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Legislating human rights due diligence: opportunities and potential pitfalls to the French duty of vigilance law

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Introduction

On the evening of 23 March 2017, just as the deadline for a decision was approaching, the French Constitutional Court [declared](#) that the [French law on the duty of vigilance \(or duty of care\) owed by parent and contracting companies](#) is constitutional and will remain on the books, albeit without the corresponding financial sanctions for companies. In this article, we pinpoint opportunities and potential pitfalls of the law by comparing it with the authoritative global standard on business' responsibility for their impacts on people: the *United Nations Guiding Principles on Business and Human Rights* (the 'Guiding Principles').

The French law is a significant development for the field of business and human rights. As the IBA observed last year in its *Practical Guide and Reference Annex*, there has been increasing legislation inspired by the soft law norms of the Guiding Principles. The most recent, and the most striking, example of this global convergence on the Guiding Principles is the French law on the duty of vigilance. It blends together French tort law with the concept of human rights due diligence in the Guiding Principles – a core feature of the Guiding Principles – which enables companies to prevent and address harm to people as they conduct their day-to-day business. As was discussed in [parliamentary debates](#), the French law seeks to 'implement the legal principle of due diligence, recommended by the Guiding Principles'.

How this law is interpreted by French judges and implemented by companies moving forward will have a considerable bearing on how companies can avoid harming people in their day-to-day business, as well as on similar legislative developments in other countries. To reach its full potential of enabling companies to identify and address human rights harm, it is imperative that this law builds upon the concepts contained in the Guiding Principles that inspired it.

Ever since the 2013 Rana Plaza tragedy, in which over 1,100 workers lost their lives while making clothes in Bangladesh for European and American brands, French parliamentarians have been discussing ways to strengthen the accountability of parent companies for their activities, and those of their suppliers, overseas. The duty of vigilance law, adopted by the French National Assembly in February 2017, is the outcome of that discussion. It asks the

largest French companies, approximately 150 of them, to develop, publish and effectively implement a 'vigilance plan' or 'duty of care plan' that includes 'the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms'.

A request for companies to conduct human rights due diligence under the Guiding Principles

There has been debate over whether the French law requires companies to conduct the same human rights due diligence as provided for under the Guiding Principles, or whether the law is asking for something different. Indeed, the law itself refers to reasonable vigilance (*mesures des vigilance raisonnable*) rather than due diligence (*procédure de diligence raisonnable*). Nevertheless, the French law and the Guiding Principles resonate strongly together. It is thus highly likely that where the law is ambiguous, human rights due diligence under the Guiding Principles will be used or referenced in order to determine the law's intention.

Indeed, using the Guiding Principles as the key framework for interpreting and implementing the French law will assist companies in developing highly flexible and effective solutions to minimise the risks of harming people throughout their business. Indeed, the French Government itself remarks that a number of French companies are already seeking to implement the Guiding Principles, and that the French law is aligned with these efforts.

As the global baseline, the Guiding Principles make clear that all companies are expected to respect internationally recognised human rights. To do this, they are asked to develop and implement appropriate policies and human rights due diligence. The Guiding Principles also describe how companies can be responsible for their involvement in adverse human rights impacts, as well as actions that are expected of them depending on whether they have caused or contributed to the harm, or whether the harm is directly linked to their operations, products or services by their business relationships.

Stakeholders involved in the development of human rights due diligence

Consistent with the Guiding Principles, the French law requires that the company's human rights due diligence plan is developed in collaboration with its stakeholders and, where appropriate, with multi-stakeholder initiatives that may exist at the subsidiary or country level. The Guiding Principles firmly underscore the need for companies to engage with potentially impacted stakeholders throughout the design and implementation of the due diligence process. This engagement extends beyond a company's workers, and can encompass, for instance, workers in the supply chain producing materials that go into its products, or communities neighbouring a company's operations that can be affected by its mishandling of waste. Although multi-stakeholder initiatives do not typically include potentially-impacted stakeholders, they can assist companies in identifying potential human rights impacts, as well as determining collective action to prevent, minimise and/or address impacts. For instance, the Fair Labor Association assists companies in managing their labour risks, as it requires them to sign up to standards that reflect leading practice and demonstrate their implementation; while the Rana Plaza Accord comprises a joint platform of trade unions and companies, in which companies agree to fund remediation of non-compliant factories and to only source from approved facilities.

Components of human rights due diligence

The French law discusses all of the components of human rights due diligence set forth in the Guiding Principles. Human rights due diligence is a process through which companies assess what impacts on people's human rights could be associated with their business, take action to prevent or mitigate those impacts, and track and communicate the success of these efforts. It focuses on risk to people, not just risk to the business, and, as described above, it requires meaningful engagement with stakeholders, including workers and communities who could be impacted. We discuss each component below:

Assessing

The French law refers to the need for companies to conduct an assessment that identifies, analyses and prioritises their human rights risks. In the same manner as the Guiding Principles, the prioritisation of human rights risks for action is to be based on the severity of the potential impact (*atteintes graves*). *The Guiding Principles Reporting Framework* calls these impacts a company's 'salient human rights issues', and provides [guidance](#) on how companies can conduct this prioritisation. The law also references the need to update this assessment process on an ongoing basis, recognising that business relationships and operating contexts change over time, and therefore, so do companies' human rights risk profiles.

Integrating and acting

The French law refers to identifying 'appropriate action' to mitigate or prevent severe human rights impacts. The Guiding Principles elaborate on appropriate action that companies are expected to take in response to impacts, stating that their action depends on how the company is involved (or could be involved) in the impact.

Tracking

The French law references the need for a monitoring system that assesses the effectiveness of measures implemented. This is consistent with the need for companies to track their performance on preventing and mitigating their human rights risks under the Guiding Principles, and is also a key area of focus in other human rights-related pieces of legislation (eg, the United Kingdom 2015 Modern Slavery Act and the European Union directive on the disclosure of non-financial and diversity information).

Communicating

The French law calls for publication of the company's human rights due diligence plan in its annual report. In the Guiding Principles, formal reporting is specifically expected for companies whose operations or operating contexts pose risks of severe human rights impacts. Note, however, that the Guiding Principles' approach to communication entails demonstrating the company's efforts to prevent and address human rights risks to a wide audience, beyond investors, and through a range of measures, beyond formal reporting, particularly where severe impacts to human rights are at issue.

Judicial and nonjudicial remedial processes

The Guiding Principles also expect that companies will make persons whole for harm that they have caused or contributed to, including through participation in judicial and nonjudicial

dispute resolution processes. In particular, the Guiding Principles expect that companies will establish or participate in operational level grievance mechanisms to act as a feedback loop and enable companies to resolve disputes quickly and directly, before they grow larger and more intractable. The French law addresses both remedial processes.

Firstly, the French law expects companies to remedy human rights harm. Although it removes the maximum €30m financial penalty for violation of its provisions that result in injury, the French law leaves intact a company's pre-existing, judicial tort law responsibility to compensate injured victims.

Secondly, the law requires French companies to establish or use 'an alert mechanism that collects reporting of existing or actual risks, developed in working partnership with the trade union organisation representatives'. Gathering information on human rights risks and actual impacts can be done using a range of methods, including through the operation of a grievance mechanism as contemplated by the Guiding Principles. These mechanisms are typically set up by companies to enable their workers and other potentially-impacted communities to raise complaints. As the French law suggests, these are most effective when designed in collaboration with those for whom the mechanism is intended. They provide valuable inputs into the company's due diligence, while providing remedy to complainants where appropriate and strengthening relationships with the company's stakeholders.

Potential divergence of the law from the Guiding Principles and potential pitfalls

Notwithstanding these widespread areas of overlap with and convergence on the Guiding Principles, there are two areas of divergence where the French law may potentially confuse the landscape and impede the ability of companies to respect human rights. They are the scope of a company's supply chain due diligence and the basis on which companies may be found legally liable for human rights harm.

Scope of human rights due diligence

The French law extends a company's human rights due diligence plan to its operations and subsidiaries, as well as to the operations of its subcontractors and suppliers – but only where the company maintains an established commercial relationship with these business partners and the operations derive from this relationship. Accordingly, the company's human rights due diligence under French law would only cover businesses with whom the company has a stable, regular and ongoing relationship, with a certain volume of business.

This narrow scope of due diligence may provide some legal certainty to companies, but it does not assist them in capturing areas where human rights risks are the greatest. Indeed, corporate experience shows that human rights risks are often higher for suppliers that provide small amounts of business to the company, or that do not have an ongoing relationship with the company. They also frequently exist at the more remote tiers of a company's value chain.

Following six years of consultation, the Guiding Principles specifically rejected the notion that the more influence a company has over a business partner, the more responsibility it has for its harmful impacts (so-called 'sphere of influence'). Rather, what matters is whether an impact occurs in a company's value chain and how the company is connected to that impact. Human rights due diligence therefore is best structured when it captures impacts that are

directly linked to the company's operations, products or services, regardless of the type of business relationship and of where they occur in the value chain. Companies then prioritise their response by addressing the most severe risks and impacts first (ie, their salient human rights issues, as described above). The actions that a company is to take will differ depending on how it is involved in the harm. Accordingly, a company should prioritise building leverage to prevent severe human rights impacts that are buried deep in its supply chain (eg, child labour in the cocoa industry or modern slavery in the shrimp industry), even if it has no established commercial relationship with the suppliers or subcontractors that cause the harm. This approach is intended to focus a company's energies on where human rights harm can be the greatest, which both benefits potential victims and the company's ability to manage its human rights risks.

This narrow scope of due diligence of the French law, when compared to the Guiding Principles, raises several difficult questions:

- Would it incentivise French companies to prioritise due diligence for first tier business partners over those that carry higher human rights risks?
- Would it incentivise companies to take measures to avoid falling into the 'commercial relationship' category with its higher risk suppliers? For example, companies might seek to frequently change those suppliers that use low-skilled workers to protect it from liability for potential labour rights violations in this workforce.
- In assessing tort liability for human rights harm, would a French judge differentiate between companies that have prioritised due diligence based on severity of harm rather than the nature of the business relationship?

Liability for remedying rights impacts

The Constitutional Court has removed from the French law the civil penalty of up to €10m where a company does not develop, publish and effectively implement a human rights due diligence plan, and the penalty of up to €30m where damage occurs that effective implementation would have avoided. Nonetheless, the Constitutional Court makes clear that anyone who has standing to sue (*justifiant d'un intérêt à agir*) can still ask the court to compel a company to develop, publish and 'effectively implement' a human rights due diligence plan. In addition, a company can still be found liable for damages through a civil action.

According to the [French Government in its observations on the law](#), the liability feature of the French law is intended to convey an obligation of means (*obligation de moyens*) and not an obligation of results (*obligations de résultats*). This means, according to the French Government, that 'the company must be able to demonstrate that the measures described in the vigilance plan have been implemented'. The occurrence of an impact does not necessarily demonstrate that the company's due diligence has not been effectively implemented. It is French tort law that governs the responsibility of a company for its impact, with its traditional requirement of a causal link between the lack of an effective due diligence plan and the damage that has occurred.

It is unclear how French judges will implement this in practical terms. Several questions can be asked:

- What will the impact be, under French tort law, of a company's failure to file and effectively implement a human rights due diligence plan?
- How will a plaintiff prove, and how will French judges decide, whether a human rights due diligence plan has been 'effectively implemented'?
- What would be the result if parts of the due diligence plan were effectively implemented (eg, engagement with stakeholders), but not others (eg, poor prioritisation of risks for action)?
- How would a judge resolve disputes over the prioritisation of risks for attention under the plan? What would be the result if the company contributed to severe harm that occurred in the operations of suppliers and subcontractors with whom the company had no established and ongoing relationship, on whom the company performed no due diligence, as permitted by the French law?
- How will the potential liability of companies overlap with the modes of responsibility described in the Guiding Principles and the actions they call for? Under the Guiding Principles, a company is only expected to remedy harm that it causes and contributes to. It is not expected to remedy harm by another that it did not cause or contribute to, but is only linked to by its operations, services or products. In such cases, the company is expected to use or try to build leverage to change the other entity's behaviour.

Moving forward: the stakes are high

There will be an opportunity to clarify some of the provisions of the French law when the highest French administrative court (*Conseil d'Etat*) specifies the modalities for developing and implementing a human rights due diligence plan. *The Guiding Principles Reporting Framework* in particular provides an overview of the due diligence and remediation processes increasingly adopted by companies, and may be helpful for French judges in this regard. The duty of vigilance law provides an ideal opportunity to level the playing field among large French companies, create a virtuous cycle of learning within companies on human rights due diligence and reduce harm to victims.


Notes

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