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## French Law on the Corporate Duty of Vigilance A Practical and Multidimensional Perspective



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**C**ompanies are currently establishing their first vigilance plans and preparing to effectively implement them. However, clarifications are still needed with regard to the interpretation and practical application of the law No. 2017-399 of 27 March 2017 on the corporate duty of vigilance for parent and instructing companies (the "Law"). This publication delves into a series of specific issues related to the Law in order to contribute to a better understanding of the Law, its implications, its grey areas and its effective implementation. Taking a multi-stakeholder approach, this publication includes articles from academics, lawyers dedicated to the practice of business and human rights, NGOs representing victims of economic crimes, and international companies committed to implementing socially responsible practices. The authors provide their own views on the Law.

This publication does not claim to be exhaustive but intends, instead, to contribute to the discussions which have preceded and followed the adoption of the Law. The hope is that this publication clarifies, in theory and in practice, certain provisions of the Law and certain aspects of its implementation.

This publication is an edited volume originally written in French in December 2017, entitled «*La loi sur le devoir de vigilance, une perspective pratique et multidimensionnelle*», published in the International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Éthique des Affaires*].

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While companies must establish their first vigilance plans and prepare to implement them effectively, law No. 2017-399 of 27 March 2017 on the corporate duty of vigilance for parent and instructing companies (the "Law") still raises a number of questions, particularly in terms of its interpretation and practical implementation.

Some of these questions, already mentioned in the first comments that preceded or followed the publication of the Law, are now starting to be studied in greater depth. Practical guides on the Law are also being drafted by different stakeholders.

The thematic publication that follows is part of this recent trend of analysis seeking to deepen, on selected themes, several issues that emerge from the Law. Its purpose is to contribute to a better understanding of the Law, its stakes, its grey areas and its effective implementation in a context where the mobilisation of the legal profession is key in encouraging businesses to respect human rights (*see IBA, Practical Guide on Business and Human Rights for Business Lawyers (2016)*). - *Conseil de l'Ordre du Barreau de Paris, Résolution portant sur la Business and Human Rights (Sept. 8, 2015)*. - *American Bar Association, Resolution 109 (February 2012)*. - *The Law Society of England and Wales, Business and Human Rights: A Practical Guide (2016)*).

This thematic publication reflects several points of view: that of academics, lawyers advising businesses (and states) on human rights, associations representing populations that are victims of economic crimes, and multinational companies involved in corporate responsibility initiatives. Therefore, in this publication, the authors express their own points of view and interpretations of the Law.

If their perspectives can sometimes differ, they enable us, in any case, to apprehend this complex subject in a more complete way.

This publication does not aim to be exhaustive; numerous issues remain, with new questions emerging as the Law is analysed and implemented. Nevertheless, it should help inform the debate and we hope it will provide answers to the questions currently raised.

In the first contribution, we place the Law in the context of the "business and human rights" movement. An understanding of this movement makes it possible to contextualise the Law and constitutes an essential prerequisite to better comprehend, interpret, implement and communicate on the Law in the international sphere (*article 91*).

In the second contribution, the scope of the Law is analysed in more depth in order to better understand, in practice, which companies are subject to the obligations set in the Law and which are exempted from them (*article 92*).

In the third contribution, we observe jointly with Charlotte Michon, a consultant specialised in business and human rights and the founder of DDH Entreprises, what is the ambit of the vigilance plan, as it is considered the cornerstone of the Law. We also propose methodological elements to establish this plan and prepare its effective implementation (*article 93*).

In the fourth contribution, Tiphaine Beau de Loménie, a lawyer within the Globalization and Human Rights program of the NGO Sherpa, and Sandra Cossart, the executive director of Sherpa, discuss how companies can involve stakeholders in the development and implementation of the vigilance plan (*article 94*).

In the fifth contribution, Horatia Muir Watt, professor at the Sciences Po Law School, examines the Law from both a global governance perspective and a private international law perspective. She shows that, politically, symbolically and technically, the Law enables the removal of several structural obstacles which generally prevent the legislation from apprehending the harmful consequences of the delocalised activities of multinational companies (*article 95*) [not yet translated].

Finally, note that the penalty aspect of the Law has already been analysed in a previous issue of this review in French (*V. Rev. Int. Compliance 2017, Comm. 44, S. Brabant and E. Savourey*). It is also available in English (*see <https://business-humanrights.org/en/france-analysis-of-penalties-imposed-on-companies-in-new-duty-of-vigilance-law>*).

We would like to express our gratitude to each of the contributors for agreeing to participate in this special publication and for giving it a multidimensional perspective.

## DUTY OF VIGILANCE

# 91 Law on the Corporate Duty of Vigilance

## A Contextualised Approach



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**T**he law on the corporate duty of vigilance for parent and instructing companies (the "Law") is part of an international movement to ensure that companies respect human rights in their activities and throughout their value chains worldwide<sup>1</sup>. The "business and human rights movement"<sup>2</sup>, which has particularly developed over the past ten years, has at its roots a body of strong principles and standards. The Law, which has been influenced by this movement and also enriched it, inspires recent national and supranational initiatives<sup>3</sup>.

This article is a translation of an article originally written by the authors in December 2017 in French, entitled « *Loi sur le devoir de vigilance, pour une approche contextualisée* », published in the International Review of Compliance and Business Ethics [*Revue Internationale de la Compliance et de l'Éthique des Affaires*]. The authors are grateful to the Editor-in-chief and LexisNexis for allowing them to circulate this translation. Translations of French legislation and French articles are provided by the authors. Translations of international sources are, where possible, based on official translations from international organisations (UN, OECD, EU).

Understanding the business and human rights movement allows the Law to be put in context and is an essential prerequisite for

understanding, interpreting and implementing it<sup>4</sup>, as well as making it known in the international sphere and within national legal systems made up of diverse legal traditions.

The explanatory memorandum [*exposé des motifs*] of the draft law contains a clear reference to the United Nations Guiding Principles

AN The authors would like to thank Stéphanie Tchanon for her research and comments on the preliminary versions of this article.

- 1 See OHCHR, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, 2014, spec. p. 47 ("A business enterprise's value chain encompasses the activities that convert input into output by adding value. It includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services that contribute to the enterprise's own products or services, or (b) receive products or services from the enterprise.").
- 2 With regard to the French version on this article, it should be noted that the United Nations, in their official translations, use the term "*droits de l'homme*" (without capitals) whilst the Law uses the term "*droits humains*". The two expressions therefore coexist in the original version in French of this article.
- 3 See *Chairman of the Open-ended inter-governmental working group, Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, Sept. 2017 (the draft international treaty currently drafted by an intergovernmental working group steered

by Ecuador within the United Nations Human Rights Council, provides for the implementation of a "vigilance plan" by companies) See *Popular Federal Initiative "Entreprises responsables: pour protéger l'être humain et l'environnement"* (the Swiss proposal, to be subject to a public vote, plans to require "diligence raisonnable" from companies headquartered in Switzerland and the possibility for victims to bring a civil liability action, See <http://konzern-initiative.ch/de-quoi-il-s-agit/texte-initiativeRlang-fr>).

- 4 Similarly, see M.-C. Caillet, *Du devoir de vigilance aux plans de vigilance; quelle mise en œuvre ?*, *Dalloz soc.* 2017, p. 819, spec. p. 821 ("Understanding the origin of these legislative developments and knowing their sources allows us to refer to them in order to answer questions raised by this law").

on Business and Human Rights (the "Guiding Principles")<sup>5</sup>, presented as a source of inspiration for the Law. These Guiding Principles, which also permeate several sectoral initiatives, serve as a frame of reference for the business and human rights movement. This movement has confirmed that there are new risks and opportunities for companies (1). Developments in positive law on a regional and national scale have emerged from these soft law initiatives. These developments are principally focused on reporting obligations and are increasingly accompanied by a requirement of effectiveness associated with penalties. The Law is at the crossroads of these trends (2).

## 1. The Emergence of the Business and Human Rights Movement

### A. - From Voluntary International Standards to Universally Applicable Standards

The Global Compact, introduced in 2000 under the leadership of the United Nations and its Secretary-General Kofi Annan represents one of the first steps in the business and human rights movement<sup>6</sup>. Companies, which are members of the Global Compact, undertake to comply with ten principles. Two of these principles are related to the respect of human rights, four are also linked to human rights as they concern the respect of international working standards, three are related to the environment and one to anticorruption. Companies must report, in an annual report, the manner in which they integrate these principles in their activities. Nevertheless, this undertaking remains voluntary and relies on a system of self-declaration via this annual report.

The drafting and implementation of the Guiding Principles by the United Nations between 2005 and 2011 marks a second step in the business and human rights movement. Appointed in 2005 by the United Nations as "Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises", Professor John Ruggie proposed the framework "protect, respect and remedy" in 2008, after three years

of research and consultations. This framework relies on three pillars: 1) the State duty to **protect** human rights, 2) the corporate responsibility to **respect** human rights by not infringing these rights and remedying any adverse impacts which they may have caused or to which they may have contributed, and finally, 3) **access by victims to effective remedy**, judicial and non-judicial<sup>7</sup>. Thereafter, from 2008 to 2011, John Ruggie's mandate focused on implementing this framework with the drafting of the Guiding Principles<sup>8</sup>. These bring together a set of processes to enable companies to respect human rights and to manage the risk of adverse impacts on these rights. They are the result of extensive consultations with stakeholders<sup>9</sup>, as well as empirical studies<sup>10</sup>. The Guiding Principles, in particular those related to "due diligence", were tested on several companies, and their content was debated among corporate law experts with expertise in almost 40 jurisdictions<sup>11</sup>. The Guiding Principles, and their commentaries, were unanimously endorsed by the Human Rights Council on 16 June 2011<sup>12</sup>. They are intended to apply universally and to all companies, regardless of their size<sup>13</sup>.

### B. - Soft Law Developments: New Judges, New Risks, New Opportunities

The Guiding Principles have gradually been incorporated into new standards<sup>14</sup>. These standards include, for example, the revised version of the OECD Guidelines for Multinational Enterprises<sup>15</sup>

5 AN, draft law n° 2578, 11 Feb. 2015, p. 4 ("In accordance with the United Nations Guiding Principles on Business and Human Rights unanimously adopted by the United Nations Human Rights Council in June 2011, and in accordance with the OECD Guidelines for Multinational Enterprises, the purpose of this draft law is to introduce a vigilance obligation for parent companies and instructing companies with respect to their subsidiaries, sub-contractors and suppliers").

6 See Address of Secretary-General Kofi Annan to the World Economic Forum in Davos, Switzerland, on 31 January 1999, Secretary-General Proposes Global Compact On Human Rights, Labour, Environment, In Address To World Economic Forum In Davos ("You can uphold human rights and decent labour and environmental standards directly, by your own conduct of your own business. Indeed, you can use these universal values as the cement binding together your global corporations, since they are values people all over the world will recognize as their own"): <https://www.un.org/press/en/1999/19990201.sgm6881.html>.

7 See J. Ruggie, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Protect, Respect and Remedy: a framework for Business and human rights*: A/HRC/8/5, Human Rights Council, 7 April 2008 (presenting the frame of reference "protect, respect, remedy").

8 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011.

9 Namely "Governments, business enterprises and associations, individuals and communities directly affected by the activities of enterprises in various parts of the world, civil society, and experts in the many areas of law and policy that the Guiding Principles touch upon." See J. Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie: A/HRC/17/31, 21 March 2011, spec. p. 4.

10 See John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, prec., spec. p. 5.

11 See J. Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, prec., spec. p. 5. - See also J. Ruggie, *The Social Construction of the UN Guiding Principles on Business & Human Rights Working Paper No. RWP17-030*, June 2017 (summarising the implementation process of the Guiding Principles).

12 See UN, resol. A/HRC/17/4, *Human rights and transnational corporations and other business enterprises*, 16 June 2011.

13 The Global Compact remains in place to enable companies that voluntarily agree to demonstrate, through their membership, their attachment to the values of the Global Compact and the way in which their activities respect human rights.

14 See OHCHR, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, prec., question 14 (presenting several international standards influenced by the Guiding Principles).

15 See OECD, *OECD Guidelines for Multinational Enterprises*, 2011.



and a series of sectoral standards, concerning, in particular, the extractive<sup>16</sup>, textile<sup>17</sup>, and financial<sup>18</sup> industries.

The Guiding Principles and these international standards are considered to be soft law. They do not create legal obligations such that non-compliance cannot be penalised *per se* by national or international courts<sup>19</sup>. However, the normative force of the Guiding Principles is derived from their acceptance by States, combined with the support of stakeholders and companies<sup>20</sup>. The responsibility of companies to respect human rights, which itself, is "a global standard of expected conduct for all business enterprises wherever they operate"<sup>21</sup>, is enshrined in these standards and is increasingly establishing itself as a standard in business conduct.

These standards are regularly invoked by the "new judges"<sup>22</sup>; in particular civil society, non-governmental organisations, local communities, shareholders, financial institutions and consumers<sup>23</sup>. These new judges act in multiple forums: through reports and media

coverage via the press and social networks, as well as before national courts<sup>24</sup>, including through class actions<sup>25</sup>, before arbitration tribunals<sup>26</sup> and before non-judicial bodies, such as the OECD national contact points<sup>27</sup>.

The increasing number of soft law instruments and the existence of these "new judges" create a heightened risk for companies that do not respect human rights in their activities and value chains. These risks are not only reputational, but also legal, operational and financial. They may therefore lead to judicial or arbitration proceedings lasting several years<sup>28</sup>, paralysing social movements, the refusal of banks or international financial institutions to finance a project, the withdrawal of funding<sup>29</sup>, the suspension of projects

16 See e.g. OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 2016. - OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, 2017. - International Council on Mining and Metals, *Human rights in the mining and metals industry Integrating human rights due diligence into corporate risk management processes*, 2012. - China Chamber of Commerce of Imported & Exported Metals, *Minerals and Chemicals, Chinese due diligence guidelines for responsible mineral supply chains*, 2015.

17 See e.g. OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, 2017.

18 See e.g. Equator Principles, *Equator Principles III - a financial industry benchmark for determining, assessing and managing environmental and social risk in projects*, June 2013, p. 2 (recognising in its preamble the inspiration that the Guiding Principles were). - OECD, *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*, 2017.

19 For a perspective on soft law, See Conseil d'Etat, *Étude annuelle 2013, Le droit souple*. Doc. fr., May 2013 (proposing a definition of soft law, which comprises "all the instruments satisfying three cumulative conditions: their purpose is to modify or direct the behaviour of their intended recipients so they adhere to such instruments, where possible; they do not, themselves, create rights or obligations for their intended recipients; their content and method of drafting present a degree of formalisation and structuring similar to legal rules." They may also have indirect legal effects).

20 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, prec., p. 1 -2.

21 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* prec., spec. p. 15, comm. under principle 11. - See also OHCHR, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, prec., question 25.

22 Les droits humains, nouvelle préoccupation des entreprises : Les Échos, 26 Jan. 2017, quoting Stéphane Brabant : "Companies no longer face court judges alone; they also face "new judges" such as NGOs, civil society, as well as institutions and financial markets, which increasingly require that they respect human rights" [our translation of the original version in French: « Les entreprises ne font plus uniquement face aux juges des tribunaux mais aussi aux « nouveaux juges » que sont les ONG, la société civile, mais aussi les institutions et marchés financiers, qui exigent de plus en plus le respect des droits humains »].

23 Note, however, the risk of strategic lawsuits against public participation (SLAPPs). See S. Fontaine, S. Savry-Cattan and C. Villette, *Les poursuites stratégiques altérant le débat public, quelle régulation face au phénomène des poursuites-bâillons en France ?*, Clinique de l'École de Droit de Sciences Po, 2016: <http://www.sciencespo.fr/ecole-de-droit/sites/sciencespo.fr/ecole-de-droit/files/rapport-final-slapp.pdf>

24 See e.g. *Choc v Hudbay Minerals Inc.*, 2013, ONSC 1414, *Superior Court of Justice* (Ontario Superior Court of Justice authorised the holding of proceedings against the mining company Hudbay Minerals Inc., regarding the accusations, by local communities, of human rights violations committed by its Guatemalan subsidiaries), <https://business-humanrights.org/en/hudbay-minerals-lawsuits-re-guatemala-0>, for more information. - See also *infra* note 54 (for this case and other examples).

25 Concerning action before the Chilean courts related to the suspension of works on the Pascua-Lama mine for environmental questions and on the class action related to this situation introduced in the United States by shareholders who had purchased shares of the mining company between 2009 and 2013, See Reuters, *Barrick Gold reaches \$140 million accord in U.S. investor lawsuit*, 31 May 2016, <https://www.reuters.com/article/us-barrick-gold-lawsuit/barrick-gold-reaches-140-million-accord-in-u-s-investorlawsuit-idUSKCN0YM2LI> - See also the website Barrick Gold Securities Litigation, <http://www.barrickgoldsecuritieslitigation.com/courtdocs> (providing several documents on the case, this website does not represent the position of the courts or of the defendant). - See also Barrick, press release, *Barrick Reaches Settlement Agreement in Class Action*, 31 May 2016: <http://barrick.q4cdn.com/808035602/files/press-release/2016/Barrick-Reaches-Settlement-Agreement-in-Class-Action.pdf>

26 See *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA case No. 2012-2 (2016), § 6.99 - 6.102 and 11.4: <https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf> (the Permanent Court of Arbitration found that Ecuador had unlawfully expropriated Mesa Copper Mining Corporation's two mining concessions, but nonetheless reduced the compensation granted to the claimant for one of the concessions by 30%, as it considered that the company had contributed to its own damage by using premeditated violence against the local population). - *Pac Rim Cayman v. The Republic of El Salvador*, ICSID, 2016: <https://www.italaw.com/cases/783> (The International Centre for Settlement of Investment Disputes (ICSID) rejected the Pac Rim Cayman LLC mining company's request according to which El Salvador had unjustly rejected its concession request for the exploitation of gold. El Salvador stated that the company had failed to obtain the necessary authorisations required by law, specifically regarding environmental matters. The ICSID found in favour of El Salvador and ordered the company to pay US\$8 million to cover the costs of the proceedings).

27 See OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2016, 2017*, spec. p. 25 (chapter 3 presents the backlog of cases before the National Contact Points).

28 See *supra* notes 24, 25, 26.

29 In 2015, the World Bank cancelled the remaining payment of an initial loan of US\$265 million, granted for the construction of a road in Uganda, due to human rights abuses which called into question the personnel working on the project (sexual violence against women). See World Bank, press release, 15 Dec. 2016: <http://www.worldbank.org/en/news/press-release/2015/12/21/wb-statement-cancellation-uganda-transport-sector-development-project>

blocked by conflicts with local communities<sup>30</sup>, or the decrease in the stock valuation of a company<sup>31</sup>.

These examples show the potential cost resulting from not respecting human rights in value chains. This cost is usually difficult to quantify especially given that it is often related to a loss of opportunity or reputational damage<sup>32</sup>, and where it has been quantified, it is often not made public, notably in the case of a settlement or arbitration. In cases where the cost is known, several examples show that it can represent extremely high sums, calculated in millions of US dollars. Such is the case for a company whose compensation for expropriation was reduced because the tribunal held that it had contributed to its own damage by using premeditated violence against local populations<sup>33</sup>. Or the case of the devaluation of an asset affected by conflicts with local communities<sup>34</sup>. This is also the case for millions owed in damages following a class action initiated by investors in the United States regarding information disclosed to them, specifically on environmental matters, in respect of a mining project<sup>35</sup>. "Soft" law is thus associated with penalties which may themselves be "hard", even in the absence of binding national legislation, an idea which may be summarised by the expression "soft law but hard sanctions"<sup>36</sup>.

Although there are costs and risks, the respect of human rights by companies and the inclusion of soft law standards in their activities may also be seen as opportunities both in the short-term and long-term. In practice, it could mean easier access to funding for international projects, the support of investors in adopting a responsible investing approach, fostering the loyalty of business partners and consumers who are increasingly sensitive to

the production conditions of the goods they buy, attracting and retaining talented and committed employees, and finally, success in calls for, or participation in, tenders with companies which require that their partners respect human rights and environmental standards. The "new judges" may then also become partners and work alongside companies to ensure human rights are respected by companies, including *vis-à-vis* stakeholders.

The business and human rights movement also requires taking a stance with regard to a new way of doing business in the 21st century, in a context where the trend in many countries is leading towards the emergence of new expectations regarding companies' contributions to society, whether through sustainable investments or corporate citizenship. Furthermore, in jurisdictions that subject companies to obligations related to the respect of human rights, compliance with these requirements represents a competitive advantage. These companies can distinguish themselves from competitors who do not apply these requirements and anticipate coming developments – especially in the current climate, a climate in which the business and human rights movement is increasingly embedded in regional and national law.

## 2. Embedding the Business and Human Rights Movement in Regional and National Law

### A. - A Growing Trend Towards Reporting

The adoption of the Guiding Principles and other standards of soft law, combined with the activities of the "new judges", including in the event of judicial disputes, have helped embed the business and human rights movement in positive law. This recent trend is more specifically based on the requirement that companies report on their respect of human rights<sup>37</sup>. This process enables them to communicate the manner in which they respect human rights in their activities and value chains. Companies are thus required to carry out internal audits and report on them. This development is inspired by the idea of "know and show" recommended by the Guiding Principles. Accordingly, in order to respect human rights, companies must be aware of these rights and show that they respect them by having "policies and processes in place"<sup>38</sup>. This approach is therefore essentially aimed at preventing the most severe adverse impacts on human rights.

30 See *supra* note 24.

31 See *Tahoe Resources*, press release, *Guatemala Lower Court Issues Ruling on Tahoe's Mining License*, 5 Jul. 2017 : <http://www.tahoeresources.com/guatemalan-lower-court-issues-ruling-on-tahoes-mining-license/> (regarding the anticipated financial consequences of the provisional decision by the Guatemala Supreme Court to suspend the company's mining permit in a dispute regarding the consultation rights of indigenous communities). - *Mining.com*, *Tahoe Resources forced to halt Escobal mine in Guatemala*, Jul. 2017: <http://www.mining.com/tahoe-resources-forced-halt-escobal-mine-guatemala/> (regarding the drop in stock values of the company Tahoe Resources Inc. which could be correlated to the Guatemala Supreme Court's decision). - See also BBC, *Chile fines Barrick Gold \$16m for Pascua-Lama mine*, May 2013: <http://www.bbc.com/news/world-latin-america-22663432>

32 See e.g. R. Davis and D. Franks, *Costs of Company-Community Conflict in the Extractive Sector: Corporate Social Responsibility Initiative Report n° 66*. Cambridge, MA: Harvard Kennedy School, 2014 (seeking to identify and assess the costs of conflict with local communities within the context of mining projects).

33 See e.g. *Copper Mesa Mining Corporation v. The Republic of Ecuador*, *prec. supra* note 26.

34 See *supra* note 24, the case of *Hudbay Mineral*: <http://www.hudbayminerals.com/English/Media-Centre/News-Releases/News-Release-Details/2011/Hudbay-Minerals-Announces-Sale-of-Fenix-Project/default.aspx> (regarding the resale, in 2011, of the mining project linked to disputes with local communities for US\$170 million, a price below the original purchase cost) and <http://www.chocversushudbay.com/> (according to the victims' legal counsel, the difference between the purchase price of the mine in 2008 and the sale price in 2011 was US\$290 million).

35 See *supra* note 25.

36 As we have already explained in several contributions. - See e.g. J. Wood, *Soft Law, Hard Sanctions: In-House Lawyer*, p. 95, *spec. p. 96* (interview with Stéphane Brabant).

37 To put these French obligations relating to the RSE into perspective, See generally, K. Martin-Chenut and R. de Quenaudon, *La RSE saisie par le droit, perspectives interne et internationale*: ed. Pedone, 2016.

38 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec., spec., comm. under Principle 15*.- OHCHR, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, *prec., question 26*.

In line with this trend, the European directive on the disclosure of non-financial information adopted in October 2014, and recently transposed in France by way of an order [*ordonnance*], requires that companies communicate certain extra-financial information, including, for some, information on the effects of their activities in relation to the respect of human rights<sup>39</sup>. This reporting is to be based on a multitude of non-financial indicators. More specifically, following the path opened by the enactment of the California Transparency in Supply Act<sup>40</sup> in 2010, the Modern Slavery Act 2015 imposes on companies, whose turnover exceeds a certain threshold, to carry out due diligence processes in their supply chains and to prepare a statement for each financial year. The objective of these requirements is notably to identify modern slavery risks and the steps taken to assess and manage these risks<sup>41</sup>. The implementation of laws on modern slavery reporting, based on the English model, is a continuing trend which has most recently reached Australia<sup>42</sup>.

By no means an exhaustive list, certain targeted initiatives are also worth highlighting, notably those which focus specifically on the interrelation between the upstream and downstream value chain. The February 2016 reform of the American Tariff Act eliminated an exception which had enabled companies to circumvent the prohibition on the importation of goods involving forced labour (including child labour) in the United States<sup>43</sup>. By linking consumers and the supply chain, article L. 113-1 of the French Consumer Code [*Code de la consommation*] gives consumers of goods sold in France, "who [are] aware of serious elements that cast doubt on whether goods were manufactured in conditions compliant with international human rights instruments [these instruments being specified by decree]", the possibility to have the manufacturer, producer or distributor of said goods provide a series of information about these goods. This includes information

regarding the geographical origin of the minerals and components used in the manufacturing of the goods, quality controls and audits, as well as the organisation of production chains and the identity of subcontractors and suppliers (Cons. Code, art. L. 113-1 and L. 113-2, introduced by order n° 2013-301 of 14 March 2016. – Cons. Code, art. D. 113-1, introduced by decree n° 2016-884 of 29 June 2016<sup>44</sup>).

The law on the corporate duty of vigilance is in line with this trend and is a result of the "progression of the notion of due diligence from the UN sphere to the French national sphere"<sup>45</sup>. There are three obligations set out in the Law which relate to reporting: establish a vigilance plan, effectively implement the plan and finally, make public and include the plan and the report on how the plan is effectively implemented in the company's annual management report (the "Vigilance Obligations"). However, the Law goes beyond merely reporting by seeking the effective implementation of the vigilance plan, thus confirming a recent trend in legislative developments relating to the business and human rights movement.

## B. - The Search for Effective Reporting and the Introduction of Penalties

A relatively recent trend involves the search for effective reporting. The objective is for reporting to represent a tangible tool to prevent adverse impacts on human rights. The introduction of penalties also participates in this search for effectiveness and prevention.

The Law, as we will see, is part of this trend, which, like other initiatives, connects reporting obligations with penalties. Amongst these initiatives, two are currently under examination: the draft law in the Netherlands on child labour in supply chains, under discussion in the Dutch Senate<sup>46</sup>, and proposals to amend the

39 EP and EU Council, dir. 2014/95/EU, 22 Oct. 2014 amending directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups: EUOJ n° L 330, 15 Nov. 2014, p. 1. - ord. n° 2017-1180, 19 July 2017 on the publication of non-financial information by certain large undertakings and groups of companies: OJ 21 July 2017, text n° 13. - D. n° 2017-1265, 9 August 2017 for application of order n° 2017-1180 of 19 July 2017 on the publication of non-financial information by certain large undertakings and groups of companies: OJ 11 August 2017, text n° 25.

40 California Transparency in Supply Chains Act of 2010 (imposing a requirement for certain companies to communicate on the measures taken to eliminate slavery and human trafficking in their supply chains).

41 Modern Slavery Act 2015 (UK), c. 30, § 54 (the law applies to commercial organisations that supply goods or services in the United Kingdom and have a turnover of not less than £36 million). - See Statutory Instruments 2015 No. 1833, The Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015 (regarding the turnover threshold).

42 See Joint Standing Committee on Foreign Affairs, Defence and Trade, Modern slavery and global supply chains, Interim report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing a Modern Slavery Act in Australia, 2017.

43 Trade Facilitation and Trade Enforcement Act of 2015, spec. section 910, signed by the President in February 2016 (law repealing the "consumptive demand" clause of 19 U.S.C. § 1307).

44 See I. Buiflier, De l'information sur les conditions sociales de fabrication des produits. Mythe ou réalité pour le consommateur ? : Rev. int. Compliance 2016, étude 64.

45 See K. Martin-Chenut, Devoir de vigilance : inter normativités et durcissement de la RSE : Dalloz soc. 2017, p. 799. - We emphasise that the vigilance appears to be distinct from the idea of "due diligence" of the Guiding Principles, the two procedures not being identical. On this, See OHCHR, Frequently Asked Questions About the Guiding Principles on Business and Human Rights, prec., p. 42 - See this issue, dossier 93.

46 A failure to comply with this law may give rise to an injunction or a fine of a maximum amount of €750,000 or 10% of the annual turnover of the company, See Mvoplatfom, Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law, Apr. 2017: <https://www.mvoplatfom.nl/bestanden/FAQChildLabourDueDiligenceLaw.pdf>



Modern Slavery Act that are aimed at adding penalties to the existing injunction, which only the Secretary of State may seek<sup>47</sup>.

In keeping with this trend, the 2016 European General Data Protection Regulation (GDPR) is an interesting example, although too often omitted from the business and human rights movement<sup>48</sup>. This regulation focuses, inter alia, on the protection of the right to privacy, which applies both offline and online<sup>49</sup>. The breach of certain provisions can lead to penalties including an administrative fine of up to 20 million euros or equal to 4% of the annual worldwide turnover, whichever is higher, as well as compensation, from the entity in question, for material or moral damages suffered as a result of the breach<sup>50</sup>.

These initiatives are increasingly providing the means necessary to guarantee their own effectiveness, and the Law clearly joins this trend in two ways. Firstly, the mandatory publication of both the vigilance plan and the report on its effective implementation serves to show that the plan is not merely declarative, but also enables stakeholders to monitor whether a company respects the Vigilance Obligations. Secondly, the penalties provided for by the Law can strengthen its effective implementation. On the one hand, if a company fails to comply with the Vigilance Obligations, a periodic penalty payment can be sought against it by any party with standing. Therefore, these periodic penalty payments appear to be the primary tool available for civil society to ensure the existence and effectiveness of the vigilance plan. On the other hand, as for civil liability, "despite the difficulties faced by victims wishing to bring an action before the courts, the very existence of such a possibility and the uncertainties as to its actionability could lead companies to fear both legal and financial risks"<sup>51</sup>. The publication of the civil

liability decision presents an additional risk. The company may be wary of the potential reputational damage related to the publication of a decision, thereby strengthening the preventative objective of the Law<sup>52</sup>. The quest for an effective implementation of the plan is thus one of the characteristics of the Law. Another point of interest is that the Law can also be interpreted as challenging the corporate veil.

### C. - The Corporate Veil Challenged?

The embedding of the business and human rights movement in positive law is also part of a trend seeking to challenge the corporate veil and therefore to "thwart the effects of the principle of legal autonomy in relation to corporate liability, within groups of companies and worldwide supply chains"<sup>53</sup>. Indeed, adverse impacts on human rights within the value chain may ultimately affect the company that is meant to prevent such events by way of its human rights reporting obligations. This challenge to the corporate veil, in cases of adverse impacts on human rights within the value chain, is currently the subject of significant legal disputes abroad as victims of said violations seek means for redress<sup>54</sup>.

Can the law on the corporate duty of vigilance be part of this movement which seeks to challenge the corporate veil, specifically through the Vigilance Obligations which it imposes? The Law may allow the "circumvention" of the corporate veil through penalties, as emphasised in the National Assembly's first preparatory works [*travaux préparatoires*] for the Law<sup>55</sup>, even if some legal commentators appear to reject this hypothesis<sup>56</sup>. Nevertheless, the vigilance plan must cover a spectrum of entities, including several

47 See Business & Human Rights Resource Centre, *First year of FTSE 100 reports under the UK Modern Slavery Act: Towards elimination?* Oct. 2017: <https://business-humanrights.org/en/first-year-of-ftse-100-reports-under-the-uk-modern-slavery-act-towards-elimination> (mentioning certain problems of the effective implementation of the Modern Slavery Act). - See recent proposals for amendments, in particular with regard to extending the reporting requirements; subject of section 54 of the *Modern Slavery Act*, including a proposed amendment aiming to exclude companies which have not produced their slavery and human trafficking statement. - See *Modern Slavery (Transparency in Supply Chains) Bill* (HL Bill 57): [https://publications.parliament.uk/pa/bills/cbill/2016-2017/0105/cbill\\_2016-20170105\\_en\\_2.htm#llg2](https://publications.parliament.uk/pa/bills/cbill/2016-2017/0105/cbill_2016-20170105_en_2.htm#llg2), introduced in July 2017 and *Modern Slavery (Transparency in Supply Chains) Bill* (HC Bill 105): [https://publications.parliament.uk/pa/bills/cbill/2016-2017/0105/cbill\\_2016-20170105\\_en\\_2.htm](https://publications.parliament.uk/pa/bills/cbill/2016-2017/0105/cbill_2016-20170105_en_2.htm), introduced in the House of Commons in November 2016. - See also A. Crockett, O. Elgie and J. Wootton, *Potential Amendments to the UK Modern Slavery Act*, Herbert Smith Freehills Legal Briefings, Sept. 2017: <https://www.herbertsmithfreehills.com/latest-thinking/potential-amendments-to-the-ukmodern-slavery-act>

48 EP and EU Council, reg. (EU) 2016/679, 27 Apr. 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC: EUOJ n° L 119, 4 May 2016, p. 1.

49 See UN, GA, resol. A/RES/68/167, *The right to privacy in the digital age*, 18 Dec. 2013 2013 (stating that "rights that people have offline should also be protected online, including the right to privacy").

50 See EP and EU Council, reg. (EU) 2016/679, prec., chap. VIII, art. 82 and 83.

51 See S. Brabant and E. Savourey, *A Closer Look at the Penalties Faced by Companies [Loi relative au devoir de vigilance: des sanctions pour prévenir et réparer?]*, V. Rev. Int. Compliance 2017., p. 24 [English translation also available on the BHRRC website].

52 See S. Brabant and E. Savourey, *A Closer Look at the Penalties Faced by Companies*, prec., p. 24.

53 See M.-C. Caillet, *De devoir de vigilance aux plans de vigilance ; quelle mise en œuvre ?*, prec., spec. p. 820.

54 See C. Bright, *Le devoir de diligence de la société mère dans la jurisprudence anglaise*: Dalloz soc. 2017, p. 828, spec. p. 830. - B. Parance, E. Groulx, *Regards croisés sur le devoir de vigilance et le duty of care*: JDI 2018, forthcoming (regarding the recognition of a duty of care in Common law countries). A number of proceedings initiated in the United Kingdom and in Canada have been particularly scrutinised, notably on the question of the courts' jurisdiction to hear cases in the parent company's jurisdiction for human rights violations that took place abroad, in the supply chain. - For examples, See *Araya v. Nevsun Resources Ltd*, 2016, *Supreme Court of British Columbia*, authorised proceedings brought against the mining company Nevsun Resources Ltd. by Eritrean refugees before the courts of British Columbia, regarding a dispute on human rights violations in Eritrea: <https://business-humanrights.org/en/nevsun-lawsuit-re-bisha-mine-eritrea> (presents the case, its most recent developments and centralises all documentation related to the litigation). - See *Garcia v. Tahoe Resources Inc.*, 2017, *Court of Appeal for British Columbia*, in January 2017, the British Columbia Court of Appeal held that a case, more specifically a human rights dispute brought against Tahoe Resources Inc. for acts committed on the company's mining site in Guatemala, could be heard in Canada: <https://business-humanrights.org/en/tahoe-resources-lawsuit-re-guatemala> (presents the case, its most recent developments and centralises all documentation from the company and the NGOs).

55 See AN, rep. n° 2628, 11 March 2015, spec. p. 78 ("The main difficulty encountered in the implementation of a vigilance obligation of instructing companies arises out of the principle of separate legal personality. [...] Article 2 [of the draft law] overcomes this difficulty using a smart mechanism referring to general civil liability law, based on articles 1382 and 1383 of the French Civil Code").



of those identified in the third paragraph of article L. 225-102-4,1 of the French Commercial Code [*Code du commerce*]. This would therefore cause parent companies and instructing companies, required to establish this plan, to also seek to avoid damages within entities that have a separate legal personality.

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<sup>56</sup> See M. Lafargue, *Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordres : l'entrée dans une nouvelle ère ?*: JCP S 2017, 1169, spec. p. 5 (emphasising the inadequacy of personal liability system [*responsabilité du fait personnel*] introduced by the Law in attempting to avoid the issue of separate legal liability). - See also C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*: 2017, p. 806, spec. p. 807 (considering that the civil liability mechanism of the Law does not achieve the goal expressed in Parliament's preparatory work of lifting the corporate veil).

Thus, the Law aims to implement effective reporting accompanied by measures that identify and prevent the risks of adverse impacts on human rights and fundamental freedoms, health and safety of persons and the environment. It is currently one of the most advanced mandatory initiatives which coexist with voluntary initiatives within the business and human rights movement. Even though the future of this voluntary/mandatory dichotomy may be the subject of further in-depth discussions, it must not curb the resolution of the challenges posed by corporate globalisation, as highlighted by John Ruggie<sup>57</sup>.

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<sup>57</sup> See J. Ruggie, *Multinationals as global institution: Power, authority and relative autonomy: Regulation & Governance*, 2017, p. 13-14 ("in light of the multinationals power, authority, and relative autonomy, the time-worn mandatory/voluntary dichotomy inhibits rather than advances our coming to grips with the challenges posed by corporate globalization").

## DUTY OF VIGILANCE

# 92 Scope of the Law on the Corporate Duty of Vigilance Companies Subject to the Vigilance Obligations



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**T**he first months following the adoption of the law on the corporate duty of vigilance of parent companies and instructing companies (the "Law") led to a number of questions regarding which companies must 1) establish a vigilance plan, 2) effectively implement it and 3) make this plan public, along with a report on its effective implementation, and include both in the company's annual management report (the "Vigilance Obligations"). The entities that fall within the scope of the Law (the "Relevant Undertakings") are the ones subject to the Vigilance Obligations and, *inter alia*, required to establish a vigilance plan. These companies must be distinguished from the other, more numerous, entities which are included within the scope of the vigilance plan of the Relevant Undertakings subject to the Vigilance Obligations, this scope being considered later<sup>1</sup>.

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The first questions on the Relevant Undertakings subject to the Vigilance Obligations have already been clarified. Two main questions, however, remain. First, whether SAS [*Sociétés par Actions Simplifiées*] are included in the corporate forms targeted by the Law, a question that resurfaced after the transposition of the directive on the disclosure of non-financial information.<sup>2</sup> Second, what control relationships are taken into account in determining the scope of the Law (1). The Law also provides that certain Relevant Undertakings subject to the Vigilance Obligations that are within groups of companies are deemed to satisfy the Vigilance Obligations pursuant

to an exemption mechanism. This mechanism also raises several questions that, to date, have rarely been addressed (2).

We recall that the Law is part of a nascent approach which aims to make reporting steps more effective with respect to human rights and fundamental freedoms, health and safety of persons [in French, *personnes* – also understood in English as "individuals"] and the environment, while limiting these to a relatively restricted number of companies<sup>3</sup>. The scope of the Law would therefore only include

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1 See this issue, dossier 93.

2 EP et EU Council, dir. 2014/95/UE, 22 Oct. 2014 amending directive 2013/34/UE as regards disclosure of non-financial information: JOUE (Journal Officiel de l'Union Européen – Official Journal of the European Union) n° L 330, 15 Nov. 2014, p. 1.

3 See this issue, dossier 95. – See S. Brabant and E. Savourey, *A Closer Look at the Penalties Faced by Companies* [Loi relative au devoir de vigilance: des sanctions pour prévenir et réparer?]: See Rev. Int. Compliance 2017, p. 24 [English translation also available on the BHRRRC website]. – See also A. Danis-Fantôme and G. Viney, *La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*: Recueil Dalloz, n° 28, 3 August 2017, p. 1610 (on sanctions and specifically the implementation of civil liability under the Law on the duty of vigilance as a preventative measure).

between 150 and 200 companies (but with whom numerous commercial partners operate)<sup>4</sup>. This restrictive scope contrasts with the alternative choice of a less coercive approach, the scope of which could have involved either a larger number of economic actors, based on the same model as the directive on the disclosure of non-financial information<sup>5</sup>, or all business enterprises, based on the model of the United Nations Guiding Principles on Business and Human Rights ("Guiding Principles")<sup>6</sup>.

## 1. Companies Bound by Vigilance Obligations

Pursuant to the provisions of article L. 225-102-4, I of the French Commercial Code [*Code de commerce*], "any company that employs, for a period of two consecutive financial years, at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory or abroad, shall establish and implement a vigilance plan in an effective manner".

The methodology of the Law involves determining its scope of application for "any company" that satisfies the criteria the Law sets. In a group of companies [i.e. corporate group] it is key, first, to determine whether each company, taken individually, satisfies these criteria. Then, determine if "duplicates" in the companies entering into the scope of the Law, in a same group of companies, can be eliminated using the exemption mechanism.

According to article L. 225-102-4, I of the Commercial Code, for a company to fall under the scope of the Law, it must satisfy several criteria. There must first be 1) a company whose corporate form falls within the scope of the Law. Then, it has to be determined whether, following two consecutive financial years, said company has, EITHER 2a) at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory, OR 2b) at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory or abroad.

Each criterion, namely the location of the registered office (A), the corporate form required to fall within the scope of the Law (B), the nature of the shareholdings (C) and the number of employees (D) requires further analysis, particularly given the letter of the Law has

sometimes caused difficulties of interpretation.

### A. - The Location of the Registered Office of Companies Falling within the Scope of the Law

The jurisdiction in which the registered office of the company falling within the scope of the Law must be located now seems to have been clarified despite the lack of precision of the Law. Indeed, given the wording of the Law, it was unclear if the expressions "whose registered office is located within French territory" and "whose registered office is located within French territory or abroad" applied to the company or its subsidiary. The French Constitutional Court [*Conseil constitutionnel*] by way of reformulation, gave its interpretation of the Law. It held that these two expressions apply to the subsidiaries, while the parent companies are incorporated under French law<sup>7</sup>. This view, which was shared by the Government<sup>8</sup>, confirms the analyses of most commentators on the Law who had previously considered this question<sup>9</sup>. It should also be emphasised that it does not matter if "the parent company itself is a subsidiary of a foreign parent company or controlled by one"<sup>10</sup>; provided the company is French and satisfies the conditions of the corporate form and the employee threshold, it will be bound by the Vigilance Obligations, even in the case of companies that are the French subsidiaries of foreign groups<sup>11</sup>.

Therefore, the companies that should be taken into account in determining the scope of the Law are, on the one hand, companies registered in France with at least 5,000 employees within the company itself and in its subsidiaries, but only those subsidiaries whose registered office is in France, or, on the other hand, companies registered in France which have at least 10,000 employees, including within their subsidiaries whose registered offices are abroad.

Furthermore, the company based in France must have one of the corporate forms covered by the Law. This company must also precisely identify the companies that form part of its group, both

4 AN (Assemblée Nationale – French National Assembly), full minutes of the session on Monday 30 March 2015, p. 3247 (Philippe Noguès remarks that the intended thresholds "affect between 150 and 200 companies, which will cover close to 50% of the export business").

5 In this regard, See Sénat, rep. n° 10, 5 Oct. 2016, spec. p. 16 and 17.

6 In this regard, See S. Brabant, *Devoir de vigilance : une proposition de Loi (pas vraiment) raisonnable*: Le Monde, 17 Jan. 2017. - See also C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*: Dalloz soc. 2017, p. 806 ("The legislator should therefore work to implement a system suitable for smaller companies").

7 Const. court, Dec. 23 March 2017, n° 2017-750 DC, § 3 ("Under paragraph I, companies whose registered office is located in France and which, at the closure of two consecutive financial years, employ at least five thousand employees themselves and in their French subsidiaries, or employ at least ten thousand employees themselves and in their French and foreign subsidiaries, are bound by the obligation to establish a vigilance plan").

8 Observations of the Government on the Law on the duty of vigilance of parent companies and instructing companies: JO (Journal Officiel – French Official Journal) 28 March 2017, text n° 5.

9 See S. Schiller, *Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre*: JCP E 2017, 1193, § 3, p. 21 (establishing a parallel with Law n° 2013-504 of 14 June 2013 on securing employment and the government report stipulating it). - A. Reygrobelle, *Devoir de vigilance ou risque d'insomnies?*: Rev. Lamy dr. aff. July. 2017, spec. § 9, p. 37 (considering that French law cannot prescribe obligations for specific performance [obligations de faire] for a foreign company and therefore have an extraterritorial scope).

10 A. Reygrobelle, *Devoir de vigilance ou risque d'insomnies?*, prec., spec. § 8, p. 37.

11 Observations of the Government on the Law on the duty of vigilance of parent companies and instructing companies, prec.

in France and abroad, and establish a record of the number of employees.

## B. - The Corporate Form of Companies within the Scope of the Law

### 1. The Inclusion of SAs [*Sociétés Anonyme*], SCAs [*Sociétés en Commandite par Actions*], SEs [*Sociétés Européennes*]

Whilst the Law does not specify the corporate form of companies that fall within its scope of application, this can be deduced based on the position of the Law's provisions in the Commercial Code. Inserted in chapter V of title II of Book II of the Commercial Code on SAs (Comm. Code, art. L. 225-101- 4 and L. 225-102-5), the new articles introduced by the Law therefore apply, without any ambiguity, to companies with the SA form [*société anonyme*].

Furthermore, looking at the cross-references in the Commercial Code, there is no doubt that these articles also apply to SCAs (Comm. Code, art. L. 226- 1, para. 2)<sup>12</sup> and, according to our interpretation, to European Companies (SE) (Comm. Code, art. L. 229-1 and L. 229-8)<sup>13</sup>.

### 2. The Debate on SASs [*Sociétés par Actions Simplifiées*]

The inclusion of SASs in the scope of the Law remains subject to debate. Whilst the majority of legal commentators are in favour of the application of the Law to SASs, a minority have expressed an opposing view<sup>14</sup>. The order for the transposition of the directive on the disclosure of non-financial information [*ordonnance de transposition*] dated 19 July 2017<sup>15</sup> and its implementing decree of 9 August 2017<sup>16</sup>, could also support both points of view.

#### a) Arguments in Favour of the Exclusion of SASs from the Scope of the Law

Those who support the exclusion of SASs mainly base their views on references contained in the Law itself, specifically the reference

to article L. 225-102, in two respects. Firstly, the Law requires the publication of the vigilance plan and the report on its effective implementation, and the inclusion of both in the report mentioned in article L. 225-102<sup>17</sup>. However, this article covers the publication of SAs' management reports and excludes SASs from its application (given it is part of the "negative referral" [*renvoi négatif*] under article L. 227-1, paragraph 3)<sup>18</sup>. Therefore, according to this interpretation, since SASs cannot prepare and publish these management reports, the duty of vigilance would not apply to them.

Another argument is based on the drafting of the transitional provisions [*dispositions transitoires*] for the Law. According to article 4 of the Law, the Law enters into force "with the report, mentioned in article L. 225- 102 of the same Code, covering the first financial year commencing after the publication of this law". The argument is similar: since SASs are not required to prepare the report mentioned in article L. 225-102, the legislation does not enter into force for them<sup>19</sup>. The legal committee of the ANSA [*Association Nationale des Sociétés par Actions* – French National Agency of Joint-Stock Companies] agrees with this position and states: "the provision on the entry into force of the new system, which makes the application of the new law conditional upon the drafting of the report mentioned in article L. 225-102, has the effect of excluding SASs from the scope of the new obligation, with regard to the establishment of a vigilance plan"<sup>20</sup>.

It is true that the desire to exclude SASs from the scope of the Law appeared at the start of the parliamentary debates, specifically in

12 See S. Schiller, *Exégèse de la loi sur le devoir de vigilance et entreprises donneuses d'ordre*, *prec.*, spec. § 3, p. 20. - A. Reygrobelle, *Devoir de vigilance ou risque d'insomnies?*, *prec.*, spec. § 10, p. 38. - J. Heinrich, *Société anonyme (SA) - Devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre : une loi finalement adoptée, mais amputée*: Dr. sociétés 2017, comm. 78, spec. p. 30.

13 See S. Brabant and E. Savourey, *A Closer Look at the Penalties Faced by Companies*, *prec.*, p. 22. - And also confirmed by A. Reygrobelle, *Devoir de vigilance ou risque d'insomnies?*, *prec.*, spec. § 10, p. 38. - C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*, *prec.*, spec. p. 811.

14 For another summary of this debate, See C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*, *prec.*, spec. p. 811-812.

15 Ord. n° 2017-1180, 19 July 2017 on the disclosure of non-financial information by certain large undertakings and groups: JO 21 July 2017, text n° 13.

16 D. n° 2017-1265, 9 August 2017 for application of order n° 2017- 1180 of 19 July 2017 on the disclosure of non-financial information by certain large undertakings and groups: JO 11 August 2017, text n° 25.

17 See A. Reygrobelle, *Devoir de vigilance ou risque d'insomnies?*, *prec.*, spec. § 12, p. 38.

18 Indeed, articles L. 225-102-4 and L. 225-102-5 are not part of the "negative referral" [*renvoi négatif*] of article L. 227-1, paragraph 3 which had been amended by Law n° 2014-1662 of 30 December 2014 including various provisions adapting European Union legislation on Economic and Tax matters.

19 See A. Reygrobelle, *Devoir de vigilance ou risque d'insomnies?*, *prec.*, spec. § 12, p. 38. - See also *Un plan de vigilance imposé aux sociétés employant au moins 5 000 salariés*: ed. F. Lefebvre, 5 Apr. 2017. - *Contra*, see C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*, *prec.*, spec. p. 811 (see *infra*).

20 ANSA, *Champ d'application de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre: les SAS sont-elles tenues de mettre en place un tel plan de vigilance ?*: Legal committee, n° 17-028, 3 May 2017.

21 See AN, *rep.* n° 2628, p. 64 ("Article 1 applies in a restricted scope due to its inclusion in a chapter of the French Commercial Code which brings together the provisions specifically applicable to *sociétés anonymes*. Its provisions will therefore not concern *sociétés par actions simplifiées*, *établissements publics* or any other legal form which a company is likely to take"). - See also AN, *rep.* n° 2628, p. 82 and 83 (on the rejection of amendment CL28 aiming to include the SAS). - See also AN, *Commission on sustainable development and land use planning*, minutes n° 34, 11 March 2015, spec. p. 17 (on the rejection of amendment CD20 by the Commission on Sustainable Development because "obligations of disclosure of extra-financial information, which constitute the common thread of this proposal to put in place a vigilance plan, do not yet affect SASs. The difference in treatment does not have the same scope. The obligation to draw up and effectively implement a vigilance plan makes sense for operating companies which, in general, are not SASs, whose form is more suited, for example, to holding companies. On the contrary, the SAS status will not prevent the court from going back to the ultimate holding company when liability for breach of the obligation may be implemented"). - See also AN, *full minutes*, session of Monday 30 March 2015, p. 3262 and 3263 (on the rejection of amendment n° 42 aiming to include SASs).



2015 when the legislator wanted to target only SASs<sup>21</sup>. The question remains, however, whether the consequences of existing referrals to the Commercial Code had been properly measured by the legislator at that time.

Finally, the order transposing the directive on the disclosure of non-financial information [*ordonnance de transposition*] could reinforce arguments which seek to exclude SASs from the scope of the Law<sup>22</sup>. We recall that the order, in line with the directive, targets the communication by certain companies of non-financial information via an extra-financial performance statement [*déclaration de performance extra-financière*] in their management report (on the scope of companies bound by this obligation, *See* Comm. Code, art. L. 225-102-1, I, as amended by order n° 2017-1180 of 19 July 2017<sup>23</sup>)<sup>24</sup>. This information covers several themes, including the social and environmental consequences of a company's activities. For a more limited number of companies, whose shares are traded on a regulated market<sup>25</sup>, this information must also cover the effects of this activity with regard to human rights and anti-corruption (Comm. Code., art. L. 225-102-1, III).

However, the order clearly excludes SASs from its scope, apart from some exceptions. This means that SASs are not required to publish extra-financial information<sup>26</sup>. Wouldn't it be tempting to deduce that the SAS should generally remain outside the scope of any form of non-financial reporting? Indeed, if SASs are not subject to the general non-financial reporting obligation, would it be coherent for them to be subject to more specific obligations of vigilance on non-financial themes such as human rights and fundamental freedoms, health and safety of persons and the environment as provided for in the Law?

Nevertheless, the inclusion of SASs in the scope of the Law has also been subject to compelling arguments advanced by the majority of legal commentators.

22 *See B. Parance, La déclaration de performance extra-financière, nouvelle ambition du reporting extra-financier - À propos de l'ordonnance du 19 juillet 2017 de transposition de la directive Barnier du 22 octobre 2014: JCP G 2017, 1150. - J. Heinrich, Obligations d'information des sociétés : les ordonnances de l'été: Dr. sociétés 2017, comm. 163 (on the exclusion of SASs from extra-financial reporting obligations).*

23 "I. – An extra-financial performance statement is inserted into the management report provided in paragraph two of article L. 225-100, when the balance sheet total or net turnover and the number of employees exceed thresholds set by a decree of the Conseil d'État [of 9 August 2017 amending article R. 225-104 of the French Commercial Code. The thresholds being assessed at the date of closure of the financial year]: 1° For any company whose shares are traded on a regulated market [20 million euros for the balance sheet total, 40 million euros for the net turnover and 500 for the average number of permanent employees during the financial year]; 2° For any company whose shares are not traded on a regulated market [100 million euros for the balance sheet total, 100 million euros for net turnover and 500 for the average number of permanent staff employed during the financial year]".

24 *Medef, Guide Méthodologique Reporting RSE, déclaration de performance extra-financière, les nouvelles dispositions légales et réglementaires, Sept. 2017 (on a general presentation of extra-financial reporting and comparisons between the order, the loi Sapin 2 and the Law).*

25 Referred to in 1° of article L. 225-102-1 of the French Commercial Code.

26 The discussions surrounding its transposition [*travaux de transposition*] had initially considered including them, *See Min. de l'Économie et des finances, Projet d'ordonnance portant transposition de la directive 2014/95/UE: https://www.tresor.economie.gouv.fr/Ressources/File/433034*

## b) Arguments in Favour of the Inclusion of SASs in the Scope of the Law

We recall that the majority of legal commentators, as expressed after the publication of the Law<sup>27</sup>, and the Government<sup>28</sup>, consider that SASs fall within the scope of the Law. Firstly, the Vigilance Obligations introduced by the Law, under articles L. 225-102-4 and L. 225-102-5, are not part of the negative referrals under article L. 227-1. This would mean that these articles do apply to the SAS. As emphasised by Michel Germain and Pierre-Louis Perrin, the insertion of articles between L. 225-102-3 and L. 225-103 renders them automatically applicable to SASs<sup>29</sup>. If SASs are to be excluded, should this not be achieved by amending article L. 227-1 in order to ensure that the provisions of the new articles L. 225-102-4 and L. 225-102-5 are not applicable to SASs, rather than by the effect of transitional provisions which are largely open to interpretation? One author even noted that article 4 of the Law could also be interpreted as making the Vigilance Obligations immediately applicable to SASs<sup>30</sup>.

Whilst the reference to article L. 225-102 of the Commercial Code seems to raise a genuine question of theoretical coherence in relation to the vigilance plan in the management report, it should not be forgotten that in practice, SASs also draft a management report required by the Commercial Code<sup>31</sup>. The distinction between the management reports of articles L. 225-102 and L. 232-1 of the Commercial Code relates more to their substance and the strengthened obligations which apply to SAs, rather than to the material document itself. Furthermore, the Constitutional Court appears to have interpreted the mention of article L. 225-102 as a wider reference to the management report. When considering the transitional provisions' compliance with the constitutional objective of accessibility and intelligibility of the law, the Constitutional Court specified that: "[t]he provisions [of the rest of article L. 225-102-4 and of L. 225-102-5] will be applicable as of the annual management report covering the first financial year commencing after the publication of the law"<sup>32</sup>.

We emphasise that if the transposition of the directive on the disclosure of non-financial information by the order of 19 July 2017

27 On the inclusion of SASs, *See S. Schiller, Exégèse de la loi sur le devoir de vigilance et entreprises donneuses d'ordre, prec., spec. p. 20. - C. Malecki, Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre: était-ce bien raisonnable?: Bull. Joly Sociétés 2017, p. 298. - P.-L. Périn, Devoir de vigilance et responsabilité illimitée des entreprises: qui trop embrasse mal étreint: RTD com. 2015, p. 215, spec. p. 218 (concerning the draft law n° 2578 of 11 February 2015). - C. Hannoun, Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017, prec., spec. p. 811-812.*

28 *Observations of the Government on the law on the duty of vigilance of parent companies and instructing companies, prec. ("These obligations will apply to sociétés anonymes as well as sociétés en commandites par actions and sociétés par actions simplifiée, pursuant to references provided in articles L. 226-1 and L. 227-1 of the French Commercial Code").*

29 *M. Germain and P.-L. Perin, SAS - La société par actions simplifiée - Études - Formules: Joly éd., Pratique des affaires, July. 2016, § 109-1.*

30 *C. Hannoun, Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017, prec., p. 812.*

31 Under article L. 232-1 of the Commercial Code.

32 *See Const. coun. Dec. 23 March 2017, prec., § 31 (our emphasis).*

provides a general exclusion of SASs from the scope of non-financial reporting, it also envisages some exceptions directly or indirectly affecting SASs. This is the case for SNCs [*Sociétés en Nom Collectif*] whose shares are held by, *inter alia*, SASs<sup>33</sup>. The exception also applies to some credit institutions and to financing companies, investment companies, parent companies of financing companies and financial holding companies whose shares are traded on regulated markets, when these entities have, *inter alia*, the SAS form and, provided that the balance sheet total or net turnover and number of employees exceed certain thresholds<sup>34</sup>. The management report provided for in article L. 225-100-1, I and the extra-financial performance statement provided for in article L. 225-102-1 apply to these SNCs and these SASs. Should the order therefore be held as the first challenge to the principle of non-applicability of non-financial reporting obligations to SASs?<sup>35</sup> Should we consider that SASs, required to draft an extra-financial performance statement, may also be subject to the Vigilance Obligations such that this signals the start of a legislative evolution? Lastly, should we not consider that precisely because the order excludes most of the SASs from non-financial reporting, it would thus be even more important that SASs be subject to the Law in order to ensure the respect of human rights and fundamental freedoms, health and safety of persons and the environment? Corporate law is certainly experiencing a general movement in this direction.

### c) Beyond the Debate: the Guiding Principles as a Compass for Interpretation

There are various positions, regarding the inclusion or exclusion of SASs in the scope of the Law, that are in conflict. These different positions may arise, in part, as a result of their proponents defending

a point of view which reflects their own interests. Such a situation could lead to an intractable debate and, unless there is legislative clarification beforehand, it will be up to the courts to decide. In these circumstances, to clarify the debate and anticipate possible interpretations, the Law needs to be placed into its broader context.

The Law adopts a restrictive approach of companies bound by the Vigilance Obligations compared to the Guiding Principles. Nevertheless, it should be remembered that the Law is expressly based on the Guiding Principles that are the foundation of the business and human rights movement.<sup>36</sup> The Guiding Principles rely on a broader interpretation of the companies bound by a duty to respect human rights. These principles could then serve, alongside the OECD Guidelines for Multinational Enterprises, as a "compass" for the court in interpreting the Law.<sup>37</sup>

Therefore, the Guiding Principles require that all "business enterprises", according to their terminology, respect human rights<sup>38</sup> in their activities and value chains<sup>39</sup>. These entities are "all enterprises regardless of their size, sector, operational context, ownership and structure"<sup>40</sup>. The Guiding Principles are indeed widely recognised by companies. Furthermore, as emphasised by the Guiding Principles, it is key that companies should "know and show that they respect human rights" and that they implement policies and processes for this purpose, including processes of human rights due diligence. These processes are adjustable depending on the size of the company<sup>41</sup>.

33 For SNCs [*sociétés en nom collectif*], See ord. n° 2017-1180, 19 July 2017, *prec.*, art. 2 ("Part I of article L. 225-100-1 and article L. 225-102-1 apply to the management report when all of the shares are held by persons with the following forms or by foreign companies with a comparable legal form: *société anonyme*, *société en commandite par actions*, *société à responsabilité limitée* or *société par actions simplifiée*").

34 See ord. n° 2017-1180, 19 July 2017, *prec.*, art. 5 ("Article L. 225-102-1 of the Commercial Code is applicable, in the conditions provided for the companies listed in 1° of its I, to *établissements de crédit* with the corporate form of *société anonyme*, *société en commandite par actions*, *société à responsabilité limitée* or *société par actions simplifiée* as well as financing companies [*sociétés de financement*], investment companies [*entreprises d'investissement*], parent companies of financial companies [*entreprises mères de sociétés de financement*] and financial holding companies [*sociétés financières holding*] with one of these company forms and whose shares are traded on a regulated market, when the total of their balance sheet or net turnover and their number of employees exceed, where applicable on a consolidated basis, the thresholds provided for the companies mentioned above in 1° of I of the same article").

35 See also C. Malecki, *Transposition de la directive RSE: un nouveau cadre de publications extra-financières pour les grandes entreprises*: Bull. Joly Sociétés 2017, p. 633 (expressing a view in favour of non-financial reporting for SASs when they exceed the thresholds set out in the decree of 9 August 2017: "[h]owever, if they exceed the thresholds specified by the decree of 9 August 2017 for unlisted companies, it would seem logical to require from them to disclose such a statement inasmuch as article L. 225-102-1, 2° generally refers to "any company" and spec. p. 633: "[g]enerally, it would seem rather un-virtuous that SASs, which exceed, for example, significant thresholds in terms of employees and turnover, would not take into account the social, environmental and societal consequences of their activities").

36 AN, *prop. of law n° 2578, spec. p. 4* (explanatory memorandum of the draft law) ("In accordance with the United Nations Guiding Principles on Business and Human Rights unanimously adopted by the United Nations Council on Human Rights in June 2011, and in accordance with the OECD Guidelines on Multinational Enterprises, the purpose of this draft law is to introduce vigilance obligations for parent companies and instructing companies with respect to their subsidiaries, sub-contractors and suppliers"). - See this issue, dossier 91.

37 C. Hammoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017, prec., spec. p. 812*. (mentioning that the OECD Guidelines for Multinational Enterprises target "enterprises" in a broader sense, independently of their corporate form. Arguing therefore that, in order to reflect the objectives of the Guidelines, the SAS should fall within the scope of the Law).

38 With regard to the French version on this article, it should be noted that the United Nations, in their official translations, use the term "*droits de l'homme*" (without capitals) whilst the Law uses the term "*droits humains*". The two expressions therefore coexist in the original version in French of this article.

39 With regard to the wide scope of application of the Guiding Principles, See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, 2011, *spec. principle 14* ("The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.").

40 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, *spec. general principles and principle 14*.

41 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, *spec. p. 18, principle 15* ("In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances [...]") and *comm. under principle 15*.

In line with the spirit of the Guiding Principles and faced with the uncertainty around the inclusion of SASs into the scope of the Law, it would probably be prudent, at the very least, to adopt a more inclusive, rather than exclusive, vision of companies subject to Vigilance Obligations. This would help anticipate the consequences of a jurisprudential or legislative confirmation that the scope of the law extends to SASs. If, however, jurisdictions were to consider that the law does not apply to SASs, then this voluntary compliance with the Vigilance Obligations would, in any event, allow SASs to use the Law as a tool to comply with the Guiding Principles. Such compliance would help them control the risk of adverse impacts on human rights in their activities and value chains. This compliance could also generate new opportunities. First, compliance could attract new employees, investors and consumers. Second, compliance could mean a potential access to new markets for which extra-financial performance is a differentiating, and even decisive, criterion<sup>42</sup>. Similarly, numerous SASs may have to comply with the human rights requirements of some of their partners, including, for example, financial institutions.

### C. - The Identification of "Subsidiaries"

The first step in determining whether a company falls within the scope of the Law, and is therefore a Relevant Undertaking subject to the Vigilance Obligations, is to identify its corporate form. The second step is to identify its "direct and indirect subsidiaries". This identification of subsidiaries is therefore an essential prerequisite in counting employees. In the absence of a clarification of the Law, does this mean that the definition of a "subsidiary" under article L. 233-1 of the Commercial Code should be applied? Under this article, a subsidiary is a company in which over half of the company capital is held by another company. The National Assembly's preparatory work<sup>43</sup> [*travaux préparatoires*] and the distinctions introduced by the Law, that refer to articles of the Commercial Code related to control, appear to be in favour of a positive response to this question<sup>44</sup>.

Some authors, however, consider that the notion of control is the one which should be taken into account in determining the scope of the Law. One of the arguments in favour of this position is the parallel that can be drawn with companies exempt from Vigilance Obligations which are "subsidiaries or companies controlled" by "the company which controls them, under article L. 233-3" (Comm.

Code, art. L. 225-102-4, I, para. 2)<sup>45</sup>. It is true that restricting the scope of the Law to the subsidiaries mentioned in article L. 233-1 seems reductive, especially since this article is not referred to<sup>46</sup>. Given the lack of precision of the Law, could international sources bring clarification? The OECD Guidelines encourage an extensive interpretation of the notion of control and, as one author notes, "in the widest possible manner, at least within the meaning of article L. 233-3 of the Commercial Code which is usually used, in order to satisfy the objectives of the legislation"<sup>47</sup>. The Guiding Principles also adopt this approach<sup>48</sup>.

In the absence of a clear indication in the Law, the definition of the link between the company and its subsidiary, ultimately in order to calculate the number of employees, should be treated with significant caution by companies falling under the scope of the Law. To date, the range of possible interpretations extends from a restrictive, literal reading of the Law to a wide interpretation of the Law, inspired by international principles<sup>49</sup>. Assuming this issue is resolved, the company must not lose sight of the process it must follow to prepare a consolidated record of its employees.

### D. - Calculation of the Number of Employees

The Law has chosen an approach based on a threshold of the number of employees. This approach contrasts with the Modern Slavery Act, for instance, which applies a turnover threshold<sup>50</sup>. These thresholds also differ from those in contemporary French legislation: namely the directive on the disclosure of non-financial information, its transposing order of 19 July 2017 and Law n° 2016-1691 of 9 December 2016 on transparency, anti-corruption and the modernisation of economic life, also known as the law Sapin 2 [*loi Sapin 2*], which combine both the turnover and the number of employees<sup>51</sup>. However, the thresholds implemented by

<sup>42</sup> See this issue, dossier 91.

<sup>43</sup> AN, rep. n° 2628, 11 March 2015, spec. p. 64 (defining the subsidiary by citing article L. 233-1 of the Commercial Code: "The definition of a subsidiary is set out in article L. 233-1 of the Commercial Code. According to this provision, "when a company owns more than half of the capital of another company, the second company is considered (...) to be a subsidiary of the first company").

<sup>44</sup> Note that this situation contrasts with law Sapin 2 which relies on the notion of a group of companies to limit its scope. The reference to a "group of companies" in article 17, I of law Sapin 2 should indeed be interpreted as a reference to the combination formed by a parent company and its subsidiaries under article L. 233-1 of all the companies which it controls under article L. 233-3 of the Commercial Code according to the Constitutional Court (See *Const. Coun.*, Dec. 8 Dec. 2016, n° 2016-741 DC, spec. § 14).

<sup>45</sup> See also the second part of this contribution on exemptions. - See also A. Reygrobellet, *Devoir de vigilance ou risque d'insomnies?*, prec., spec. § 7, p. 37.

<sup>46</sup> We note in this respect that article L. 233-1 of the Commercial Code expressly provides that it is only applicable to sections II and IV of chapter III of title III of book II of the Commercial Code.

<sup>47</sup> See C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*, prec., spec. p. 813.

<sup>48</sup> See spec., UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, prec., principle 14 (relating to the notion of a company: "regardless of their [...] ownership and structure").

<sup>49</sup> In the same way we had for the SAS.

<sup>50</sup> *Modern Slavery Act 2015 (UK)*, c. 30, § 54. - *The Modern Slavery Act 2015 (Transparency in supply chains) Regulations 2015 No. 1833: 28 Oct. 2015* ("The amount of total turnover prescribed for the purposes of section 54(2)(b) of the 2015 Act is £36 million.").

<sup>51</sup> It should be noted that the Senate sought to harmonise this with the thresholds found in the directive on non-financial reporting and consequently amended the draft law in its second reading, which was rejected by the National Assembly, see *Senate*, rep. n° 10, 5 Oct. 2016, spec. p. 16 and 17. - See article 17, I of law Sapin 2 ("Chairmen, CEOs, and managers of a company employing at least 500 employees, or belonging to a group of companies whose parent company has its registered office located within France and whose workforce includes at least 500 employees, and whose turnover or consolidated turnover is higher than 100 million, are required to take measures to prevent and detect commission of acts of corruption or influence-peddling in France, or abroad, in accordance with the conditions provided in paragraph II").



the Law recall those of the Law of 14 June 2013 related to securing employment [*loi relative à la sécurisation de l'emploi*] which provides that companies included in the scope of application of this law shall have directors [*administrateurs*] in place to represent employees<sup>52</sup>.

It is also worth noting that the Law requires calculating the number of "employees" [*salariés*] of a parent company and its subsidiaries at the end of two consecutive financial years. This identification of employees contrasts, for example, with the order of 19 July 2017 which refers to the threshold of "permanent staff employed during the financial year" (Comm. Code, art. R. 225-104<sup>53</sup>). In the absence of a provision in the Law on a method to calculate the 5,000 or 10,000 employees, it seems nonetheless possible to use the method found in the French Employment Code [*Code du travail*] (Emp. Code, art. L. 1111-2 and L. 1111-3), which is used to calculate a company's workforce. In any event, the wording "employees" seems to exclude certain forms of employment in particular people working for the company and its subsidiaries, in France and abroad, under a status other than salaried staff.

Below are some examples of calculations of the number of employees in hypothetical companies fulfilling the corporate form requirements. For instance, a French company with less than 4,000 employees in France, with no subsidiaries abroad, would not fall within the scope of the Law because it does not exceed 5,000 employees in France. If this same company also had subsidiaries abroad totalling 4,000 employees, it would not fall within the scope of the law because it does not exceed the threshold of 10,000 employees in France and abroad. A French company with 10 employees in France and 9,991 employees distributed in one or more subsidiaries abroad would fall within the scope of the Law since it has more than 10,000 employees in France and in its subsidiaries abroad. For a foreign company with a subsidiary in France which has more than 5,000 employees in France, the subsidiary would also fall within the scope of the Law.

Having identified the companies that fall within the scope of the Law, it is now possible to determine which of them may be exempted, under certain conditions, from the Vigilance Obligations.

## 2. Companies Exempt from Vigilance Obligations

Article L. 225-102-4, I, paragraph 2 of the Commercial Code provides that: "[s]ubsidiaries or controlled companies which exceed the thresholds set out in the first paragraph are deemed to satisfy the obligations provided in this article when the company

which controls them, within the meaning of article L. 233-3, establishes and implements a vigilance plan related to the activity of the company and all of the subsidiaries or companies which it controls".

The exemption mechanism is inspired by the law Sapin 2 and uses a similar wording<sup>54</sup>. This mechanism was proposed at a late stage in the drafting of the Law, first by the Senate and then by the National Assembly<sup>55</sup>. The exemption provides that subsidiaries and controlled companies are deemed to satisfy the Vigilance Obligations, even though they fall within the scope of the Law in addition to their parent company, assuming they satisfy the criteria that we analysed previously, i.e. in terms of the location of the registered office, the company form and the threshold of employees. To avoid duplication, these entities "are deemed to satisfy the obligations provided in this article when the company which controls them, within the meaning of article L. 233-3, establishes and implements a vigilance plan related to the activity of the company and all of the subsidiaries or companies which it controls" (Comm. Code, art. L. 225-102-4, I, para. 2).

As was the case in the definition of the scope of the law, the notion of subsidiary is not clearly defined<sup>56</sup>. It seems reasonable here to draw inspiration from the exemption provided by law Sapin 2 which defines subsidiaries within the meaning of article L. 233-1. However, the "controlled companies", which are not mentioned in the determination of the scope of the Law, do appear in the scope of the exemptions. They are defined by reference to article L. 233-3 of the Commercial Code which includes various hypotheses of control, including joint control and presumption of control.

The question is therefore whether this exemption mechanism is mandatory or optional for subsidiaries and controlled companies. What happens if the parent company or its subsidiary wants the subsidiary to be bound by the Vigilance Obligations? The legislator's use of the words "are deemed" may seem to introduce a conclusive presumption [*présomption irrefragable*], as a result of the parent company complying with the Vigilance Obligations for its

54 L. n° 2016-1691, 9 Dec. 2016, prec., art. 17, I, 2 ("[w]hen the company produces consolidated accounts [*comptes consolidés*], the obligations defined in this article concern the company itself as well as all of its subsidiaries, within the meaning of article L. 233-1 of the Commercial Code, or companies which it controls, within the meaning of article L. 233-3 of the same code. The subsidiaries or controlled companies which exceed the thresholds set out in the aforementioned paragraph I are deemed to satisfy the obligations provided in this article, provided the company which controls them, within the meaning of the same article L. 233-3, implements the measures and procedures provided in paragraph II of this article and that these measures and procedures apply to all of the subsidiaries and companies which it controls"). We can note the symmetry between the companies entering into the scope of application of article 17 and those exempt in the anticorruption legislation. This parallel is not found in the Law, *See* in this respect, *supra*, part C.

55 The principle was proposed by the Senate Law Commission [*Commission des lois du Sénat*] in the amended draft law on 5 October 2016 before being taken up by the National Assembly in the same spirit, but using a different wording, on the basis of two amendments brought before it on 29 November 2016, *See Senate, prop. n° 11, 5 Oct. 2016. - See also, AN, full minutes, second session of Tuesday 29 November, spec. p. 8057-8058*, on amendments n° 17 and 22 adopted in this respect.

56 We note that contrary to the definition of the scope of the Law, the distinction between direct and indirect subsidiaries is no longer mentioned.

52 *See* L. n° 2013-504, 14 June 2013 on securing employment: OJ 16 June 2013, text n° 1. As also notes S. Schiller, *Exégèse de la loi sur le devoir de vigilance et entreprises domeuses d'ordre, prec., spec. p. 21*.

53 To determine the average number of permanent staff employed during the financial year, this article refers to article R. 123-200, paragraph 6 (decree n° 2017-1265 of 9 August 2017 implementing order n° 2017-1180 of 19 July 2017 on the disclosure of non-financial information by certain large undertakings and groups referring to article R. 225-104).



subsidiaries and controlled companies. This mechanism does not seem to be a flexible and adaptable tool and is likely to encourage the management/distribution of the responsibility within groups.

*De facto*, it appears preferable that the establishment of the plan, its effective implementation and its publication be centralised and that several entities in the same group do not work on the implementation of the same document, particularly given controlled companies - this time not in the capitalistic but rather the accounting sense<sup>57</sup> - fall within the scope of the vigilance plan to be drafted by the parent company. However, this exemption mechanism means that the parent company will have to address breaches of the Vigilance Obligations, not only in its activities, but also in those of its subsidiaries and controlled companies, where these fall within the ambit of the plan. Is the vigilance, required by the Law, more effective if it is higher in the corporate pyramid? In any event, in applying this exemption, it is essential that the parent company, when putting in place its vigilance plan, followed by its effective implementation, guarantees the implementation of procedures and indicators within the exempt companies. This will ensure the effective implementation of the plan.

It remains to be seen whether the vigilance plan, drafted by the parent company, must also include within its scope the entities which would normally have been included in the ambit of the vigilance plan that the subsidiary or controlled company would have to establish in the absence of the exemption mechanism. The Law provides that the controlling company must, within the framework of the exemption mechanism, "implement a vigilance plan relative to the activity of the company and all of the subsidiaries or companies which it controls" (Comm. Code, art. L. 225-102-4, I, para. 2). This wording could therefore limit the ambit of the plan and exclude companies which would have fallen within

the ambit of the plan that the subsidiary or controlled company should have drafted. However, looking at the ambit of the plan, it seems that a broader interpretation is possible. The ambit of the plan actually appears to cover the activities of controlled companies within the meaning of article L. 233-16, II, as well as subcontractors and suppliers of both the company and the controlled companies (Comm. Code, art. L. 225-102-4, I, para. 3, determining the ambit of the vigilance plan)<sup>58</sup>.

Finally, should we therefore understand that the parent company should only "establish and implement a vigilance plan related to the activity of the company and all of the subsidiaries or companies which it controls", such that the controlled company or subsidiary is deemed to satisfy the Vigilance Obligations? This would mean that the mere establishment and implementation of the plan would trigger the exemption, therefore enabling the subsidiaries and controlled companies to avoid liability for ineffective implementation. But, does this interpretation mean that to allow its subsidiaries and controlled companies to benefit from the exemption, the parent company is only required, *a minima*, to draft the plan and implement it, without monitoring or publishing the plan and its effectiveness? Such a situation would appear to be contrary to the philosophy of the Law which seeks the effective implementation of the plan.

Though it is increasingly possible to provide answers to questions concerning the scope of the Law, questions related to the definition of control and the exemption mechanism would benefit from further investigation from a corporate law standpoint and from jurisprudential clarifications. In the meantime, the implementation of the Law will most probably lead companies to take a position on the subject and contribute to practical clarifications of these questions and to any adjustments to be made to the Law.

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57 In accordance with article L. 233-16, II of the Commercial Code, *See this issue, dossier 93*.

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58 *See also this issue, dossier 93* (for a detailed analysis of this point)

## DUTY OF VIGILANCE

### 93 The Vigilance Plan Cornerstone of the Law on the Corporate Duty of Vigilance



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**T**he vigilance plan, cornerstone of the law on the corporate duty of vigilance for parent and instructing companies (the "Law"), must be established by companies falling within its ambit. This plan, through the implementation of reasonable vigilance measures, should "identify the risks and prevent severe impacts on human rights and fundamental freedoms, health and safety of persons and on the environment" (Comm. Code, art. L. 225-102-4, para. 3).

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The plan is focused on three vigilance obligations: the establishment of the plan, its effective implementation and the publication of both the plan and its effective implementation (the "Vigilance Obligations"). There are some outstanding uncertainties regarding numerous matters related to the vigilance plan despite clarifications provided in parliamentary works [*travaux parlementaires*, including both parliamentary debates and parliamentary drafts of the Law]. These questions concern the entities included within the ambit of the vigilance plan that a company is required to establish (1), the content of the plan, as well as its establishment and implementation (2). This article therefore proposes a practical approach to establishing the plan focussing essentially on the theme of human rights<sup>1</sup>. Themed boxes included throughout this article present the approaches of several companies with vigilance plans under preparation [at the time of writing this article].

## 1. An Ambit Difficult to Capture

### A. - *Ratione Personae*: the Entities Included in the Ambit of the Plan

The implementation of the vigilance plan requires first to identify the entities which fall within its ambit. The vigilance plan must not only cover the activities of the company required to establish the plan (the "Relevant Undertaking")<sup>2</sup>, but also the activities of a whole range of entities connected to the Relevant Undertaking. Indeed, the Relevant Undertaking must also include in the ambit of its plan the activities of the "companies that it controls, within the meaning of article L. 233-16 II, directly or indirectly, as well as the activities of subcontractors or suppliers with whom they have an established commercial relationship, when these activities are related to this relationship" (Comm. Code, art. L. 225-102-4, para. 3). This description of the ambit *ratione personae* raises a number of questions, as already suggested by the French Constitutional Court [*Conseil constitutionnel*]<sup>3</sup>.

#### 1. The Concept of Controlled Companies

Controlled companies whose activities must be included in the vigilance plan are determined, as specified in the Law, by reference to article L. 233-16, II of the Commercial French Code [*Code de commerce*]. The concept of control introduced by this article is used by commercial companies for book-keeping purposes in the context of the preparation of consolidated accounts [*comptes consolidés*] and the group management report<sup>4</sup>.

The control envisaged in article L. 233-16, II is classified as

"exclusive control" in that it enables the company to have decision-making power<sup>5</sup>, in particular over the financial and operational policies of another entity. This control can be exercised by different methods<sup>6</sup>: legal control (Comm. Code, art. L. 233-16, II, 1°)<sup>7</sup>, *de facto* control (Comm. Code, art. L. 233-16, II, 2°)<sup>8</sup> or contractual control (Comm. Code, art. L. 233-16, II, 3°)<sup>9</sup>. In the case of contractual control, a company is entitled "to use or to direct the use of assets" of another company in the same way that it controls its own assets, by virtue of a contract or statutory clauses<sup>10</sup>. This concept of exclusive control significantly expands the number of companies to be included within the ambit of the plan, especially given this control can be direct or indirect, as specified by the Law. Therefore, Sophie Schiller emphasises that the companies targeted are those "that are directly and also indirectly controlled, in other words all of those, with no limits to the chain of control, over which a company exercises a decision-making power, whether they are direct subsidiaries [*filles*], second tier subsidiaries [*petites-filles*], or third tier subsidiaries [*arrières-petites-filles*], etc."<sup>11</sup>.

Consequently, it is important for Relevant Undertakings falling under the Vigilance Obligations to properly identify the scope of their accounting consolidation in order to determine and document the companies which will have to be covered by their vigilance plan. Note that it is important to distinguish this concept of accounting control from capitalist control which coexists in the Law<sup>12</sup>.

#### 2. The Concept of Subcontractors and Suppliers

The ambit of the plan also includes "the activities of subcontractors or suppliers with whom an established commercial relationship exists, when these activities are linked to this relationship" (Comm. Code, art. L. 225-102-4, 1, para. 3). This complex wording calls for a number of comments.

The reference to subcontracting [*sous-traitance*] and the uncertainty of its definition can be considered first. This concept may be defined from a wide economic point of view or a more restricted legal

5 See S. Schiller, *Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre*: JCP E 2017, 1193, § 5, p. 21.

6 See *Memento Pratique Sociétés Commerciales* 2018: ed. F. Lefebvre, 2017, § 80571 (on the different types of control).

7 Exclusive control by a company results "from the direct or indirect holding of the majority of voting rights in another company."

8 Exclusive control by a company results "from the appointment, for two successive financial years, of the majority of the members of the administrative bodies, board of directors or supervisory board of a company. The consolidating company is presumed to have made this appointment when it directly or indirectly held a fraction greater than 40% of the voting rights during this period, and no other director [*associé*] or shareholder [*actionnaires*] held a greater fraction than this, directly or indirectly".

9 Exclusive control by a company results from "the right to exercise a dominant influence on a company pursuant to a contract or statutory clauses, when the applicable law permits this". - See also *Memento Comptes Consolidés, Règles françaises, préc.*, § 2025 et s. (which allows the inclusion of certain *ad hoc* entities specifically created to manage one or more operations on behalf of the company).

10 See *Memento Comptes Consolidés, Règles françaises, préc.*, § 2001 and 2024.

11 See S. Schiller, *Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre*: *prec.*, § 5, p. 21.

12 See dossier 92.

1 With regard to the French version of this article, it should be noted that the United Nations, in their official translations, use the term "*droits de l'homme*" (without capitals) whilst the Law uses the term "*droits humains*". The two expressions therefore coexist in the original version in French of this article.

2 See this issue, dossier 92.

3 *Const. court*, 23 March 2017, n° 2017-750 DC, §13.

4 See *Memento Comptes Consolidés, Règles françaises*: ed. F. Lefebvre, 2017, § 2011 et s. (for an overview of the range of companies covered by this notion within the meaning of the accounting standards).

perspective<sup>13</sup>. The rare comments on subcontracting<sup>14</sup>, including those in the transcripts of parliamentary debates<sup>15</sup>, indicate that we should refer to the concept as defined by the law of 31 December 1975 under which "subcontracting is the operation by which an entrepreneur entrusts another person called the subcontractor [*sous-traitant*], via a subcontractee [*sous-traité*] and under his responsibility, the performance of all or part of the service contract or part of the public procurement contract entered into with the principal [*maître de l'ouvrage*]"<sup>16</sup>.

Whilst the concept of subcontractor seems to be defined and relatively restricted, this does not appear to be the case for the concept of suppliers. The latter does not have "substantially dense prescriptive content"<sup>17</sup> and the rare definitions which exist include a broad range of content<sup>18</sup>. It may refer to "industrial subcontracting" defined as the situation where "a production agent does not personally carry out all of the operations leading to the manufacture of the product from the outset, but uses another agent classified as a subcontractor for all or part of its operations"<sup>19</sup>. It would cover any provision of goods and services to a company by operators (individuals or legal persons). This wide interpretation could add to the more restrictive definition of "subcontractors" defined in the law of 31 December 1975, and could further extend the ambit of the vigilance plan.

Assessing the definitions of subcontractors and suppliers as set in the Law also entails determining whether these concepts encompass the subcontractors and suppliers of solely the Relevant Undertaking, or those of both the Relevant Undertaking and the companies under its control. How to interpret the final redaction of the Law and its use of the passive voice? According to this wording, the Relevant Undertaking must include in its vigilance plan "reasonable vigilance measures to identify the risks and prevent severe impacts [...] resulting from the activities of the company and those of the companies which it controls [...], as well as the activities of subcontractors or suppliers with whom there is an established commercial relationship, when these activities are linked to this relationship" (Comm. code, art. L. 225-102-4, para. 3).

13 See A. Reygrobellet, *Devoir de vigilance ou risque d'insomnies*: Rev. Lamy dr. aff. July. 2017, § 18, p. 39. - See also A. Benabent et L. Jobert, *Sous-traitance. Sous-traitance des marchés des personnes privées*: JCI. Contrats-Distribution, Fasc. 1450 (for a definition of economic subcontracting).

14 See S. Schiller, *Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre*, préc., § 5, p. 21. - See also A. Reygrobellet, *Devoir de vigilance ou risque d'insomnies*, préc., spec. § 18, p. 19.

15 AN, rep. n° 2628, 11 March 2015, spec. p. 65 (defines subcontracting using the definition provided by the law of 31 December 1975 on subcontracting and mentions the risks posed by successive subcontracting).

16 L. n° 75-1334, 31 Dec. 1975 on subcontracting, art. 1: OJ 3 Jan. 1976, p. 148.

17 See A. Reygrobellet, *Devoir de vigilance ou risque d'insomnies*, préc., spec. § 19, p. 40.

18 Directive 2004/18/EC of the European Parliament and Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, since repealed, defined suppliers, entrepreneurs and service providers within the same definition: "any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or work, products or services" (art. 1, § 8).

19 A. Benabent et L. Jobert, *Sous-traitance. Sous-traitance des marchés des personnes privées*, préc., § 1.

The conjunction "as well as" could lead to the conclusion that the ambit of the plan only extends to activities of the Relevant Undertaking (which establishes the plan), the companies which it controls and to its subcontractors and suppliers. However, on reading the transcripts of parliamentary debates and the various versions of the draft law, one could conclude that the plan applies to both subcontractors and suppliers of the Relevant Undertaking and those of the companies which it controls. Indeed, the ambit of the plan would include the "activities of the company and the companies which it controls [...]" as well as the activities of their subcontractors or suppliers with whom they have an established commercial relationship<sup>20</sup>. The possessive determiner "their" would therefore refer to subcontractors and suppliers of both the parent company and the companies that it controls<sup>21</sup>. Can we assume that this determiner was removed from the final text of the Law so as to exclude subcontractors and suppliers of controlled companies ("controlled" being understood within the meaning of article L. 233- 16, II of the Commercial Code) from the ambit of the plan? If the interpretation of the transcripts of parliamentary debates is to be retained so far, the concept of an established commercial relationship as applied to the subcontractors and suppliers still requires clarification. In any case, questions arise with regard to the assessment of the concept of an established commercial relationship in the context of application to the subcontractors and suppliers.

### 3. The Assessment of the Established Commercial Relationship

The Law does not clearly specify the entities in relation to which the existence of an established commercial relationship should be determined. The choice of passive voice by the parliamentarians further complicates the reading of article L. 225-102-4, paragraph 3. Should the established commercial relationship be assessed with regard to the relationship between the Relevant Undertaking and its subcontractors or suppliers? Or does it also include the relationship between the companies controlled by the Relevant Undertaking and their subcontractors and suppliers? This is not merely a semantic distinction. If we consider that the assessment of established commercial relationship should only be limited to the Relevant Undertaking, and not with regard to the companies which it controls, an entire range of business relationships escapes the ambit of the plan.

Initially, according to the wording of the first drafts of the Law, parliamentarians may have sought to limit the ambit of the plan, in the hope that the established commercial relationship would only be

20 See AN, draft law n° 708, 23 March 2016, p. 2. - See also in this respect, AN, draft law n° 2578, 11 Feb. 2015, p. 14.

21 In this respect, See AN, rapp n° 3582, 16 March 2016, p. 29: "it is clear that "their" refers to both the subcontractors and suppliers of the controlled companies and to those of the parent company, whether they are in the French territory or abroad, since the obligation itself only covers *in fine* the parent company established in France".



assessed with regard to the Relevant Undertaking<sup>22</sup>. However, later transcripts of parliamentary debates suggest a potentially broader interpretation under which the risks of adverse impacts, specifically to human rights and freedoms which the plan aims to prevent, "are related to the activity of the relevant company [*société assujettie*], but also to the operations of the companies which it controls, as well as those of subcontractors and suppliers with whom they have an established commercial relationship"<sup>23</sup>. Subcontractors and suppliers with an established commercial relationship solely with the companies controlled by the Relevant Undertaking would then enter into the ambit of the plan even if the Relevant Undertaking does not have an established business relationship with these subcontractors and suppliers. The Constitutional Court seems, through the rewording, to have confirmed that subcontractors and suppliers fall within the ambit of the plan when they have an established commercial relationship with the parent company or the companies which it controls<sup>24</sup>. Wouldn't this inclusive interpretation of the "ambit of economic partners"<sup>25</sup> confirm the desire of the legislator, inspired by the philosophy of the United Nations Guiding Principles on Business and Human Rights (the "Guiding Principles"), to ensure compliance with human rights through the company's value chain, including through its relationships with a relatively broad set of business partners? With regards to the rank of suppliers included within the ambit of the plan, the established commercial relationship remains a condition for determining the entities falling within this ambit. The above comments outline potential ways to identify the entities in respect of which the established commercial relationship could be assessed. In this regard, greater clarification is needed on the concept of established commercial relationship.

This concept has been the subject of abundant case law, in particular under article L. 442-6-5, I of the Commercial Code regarding the appreciation of the sudden termination of established commercial relationships<sup>26</sup>. The preparatory works for the Law have referred to this case law jurisprudence to consider that the concept of an

established commercial relationship was sufficiently precise<sup>27</sup>. For example, citing, in particular, a decision by the commercial section of the French judicial court of last resort [*Chambre commerciale de la Cour de cassation*] dated 15 September 2009, the transcripts of parliamentary debates defined the established commercial relationship as "a partnership which each party can reasonably expect to continue in the future"<sup>28</sup>. However, and as rightly emphasised by Charley Hannoun, it is important to consider this earlier case law with caution, since it addresses a purpose different from that covered by the Law. The Law does not aim to protect subcontractors and suppliers from the sudden termination of established commercial relationships, but instead individuals and the environment<sup>29</sup>.

Given the remaining uncertainties with regard to the determination of the ambit *ratione personae* of the vigilance plan, the recommendations of the Guiding Principles could, beyond the letter of the Law, help shed light on the interpretation of the Law. This is all the more appropriate as the Guiding Principles provide, *inter alia*, "an ideal and internationally recognised foundation for the construction of a vigilance plan"<sup>30</sup>.

#### 4. Beyond the Letter of the Law

Firstly, we recall that according to the Guiding Principles, companies are bound to respect human rights "regardless of their size, sector, operational context, ownership and structure"<sup>31</sup>, using policies and processes adequate for their size and circumstances<sup>32</sup>. As the Guiding Principles emphasise, these companies may have adverse impacts on human rights either due to their own activities, or via their business relationships. In order to identify these impacts on human rights, prevent them, mitigate their effects and account

22 Particularly by the use of the singular: "resulting from the activities of the company and those of the companies which it controls within the meaning of II of article L. 233-16, directly or indirectly, as well as the activities of their subcontractors or suppliers with whom it has an established commercial relationship". See AN, TA n° 501, 30 March 2015 (our emphasis). - See also AN, draft law n° 708, *prec.*: "resulting from the activities of the company and the companies which it controls within the meaning of article L. 233-16, directly or indirectly, as well as the activities of their subcontractors or suppliers with whom it has an established commercial relationship" (our emphasis).

23 See AN, *rep.* n° 3582, p. 29 and *rapp.* n° 4242, 23 Nov. 2016, p. 11. Both of these reports show a broad interpretation according to which it is indeed with the parent company or its controlled companies that the subcontractors and suppliers must establish an established commercial relationship, despite the use of the singular in the body of the text of the draft law examined (our emphasis).

24 See *Const. court*, 23 March 2017, *prec.*, § 11 ("the ambit of the economic partners of the company subject to the obligation to establish a plan [...] includes all of the companies controlled directly or indirectly by this company as well as all of the subcontractors and suppliers with which it has an established commercial relationship, irrespective of the nature of the activities of these companies, their workforce [*effectifs*], their economic weight or the place of establishment of their activities").

25 See *Const. court*, 23 March 2017, *prec.*, § 11.

26 See in this respect, *Const. court*, 23 March 2017, *prec.*, § 22 (considers that the notion of established commercial relationship is "sufficiently precise").

27 See AN (*Assemblée Nationale – French National Assembly*), *full minutes of the session on Wednesday 23 March 2016*, *spec.* p. 2393 (considers the established commercial relationship as a "precise legal term": "there is no established direct or indirect business link at a legal level. There are established commercial relationships - this is what features in the Law. In the Commission we used a wording allowing for a clarification of scope of subcontracting, which was too extensive and which, in certain circumstances, could cover catastrophes out of the control of the instructing party. We retained what was important: solid contractual relationships, and chose a precise legal term").

28 See AN, *rep.* n° 2628, p. 36, and p. 71 (it is also surprising that parliamentarians quote this decision in particular when the conclusion they draw from it is set out considerably more explicitly in decisions more recent to the time of the legislative drafting).

29 See C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*: *Dalloz soc.* 2017, p. 806, *spec.* p. 810 (discusses the purpose of the Law aiming to protect "third parties and the environment" and also suggests substituting the duration criteria used within the case law relating to the sudden termination of established commercial relationships with the criteria related to importance of the activities subcontracted or the goods supplied to the instructing company. - See also A. Reygobellet, *Devoir de vigilance ou risque d'insomnies*, *prec.*, *spec.* § 20, p. 40 (emphasises that courts hearing a liability action for a breach of the Law may not transpose existing case law solutions, in particular where these had been formulated in different contexts, especially within the framework of anti-competitive practices).

30 See AN, *rep.* n° 3582, *prec.*, p. 11.

31 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011, principle 14.

32 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, *comm.* under principle 14 and principle 15.

for the way in which they remedy them, companies should carry out human rights due diligence<sup>33</sup>. This due diligence requires paying particular attention to the entities with which the company is involved<sup>34</sup>.

Unlike the Law which defines an ambit *ratione personae* which must be covered by vigilance depending on the types of entities (controlled companies, subcontractors and suppliers), the scope of due diligence required under the Guiding Principles depends on the degree of involvement of the companies in the adverse human rights impacts. Therefore, the due diligence "[s]hould cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships"<sup>35</sup>.

In the latter case, the idea of being "directly linked" means that the company is not causing or contributing to the adverse impacts but is involved inasmuch as the adverse impacts are caused by an entity with which it has a business relationship and that these impacts are linked to its own operations, products or services<sup>36</sup>. In other words, the notion of a direct link is assessed with regard to the activities, products and services only, and not with regard to the company itself. If the adverse human rights impacts can therefore be caused by an entity with which a given company has directly or indirectly a business relationship, these adverse impacts may nevertheless be directly linked to the activities, products or services of this company. That means that such a company only escapes all responsibility under the Guiding Principles for adverse impacts when these impacts have no connection whatsoever with the company.

In respect of leverage [understood in the sense of "influence" in French], certain commentators on the Law consider this is essential in determining the ambit of the plan, requiring the company to

exercise vigilance on entities over which it has leverage<sup>37</sup>. However, we recall that according to the Guiding Principles, leverage is not relevant when determining the ambit of the vigilance plan, but is important when a response is to be provided by the company in the event of an adverse impact<sup>38</sup>. It is defined as an advantage that gives a power of influence; the company has the ability to "effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact"<sup>39</sup>.

This approach contrasts with the Law which does not deal with the situation downstream in the value chain (in other words with the company's clients). This contrast may be explained through the Law's intent which is focused on prevention and is associated with quite stringent [*contraignantes*] measures (which also intended to be punitive<sup>40</sup>). The Guiding Principles aim to be a "tool" to prevent and remedy adverse impacts. The Guiding Principles also intend to give companies the means to identify, using due diligence, possible cases of adverse human rights impacts which they could cause, to which they could contribute or more simply to which they could be linked by their activities, products or services. Companies should then draw conclusions on the actions to be considered. They will be required to remedy these impacts only if they have caused them or have contributed to them or, if they are only linked to these impacts, use their leverage.

Thus, a company may be linked to an adverse impact through any of the business partners in its value chain, in particular when this impact is directly linked to its activities, products or services. This value chain is defined comprehensively as including the upstream and downstream of the company's activities<sup>41</sup>. This definition can therefore encompass a large number of entities that can potentially be included in the ambit of the due diligence as envisaged by the Guiding Principles. This ambit therefore goes beyond even first rank suppliers and subcontractors to include the entire value chain of the company. As for the Law, it only seems to cover situations where the company would cause or contribute to the risks and adverse impacts.

33 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, principles 15 b et principle 17 (the Guiding Principles provide for the implementation of a due diligence procedure [called "due diligence" and often translated in French by the term "*diligence raisonnable*"] with regard to human rights aiming to identify the impacts companies can have on human rights and how they can prevent these impacts, mitigate their effects and report on the way in which they remedy such impacts. The processes set in the Guiding Principles seem broader than those provided in the vigilance plan and focus on the "impacts" and not, as provided in the Law, on the risks and severe impacts. Nevertheless, both the vigilance plan and the processes as provided in the Guiding Principles have in common a function of identification and prevention).

34 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, 2012, p. 17, box 2 (for examples of adverse impacts on human rights).

35 UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, principle 17 a (our emphasis).

36 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, *prec.*, question 9 ("How can enterprises be involved in adverse human rights impacts?").

37 See M. Lafargue, *Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordres : l'entrée dans une nouvelle ère*: JCP S 2017, 1169, *spec.* § 9, p. 2 ("The duty of vigilance is thereby extended to the entire "*sphere d'influence*", in other words to the subsidiary companies and business partners over which the dominant company (parent or instructing) exercises leverage, in other words a power. The duty of vigilance thereby applies in an individual manner on companies "with leverage" [*influence* in French], parent or instructing companies. But, through the leverage [*influence*] they exert, these oblige all of the companies in the production chain to anticipate risks related to the activities and to ensure that they respect the required obligations").

38 See OHCHR, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, 2014, question 30.

39 See OHCHR, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, *prec.*, p. 43 (the definition of leverage, translated as "*influence*" in the French version of this document (for French version, page 50)).

40 In particular, the civil fine was held unconstitutional by the Constitutional Court.

41 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, *prec.*, question 27 ("What should the scope of human rights due diligence be?"). For a definition of the value chain, See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, *prec.*, p. 8 ("A business enterprise's value chain encompasses the activities that convert input into output by adding value. It includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services that contribute to the enterprise's own products or services, or (b) receive products or services from the enterprise").

The notions of value chains, business relationships and business partners could therefore interact with that of the established commercial relationship and once again advocate for a more inclusive, rather than exclusive, vision of entities falling under the ambit of the vigilance plan. This inclusive vision should also be assessed through the prism of risks and severe impacts, as emphasised by the Law and confirmed by the Guiding Principles.

## B. - *Ratione Materiae*: the Risks and Infringements that the Plan Aims to Identify and Prevent

The Law targets a particularly broad ambit *ratione materiae*. Indeed, the vigilance plan must include "due diligence measures meant to identify risks and prevent severe impacts on human rights and fundamental freedoms, health and safety of persons [in French, *personnes* – also understood in English as "individuals"] and on the environment" resulting from the activities of the entities falling within the ambit *ratione personae* of the plan (Comm. Code, art. L. 225-102- 4,1, para. 3). With its large ambit covering a number of risks and serious impacts, the Law therefore stands out from laws with a narrower ambit only targeting limited risks and impacts<sup>42</sup>. The notions of risks [*risques*] and severe impacts [*atteintes graves*] on human rights and fundamental freedoms, health and safety of persons and on the environment need to be further analysed. In particular, should such notions be understood with reference to specific pre-existing norms? How to determine risks and severe impacts?

### 1. The Concepts of Human Rights, Fundamental Freedoms, Health and Safety of Persons and the Environment

It is necessary to better understand the notions in respect of which the risks and severe impacts must be assessed. Firstly, with regard to concepts of human rights and fundamental freedoms<sup>43</sup>, these have been considered as having a "broad and undefined nature" by the Constitutional Court to the surprise of certain commentators<sup>44</sup>. These concepts nevertheless remain part of the Law. The initial parliamentary works emphasised that the "detail of the rights and liberties to be protected and the degree of severity [*gravité*] attached to physical and environmental damages to be prevented" were still to be specified<sup>45</sup>.

In later parliamentary works, however, it was considered, despite some opposition<sup>46</sup>, that it was not necessary for the *Conseil d'Etat* to clarify, by decree, the "norms of reference against which it would be possible to assess the concept of impact on human rights and fundamental freedoms, severe physical or environmental harms or health risks" due to the "sufficiently precise and comprehensive" nature of the international commitments undertaken by France<sup>47</sup>. The Government, in support of this position, emphasises that the "ambit does not target a corpus of pre-established norms to be imposed on the companies in question. It identifies the nature of the risks which will be included in the vigilance plan"<sup>48</sup>. The absence of a reference list presents several advantages: taking into account the evolving nature of these notions, covering the broad and diverse risks and severe impacts, including with regards to "individuals belonging to specific groups or populations that require particular attention"<sup>49</sup> and which are subject to protection through specific international legislation<sup>50</sup>.

Whilst the norms of reference are not precisely listed, they may nevertheless be determined based on the international commitments undertaken by France. With regard to human rights, for example, the parliamentary works list a number of these commitments<sup>51</sup>, which also appear to overlap with the "International Bill of Human Rights"<sup>52</sup> mentioned in the Guiding Principles. This charter is the basis, *a minima*, of the responsibility to respect human rights and therefore of the due diligence defined by the Guiding Principles and

42 See AN, rep. n° 2628, p. 15 (note that the Law was initially intended to target an even broader ambit and extend to corruption, but the idea was abandoned by the legislator faced with the imminent definitive adoption of the draft law also known as "loi Sapin 2". - L. n° 2016-1691, 9 Dec. 2016 on transparency, anti-corruption and the modernisation of economic life, called law Sapin 2: OJ 10 Dec. 2016, text n° 2).

43 The distinction between "human rights" and "fundamental freedoms", that may have been inspired by the European Convention on Human Rights and Fundamental Freedoms, seems to remain relatively academic. See Tchen, *Contentieux constitutionnel des droits fondamentaux*: JCl. Administratif, Fasc. 1440 (freedom seems to be presented as the object of a right [*l'objet du droit*], and a right would correspond to the implementation of this freedom, such a freedom being specified by positive law). - B. Mathieu and M. Verpeaux, *Contentieux constitutionnel des droits fondamentaux*: LGD, 2002, p. 17 (the two notions cannot be confused since certain "freedoms" are not regarded as "rights").

44 In this respect, See D. Roman, « Droits humains et libertés fondamentales », des notions « intelligibles » mais « imprécises » ? : à propos du devoir de vigilance des sociétés multinationales: Rev. dr. trav. 2017, spec. p. 394-395.

45 See AN, rep. no. 2628, p. 66.

46 See also AN, full minutes, second session of Tuesday 29 November 2016, p. 8048 (Mr Dominique Tian noting that: "[l]egally, this legislation opens serious breaches in legal stability, a stability which is so necessary to companies: uncertainty regarding the norms of reference on the basis of which the vigilance plan should be drafted [...]"). - AN, rep. n° 2826, prec., p. 39-40 (the joint-rapporteur Mr Philippe Houillon states that there is no information regarding which norms will be used in assessing infringements and emphasises the absence of a referential framework [*référentiel*]).

47 See AN, rep. n° 4242, prec., p. 11.

48 See Observations of the Government on the Law on the duty of vigilance of parent companies and instructing companies: OJ 28 March 2017, text n° 5.

49 See UN, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., comm. under principle 12.

50 See UN, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework UN, prec., comm. under principle 12. See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, prec., question 4 (for a list of United Nations instruments on the rights of individuals belonging to specific groups or populations).

51 See AN, rep. n° 2628, prec., p. 66 (lists the *Déclaration des droits de l'homme et du citoyen* of 1789, the Preamble to the Constitution of 1946 and the Charter for the Environment of 2004. There are also international commitments made by France: the International Declaration of Human Rights of 1948, the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, or the Charter of Fundamental Rights of the European Union of 2000).

52 See UN, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., Principles 12 (this charter is composed a minima of the Universal Declaration of Human Rights of 1948 and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966).



interpreted by the legislator in the preparatory works<sup>53</sup>. Besides, the legislator seems to adopt a broad view of these rights which bring together "first-generation rights and public liberties (property right, freedom of conscience, political rights, habeas corpus, etc.), second-generation rights (right to work, access to healthcare, education, right to strike, etc.), and third-generation rights (environment, bioethics, etc.)"<sup>54</sup>. By invoking three generations of human rights it is also possible to cover, at least in part, the risks and severe impacts on health and safety of persons, including workers and also in respect of the environment<sup>55</sup>. Additional and more specific international commitments related to the environment or health and safety of persons may be added to these human rights commitments. Furthermore, it is useful to note that it is indeed the health and safety of all individuals which are targeted and not exclusively of workers, which should enable, depending on the context, the integration into the ambit *ratione materiae* of the vigilance plan of a variety of individuals who may be affected by the activity of the company, in particular local communities.

In the presence of a vigilance plan whose ambit *ratione personae* brings together entities situated in several countries, the notions of human rights, fundamental freedoms, health and safety of persons and the environment may be subject to different legal protections depending on the jurisdictions in which these entities operate. Whilst it is up to the courts to "assess the circumstances to determine whether the company has correctly satisfied the obligation to reach a certain result [*obligation de moyens*] imposed upon it"<sup>56</sup>, the Guiding Principles may once again provide clarification to both the courts and to the Relevant Undertakings subject to the Vigilance Obligations. The Guiding Principles state that if companies are intended to respect both the applicable laws where they operate and "internationally recognised human rights", in the event of a contradiction between local laws and international standards, they are required to "[s]eek ways to honour the principles of internationally recognized human rights"<sup>57</sup>.

The reasoning of the Guiding Principles as applied to the Law acts as a reminder of two points. First, each entity entering within the ambit of the plan must respect the law of the jurisdictions in which it operates, including when this law offers protection in respect of human rights, fundamental freedoms, health and safety of persons and the environment. Second, the Relevant Undertaking subject to the Vigilance Obligations when establishing its vigilance plan will assess the risks and severe impacts with regard to the international commitments undertaken by France in respect of human rights,

fundamental freedoms, health and safety of persons and the environment. In any event, it should also ensure that it respects *a minima* international standards if such standards are more protective than the national standards of the jurisdictions in which the entities entering into the ambit of its vigilance plan operate.

Having discussed norms of reference, the methods for identifying risks and severe impacts [*atteintes graves*] on human rights and fundamental freedoms, health and safety of persons and on the environment must now be considered.

## 2. The Severity of the Impacts

The Law does not specify how and on what scale the notion of severity should be assessed<sup>58</sup>. The Guiding Principles may however offer a possible interpretation<sup>59</sup>. According to these, a severe impact is measured in accordance with its scale, its scope and its irremediable character<sup>60</sup>. "This means that its gravity and the number of individuals that are or will be affected [...] will both be relevant considerations", whilst irremediability means "any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact"<sup>61</sup>. This test of severity may also be applied to impacts on economic, social and cultural rights<sup>62</sup>, health and safety of persons and on the environment. For instance, the above-mentioned analysis of the Guiding Principles takes as an illustration the delayed effects of environmental harm<sup>63</sup>.

The assessment of the notion of severity is also closely related to that of reasonable vigilance [*vigilance raisonnable*] which must specifically enable the prevention or remedying of severe impacts, specifically on human rights. This notion of "*vigilance raisonnable*" is relatively new to the French legislative landscape and is not

53 See AN, rep. n° 2628, prec., p. 3. - See also AN, draft law n° 2578, prec., p. 4 (explanatory memorandum of the draft law [*exposé des motifs*]): "In accordance with the United Nations Guiding Principles on Business and Human Rights unanimously adopted by the United Nations Human Rights Council in June 2011, and in accordance with the OECD Guidelines for Multinational Enterprises, the purpose of this draft law is to introduce a vigilance obligation for parent companies and instructing companies in respect of their subsidiaries, subcontractors and suppliers".

54 See AN, rep. n° 2628, p. 66.

55 This coverage is nevertheless anthropocentric and the protection of the environment cannot be thus limited.

56 See AN, rep. n° 2628, prec., p. 66.

57 See UN, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., principle 23.

58 On this point, the transcripts of parliamentary debates do not offer further clarification on the assessment of severity in that they simply emphasise the necessity of defining this notion without actually doing so. See AN rapp. n° 2628, prec., p. 66 (This article should specify details of the rights and freedoms to be protected as well as the severity attached to the physical and environmental damage to be prevented).

59 See M.-C. Caillet, *Du devoir de vigilance aux plans de vigilance ; quelle mise en œuvre?*, Dalloz soc. 2017, spec. p. 825 (referring to the Guiding Principles in order to assess severity).

60 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, prec., p. 8. - See also UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, prec., comm. under principles 14 and 24 (the French translation of such criteria in the French version of the UNGPs is the following: scale [*ampleur*], scope [*portée*], irremediable character [*irremediable*]).

61 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, prec., p. 8. - See also Dr. J. Zerk, *Corporate liability for gross human rights abuses. Towards a fairer and more effective System of domestic law remedies. A report prepared for the Office of the UN High Commissioner for Human Rights*, p. 25-28 (for a definition of gross human rights abuses that is also related to the severity criterion): <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>

62 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, prec., p. 6 ("economic, social and cultural rights, can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups").

63 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, prec., p. 8.



clearly defined in the transcripts of parliamentary debates. This notion seems related to that of due diligence under the Guiding Principles<sup>64</sup>. The company's assessment ability is key: the vigilance measures must allow identification and prevention of risks and severe impacts in respect of which companies have the means and ability to act, which they must therefore act upon in priority<sup>65</sup>. Thus, companies cannot be asked to prevent risks of impacts over which they have no means of action such as when "these risks are external to [their] business relationships"<sup>66</sup>. As for the assessment of "potential risks", it interrelates with how impacts are assessed. Indeed, the assessment of risk depends both on its severity and its probability<sup>67</sup>.

The operational sector and context in which a company operates are therefore essential to appreciate the severity of the impacts<sup>68</sup>. These two factors allow the "most salient human rights" to be identified, that is, the rights which are the most at stake depending on the sector and operating context of a company. In turn, identifying the most salient human rights can allow for the identification of the risks and severe impacts associated with these rights. Thus, the company must concentrate its initial efforts on such rights<sup>69</sup>. These various notions having been discussed, the company can then turn,

in practice, to the identification of the risks and prevention of the severe impacts on human rights and fundamental freedoms, health and safety of persons and on the environment.

## 2. The Vigilance Plan in Practice: a Global Process to Manage Risks to Individuals and the Environment<sup>70</sup>

As we saw previously, to adequately understand the ambit of the plan companies should refer to international standards, and in particular the Guiding Principles<sup>71</sup>. They serve as an inspiration to the Law and companies already refer to such standards in their approach to corporate responsibility.

The use of these standards as a benchmark will be essential in formalising the vigilance plan and determining the practical measures it includes. Indeed, given the extent and novelty of the vigilance approach, this benchmark will provide methodological guidance and help companies on several levels. First, to understand what a vigilance plan is and its specific features in order to establish and implement this plan (A) second, to understand how to publicly report on the plan (B). The following methodological analysis and the examples will more specifically cover the aspects of the Law related to the protection of individuals [*personnes*] (human rights and health and safety of persons)<sup>72</sup>.

### A. - Establishing and Implementing the Vigilance Plan

As a preliminary comment concerning the governance of the vigilance plan, it is difficult to determine *a priori* the most suitable department or person inside a company to steer the plan and ensure its overall coordination. This determination will depend on 1) the company's culture and the individuals already in charge of the areas touched upon in the Law (human rights, health and safety, environment, etc.) or 2) the existing processes already in place within the company and which may support the vigilance plan. In practice, companies have created inter-department working groups which include *a minima* the departments whose missions relate to the fields covered by the Law and the purchasing department in charge of relationships with suppliers. Cooperation is needed to reference existing actions within the company, carry out a

64 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, principle 17. See AN, *rep. n° 2628, prec.*, p. 31 (offering a rewording of due diligence under the Guiding Principles: this is "a series of appropriate measures with the aim of achieving an objective defined in a national or international standard, to respect a minimum level of prudence in taking into account an external standard"). - See also note 33 (on the fact the two notions are not perfectly identical).

65 See AN, *full minutes of the second session of 29 November 2016, prec.*, p. 8058 ("The word: "reasonable" [*raisonnable*] already allows for a limitation of the scope of the measures taken as part of the vigilance plan to relationships in which the companies targeted by the Law have the means and power to take actions. This word also preserves companies from being imposed to take vigilance measures for activities which would not form part of their business relationships"). - See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, *comm. under principle 17* ("Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence").

66 See AN, *full minutes of the second session of 29 November 2016, prec.*, p. 8058.

67 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, *prec.*, p. 8-9. See C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017, prec.*, *spec. p. 813* (on the notion of risk and notes that the Law excludes what can be viewed as a suspected risk [*risque suspecté*] which relates to precautionary measures, and does not cover proven risk [*risque prouvé*] which refers to prevention measures). - See also M.-C. Cailliet, *Du devoir de vigilance aux plans de vigilance ; quelle mise en oeuvre ?*, *prec.*, *spec. p. 825* (on the assessment of risk infringements and severe impacts).

68 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, *prec.*, *question 13 and question 15* (on the definition of due diligence).

69 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, *prec. p. 8* (but recalling, nevertheless, as the Guiding Principles emphasise, "that an enterprise should not focus exclusively on the most salient human rights issues and ignore others that might arise.").

70 This part aims to give methodological guidance for the establishment of the plan and its publication. In the absence of regulatory clarifications on the practical details for the implementation of the Vigilance Obligations, guidance can be drawn from international CSR standards and their interpretation by experts and company practices.

71 The OECD Guidelines for multinational enterprises are also a key reference for understanding the concept of vigilance. Quoted in the transcripts of parliamentary debates and government observations, companies also refer to these guidelines as part of their corporate responsibility approach. The OECD has developed sectoral application guides based on the due diligence for companies, as defined by the OECD Guidelines and a general guide on due diligence is currently under preparation, See <https://mneguidelines.oecd.org/>.

72 Naturally, these elements may be extended with regard to the environment, given the underlying purpose and reasoning of the vigilance approach is identical in all sectors.

gap analysis and formalise the vigilance plan. Each department, depending on their attributions, will then have the responsibility to implement relevant actions addressing the risks identified in the plan and their subsequent monitoring.

Whilst the Law is silent on the matter, it is likely that the validation, approval and thus the overall monitoring of the vigilance plan at the highest level of the company will send a strong signal in several regards. First, it will be a signal for the individuals responsible for implementing the plan and related processes (internal staff and external business relations) of the importance the company gives to such processes. Second, it will reinforce the credibility of these processes *vis à vis* stakeholders or even the court, if a case is brought before one<sup>73</sup>.

## 1. Understanding the Specific Features of the Vigilance Plan: an Approach Centred on Individuals

The overriding aim of the vigilance plan is to prevent severe impacts on individuals and the environment which could be caused by the activities of the company (in the broadest sense, therefore including the activities of some of its subsidiaries and business relationships<sup>74</sup>). To fulfil this aim, the Law expressly provides for five measures (set out in detail below) that must be included in the vigilance plan and which specifically aim to identify, analyse, assess and manage the risks of such adverse impacts on individuals and the environment.

Although the required measures<sup>75</sup> may bring to mind traditional risk management processes found in companies, there is, however, a fundamental difference: the purpose of the vigilance approach is to protect individuals and the environment whereas the purpose of classic risk management processes is to protect the company. The vigilance approach does not consist of an assessment of legal, financial, operational, etc. risks for the company but rather the risks (in other words the likelihood) that the activities of the company will have adverse impacts on human rights. Defined as such, the notion of "risk" mentioned by the Law is similar to that of "potential

adverse impacts on human rights"<sup>76</sup>, defined by international standards and frameworks<sup>77</sup>.

Having processes centred on the potential consequences posed to individuals as a result of a company's activities requires an understanding and knowledge of human rights issues. These issues are closely linked to the specific circumstances of the business operating context (country of activity, status of the legislation or societal practices, populations potentially affected, conflict zones, etc.) and the commercial activity (type of project, business relationships, etc.)<sup>78</sup>. Issues related to human rights are not fixed<sup>79</sup>. They depend on circumstances external to the company's environment, as well as on its commercial strategies (to a new sector of activity, establishment in new countries, acquisition of a company, etc.).

It is therefore fundamental that the vigilance plan be:

- **A dynamic process** which allows for the regular assessment of all of the company's activities with regard to potential impacts on human rights. This requires processes for the identification of risks for every new commercial activity, as well as regular risk analyses of existing activities.
- **A process based on targeted risk analyses:** as mentioned, since the challenges are related to specific circumstances, risks must be assessed *in concreto* wherever possible: for example at the level of major operating sites, by business units or by sectors, product category or services used or sold, by type of business relationship, etc.
- **A process based on the consideration of expectations and perspectives of the individuals potentially impacted by the activities of the company**, and whose rights must specifically be protected<sup>80</sup>.

During the drafting of the vigilance plan, companies must therefore pay special attention not to rely solely on known reflexes related to their professional risk management practices. They also need to take into account the above-mentioned principles of action. This does not necessarily involve the creation of *ad hoc* processes

73 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, principle 16 (the approval of commitments and the monitoring of the approach by the highest level of the company are criteria recognised by the international standards as being essential to effective vigilance processes).

74 See *supra* part A.

75 See AN, *rep. n° 4242, spec. p. 14* (details of these measures appeared as part of the last version of the Law presented to the National Assembly and aim to determine the content of the vigilance plan: "[The] presentation [of the measures] is directly inspired by article 17 of the draft law on transparency, la lutte contre la corruption et la modernisation de la vie économique known as "Sapin 2", which introduces a vigilance obligation in relation to corruption and influence peddling. It allows for the structure of the plan to be determined with precision so that the companies concerned can draft them without difficulty"). - See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, principle 17 (these measures are also very similar to the steps recommended by the Guiding Principles to implement the human rights due diligence process: "this process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed").

76 The term "adverse impact" is used both by the Guiding Principles of the United Nations and the Guidelines of the OECD, See for example UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, principle 24.

77 In this respect, see M-C. Cailliet, *Du devoir de vigilance aux plans de vigilance : quelle mise en œuvre ?*, *prec.*

78 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, *prec.*, question 15 (on the question "[h]ow is an enterprise's sector and operational context relevant to its responsibility to respect human rights?").

79 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, principle 17 ("human rights due diligence:[...] c) [s]hould be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.").

80 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, principle 18 ("[The risk assessment process] should: [...] b) [i]nvolve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation."). - See also *this issue, dossier 94*.

within companies<sup>81</sup>. In practice, companies may rely upon existing risk analysis, information referral or monitoring processes<sup>82</sup>. The bottom line is that they constantly need to remember that the purpose of the vigilance plan is the protection of individuals and the environment. Appropriately assisting staff with the specific nature of the Vigilance Obligations is also key.

## 2. The Content of the Vigilance Plan as Determined by the Risk Mapping

As provided by the Law, the vigilance plan shall contain the following measures (Comm. Code., art. L. 225-102-4):

- 1 Risk mapping [*cartographie des risques*] intended for th[e] identification, analysis and prioritisation [of the above-mentioned risks];
- 2 Processes for the regular assessment of the situation of subsidiaries, subcontractors, or suppliers with whom there is an established commercial relationship, as identified by the risk mapping;
- 3 Tailored actions to mitigate risks or prevent severe impacts;
- 4 An alert mechanism [*mécanisme d'alerte et de recueil des signalements*] on the existence or the materialisation of risks, established in cooperation with trade unions considered as representative [*organisations syndicales représentatives*] within the aforementioned company; and
- 5 A system monitoring implementation measures and evaluating their effectiveness [*efficacité*].

### a) Identifying All Potential Impacts of the Activities

The "risk mapping" of activities is the first step in the drafting of the vigilance plan. This step is the most fundamental one in the sense that its results will determine the subsequent steps and thus the effectiveness of the plan as a whole<sup>83</sup>. The Law is clear: the processes for assessing subsidiaries and business relationships will be carried out "with regard to risk mapping". Actions to mitigate risks and prevent severe impacts must, by definition, be "tailored" to the results of the risk mapping. Then, the vigilance plan must provide an "alert mechanism [*mécanisme d'alerte et de recueil des signalements*] on the existence or the materialisation of risks" (Comm. Code., art. L. 225-102-4).

As defined above, it is not a question of mapping the "risks", in the traditional sense of the term, within companies, but the potential impact of the company's activities on individuals or the

environment. In other words, the activities of the company which may infringe the rights of any individuals (staff, local communities, clients, users, business relationship workers, etc.) must be determined, as well as the manner in which they do so.

In practice, companies must initially identify the risk factors "intrinsic" to their activities based on external or internal company data. Each company activity must be considered in terms of its potential risks for individuals, if the products/services used involve risks related to human rights, or if the business partners related to the activity are likely to infringe human rights when acting within the joint relationship.

### The human rights approach of BNP Paribas

As early as 2012, BNP Paribas has published its Statement on Human Rights<sup>84</sup> in which the Group committed to respect internationally-recognised human rights and to support the United Nations Guiding Principles on Business and Human Rights. Regarding its activities, the Group has identified four areas in which it should exercise human rights vigilance: among its employees, among its suppliers, regarding its individual clients and in the activities financed by the Group. This last issue, specific to the banking sector, particularly requires that BNP Paribas verifies that the activities of major international companies which it finances or in which it invests, do not infringe human rights.

This means ensuring that these companies measure their impacts on human rights and exercise, themselves, due diligence in their activities. In order to do so, BNP Paribas has gradually implemented a risk management mechanism which aims to cover all of its financing activities. This mechanism is based in particular on the integration of human rights criteria into its client assessment tools, its credit policies which frame financing, and in its sectoral policies which frame activities in environmentally and socially sensitive sectors.

### b) Prioritising Issues Identified with Reference to the Severity of the Potential Impact

Once the potential impacts of activities have been identified, they must be assessed and prioritised. Once again, the company must pay specific attention using criteria that are relevant to the ultimate aim of the vigilance approach, namely the protection of individuals and the environment. To this end, severity, as defined above<sup>85</sup>, must be the predominant criteria to prioritise risks<sup>86</sup>.

It is not (once again) a question of managing risk within the company. Even a risk of adverse impact which is already managed by internal actions can remain a "potential adverse impact" and may

81 See OECD, *Guidelines for multinational enterprises: 2011*, § 45, p. 34 ("Human rights due diligence can be included within broader enterprise risk management systems provided that it goes beyond simply identifying and managing material risks to the enterprise itself to include the risks to rights-holders.").

82 It will probably be simpler to adapt existing, internal processes which are known, understood and used by managers rather than creating new ones, particularly since operational managers are often already, and particularly, asked to report on various activities for the purpose of complying with reporting obligations.

83 See Y. Queinnec, *Le plan de vigilance idéal n'existe pas ! Pour être raisonnable et effectif il doit être co-construit*: Rev. Lamy dr. aff. March 2017, n° 124, p. 22 ("risk identification, a quasi-obligation to guarantee the actual attainment of that result [*quasi-obligation de résultat*]").

84 See BNP Paribas, *Statement on Human Rights*: [https://group.bnpparibas/uploads/file/uk\\_declaration\\_bnp\\_sur\\_droit\\_de\\_l\\_homme.pdf](https://group.bnpparibas/uploads/file/uk_declaration_bnp_sur_droit_de_l_homme.pdf)

85 See *supra* part I.B.2°.

86 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, prec., principle 24 ("Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.").



appear in the risk mapping under the Law. Indeed, as previously explained, the circumstances in which such an impact occurs may change and the risk management actions in place may no longer be sufficient to address such a risk. This risk must therefore appear in the risk mapping and be included in the vigilance plan measures.

## The Schneider Electric risk mapping method throughout its value chain

Following the publication of its Human Rights Policy<sup>87</sup> in June 2017, Schneider Electric set up a "Duty of Vigilance Committee" managed by the CSR department to determine and implement the company's vigilance plan. Made up of representatives of the CSR, purchasing, environment, and health and safety teams, this Committee is specifically in charge of risk mapping. The approach used enables the company to manage its risks throughout its value chain: upstream with its suppliers, internally within its subsidiaries and downstream with its clients and subcontractors.

- **Supplier risk mapping:** Schneider Electric has more than 40,000 tier 1 suppliers. Of these, approximately 1,100 are considered to be strategic suppliers representing 62% of purchasing revenue and benefiting from a specific program based on ISO 26000. This mapping addresses the other suppliers who are subject to a first so-called "inherent risk analysis" based on their geographical location (country of the production entity and not of the head office) and the type of product or solution purchased by Schneider Electric. The risks considered cover human rights, the environment, health and safety conditions and corruption. From this phase, prevention measures will be implemented by buyers for the suppliers located in exposed countries and selling products or services which are at risk. The latter will be subject to a second risk analysis by self-assessment questionnaire. Lastly, those for whom the results are not satisfactory will be subject to a third risk assessment via on-site audits.

- **Subsidiaries mapping:** the health and safety, environmental and human rights internal processes are strengthened for all of the subsidiaries. However, specific work is carried out for subsidiaries located in countries at risk of child and forced labour. For example, subsidiaries using foreign migrant workers must strengthen their prevention and control procedures, particularly if a third party is in charge of recruiting these workers.

- **Clients and subcontractors mapping:** Schneider Electric is currently strengthening its due diligence procedures on its clients and its subcontractors in its project activities. The objective of these measures is that from the beginning of the tender phase, when a project is integrated in management software, if this is located in an exposed country and in a risky activity, the Committee will have to be asked to carry out due diligence on the client and strengthen the control process with regard to subcontractors involved in the project.

This risk mapping exercise is a continuous improvement process, which will evolve regularly on an ad hoc basis and at least once a year.

## c) Managing the Identified Risks

Once the risks have been identified, the company must analyse whether the responses which already exist within the company are satisfactory to both manage them and decide, if necessary, what actions need to be implemented.

These actions will be highly dependent on the risks to be managed and a reasonable vigilance approach requires that the measures are graduated and proportionate to the nature of the risk identified and to the assessment of its severity. As indicated above, it also requires a dynamic risk management process: the solutions provided for the risks identified must be questioned and reviewed regularly in order to be effective. This is also the point "of the procedures for the regular assessment of the situation of subsidiaries, subcontractors or suppliers [...] with regard to risk mapping", explicitly required by the Law.

Likewise, as explained above<sup>88</sup>, the notions of causing- contributing-linkage as well as of leverage may determine the actions required to manage identified risks. In order to be effective, these actions must also be suited to the specific operational context.

## Vinci: measures tailored to operational challenges

The Vinci Group favours a pragmatic approach to ensuring the effective application of its commitments at the operational level by seeking to develop solutions tailored to realities on the ground, such as:

- The development of a Human Rights Guide<sup>89</sup> which identifies the main human rights risks related to the Group activities and gives very precise guidelines on how to best manage them at the operational level. Developed in collaboration with the business lines and covering the entire project life-cycle, this guide therefore translates the issues of labour migration and recruitment practices, working conditions, accommodation and human rights practices in the value chain and local communities into concrete actions.

- The conclusion of a specific framework agreement on workers' rights in Qatar, between the Vinci Group, the Qatari company QDVC and the international trade union BWI. This agreement, directly based on international human rights standards and international frameworks available for companies, formalises QDVC's commitments to respect the human rights of workers and its obligations of due diligence on construction sites. It provides for a monitoring, reporting, inspection and audit system to ensure its effective application. Directly adapted to the operational context of the country and the activity in question, this first agreement enables Vinci Group to provide an effective response to an identified risk and is fully integrated into its vigilance approach. The Group wishes to develop other similar measures.

Potential measures may be very diverse: a new policy, the inclusion

<sup>87</sup> See Schneider Electric, Human Rights Policy, June 2017: [https://www.schneider-electric.com/en/download/document/Human\\_Rights\\_Policy/](https://www.schneider-electric.com/en/download/document/Human_Rights_Policy/)

<sup>88</sup> See *supra* I.A.4°.

<sup>89</sup> See Vinci, Human Rights Guide, April 2017: [https://www.vinci.com/vinci/developpement\\_durable\\_2011.nsf/index/0805/\\$file/VINCI-Guide\\_on\\_Human\\_rights.pdf](https://www.vinci.com/vinci/developpement_durable_2011.nsf/index/0805/$file/VINCI-Guide_on_Human_rights.pdf)



of human rights criteria in processes which already exist, audits, the development of self-assessment tools, actions to raise awareness or training plans for staff working in the activities which are most at risk, etc. They may apply to a specific right, a particular activity or to a process already applicable throughout the business.

## Forced labour risk management by STMicroelectronics

STMicroelectronics made an early commitment to respect human rights through the adoption of standards going far beyond legal requirements, particularly in the area of risks related to forced labour. We have implemented strict procedures to monitor the practices of all recruitment and employment agencies we use worldwide and we have increased our vigilance for those recruiting migrant workers. We have prohibited the retention of documents that could be used as means of coercion and we ensure that contracts are written in the language of the workers. We also cover all recruitment fees set by agencies in order to reduce the risks of debt on workers. In some cases, our task can be complicated because the recruitment process involves sometimes several levels of agencies and intermediaries and in several countries. For example, in Malaysia where we regularly employ Indonesian, Nepalese and Sri Lankan workers, we audit agencies directly in countries where we recruit migrant workers in order to reduce risks. A key parameter for our success is to rely on our local managers who have the expertise to exercise the required level of awareness and control over our direct supply chain.

When determining the actions to be implemented, the company may find it useful to refer to the expectations of international frameworks and to the best practices set in sectoral initiatives or the best practices of its peers<sup>90</sup>.

## The French initiative "Initiative Clause Sociale" (ICS)<sup>91</sup>

The ICS is an international sectoral initiative whose purpose is to pool social and environmental audit tools (from 2018 onwards) in order to enable its members to deploy their risk prevention plan in supply chains. The ICS includes 37 major French brands in different sectors of activity: textiles, food, home, DIY and electronics. ICS's member companies verify social production conditions on the ground through the implementation of social audits carried out by independent firms approved by the ICS and mandated by its brands and retailers' members. The audit methodology and tools are common: a code of conduct, profile of the production site, audit questionnaire, implementation guide, corrective action plans, alert notification, database. The ICS also offers its members an exchange place to share their experiences and work transparently based on audits results when a production site is identified as common to several members, so that follow-up of corrective action plans can be carried out jointly. Beyond

social and environmental audits, ICS works to strengthen its capacity to offer tools and services adapted to the needs of its members, enabling them to rely on joint methodologies to map risks, address environmental issues and assess audit firms.

## d) Setting Up an Alert Mechanism

As part of the vigilance plan, the Law provides for the implementation of an "alert mechanism [*mécanisme d'alerte et de recueil des signalements*] on the existence or the materialisation of risks, established in cooperation with trade unions considered as representative [*organisations syndicales représentatives*] within the aforementioned company;" (Comm. Code., art. L. 225-102-4, 1, para. 4, 4°).

With reference to the final objective of the Law which is the protection of individuals and the environment, and to the Guiding Principles<sup>92</sup>, it is very likely that this mechanism would firstly be intended for individuals potentially affected by the activities of the company and who wish to alert and question the company on its activities. It should therefore be open to any individuals, internal and external. This alert mechanism must enable the company to receive questions or complaints as early as possible and therefore take the necessary actions to avoid the occurrence of risk or avoid the situation becoming more serious.

In order to be used and therefore to be effective, the mechanism must be communicated proactively and using a means of communication tailored to the individuals likely to use it. Communication on the existence of the mechanism will depend on the previously identified risks. Such risks will determine the individuals potentially affected and thus the main recipients of the alert mechanism. This mechanism must also provide guarantees of predictability, equity and transparency to protect users and encourage them to use it<sup>93</sup>.

## e) Monitoring the Measures Implemented and Assessing their Effectiveness

The last measure to be included in the vigilance plan is "a system monitoring the implementation measures and evaluating their effectiveness [*efficacité*]". Placed at the end of the list of the measures to be included in the vigilance plan this monitoring mechanism must cover all of the measures previously described: from the risk mapping to the alert mechanism. Monitoring the measures and assessing their effectiveness is part of the above mentioned dynamic process on which the vigilance plan is based.

In practice, there will probably be a number of monitoring

<sup>90</sup> The website [www.business-humanrights.org](http://www.business-humanrights.org) is a large online library, bringing together all useful information on the subject of business and human rights for companies: news, practical tools, reports from international organisations, reports by NGOs, good practice of companies, etc.

<sup>91</sup> See <http://ics-asso.org/index.php?id=2&L=2>

<sup>92</sup> See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, prec., principle 29.

<sup>93</sup> See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, prec., principle 31 (the Guiding Principles list, for example, criteria to respect so that grievance mechanisms are effective at an operational level (legitimate, accessible, predictable, equitable, transparent, rights-compatible and based on engagement and dialogue) that companies may transpose into the alert mechanism). - EDH, *Guide to assess human rights risks*, 2013, p. 29 and following: <https://www.e-dh.org/en/evaluate.php> (for a precise description of these criteria).

mechanisms that the company will have to implement:

- Monitoring and assessment of the effectiveness of risk mapping, in other words:
  - Monitoring of risk mapping results: are the risks identified and prioritised still relevant? Have they changed since the initial risk mapping?
  - Monitoring of the process used to identify risks: analysis methodology, quality of information referred, etc.
- Monitoring and assessment of effectiveness of all actions taken to manage the risks identified.
- Monitoring and assessment of the effectiveness of the alert mechanism.

Numerous companies already have systems in place monitoring and evaluating the performance of their policies or processes (internal control system, compliant systems). These mechanisms may be consolidated with several measures taken from the vigilance plan.

## ENGIE: a human rights policy integrating the ethical principles and compliance procedures of the Group

From 2014, the ENGIE Group adopted a policy specifically dedicated to human rights. Based on a vigilance approach, it requires all entities in the Group to ensure that their activities respect human rights as defined by international standards. In particular, these entities implement specific processes at the operational level for the identification and management of risk.

Monitoring of this Policy has been integrated in the Group ethical compliance processes to ensure its proper application.

- Quantitative and qualitative indicators on the implementation of the required operational processes are included in the Group ethical compliance procedure. Therefore, each Business Unit reports annually on the progress made in implementing the policy (with a compliance letter from the director of the entity certifying its responsibility and commitment to its implementation).
- Control points related to operational risk analyses have been integrated in the ethical section of the Group internal control system.

These monitoring processes enable ENGIE SA to ensure that the human rights vigilance plan is applied effectively and to determine, if necessary, additional control actions such as internal or external audits.

Once the plan has been established, the company must then publish it and report on its contents in a suitable manner, under the Vigilance Obligations

## B. - Publicly Report on the Plan: an Exercise Directed to the Stakeholders of the Company

The Law states that "the vigilance plan and the report of its effective implementation are published and included in the report

mentioned at article L. 225-102" (i.e. the company management report, *See Comm. Code.*, art. L. 225-102-4, I, para. 5)<sup>94</sup>. However there is a distinction between 1) the first publication of the vigilance plan, which is to be included in the report covering the financial year underway at the time of publication of the Law, and 2) the following publication (corresponding to the following financial year) which will include the vigilance plan and the report on its effective implementation<sup>95</sup>.

Whilst large French companies are familiar with extra financial reporting<sup>96</sup>, here, it seems that the publication of the plan will, in part, enable stakeholders to verify its existence and its quality under the Law (1), which will require companies to adapt their reporting (2).

## 1. Reporting as a Guarantee of the Plan's Credibility

Companies are subject to increasing demands in respect of the disclosure of extra-financial information. Such a disclosure can be the result of European regulatory obligations, such as the European directive on the disclosure of non-financial information of 2014<sup>97</sup> or obligations imposed by foreign laws such as the Modern Slavery Act<sup>98</sup>. We note that all these reporting obligations are now centred on the notion of vigilance and therefore require the company to show how their risks (in the sense of adverse impacts) are identified and which processes are

<sup>94</sup> See also this issue, dossier 92 (for more information on the management report).

<sup>95</sup> See Article 4 of the Law ("articles L. 225-102-4 and L. 225-102-5 of the Commercial Code apply from the report mentioned in article L. 225-102 of the same Code for the first financial year opened after the publication of this law. By derogation to the first paragraph of this article, for the financial year during which this law was published, I of article L. 225-102-4 of the aforementioned Code applies, with the exception of the report provided in its penultimate paragraph").

<sup>96</sup> Since the law called "NRE" (L. n° 2001-420, 15 May 2001 on new economic regulations: *OJ 16 May 2001*, p. 7776), French listed companies are required to publish information on the social and environmental consequences of their activities in their annual management report. This obligation is strengthened by the law called "Grenelle 2" (L. n° 2010-788, 12 July 2010 on a national environmental commitment: *OJ 13 July 2010*, p. 12905), then with the transposition of directive 2014/95/EU of the European Parliament and Council of 22 October 2014 (*EUOJ n°L330, 15 Nov 2014*, p. 1). - See also the provisions of article L. 225-102-1 of the Commercial Code.

<sup>97</sup> European directive 2014/95/EU requires companies to disclose non-financial information on the impacts of their activities on the environment, society, human rights and related to corruption. It has recently been transposed in France by order n° 2017-1180 of 19 July 2017 (*OJ 21 July 2017*, text n° 13), supplemented by decree n° 2017-1265 of 9 August 2017 (*OJ 11 August 2017*, text n° 25). Companies are now required to produce an annual "extra-financial performance statement", pursuant to the provisions of article L. 225-102-1 of the Commercial Code.

<sup>98</sup> *Modern Slavery Act 2015 (UK)*, c. 30, § 54 (designed to tackle modern slavery and human trafficking. It requires that certain companies produce a statement on the measures they take to ensure that there is no slavery or human trafficking in their direct activities and in all of their supplier chains. This law applies to all companies with a turnover in excess of £36 million, exercising a business activity in the United Kingdom, and can therefore include French and foreign companies).

in place to manage them (See e.g. Comm. Code, art. R. 225-105<sup>99</sup>).

Extra-financial reporting allows for increased transparency with the aim of informing investors, consumers and more broadly all stakeholders on company practices, and enabling them to make informed decisions on whether or not to place their "trust" in such companies<sup>100</sup>. This reporting exercise and more generally the information publicly disclosed by companies are today very carefully scrutinised by all of their stakeholders (for example they serve as a criterion for extra-financial rating agencies). The companies are judged and even ranked<sup>101</sup> based on the way in which they publicly report.

Within the framework of the Law, the stakeholders of the company, such as investors, shareholders, extra financial rating agencies will also rely on this public reporting to assess responsible practices of the different companies. Additionally, this public reporting will serve as the starting point for the potential penalty payment procedure provided in the Law for a lack of, or non-effective, plan. We recall that such a procedure is available even in the absence of damage to an individual or to the environment. Indeed, the "new judges— the media, social networks and civil society – [may] request periodic penalty payments, reports on failures to comply and share such reports."<sup>102</sup> They will rely on the items published in the vigilance plan to do so.

Public reporting then becomes a method of monitoring the proper application of the Law and companies must be particularly attentive to the way in which they publish their vigilance plan. International frameworks, which provide a basis for the vigilance approach, will then be useful for companies to establish quality reporting

## 2. Elements for Adequate Reporting

Although the Law provides that the vigilance plan (and later the report on its effective implementation) should be included in the management report, there is no further information on the

publication of the plan, in particular as to its form and substance.

In the absence of specific indications, it is likely that the position of the vigilance plan within the management report<sup>103</sup> or its length<sup>104</sup> is of little importance. What is important, however, is that the vigilance plan is easily identifiable as such (a title of a chapter for example) and includes the measures set in the Law. It will serve to show compliance with the Law and will enable the dissemination of information to the stakeholders likely to read and assess this plan.

The selection of information may be difficult. It requires a return to the fundamentals of an effective vigilance plan: a process of identification and management of risks focused on individuals and the environment. It is not sufficient for the company to show simple compliance with the Law by describing the various measures required by the Law. A company must clearly show for each of these measures 1) how they are articulated with the objective of the vigilance plan and 2) its proper understanding of the processes provided in the Law. Concerning the upcoming report on the effective implementation of the vigilance plan, companies will have to prove, for each new financial year, their developments and progress in the implementation of their respective plans. Such plans must therefore be part of a continuous improvement approach.

Examples of elements to be included in the public reporting of the plan<sup>105</sup>:

- **Elements related to the governance of the vigilance plan:** who is leading the vigilance approach? Which departments are involved? Methodology for drafting and monitoring the plan? Bodies to approve/validate the plan? Consultation of stakeholders?
- **Risk-mapping:** how are the risks for a company identified? How have they been prioritised? Associated stakeholders (internal and external)? What are the priority risks identified? How is the risk-mapping reviewed and updated (system for monitoring and assessment of effectiveness)?

99 The extra financial performance statement must contain for each of the subjects "[a] description of the main risks related to the activity of the company or all of the companies included, where this is relevant and proportionate, risks created by its business relationships, products or services; a description of the policies applied by the company or all of the companies including, where applicable the due diligence procedures implemented to prevent, identify and mitigate the occurrence of risks; the results of these policies, including key performance indicators".

100 See e.g. *Transparency in Supply Chains etc. A practical guide, 2017 (update)*, § 1.8, p. 4: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/649906/Transparency\\_in\\_Supply\\_Chains\\_A\\_Practical\\_Guide\\_2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf) ("It is important for large organisations to be transparent and accountable, not just to investors but to other groups including employees, consumers and the public whose lives are affected by their business activity. Due diligence processes and reporting are essential management tools that improve risk identification and long-term social, environmental as well as financial performance.").

101 See e.g. the classification of «corporate human rights benchmark» initiatives (<https://www.corporatebenchmark.org/>), behind the Brands (<https://www.behindthebrands.org/>), KnowTheChain (<https://knowthechain.org/benchmarks/>), Ranking Digital Rights (<https://rankingdigitalrights.org/>).

102 See S. Brabant and E. Savourey, *A Closer Look at the Penalties Faced by Companies [Loi relative au devoir de vigilance: des sanctions pour prévenir et réparer?]*: *Rev. Int. Compliance* 2017, spec. p. 24 [English translation also available on the BHRR website].

103 The new article L. 225-102-1, III of the Commercial Code amended after transposition of the European directive, specifies that "the declaration [of extra-financial performance] may refer, if applicable, to the information mentioned in the vigilance plan (...)". Therefore, the companies concerned may refer to the vigilance plan for redundant information. We note however, that even for subjects related to the environment, health and safety, or human rights, the vigilance plan is unlikely to be sufficient to cover the information required under article L. 225-102-1 the scope of which is broader, in particular with regards to business relationships (See *supra*).

104 For reasons of space, companies may choose to publish the summary of the plan and its report in the management report referring to more detailed information in other chapters of the management report, other reports by the company or communications tools.

105 See *Shift and Mazars, UN Guiding Principles Reporting Framework, 2015*: <https://www.ungpreporting.org/framework-guidance/> (having inspired this model). All of the information specified herein is not necessarily required in the strict sense of the Law, despite this it aims to show the effectiveness of the vigilance plan adopted by the company.

- **Risk management process:**

- Regular evaluation processes for subsidiaries and business relationships: what regularity? Which entities and why? Which assessment methods (self-assessment, certification letter, audits, etc.)?
- The responses to the major risks identified: what measures have been taken (policies, processes, training/awareness actions, participation in sectoral initiatives, etc.)? What dialogue with the stakeholders? What systems for the monitoring and assessment of their effectiveness, including performance goals and associated indicators?

- **Alert mechanism:** how does the system work (from collection to processing)? Who is responsible for the system? What are the available guarantees for effectiveness/impartiality of the system? How is it communicated to the stakeholders who are potentially affected? How is it assessed and updated (system of monitoring and assessment of its effectiveness)?



## DUTY OF VIGILANCE

## 94 Stakeholders and the Duty of Vigilance



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**T**he law No. 2017-399 of 27 March 2017 on the corporate duty of vigilance for parent and instructing companies<sup>1</sup> ("the Law") sought to reflect in law the political, social and economic importance of multinational companies, and strengthen the accountability of parent companies. It is a legislative innovation, building on both the existing soft and hard legal frameworks, thus challenging its observers on their conceptions of law and legal theory. In particular, the Law introduces into substantive law some apparently unidentified legal objects, which can be new to lawyers.

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It appears to be the case for the "stakeholders", which are mentioned in Article 1 of the Law, in the paragraphs regarding the establishment of the vigilance plan.<sup>2</sup> While this concept seems rather new to lawyers, it is not completely foreign. Stemming from British theories on corporate governance<sup>3</sup>, the notion can be found in soft law instruments of Corporate Social Responsibility (CSR). These instruments almost always include the concept of stakeholders or propose a definition. For instance, in the OECD

Guidelines for Multinational Enterprises<sup>4</sup> ("OECD Guidelines"), the United Nations Guiding Principles on Business and Human Rights<sup>5</sup> ("Guiding Principles"), ISO 26000 Guidance on Social Responsibility, or the AA1000 Stakeholder Engagement Standard.<sup>6</sup>

1 JO March 28, 2017, text no.1.

2 L. no. 2017-399, 27 March 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, art. 1: "The plan shall be drafted in association with the company's stakeholders, and where appropriate, within multiparty initiatives that exist in the subsidiaries or at a territorial level".

3 See N. Cuzacq, « Quelle place peut-on octroyer aux parties prenantes dans le puzzle de la gouvernance de la société ? », *D.z.*, 2017, p.1844. – M.C. Caillet, « Du devoir de vigilance aux plans de vigilance; quelle mise en œuvre ? », *D. soc.*, 2017, p.828, referring to R. Edward Freeman's work on stakeholders' theory: R.E. Freeman and D.L. Reed, "Stockholders and Stakeholders: A new perspective on Corporate Governance", *California Management Review*, Vol.25, 1983, p.91. – See also R.E. Freeman, *Strategic Management: A Stakeholder Approach*, Boston, Pitman, 1984, p.46.

4 See OECD, *Guidelines for Multinational Enterprises*, 2011, p.13: "Enterprises should fully take into account established policies in the countries in which they operate, and consider the views of other stakeholders".

5 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, principle 18: "To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement".

6 Definitions of ISO and AA standards are inserted in Comité 21, « *Guide Responsabilité Sociétale des associations. Méthodes, outils et pratiques* », Ed. 2015. A generic definition taken from AA1000SE standard is the following: "Stakeholders are those groups who affect and/or could be affected by an organisation's activities, products or services and associated performance". This definition emphasises the reciprocal influence of stakeholders and enterprises, unlike the definition chosen in ISO 26000, more sibylline and literal: "individual or group that has an interest in any decision or activity of an organisation". The aim of a dialogue between the organisation and one or more of its stakeholders is to "provid[e] an informed basis for the organisation's decisions", according to ISO 26000. It can take the form of multiparty panels, surveys, forums, blogs, etc.

Recently, the occurrences of the notion of stakeholders in national law have increased, in particular in legislation linked to CSR issues.<sup>7</sup> Though the concept of stakeholders is not defined in the Law<sup>8</sup>, the explanatory memorandum [*exposé des motifs*] of the draft law of February 2015 referred to the definition given in the law of December 31, 2012 on the creation of the Public Investment Bank [*Banque publique d'investissement*], pursuant to which a vigilance plan "must undergo a consultation between the company and its stakeholders, defined as all individuals who participate in its economic life and actors of the civil society influenced, directly or indirectly, by its activities [...]".<sup>9</sup>

The elaboration of a vigilance plan in association with the stakeholders within multiparty sectoral initiatives or at the territorial level is not presented as a duty in itself, but rather as an incentive. It actually appears that the French Constitutional Court [*Conseil constitutionnel*] approved the mention of stakeholders in the Law because it was not made mandatory.<sup>10</sup>

The eminently elastic and multi-faceted nature of stakeholders does not, *prima facie*, satisfy the requirements of legal certainty, thereby making it difficult to impose a legal obligation based on this notion. The soft and hard legislations mentioned above are evidence of the very diverse and unsettled nature of stakeholders. The concept is seldom used in the singular. In some cases, the suggested definition comes with an indicative but not exhaustive list of individuals or groups, internal or external to the company, which can enter the scope of the definition.<sup>11</sup> Such a list may include subsidiaries, subcontractors, suppliers, trade unions, non-governmental organisations (NGO), local residents, governments, investors, consumers...

Despite this diverse nature, stakeholders all share a common feature, which is to have their rights and obligations affected directly or

indirectly by a given company's activities. In particular, for the law on the corporate duty of vigilance, these rights and obligations will be affected by the execution or the failure to comply with the duty of vigilance. Thus, although stakeholders are not exhaustively targeted by the Law, they can be perfectly identified by each company in the process of establishing and implementing its vigilance plan.

It actually seems that the voluntary nature of the provision on stakeholders as well as the interpretation given by the Constitutional Court fall within the logic of compromise sought by the Law, between soft and hard law, self-regulation and regulation. Beyond the consideration of constitutional law, the idea was to prevent the Law from over-defining a soft legal concept. Its main interest is precisely to preserve the self-regulation capacity of companies, which they were very keen to lobby for during the past decades, calling for CSR to be maintained in the realm of soft law. The diversity of stakeholders requires each company to identify them and operate a deliberate choice, in the spirit of self-regulation, between possibly conflicting interests.<sup>12</sup>

Moreover, because it is a voluntary feature, it avoids any risk of diluting responsibility for damages linked to a flawed vigilance plan onto other stakeholders, rather than the parent company itself. This is also why proponents of the Law were very leery of a mandatory integration of stakeholders and their precise definition in the Law. They aimed first and foremost at holding parent companies accountable and did not want companies, under the cover of consultation, to obtain the endorsement of other actors and displace their responsibility for the establishment and implementation of the vigilance plan.

Therefore, the provision regarding stakeholders appears as a reminder of the adoption context, of the preexistence of a soft legal framework; it should inform companies on the practices of their respective industry and on what could reasonably be expected from them if their self-regulation process was assessed.<sup>13</sup>

But one shall not be mistaken: stakeholders are anything but accessory to the Law. They are essential in many ways.

7 L. no. 2010-788, 12 July 2010 portant engagement national pour l'environnement, art. L. 566-11: "Preliminary flood risk assessments, flood maps, flood risk maps and flood risk management plans are developed and updated with stakeholders identified by the administrative authority, foremost of which are the local authorities and their relevant groups in the field of urban planning and spatial planning, as well as the 'basin committee' [*Comité de bassin*] and the territorial public institutions of the basin and the territorial collectivity of Corsica for its part". - L. no. 2015-992, 17 August 2015 relative à la transition énergétique pour la croissance verte, art. 88: "Depending on the industry, the statement of work may provide for the setting up by the eco-organisation of financial incentives defined in consultation with the stakeholders, for waste prevention and management near the production points", art. 92 and 100. - L. no. 2014-856, 31 July 2014 relative à l'Économie Sociale et Solidaire (ESS), art. 1, I, al. 2 defining Social Solidarity Economy [*l'Économie Sociale et Solidaire*]: "Democratic governance, defined and organised by the Articles of Association, provide for information and participation, whose expression is not only linked to the capital contribution or the amount of the financial contribution of partners, employees and stakeholders in the company's achievements".

8 L. no. 2017-399, 27 March 2017, *supra*, art. 1.

9 AN, report no. 2578 [*exposé des motifs de la proposition de loi*] (explanatory memorandum of the draft law).

10 Const. court., Dec. no. 2017-750 DC, 23 March 2017, §22: "[t]he provisions according to which the vigilance plan should be developed with the 'company's stakeholders' are intended to encourage such an outcome. Under these circumstances, the legislator did not violate the constitutional objective of accessibility and intelligibility of the law".

11 See T. Sachs, « La loi sur le devoir de vigilance des sociétés mères et sociétés donneuses d'ordre: les ingrédients d'une corégulation », RDT.2017, p.380, it would be different types of interlocutors "which are all actors whose interests or those they represent may be affected by the execution or the failure to comply with the duty of vigilance: subsidiaries, subcontractors, suppliers, non-governmental organisations, consumer associations, etc."

12 See N. Cuzacq, « Quelle place peut-on octroyer aux parties prenantes dans le processus de la gouvernance des sociétés ? », *prec.*, "even if they adopt a collaborative logic, the sum of the rational choices of each stakeholder does not necessarily lead to a rational collective choice. The diversity of stakeholder interests reinforces the hypothesis of this impossibility theorem".

13 Observations du gouvernement sur la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre: "The law-maker wanted to indicate that the plan was intended to be drawn up in association with the stakeholders within subsidiaries or at a territorial level. These provisions do not aim to be mandatory, but they underline the interesting process of relying on the initiatives already carried out by various actors who set up agreements for certain industries or certain countries, pulling together not only subcontractors and suppliers, but also non-governmental organisations and representatives of civil society".

## 1. Stakeholders' Role in the Adoption of the Law on the Corporate Duty of Vigilance

The advocacy and the adoption process of the Law involved an unprecedented coalition of NGOs, academics, Members of Parliament and trade unions, from all sides of the political spectrum. It sought to reflect in law the political, social and economic importance of multinational corporations and strengthen accountability of parent companies.

Sherpa and other members of the Citizens' Forum for Corporate Social Responsibility [*Forum Citoyen pour la Responsabilité Sociale des Entreprises*] participated in the drafting of the first bill introduced by green MPs in 2013. It set forth an accountability tryptic for parent and instructing companies, when they failed to exercise vigilance over their subsidiaries, suppliers, and foreign subcontractors. The bill aimed at introducing a new liability regime in the French Civil Code, (Civ. Code, Art. 1386-19) with a presumption of liability on the company, as well as modifying the French Commercial Code (Comm. Code, Art. L-233-41) and the French Criminal Code (Crim. Code, Art. 121-3).

Though this draft law did not pass the National Assembly's vote<sup>14</sup>, the organisations involved in this advocacy process developed considerable expertise and comprehensive knowledge of CSR issues that are recognised today.<sup>15</sup>

## 2. The Notion of Stakeholders Essential to the Purpose of the Vigilance Plan and its Content

As mentioned above, *in fine*, the exhaustive identification of all stakeholders and the choice of relevant information and measures to be provided in the plan shall be conducted by the company. First, this is because the company is the debtor of the duty of vigilance, which opens the door to self-regulation and accountability. Second, the company itself is in the best position to gather the necessary means to fulfill the duty of vigilance.

The individualised identification of stakeholders is a crucial preliminary step in the Law because the company has the duty to identify and prevent adverse impacts on human rights and on the environment through its vigilance plan. Without identifying its potential stakeholders and the ones effectively affected, the company will not be able to determine its impact. Therefore, the purpose of the Law itself, as well as the ambit and the mandatory content of the vigilance plan, must guide the company's choice of its stakeholders.<sup>16</sup> The ambit of the vigilance plan must cover

subsidiaries, suppliers and subcontractors as does the scope of assessment procedures.<sup>17</sup> Impact mapping cannot be established without taking into account the stakeholders.<sup>18</sup> They also have a major role to play in the development and the implementation of the alert and complaint mechanism required by the Law.<sup>19</sup>

### A. - Stakeholders and Impact Mapping

The identification of stakeholders is inherent to the impact mapping specific to each company and appears as one of the first steps that ought to be carried out by the debtors the vigilance plans.

In a related matter, the French Anti-Corruption Agency (FAA) recently opened for consultation its draft recommendations on the prevention and detection of breaches of the duty of probity.<sup>20</sup> Amongst the first published elements are the recommendations on corruption risk mapping. According to this document, risk mapping requires first and foremost to identify internal stakeholders that should be mobilised.<sup>21</sup> The FAA project then recommends identifying the inherent risks of the activities and "in this context, risk mapping must take into account the intervention, in all the processes, of third parties to the organisation concerned, when the intervention may expose the party to corruption (risk factor). This verification involves the implementation of third-party assessment procedures ("due diligence")".

It is therefore up to each company to identify its most relevant stakeholders for its risk mapping, based on its activity, its structure, and its locations. The same applies to any new investment or infrastructure project which ought to be subjected to a prior impact study, including a mapping of stakeholders. Beside "good practices" that companies are fond of, both international law and national law alike are innervated with principles such as the free prior and informed consent of affected parties, which should inform companies on these types of development projects.<sup>22</sup>

It will be necessary to include both internal stakeholders, with whom the company has usually already started a dialogue, and external stakeholders, with whom companies might be less comfortable. Among the internal stakeholders, we think in particular of, but

14 AN, draft law no. 1519, 6 November 2013.

15 See M. A Moreau, « L'originalité de la loi française du 27 mars 2017 relative au devoir de vigilance dans les chaînes d'approvisionnement mondiales », D. soc. 2017, p.792.

16 See M.C. Caillet, « Du devoir de vigilance aux plans de vigilance ; quelle mise en œuvre ? », *prec.*

17 L. no. 2017-399, 27 March 2017, *prec.*, art. 1, al. 2: "Procedures regularly assessing the situation of subsidiaries, subcontractors or suppliers with which an established commercial relationship exists, with regard to risk mapping".

18 L. no. 2017-399, 27 March 2017, *prec.*, art. 1, al. 1: "A risk mapping intended for their identification, analysis and hierarchy".

19 L. no. 2017-399, 27 March 2017, *prec.*, art. 1, al. 4: "An alert mechanism and a collection of reports relating to the existence or the realisation of risks, established in consultation with the representative trade union organisations in the said company".

20 L. no. 2016-1691, 9 December 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, art. 3-2°: the FAA [AFA] "develops recommendations to help public and private law legal entities prevent and detect acts of corruption, influence-peddling, extortion, illegal conflicts of interest, misappropriation of public funds, and favouritism".

21 AFA, La cartographie des risques, 4 October 2017: <https://www.economie.gouv.fr/lutte-contre-corruption-consultation-agence-francaise-anticorruption>

22 See M.C. Caillet, « Du devoir de vigilance aux plans de vigilance ; quelle mise en œuvre ? », *prec.*

not exclusively, the different departments such as CSR, legal, purchasing, audit, but also financial, lobbying and public affairs, of the subsidiaries, employees, trade unions, ... External stakeholders may include subcontractors, suppliers, NGOs, associations, international organisations, consumers, local residents and governments...

The ISO 26000 standard suggests ways to navigate the diversity of stakeholders: what matters is that they are representative and credible.<sup>23</sup> We would gladly include criteria of independence for external stakeholders as well, so as to ensure a plurality of opinions, which implies in particular not to rely on stakeholders merely because we count on their complacency.<sup>24</sup>

Specifically, with regard to NGOs, which often crystallise the companies' concerns because of their growing reputational and legal impact, it is important to remember that they represent a wide variety of opinions and modes of action. Thus, NGOs close to parent companies cannot and do not want to play the same role in vigilance plans as NGOs located near subcontractors or suppliers in third countries.

For example, Sherpa, in order to protect its mandate, does not wish to respond to individual company's requests for the establishment of vigilance plans. The organisation is not meant to assess the complexity of the value chain of each company in each industry, or to validate *ex ante* the relevance of each impact and stakeholders mapping. In addition, the association is committed to maintaining its margin of action against companies subjected to the duty of vigilance. It considers that maintaining a watchdog status is important to act effectively and impartially in the event of violations of human rights by a company.

In terms of prevention and the establishment of vigilance plans, companies should identify relevant stakeholders in order to obtain essential operational information on their human rights impacts, which is the very purpose of vigilance plans. If Sherpa, as a French NGO, is aware of situations of human rights violations or needs of remediation at various levels of the supply chain, it is often because this information is collected or transmitted, as a matter of last resort, by those directly affected. It is primarily towards these stakeholders that companies should make an effort of identification, dialoguing and integration.<sup>25</sup>

Finally, companies should publish the list of identified stakeholders as comprehensively as possible and justify the choices made.<sup>26</sup> Indeed, stakeholders have divergent interests because of their great diversity, and the sum of their interests does not necessarily lead to a rational or optimal choice. It is therefore necessary that the company make an explicit choice between conflicting positions and then upholds the consequences in terms of responsibility.<sup>27</sup> In addition, because the Law emphasises the prevention and the means implemented by the company, it is the work of identification and of integration of the impacts that will be scrutinised, and the company will sometimes be asked to justify itself. A proper level of transparency will also allow "forgotten" stakeholders to come forward, particularly through the alert mechanisms and thus ensure an effective update of the impact mapping.

## B. - Stakeholders and Alert Mechanisms

The integration of stakeholders is not a one-off exercise, but rather a constantly renewed, iterative process, particularly through the development and management of alerts, complaints and reporting. The alert mechanism should also be the focus of attention when it comes to determining which stakeholders should be involved in its development, have access to it, and the way one should deal with the information. Once again, the parent company should put some efforts to identify relevant, representative, diverse and credible stakeholders.

Alert mechanisms require looking more specifically at the company's historical stakeholders: trade unions.<sup>28</sup> They have a very specific role in the Law because of both the purpose of the plan and of the prerogatives that are explicitly and imperatively given to them, namely the participation in the development of the alert mechanism.<sup>29</sup>

The company will then need to choose, depending on its stakeholders, its activities and its impacts, different methods of alerting and reporting: for example they may promote feedback through subsidiaries, subcontractors and suppliers, or provide a centralised alert mechanism at the level of the parent company. They will also have to decide which tools to set up (texting, platform, email, referee) and a regulatory framework to control the veracity of the information given, manage advertising, prevent retaliations, comply with the requirements in terms of personal data management or international standards, such as the Guiding Principles, which offer very interesting guidelines on this subject.

23 See ISO 26 000, art. 5.3.2: "An organisation should examine whether groups claiming to speak on behalf of specific stakeholders or advocating specific causes are representative and credible".

24 See N. Cuzacq, « Quelle place peut-on octroyer aux parties-prenantes dans le puzzle de la gouvernance des sociétés? », *prec.*, who encourages not to choose stakeholders for their pusillanimity and reminds us that "a stakeholder must remain a master of his voice and not be the voice of a master".

25 See T. Sachs, « La loi sur le devoir de vigilance des sociétés mères et sociétés donneuses d'ordre: les ingrédients d'une corégulation », *prec.*, esp. p. 380: "Given the content of the vigilance plan, it is difficult to imagine that the dominant society can deprive itself of the help of focal actors, where the different activities are located".

26 See N. Cuzacq, « Quelle place peut-on octroyer aux parties-prenantes dans le puzzle de la gouvernance des sociétés? », *prec.*, who suggests that "it would be legitimate for companies, debtors of the obligation, to justify on their websites the choice of stakeholders that they associate with the development of vigilance plans".

27 *Ibid.*, "even if they adopt a collaborative logic, the sum of the rational choices of each stakeholder does not necessarily lead to a rational collective choice. The diversity of stakeholder interests reinforces the hypothesis of this impossibility theorem".

28 See T. Sachs, « La loi sur le devoir de vigilance des sociétés mères et sociétés donneuses d'ordre: les ingrédients d'une corégulation », *prec.*

29 L. no. 2017-399, 27 March 2017, *prec.*, art. 1, al. 4.



Retaliation risks must be given heightened attention, as evidenced by the increased scrutiny over topics such as whistleblowing or Strategic Lawsuit Against Public Participation (SLAPPs) in France, but also at the UN level within bodies mandated on the issue of Business and Human Rights<sup>30</sup>. Therefore, companies must ensure that the alert and complaint procedures they set up are compatible with freedom of expression and information and that they do not expose their users to a heightened risk of lawsuits and other retaliation practices.

### 3. Stakeholders' Essential Role in the Control of the Effective Implementation of the Law on the Corporate Duty of Vigilance

The Law provides three judicial mechanisms to ensure and control the effective implementation of the duty of vigilance: a formal notice to comply [*mise en demeure*], an injunction with periodic penalty payments [*astreintes*] [Translator Note: periodic penalty payments are injunctive fines payable on a daily or per-event basis until the defendant satisfies a given obligation], and a civil liability action in case of a damage. These mechanisms are available to any party with standing, which includes, *ipso facto*, stakeholders whose rights and obligations are affected by the execution or the failure to comply with the duty of vigilance, for example local communities, employees, consumers, trade unions, associations or NGOs.<sup>31</sup>

NGOs have recently benefited from a broader understanding of their *locus standi*, which reflects the imperatives of access to justice and is perfectly justified with regard to the mandate, the social interest and the expertise developed by these entities.<sup>32</sup>

Debates over *locus standi* occurred throughout the parliamentary debates on the Law<sup>33</sup> and before the Constitutional Court. These debates highlighted the emerging role of non-profits and NGOs in the field of strategic litigation on business and human rights in France, and the reluctance of the private sector which was worried that the Law was a covert attempt to introduce some sort of class-action for human rights violations.

As far as the civil liability action is concerned, it must be reminded that the Law emphasises the means used by the company to self-regulate and carry out its duty of vigilance, rather than the outcome. Furthermore, as evidenced by the reference to the common system of liability, it will be up to the claimants to prove a company's breach – a lack of reasonable vigilance –, damage and a causal link. If the vigilance plan is thoroughly established, published and implemented, the company should not be held liable. If not, NGOs, which are more and more experienced in litigation, could play a major role in securing the gathering of evidence on the ground through their networks, or in analysing the vigilance plans. They will support direct victims, and alleviate the burden of proof that currently weighs on them, which can discourage victims from acting. In addition, these stakeholders will make sure to send alerts and notices to comply, as these elements can constitute evidence of the lack of vigilance of the parent company and of the reasonable character, or not, of the measures employed to fulfil their duty of vigilance.

Finally, the potential publication of a court decision on liability provided for in the Law<sup>34</sup> also calls for control by stakeholders, including consumers and investors, of the effectiveness of the plan, by playing on the reputational risks of the company.<sup>35</sup>

30 Sherpa, « Quand les multinationales réduisent les défenseurs des droits humains au silence », *La Tribune*, 23 mars 2017. See also S. Fontaine, S. Savry-Cattan et C. Villette, research report, « Les poursuites stratégiques altérant le débat public », 2017: <http://www.sciencespo.fr/ecole-de-droit/sites/sciencespo.fr/ecole-de-droit/files/rapport-final-slapp.pdf> - UN Working Group on Business and Human Rights, *Human rights defenders and civic space: the business and human rights dimension*, 2017: [http://www.ohchr.org/Documents/Issues/Business/ForumSession6/UNWG\\_ProjectHRDsBackgroundNote12052017.pdf](http://www.ohchr.org/Documents/Issues/Business/ForumSession6/UNWG_ProjectHRDsBackgroundNote12052017.pdf)

31 See A. Danis-Fatôme et G. Viney, « La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre », *D.2017*, p. 1617.

32 *Ibid.*, "We know that the evolution of French substantive law has led to progressively broaden the conditions of action for associations defending a collective interest. The role played by several NGOs - and several trade unions - in the adoption of the law on the duty of vigilance showed that these legal entities were well aware of the sometimes unorthodox behaviour adopted by certain companies whose subsidiaries or subcontractors develop their activities abroad. It therefore seems fairly coherent to consider them to be in a good position to take legal action when they raise doubts as to whether the plan of vigilance adopted is sufficient and effective. The growing role of associations as actors of the civil society is a reality which can inspire reservations, but it seems that their independence regarding companies put them in a different situation than the unions. The trade unions, because they defend an identified interest, that of the employees, were quicker than the association in using legal actions to defend the collective interest of the employees."

However, this particular mission of defence of a category of victims is likely to complicate their legal actions in some cases. The actions of trade unions and associations could thus appear to be complementary".

33 *Ibid.*, "In this regard, one can note that the restriction set forth in the draft bill, pursuant to which "any association recognised as acting for the public good, any association that has been approved or regularly registered for at least five years, whose statutory purpose includes the defence of interests" mentioned by the text 'can take legal action' has been deleted. This being deleted, and considering the conception of *locus standi* in French law, it is only logical that the articles of association of each organisation will enable to determine if it has, or not, a *locus standi*".

34 *L. no. 2017-399, 27 March 2017, prec., art. 2*: "The court may order the publication, dissemination or display of its decision or an extract thereof, according to the terms it specifies. The costs shall be paid by the convicted person".

35 See N. Cuzacq, « Le mécanisme du Name and Shame ou la sanction médiatique comme mode de régulation des entreprises », *RTD com.* 2017, p. 473 ; See also X. Boucobza & Y.M. Serinet, « Loi 'Sapin 2' et devoir de vigilance : l'entreprise face aux nouveaux défis de la compliance », *D. 2017*, p. 1622: "[...]The commitment of CSR actors to an outstanding behaviour drew its efficiency on the threat of reputational or financial damages triggered by angry NGOs, unions, consumers, or shareholders rather than on the sanction of the law. From now on, they will do it under the threat of an effective legal constraint".

## 4. Conclusion

Many companies and their advisors will see the paradox of the law, which encourages the association of stakeholders without making it imperative and without defining them, even though the identification, the inclusion and the contribution of these stakeholders seems to be a prerequisite for the proper execution of the duty of vigilance.

This is because the Law uniquely combines mechanisms stemming from soft and hard law and aims to strengthen the accountability

of parent companies in allowing them to self-regulate, under the control of both the judge and stakeholders.

Thus, the implication of stakeholders is anything but trivial and remains the responsibility of the companies. It cannot dissipate the liability of the parent companies towards public interest issues, which is at the heart of the law on the corporate duty of vigilance.<sup>36</sup> Companies will have to identify various stakeholders and develop numerous modes of association, consultation, contribution and information.

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36 N. Cuzacq, « *Quelle place peut-on octroyer aux parties-prenantes dans le puzzle de la gouvernance des sociétés?* », *prec.*, "It seems to us that the approach with stakeholders must be complementary, and not substitute, state, interstate or supra-state regulation. This reduces its scope but makes it more realistic. The idea of a spontaneous adjustment of the interests of the stakeholders, isolated from an institutional logic, seems a delusion to us [...]. The corporate duty of vigilance law is in line with this approach because the legislator links the power of parent and instructing companies to legal liability, and suggests an additional role for stakeholders in the development of the vigilance plan".

## FRANCE'S CORPORATE DUTY OF VIGILANCE LAW

## A Closer Look at the Penalties Faced by Companies



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**T**he penalties set out in France's new law on the "duty of vigilance for parent and instructing companies" the "Law" make it stand out from other foreign laws that address similar issues, but that are often viewed as less stringent. After causing tension during parliamentary debates, these penalties were also singled out by the French Constitutional Court [*Conseil constitutionnel*] during its review of the Law; and the civil fine was held unconstitutional.

This article focuses on the two remaining penalties, which have received less commentary to date: periodic penalty payments [*astreintes*] and civil liability action [*responsabilité civile*]. It analyses whether, and the extent to which, implementation of these penalties is likely to be genuinely effective in achieving the Law's twofold objective: remediation and prevention.

This article suggests that the Law's provisions on civil liability afford limited opportunity for victims of adverse human rights impacts to bring actions before the courts, thereby falling short on the goal of remediation. However it also concludes that the Law's set of penalties does act as an effective tool for ensuring corporate accountability and preventing human rights abuses through increased scrutiny and deterrence.

L. n° 2017-399, 27 March 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre : JO 28 March 2017, texte n° 1

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The penalties set out in France's new law on the "duty of vigilance for parent and instructing companies" (the "Law") make it stand out from other foreign laws that address similar issues (but that are often viewed as less stringent).<sup>1</sup> After causing tension during parliamenta-

ry debates, these penalties were also singled out by the French Constitutional Court [*Conseil constitutionnel*] during its review of the Law. Now that the civil fine provided for in the original draft of the Law has been found unconstitutional,<sup>2</sup> the number of potential penalties faced by companies failing to comply with the Law has been reduced to two: namely, (i) periodic penalty payments [*astreintes*] and (ii) civil liability action [*responsabilité civile*] [Translator's note: periodic penalty payments are injunctive fines payable on a daily or per-event basis until the defendant satisfies a given obligation].<sup>3</sup>

This article will focus on these two penalties, which have to date attracted little commentary,<sup>4</sup> with a view to shedding light on their

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- 1 Modern Slavery Act 2015 (UK). See S. Brabant, « Devoir de vigilance : une proposition de loi (pas vraiment) raisonnable », *Le Monde*, 17 Jan. 2017 (for the comparison with the Modern Slavery Act).
- 2 Cons. const., Dec. no. 2017-750 DC, 23 March 2017.
- 3 Formal notice to comply must be issued before a periodic penalty payment can be ordered; a civil liability action may also be followed by the publication of the court decision.
- 4 For a general review of the Law, see S. Schiller, « Exégèse de la loi sur le devoir de vigilance et entreprises donneuses d'ordre », *JCP E* 2017, 1193, p. 19. - C. Malecki, « Le devoir de vigilance des sociétés mères et entreprises donneuses

effectiveness in terms of meeting the Law's twofold objective: remediation and prevention. According to the explanatory memorandum of the draft Law [*exposé des motifs*], the goal is to "encourage multinational companies to act responsibly with the aim of preventing tragic events" in France or abroad that would violate human rights and harm the environment, and to "obtain remediation for the victims" where damage is sustained.<sup>5</sup>

Before discussing the penalties, we need briefly to define the scope of the Law and the substance of the duty of vigilance.<sup>6</sup> The Law applies to "any company that employs, for a period of two consecutive financial years, at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory or abroad". The majority of legal commentators consider that companies within the scope of the Law will be those incorporated in France under the form of an SA [*Société Anonyme*], an SCA [*Société en Commandite par Actions*] or an SAS [*Société par Actions Simplifiée*].<sup>7</sup> It follows that the duty of vigilance will only apply to French-incorporated companies, and so will the relevant penalties.

The duty of vigilance comprises three obligations (the "Vigilance Obligations"). First, companies must establish a vigilance plan. This plan sets out "reasonable vigilance measures for identifying risks and preventing serious human rights abuses [...] that result from the activities of the company or of companies it controls [...] directly or indirectly, or from the activities of any subcontractors or suppliers with which the company has an established commercial relationship, where these activities are connected to the relationship" (C. com., art. L. 225-102-4, I). Second, the plan must be effectively implemented. Third, the plan and the report on how the plan is effectively imple-

mented must be made public and included in the company's annual management report (C. com., art. L. 225-102-4, I).<sup>8</sup>

The analysis of the penalties provided by the Law indicates that:

- There are a number of issues with civil liability that weaken its impact in terms of securing remediation for victims.
- However as monitoring and deterrent tools, these penalties seem to be sufficiently effective in achieving the objective of holding companies accountable so as to prevent human rights abuses.

## 1. The Law's Penalties: Insufficient Remedy for Victims

### A. - Uncertainty over the Conditions for Establishing Civil Liability

The Law provides that companies failing to comply with the Vigilance Obligations will have to remedy the damage that "the execution of these obligations could have prevented" (C. com., art. 225-102-5). As underlined by the French Constitutional Court, civil liability is based on the general law of tort [TN: under the French law of tort, an individual is liable for his/her own fault (*responsabilité pour faute*) except in certain circumstances, where an individual can be liable for the fault of someone else (*responsabilité du fait d'autrui*)].<sup>9</sup> There are three conditions for establishing civil liability under the general law of tort: damage, a breach of one of the obligations defined in the law and causation between the two. The burden of proof is on the claimant who has to prove the case satisfies all three conditions. Breach and causation are likely to be the most difficult elements for a claimant to establish under the Law for the reasons stated below.

First, according to the transcripts of parliamentary debates, a breach of the Vigilance Obligations is constituted by "the failure to establish, publish or effectively implement a vigilance plan".<sup>10</sup> However, the French Constitutional Court has declared that this breach was defined in an "insufficiently clear and precise" manner with respect to constitutional requirements that criminal offences and penalties be defined by law<sup>11</sup> [*légalité des délits et des peines/nullum crimen nulla poena sine lege*]. As a result, the civil fine, considered as an equivalent to a criminal penalty, was deemed unconstitutional. Although this definition of the breach was deemed unconstitutional from the perspective of criminal law, it remains a condition for any finding of civil liability, despite being "insufficiently clear and precise".

Moreover, the obligation to effectively implement a vigilance plan was specifically introduced by the Law as an obligation on companies to take all steps in their power to reach a certain result [*obligation de moyens*] rather than to guarantee the actual attainment of that result [*obligation de résultat*]. As a result, a breach of that obligation

d'ordre : était-ce bien raisonnable ? », *Bull. Joly Sociétés* 2017, p. 298. - Un plan de vigilance imposé aux sociétés employant au moins 5 000 salariés, *Editions F. Lefebvre*, 5 Apr. 2017. - N. Cuzacq, « Le devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre : acte II, scène 1 », *D.* 2015, p.1049 (on proposed law no. 2578 of 11 February 2015).

5 AN, proposed law no. 2578, 11 Feb. 2015, p. 4.

6 These issues warrant further discussion, particularly because the French Constitutional Court has remarked upon imprecisions contained in certain provisions of the Law. See Cons. const., Dec. no. 2017-750 DC, op. cit.

7 According to the transcripts of parliamentary debates - and as it is not clearly specified in the Law itself - it applies to companies whose registered office is located in France. This interpretation of the scope of the Law is also in line with that of the Constitutional Court. See Cons. const., Dec. no. 2017-750 DC, op. cit., § 3. - On the corporate forms of the companies concerned and whether or not the SAS should be included, see S. Schiller, « Exégèse de la loi sur le devoir de vigilance et entreprises donneuses d'ordre », op. cit., esp. p. 20. - C. Malecki, « Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre : était-ce bien raisonnable ? », op. cit., esp. p. 298. - P.-L. Périn, « Devoir de vigilance et responsabilité illimitée des entreprises : qui trop embrasse mal étreint », *RTD com.* 2015, p. 215, esp. p. 218 (on proposed law no. 2578 of 11 February 2015). - Contra, « Un plan de vigilance imposé aux sociétés employant au moins 5 000 salariés », op. cit. - AN, report no. 2628, 11 Mar. 2015, p. 83 (which provides that the Law could only apply to SA companies). The Law apparently also applies to SE [*Société Européenne*] companies by reference to articles L. 229-1 and L. 229-8 of the French Commercial Code [*Code de commerce*].

8 This report corresponds to the one provided for in article L. 225-102 on employee shareholding, which is included in the annual management report.

9 See Cons. const., Dec. no. 2017-750 DC, op. cit., § 27. New article L. 225-102-5 refers to articles 1240 and 1241 of the French Civil Code [*Code civil*] (formerly 1382 and 1383).

10 AN, report no. 2628, op. cit., p. 30.

11 See Cons. const., Dec. no. 2017-750 DC, op. cit., § 13.



cannot be inferred merely because damage has been caused.<sup>12</sup> With this in mind, how is it possible to assess whether or not a given company has fulfilled its obligation to effectively implement a vigilance plan? The transcripts of parliamentary debates on the Law provide indications to assess whether a company has fulfilled its obligation. Such indications include: contractual commitments, certifications, partnerships with stakeholders, etc.<sup>13</sup> Further, it remains to be seen whether it would be enough for a vigilance plan to incorporate all of the measures listed in the Law (including “suitable actions to mitigate risks or prevent serious abuses”) to be deemed to “contain reasonable vigilance measures”<sup>14</sup> (C. com., art. L. 225-102-4, I). The ambiguity of certain terms in the Law raises the question of how to assess the effectiveness of a vigilance plan.<sup>15</sup>

In addition to the uncertainty over the boundaries of what constitutes a breach, the Law contains a further source of difficulty: proving causation. There are many different ways in which damage could arise, especially with long supply chains involving multiple players. The court would need to assess whether a breach of the Vigilance Obligations caused the damage and consider the impact of any other relevant factors. It would then have to determine if meeting those obligations would have prevented the damage (C. com., art. L. 225-102-5<sup>16</sup>). At this point, the parties may disagree on whether the adequate causality [*causalité adéquate*] theory or the equivalence of conditions [*équivalence des conditions*] theory should apply to the question of causation, with each party likely to favour the theory that best supports their case. Either way, however, each theory presents various difficulties for claimants [TN: the theory of adequate causality and the equivalence of conditions are the two main theories of causation under French civil liability law. The theory of equivalence of conditions is based on the idea that each factor contributed to cause the damage. In that case, each factor is considered as having caused the damage. The theory of adequate causality seeks to find the most likely determining cause of the damage].<sup>17</sup> The United Nations Guiding Principles on Business and Human Rights (the “Guiding Principles”), which inspired the Law, distinguish between situations in which a company caused, contributed or was simply linked to the adverse impact. The appropriate action required under the Guiding Principles depends on this

distinction.<sup>18</sup> The distinction could also offer useful guidance to the French courts when dealing with the ambiguous notion of causation.

In terms of substance, ambiguous concepts such as breach and causation can be particularly difficult for a claimant to prove. This can make it difficult to establish civil liability and can weaken the objective of providing remediation for victims. This is all the more so in circumstances where the victims already have limited options for bringing a civil liability action.

## B. - Victims Have Limited Possibility to File a Civil Liability Action

Civil liability actions must also be assessed from the perspective of those who might file them. Although one of the Law’s objectives was to offer French or foreign victims a right to remediation from parent or instructing companies based in France,<sup>19</sup> it is, in practice, particularly complex for a foreign victim to gain access to the French courts.<sup>20</sup>

The French Constitutional Court notes that the general rules of civil liability cannot be understood as “allow[ing] actions to be brought on behalf of the victim by a third party, since only the victim has standing [*locus standi*].”<sup>21</sup> In practice, victims cannot easily access the courts, especially victims living in distant countries who may not be aware of their rights under the Law or of the relevant procedural rules in France. Furthermore, material, social, institutional and linguistic circumstances may not empower them to take legal action before French courts.

In addition, in France the power of non-profit organisations and trade unions to bring class actions for remediation in a civil court for damage actually incurred by third parties,<sup>22</sup> or even by their own

12 AN, report no. 2628, op cit., p. 31, 55 and 59. - AN, report no. 3582, 16 March 2016, p. 14. - Contra, Four proposed laws issued prior to the Law in 2013 and 2014 and covering the same issues all provided for a strict liability [*présomption simple de responsabilité*]. See. N. Cuzacq, « Commentaires des propositions de loi relatives au devoir de vigilance des sociétés mères et entreprises donneuses d’ordre », *Rev. dr. trav.* 2014, p 265.

13 AN, report no. 2628, op cit., p. 79.

14 Emphasis added.

15 P.-L. Périn, « Devoir de vigilance et responsabilité illimitée des entreprises : qui trop embrasse mal étreint », op. cit., esp. p. 223 (also noting, on the proposed law of 11 February 2015, the ambiguity of certain terms used therein, including standards to be respected).

16 “[...] any person found to have breached the obligations defined in article L. 225-102-4 of this Code may be held liable and required to repair the damage that would have been avoided had he/she complied with said obligations”.

17 N. Cuzacq, « Le devoir de vigilance des sociétés mères et des donneurs d’ordre », in *La RSE saisie par le droit, perspective internationale*, (eds.) K. Martin-Chenut and R. De Quenaudon : Editions Pedone, 2016, p. 453, esp. p. 461.

18 UNCHR, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, 2011, principles 13, 19 and commentary under principle 19. - See also, United Nations, The Corporate Responsibility to Respect Human Rights, an interpretative Guide, 2012.

19 See also P.-L. Périn, « Devoir de vigilance et responsabilité illimitée des entreprises : qui trop embrasse mal étreint », op. cit., esp. p. 223. - On the options for bringing an action before French courts, AN, report no. 2628, op. cit., p. 29 and 30. - See also O. Boskovic, « Brèves remarques sur le devoir de vigilance et le droit international privé », *D.* 2016 p. 385. - On the general jurisdiction of the French courts in civil law matters and other issues related to the right to an effective remedy, see Min. des Affaires étrangères et du développement international, *Plan national d’action pour la mise en œuvre des principes directeurs des Nations unies relatifs aux droits de l’Homme et aux entreprises* [French Ministry of Foreign Affairs and International Development, National Action Plan for implementing the United Nations Guiding Principles on Business and Human Rights], April 2017, p. 54 to 58.

20 Access is a counterpart to victims’ right to an effective remedy in the courts as guaranteed under article 8 of the Universal Declaration of Human Rights. For a broader, more international portrait of what obstructs victims’ access to justice, see R.-Cl. Drouin, « Le développement du contentieux à l’encontre des entreprises transnationales : quel rôle pour le devoir de vigilance ? », *Dr. soc.* 2016, p. 246, esp. p. 252 to 254.

21 See Cons. const., Dec. no. 2017-750 DC, op. cit., § 28.

22 J. Héron and Th. Le Bars, *Droit judiciaire privé*, Montchrestien, 2012, esp. p. 96 to 101.

members,<sup>23</sup> is quite limited. NGOs would like to see victims have more options for obtaining remedies through class actions with the broadening of the scope of such actions.<sup>24</sup>

As the Law currently stands, if victims of serious human rights abuses abroad are working for an entity within the scope of a vigilance plan, they have very little chance of being able to bring a civil liability action before the courts in France.<sup>25</sup> Nonetheless, as we discuss below, the penalties provided in the Law can effectively contribute to the objective of prevention.

## 2. The Law's Penalties: Effective Prevention of Human Rights Abuses

### A. - Penalties as a Tool for Monitoring and Deterrence

The penalties under the Law are designed to encourage companies to effectively implement the Vigilance Obligations, thereby achieving the Law's preventive goals. For example, the Law imposes periodic penalty payments if companies within its scope do not fulfil their obligations to establish, publish and effectively implement a vigilance plan. The amount of such periodic penalty payments, to be decided by the judge, may need to be sufficiently large to bring about swift changes in companies' behaviour. Once a periodic penalty payment has been imposed, it should encourage the company to satisfy its Vigilance Obligations to limit the possibility of damage ensuing.

A periodic penalty payment can be sought by any party with standing. Once a company has failed to comply with its Vigilance Obligations, after having been given three months' official notice [*mise en demeure*] to comply, such party can ask the competent court to order the company to comply (C. com., art. L. 225-102-4, II<sup>26</sup>). Given the many kinds of parties that may be able to prove they have standing (including victims, NGOs and trade unions<sup>27</sup>), this procedure is a privileged tool for members of civil society to check whether the Vigilance Obligations are being observed, irrespective of whether any actual damage has been sustained.

As for civil liability, despite the difficulties faced by victims wishing to bring an action before the courts (as discussed above), the very existence of such a possibility constitutes both a legal and financial risk for companies. That risk could be difficult for companies to quantify due to the present uncertainty surrounding the court's interpretation of the conditions necessary to establish that civil liability. Companies might therefore be wary of those risks, in addition to the reputational risk related to a civil liability action under the Law. Indeed, if a company is found liable, the court could order its decision to be published, disseminated or displayed (C. com., art. L. 225-102-5, 3), thereby causing the company further reputational damage. Therefore, the mere existence of an action in civil liability (and the prospect of the related penalties) could encourage companies to implement their vigilance plan in order to monitor and control their risks.

Therefore, the threat over the application of such penalties could be effective on two fronts. The first reason is that the Law entrusts "new judges" – the media, social networks and civil society – with the power to request periodic penalty payments, report on failures to comply and share such reports. The second reason is inherent in the legal, financial and reputational risks the company runs if it actually incurs these penalties. Companies should therefore be highly incentivised to establish a vigilance plan and document its effective implementation along with other stakeholders, as suggested in the Law itself (C. com., art. L. 225-102-4, I<sup>28</sup>). Thus, penalties fulfil a preventive goal that resonates with the underlying philosophy of the Law.

### B. - Prevention as the Underlying Philosophy of the Law

The preventive goal of penalties is in line with the general objective of prevention as set in the Law. Indeed, the Law introduces what could be called an ex-ante liability that serves as the foundation for the Vigilance Obligations.<sup>29</sup> In establishing a vigilance plan, companies must be able to "identify the risks and [...] prevent serious infringements of human rights and fundamental freedoms [...]" (C. com., art. L. 225-102-4, I). Professor Nicolas Cuzacq confirms that "the goal of the vigilance plan is to prevent harm from occurring [...], with the right to remediation as a solution of last resort."<sup>30</sup> Furthermore, the requirement that implementation of the vigilance plan must be effective ensures that prevention is operational, thereby avoiding a situation where plans are established merely for declarative purposes. Finally, publishing a plan, reporting on its effective implementation, and including the plan and related report in the annual management report reduces information asymmetries between companies and stakeholders. Shareholders, individuals and actors from civil society thereby have access to better information on how the company is meeting its Vigilance Obligations, which creates even more effective external monitoring. Such external monitoring may be all the more effective when combined with periodic penalty payments that any parties with standing may seek.

23 *Associations. Fondations - Congrégations. Fonds de dotations*, coll. Mémento pratique : Editions F. Lefebvre, 2016, esp. p. 232, p. 233 and p. 245.

24 French Ministry of Foreign Affairs and International Development, *Plan national d'action pour la mise en œuvre des principes directeurs des Nations unies relatifs aux droits de l'Homme et aux entreprises*, op.cit., p. 56 (noting the option of class actions in several fields, especially discrimination, health, personal data protection). - Sherpa, press release, « Réaction publique de Sherpa au Plan national d'action pour la mise en œuvre des Principes directeurs des Nations Unies relatifs aux droits de l'Homme et aux entreprises », 4 May 2017 (recommending that the option of bringing class actions be extended to cover human rights).

25 In certain cases, moreover, remediation is even less likely since subcontractors involved in adverse human rights impacts are not necessarily within the scope of the vigilance plan, if they have *no established* commercial relationship [*relation commerciale établie*] with the French company.

26 "The case may also be referred for the same purpose to the president of the court in the context of interim/emergency proceedings [*statuant en référé*]."

27 Amendment no. 65 submitted for text no. 2628 on a first reading in the French National Assembly on 26 March 2015. Competitors of companies subjected to the Vigilance Obligations may also have standing to refer a case to the courts.

28 "The plan is meant to be designed together with company stakeholders, if so through multi-party initiatives within sectors, or territorial level."

29 N. Cuzacq, « Le devoir de vigilance des sociétés mères et des donneurs d'ordre », op. cit., esp. p. 455 to 458.

30 N. Cuzacq, « Le devoir de vigilance des sociétés mères et des donneurs d'ordre », op. cit., esp. p. 455.

The vigilance plan, as the backbone of the Vigilance Obligations, is also quite distinct from remediation. Plans do not have to include remedies to be put into action once human rights abuses have already occurred. By contrast, according to the provisions on corporate responsibility in the Guiding Principles, companies should respect human rights by having appropriate processes in place to prevent and also address the adverse impacts they may have on such rights.<sup>31</sup> The now-rejected civil fine also reflected this focus on prevention. The logic of remediation would have dictated a fine that was paid to a compensatory fund related to the type of damage incurred, rather than to the Public Treasury. A fine operating in the similar manner was actually proposed in the most recent preliminary draft reform of French civil liability.<sup>32</sup>

It appears that in line with the overall philosophy of the Law, the penalties it contains will be more effective in preventing abuses than in offering an actual remedy for any abuses that do occur. Yet this observation should not be taken to detract from the Law's merits – pre-

ventive action is essential to raising company awareness, limiting the negative impact of their activities on human rights and thus reducing the number of potential victims of such impacts.

The Vigilance Obligations could lead to the emergence of a “new standard of behaviour”<sup>33</sup> on the part of companies included in the scope of the Law. If so, the penalties provided in the Law would ensure compliance with a standard that is firmly rooted in the Law and focused on prevention. Further, this standard might even reach a larger number of companies than those subject to the Law, as other such companies could also have an interest in taking a preventive approach in their own operations. In the meantime, remediation for victims will certainly be a key objective over the next few years as work on the Guiding Principles<sup>34</sup> and the French National Action Plan continues.<sup>35</sup>

31 On remediation see esp. UN, CHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, op. cit., principles 11 and 22.

32 French Ministry of Justice, Draft reform of civil liability law, March 2017, article 1266-1 (establishing, for non-contractual matters, a non-insurable fine for undue profit earned from wrongful acts, to be paid either to the Public Treasury or to a compensatory fund related to the type of damage suffered, rather than punitive damages intended for the victim.).

33 E. Daoud & S. Sfoggia, « Entre fantasme et réalité : le rôle de l'avocat en matière de mise en conformité des entreprises avec la loi sur le devoir de vigilance », *D. Avocats. Exercer et Entreprendre*, 2017, p. 99, esp. p 101.

34 United Nations, Working Group on the issue of human rights and transnational corporations and other business enterprises, Outcome of the fifteenth session of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 26-30 Sept. 2016, § 6, 10, 15 and 18.

35 French Ministry of Foreign Affairs and International Development, *Plan national d'action pour la mise en œuvre des principes directeurs des Nations unies relatifs aux droits de l'Homme et aux entreprises*, op. cit.