. In other words, the fact that BNP (or any other provider of the financial means) is the facilitator of these projects and that the damage is indirectly caused by its actions, make it more difficult for it to be held liable. As such, it may be more difficult for the claimants in the BNP case to prove the causality between the action and the damage than the Dutch case.

Consequently, this intricate web of interrelations demonstrates how important it is to include the financial actors within the scope of the CSDDD and explicitly put obligations on them to firstly respect and uphold human rights and environmental standards and then to proactively engage with an effective due diligence mechanism to prevent, mitigate and/or bring an end to actual/potential human rights and environmental impact.

Therefore, I hope that the European Commission and the Parliament will hold strong positions and not cave in to the proposal by the Council to leave it up to the Member States whether or not to include the financial sector within the scope. Such a compromise would significantly hinder the effectiveness of the proposed Directive.