



## TOWARDS AN EU LEGISLATION ON CORPORATE ACCOUNTABILITY

### Recommendations from French NGOs and trade unions that advocated for the French law on the duty of vigilance

December 2020

On April 29th 2020, Commissioner Reynders committed to a legislative initiative on “mandatory human rights and environmental due diligence obligations” for EU companies in early 2021, which will include liability, enforcement mechanisms, and access to remedy provisions for victims of corporate abuse. As French organisations that advocated for a duty of vigilance law in France, we want to list several recommendations based on our experience, to contribute to the elaboration of ambitious and efficient EU legislation.

Over the years, our organisations have been documenting cases of human rights violations by transnational corporations, as well as the many ways in which the victims’ access to justice, especially for groups facing structural discrimination, such as women and indigenous people, is restricted. The tragedy in Bhopal, India, the dumping of toxic waste in the Ivory Coast, the pollution caused by the Erika tanker on the French coast, oil spills and gas flaring by Shell in Nigeria and by Chevron/Texaco in Ecuador, or even the much publicised collapse of the Rana Plaza in Bangladesh are emblematic and dramatic examples of ongoing corporate impunity. These cases demonstrate that existing national and international regulatory frameworks are ineffective in holding companies to account for human rights violations and environmental damage. They fail to secure access to justice for those affected, wherever the harm occurred. This situation reveals that voluntary standards are ineffective in preventing violations of human rights and fundamental freedoms, in protecting the health and safety of individuals, and in remedying the environmental damage caused by companies throughout their corporate groups and value chains. A legally binding framework is therefore essential.

The French law on the duty of vigilance of parent and outsourcing companies (Law No. 2017-399 of the 27th of March 2017) is meant to address this issue. This law places the burden of responsibility in preventing human rights violations and environmental

degradation on parent and outsourcing companies. Most importantly, it imposes civil liability on companies for the impact of their corporate activities including those of their subsidiaries, suppliers and subcontractors, wherever they may be in the world. It is the first legislation that creates human rights obligations upon companies for their activities throughout the world<sup>1</sup>.

But domestic legislation in France alone is not sufficient. And even though the French law on the duty of vigilance now creates a significant precedent, it is crucial to go beyond this example, by learning from its strengths and correcting its weaknesses. Some positive developments in the areas of parent company liability, the duty of vigilance, access to national courts and the disclosure of information have occurred in the last years in some European countries. But victims need EU-wide legislation applicable to all commercial enterprises domiciled or based in the EU, or active on the EU market. This is crucial to prevent human rights violations and environmental harm on a global scale.

The French law on the duty of vigilance is centred on the duty of each company to establish, publish and effectively implement a “vigilance plan”, a document containing measures to prevent serious harm to human rights and the environment. In the primary version of the bill supported by the French organizations in 2013, there was no «vigilance plan» as such. The French organizations supported, and still support, the overriding objective of a general duty of vigilance in order to respect human rights, protect the environment and prevent violations caused by subsidiaries or subcontractors. Breach of such a duty would be likely to trigger not only civil, but also criminal liability of a company. It is this objective, as well as that of facilitating access to evidence by stakeholders, especially affected people, which must guide the European legislator.

Below are some key elements for which EU legislation should aim.

## 1 • A cross-sectoral perspective

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- The legislation should cover prevention and legal redress for all human rights and environmental violations.
- While the EU has so far addressed issues relating to a limited number of commodities with a sectoral approach (Timber Regulation, Conflict Minerals Regulation), a corporate obligation to prevent human rights and environmental violations should not be limited to certain sectors, commodities, or types of impact. Doing otherwise means that the EU is doomed to lag international human rights norms’
- The French law on the duty of vigilance - which applies to all serious violations of human rights, fundamental freedoms, the health and safety of individuals, and the environment, regardless of the sector or commodities at stake - demonstrates that such a cross-sectoral perspective is possible. Our [analysis](#) shows how the duty of vigilance can be applied in different sectors.

<sup>1</sup> The economic reality of transnational corporations is indeed very different to their legal reality; in France, as in other countries, the so-called ‘corporate veil’ means that parent companies or global buyers are not liable for actions committed by their subsidiaries or suppliers because they are considered to be autonomous legal entities, even though they are obviously economically and operationally connected.

## 2 • A clear scope

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- An important issue with the French law on the duty of vigilance is the narrow scope of companies covered; it only applies to French companies with more than 5,000 employees in France, including those of their subsidiaries, or companies with 10,000 employees worldwide, including those of their subsidiaries. Yet the lack of transparency on the number of employees in corporate structures makes it impossible for stakeholders (including civil society, trade unions and local authorities) and even the government to know exactly which companies are covered (see CCFD-Terre Solidaire & Sherpa's tentative [list](#) of companies subject to the French law, and [their conclusions](#)). In addition, these thresholds are so high that many large companies operating overseas with disastrous human rights records and environmental impacts are not subject to this law.
- Another limit is the corporate forms covered. While the law was initially adopted to prevent disasters such as the Rana Plaza collapse, two of the major garment companies in France (H&M and Zara) are not subject to this law because their corporate forms (SARL) are outside the scope of this law. An effective EU Regulation on business and human rights should avoid such loopholes. The French government issued, in January 2020, a first evaluation report of the duty of vigilance law which recommends addressing this issue by covering all corporate forms.
- Any new EU legislation must apply to commercial enterprises, both public and private, including financial institutions, of all sizes and across all sectors, domiciled or based in, operating, or offering a product or service, within the EU.

## 3 • Corporate duty to identify risks and to prevent violations throughout the corporate group and value chain

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- The obligation should not be for companies to follow certain procedures (e.g. adopt a policy, insert contractual clauses, etc.) and/or to report on them. It should instead be to adopt and effectively implement all necessary measures to prevent, mitigate and cease human rights and environmental violations within their corporate group and value chain.
- As such, and to avoid confusion, reporting and compliance obligations should clearly be separated from the substantive obligations described above.
- The concept of "human rights due diligence" is often used to refer to the ongoing legislative process. Due diligence procedures are at the core of the UNGP on business and human rights, as well as the OECD Guidelines for Multinational Enterprises and ILO tripartite declaration. In addition to what those principles and guidelines prescribe, it is crucial that in the context of the upcoming European legislation, those terms are precisely defined. "Due diligence" should refer to companies' obligation to take all necessary, adequate and effective measures to prevent human rights and environmental violations, resulting from their activities and the activities of companies in their value chain. It should not be a mere expectation to demonstrate "reasonable steps".

- The French law not only requires companies to take measures to identify risks within their corporate group and value chain, and to prevent violations, it also specifies that these measures must be adequate, and effectively implemented. These qualifications are essential; companies cannot simply pay lip service to the measures listed under the law or interpret the legal requirements as a formal box ticking exercise. Judges are able to assess whether the measures taken are adequate, efficient and are effectively implemented throughout the subsidiaries, controlled companies and the whole value chain.
- This obligation should cover the activities of the companies subject to the EU directive itself, and also the activities of their subsidiaries, directly or indirectly controlled companies and all entities in their value chain (direct and indirect subcontractors, providers, franchises etc. and their clients).
- The legislation should specify that risks are to be understood as risks to people and the environment, not to business interests.
- The list of companies falling under the scope of the law should be maintained by a competent national and/or EU authority and made publicly available.

#### **4 • Access to justice through preventive action and liability**

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- Judicial mechanisms have been included in the French law to enforce the law and to provide remedies to victims. Where a company fails to comply with its obligations, the law lays down two different judicial mechanisms:
  - ▶ Firstly, where a company fails to respect its obligations to establish, publish and effectively implement a vigilance plan, any interested party may address a formal notice to the company. The company must then comply with the law within 3 months or can otherwise be taken to court.
  - ▶ Secondly, if a company's failure to comply with the law has caused damage to a third party, that third party may request compensation under civil liability law.

Such judicial provisions are key; any duty of vigilance legislation which does not provide for adequate, effective, and dissuasive judicial sanctions and mechanisms for enforcement is bound to have a very limited effect.

- Cases should be dealt with before civil courts and not commercial courts, depending on the judicial system of the relevant Member State.
- Criminal, or functionally equivalent, liability of legal persons, depending on the respective recognition of criminal liability of legal entities in member States, should be considered in the legislation.

## 5 • Liability of parent companies and the burden of proof falling on companies

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- Commercial enterprises must be liable for harm caused, or contributed to, by the acts or omissions of the enterprise itself, or by a company that the enterprise controls or has the ability to control<sup>2</sup>. In a legal action, claimants should have the right to rely on a rebuttable presumption of control by the parent company over one or several other entities. The burden to rebut this presumption should fall on the putative controlling company to demonstrate that it does not control the other entities.
- Equally, grounds for liability must be established on the basis of failure to carry out due diligence.
- In the absence of control, a company should be liable for harm caused by a business in its value chain, unless it can prove it took all necessary measures to prevent the harm.
- Civil liability is often difficult to prove in a claim of a human rights violation against corporations because the relevant information (and expertise to understand it) is in the hands of the corporate defendant. To redress this imbalance, the specific barriers rights-holders may face because of heightened vulnerability and/or marginalisation, for instance by reason of their gender, should be taken into account. If claimants can prima facie demonstrate that they have suffered harm (the damage) and that this is likely to have been the result of activities carried out in the corporate group or value chain of the company (causation), the law must shift the burden of proof to the corporate defendant. Significantly, the Committee on Economic, Social and Cultural Rights calls on States to consider this recommendation. It notes in General Comment 24: “Shifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant”.

## 6 • Issues with the vigilance plan mechanism and proposal of alternatives

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The vigilance plan is comprised of the set of vigilance measures put in place by the company to prevent and mitigate human rights violations and environmental harm throughout its value chain. Since the plan is binding, it enables stakeholders and third parties to access and challenge the company’s business model and strategy for respecting human rights and the environment as a whole, or on a country by country, or project by project basis. It also allows for voluntary commitments taken by the company, and referenced in a plan, to become legally binding.

However, the definition of the duty of vigilance as an obligation to establish, publish and effectively implement a vigilance plan has led to several difficulties in litigation:

<sup>2</sup> See ECCJ Legal Brief, February 2020 “Undertakings should be: a) Jointly and severally liable for harm arising out of human rights and environmental abuses caused or contributed to by controlled or economically dependent entities. b) Liable for harm arising out of human rights and environmental abuses directly linked to their products, services or operations through a business relationship, unless they can prove they acted with due care and took all reasonable measures that could have prevented the harm.”

- In practice, many companies do not publish a vigilance plan and, so far, the vigilance plans published by companies are not complying with legal requirements. Companies list very general (and publicly available) information. They do not include any real risk mapping or detailed descriptions of the vigilance measures implemented. Therefore, stakeholders and judges cannot evaluate the relevant risks, or the quality of the company's responses to those risks.
- This leads to confusion between, and conflation of, the 'reporting' obligations and the 'duty of vigilance' aspects. It makes legal action from civil society and affected people more complex as plaintiffs need to prove:
  - a) that the content of the plan is insufficient and/or ineffectively implemented
  - b) the harm or risk of harm; and
  - c) the existence of a causal link between the weak content and/or ineffective implementation of the plan and the harm or risk of harm.
- As a result, current discussions tend to focus on the interpretation of what constitutes an adequate vigilance plan (e.g. discussions around due diligence standards), and the meaning of "effective implementation", instead of focusing on the actual violations or risks of violations.

A general duty of vigilance associated with a mechanism to access information (including internal documents of the company) could be more effective than a vigilance plan. European legislation should therefore provide for a right to know (or request for information) procedure, enabling any stakeholders to formally request information that is in the possession of a company, and to compel that company to disclose such information.

If the requirement of publishing a vigilance plan is pursued at the EU level, it should make clear that:

- Any requirement to publish such a plan is distinct and separate from the general duty of vigilance that may trigger a company's civil liability.
- The vigilance plan should be sufficiently detailed to give concrete information about the activities of the company and its vigilance measures. More particularly, the risk mapping should explicitly include a detailed list of all countries, activities and projects which pose risks for human rights and the environment.
- Any vigilance measure described in a company's vigilance plan is legally binding upon the company and may be judicially enforced.

## **7. Special involvement of trade unions and workers' representatives in the duty of vigilance process<sup>3</sup>**

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Trade unions and workers' representatives should be consulted, communicated with, and adequately involved and informed. This must also apply to indigenous populations, and other marginalized groups.

<sup>3</sup> See the [ETUC Position](#) for a European directive on mandatory Human Rights due diligence and responsible business conduct adopted at the Executive Committee of 17-18 December 2019.

According to the UNGP, OECD Guidelines and ILO Tripartite Declaration definition, workers, and their legitimate representatives, in particular trade unions, have a legitimate role in the definition and implementation of companies' due diligence initiatives. The legislation should fully recognise the role of workers and trade unions as central actors in companies. Without prejudice to existing information, consultation, and participation legislation, but building on strong collective rights of workers, the legislation should include the following elements:

- The right for trade unions at the relevant level, as defined by the unions themselves, to negotiate with the company the duty of vigilance process that should be introduced.
- Mandatory involvement of trade unions and workers' representatives as well as indigenous populations, and other marginalized groups should be guaranteed in an effective manner, The involvement should continue from an early stage, in the identification of the actual and potential adverse impacts, as well as in the elaboration of the vigilance measures, in their implementation and enforcement, and their periodic assessment and review.
- An early alert mechanism should be developed and managed in partnership with the trade union organisations in the companies concerned.
- Mandatory workers' information and consultation rights should be fully respected regarding the definition of vigilance measures and their implementation, at national, European, and global levels, including through the involvement of the European Works Councils and Global Works Councils. The information should be timely and sufficient to support workers' active and efficient involvement in the process. Workers' representatives in company boards should be fully involved in the different steps of the duty of vigilance process.
- The legislation should ensure that trade unions and workers' representatives of companies in the supply and subcontracting chains, as well as indigenous populations and other marginalized groups, are also involved in the identification and assessment of vigilance measures and in the early alert mechanism. It is imperative that the legislation provides trade unions with the resources and capacity to intervene, and act, on all stages of the process.
- Social dialogue practices, and trade union rights, notably the right to organise, to bargain collectively, and the right to strike, must also be protected and enforced in the value chain or subcontracting chains, including for non-standard employment relations.