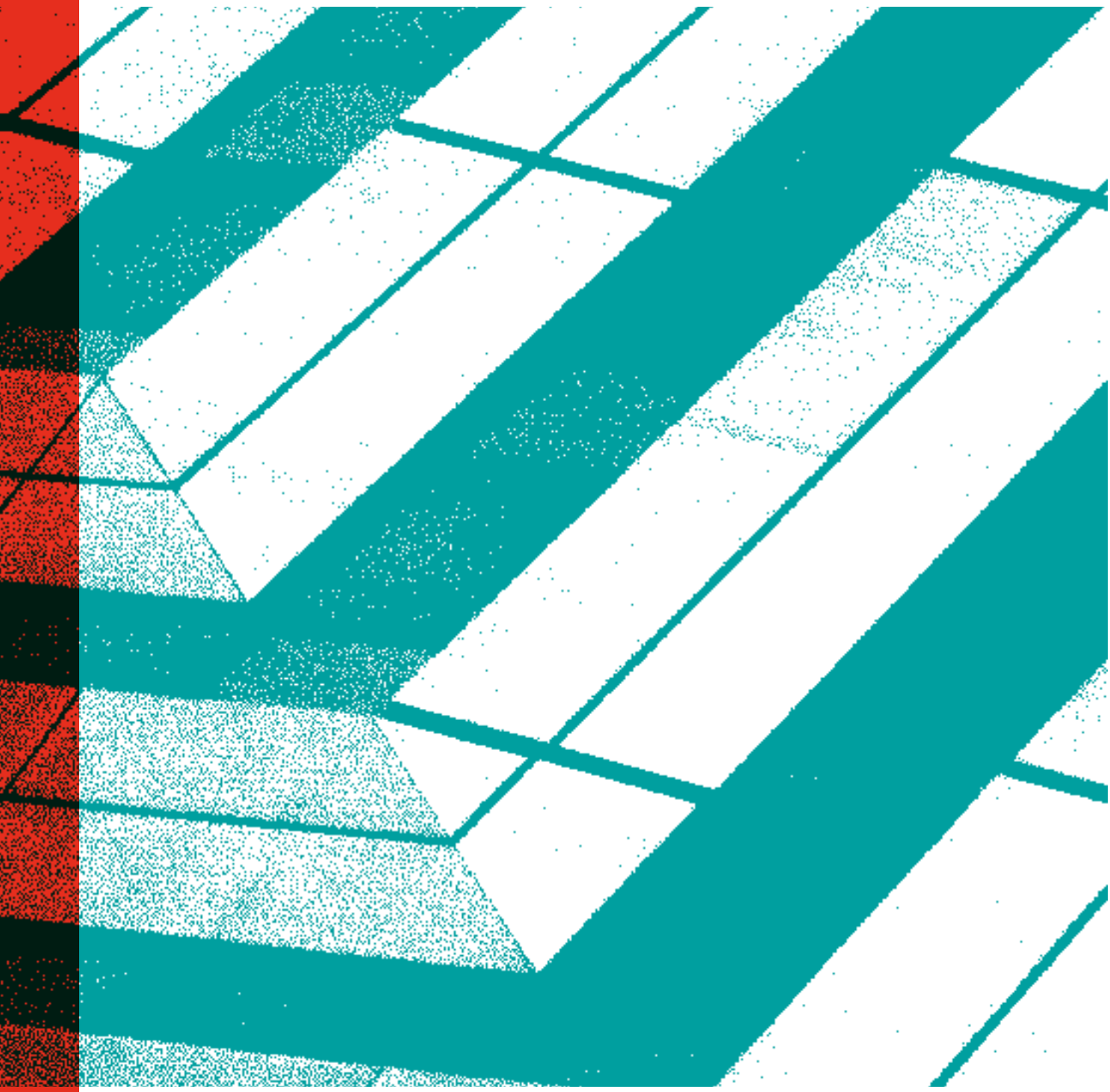
Vigilance Plans Reference Guidance

*Sherpa

First edition



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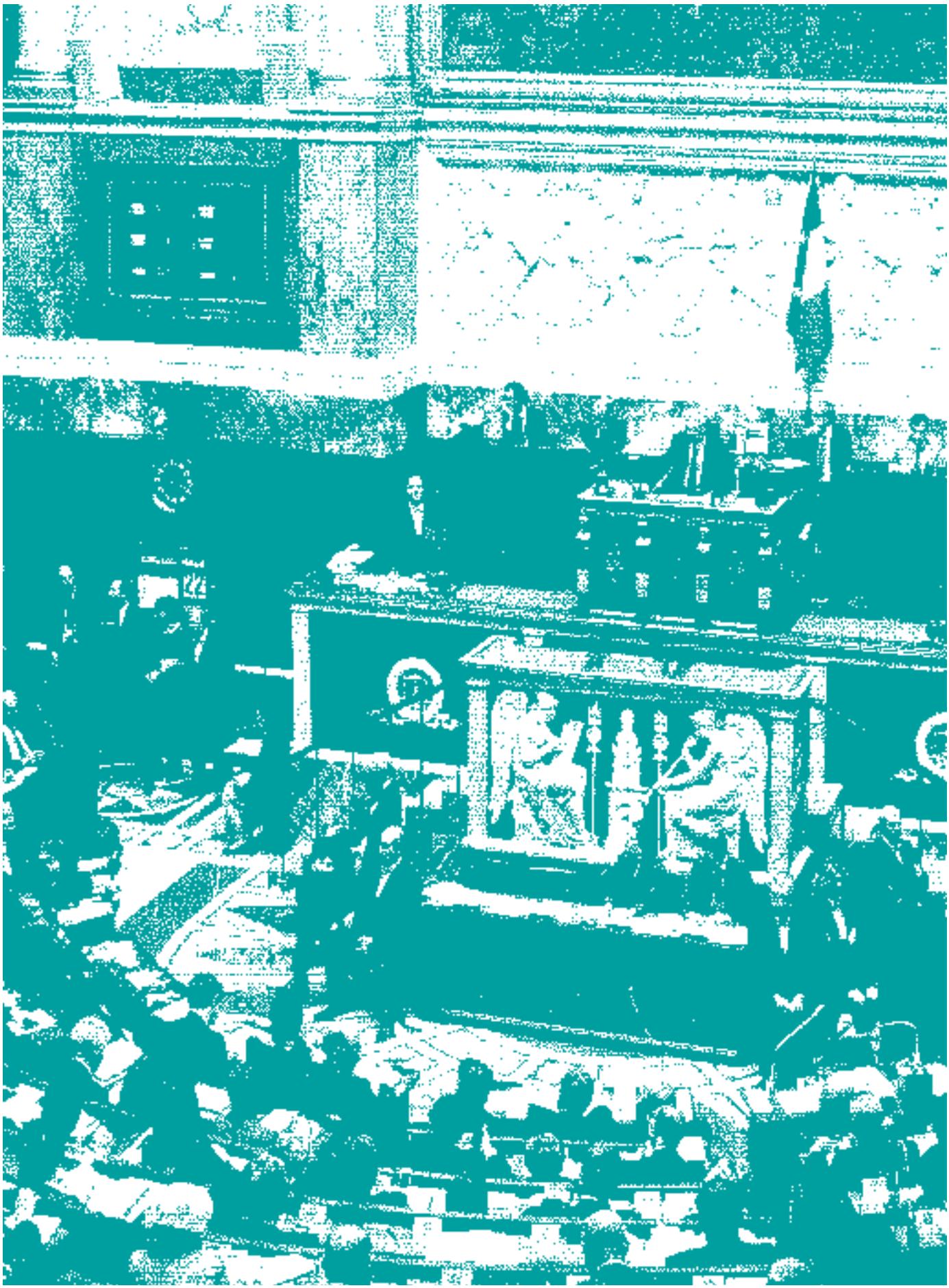
Founded in 2001, Sherpa fights new forms of impunity linked to globalisation and defends victims of economic crimes.

Sherpa strives to put the law at the service of a fairer globalisation. We use creative legal means, relying on four interdependent activities: research, strategic litigation, advocacy and capacity building.

Sherpa's work has led to the remediation of communities affected by economic crimes, landmark court decisions against multinationals and their executives and groundbreaking legislative policies, such as the Law on the Duty of Vigilance.



Introduction

The purpose of this Vigilance Plans Reference Guidance (hereinafter the "Guidance") is to explain our organisation's understanding of Law No. 2017-399 of 27 March 2017, on the duty of vigilance of parent and instructing companies[1] (hereinafter the "Law on the Duty of Vigilance") and to provide a tool for the various actors who wish to take it up. In particular, this Guidance should enable civil society, including trade unions and non-governmental organisations (NGOs), to address or deepen their knowledge of the Law.

They will be able to use this document for their actions that contribute to the respect of human rights and the environment on the basis of the Law, in all sectors of the economy, whether through litigation or advocacy. It may serve as a support tool in the dialogue with stakeholders on the implementation of the new obligations resulting from the Law on the Duty of Vigilance. The Guidance could also be used as a training and awareness-raising tool on the necessary legislative improvements. It will also provide input for the development of new European or international tools for vigilance.

However, the Guidance may in no way reflect any "minimum expectations" of our organisation and may not automatically validate, for stakeholders such as Sherpa, Plans that have been inspired by or could refer to it.

The Law on the Duty of Vigilance in a few words

After a legislative saga[2], the French National Assembly finally adopted the Law on the Duty of Vigilance in February 2017. It was partially censored by the French Constitutional Court the following month because of the civil fine, which lacked compliance with the requirements of criminal legality[3]. For the rest, the provisions were declared in accordance with the Constitution.

The Law on the Duty of Vigilance establishes a duty of vigilance in the French Commercial Code, i.e. a legal obligation of prudent and diligent conduct, owed by the parent companies of groups that employ at least 5,000 employees in France or 10,000 employees worldwide.

For these companies, this duty of vigilance consists in establishing, effectively implementing and publishing "reasonable vigilance measures adequate to identify risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of individuals and on the environment[4]". These measures must concern subsidiaries, subcontractors and suppliers with whom an established business relationship is maintained. They must be formalised in a vigilance Plan (hereinafter the "Plan"), i.e. a material support for vigilance, made public and included in the annual report, as well as in a report on its effective implementation. Vigilance measures include, but are not limited to: risk mapping, value chain assessment processes, mitigation and preventive actions, alert mechanisms and monitoring systems on the effective and efficient implementation of measures.

1. *LAW No 2017-399 of March 27, 2017 on the Duty of Vigilance of parent companies and instructing companies, JORF No 0074 of 28 March 2017, text No 1, hereinafter LAW No 2017-399 of 27 March 2017 on the Duty of Vigilance.*

2. Catherine MONNET, « Il était une fois une loi ». *La Chronique d'Amnesty International, Entreprises*, 20 September 2017, [https://www.amnesty.fr/responsabilite-des-entreprises/actualites/entreprises-il-etait-une-fois-une-loi]

3. French Constitutional Court, Decision No. 2017-750 DC of 23 March 2017, *Law on the Duty of Vigilance of parent and instructing companies*, cons. 13 et 14.

4. *French Commercial Code*, art. L. 225-102-4, resulting from *LAW No. 2017-399 of 27 March 2017 on the Duty of Vigilance*, art. 1.

The Law also provides that the Plan is to be drawn up in association with the company's stakeholders, where appropriate, through multi-stakeholder initiatives within sectors or at a territorial level[5]. This provision recalls the necessary engagement of the stakeholders, in particular those directly impacted, in the development of the Plan and its effective rolling out. The Law provides for two different implementation mechanisms. One concerns compliance with the Law as a preventive measure, with recourse to the judge. The other refers to the common civil liability law, in the event of damage resulting from a lack of vigilance.

Indeed, any person having a legal interest in bringing proceedings may, after a formal notice has remained unsuccessful after three months, ask the judge, ruling in summary proceedings where necessary, to order the establishment, disclosure and effective implementation of vigilance measures, including under penalty payment. In addition, in the event of damage, any person having an interest in bringing proceedings may bring an action before the court, seeking compensation, including if the damage takes place abroad. The plaintiffs will then have to demonstrate a breach of the duty of vigilance, a damage and a causal link between them.

The Law partially came into force on 28 March 2017. The first Plans were included in the 2017 annual reports, published mainly in 2018. The first report on the effective implementation of the Plan and the possibility of taking legal action under the Law, however, will only be available from the publication of the annual reports for the 2018 financial year, that is to say, for most of them, in 2019[6].

The first vigilance Plans in a few words

The first Plans published in 2018, particularly short[7], are of a lightness that contrasts with the importance of the stakes of the Law on the Duty of Vigilance. Is this phenomenon indicative of companies' concern about the compliance of their activities with human rights and environmental standards? Or is it a sign of a lack of consideration for the new obligations resulting from the Law? Most of these Plans do not enable us to understand precisely which risks have been identified by the businesses, their location within the group and even less how companies respond to them.

> However, the duty of vigilance does include, in addition to the establishment and effective implementation of measures, an obligation of transparency and disclosure, through the publication of the Plan, which is the material support of the obligation.

Without a complete and accurate picture of the risks and their management, the company and its stakeholders are not in a position to know or alert about the company's impacts, nor to be adequately committed to their resolution. Thus, the lack of information does not allow vigilance to be effective, although this is also one of the aspects of this new legal obligation. Indeed, the companies liable for the obligation must ensure the Plan is carried out "effectively"[8].

5. *LAW No. 2017-399 of 27 March 2017 on the Duty of Vigilance*, art. 1, para. 4.

6. *LAW No. 2017-399 of 27 March 2017 on the Duty of Vigilance*, art. 4.

7. For example, the parent company of a major group in the extractive sector has published a six-page Plan, while the group has more than 900 subsidiaries operating in nearly 130 countries.

8. *French Commercial Code*, art. L. 225-102-4.-I; see also, French National Assembly, *Report No. 2628, Duty of Vigilance of parent and instructing companies, M. Dominique Potier*, 11 March 2015, [http://www.assemblee-nationale.fr/14/rapports/r2628.asp#P252_90424], "As it stands, the draft law does not simply require the company to provide proof that inspectors have visited the company, for example in textile factories, but to prove that they have effectively inspected them."

Moreover, the obligation to publish the vigilance Plan must allow effective recourse to justice on the basis of the Law. The parliamentarians had ultimately waived the reversal of the burden of proof in the context of liability actions[9], as it appeared in the first version of the bill, in exchange for a sincere and exhaustive publication of measures.

> "If the mechanism waives a reversal of the burden of proof, it nevertheless adjusts it to restore equality between the parties. The obligation to communicate the vigilance plan to the public allows the plaintiff to know the measures taken by the company to prevent violations of rights and situations of corruption[10]".

Finally, the soft law norms for the responsible conduct of companies that define the notion of due diligence include a requirement for transparency[11].

Indeed, these norms of reference make it possible to define due diligence as the voluntary, constant, prudent and diligent conduct of companies that seeks to identify, prevent and remedy the risks and impacts of their activities on human rights and the environment, through their value chains[12]. This due diligence includes an imperative of transparency and communication around the diligence measures taken by companies to ensure their effectiveness[13]. The Law on the Duty of Vigilance is explicitly intended to enshrine these soft law norms in positive law. They must therefore clarify its interpretation and implementation and encourage companies liable for the obligation to publish the vigilance measures in a sincere and comprehensive manner[14].

9. French National Assembly, *Draft law No. 1519, on the Duty of Vigilance of parent and instructing companies*, 6 November 2013, [http://www.assemblee-nationale.fr/14/propositions/pion1519.asp]

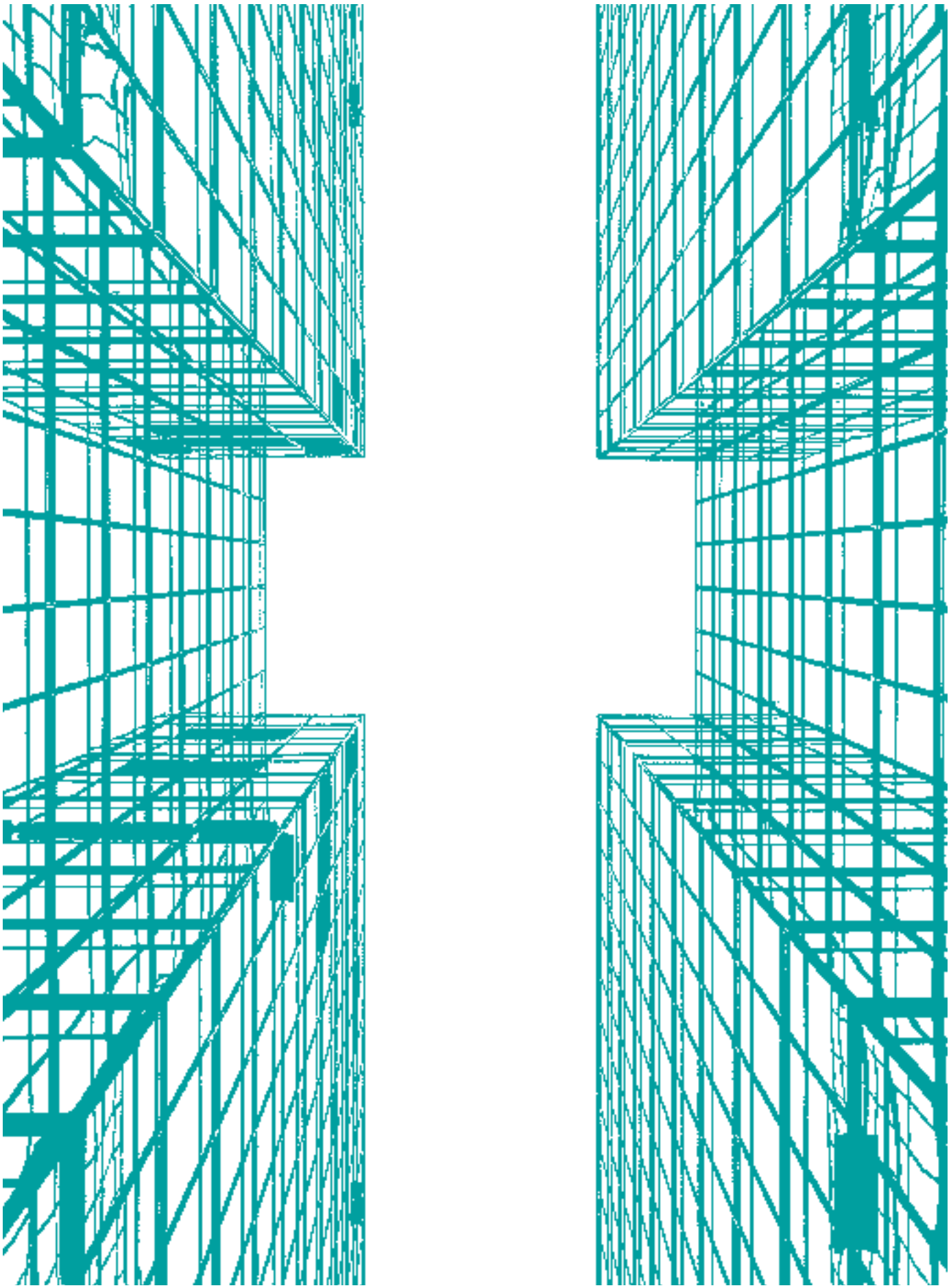
10. French National Assembly, *Report No. 2628*, op. cit.

11. These standards are listed in the Annex.

12. The concept of soft law refers to non-binding standards adopted by national, regional and international institutions. In terms of responsible business conduct, the main focus is on: United Nations, Guiding Principles on Business and Human Rights, 2011, [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_fr.pdf]; OECD, Guidelines for Multinational Enterprises, 2011, [http://www.oecd.org/fr/daf/inv/mne/principesdirecteursdelocdea-lintentiondesentreprisesmultinationales.htm]

13. See OECD, *Guidelines*, Chapter II, General Policies, para. 10, Chapter III, Disclosure and Chapter IV, Human Rights, para. 4; see also United Nations, Guiding Principles on Business and Human Rights, II, Principles 16 and 21.

14. French National Assembly, *Draft law No. 2578, on the Duty of Vigilance of parent and instructing companies*, 11 February 2015, explanatory statement, [http://www.assemblee-nationale.fr/14/propositions/pion2578.asp], "it is important to transpose into French law the duty of vigilance» contained in the soft law norms of reference, also listed in the explanatory statement"



Executive summary

The Guidance is divided into two parts. On the one hand, the “cross-cutting principles”, i.e. the content, scope and perimeter of the obligation, which must constantly guide the company’s conduct in the exercise of the duty of vigilance. These principles should therefore be kept in mind and integrated transversely into the Plan. Indeed, the duty of vigilance is first and foremost a general obligation of prudent and diligent conduct[15].

The second part deals more specifically with the five measures announced by the Law, it being specified that these measures are neither restrictive nor exclusive. The Law also provides that they may be supplemented by a decree[16]. It would appear logical that the company should take any additional measure to meet its general duty of vigilance, namely the identification of risks and the prevention of severe impacts on human rights, the environment, health and safety of persons in its value chain.

At each stage and in response to the lack of transparency of the first Plans published in 2018, the Guidance highlights the elements to be retained and published in order to respect the transparency requirement of the duty of vigilance, while ensuring its effectiveness. These items are included in the executive summary below. They appear in red colour in the body of the Guidance. In addition, there are explanations anchored in the text of the Law, but also in the requirements of soft law instruments. Indeed, as mentioned in the introduction, these norms of reference must guide the interpretation and implementation of the Law. Furthermore, the vast majority of companies claim to adopt these norms[17]. These references should thus enable them to quickly make the connection between their long-standing commitments and the new obligations resulting from the Law.

The Guidance also presents at each stage avenues for development that can feed into the dialogue with stakeholders. Occasionally, the Guidance also provides practical cases within boxes. As such, it is important to note the authors’ deliberate choice not to talk about “best practices”. The quality of vigilance measures will depend, for each company, on its particular operating circumstances.

15. We can speak of a "chapeau" of the obligation, *French Commercial Code*, art. L. 225-102-4.-I paragraphs 1 to 4.

16. *French Commercial Code*, art. L. 225-102-4.-I.

17. French National Assembly, *Draft Law No 2578*, op. cit. explanatory memorandum “These vigilance measures are already taken by many companies in the context of sectoral initiatives or international commitments such as the Global Compact. It is therefore only a question of incorporating into our legislation the use of rules of good conduct to which the majority of companies already subscribe, in accordance with our legal model.”

The main points to remember

I. Cross-cutting principles: content, scope and perimeter of the duty of vigilance

The cross-cutting principles must constantly guide the company's conduct in the exercise of its duty of vigilance and should be integrated throughout the whole Plan.

1. Content of the duty of vigilance

It is a legal obligation of prudent and diligent conduct, making it possible to identify and prevent risks and severe impacts on human rights, environment, health and safety. It is materialised in a vigilance Plan. A **formalised, accessible, transparent, exhaustive and sincere** Plan is made public in a visible way on the group's websites, and communicated within the group as well as to its commercial partners. It is updated regularly and in particular in case of major event. It is complemented by a report on the effective implementation, i.e. a synthetic narrative document including indicators to demonstrate **the effectiveness and efficiency of the Plan's measures.** This implementation report is updated once a year. Both documents are included in the annual report and reflect each year, in a comparable way, the state of vigilance measures at the end of the financial year.

2. Companies liable for the obligation of vigilance

The Plan should contain relevant information that have led to determine why the company is covered by the Law, in particular, the list of direct and indirect subsidiaries considered for the calculation of the number of employees during the last two financial years, the number of employees per entity included and their location. For controlled companies that are also liable for the duty of vigilance, the parent company must clarify whether these entities are implementing their own Plan or whether the parent company is allowing them to benefit from the exemption mechanism provided by the Law. Companies that benefit from this exemption must indicate it and refer by a hypertext link to the Plan established by the parent company.

3. Organisational perimeter of the obligation of vigilance: companies on which diligence must be exercised

a — The group scope: controlled companies

The Plan should contain information on the group scope of the vigilance Plan drawn up by the company liable for the obligation, i.e. the list of controlled companies covered by the Plan, with, for each of them, information on the control exercised by the parent company that may justify the inclusion or exclusion from the Plan scope, the countries of location and operation, the

number of employees and the activities. **Publication should be in a form that makes it possible for information to be processed.** It can exceptionally be done separately, as long as the plan refers to it by a hypertext link.

b — The extra-group scope: suppliers and subcontractors

The company liable for the obligation should determine and publish information relating to the extra-group scope of the duty of vigilance, i.e. the list of suppliers and subcontractors covered by the Plan as a result of the established commercial relationships maintained with the parent company and its subsidiaries. Depending on the number of suppliers and subcontractors involved, the publication may not necessarily be produced directly in the body of the Plan itself. In this case, it should be possible to refer to it clearly, for example by a hypertext link. The publication should be in a form that makes it possible for information to be processed. Information should include the name, address, products or services provided, number of workers, products used and their origin, the list of authorised subcontractors, the share of the supply chain represented by the publication, the latest update of information and the timetable for upcoming updates.

Companies that are unable to identify precisely all of this scope or information in the immediate term should clearly indicate in the published Plan the timeline and intermediate objectives they set in that matter. **Businesses that are partially or totally unable to identify this scope or this information within a reasonable period of time should consider reorganisation.**

4. Substantial perimeter of the obligation of vigilance: impacts on which vigilance must be exercised

The company liable for the obligation should list the human rights it must respect, determine their content and potential breaches in the different countries where the group operates. The same applies to environmental, health and safety norms, it being specified that **these three fields are interdependent and indivisible**. The published Plan must highlight the vigilance measures taken for this entire substantial perimeter. When discrepancies are identified between international law, French law and local law, with a risk or severe violations arising therefrom, the Plan should highlight these legislative variations. It should also clearly state the standards on the basis of which the company defines its conduct, emphasising, where appropriate, how it will solve conflicts of standards.

5. Temporal perimeter of the duty of vigilance: when to be vigilant

The company liable for the obligation must **consistently** adopt a vigilant conduct whereby it identifies and prevents risks and severe impacts. As such, the Plan, which embodies compliance with the obligation, should be made available to the public as soon as it is drawn up and then updated as regularly as possible, in line with the evolution of risks, damages and their management. **This is not just a simple forward reporting exercise.**

6. Interpersonal perimeter of the duty of vigilance: actors who take part in the duty of vigilance

a — General engagement of stakeholders

Stakeholders' engagement is also to be visible in each measure of the Plan. Companies are strongly encouraged to do so by the Law and by the soft law norms it enshrines in positive law. In any case, it is unavoidable in practice to ensure the establishment and effective implementation of the Plan and the reasonableness of vigilance measures. Also, companies should publish a list of internal and external stakeholders involved in the establishment and implementation of each measure of the Plan.

The publication should indicate the methodology for the selection of stakeholders, i.e. their definition and the criteria that led to their selection. The company should also provide details on the frequency, spaces and mode of interaction preferred: prior information, interviews, hearings, consultations, questionnaires, discussions in boards of directors, social and economic committees or European works councils, etc. The results of these actions should be indicated and the company should justify their consideration or exclusion in the preparation and implementation of the Plan.

b — Multi-stakeholder initiatives within sectors or at territorial level

If multi-stakeholder initiatives are used within sectors or at an international level, the company should publish a list of them, as well as a critical evaluation of each initiative at regular intervals.

The evaluation should take into account, in particular, the relevance of the stakeholders involved, the mode of interaction, the specifications of the initiative and its governance, the quality of internal complaints mechanisms, the results of the follow-up and effectiveness indicators, the criticisms made by observers and the degree of transparency of the initiative.

c — Governance organisation

The organisation of the governance of the Plan should also be indicated in a global manner and for each measure of the Plan.

II. Vigilance measures to be established, implemented and published

The measures that are set out in the Law are not restrictive or exclusive: the company must put in place any additional measures that enable it to meet its general obligation of vigilance, i.e. the identification and prevention of risks and severe violations according to the perimeters previously identified.

1. "A risk mapping meant for their identification, analysis and prioritisation"

a — Risk identification

The Plan should contain the methodology for identifying risks within the scope of the Plan and the tools used or planned to be used by the company. Disclosure must be comprehensive and sincere with regard to the results of the risk identification and must present in detail the risks and severe impacts, for example, for each product, region, entity, activity and sector. If the identification of risks and severe impacts is incomplete, the company should specify the reasons and a timeline for its completion. **Of course, these risks concern third parties and the environment, and not the company itself.**

a — Analysis and prioritisation

The company should report on the methodology used for risk analysis, assessment and prioritisation. This depends on the severity, assessed according to the extent, scale, and reversibility or not of the damage, and on the probability of the risk or aggravation of the damage. **The prioritisation is not intended to exclude risks or severe violations from the scope of vigilance but to prioritise responses over time in the event of resource constraints, with the ultimate objective of addressing all risks.**

The final and global prioritisation of all risks set up by the company should also be presented in an **accessible, sincere and comprehensive** way, which implies presenting **several maps**, if necessary, for their readability.

2. "Regular evaluation procedures regarding the situation of subsidiaries, subcontractors or suppliers with whom there is an established commercial relationship, in line with the risk mapping"

Regarding the organisational perimeter defined for the Plan, the company should determine and publish the tools, methodology, objectives and timetable of the evaluation processes on the situation of subsidiaries, suppliers and subcontractors. As indicated by the use of the plural, these measures must be multiple and complementary in order to avoid deficiency in the evaluation and monitoring of companies as much as possible. The company should publish the results of the evaluations and in particular the relevant indicators and their method of elaboration and calculation, in order to highlight breakthroughs, stagnation and regression. It should indicate the corrective measures adopted, if any, and their timeline.

3. "Appropriate actions to mitigate risks or prevent severe impacts"

The company must set up preventive, mitigation and **remediation** measures with stakeholders based on the prioritisation of risks and the company's human, technical and financial resources. For each risk identified, the company must publish a summary of the prevention, mitigation and remediation measures to be implemented, their timeline and indicators to monitor their effectiveness and efficiency. It would also be relevant to indicate the methodology for selecting the indicators and data sources.

4. "An alert and complaint mechanism relating to the existence or realisation of risks, drawn up in consultation with the representative trade union organisations within the company"

a — Establishment of various tools forming the alert and complaint mechanisms

The company should set up **decentralised** mechanisms according to the scope of the duty of vigilance, and mechanisms for reporting information at a global level or for centralisation to ensure that the Plan is updated as necessary. It should also distinguish between mechanisms relating to risks and those relating to impacts and determine processes, guarantees and treatment schedules specific to each. Emergency cases must be anticipated.

The list of the various mechanisms and processes, their scope and recipients, must be published providing in particular details on **their accessibility, adaptability, security and confidentiality**. Information must be widely disseminated internally and externally, in a way that is appropriate for each potential recipient of the different mechanisms. To demonstrate the effectiveness and efficiency of those mechanisms, the Plan must contain indicators on how alerts and complaints are taken into account in identifying

and responding to risks or violations. Such indicators include the publication of processed and anonymised cases. **If comprehensive mechanisms cannot be immediately set up, the company must plan clear intermediate steps, a global timetable and report on them in its Plan.**

b — Consultation with the trade unions considered as representative in the said company

The Plan should contain details on the methodology used to develop alert and complaint mechanisms in association with stakeholders. It must necessarily provide the elements relating to the engagement of trade unions in the preparation of the mechanism and, ideally, in the monitoring of alerts and complaints.

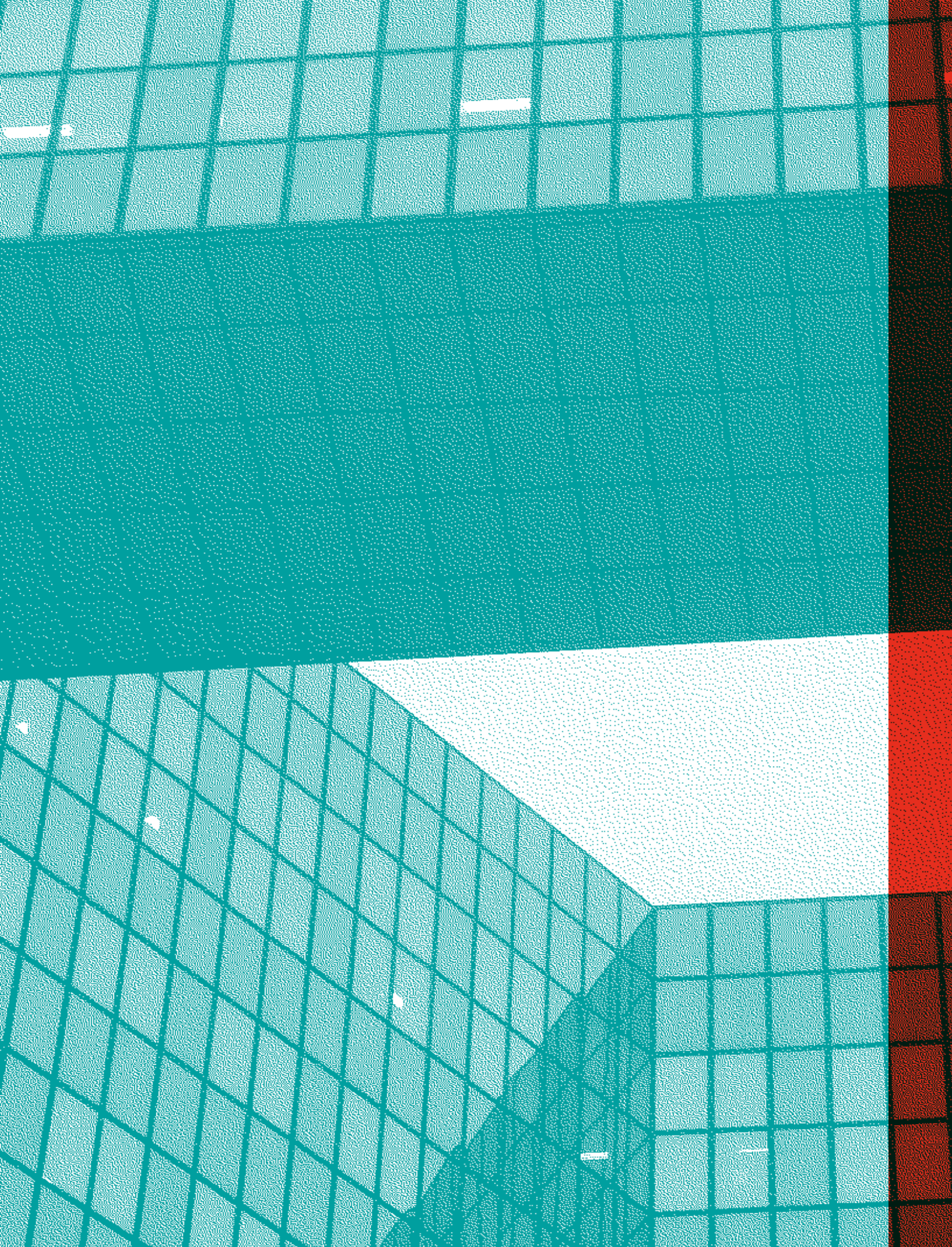
5. "A system monitoring implementation measures and evaluating their effectiveness"

The company will have to establish a monitoring system for each risk, violation and corresponding measure, as well as a global monitoring system of the Plan. Such a monitoring system must necessarily include the establishment of indicators for each vigilance measure and for each severe risk or violation, in order to demonstrate both the effectiveness and efficiency of the measures. There will be therefore indicators of means and results.

The company must publish the monitoring items in an accessible, exhaustive way and in accordance with the identification and prevention of risks and breaches. Ideally, in the published Plan, monitoring measures and their results respond to the risks as well as to prevention, mitigation and remediation measures that are identified and implemented. **This may involve the establishment of a follow-up table or other graphical tool that would satisfy the informative aspect of the obligation.**

The company should also provide a methodological explanation on the selection of indicators and statistical tools, as well as on the sources of the data used.

As far as method indicators are concerned, **the resources allocated to measures and their development may be particularly relevant.** The company may indicate the governance of the monitoring. To account for the constant vigilance, the company should regularly update the monitoring tool according to the evolution of risks, violations and their treatment and for any significant event occurring while implementing the Plan. The same applies to the monitoring document made public.



Details about the proposed items

I.

Cross-cutting principles: content, scope and perimeter of the duty of vigilance

The cross-cutting principles must constantly guide the company's conduct in the exercise of the duty of vigilance and must be integrated throughout the Plan.

1. Normative content of the duty of vigilance

It is a legal obligation of prudent and diligent conduct, making it possible to identify and prevent risks and severe impacts on human rights, environment, health and safety. It is materialised in a vigilance Plan. A **formalised, accessible, transparent, exhaustive and sincere** Plan is made public in a visible way on the group's websites, and communicated within the group as well as to its commercial partners. It is updated regularly and in particular in case of major event. It is complemented by a report on the effective implementation, i.e. a synthetic narrative document including indicators to demonstrate **the effectiveness and efficiency of the Plan's measures**. This implementation report is updated once a year. Both documents are included in the annual report and reflect each year, in a comparable way, the state of vigilance measures at the end of the financial year.

The duty of vigilance is a general obligation of conduct, the purpose of which is to identify risks and prevent severe breaches of human rights and fundamental freedoms, health and safety of persons and the environment resulting from the activities of a group and its value chain[18]. In addition to the substantial and formal scope thus outlined, the obligation includes three main elements : establishment, effective implementation and publication of reasonable vigilance measures to identify and prevent such risks. These measures are formalised in a vigilance Plan. In this first edition, the Guidance focuses on the third part of the obligation, namely the obligation of publication. Indeed, the Law states that "The vigilance plan and the report concerning its effective implementation shall be published and included in the report mentioned in article L. 225-102".

The obligation to publish applies not only to the Plan itself but also to the implementation report, as from the second financial year after the entry into force of the Law[19]. The report deals with the effective implementation of the Plan, i.e. **it must demonstrate that the Plan is not merely a documentary or declaratory exercise but that it also produces effects**. To this end, it must contain effectiveness indicators to prove the reality of the resources invested in the implementation of the adopted measures and their effects on risks.

The obligation to publish targets two addressees. First, it is based on "making public", i.e. actively disseminating information to the public about the vigilance of the company[20].

Then the publication obligation relies on the inclusion of the Plan and the report on its effective implementation in the annual report. In accordance with the provisions of the French Commercial Code[21], the annual report of business enterprises is presented to the annual meeting by the board of directors, the executive board or the managers and covers the past financial year. It is therefore an obligation to provide information expected from the executives of commercial companies and addressed to the partners or shareholders of these companies. It requires that the content of the vigilance Plan be established and validated internally by the governing bodies and presented to the general assembly and, as the case may be, to any partner or shareholder who so request.

18. Marie-Caroline CAILLET, Marie-Laure GUISLAIN and Tamsin MALBRAND, « La vigilance sociétale en droit français », *Ritimo, coll. Passerelle*, Paris, December 2016, 110 p.

19. *LAW No. 2017-399 of 27 March 2017 on the duty of vigilance,* art. 4.

20. The right of access to information, which is consubstantial with the freedom of expression, is mentioned in international, regional and French laws: *International Covenant on Civil and Political Rights, Art. 19, para. 2; Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 10 para. 1; see also the *Aarhus Convention of June 25, 1998 on Access to Information and Public Participation in Environmental Matters and the 2004 Charter for the Environment*, Art. 7.

21. *French Commercial Code,* Art. L. 232-1, para. 1, complemented by Art. L. 225-100 and L. 227-1, para. 2, for simplified joint stock companies.

The Plan made public should therefore, in order to meet the various information requirements aforementioned, be accessible, formalised, exhaustive and sincere. These last two requirements are all the more important as companies can be exposed to very strong criticism, or even prosecution, when they lack transparency or engage in “window dressing” or “image laundering”.

The accessibility requirement specifically implies that the publication be made visible online on the company's website, that it be translated at least into the languages of the countries in which it operates, that it be sent out to workers and that it be regularly updated. In addition, documents should be made available to suppliers, subcontractors and their workers in accessible formats and languages.

This excludes the mode of operation “by reference” to other sections of the annual report or other documents established by the company. Such a practice undermines the imperatives of accessibility to information by reducing its readability, except in cases where the amount of data relating to certain aspects of the Law would make the Plan unreadable. This may be the case for lists of subcontractors and suppliers, which regularly reach several thousand from “rank 1”. In this case, a hypertext link allowing direct access to the information should be planned, always with a concern for transparency, readability and accessibility.

Avenues for evolution

For the moment, most companies find it sufficient to include the document in the annual report, ignoring the publication requirement of the Law. It should be noted, however, that several companies have already posted their Plans on their websites.

The Plans of these companies are also limited to a few pages, whereas the importance of their activities and risks calls for much more extensive documentation. In order to ensure the effectiveness of vigilance, this publication should be updated on a regular basis.

As far as the implementation report is concerned, it is expected that it will take the form of a synthetic narrative of a few pages, on the key events and indicators of effective implementation. In particular, it should highlight the major events during the financial year that may have had a significant impact on the scope of the Plan, leading to the progress, stagnation or significant regression of some of the indicators. **It should also describe the corrective measures that will be adopted as a result of the trends revealed by the indicators.**

As the implementation report concerns the overall effectiveness of the Plan, it would suffice if it were updated once a year, when the Plan is included in the annual report. Shorter deadlines would probably not allow to identify overall trends.

	What the soft law says about the publication and transparency of vigilance measures
OECD Guidelines, Chapter II, General Policies, para. 10, Chapter III, Disclosure, para.1 and 35 and Chapter IV, Human Rights, para. 44	The Principles state that companies must "account for how they address adverse impacts". They should "ensure the timely and accurate information is disclosed on all material matters regarding their activities". The comments encourage **"to provide easy and economical access to published information and to consider making use of information technologies to meet this goal**. Information that is made available to users in home markets should also be available to all interested users. Businesses may take special steps **to make information available to communities that do not have access to printed media**". They recommend that the human rights declaration "be approved at the most senior level" and "publicly available and communicated internally and externally to all personnel, business partners and other relevant parties".
UN Guiding Principles on Business and Human Rights, II, Principles 16 and 21	The Principles require the expression of companies' commitment to human rights and its approval "at the most senior level of the business enterprise". The commitment "is publicly available and communicated internally and externally to all personnel, business partners and **other relevant parties**". To account for their diligence, "business enterprises should be prepared to communicate this externally". They should "report formally on how they address" the adverse impacts of their activities on human rights. Communication should be "of a form and frequency that reflect enterprise's human rights impacts and that are accessible to its intended audiences" and "provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved".
ILO Tripartite Declaration, General Policies, para. 10.d	Companies, including multinational enterprises, should "account for how they address" their adverse impacts on internationally recognised human rights.

2. Company liable for the obligation of vigilance

> The Plan should contain relevant information that have led to determine why the company is covered by the Law, in particular, the list of direct and indirect subsidiaries considered for the calculation of the number of employees during the last two financial years, the number of employees per entity included and their location. For controlled companies that are also liable for the duty of vigilance, the parent company must clarify whether these entities are implementing their own Plan or whether the parent company is allowing them to benefit from the exemption mechanism provided by the Law. Companies that benefit from this exemption must indicate it and refer by a hypertext link to the Plan established by the parent company.

The Law targets “any company that employs, by the end of two consecutive financial years, at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory or abroad[22]”.

It is specified that “subsidiaries or controlled companies that exceed the thresholds referred to in the first paragraph shall be deemed to satisfy the obligations provided in this article, if the company that controls them, within the meaning of Article L. 233-3 of the French Commercial Code, establishes and implements a vigilance plan covering the activities of the company and of all the subsidiaries or companies it controls”. Companies liable for the duty of vigilance are therefore companies with a registered office in France that reach the thresholds concerning the number of employees for two consecutive financial years. The calculation is always based on the company that is responsible for the duty of vigilance.

> Subsidiary companies of foreign groups may fall within the scope of the Law through their own French and foreign subsidiaries[23].

When, within a group whose parent company is liable for the duty of vigilance, controlled subsidiaries within the meaning of article 233-3 of the French Commercial Code are themselves liable for the obligation, they do not have to set up a vigilance Plan, as long as their parent company has properly included them in their own Plan.

With regard to the calculation of thresholds, the expression “direct or indirect subsidiaries” is to be understood within the meaning of article L. 233-3 of the French Commercial Code which defines control[24]. Indeed, it cannot be about the definition of a subsidiary set out in article L. 233-1 of the Commercial Code, since this article is not targeted by the Law. However, regarding the establishment of companies liable for the obligation and the use of the exemption mechanism, the Law makes explicit reference to article L. 233-3 of the French Commercial Code[25]. This article constitutes somehow “the criterion of the ordinary law of control, applicable whenever the Law refers to control

22. *French Commercial Code,* Art. L. 225-102-4. -I

23. French Constitutional Council, Decision No. 2017-750 DC of March 23, 2017, *Government’s comments*; the provisions "will thus apply to French parent companies but also to French subsidiaries of foreign groups".

24. According to this article, any person, whether natural or legal, is considered to control another “1° When they directly or indirectly possess a portion of the capital conferring on them a majority of voting rights in the general meetings of the company ; 2° When they alone possess a majority of voting rights in the company by virtue of an agreement concluded with other partners or shareholders and which is not against the interest of the company; 3° When they determine in fact, by the voting rights they possess, the decisions in the general meetings of the company ; 4° When they are a partner or shareholder of this company and have the power to appoint or dismiss a majority of the members of the administrative, management or supervisory bodies of this company. II. – They are presumed to exercise this control when they directly or indirectly possess a portion of the voting rights greater than 40% and that no other partner or shareholder possess directly or indirectly a portion greater than their own. III. – Regarding the same sections of this Chapter, two or more persons acting in concert are considered as jointly controlling another person when they actually determine the decisions taken at general meetings.”

without giving a specific definition valid for the implementation of the measure that depends on it[26]". Control may be directly carried out by the parent company or indirectly by other companies that are also controlled.

In order to be consistent with the other information and reporting obligations of commercial companies, another option would be to calculate the thresholds on the basis of the consolidated scope of article L. 233-16 of the French Commercial Code, which also corresponds to the internal perimeter of the vigilance Plan to be established by companies. For the identification of employees, companies should refer to the definitions given by the French Labour Code in articles L. 1111-1 to 1111-3.

Avenues for evolution

Information on controlled subsidiaries and the number of employees usually allows stakeholders to clearly identify companies that are liable for the obligation and those that benefit from the exemption mechanism within the group. It contributes to the more global transparency required from companies about value chains that are often still opaque. For the time being, information to calculate thresholds and verify the applicability of the Law to a given company is difficult to access. The criteria for calculating thresholds are quite complex, and have raised many questions after the adoption of the Law.

These points make it particularly difficult to monitor compliance with the Law, especially since **no official list of companies covered has been published**. The figures announced, which are very vague, since they vary between 100 and 250 companies[27], do not correspond to the real number of Plans that we were actually able to collect, from various sources and sometimes with limited means[28]. The gap with the projected data may result from difficulties in evaluating the effects of the exemption mechanism for controlled companies. However, in the absence of a database corresponding to the criteria of the Law or of an official list published by the Government, this assertion cannot be confirmed.

It therefore seems impossible today to control that all companies liable for the duty of vigilance comply with the Law, regardless of the declarations of these companies themselves. This situation reduces the scope of the Law, by limiting the monitoring of its implementation and the risk of litigation against companies that deliberately choose not to comply with it.

This situation also creates a risk for companies themselves. Indeed, in the absence of clarity on the list of businesses liable for the obligation and employees thresholds, it may be possible that communities of victims, employees or associations question companies for failing to comply with their duty of vigilance while these companies would not be covered by the Law. Beyond their complexity, the thresholds and calculation criteria are different from those used in France in related fields, such as extra-financial reporting or the fight against corruption, which does not make it easy to read corporate obligations. Multinational groups may also be subject to other vigilance

25. Stéphane BRABANT and Elsa SAVOUREY, « Le Plan de Vigilance, clé de la voûte de la loi relative au devoir de vigilance », *Revue Internationale de la Compliance et de l'Éthique des Affaires*, December 2017.

26. Dalloz, *Mémento Sociétés commerciales*, « Les groupes de sociétés », 11 Septembrer 2018.

27. French Constitutional Court, Decision No. 2017-750 DC of 23 March 2017, *Government's comments* "The 150 or so enterprises involved are multinational companies." ; see also French Senate, *Devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (Duty of vigilance of parent and instructing companies)*, Full report of the debates, Session of 18 November 2015, intervention by Philippe Dallier "Think about it, dear colleagues : this text will concern the 217 major French companies", [https://www.senat.fr/seances/s201511/s20151118/s20151118009.html#section1045]

28. About 80 Plans were collected.

obligations, particularly sectoral ones, under other jurisdictions, which are very similar in their content but with different thresholds for application. It would therefore be appropriate to lower and simplify the thresholds, for example by limiting the calculation of the number of employees to a single financial year and to France. It would also be conceivable to promote other application criteria than the employees number. The lowering of the Law's thresholds was requested by parliamentarians, who set the current thresholds as a "first step"[29].

> The complexity of the application thresholds, revealed after almost two years of practice, should encourage their lowering and simplification as soon as possible. A European harmonisation of vigilance obligations could also make these obligations easier to read.

Another question that has been raised in the debates is whether all corporate forms are covered by the Law. We believe that a favourable response is required. Indeed, the Law itself does not make distinctions between corporate forms and refers indifferently to "any company". The Government in its observations to the Constitutional Court also agreed on that vision, considering in particular that the SAS companies (simplified joint-stock companies) were covered[30].

This interpretation is also required in light of the objectives of the Law on the Duty of Vigilance, which seeks to impose the identification and prevention of human rights risks through groups whose impact is no longer to be demonstrated. To achieve this goal, it would not be relevant to make a difference based on the way companies are financed and not on the real social, environmental and economic impact of groups[31]. If the question of corporate form still persists, it will certainly be raised in jurisdictions that will have to decide it.

> In any case, we can anticipate repercussions for the brand image of a business enterprise that may claim, because of the form of its company contract, that it is not required to identify and prevent human rights and environmental impacts caused by its activities.

29. French National Assembly, *Report No. 2628*, op. cit., "its authors claim its first-step function (...). They may subsequently be lowered (...) either by the future intervention of the national legislator, or following a European initiative in that way."

30. French Constitutional Court, Decision No. 2017-750 DC of March 23, 2017, *Government's comments* "These obligations will apply to public limited companies but also to limited partnerships with shares and simplified joint stock companies, in accordance with the references provided for in articles L. 226-1 and L. 227-1 of the French Commercial Code."

31. Nicolas CUZACQ, « Le nouveau visage du reporting extra-financier français », *Revue des sociétés*, 2018 ; otherwise we end up with "extravagances" since for equivalent activities, revenues, sectors and impacts, some companies would be covered and others not.

	What the soft law says about companies that have to be vigilant:
UN Global Compact, Principle 1 - comments	The Principles apply to all types of organisations, regardless of sector, form or location. The Human Rights Principles are backed by the UN Guidelines, and are for all companies, "regardless of their size or sector".
UN Guiding Principles on Business and Human Rights, II, 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."
OECD Guidelines, Chapter I, Concepts and Principles, para. 1 & 4	They are addressed to all multinational enterprises, regardless of their corporate form or economic importance. "The Guidelines are recommendations jointly addressed by governments to multinational companies."
ILO Tripartite Declaration, Aim and Scope, para. 6 and General Policies, para. 10.b.	The declaration uses similar terms to the OECD and UN Principles and applies to all "multinational or other enterprises, regardless of their size, sector, operational context, ownership and structure".
Recommendation of the Committee of Ministers of the Council of Europe, Human Rights and Business (2016)	The recommendations are addressed to member states that should "encourage" or "require" that "business enterprises domiciled within their jurisdiction" or "conducting substantial activities within their jurisdiction", "carry out human rights due diligence" regardless of the size, corporate form or sector.
Conclusions of the Council of the European Union on Business and Human Rights (June 2016)	The Council calls on "all business enterprises, both multinational and domestic" to comply with international principles, by promoting human rights due diligence in their activities.

3. Organisational perimeter of the obligation of vigilance: companies on which vigilance must be exercised

a — Group scope: controlled companies

> The Plan should contain information on the group scope of the vigilance Plan drawn up by the company liable for the obligation, i.e. the list of controlled companies covered by the Plan, with, for each of them, information on the control exercised by the parent company that may justify the inclusion or exclusion from the Plan scope, the countries of location and operation, the number of employees and the activities. Publication should be in a form that makes it possible for information to be processed.

The Law provides that the Plan "shall include reasonable vigilance measures adequate to identify risks and to prevent severe impacts (...) resulting from the activities of the company and of those companies it controls within the meaning of article L. 233-16, II, directly or indirectly". Thus, the Law indirectly refers to the notion of group, by referring to the accounting consolidation scope of groups of companies. It specifically targets controlled companies within the meaning of article L. 233-16, II of the French Commercial Code, i.e. the notion of direct or indirect "exclusive control[32]", whether it is exercised directly by the parent company or indirectly through other companies that are also controlled. The Plan must therefore clearly show that these companies are included in the scope *ratione personae* of the obligation and that each of them must be subject to reasonable vigilance. The vigilance measures presented in the Plan must therefore be applied, in an appropriate way, to all these companies.

Avenues for evolution

The aim of this provision is to clearly identify within the group the entities over which the parent company exercises some form of control in terms of vigilance, enabling to reflect in law the reality of the group's economic, social and environmental impact. Parent companies can no longer hide behind the opacity of their value chain or the autonomy of legal entities to avoid any form of legal liability. They must now identify and prevent risks, including within the group.

> The identification of the group's entities and their location contributes to the transparency and effectiveness of vigilance. Indeed, it allows stakeholders to express themselves when there is a gap between the information presented in the Plan and the reality of risk management at the operational level.

Article L. 233-16, II of the French Commercial Code, on the accounting consolidation scope, has the advantage of being already known to companies.

32. This article provides that "Exclusive control by a company results either from the direct or indirect possession of a majority of the voting rights in another company; or the appointment, for two successive financial years, of a majority of the members of the administrative, management or supervisory bodies of another company. The consolidating company is presumed to have made this designation when, during this period, it has directly or indirectly possessed a portion exceeding 40% of the voting rights, and no other partner or shareholder possessed, directly or indirectly, a portion exceeding its own ; or the right to exercise a dominant influence over an enterprise by virtue of a contract or statutory clauses, where the applicable law so permits."

But it also presents several difficulties. First, this scope is limited to exclusive control, while joint control[33] may also result in some influence over the operational policy of an entity.

In addition, this notion of control is not the same as the one used previously in the Law to identify the companies liable for the obligation, by reference to article L. 233-3 of the French Commercial Code, thus creating a certain complexity in determining the scope and content of the obligation.

Finally, it should be noted that the notion of control as defined in the French Commercial Code in article L. 233-16, II would not necessarily be relevant for stakeholders or persons affected by a group's activity. The fact that a French parent company owns stakes in another company that is not characterised by exclusive control, does not protect it from being called into question. The risk to the company's image will persist. Quasi-legal risk, based on soft law, may also remain. Indeed, soft law norms expect companies to be vigilant on the whole group's scope, in the broadest possible sense.

> It would therefore be prudent for companies covered by the obligation of vigilance to exercise it as broadly as possible and to anticipate potential legislative developments in this direction.

33. *French Commercial Code*, art. L. 233-16 -III; III of the article, excluded from the scope of the law which only refers to II, defines the notion of "joint control".

b — Extra-group scope: suppliers and subcontractors

The company liable for the obligation should determine and publish information relating to the extra-group scope of the duty of vigilance, i.e. the list of suppliers and subcontractors covered by the Plan as a result of the established commercial relationships maintained with the parent company and its subsidiaries. Depending on the number of suppliers and subcontractors involved, the publication may not necessarily be produced directly in the body of the Plan itself. In this case, it should be possible to refer to it clearly, for example by a hypertext link. The publication should be in a form that makes it possible for information to be processed. Information should include the name, address, products or services provided, number of workers, products used and their origin, the list of authorised subcontractors, the share of the supply chain represented by the publication, the latest update of information and the timetable for upcoming updates.

Companies that are unable to identify precisely all of this scope or information in the immediate term should clearly indicate in the published Plan the timeline and intermediate objectives they set in that matter. **Businesses that are partially or totally unable to identify this scope or this information within a reasonable period of time should consider reorganisation.**

The Law requires companies to ensure that their Plan "include reasonable vigilance measures adequate to identify risks and to prevent severe impacts" resulting from "the activities of subcontractors or suppliers with whom they have an established commercial relationship, when these activities are related to this relationship".

The Plan will have therefore to demonstrate the integration of the subcontractors and suppliers of the parent company and of controlled companies into the perimeter *ratione personae* of the obligation and the effective exercise, on each of them, of reasonable vigilance. Hence, the vigilance measures presented in the Plan must be applied, in an appropriate way, to all the subcontractors and suppliers of the parent company and of the group companies. The Law defines the scope of vigilance over suppliers and subcontractors, first by using the concept of "established commercial relationship" and second by the connection to the activity.

The concept of established commercial relationship refers to article L. 442-6, I of the French Commercial Code, which makes the brutal termination of such relationships a civil tort[34]. According to case law, a relationship is deemed to be established when it is of a long-term nature, of a certain intensity and suggests that it will continue. It does not necessarily have to be formalised by a contract. The criterion of duration tends to diminish in the case of a new relationship but is generally of great importance and implies a long-term partnership[35].

34. By virtue of article L. 442-6, I of the Commercial Code "Engages the liability of its author and obliges him to remedy the damage caused by any producer, trader, industrialist or person registered in the register of occupations (…) to suddenly, even partially, breach off an established commercial relationship without written notice (…)".

35. Dalloz, *Dictionnaire permanent Droit des affaires*, 2018.

These criteria are more economic than legal[36] and are based, in fact, more on the quality of the relationship and the various trading partners rather than the nature of any legal relationship between the actors. Abrupt breakup as an offense is moreover assessed in the light of the economic imbalance in commercial relations. It seeks to protect suppliers and subcontractors in a situation of economic dependence and its benefit may extend to third parties in a direct contractual relationship[37].

The question is whether these criteria can be used to determine the extent of the duty of vigilance. Indeed, at first glance, the objectives of the two measures are different, so that one may doubt an analogous reasoning. However, despite the presence of distinct stakes, the Law on the Duty of Vigilance aims to take into account the dependency situation of some economic partners.

> Indeed, in addition to parent companies, the Law also explicitly targets instructing companies. Its stated objective is to prevent social and environmental tragedies following the sprawling development production or supply chains, characterised in particular by "cascading subcontracting".

It is also known as the "Rana Plaza Law", in tribute to the Bangladeshi women workers killed in the collapse of a factory that symbolises this sometimes-wild subcontracting. Such subcontracting, which delocalises the burden of social and environmental damages to distant commercial partners, only reinforces the already strong logic of economic dependence. The Law on the Duty of Vigilance, by referring to suppliers and subcontractors, thus aims to prevent the repetition of such tragedies by limiting the negative effects of this dependence.

This approach to the established commercial relationship concept should guide companies in identifying the extra-group scope of their Plan. It must therefore reach all suppliers and subcontractors of a company and its subsidiaries, regardless of their position in the value chain, whenever they have an established commercial relationship with them that goes beyond a direct or 1st tier contractual relationship.

The question as to whether these are the parent company's suppliers and subcontractors or those of controlled companies was raised by the parliamentarians during the debates[38]. It is also possible to refer to the Government's observations before the Constitutional Court: "The vigilance Plan should therefore include measures relating to subcontractors and suppliers involved in the production chain of the group concerned, either directly for the parent company or indirectly for one of its subsidiaries[39]." Considering the objectives of the Law, this is again the most logical interpretation.

36. See Charley HANNOUN *«Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017»*, Dalloz, Droit Social, 2017, 806; See also "Rupture brutale de relations commerciales établies dans le secteur automobile", Cour of Cassation, com. 5 July 2016, AJ contrat 2016, p. 439.

37. The Court of Cassation says that "a third party may invoke, on the basis of delictual liability, the termination of a business relationship as soon as this failure has caused him a prejudice"; see also "Rupture des relations commerciales établies: préavis prévu par les usages professionnels, Court of Cassation, com. 3 May 2012 - D. 2012. 1324: the court must «examine if the notice (...) takes into account the duration of the business relationship and other circumstances of the case, including the state of economic dependence of the ousted company."

38. French National Assembly, *Report No. 3582* on the duty of vigilance of parent and instructing companies, made on behalf of the Law Commission by Dominique Potier, 16 March, 2016, [http://www.assemblee-national.fr/14/rapports/r3582.asp]

39. Cons. court, Decision No. 2017-750 DC of 23 March 2017, *Government Comments*; See also Decision, cons. 11 "the obligation includes all companies controlled directly or indirectly by this company as well as all the subcontractors and suppliers with in which they have a relationship established commercial."

	What the soft law says about the scope of vigilance:
OECD Guidelines, Chapter II, General Principles, para. A.10, 11 and 12, Chapter III, Disclosure and Chapter IV, Human Rights, paras. 1 to 3 and 5, Comments, para. 33	They require reasonable diligence from the company and corporations, addressing the negative impacts they cause, contribute to or are directly linked by their activities, services, products or business relationships. It therefore covers the entire value chain. The comments on the Principles recall that, in some cases, communication with the public and with other parties "may pertain to entities that extend beyond those covered in the enterprise's financial accounts", such as, for example, "information on the activities of subcontractors and suppliers or of joint venture partners. This is particularly appropriate to monitor the transfer of environmentally harmful activities to partners".
UN Guiding Principles on Business and Human Rights, II, Principles 13, and 15 to 19	Due diligence should be widely exercised throughout the group and its business relationships since it "should 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.
UN Global Compact, Principles 1 & 2 and comments	The Principles call on enterprises to protect human rights and not to be complicit in their violations. They rely on the trinity "to talk, to contribute, directly linked" to cover the entire value chain, activities, products and services.

Avenues for evolution

> Companies often use competition and trade secret arguments to refuse to disclose lists of suppliers and subcontractors.

However, they are the *sine qua non* condition for an effective and efficient vigilance, as they enable workers, trade unions, NGOs and affected communities to identify quickly instructing companies to alert them in case of problems that irregular, often incomplete and not always fully independent audits are not able to identify. Moreover, subcontractors and suppliers may themselves display on their websites the names of the brands with which they maintain commercial relationships, which limits the relevance of arguments relating to competition and business confidentiality.

This practice may damage the company's image because the information disclosed is not necessarily up to date and controlled by the instructing company. In the event of an incident involving the suppliers or subcontractors, the impact on the reputation of the instructing company by the subcontractor may then be significant, even though the subcontractor may no longer work with the partner in question.

Hence, disclosure and regular updating of lists of suppliers and subcontractors by the instructing company make it possible to prevent and control this risk. In addition, the competition argument is increasingly being challenged by the proliferation of sectoral, regional or multi-stakeholder initiatives. Some of these initiatives already collect and mutualise information on subcontractors and suppliers[40].

However, in these cases the information is not always disaggregated by company and not always made public either, compromising the preventive logic allowed by transparency and targeted in particular by the Law on the Duty of Vigilance. Only the companies themselves, by publishing lists of suppliers and subcontractors, can fully satisfy this objective.

Finally, NGOs, communities, trade unions, investigative journalists or researchers, faced with situations of human rights or environmental violations, sometimes decide to engage in this research work of tracing the origin of orders, finding clothes labels or the origin of products. These searches may take weeks, months or years, sometimes due to limited resources, but the chain will often be identified eventually. Failure to deliver this information in a transparent manner *ab initio* only extends the deadline and increases tensions with the stakeholders. Finally, such disclosures are becoming more widespread in various sectors, including textiles or agriculture.

Transparency of supply chain and subcontractors

A coalition of NGOs, including Human Rights Watch and Clean Clothes Campaign, launched the "Transparency Pledge" campaign in 2016, which aimed to obtain a list of suppliers and subcontractors from parent and instructing companies in the textile sector[41]. The initiative was also in line with the Rana Plaza disaster and aims to increase the transparency of the supply chain in order to improve health risk prevention, safety or labour law.

Companies engaging in the initiative should publish and specify the following information: name, address, parent company, type of products supplied, manufactured or processed, information on the number of workers, list of authorised subcontractors, part of the supply chain involved in the public communication, volume of business it represents, latest update and timeline for future updates. Updates must be carried out regularly. Public communication must be in **documents that allow users to manipulate and manage the data**. Dozens of companies have signed the initiative and have begun to disclose lists and all or part of the required information. Some of them update the data **every three months.**

40. *Bangladesh Agreement on Fire and Building Safety*, [http://bangladeshaccord.org/factories/list-factories/]

41. Clean Clothes Campaign, "Follow the thread", [https://cleanclothes.org/transparency]

Other initiatives such as "Know the Chain[42]" assess the transparency and traceability of value chains of companies in different sectors. **This is a determining factor in the quality of identification of the risk** of forced labour and its treatment by the assessed companies. In addition to the textile sector, the initiative assessed the practice of companies in the agro-food sector and the communication and information technology sector. The quality of traceability is assessed by means of a disclosure that includes at least: the name and address of 1st tier suppliers, the country of suppliers beyond tier 1 (excluding raw material suppliers), countries that are sources of raw materials with high risks of forced labour and information on the workers present at the different suppliers.

Among the evaluated companies, a major IT equipment group discloses a list of names, addresses and information on the sustainability practices of its tier 1 suppliers; a list of tantalum, tin, tungsten and gold foundries and refiners in its supply chains; a list of products and component providers; a list of countries from which it believes minerals in its supply chain could come; and information on the proportion of the student labour in its supply chain.

Another company in the agro-food sector discloses information about its agricultural raw material supply chain, in particular a list of the names and parent companies of its palm oil suppliers, as well as a list with the names and countries of supply of its palm oil mills. It discloses information on the labour force in its supply chain in some countries where forced labour is a risk, including gender, age, literacy level, languages and other demographic characteristics.

42. Know the Chain, Benchmarks, [https://knowthechain.org/benchmarks/]

4. Substantial perimeter of the obligation of vigilance: impacts on which vigilance must be exercised

> The company liable for the obligation should list the human rights it must respect, determine their content and potential breaches in the different countries where the group operates. The same applies to environmental, health and safety norms, it being specified that these three fields are interdependent and indivisible. The published Plan must highlight the vigilance measures taken for this entire substantial perimeter. When discrepancies are identified between international law, French law and local law, with a risk or severe violations arising therefrom, the Plan should highlight these legislative variations. It should also clearly state the standards on the basis of which the company defines its conduct, emphasising, where appropriate, how it will solve conflicts of standards.

The Law specifies that the Plan should contain measures to "identify risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of individuals and on the environment". As the Law is part of French legislation, it is the French conception of human rights and fundamental liberties, of the environment, health and safety of individuals, which must guide the establishment and implementation of vigilance. They also correspond to France's international commitments[43] (see box Soft Law p. 38).

Environmental, health and safety issues must be addressed in a way that is interdependent with human rights issues. The public's right of access to information, a corollary of freedom of expression and information, is thus enshrined in France's international environmental commitments and in the Environmental Charter based on the Preamble to the Constitution. Health and safety of persons may also be affected by the principle of dignity, inviolability and unavailability of the human body. The right to a healthy environment is a human right in itself, called "third generation".

In brief, the list of the substantial perimeter, or *ratione materiae*, of the vigilance Plan should be approached as a coherent, indivisible and interdependent whole and not as items subject to impermeable distinctions within separate sub-chapters and often treated in a highly unequal manner by companies in their Plan[44]. If the perimeter *ratione materiae* of the Plan thus seems at first sight rather vast, it is in fact circumscribed by the notion of "risks" and "severe impacts".

This notion of risks as defined by the Law on the Duty of Vigilance must be distinguished from that found elsewhere in the companies' annual report, with regard to the risks specific to the company itself, namely the legal, reputational or financial risks to which it is exposed.

43. French National Assembly, *Report No. 2628*, op. cit. "A formal definition is generally accepted according to which fundamental rights are proclaimed by texts of constitutional status (...) as well as by international and European conventions (...)".

44. Edward CAMERON and Peter NESTOR, "Climate and Human Rights: The Business Case for Action" BSR Report, San Francisco, November 2018.

	What the soft law says about vigilance substantial perimeter
OECD Guidelines, Chapter IV, Comments para. 39	The company must refer "at a minimum to the internationally recognised human rights expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and to the principles concerning fundamental rights set out in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work."
ILO Tripartite Declaration, General Policy, para. 10.d	Companies should carry out due diligence with regard to "internationally recognized human rights, understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work."

	What the soft law says about the notion of risk:
United Nations Guiding Principles on Business and Human Rights, Principle 19 comments, and Principle 22	"In assessing human rights impacts, business enterprises will have looked for both actual and potential adverse impacts. Potential impacts should be prevented or mitigated through the horizontal integration of findings across the business enterprise, while actual impacts—those that have already occurred – should be a subject for remediation".

As for the notion of risk, it is defined as "a harmful event whose occurrence is uncertain as to its happening or to the time of its happening[45]". Vigilance therefore concerns future, random damage resulting from the activity of the company and its subsidiaries or their suppliers and subcontractors.

The risk may be proven or suspected, i.e. its materialisation will be confirmed or unknown. It will then be the subject of either preventive or precautionary measures. The Law requires "risk mapping" with no distinction, which should therefore cover these two aspects. In addition to the legal precaution required, this approach is consistent with the requirements of the Environmental Charter, which enshrines the precaution and prevention principles in the French Constitution[46]. On the contrary, the notion of "prevention of severe harms" would only refer to a proven risk.

The damage must be of a certain severity. The Law on the Duty of Vigilance does not define the notion of severity, but it is known under French law. It has many occurrences, particularly in labour law, and the jurisdictions have acquired a long experience in its interpretation[47]. This concept is found in the alert procedure of the Labour Code in the event of serious and imminent danger

45. Gérard CORNU, *Vocabulaire juridique*, 8th edition, PUF, 2007, See « Risque », p. 833.

46. *Charte de l'environnement*, art. 3 et 5.

to the life or health of workers. In this context, severity means a danger that is not simply minor; what is severe is what is likely to have both negative and serious consequences. For severe environmental impacts, the notion of "non-negligible" ecological prejudice, recently recognised in positive law, may serve as a basis. Indeed, ecological prejudice means "a significant harm on the elements or ecosystem functions or on the collective benefits obtained by man from the environment[48]". This definition implies that minor impacts could not be qualified as ecological prejudices.

Avenues for evolution

At this stage, a recurring question will be how to proceed, in situations with an external element, when local law is different from the law of the parent company and grants a different level of protection to a given fundamental freedom. The principle rule is to respect local law. It is then necessary to consider in stages, depending on the nature of the conflict between local law and the law of the parent company.

If local law is more prescriptive, there is no real conflict in this case and the existence of a more protective standard is an advantage. We just have to make sure that it is effectively applied. The practices it requires at the local level can then be transferred within the group to align protection levels.

> If local law is less prescriptive than French law, then there is typically a risk or a real severe harm. This risk must be identified and the company must consider whether it is possible to comply with a more prescriptive French or international standard while still respecting local law.

In this case, the company must respect the best standard and exert its vigilance so that its business partners comply with this standard. For example, in the case of child labour, it is quite possible to respect a higher minimum working age without infringing local law. If the answer is no, then compliance with the French or international standard must be sought. Several options are possible for companies facing conflicting standards[49]. One obvious solution is to not operate in the country. If this is not possible, companies can set up compensation systems, use legal and judicial channels to contest the conflicting rule, practice a form of peaceful disobedience or exercise leverage with business partners and local authorities.

Indeed, companies, including the French ones, usually do not hesitate to exercise their leverage with governments in order to obtain advantageous operating conditions. They might as well do the same for human rights or environmental standards. Companies can also use the diplomatic channels of their home countries to promote effective dialogue between States on human rights standards or the environment. These actions are all the more effective if they are carried out in concert with other actors. The point is then moving closer to multi-stakeholder sectoral or regional initiatives.

47. *Labour Code*, art. L 4131-1, L 4133-1 or L4614-2, C. *Public health*, art. L. 1142-1.

48. *Civil Code.*, art. 1247.

49. United Nations Global Compact Human Rights Working Group, *Meeting the Responsibility to Respect in Situations of Conflicting Legal Requirements: A Good Practice Note*, June 2011, [https://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/Conflict_of_Laws_GPN.pdf]

	What the soft law says about local law and conflicting standards:
UN Guiding Principles on Business and Human Rights, Principle 23 (a) and (b)	In all contexts, business enterprises should "seek ways to honour the principles of internationally recognized human rights when facing with conflicting requirements".
ILO Tripartite Declaration, General Policy, para. 11, Employment, para. 16, Working and Living Conditions, para. 44	The activities of multinational enterprises should "be consistent with national law and in harmony with the development priorities and social aims and structures of the country in which they operate". In particular, with regard to employment, companies, "particularly when operating in developing countries, should endeavour to increase employment opportunities and standards".

Strategies for managing conflicts of standards[50]

To manage conflicting standards and the risks of child labour, some companies choose to set the mandatory minimum age for all their employees worldwide at that compatible with international requirements, i.e. at the age of 16. On the other hand, given their young age, these minor workers are closely monitored and cannot work at night, work overtime, perform tasks involving the use of dangerous substances or tools, or carry heavy loads. They are the subject of reinforced training plans, are provided with an internal "tutor" and are recorded in a special monitoring register.

Several Internet service providers have introduced a policy of handling requests for information or network disconnection from the authorities of certain countries that may affect freedom of expression or privacy[51].

The authorities demand such measures to be carried out immediately. However, companies may ask that such requests be submitted in an official written form with the seal of the requesting authority, and insist that all requests be sent to the company's headquarters for approval. The request should explain the legal basis for the restrictions on freedom of expression, and should specify in particular the name of the requesting government entity and the name, as well as the title and signature of the authorising official.

The company is encouraged to take all administrative and judicial steps to challenge the legality of this request. This strategy does not necessarily keep the company from satisfying requests. However, it does discourage illegitimate requests, slows down the process and ensures that the parent or instructing company is informed, so that they cannot claim to be

50. Examples are drawn from several companies' reports, whose references can be provided upon request to the authors. The examples are also taken from the guide, LISE SMIT, Arianne GRIFFITH and Robert MCCORQUODALE. "When national law conflicts with international human rights standards: Recommendations for Business". *British Institute of International and Comparative Law (BIICL)*, 2018.

51. Global Network Initiative, [https://globalnetworkinitiative.org/gni-principles/]

ignorant of the risks and/or serious violations that are ongoing. They will then be able to take the appropriate decisions accordingly, including considering the option of ceasing operations in that country. Consequently, in the case that the request cannot be avoided, the company can clearly express its reluctance and in particular, its willingness to no longer offer services in the region in the face of repeated requests from the authorities.

In the case of a disparity between the French concept of some fundamental freedoms or of the environment and the legislation of countries where the French corporation operates through subsidiaries, subcontractors or suppliers, this disparity must be identified and the company must clearly highlight in its Plan the standard it chooses to meet, how it will do so and why.

According to the most fervent critics of the Duty of Vigilance Law, the textual foundations and normative content of fundamental rights and freedoms would be unclear[52]. However, the Constitutional Court stated that the references to such rights were "not precise enough to determine a failure likely to justify a sanction having a punitive character, **nonetheless, they were not unintelligible**[53] ".

Large companies have many lawyers and often use the services of external consultants who have in common that they have studied, in preparation for their entry into the profession, fundamental rights and freedoms, sometimes called human rights or public liberties. Those legal professionals, in particular lawyers, should therefore be able to guide companies and their stakeholders in identifying the sources and content of these fundamental rights.

Therefore, companies can only be encouraged to hire lawyers specialised in international human rights law, social law, fundamental freedoms or environmental criminal law, as they already do for competition law or tax law. These lawyers should be appointed, internally, to participate in the development and implementation of the vigilance Plan.

52. Cons. court., Decision No. 2017-750 DC of 23 March 2017, *Referral by 60 Senators* "The expression 'fundamental freedoms' does not refer to any clear legal concept (...) no definition of the standards that must be upheld and of the infringements concerned is provided in the text of the law."

53. Cons. court, Decision No. 2017-750 DC of March 23, 2017, cons. 22.

5. Temporal perimeter of the duty of vigilance: when to be vigilant

> The company liable for the obligation must **consistently adopt a vigilant conduct** whereby it identifies and prevents risks and serious harms. As such, the Plan, which embodies compliance with the obligation, should be made available to the public as soon as it is drawn up and then **updated as regularly as possible**, in line with the evolution of risks, damages and their management. The company must pay particular attention to updating the Plan in the case of a change in the perimeter of the Plan, i.e. the entry or exit of certain companies or activities from the scope of its vigilance.

It is necessary to remind here the three elements of the duty of vigilance: it is a three-part obligation of conduct. In its first two components, the obligation is to "establish and effectively implement (...) reasonable vigilance measures adequate to identify risks and to prevent severe impacts", within the scope previously described. The third aspect of the obligation is the informative aspect, described at the beginning of the chapter, with the publication of the Plan and its inclusion in the annual report. While it is certain that inclusion in the annual report is a term obligation, which depends on the publication of the said report each year, the establishment, effective implementation and public disclosure of the Plan are of a steady character.

Indeed, the duty of vigilance has been described as an obligation of means. The distinction between an obligation of means and an obligation of result was initially proposed by the doctrine on contractual obligations, but today it infuses the entire law of obligations. The terminology tends to evolve towards the notions of general obligations of prudence and diligence as well as specific obligations. In this regard, the doctrine now considers that articles 1240 and 1241 of the Civil Code (which define the principle of individual liability) correspond to an obligation of prudence and diligence, i.e. the behaviour of the "prudent father", the reasonable person[54].

The duty of vigilance, which also refers to these articles, is to be therefore understood as an obligation of generally prudent and diligent conduct, a reasonable conduct, which cannot obviously take place only once a year. It must be constantly renewed, as risks and infringements evolve. This approach is fully consistent with the tools and objectives of civil liability, to which the Law is explicitly linked and which make it possible to prevent impacts and to halt them or remedy them once they have been committed[55]. This clearly makes the Law distinct from simple reporting or compliance obligations.

The Plan itself, which formalises the vigilant conduct of the parent company, must therefore be also subject to regular changes that will be incorporated in the Plan disclosed to the public.

54. Yves PICOD, *Répertoire de droit civil*, Dalloz Obligations, June 2017.

55. Philippe LE TOURNEAU, «Responsabilité : généralités», *Répertoire de droit civil*, Dalloz, May 2009.

Avenues for evolution

With regard to the publication of the Plan and its communication to the broader public, the practical constraints must however be recognised. It would probably be unreasonable to expect companies to update in real time the entire Plan on the website for public information. Nevertheless, as this aspect of the obligation fuels the other two, it is in the interest of companies to update their communications and publications on the subject more than once a year to ensure the transmission of information, to enable stakeholders to react in the event of forgetting and to prevent complaints from being brought.

Companies should update the Plan as regularly as possible in the event of a significant change in the scope of vigilance, i.e. in the case that new companies or activities were to enter the scope of the Plan. In particular, the lists of suppliers and subcontractors should be updated very regularly.

What the soft law says about the constant nature of vigilance:

UN Guiding Principles on Business and Human Rights, Principle 17 (c) and comments	Due diligence "should be ongoing, recognizing that human rights risks may change over time as the company's operations and operating context evolve". In other respects, according to the comments, due diligence "must be initiated as early as possible in the development of a new activity or relationship."
OECD Guidelines, Chapter IV, Comments, para. 45	Due diligence is "an on-going exercise, recognising that human rights risks may change over time as the enterprise's operations and operating context evolve."

6. Interpersonal perimeter of the duty of vigilance: persons taking part in the duty of vigilance

a — General engagement of stakeholders

> Stakeholders' engagement is also to be visible in each measure of the Plan. Companies are strongly encouraged to do so by the Law and by the soft law norms it enshrines in positive law. In any case, it is unavoidable in practice to ensure the establishment and effective implementation of the Plan and the reasonableness of vigilance measures.
>
> **Also, companies should publish a list of internal and external stakeholders involved in the establishment and implementation of each measure of the Plan.** The publication should indicate the methodology for the selection of stakeholders, i.e. their definition and the criteria that led to their selection. The company should also provide details on **the frequency, spaces and mode of interaction preferred**: prior information, interviews, hearings, consultations, questionnaires, discussions in boards of directors, social and economic committees or European works councils, etc. The results of these actions should be indicated and the company should **justify their consideration or exclusion** in the preparation and implementation of the Plan.

The Law states that "the plan is meant to be drawn up in conjunction with the stakeholders of the company, where appropriate as part of multi-stakeholder initiatives within sectors or at territorial level."

It also specifies that the alert and complaint mechanism must be "drawn up in consultation with the representative trade union organisations within the company". The general engagement of stakeholders in the establishment and implementation of the Plan must be transversal, i.e. at all stages and on a continuous basis. The law does not define these stakeholders, nor does it specify how they should be associated. The law is not mandatory on this subject, except for the alert mechanism, which explicitly requires "consultation" with trade unions.

At first sight, the notion of stakeholders appears to be highly elastic, referring to subjects with diverse characteristics. Stakeholders are defined in texts of positive law and soft law; indicative and non-exhaustive lists of these stakeholders often support their definitions. The debates preceding the adoption of the Law referred in particular to the definition adopted by the legislator in article 4 of law No. 2012-1559 of 31 December, 2012 on the creation of the Public Investment Bank. According to the latter, stakeholders are, for a company, "those who participate in its economic life and civil society actors that are affected, directly or indirectly, by [its] activities". What emerges from these definitions is always the correlation between an entity and its stakeholders, an influential relationship in other words. This is in fact what appears from the more sociological definitions of stakeholders derived from Anglo-Saxon theories of corporate governance[56].

In the context of the Law on the Duty of Vigilance, the stakeholders will thus be individuals, groups or groupings, whether or not they have legal personality, whose rights and obligations or interests are affected, directly or indirectly, by the company's total or partial failure to perform its duty of vigilance. They should therefore be different for each company liable for the obligation of vigilance. It is thus obvious that although the stakeholders are not precisely listed in the Law, and they are not identifiable upstream and exhaustively for each company, they are nevertheless perfectly identifiable by the company

They may include, in particular: company managers, employees, collaborators, subsidiaries and agencies, suppliers, service providers and subcontractors, customers, consumers and end-users, shareholders, investors, banks, trade unions at headquarters, in subsidiaries, suppliers and subcontractors, transnational trade union federations, local communities, residents, severely affected groups, national or local governments, national, regional or international institutions, journalists, whistleblowers, NGOs and local civil society organisations (associations, citizens movements, etc.).

Stakeholders engagement, although not mandatory, is nevertheless necessary and even inevitable. First, at the legal level, this provision is quite a normative one. Indeed, the Constitutional Court in its decision on the Law reiterated it. Some members of Parliament criticised this provision, which they considered to be lacking a normative character. The Constitutional Court rejected this argument, stating that the provision had an “incentive” effect. If the normativity of this provision appears lesser, this does not mean that it disappears[57].

> The reasonableness of vigilance measures could well be compromised from a lack of stakeholder engagement

This provision does not replace the parent company's primary responsibility to identify and prevent risk and harm. It is therefore always up to the company liable for the obligation to exercise vigilance over the choice of stakeholders, places and modes of engagement and to disclose these elements transparently in its Plan in order to demonstrate its vigilance.

In addition to the normative implications of the above-mentioned provision, the transversal involvement of stakeholders appears to be a *sine qua non* condition for the establishment and effective implementation of the Plan and therefore for compliance with the obligation of vigilance itself. Indeed, since the aim of the duty of vigilance is to identify and prevent risks and severe impacts on human rights and the environment related to the activities of the company, it would seem quite foolhardy not to involve the persons directly entitled to these rights or dependent on this environment in the vigilance process.

56. Tiphaine BEAU DE LOMENIE and Sandra COSSART, « Parties prenantes et devoir de vigilance », *Revue Internationale de la Compliance et de l'Éthique des Affaires*, December 2017.

57. Cons. Court, Decision No. 2017-750 DC of 23 March 2017, cons. 22.

Free, Prior and Informed Consent (FPIC)[58]

Quite often, consultation with directly affected stakeholders is mandatory, not only because of the Law on the Duty of Vigilance but because of other national or international texts that consecrate the concept of free, prior and informed consent (FPIC). This consultation must therefore be carried out imperatively in order to comply with it and **the lack of stakeholder engagement would then constitute a real violation of the duty of vigilance, because of non-compliance with FPIC.**

FPIC brings together various requirements for different policies, projects and measures that affect in particular the land rights of indigenous peoples in an increasing number of national, regional and international contexts.

The United Nations Declaration on the Rights of Indigenous Peoples states that States wishing to validate projects affecting lands, territories or resources of indigenous peoples must consult and cooperate with them in order to obtain their free, prior and informed consent (Articles 19 and 32). ILO Convention No.169 on Indigenous Peoples refers to the principle of free and informed consent in the context of relocation of indigenous peoples (Article 16). In addition, the Convention requires States to consult and ensure the participation of indigenous peoples. Similarly, the Committee on the Elimination of Racial Discrimination (CERD) in its General Comment No.23 invites States to ensure that members of indigenous peoples have the right to participate effectively in public life and that no decisions directly related to their rights and interests are taken without their informed consent.

At the regional level, the Inter-American Commission on Human Rights also recognises FPIC, and the 1998 Resolution of the Council of Ministers of the European Union on indigenous peoples states that indigenous peoples have the right to choose their own development way, including the right to oppose projects. The International Finance Corporation (IFC) has also incorporated FPIC requirements into its performance standards (Performance Standard No. 7).

FPIC may also be regulated by national legislation. For example, in Australia, Canada, the United States, Papua New Guinea, Indonesia and Peru, private sector representatives must conclude an agreement with indigenous landowners in order to buy land from them. In the Philippines, under the Mining Act (1995) and the Indigenous Peoples' Rights Act (1997), "prior and informed consent" is required at the exploration stage at least.

58. Verisk Maplecroft and the UN Global Compact, "Indigenous peoples", *Human Rights and Business Dilemmas Forum*, [https://hrbdf.org/dilemmas/indigenous-peoples/#_ftn22]

Avenues for evolution

Since stakeholders are involved in a transversal way and at each stage of vigilance, their range is very wide. It then becomes necessary for the company to select some of them, ensuring their legitimacy and relevance. To do this, it must evaluate their leverage, their collaborativity and their existing relationship with the company. **The criteria for choosing stakeholders will be representativeness, credibility, independence and plurality of opinion.**

"Stakeholders committees" established within some businesses at the level of parent companies cannot constitute a single and adequate method of consultation for the entire Plan. In addition to their widely questionable composition, **they do not replace consultation with stakeholders directly affected, in a delocalised and contextualised way**. Then, when it comes to modes of interaction, they can take different forms: meetings, interviews, hearings, multilateral or bilateral consultations, anonymous questionnaires or partnerships. The point is to ensure reciprocal, good faith, responsive and continuous communication, with effective consideration of opinions and a clear explanation in case of their rejection. To this purpose, **prior, accessible, transparent, exhaustive and appropriate information must be provided within a reasonable time**. On this point, the content and regime of the right to FPIC can serve as a guidance for companies. Adequate discussion forums must also be identified, particularly with regard to "internal" stakeholders (*see* box Soft law on p. 48).

b — Multi-stakeholder initiatives within sectors or at territorial level

> If multi-stakeholder initiatives are used within sectors or at an international level, the company should publish a list of them, as well as a c**ritical evaluation of each initiative at regular intervals.**
>
> The evaluation should take into account, in particular, the relevance of the stakeholders involved, the mode of interaction, the specifications of the initiative and its governance, the quality of internal complaints mechanisms, the results of the follow-up and effectiveness indicators, the criticisms made by observers and the degree of transparency of the initiative.

The Law states that "the plan is meant to be drawn up in conjunction with the stakeholders of the company, where appropriate as part of multi-stakeholder initiatives within sectors or at territorial level." This provision will in no way diminish the parent company's primary liability to identify and prevent risks through the establishment and implementation of its Plan. As such, it is important that the parent company be vigilant even regarding the above-mentioned initiatives. For this purpose, it may refer to the tools developed by the OECD for alignment[59].

59. See for the extractive industries, OECD, *Alignment assessment of industry programmes with the OECD minerals guidance*, April 2018, [https://mneguidelines.oecd.org/industry-initiatives-alignment-assessment.htm]

	What the soft law says about stakeholders engagement:
OECD Guidelines, commentary on the general principles, para. 25 and Chapter II, A. para. 14	Companies must "engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities".
OECD Due Diligence Guidance For Responsible Business Conduct, Section I, Characteristics of due diligence - Information obtained by exchanging with stakeholders and question 9	"Stakeholders are persons or groups who have interests that could be affected by an enterprise's activities". "Due diligence is informed by engagement with stakeholders"; "Stakeholder engagement involves interactive processes of engagement with relevant stakeholders. Stakeholder engagement can take place through, for example, meetings, hearings or consultation proceedings. Meaningful stakeholder engagement is characterised by two-way communication and depends on the good faith of the participants on both sides. It is also responsive and on-going, and includes in many cases engaging with relevant stakeholders before decisions have been made."
UN Guiding Principles on Business and Human Rights, Principle 18 comments	The Principles specify that risks assessment must "involve 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." The comments states business enterprises "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. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defender and others from civil society".
ILO Tripartite Declaration, General Policy, para. 10 e)	Diligence "should involve meaningful consultation with potentially affected groups and other relevant stakeholders including workers organizations, as appropriate to the size of the enterprise and the nature and context of the activity."

	What the soft law says about governance:
UN Guiding Principles on Business and Human Rights, Principle 19 (a) and comments	"Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise"; commentary states that "the horizontal integration across the business enterprise of specific findings from assessing human rights impacts can only be effective if its human rights policy commitment has been embedded into all relevant business functions. This is required to ensure that the assessment findings are properly understood, given due weight, and acted upon."

c — Governance organisation

> The organisation of the governance of the Plan should also be indicated in a global manner and for each measure of the Plan.

The Law does not provide for any internal organisation or governance of the Plan. However, many standards on diligence and Plans published in 2018 pay great attention to this aspect. Such governance has two main elements. On the one hand, there is a definition of a global governance of the vigilance process, with many companies having set up committees or working groups dedicated to monitoring the Plan within the parent company.

These committees generally include purchasing, Social and Environmental Responsibility or sustainable development, compliance, audits, human resources, finance, legal issues, but also innovation, or communication and public affairs departments. Indeed, **it seems important to have a global involvement of different departments to avoid any compromising effect** of the vigilance process between departments. The compromising effect here refers to the mechanism by which the positive action of one department will be cancelled by the action of another department.

On the other hand, some Plans and soft law norms also draw up decentralised governance for each measure to be established and implemented. The description of governance in the Plans must make it possible to identify the relevant stakeholders and, above all, to assess the allocation of human and financial resources dedicated to vigilance. It can therefore help, to a certain extent, to assess the effectiveness or reality of the means deployed. This will be the case in particular when the Plans identify for each risk and measure, the departments or operational units in charge and the resources allocated to them in this respect, or the evolution of the human resources planned for each measure.

However, governance of the Plan is only an organisational modality, without being an objective in itself of vigilance or even a legal imperative, since the Law does not mention it. Thus, setting up of “governance”, although useful, should not be presented as a measure of vigilance in the strict sense of the term.

It is essential to avoid at all costs that these clarifications lead to a dilution of responsibility for the establishment and the implementation of the Plan within the group. As such, companies should be careful not to overweight the issue of the “governance” within their Plans. **The Law aims to make the parent company accountable as a legal entity and not to spread responsibility to physical persons.** Similarly, identification of the governance of the Plan and measures must not be at the expense of employees, who should not be subject to personal sanctions or disciplinary measures in case of failure to exercise vigilance.

II.

Vigilance measures to be established, implemented and published

The measures that are set out in the Law are not restrictive or exclusive: the company must put in place any additional measures that enable it to meet its general obligation of vigilance, i.e. the identification and prevention of risks and severe violations according to the perimeters previously identified.

1. A risk mapping meant for their identification, analysis and prioritisation

a — Risk identification

> The Plan should contain the methodology for identifying risks within the scope of the Plan and the tools used or planned to be used by the company. Disclosure must be comprehensive and sincere with regard to the results of the risk identification and **must present in detail the risks and severe impacts, for example, for each product, region, entity, activity and sector**. If the identification of risks and severe impacts is incomplete, the company should specify the reasons and a timeline for its completion.

The Law states that the Plan contain in particular "a risk mapping meant for their identification, analysis and prioritisation". The identification of risks and severes impacts must cover the different perimeters identified in the transversal principles: the organisational perimeter or *ratione personae* and the substantial perimeter or *ratione materiae*. It must involve stakeholders and be performed consistently to respect the temporal scope of the obligation. Similarly, risk identification will be regularly disclosed and updated to reflect the ongoing execution of vigilance. Its update each year to n+1 will be included in the annual report for each financial year.

In order to comply fully with the obligation of publication, which, as explained above, has an informative purpose, the risk mapping published should reach a sufficient standard of detail, enabling any person to identify accurately the risks within the substantial and organisational perimeters of the group. Any risk mapping not sincere would not comply with the obligation of making public the duty of vigilance as it should help identify risks and violations of human rights and environmental standards, which are necessarily specific.

Avenues for evolution

In the past, parent companies and instructing companies have often pleaded ignorance when their image or responsibility is at stake for human rights violations or environmental damages committed by other companies in their group or by some of their business relationships.

The underlying reason of risk identification is precisely that a company can no longer plead ignorance. **The Law now imposes the obligation to identify and therefore know the risks generated by its activities and those of the entities within its scope of vigilance**. However, some companies may argue that they are technically unable to achieve effectively this identification throughout the scope of the Law. There are several solutions to address the concerns of companies facing risk identification in hundreds of subsidiaries and thousands of suppliers and subcontractors.

First, there are very many tools and sources of information available to identify risks once the scope has been delimited. Numerous experts and consultants can assist them in this exercise. The reports and databases of international organisations or NGOs make it easy to build up a rather exhaustive overview of the risks and impacts in certain sectors or regions.

Second, the Law encourages companies to join in multi-stakeholder sectoral or regional initiatives, which generally have good risk control in a given sector or region and facilitate the exchange of useful information between the companies concerned.

Third, controversies concerning parent companies over human rights violations or environmental damages are often revealed by NGOs, workers or investigative journalists. While these actors are able to detect risks in the value chains of parent companies, **it seems reasonable to expect companies to have at least the same, if not greater, capacity, since they should have a better knowledge of their own activities and more substantial human, technical and financial resources** to carry out this identification. Especially since the duty of vigilance has been described as an obligation of means, companies liable for the obligation are expected to make their best efforts to achieve the objective in question. A company that does not use all the technical, financial and human resources to identify risks that NGOs or reporters are able to identify, would have great difficulty justifying the reasonableness of its risk identification measures.

> As an illustration, if companies are really unable to identify risks in their value chain technically or financially, it will be their responsibility to consider how to rearrange their value chain according to a more manageable and sustainable model, effectively allowing them to identify risks within the scope of the Plan.

b — Analysis and prioritisation

> The company should report on the methodology for risk analysis, assessment and prioritisation. This depends on the **severity**, assessed according to the extent, scale, and reversibility or not of the damage, and on the other hand, on the probability of the risk or the aggravation of the harm. Prioritisation criteria are not based on risks for the company or the group, whether financial, legal or reputation. **Prioritisation is not meant to exclude risks or severe impacts** from the scope of vigilance but to prioritise responses over time in the event of resource limitations, with the ultimate objective of **addressing all risks**. The final and global prioritisation of all risks as established by the company should also be presented in an accessible, sincere and exhaustive manner, which means that several mappings should be presented, if necessary, to make them easier to read.

The Law provides that the Plan contain, in particular, "risk mapping for their identification, analysis and prioritisation". Risks have already been clarified in Part I of the Guidance. How do we determine now the criteria for analysis and prioritisation in relation to these definitions?

What the soft law says about analysis and prioritisation:

UN Guiding Principles on Business and Human Rights, Principle 24 and comments	Whenever it is necessary to give priority to measures, "business enterprises should first seek to prevent and mitigate those **that are most severe or where delayed response would make them irremediable**." The comments state that although business enterprises should address all incidences on human rights, it may not always be possible to address them simultaneously. "In the absence of specific legal guidance", "business enterprises should begin with the most severe incidences on human rights, recognising that a delayed response may affect remediability. Severity is not an absolute concept in this context, but is relative to the other human rights impacts the business enterprise has identified."
OECD Due Diligence Guidance For Responsible Business Conduct, Section II, 2.4 and question 31	"Drawing from the information obtained on actual and potential adverse impacts, where necessary, prioritise the most significant RBC risks and impacts for action, based on severity and likelihood. Prioritisation will be relevant where it is not possible to address all potential and actual adverse impacts immediately." "When prioritising actions for response, the significance of the actual or potential harm is the most important factor. However, recognising that enterprises may be exposed to a variety of significant adverse impacts, **the imminence of harm may be considered secondarily.**"

In this matter, and in the absence of specificity in the Law, soft law provides excellent guidance. In the case of a risk, its importance will be assessed both in terms of severity of the harm and its probability. **With regard to gravity, this refers to the degree of impact on the rights or the environment and its functions, the extent of the impact, and their reversibility or not.** Be cautious not to confuse the severity of the risk with an increased importance of some interests protected under international law over others. On the contrary, in accordance with the principles of international law, human rights and fundamental freedoms are interdependent and indivisible. They cannot be subject to a selection or value rating in relation to each other. Nevertheless, particular attention should be paid to **groups and individuals particularly at risk of abuse:** women, children, the elderly, and minorities. **Severity of the risk must not be confused with materiality which corresponds to expectations** of certain stakeholders and the serious stakes for the company itself.

The probability is assessed in terms of whether or not the risk is confirmed, how often it occurs, the level of governance, control and the transparency of the industry or the market. Nevertheless, the gravity character should prevail.

Avenues for evolution

The Law mentions a risk mapping but it seems obvious that several mappings will be necessary, considering that the companies covered by the Law have extensive value chains, often offer several services and products and operate in many countries.

> It is unlikely that a single risk mapping could reasonably combine all of the group's risks in a clear and comprehensive manner.

Therefore, for pragmatic reasons, it would seem reasonable for companies to draw up several mappings according to countries, products and activities. These mappings should at least be made available to stakeholders upon request, if they are not already included in the Plan to be published.

A common question is whether the Law can cover severe impacts that occurred before its enforcement. On this point, we must reason in two stages. In principle, it is only valid for the future, and the responsibility of parent companies covered by the Law cannot be claimed for actions or omissions that may have occurred before its adoption. Nevertheless, in the case of severe impacts on human rights, health and safety, and the environment, such violations often have human and environmental consequences that continue over time, beyond the time corresponding to the event that caused them.

Moreover, since the Law deals with the notion of risk, it is partially detached from the notion of wrongful action creating risk. It does not matter that the harmful activity took place before the law was passed, since what it is really aiming at is the systemic effects of business activities. In this case, past impacts would fall within the scope of the Law on two points. Indeed, depending on the

context of the operation, a past violation may generate a very current risk of denial of justice and therefore a new full-fledged risk of violation of fundamental rights. If the company does nothing to correct this past situation, it exposes the affected people to a new risk. Furthermore, a severe impact that continues over time falls within the scope of the Law because the absence of compensation as such may aggravate the original harm. We consider the concept of aggravation of harm by analogy. It is therefore the risk of aggravating the damage itself that should be identified. The concept is particularly relevant with regard to environmental damage.

> As such, past serious violations, whose consequences are still ongoing today, should be identified and addressed in the Plans under the Law on the Duty of Vigilance.

In addition, with regard to risk analysis and prioritisation, it is important to note that there should be no exclusion of certain risks. The company should conduct its risk mapping according to all rights and principles and identify all the risks that its activities pose to them, with no exception. This does not mean that risks for each of these rights will indeed appear in its value chain, nor that it must treat these risks in the same way.

The purpose of analysing and prioritising is to prioritise actions of prevention, mitigation or remediation. In particular, they make it possible to identify the risks that will be the subject of priority action because of their seriousness or the imminence of their occurrence. **The reasonableness of vigilance also depends on the proportionality of the measures taken in relation to the risks. This implies in particular that the highest level of technical, human and financial resources should be invested according to the seriousness of each risk**. This also corresponds to the obligation of means, i.e a concept that characterises the duty of vigilance. However, in the end, all risks without exception must be addressed.

Prioritising risks will prioritise resources and means to address them, **if and only if these are not sufficient to address all risks in the immediate future**. Prioritising vigilance actions is only acceptable if the company does not possess the resources to deal with everything directly. Therefore, the true insufficiency of resources to deal with all the subjects should lead the company to interrupt or not engage in new activities or business relationships.

> The temporary exclusion of certain risks from being treated must remain the exception and not the rule. The company has to demonstrate that it does not have the wherewithal to respond to this risk in the short term.

2. Regular evaluation procedures regarding the situation of subsidiaries, subcontractors or suppliers with whom there is an established commercial relationship, in line with the risk mapping

> Regarding the organisational perimeter defined for the Plan, the company should determine and publish the tools, methodology, objectives and timetable of the evaluation processes on the situation of subsidiaries, suppliers and subcontractors. As indicated by the use of the plural, **these measures must be multiple and complementary** in order to avoid deficiency in the evaluation and monitoring of companies as much as possible. The company should publish **the results of the evaluations** and in particular the relevant indicators and their method of elaboration and calculation, in order to highlight breakthroughs, stagnation and regression. It should indicate the **corrective measures adopted**, if any, and their **timeline.**

The Law stipulates that companies must establish, put in place and include in their Plan the "regular evaluation procedures regarding the situation of subsidiaries, subcontractors or suppliers with whom there is an established commercial relationship, in line with the risk mapping".

These measures therefore cover the previously identified group and non-group organisational perimeter and the entire substantial perimeter or *ratione materiae*[60]. They should be established and implemented in a constant manner, ideally in association with relevant stakeholders.

The text specifies that the processes be established, implemented and made public with regard to "risk mapping", i.e. if it is technically or financially impossible to carry out such evaluations, the risk mapping that has made it possible to prioritise risks can help to allocate resources for the drafting and implementation of the evaluating processes.

Once again, since mapping is not a way for excluding risks, this means that evaluating processes should cover all risks, but that they can be **carried out gradually**, depending on the technical and financial capacities, to cover all risks eventually.

> It also implies that if the company does not have the means to carry out a comprehensive risk assessment of all its subsidiaries, suppliers and subcontractors, it should refrain from creating new business relationships or entering into new lines of business.

The nature of these evaluation measures is not specified, but they must be multiple as indicated by the use of the plural.

60. *See* I. Transversal principles

In light of the objectives of the Law, they should obviously combine complementary techniques to avoid as much as possible gaps in the evaluation that underlies the identification and prevention of risks: announced and unannounced audits, surveys, unexpected visits by independent third parties, self-evaluations, questionnaires....

Avenues for evolution

Such procedures meet several objectives in terms of vigilance: on the one hand, they make it possible to update regularly the content of the identification, analysis and prioritisation of risks. On the other hand, they allow for mitigation, prevention and remediation measures based on the results of the assessments. In particular, they enable business enterprises to prevent the entry of risky entities into the scope of vigilance or to exclude risky entities. Finally, they help set up and collect qualitative and quantitative risk monitoring indicators, which then demonstrate whether vigilance is effective or not.

> Auditors, service providers and other external providers should also be subject to the vigilance of parent companies as they may fall within the scope of their Plans.

As such, the relevance of these practices should itself be regularly evaluated according to their timing and frequency, the independence of audits and evaluations, the quality and training of auditors and evaluators, and the relevance of the specifications. In the event of criticism from third parties, it is also necessary to examine the responsiveness of the mechanism, i.e. whether it encourages the effective implementation of corrective measures, depending on the level of protection of workers and in particular the prevention of reprisals and interviews without managers, or with regard to cost management which is primarily the responsibility of parent companies.

The same applies when these evaluation mechanisms are developed and applied through multi-stakeholder initiatives at the sectoral or regional level. These should be checked regularly. The advantage of such initiatives is to reduce the pressure on suppliers and subcontractors by mutualising information and measurements for several instructing parties[61]. Evaluating processes must trigger corrective or mitigating measures with specific follow-up depending on the risks or impacts identified. In particular, an imminent risk or a damage must be the subject of immediate corrective measures with a quick follow-up schedule. For each evaluation measure, companies should provide a timeframe, objectives and process and outcome indicators.

These elements must be published, to allow relevant stakeholders to express themselves and alert companies in the event of a discrepancy between the results of these measures and the operational reality. Such publication is also necessary to fulfil effectively the obligation of transparency and informing of the duty of vigilance

61. See more generally on SHIFT audits, "From Audit to Innovation: Advancing Human Rights in Global Supply Chains", Report, New York, 2013

Deficiencies in certification mechanisms[62]

The Changing Markets Foundation has studied voluntary certification initiatives in three sectors where increasing consumption and unsustainable supply have caused serious environmental problems: palm oil, fisheries and textiles. The study comes within the context of growing pressure from the private and public sectors for the development of such certification mechanisms, while their beneficial effects on social and environmental issues have not been confirmed. According to the authors of the report, **these mechanisms more often allow companies to whitewash their image in the eyes of consumers, without really addressing the underlying issues.**

In particular, the report points out that the increasing certification of palm oil has not led to a slowdown in deforestation or biodiversity loss. According to the authors, the certification mechanisms for this raw material lack requirements and do not ensure the required traceability, and even **pull certification standards down to permit the certification of larger volumes of palm oil.**

As a rule, certification mechanisms only tackle some of the problems associated with the production of raw materials. For example, they target only a part of the supply chain or only some of the specific chemicals used at a specific stage in the supply chain. In addition, they only cover a very small volume of the overall production. The report encourages the development of more comprehensive certification mechanisms, covering the entire life cycle of materials. Membership criteria and specifications should also be raised. Reforms should be based on four key principles:

1. Transparency, which includes the availability of criteria and reports on the performance of the various members of the regime, and encourages supply chain transparency.

2. Independence, which includes the elimination of conflicts of interest, such as de-coupling membership revenues from certification and compliance results, and ensuring that independent bodies set the standards.

3. A holistic approach with high traceability, aiming to cover the entire life cycle of a product, and not allowing companies to choose criteria or to be certified under conditions.

4. Aiming for continuous improvement, which means setting the bar high enough to certify only those companies that go beyond average performance and are committed to continuous improvement. Regimes should also be science-based, reflect regulatory improvements and prevent setbacks.

62. "The False Promise of Certification", Changing Markets Foundation, *Report*, May 2018.

While these voluntary mechanisms can have a virtuous effect by enhancing the traceability of supply chains, they **do not exempt companies from responding appropriately to prevent and mitigate the negative impacts of these products, and not to source from suppliers when they cannot guarantee the origin of the products**. In particular, in the agricultural sector, companies should commit themselves to the establishment of moratoria on deforestation. **These mechanisms do not replace the requirement for national and international regulations of the sectors.**

3. Appropriate actions to mitigate risks or prevent severe impacts

> The company must set up preventive, mitigation and remediation measures with stakeholders based on the prioritisation of risks and the company's human, technical and financial resources. **For each risk identified, the company must publish a summary of the prevention, mitigation and remediation measures to be implemented, their timeline and indicators to monitor their effectiveness and efficiency**. It would also be relevant to indicate the methodology for selecting the indicators and data sources.

According to the Law, the parent company must, in particular, prepare, carry out effectively and publish in its Plan "appropriate actions to mitigate risks or prevent severe impacts." "Appropriate actions" should be developed in association with relevant stakeholders, implemented and published in the Plan. They must mitigate, prevent and remedy any risks and severe impacts.

> The use of the term "appropriate actions" implies that businesses cannot be limited to measures that are declarative and/or not specific to each risk or impact.

As expressed, there is no room for doubt: moral commitments, such as codes of conduct or ethical charters, do not constitute "actions".

In addition, Plans that do not respond to each identified risk or impact would not be "appropriate". The adjective "appropriate" also refers to the concept of reasonableness. An "appropriate" action will then be proportional to the risk or impact it aims to mitigate or prevent and will depend, as before, on the human, technical and financial resources allocated to the establishment and implementation of each action depending on the risk mapping.

What the soft law says about prevention, mitigation and remediation measures:

UN Guiding Principles Relating on Business and Human Rights, Principle 19 (a.ii)	In order to prevent and mitigate adverse impacts, enterprises "should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action. Internal decision-making, **budget allocations** and oversight processes enable effective responses to such impacts."

Again, this implies that the temporary exclusion of certain risks from the scope of mitigation or prevention measures must remain the exception not the rule, and that it will be the company's responsibility to prove that it is not financially or technically able to respond to that risk in the immediate future. Prioritising prevention and mitigation actions is only acceptable if the enterprise does not have the resources to deal with everything directly. In addition, the sincere insufficiency of resources to handle everything should logically lead the company to interrupt or not engage in new activities or business relationships.

For each measure, the company should provide a timeframe, qualitative and quantitative objectives and indicators able to prove its effectiveness and efficiency. Particularly, the indicators should make it possible to assess the resources allocated to the various measures and their development over time according to actual results. Indeed, since the Law requires effective implementation of the measures, only such details would tend to show the good faith fulfilment of the obligation by the company.

Avenues for evolution

This provision highlights the essentially preventive nature of the vigilance Plan. This central and paramount principle of prevention is present in all soft law norms concerning reasonable vigilance for responsible business conduct.

These measures will be as diverse as the risks and harms identified. To satisfy the requirement of reasonableness, the measures should be proportionate to the seriousness of the risks and impacts. Mitigation and prevention measures should be decided with the stakeholders. The company should carry out a diagnosis of the various appropriate actions that can be taken in proportion to the risks, and take into consideration the additional risks they may cause. The choice of the measure must therefore be justified and its result measurable in terms of effectiveness.

Therefore, when the risk is too high, the only appropriate solution will be not to engage in a commercial relationship, a new activity or to cease it. Prior to any activity or relationship, the company should establish a process that precedes entry into the business relationship or within the intra-group perimeter. It should carry out impact studies and assessments prior to any purchase or merging operations.

In the course of its activities and business relations, the company must continuously exercise and develop its leverage. This should include clear requirements in contractual provisions for example, and explicit statements of the potential consequences in the event of breaches of commitments or occurrence of risks and impacts. The potential consequences range from the possible termination of the business relationship, to the suspension of the relationship until risk mitigation or prevention is ensured, to the continuation of the relationship conditioned on the effective initiation of corrective actions. **The termination of certain activities or the severance of commercial relationships must be clearly considered between the company and its**

business relationships. This solution must be seen as a possible option from the very beginning of the relationship. It must be carried out in compliance with national and international laws and must not infringe workers' rights, in particular. Strategies should include the definition of qualitative and quantitative objectives as well as timetables to anticipate the requirement to monitor measures and their effectiveness. **We rightly expect also that companies will establish and implement remedial measures in the event of a severe impact**. Such measures do not exclude judicial mechanisms but help to avoid the impact being aggravated, which itself must be considered as a risk.

Severe impact caused by soybean cultivation in South America[63]

Serious environmental degradation and human rights violations have been reported in all regions where soybean cultivation has developed (Bolivian Amazon, "Cerrado" savanna in Brazil, and Chaco region in Argentina, Paraguay and Bolivia).

Environmental damages are the result of massive **deforestation** of these ecosystems, which are home to many protected species, and of the conversion of preserved land to soy monoculture, most often genetically modified. The growing of GMO soybeans is combined with the massive use of pesticides, leading to **significant pollution** and contamination of the water used by local populations. In addition to these elements, which **constitute violations of the right to health and to a healthy environment**, the expansion of soybean cultivation can generate cases of **land grabbing** and other human rights violations.

These violations have been widely documented and denounced by local communities and NGOs on the field, but also by NGOs closer to the parent companies. **The Brazilian authorities have recently condemned seven major soybean importing and exporting corporations for their involvement in illegal deforestation**. Some of these corporations, via several Breton ports, export "dirty" soy in large quantities into France. It is mainly used to feed farm animals in the supply chain of the agro-food sector and large-scale distribution.

This soybean could therefore be present directly or indirectly in the supply chain of several corporations in the agro-food and mass distribution sectors. Companies that use soya directly or indirectly cannot thus ignore this risk in their Plans. On this issue, an appropriate action that could reasonably be taken to prevent the risk, beyond the assessment measures applied to subsidiaries and subcontractors, is the extension of the moratorium on soybean-related deforestation to the entire region of South America. Indeed, the moratorium on deforestation linked to soy cultivation, currently in place for 10 years in Amazonia,

63. « Interpellation de l'industrie française de la viande : les impacts dramatiques de la culture du soja en Amérique latine », Sherpa, March 2018, [https://www.asso-sherpa.org/interpellation-de-lindustrie-francaise-de-viande-impacts-dramatiques-de-culture-soja-amerique-latine]

has made it possible to reduce the proportion of forests destroyed for soy cultivation from 30 to 1%, without affecting the productivity of soy crops, and all this at a minimal cost[64]. Thus, the extension of such a moratorium to all endemic ecosystems in South America appears to be a reasonable measure to put an end to serious environmental and human rights violations, whilst avoiding the risk of simply moving them to another region of the continent.

The measure seems all the more reasonable as many relevant stakeholders on the subject recommend it. This also means that corporations must transparently trace their supply chain back to the origin of soybeans and that they must no longer source soybeans whose origin is not guaranteed. Measures may also include reducing dependency on soybeans and seeking local alternatives.

What the soft law says about ceasing business activities or relationships:

UN Guiding Principles on Business and Human Rights, Principle 19, comments	"There are situations in which the company lacks the leverage to prevent or mitigate adverse impacts or is unable to increase its leverage". In this case, it "should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so."
OECD Guidelines, Chapter II, Comments, para. 22	The principles provide that "appropriate responses with regard to the business relationship may include ": "continuation of the relationship" throughout the course of risk mitigation efforts; "temporary suspension (...) while pursuing ongoing risk mitigation"; "or, as a last resort, disengagement with the supplier either after failed attempts at mitigation, or where the company deems mitigation not feasible, or because of the severity of the adverse impact."
OECD Due Diligence Guidance For Responsible Business Conduct, Guide, Section II, 3.2 (h) and question 39	The company may consider disengagement "as a last resort after failed attempts at preventing or mitigating severe impacts; when adverse impacts are irremediable; where there is no reasonable prospect of change; or when severe adverse impacts or risks are identified and the entity causing the impacts does not take immediate action to prevent or mitigate them."

What the soft law says about remediation of damages:

UN Guiding Principles on Business and Human Rights, Principle 22 comments	"Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so"

64. Mighty Earth, "The Avoidable Crisis", *Report*, 2018, [http://www.mightyearth.org/avoidablecrisis/fr/]

4. An alert and complaint mechanism relating to the existence or realisation of risks, drawn up in consultation with the representative trade union organisations within the company

a — Establishment of different tools composing the alert and complaint mechanisms

> The company should set up **decentralised mechanisms** according to the scope of the duty of vigilance, **and mechanisms for reporting information** at a global level or for centralisation to ensure that the Plan is updated as necessary. It should also distinguish between mechanisms relating to risks and those relating to impacts and determine processes, guarantees and treatment schedules specific to each. **Emergency cases must be anticipated.**
>
> The list of the various mechanisms and processes, their scope and recipients, must be published providing in particular details on their accessibility, adaptability, security and confidentiality. Information must be widely disseminated internally and externally, in a way that is appropriate for each potential recipient of the different mechanisms.
>
> To demonstrate the effectiveness and efficiency of those mechanisms, the Plan must contain indicators on how alerts and complaints are taken into account in identifying and responding to risks or violations. Such indicators include the publication of processed and anonymised cases. If comprehensive mechanisms cannot be immediately set up, the company must plan clear intermediate steps, a global timetable and report on them in its Plan.

The Law stipulates that companies must establish, effectively implement and publish, in their Plan, information relating to an “alert and complaint mechanism relating to the existence or realisation of risks, drawn up in consultation with the representative trade union organisations within the company”.

The alert and complaint mechanism must cover the entire substantial perimeter of the Plan, namely risks to human rights, the environment and the health and safety of persons. The Law clearly specifies that the mechanism must be usable for “the existence or realisation of risks”. **In other words, its recipients may use it to alert the company of potential and proven risks that have not been identified, but also of serious abuses that have not been prevented**. The informative nature of the alert is perfectly in line with the preventive logic required by the Law on the Duty of Vigilance.

Positive law frequently requires the alert and complaint mechanisms, in addition to the recommendations of a large number of soft law reference systems. Positive law can thus inform companies about the establishment and implementation of the mechanisms of the Law on the Duty of Vigilance, particularly with regard to operating criteria, procedures and the protection to be granted to whistleblowers [65]. In particular, regarding the risk raised by the alert, the analysis should be done in a subjective way. According to the Labour Code, employees are entitled to alert, which allows them to withdraw when they have a "reasonable reason to believe" that a work situation presents a danger (see art. L. 4131-1 et seq.). Similarly, even if the danger or risk are not effective, holders of the right to alert under the Law on the Duty of Vigilance may reasonably believe that they are facing a danger.

The mechanism will also cover serious violations that have not been effectively prevented. The implementation of these procedures must not affect the wider right of individuals to alert public or judicial authorities at any time during the procedure, in particular through media. **Moreover, whistleblowers should not be subject to retaliation.**

By the use of the singular, the alert and complaint mechanism is expected to be centralised at the level of the parent company. Nevertheless, it will necessarily have to be divided into multiple decentralised tools and processes, i.e. deployed widely throughout the operational perimeter, in order to be activated by various recipients and therefore be effectively utilised, as required by the Law.

Within the temporal perimeter of the obligation, alert and complaint measures naturally contribute to the continuity of vigilance: they make it possible to update, almost in real time, the risk mapping and all the mitigation, prevention and monitoring measures that result from them.

Banking sector alert and complaint mechanisms[66]

Oxfam and BankTrack have published several recommendations for alert mechanisms in the banking sector. They recommend that companies start by mapping and evaluating the internal or external alert and complaint channels already available to the group. Companies should ensure that all stakeholders, **including communities affected by the projects and activities financed, have access to the bank's complaint mechanisms.**

They then encourage companies to develop mechanisms guided by United Nations effectiveness principles (accessibility, transparency, consultation, clear and time-bound procedures) as well as to **combine different options** (own mechanism, multi-bank mechanism or sectoral initiative mechanism).

65. Law "Sapin II" No 2016-169 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, JORF No 0287 of 10 December 2016, [https://www.legifrance.gouv.fr/affichTexte]

66. Developing Effective Grievance Mechanisms In The Banking Sector, BankTrack et Oxfam Australia, *Report*, July 2018, [https://www.banktrack.org/news/banktrack_and_oxfam_australia_call_on_banks_to_ensure_access_to_remedy_for_victims_of_human_rights_abuses]

They call for **transparency and disclosure of information on loans and projects financed by corporate clients** to enable affected people to know the origin of funds and to use the mechanisms in an informed way. Mechanisms must provide for remediation or facilitate remediation by corporate customers. Banks must also check that the complaint mechanisms applied by corporate clients are also effective and comply with the effectiveness principles.

Avenues for evolution

One year after the adoption of the Law, most companies are still far from having comprehensive mechanisms in place, due - according to them - to a lack of information and time. However, a large number of guides developed by institutions and NGOs provide valuable assistance in this matter. Some are listed in the annexes.

For the setting and implementation of the timeline, it may be useful to note that the Agence Française de Développement took about two years to develop and launch its own alert mechanism. It is therefore reasonable to expect that companies covered by the Law will take up to two years to establish a comprehensive mechanism, until spring of 2019 at the latest. Until such tools are formalised, companies can only be encouraged to remain open to alerts, complaint mechanisms and other public interpellations that could be addressed to them.

Companies should already show consideration to stakeholders who would try to alert them to risks, even in the absence of an established alert mechanism. Indeed, in the absence of an available mechanism, many stakeholders have already decided to make free alerts and complaint to some companies, by post or email, or via the media.

These spontaneous alerts should be treated seriously, as closely as possible to the alert treated via the official mechanisms set up by the company, with a procedure and timeframe to respond as soon as possible to the risks highlighted or the worries of the parties concerned. In any case, they should not be subject to reprisals.

Protection of Civil and Political Rights and in particular the freedom of expression of human rights defenders[67]

Two British NGOs recently outlined, in a guide for the private sector, the necessity of respecting in particular the civic freedoms of human rights defenders, as well as the right to freedom of expression. In a context marked by violence and repression against these human rights defenders, particularly when they oppose agricultural or extractive projects, the report proposes avenues for thought and measures to prevent such violations. First, they imply identifying these actors as stakeholders potentially impacted by the company's activity and as assets in addressing human rights violations by companies, rather than merely as "hostile" stakeholders.

Indeed, human rights defenders, whether NGOs, journalists or community representatives, are often victims of violence in the context of company activities. Every year, hundreds of people die, especially among the environmental defenders.

In March 2016, the murder of Berta Cáceres, an activist for indigenous peoples and environmental rights in Honduras, shocked public opinion. She had expressed her opposition to a hydroelectric dam project. Two years later, the president of the company that was building the dam was arrested in connection with the case. The Dutch development bank was sued in the Netherlands for its involvement in financing the dam.

It is essential that companies become aware of the seriousness of these attacks, which, in addition to harming the lives or safety of individuals, limit freedom of expression by creating a climate of fear within communities. Businesses may be seen as complicit in these attacks through their actions and omissions and may even find themselves judicially entangled, as shown by the Cáceres case. The guide indicates that to **break the cycle of defiance created by these practices, it is imperative that companies proactively engage in defending these freedoms**. To do so, they must cease activities that violate freedom of expression or make them complicit in such violations. This means, for example, no more prosecuting human rights defenders through SLAPP suits, with no other purpose than to deter defenders from exercising their freedom of expression. They may refrain from continuing their operations or projects when the defenders' voices are not respected until their views have been fully heeded.

Companies can also exert their power in favour of organisations and human rights defenders when they are threatened and defend them against repression by governments, for example. **Companies in the information and communication technologies sector should pay particular attention to these freedoms.**

67. « Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders », *Guide BHRRC & ISHR*, August 2018, [https://www.business-humanrights.org/sites/default/files/documents/Shared%20Space%20Under%20Pressure%20-%20Business%20Support%20for%20Civic%20Freedoms%20and%20Human%20Rights%20Defenders_0.pdf]

At this stage, a recurring question will be whether the alert and complaint mechanism is extended to third parties, i.e. beyond the parent company and its employees. Due to the perimeter of the Plan, identified by the Law, the alert and complaint mechanism must be available, at a minimum, to all individuals within this perimeter. This means that the mechanism must be available, in particular within subsidiaries, or for suppliers or subcontractors of the parent company and its subsidiaries.

However, the Law does not specify the recipients, whether natural or legal persons, of the alert and complaint mechanism. It only defines the scope of the alert mechanism in relation to the substantial perimeter of the Plan, i.e. human rights, environment, health and safety. These risks do not necessarily only affect the employees of subsidiaries, subcontractors and suppliers, since they are the result of the activities of these entities in general. They may also concern riverside communities, governments or consumers directly affected by an activity involving the production of services or goods.

Yet the logic of the alert mechanism is to improve identification and prevention of risks for all stakeholders. It is therefore relevant to make the alert mechanism available to them in order to ensure its effectiveness.

> This obviously requires the company to think in depth about the tools to be put in place, their format and their language, depending on its regions of activity, products and stakeholders.

Some regions are not suitable for Internet use but more so for telephone use. Some communities will favour oral exchanges and others will encourage written exchanges. These different characteristics, linked to the context of the operation, must absolutely be taken into account, in particular through cooperation with the recipients of the mechanisms.

What the soft law says about alert and complaint mechanisms

OECD Guidelines, Chapter IV, Comments para. 46	Complaint mechanisms within the company, available to persons likely to be affected by its activities, may be effective provided that they meet the following criteria: “legitimacy, accessibility, predictability, equitability, compatibility with the Guidelines and transparency”. **These mechanisms should not “preclude access to judicial or non-judicial grievance mechanisms.”**
UN Guiding Principles on Business and Human Rights, Principle 29	“To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective **operational-level grievance mechanisms for individuals and communities who may be adversely impacted.**”

While a centralisation of information is indispensable to enable the Plan as a whole to be updated, this should not prevent the alert mechanism from being applied at the operational and local levels, in order to ensure its adaptability and accessibility. Persons, wishing to access the mechanism, must also have access to the global mechanism if they do not wish to go through the operational level, as may be the case when the operational or local situation is characterised by tensions or violence.

> In addition to its establishment with the trade unions mentioned below, the mechanism should provide an exact procedure, as well as a timeline and governance.

The procedure must be sufficiently rapid and provide for verification and investigation mechanisms. It must also define the procedures for submitting documents to support the allegations, the modalities of exchange between the alerting party and the referent designated to collect grievances. It must inform the author of the alert as well as possible of the reception of the alert, of each stage of the process and of the next deadlines.

The procedure must also outline the consequences of the alert, although of course the risk management, if confirmed, will be ad hoc. However, the alert mechanism must anticipate the overall impact of the alert on, in particular, the risk map, the risks' hierarchy and on the prevention and mitigation measures.

Whatever the timeline, procedure and tools put in place, these mechanisms must comply with procedural criteria, such as the safety of the whistleblower, in particular against reprisals, including SLAPPs, **disciplinary sanctions, discrimination, or interference with the career development**. They must ensure the confidentiality of the alert to protect the whistleblower, but also to **prevent the destruction of evidence.** They must be appropriate and accessible, physically for all recipients, and intelligible, i.e. in understood languages. Finally, the mechanisms must be **proactive**, i.e. the company will ensure that they are known and understood by the recipients.

The mechanism must be regularly tested and monitored, to ensure, in particular, that its implementation is effective and efficient.

b — Coordination with the representative trade unions within the company

> The Plan should contain details on the methodology used to develop alert and complaint mechanisms **in association with stakeholders**. It must necessarily provide the elements relating to the engagement of **trade unions in the preparation of the mechanism and, ideally, in the monitoring of alerts and complaints.**

The Law specifies that the mechanism must be settled, rolled out and published in the Plan, "in consultation with the representative trade union organisations within the company". Unlike the participation of stakeholders in the overall preparation of the Plan, trade unions involvement is not an incentive provision but a mandatory one.

> The reflection on the alert and complaint mechanism and its establishment cannot and must not take place without the real cooperation of the trade unions.

This choice by the legislator can be explained by the fact that, as demonstrated above, the alert is a tool known to workers and their representative organisations because of their pre-existing right to alert and withdraw in the event of a serious and imminent danger to health or safety. Their involvement in the preparation of the mechanism is required through "consultation", a mode of dialogue also known to companies and their trade unions. **First, consultation requires adequate prior communication of the company's wish to establish the mechanism and of the expected timeline.** It also requires making information sources on the subject available and explaining the procedure for involvement in the preparation of the mechanism in a clear way so that organisations can prepare for it.

Trade union organisations should be mobilised at both national and international levels given the formal perimeter of the vigilance Plans. It would also be appropriate for trade unions to be involved **in the longer run in the implementation of the alert mechanism and in particular to participate in its monitoring and evaluation.**

What the soft law says about stakeholders engagement within alert mechanisms:

OECD Guidelines, Chapter IV, Commentaries para. 46	Alert mechanisms must be "based on dialogue and engagement with a view to seeking agreed solutions. Such mechanisms can be administered by an enterprise alone or in collaboration with other stakeholders and can be a source of continuous learning."

Avenues for evolution

Consultation should logically be held within the representative bodies, in particular but not exclusively the social and economic committee (SEC). Indeed, as a reminder, the SEC has replaced the employee representative committee and other former representative bodies[68].

The question is also to know whether a company that does not consult the SEC for the establishment of the mechanism would commit the offence of obstructing the normal functioning of this committee, in terms of article L2317-1 of the Labour Code. The Macron Ordinance creates an offence of obstructing the proper functioning of the SEC in article L. 2317-1 of the Labour Code, which more or less reproduces the previous offences of obstructing the regular functioning of the former bodies: "The act of obstructing either the establishment of a social and economic committee, a workplace social and economic committee or a central social and economic committee, or the free appointment of their members, in particular by disregarding the provisions of articles L. 2314-1 to L. 2314-9 shall be punished by one year' imprisonment and a fine of €7,500. The act of obstructing their regular functioning is punishable by a fine of €7,500".

The offence of obstruction is an intentional offence, with awareness and willingness to commit the offence. The Court of Cassation uses a broad conception of the moral element of the offence. As regards to the material element, the case law prior to the reform comprises failures to consult the works council, which has now been replaced by the SEC[69]. Thus, the lack of consultation with the SEC in drawing up the Plan could constitute an obstacle to the regular functioning of this body.

Mandatory consultation with trade unions for the preparation of the alert mechanism is not exclusive of the participation of other relevant stakeholders. Indeed, soft law norms draw up very precise criteria concerning alert mechanisms and require their establishment with the participation of the persons to whom they are addressed. Their legitimacy, accessibility and compatibility with the rights will depend on the vision of these stakeholders.

68. It was created by Ordinance No. 2017-1386 of 22 September 2017 known as the "Macron" Ordinance, which has amended the Labour Code. It is made up of the staff delegation and the employer who chairs it. For companies with less than 300 employees, it includes the trade union delegate. For companies with more than 300 employees, it includes all the representative unions in the company.

69. See Court of Cassation of 14 October 2003 No. 03-81366: offence of obstructing the CHSCT in the absence of consultation before taking a major planning decision modifying health and safety conditions or working conditions; Court of Cassation, Criminal Chamber, 19 September 2006, No. 05-86.668: failure to consult following the advancement of the timetable for implementing the restructuring plan; Court of Cassation, Criminal Chamber, 10 May 2011, No. 09-87.558: The failure to consult the central works council on the transfer of know-how and the relocation of activities constitutes the offence of obstruction, even if few employees were concerned, on a voluntary basis.

5. A system monitoring implementation measures and evaluating their effectiveness

> The company will have to establish a monitoring system for each risk, violation and corresponding measure, as well as a global monitoring system of the Plan. Such a monitoring system must necessarily include the establishment of indicators for each vigilance measure and for each severe risk or violation, in order to demonstrate both the effectiveness and efficiency of the measures. There will be therefore indicators of means and results.
>
> The company must **publish the monitoring items in an accessible, exhaustive way and in accordance with the identification and prevention of risks and breaches**. Ideally, in the published Plan, monitoring measures and their results respond to the risks as well as to prevention, mitigation and remediation measures that are identified and implemented. This may involve the establishment of a follow-up table or other graphical tool that would satisfy the informative aspect of the obligation.
>
> The company should also provide a **methodological explanation on the selection of indicators and statistical tools, as well as on the sources of the data used**. As far as method indicators are concerned, the resources allocated to measures and their development may be particularly relevant. The company may indicate the governance of the monitoring. To account for the constant vigilance, the company should **regularly update** the monitoring tool according to the evolution of risks, violations and their treatment and for any significant event occurring while implementing the Plan. The same applies to the monitoring document made public.

The Law also provides that "a system monitoring implementation measures and evaluating their effectiveness" must be set up, effectively implemented and published. This provision concerns all risks identification and prevention measures rolled out. The monitoring and evaluating system must therefore cover, without exception, the entire substantial and organisational perimeters as well as all the measures taken in the Plan. This refers to the measures for identifying and assessing the risks mapped, the alert mechanism, the processes for evaluating suppliers and subcontractors, as well as to any other measures taken as part of the duty of vigilance.

> Monitoring should focus in particular on "implementation" and evaluation of "effectiveness". These are two distinct elements.

On the one hand, the system for monitoring implementation has to demonstrate the effectiveness of vigilance. In other words, as an obligation of means, the Plan is not merely a declaration but corresponds internally to the deployment, over time, of human, technical and financial resources to effectively identify risks and prevent severe impacts.

The monitoring system for the measures implemented should therefore show, for each measure, the resources allocated in proportion to the objective pursued[70].

On the other hand, the system must focus on the evaluation of "effectiveness". Efficiency goes beyond effectiveness. It is the fact that the measure not only produces effects, but also that it really contributes to the achievement of the objective pursued. The aim is to demonstrate that the measure has effects, but also that its effects are adequate, i.e. that it effectively reduces the risk or prevents severe impacts. **An efficient measure will have produced the expected results**. For example, this means that the alert mechanism will have effectively enabled identification, or refinement of risk analysis. This indicates also that a prevention or mitigation measure will have effectively reduced the risk caused by the activities or prevented its occurrence.

Besides, a measure that does not produce the appropriate effects will need to be rectified.

Avenues for evolution

This monitoring provision therefore contributes to the efficiency of vigilance. Efficiency implies that, on the one hand, the measures adopted are used and, on the other hand, that they have a measurable or identifiable impact on their recipients. These are exactly the two aspects that are addressed in the fifth measure of the Plan examined here.

Companies will be committed to putting in place internal procedures to verify that vigilance is efficient. In practice, this implies the existence of control measures: it will be necessary to regularly ensure that the measures are known and applied by the operators, that management checks the implementation of the measures by the operators and finally, that audits and verifications are carried out to verify the veracity and reality of the measures. **This follow-up must be carried out in collaboration with stakeholders and in particular with those directly affected.**

In the event of independent control, the widest possible scope in line with the duty of vigilance at least, as well as ambitious criteria, principles and procedures, must be provided for. Third party control does not relieve the company of its responsibility as part of the duty of vigilance with regard to monitoring the effectiveness and efficiency of the measures.

It will also be crucial to set up indicators that will demonstrate both the effectiveness of vigilance and its efficiency.

70. Cons. Court, Decision No. 2017-750 DC of 23 March 2017, *Government Comments*, The obligation "is therefore not merely a documentary obligation but an obligation of means to implement the vigilance measures provided for by the law and whose content they have defined in view of the risks that their activity may generate". The company must be able to demonstrate that the measures mentioned in the vigilance Plan have been carried out.

These indicators can be divided into two main categories: indicators of process or means, and indicators of results that correspond to the objectives of effectiveness and efficiency previously identified. With regard to process or method indicators, they will make it possible to demonstrate that the company has effectively deployed all the technical, human and financial means at its disposal to achieve the objective pursued by the measure, namely the identification, prevention or mitigation of a given risk, in proportion to its gravity.

With regard to result indicators, they will have to demonstrate the reduction and efficient prevention of risks and impacts on human rights, the environment, health and safety. **In this respect, they should be inspired by the standards themselves and their normative content.** Various guides and tools exist to develop such indicators.

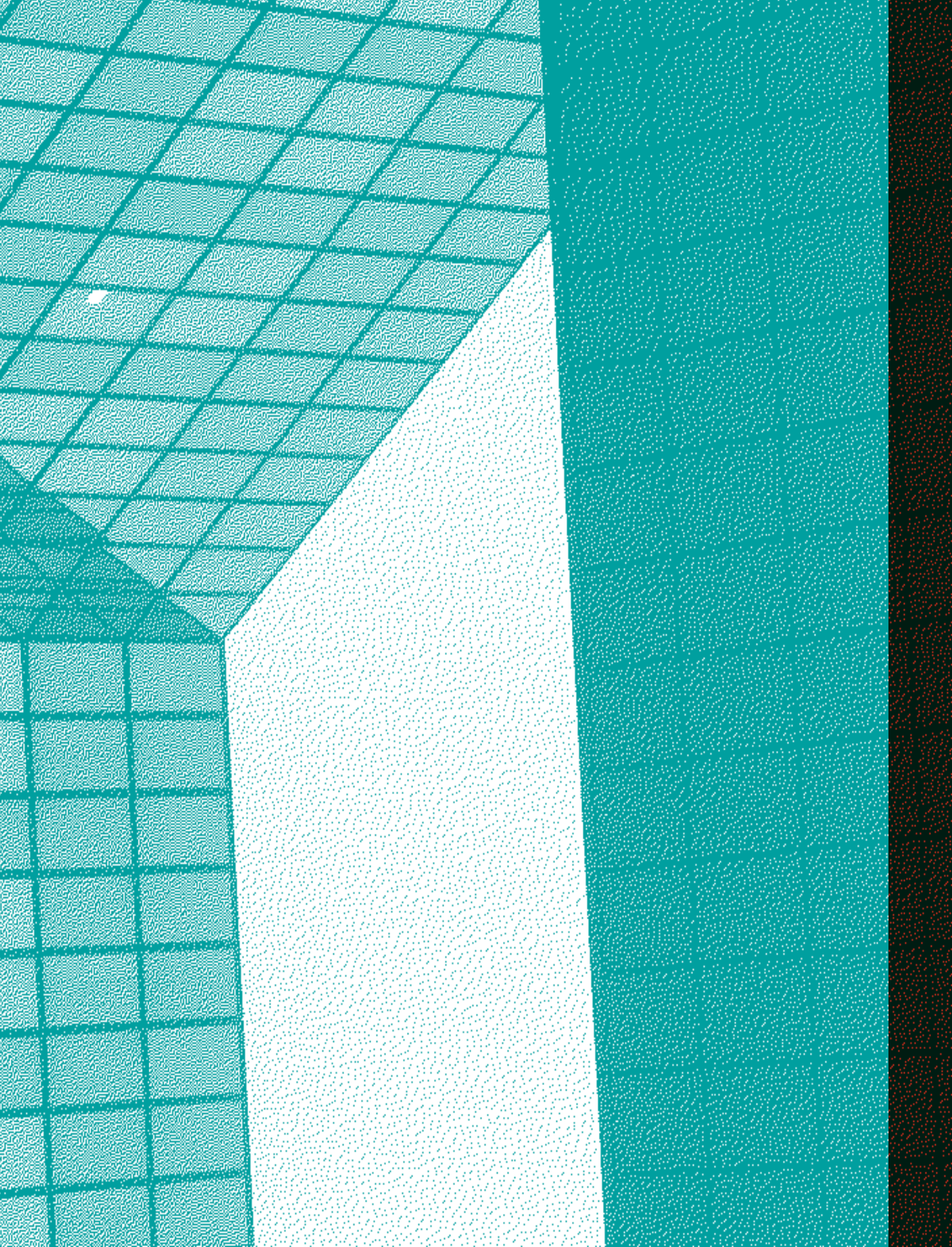
In particular, the UN has developed a guide that includes a basic conceptual framework for the elaboration of indicators on the respect of human rights by States, but which can fully inspire the formulation of indicators on the respect of human rights by companies[71]. It is organised around three types of indicators: structural, process-oriented and results-based. Structural indicators reflect the ratification of the Treaties and thus the adherence in principle to legal standards and their content. Process indicators link programs and specific interventions to key milestones related to the direct or progressive realisation of human rights. Finally, results indicators describe the realisation, individually and collectively, of human rights in a given context. These are specific indicators composed by reference to the normative content of each human right. It would also be relevant to require the different indicators to be specific, measurable, acceptable, realistic and time-bound (SMART).

As a reminder, the report on effective implementation contains a narrative on key events and indicators while tracking the effective implementation of the measures and their efficiency. In particular, it should highlight major events during the financial year that may have had a significant impact on the substantial and organisational perimeters of the Plan, leading to the progress, stagnation or significant regression of some of the indicators. It also describes the corrective measures that will be adopted as a result of the trends revealed by the indicators.

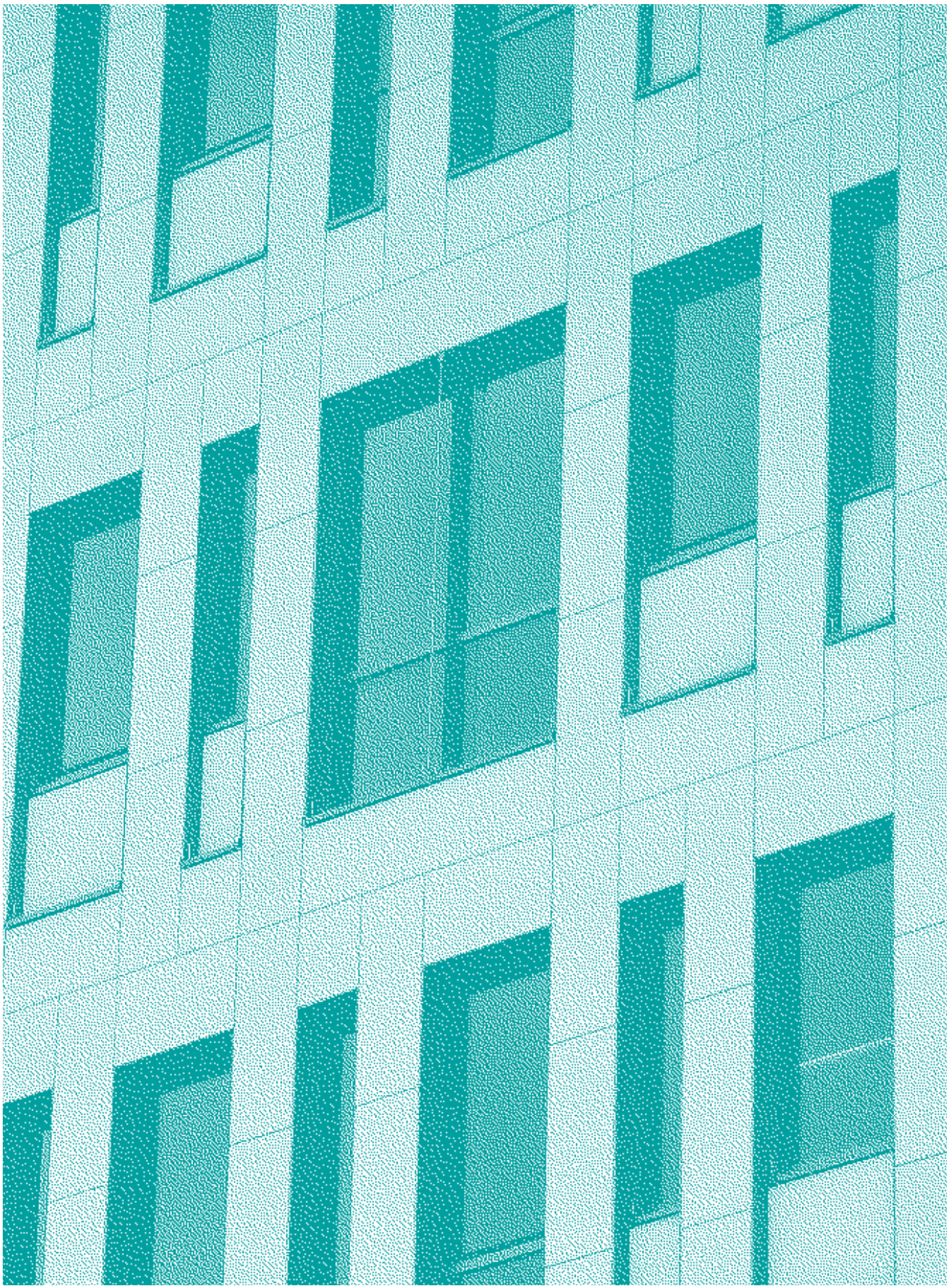
What the soft law says about indicators

UN Guiding Principles on Business and Human Rights, Principle 20	"(…) business enterprises should track the effectiveness of their response. Tracking should: (a) Be based on appropriate qualitative and quantitative indicators; (b) Draw on feedback from both internal and external sources, including affected stakeholders."

71. UN (OHCHR), "Human Rights Indicators: A Guide to Measurement and Implementation", Geneva, 2012, [http://www.ohchr.org/Documents/Issues/HRIndicators/Human_rights_indicators_fr.pdf]



Annexes



I. Methodology

This Guidance is the result of research and exchange with various actors active in the field of vigilance or due diligence. In order to achieve the publication of this Guidance and its distribution, three methodological components were necessary.

First, an inventory and analysis of standards, norms, reference systems and opinions formulated by stakeholders in terms of vigilance or due diligence. The standards are derived from positive law, both national and international, as well as from soft law. Indeed, the Law on the Duty of Vigilance incorporates into positive law principles of soft law that must necessarily inform its interpretation and implementation. Certain norms and opinions have a generalist approach; others are sectoral or focus on specific stages of vigilance, such as alert mechanisms. The references of this inventory are given in Annex II.

Second, exchanges with a range of stakeholders: NGOs in host countries and countries of origin, trade unions, “vigilance specialists”, legal professionals and private-sector representatives to ensure a balance between ambition and pragmatism.

Third, the analysis of the first published vigilance Plans, to provide a detailed analysis and highlight areas for improvement and avenues for further development.

As vigilance is a constant and renewed process, this Guidance may evolve with the experience and possible emergence of other legislation and standards in the field of vigilance and diligence. This Guidance will therefore be updated regularly to take into account these developments.

II. Translation of the Law on the Duty of Vigilance

French Law on the Duty of Vigilance of Parent and Instructing Companies

Free translation by Sherpa

JORF n ° 0074 from March 28, 2017 - text n ° 1

LAW n ° 2017-399 of March 27th, 2017 on the duty of vigilance for parent and instructing companies

Article 1

After article L. 225-102-3 of the Commercial Code [Code de commerce], an article L. 225-102-4 is inserted and reads as follows:

"Art. L. 225-102-4.-I.-Any company that employs, by the end of two consecutive financial years, at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory or abroad, shall establish and effectively implement a vigilance plan.
"Subsidiaries or controlled companies that exceed the thresholds referred to in the first paragraph shall be deemed to satisfy the obligations provided in this article, if the company that controls them, within the meaning of Article L. 233-3 of the French Commercial Code, establishes and implements a vigilance plan covering the activities of the company and of all the subsidiaries or companies it controls.
"The plan shall include reasonable vigilance measures adequate to identify risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of individuals and on the environment, resulting from the activities of the company and of those companies it controls within the meaning of II of article L. 233-16, 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."
"The plan is meant to be drawn up in conjunction with the stakeholders of the company, where appropriate as part of multi-stakeholder initiatives within sectors or at territorial level. It includes the following measures:
"1° A risk mapping meant for their identification, analysis and prioritisation;
"2° Regular evaluation procedures regarding the situation of subsidiaries, subcontractors or suppliers with whom there is an established commercial relationship, in line with the risk mapping;
"3° Appropriate actions to mitigate risks or prevent severe impacts;
"4° An alert and complaint mechanism relating to the existence or realisation of risks, drawn up in consultation with the representative trade union organisations within the company;
"5° A system monitoring implementation measures and evaluating their effectiveness.

"The vigilance plan and the report concerning its effective implementation shall be published and included in the report mentioned in article L. 225-102.
"A decree issued by the Conseil d'Etat may expand on the vigilance measures provided for in points 1 to 5 of this article. It may detail the methods for drawing up and implementing the vigilance plan, where appropriate in the context of multi-stakeholder initiatives within sectors or at territorial level.
"II.-When a company receiving a formal notice to comply with the obligations laid down in paragraph I, does not satisfy its obligations within three months of the formal notice, the competent court may, at the request of any party with standing, order the company, including under a periodic penalty payment, to respect them.
"The case may also be referred for the same purpose to the president of the court in the context of summary proceedings.

Article 2

After the same article L. 225-102-3, it is inserted an article L. 225-102-5 and reads as follows:

"Art. 225-102-5.-Following the conditions provided in articles 1240 and 1241 of the Civil Code, a breach of the obligations defined in article L. 225-102-4 of this Code, establishes the liability of the offender and requires him to remedy any damage that the execution of these obligations could have prevented.
"The civil liability action is brought before the competent court by any person proving standing.
"The court may order the publication, dissemination or display of its decision or an extract thereof, according to the terms it specifies. The costs are borne by the person found liable.
"The court may order the execution of its decision under a periodic penalty payment."

Article 3

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, relating to the first financial year opened after the publication of this Law.
By way of derogation from the first paragraph of this article, for the financial year during which this Law was published, paragraph I of article L. 225-102-4 of the said Code applies, with the exception of the report in its penultimate paragraph.
This Law shall be executed as the law of the State.

III. References for vigilance

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The ambition of this Vigilance Plans Reference Guidance is to provide keys to understanding and tools to the different actors who wish to take up the Law on the Duty of Vigilance for parent and instructing companies.