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The EU Commission's draft directive on corporate sustainability due diligence - Analysis and recommendations

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The French Duty of Vigilance Law, enacted on 27 March 2017, was a first step in the fight against the impunity of economic actors. Since then, the political and economic context has changed significantly. Several countries have adopted, or are about to adopt, legislations in this area. The climate emergency, the Covid-19 crisis and the war in Ukraine have all questioned the current legal framework of global supply chains and their viability.

The European Commission's proposal for a directive on corporate sustainability due diligence, published on 23 February 2022, was long overdue. As currently drafted, however, the proposal falls short of what is at stake.

This note presents our analysis and recommendations on six key points: the substantive scope of application of the future directive, the notion of established business relationships, the definition of the duty of vigilance, civil liability, administrative supervision, and the protection of persons likely to act on the basis of the duty of vigilance.

Our concerns mainly relate to the vision and the general balance of the text, which tends to transform the duty of vigilance into a *compliance* exercise aimed at reinforcing the legal security of companies, to the detriment of the protection of the environment and of the rights of affected persons.

The need to cover all corporate abuses to human rights, the environment, and human health and safety

In order to identify the human rights falling within its substantive scope, the proposed directive lists "*adverse impacts on human rights*" using a two-step approach.

First, the annex lists human rights violations (I.1), and then also includes any "*violation of a prohibition or right*" listed in international conventions (I.2), provided that such a violation "*directly impairs a legal interest protected in those conventions*" and provided that "*the company concerned could have reasonably established the risk of such impairment and any appropriate measures to be taken in order to comply with the due diligence obligations under this Directive, taking into account all relevant circumstances of their operations, such as the sector and operational context.*"

This delimitation of the material scope of the obligation raises methodological questions. Indeed, in order to know whether a human right falls within this scope, it is first necessary to assess the capacity of the company to establish the risk of violation of this human right and to take measures to comply with its obligations.

Moreover, proceeding by enumeration through a list seems incompatible with the principle of indivisibility and interdependence of human rights. Some conventions are even absent from the list in Annex I.2: the ILO Convention 190 on Violence and Harassment at Work, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, ILO Convention 169 on Indigenous and Tribal Peoples, or ILO instruments on occupational safety and health.

As Anne Danis-Fâtome points out, this enumeration also seems problematic as far as civil liability is concerned: "*civil liability derives its strength from the malleability of the notion of fault. It is therefore important to avoid listing in advance the violation of rights likely to give rise to liability*" [1].

Similarly, the perimeter of "*adverse environmental impacts*" is defined solely on the basis of a list of international environmental conventions (Annex II). This approach is much more restrictive than the one existing under the French Duty of Vigilance Law. Indeed, the latter applies to all serious environmental damage and is consistent with the notion of ecological damage defined in Article 1247 of the French Civil Code as any "*non-negligible damage to the elements or functions of ecosystems or to the collective benefits derived by man from the environment*."

Conversely, defining environmental damage by means of a list of international conventions is problematic. First of all, international environmental law is highly sectoral and fragmented: while there are more than 500 international environmental conventions, many environmental harms (soil pollution, deforestation, damage to marine biodiversity on the high seas, etc.) are not covered by internationally binding agreements. General principles of international environmental law (including the precautionary principle, the prevention principle, the polluter-pays principle) have gradually emerged but do not appear in the list in Annex II. The approach of referring to a list of international conventions to define the Directive's scope of application therefore risks creating blind spots in the prevention and remediation of environmental damage perpetrated by companies.

Second, most international environmental conventions impose obligations exclusively on States and depend on the adoption of national rules for their implementation. Many are framework conventions, which set targets for States to achieve, while leaving them a wide margin of appreciation as to the measures to adopt. For example, the Convention on Biological Diversity only obliges States parties to develop national biodiversity strategies and action plans. These conventions cannot easily be applied horizontally to businesses, unlike human rights conventions.

In any case, the list in Annex II is notoriously incomplete. In particular, essential instruments such as the Paris Climate Agreement, the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat, the International Convention for the Prevention of Pollution from Ships MARPOL 73/78, the UN Convention on the Law of the Sea, the UN Convention to Combat Desertification or the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) are missing.

The exclusion of climate change from "*adverse environmental impacts*" and therefore from the provisions on due diligence and civil liability is equally disturbing. It is the subject of a specific provision (Article 15), which merely requires companies to adopt a climate change plan – with no obligation to actually implement that plan, and with no liability for failure to do so under Article 22.

Recommendation n°1

The substantive scope of application of the future directive must not be more limited than that of the French Law on the Duty of Vigilance. In particular, any enumeration of the human rights concerned must not be limitative. The scope of application in environmental matters must be able to encompass all damage to ecosystems and their components, as well as their interdependence. In particular, environmental adverse impacts must not be conditional upon the violation of an international environmental convention.

The perverse effects of the notion of "*established business relationship*" and the need to extend the duty of vigilance throughout the company's value chain

To define the scope of the duty of vigilance, the proposed directive relies on the notion of "*established business relationship*", associated with the notion of "*value chain*", both notions being defined in Articles 3(f) and (g). The companies concerned must exercise their duty of vigilance with regard to violations arising from their own activities, the activities of their subsidiaries and, when linked to their value chain, the activities of their established business relationships.

The notion of "*established business relationship*" seems to be partly inspired by the French law on duty of vigilance, which uses the notion of established commercial relationship, without defining it.

In French law, the notion of "*established commercial relationship*" is originally a commercial law concept.[2] However, it remains to be determined what meaning will be given to it in matters of duty of vigilance. Indeed, the interpretation given by commercial case law does not seem to be transposable, as the objectives pursued by the sanction of the abrupt termination of an established commercial relationship differ from those of the Duty of Vigilance Law: protection of the legitimate expectations of the commercial partner on the one hand, and protection of the rights of individuals and the environment on the other. Some commentators have noted potential perverse effects, encouraging companies to prefer short, unstable business relationships to avoid the requirements of the duty of vigilance.[3]

Moreover, legal commentators seem to be divided today on the capacity of this notion to cover the entire value chain of companies. While a majority considers that a restrictive interpretation would be contrary to the objectives of the law[4], some authors consider that only direct subcontractors and suppliers are concerned.[5] On this subject, the parliamentary work was however clear. In the words of the law's rapporteur in the National Assembly, Dominique Potier, "*it goes without saying that the obligation of vigilance does not stop with first-tier subcontractors and obviously covers cascading subcontractors. I want this point to be very clearly stated in the minutes so that companies know the exact scope of their obligations and so that the judge will take this into account the day they have to enforce the law.*"[6]

However, some companies have taken advantage of this uncertainty to define the scope of their vigilance plan in a restrictive manner, by expressly limiting it to direct or "*first tier*" suppliers.[7] This is the official position of the French business association AFEP.[8] The question must now be decided by the courts, but such a restrictive interpretation is a factor of legal insecurity for victims.

In the proposed directive, the definition of "*established business relationship*" clarifies that this relationship can be either "*direct or indirect*" and is therefore not limited to first tier suppliers. This is a welcome clarification.

However, the criterion of the duration of the relationship ("*which is, or which is expected to be lasting, in view of its intensity or duration*") could lead to the exclusion, from the scope of the duty of vigilance, of the upstream part of the value chain, where the informal sector is more prevalent and business links are more ad hoc and less formalised, even though human rights and environmental abuses are more frequent. It could also exclude from the scope of the duty of vigilance business relationships that are economically significant but one-off. This criterion therefore risks generating the same perverse effects as those highlighted above with regard to the French provisions.

Similarly, the exclusion of business relationships that are a "*negligible or merely ancillary part of the value chain*" is problematic. Some components are only a "*negligible*" part of the supply chain of the companies that use them, yet present significant risks of violations. Similarly, some services, precisely because they are perceived as "*ancillary,*" give rise to massive outsourcing (e.g., the use of security or maintenance companies).

Recommendation n°2

The duty of vigilance must apply to the entire value chain of the company, according to a risk-based approach. Otherwise, the most frequent and most serious violations may not be subject to vigilance measures, and companies will be encouraged to give priority to ad hoc and informal relationships, which would defeat the purpose of the legislation.

The risks of a formalistic approach to vigilance: the duty of vigilance must be defined as a constant obligation of behaviour

The proposal provides for the obligation to adopt measures to identify "*potential*" and "*actual*"[9] adverse impacts (Article 6). It then distinguishes between measures to prevent or, failing that, to mitigate potential negative impacts (Article 7), and measures to bring to an end or, failing that, to minimise actual negative impacts (Article 8). Article 10 deals with the periodic monitoring of the effectiveness of the measures.

The proposal also defines the criteria to be taken into account in assessing the adequacy of such measures, a measure being "appropriate" when it is "*capable of achieving the objectives of due diligence, commensurate with the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific case, including characteristics of the economic sector and of the specific business relationship and the company's influence thereof, and the need to ensure prioritisation of action*" (Article 3). This clarification seems to require a concrete assessment of the adequacy and effectiveness of the vigilance measures announced by the companies according to the circumstances of the case.

However, the prevention or mitigation and suppression or minimization measures are then listed in a restrictive manner. They are based on the adoption of a code of conduct, the implementation of preventive or corrective plans, the attempt to obtain contractual guarantees (potentially according to model clauses) from established business relationships, the making of investments, targeted and proportionate support for SMEs, and the use of sectoral initiatives or third-party verification mechanisms (audits). If these measures are insufficient, the suspension or termination of business relationships would be required under certain conditions.

By defining the duty of vigilance in this way, the proposed directive prescribes certain risk management processes that are already used by companies and whose effectiveness is widely disputed.

Indeed, the limitations of social audits have been exposed for many years, so that these cannot be considered as appropriate measures of vigilance. In particular, the lack of independence of private social auditing firms,[10] the superficial nature of the controls carried out during summary[11] and announced factory visits,[12] or the incompatibility between the methodology of the social audit and the fundamental rights of workers, have been the subject of numerous studies. The failure of social audits is due in particular to the lack of involvement of employees and trade unions in the audit process. Thus, when employees are not simply excluded from interviews during audits, they may be interviewed in the presence of management, in their offices, or selected in advance by management, or even "*prepared*" by it.[13]

Similarly, the simple use of standard contractual clauses – if accepted by business partners – may in fact shift responsibility to the upstream actors in the supply chain, ultimately absolving the outsourcing companies.

Finally, it has been shown that, while they can sometimes create a space for dialogue or experience sharing, multi-stakeholder sectoral initiatives do not allow for the implementation of prevention standards adapted to the protection of human rights.[14] This is due to the structurally unbalanced balance of power within these initiatives, where the interests of the companies directly concerned prevail.

For Sherpa, the duty of vigilance can only be useful if it is defined as a general obligation to take all necessary, reasonable, appropriate, and effective measures to avoid abuses in the value chain or in the subsidiaries of the company.

Any formal prescription as to the types of due diligence measures required turns this obligation into a compliance exercise that facilitates "*liability avoidance*"[15] strategies, without addressing the root causes of harm.

Indeed, many human rights and environmental abuses have structural causes. These are related to the company's economic model (its choice to manufacture its products at low cost in countries where workers' rights are not respected, to resort to subcontracting, or to market certain harmful products), to commercial decisions (choice of a process or a component), or to commercial practices (prices and deadlines granted to the supplier or subcontractor). The definition of the duty of vigilance should make it possible to control these decisions and to exclude certain practices.

Simply imposing formal verification processes on suppliers or subcontractors, while exempting the companies that implement them from liability, is bound to reinforce rather than challenge the business models that cause human rights and environmental abuses in value chains.

Recommendation n°3

It is necessary to define the duty of vigilance as the obligation to take all necessary, reasonable, appropriate, and effective measures to prevent violations from occurring in companies' value chains and subsidiaries. Any prescription of compliance measures whose ineffectiveness is widely recognised (audits, contractual guarantees, multi-stakeholder initiatives) runs the risk of reinforcing the practices at the origin of the violations, while absolving companies from liability.

The need to enshrine an effective civil liability regime

The draft directive provides that a failure to comply with Article 7 (prevention or mitigation) or Article 8 (elimination or minimisation) may give rise to civil liability on the part of the company and oblige it to compensate for the resulting damage (Article 22).

While civil liability is essential to enable affected persons to have access to compensation, the regime provided for in the proposal is inadequate as it stands.

First, the proposal provides for a mechanism of exemption for the company when the damage results from the activities of one of its indirect partners. In these situations, the company will not be liable if it has made efforts to obtain contractual guarantees from its direct partners and to attach appropriate measures to verify compliance, "*unless it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact.*"

By providing for such exemption clause, the civil liability regime prescribed by the draft directive relies heavily on companies' compliance procedures, even though their relevance and effectiveness are disputed (see Recommendation n°3) and facilitates liability avoidance strategies.

Secondly, the liability regime envisaged by the proposed directive appears inadequate to guarantee access to justice, particularly in view of the asymmetries of information between companies and the people affected by their activities.

This regime is in fact similar to that provided for by the Law on the Duty of Vigilance, which refers to liability for fault or negligence under articles 1240 and 1241 of the French Civil Code. Liability can therefore only be imposed if a fault, a damage, and a causal link between the two are established. While the proposed directive allows Member States to adjust the burden of proof with respect to the "*adequacy*" of due diligence measures, the burden of proof remains with the victims.[16]

However, certain difficulties in the implementation of the French Law on the Duty of Vigilance can be explained precisely by difficulties in accessing information held by companies and which is essential to characterise the lack of vigilance or the causal link (names of suppliers, prevention measures implemented, impact studies of projects abroad, specifications and results of audits invoked, contents of contracts, etc.). Neither the publication of non-financial performance declarations nor the publication of vigilance plans currently remedy this information asymmetry. The evidentiary measures provided for by Article 145 of the French Code of Civil Procedure are also insufficient, as demonstrated by the refusal of Perenco SA, a company specialising in oil exploitation, to comply with an order issued by the Paris Court which concerned documents relating to the group's activities in the Democratic Republic of Congo.[17]

Legal commentators have recommended the creation of mechanisms to enable access by third parties to information held by companies which, as in the case of access to administrative documents, could, in the event of refusal, give rise to a judicial review.[18] This recommendation, long promoted by Sherpa, was also envisaged at European level in the form of a "*right to know*".[19] Unfortunately, it does not appear in the proposed directive.

In addition, it is necessary to adjust the civil liability regime, and in particular to provide for a regime of vicarious liability of the parent company in the event of environmental or human rights violations resulting from the activities of controlled companies. It is undesirable for a parent company to be able to invoke due diligence measures and thus deprive victims of compensation, even though the damage results from the activities of a company under its control. The liability of parent companies for acts of their subsidiaries, which would be more protective of the rights of victims and more consistent with the objectives of civil liability, has been recommended by several academics, in particular Benoit Grimonprez and Julien Lagoutte.[20]

In any event, it seems essential to reverse the burden of proof that currently falls on victims and civil society organisations. [21] The company in question is in the best position to prove the measures it has put in place, and that these are appropriate and effective in preventing the harm. Such a reversal of the burden of proof appeared, with regard to controlled companies, in the European Parliament Resolution adopted in March 2021.[22]

Thirdly, the draft directive merely provides for a liability mechanism in the event of damage, without providing for a preventive judicial mechanism. In the absence of damage, the claimants (associations, employees, trade unions) could therefore only submit a "*substantiated concern*" to the supervisory authority on the risk of damage,[23] or refer the matter to the court, but only if the restrictive conditions for summary proceedings in civil matters are met.

On the contrary, the provisions resulting from the Law on the Duty of Vigilance allow any interested person to request the judge to order the defaulting company to comply with its legal obligations (Article L. 225-102-4 II of the French Commercial Code), without necessarily having to establish that the conditions for summary proceedings have been met. Such a mechanism also exists in relation to the prevention of environmental damage (Article 1252 of the French Civil Code) and allows the judge to pronounce measures before a damage occurs, in accordance with the principle of prevention, knowing that any damage to the environment, once it has occurred, is difficult to repair. The absence of a preventive judicial mechanism in the proposed directive is worrying all the more since all the lawsuits initiated in France on the basis of the duty of vigilance include preventive requests and, for the most part, have an exclusively preventive purpose.[24]

Finally, the perimeters of the controls carried out by the administrative authority and by the civil judge partly overlap, which could weaken the control of the judge.

With respect to the relationship between the two mechanisms, Article 18.4 provides that the adoption of corrective measures "*does not preclude* [...] *the triggering of civil liability in case of damages*" and Article 22.2 provides that "*in the assessment of the existence and extent of liability* [...] *due account shall be taken of the company's efforts, insofar as they relate directly to the damage in question, to comply with any remedial action required of them by a supervisory authority.*"

As a result, the control carried out by the administrative authority may hinder victims' access to compensation. As it stands, a decision by the supervisory authority in favour of the company (considering, for example, that there have been no violations of Article 7 or Article 8), will make it difficult – or even illusory – for the company to incur civil liability under Article 22.

More generally, the supervisory authority's interpretation of the provisions of Articles 7 and 8 will probably be invoked before the court, even though such an interpretation will not have been the subject of an adversarial debate between the parties.

Recommendation n°4

It is crucial to enshrine an appropriate civil liability regime for human rights and environmental abuses resulting from corporate activities. A company should be civilly liable when human rights and environmental abuses occur as a result of activities in its value chain, unless it can demonstrate that it has implemented all necessary, reasonable, appropriate, and effective vigilance measures to prevent such abuses from occurring in its value chain. However, the company should not be able to rely on this defence when it controls the entity in question.

This civil liability regime must be coupled with effective rules on applicable law, collective redress, and access to evidence.

The pitfalls of an administrative control of the duty of vigilance

According to the draft directive, each Member State will have to designate one or more supervisory authorities responsible for monitoring compliance with Articles 6 to 11, and the first and second paragraphs of Article 15 (Article 17). The authority will be able to initiate investigations "*where it considers that it has sufficient information indicating a possible breach by a company of the obligations provided for in the national provisions adopted pursuant to this Directive*" (Article 18). It may order the cessation of infringements, prohibit the repetition of the conduct in question, order "*remedial action proportionate to the infringement and necessary to bring it to an end*", impose financial penalties (Article 20) or adopt interim measures. It may act on its own initiative or after receiving "*substantiated concerns*" (Article 19).

It is crucial to specify that the supervisory authority will not be empowered to investigate or decide on human rights or environmental abuses caused by the activities of the company in question, but only to monitor the company's compliance with the various due diligence obligations described in the directive. In other words, a company will never be sanctioned for having used a subcontractor responsible for forced labour or for having caused environmental damage through its subsidiaries, but only, if applicable, for not having taken the measures of identification, prevention or mitigation, elimination or minimisation, monitoring or communication required by the directive.

As we noted in a research note published in April 2021, such administrative oversight of vigilance seems to be "*a false good idea*".[25]

On the one hand, administrative control follows a different logic than the duty of vigilance. In French law, the duty of vigilance is a civil law concept, developed by case law in tort law matters.[26] The characterisation of a duty of vigilance, which is a general standard of conduct, and of a breach of this duty makes it possible to establish a fault, and to oblige the author to repair the resulting damage.

An administrative control therefore risks distorting the duty of vigilance, transforming it into a formal exercise of adopting and publishing internal risk management processes. In particular, in the absence of any adversarial process and without the capacity to conduct on-site investigations, a supervisory authority will not be able to assess the effectiveness and adequacy of the company's measures in practice and will only be able to rely on the company's declarations. This means a switch from a logic of vigilance to a logic of *compliance*.[27]

The experience of the Anti-Corruption Agency (AFA) in France demonstrates the logic of "*liability avoidance*" promoted by these mechanisms, contrary to the need for increased accountability of economic actors.[28]

Secondly, administrative control of vigilance plans risks hindering victims' access to justice, in that it would limit the possibility of challenging the adequacy and effectiveness of the vigilance measures invoked by the company through a liability action.

Third, administrative control will not necessarily lead to greater transparency. The experience of the European regulations on timber and on conflict minerals, which provide for the designation of national authorities in charge of their application, testifies to the opacity of the monitoring conducted by these administrations.

The French General Directorate for Development, Housing and Nature, in charge of the application of the Conflict Minerals Regulation in France, refused to give Sherpa access to the mere list of companies subject to this regulation, in the name of customs confidentiality and the protection of trade secrets.[29] Also, the administrations in charge of the application of the 2010 Timber Regulation (the Regional Directorates of Agriculture, Food and Forestry and the Ministry of Ecological Transition) do not publish any information on the companies concerned or the controls carried out.

Recommendation n°5

Instead of setting up administrative authorities, we recommend facilitating access to information held by companies, strengthening the civil liability regime, and strengthening the prosecution of companies that benefit from environmental and human rights abuses, including by allowing criminal prosecutions and liability.

The need to ensure the protection of all persons likely to act on the basis of the duty of vigilance

The provisions of the draft due diligence directive and those of the Directive on the protection of whistle-blowers[30] overlap in many respects, without the articulation between these texts being sufficiently clear and precise. In addition to the lack of legal certainty, these imprecisions risk creating two-tier warning systems and excluding people from the protection regime.

First of all, the material scope of the different texts largely overlaps, without corresponding completely. Indeed, these two texts deal with the violation by companies of obligations relating to the protection of the environment or fundamental rights. As a reminder, the whistle-blowers Directive provides for a system of whistleblowing and protection of persons who have reported or disclosed information on violations of certain Union acts, in areas such as product safety and conformity, environmental protection, public health or the protection of privacy and personal data, and listed in the annex to the Directive (Article 2). The draft due diligence directive also provides for the addition of the future directive to this list (Article 27).

In addition, and even if their designation differs, the draft due diligence directive requires, like the whistle-blowers Directive, the establishment of internal reporting channels within companies, as well as the establishment of external reporting channels, through administrative authorities, to enable individuals to report violations. Indeed, it requires Member States to ensure that the companies concerned establish and maintain "*a complaints procedure*" (Article 4) and to designate supervisory authorities to receive "*substantiated concerns*" (Article 19).

However, the modalities for setting up and operating these mechanisms are different. In particular, the whistle-blowers Directive is more prolix as to the procedural requirements and guarantees relating to the processing of whistleblowing via internal channels or via administrative channels.

For example, Article 8 states that internal reporting and follow-up channels shall be established "*following consultation and in agreement with the social partners where provided for by national law.*" Furthermore, it is specified that the reporting channels "*designed, established and operated in a secure manner that ensures that the confidentiality of the identity of the reporting person and any third party mentioned in the report is protected.*" The text also provides for certain time limits for the processing of alerts (Article 9).

Finally, the persons who can activate these different reporting channels under the whistle-blower Directive and under the draft due diligence directive are not the same. In particular, the latter allows all persons affected by the activity of the companies concerned, as well as non-profit organisations and trade unions, to resort to these mechanisms (Article 9), whereas the definition of a whistle-blower in the former concerns primarily natural persons having obtained information in a professional context (Article 4). Only the whistle-blowers Directive provides for a system of protection against reprisals against such persons.

The articulation of these different obligations lacks clarity, both in terms of what is expected of companies, but also in terms of the identification of the persons who may activate the various whistleblowing or reporting mechanisms and the conditions under which they may or may not benefit from protection against potential retaliation.

Indeed, Article 23 of the draft due diligence directive provides that: "*Directive (EU) 2019/1937 shall apply to the reporting of all breaches of this Directive and the protection of persons reporting such breaches*", while Article 3 of the whistleblowing Directive states that: "*where specific rules on the reporting of breaches are provided for in the sector-specific Union acts listed in Part II of the Annex, those rules shall apply. The provisions of this Directive shall be applicable to the extent that a matter is not mandatorily regulated in those sector-specific Union acts.*"

These provisions do not provide a perfect answer to the questions that could be raised by the articulation of the obligations arising from the two texts: will the companies concerned by the duty of vigilance have to set up complaint channels in accordance with the provisions of the whistle-blowers Directive? Will all persons likely to resort to the complaint mechanisms provided for in matters of due diligence be able to avail themselves of the protections provided for by the whistle-blowers Directive? Or will only those who meet the criteria of the whistle-blower Directive be able to benefit from this protection? **If so, many people who are likely to use the mechanisms provided for under the due diligence directive (internal, administrative or judicial) could find themselves excluded from the protection regime of the whistle-blowers Directive.**

The clarification of this articulation is necessary. This must be done through an effective protection of all whistle-blowers, defined as broadly as possible. Indeed, it is necessary to recognise as whistle-blowers benefitting from the corresponding protection regime, not only the persons who meet the criteria imposed by the whistle-blowers Directive, but also all the natural and legal persons who resort to the mechanisms provided for by the due diligence directive.

Recommandation n°6

It is necessary to extend the protection regime of the whistle-blowers Directive to all persons making internal or external whistleblowing, public disclosures or liability claims under the due diligence directive. Such persons should be able to make public disclosures of breaches without condition.

About Sherpa

Fighting new forms of impunity linked to the globalization

Sherpa carries out advocacy, strategic litigation, legal research and capacity building activities, in order to strengthen economic actors' accountability and build up a legal framework that better protects the environment, communities and human rights.

To implement these activities, Sherpa brings together lawyers, legal experts, academics and many other experts who support its action by putting forward an innovative approach to law.

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1. Anne Danis-Fâtome, « La responsabilité civile dans la proposition de directive européenne sur le devoir de vigilance », Recueil Dalloz, 2022, n°22, p. 1107.

2. According to case law, the established nature of the relationship occurs when it is of a certain duration, when it has a certain intensity and suggests that it will continue. It does not necessarily have to be formalized by a contract.

3. Emmanuel Daoud, Solène Sfoggia, « Les entreprises face aux premiers contentieux de la loi sur le devoir de vigilance », *Revue des juristes de Sciences Po*, n°16, January 2019.

4. See in particular, Charley Hannoun, « Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017», *Droit social 2017*, p. 806. ; Tatania Sachs, « La loi sur le devoir de vigilance des sociétés-mères et sociétés donneuses d'ordre : les ingrédients d'une corégulation » RDT 2017, p. 380 ; Béatrice Parance, Elise Groulx, « Devoir de vigilance - Regards croisés sur le devoir de vigilance et le duty of care », *Journal du droit international (Clunet)* n° 1, January 2018 ; Dorothée Gallois-Cochet, « Le périmètre du devoir de vigilance », *Le devoir de vigilance*, pp. 45-55, 2019 ; Yann Queinnec et Félix Feunteun, « La preuve de vigilance, un challenge d'interprétation », *Revue Lamy Droit des Affaires*, n° 137, May 2018, p. 23 ; G. Jazottes, Sous-traitance et « relation commerciale établie » au sens de l'article L. 442-6 du Code de commerce : quelle pertinence pour le plan de vigilance ?, *Revue Lamy droit des affaires*, 1st of July 2018, n° 139.

5. Arnaud Reygrobellet, « Devoir de vigilance ou risque d'insomnies ? » *Revue Lamy Droit des Affaires*, Wolters Kluwer France - Les Éditions Lamy, 2017, pp.35-42 ; Sophie Schiller, « Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre » *La Semaine juridique - Entreprise et affaires*, LexisNexis, 2017, 2017 (15).

6. Proposal for a law on the duty of care of parent companies, discussion of articles, 2014-2015, National Assembly, session of the 30th of March 2015.

7. See, for exemple, the vigilance plan of the Yves Rocher company, published in 2021, p. 5 : « *Dans le présent document, le terme « Fournisseur » désigne les Fournisseurs et sous-traitants de premier rang avec lesquels le groupe entretient des relations commerciales établies*. »

8. Assemblée nationale, Rapport d'information n° 5124, Les enseignements de la loi sur le devoir de vigilance des entreprises en vue d'une règlementation européenne, March 2022, cited p. 38.

9. Note that the distinction between "*actual*" and "*potential*" impacts appears only in relation to human rights and not in relation to the environment, which seems to be the result of an English language error in the proposal.

10. Barraud Pauline, « Faut-il sonner le glas de l'audit social - Essor et critique d'un dispositif privé de régulation des conditions de travail », *Revue de l'Office Universitaire de Recherche Socialiste*, n°72-73, July-December 2015, p. 49.

11. Barraud Pauline, « L'audit social : vers une privatisation de l'inspection du travail ? », dans *La responsabilité sociale de l'entreprise, vecteur d'un droit de la mondialisation ?* (dir. Daugareilh), Collection *Paradigme, Bruylant*, 2017, p. 266.

12. Terwindt Carolijn and Miriam Saage-Maas, "Liability of Social Auditors in the Textile Industry", International Policy Analysis department of the Friedrich Ebert Stiftung, December 2016, p. 5 (original and free translation). The authors observe that factory managers can then easily "manipulate the appearance of working conditions".

13. Delalieux Guillaume, « Quelques considérations prospectives sur l'effectivité présumée de la loi " Devoir de vigilance des firmes multinationales" », (dir. Schiller), *Le devoir de vigilance*, Centre de recherche droit Dauphine et LexisNexis, 2019, p. 32.

14. MSI Integrity, *Not Fit For Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Global Governance and Human Rights,* 2020.

15. Juliette Tricot, Tatiana Sachs, « La loi sur le devoir de vigilance : un modèle pour (re)penser la responsabilité des entreprises » , *Droit et Société*, n° 106/2020.

16. See in particular recital 58: "*The liability regime does not regulate who should prove that the company's action was reasonably adequate under the circumstances of the case, therefore this question is left to national law*".

17. Le Monde, « Perenco, boîte noire pétrolière et toxique en RDC », 9th of October 2019 ; S. Cossart, L. Bourgeois, « L'article 145 du Code de procédure civile : un outil insuffisant pour la preuve des violations économiques de droits fondamentaux », Semaine sociale Lamy, 5th of October 2020, p. 10.

18. Aude Solveig-Epstein, « La comptabilité du droit d'accès aux informations environnementales de source privée avec la protection du secret des affaires : prélude à la consécration d'un droit d'accès aux données d'intérêt général de source privée », Revue juridique de l'environnement, 2020, vol. 45, pp. 137-149

19. European Parliament, Directorate General for External Policies, "Human Rights Due Diligence Legislation - Options for the EU", June 2020.

20. Benoît Grimonprez, « Pour une responsabilité des sociétés mères du fait de leurs filiales », *Revue des sociétés* 2009, p. 715 ; Julien Lagoutte, « Le devoir de vigilance des sociétés mères et des sociétés donneuses d'ordre ou la rencontre de la RSE et de la responsabilité juridique », *Responsabilité civile et assurances* n° 12, December 2015, étude 11.

21."Vers une législation européenne sur la responsabilité des multinationales - Recommandations d'organisations ayant défendu la loi française relative au devoir de vigilance", December 2020.

22. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) article 19 : "2. *Member States shall ensure that they have a liability regime in place under which undertakings can, in accordance with national law, be held liable and provide remediation for any harm arising out of potential or actual adverse impacts on human rights, the environment or good governance that they, or undertakings under their control, have caused or contributed to by acts or omissions. 3. Member States shall ensure that their liability regime as referred to in paragraph 2 is such that undertakings that prove that they took all due care in line with this Directive to avoid the harm in question, or that the harm would have occurred even if all due care had been taken, are not held liable for that harm.*"

23. Article 19 of the proposal : "*substantiated concern*".

24. See the summary of current cases on the website www.plan-vigilance.org

25. Sherpa, « Création d'une autorité de contrôle en matière de vigilance, une fausse bonne idée ? »

26. See, in particular, the Distilbène's case law : Civ. 1re, 19 juin 2019, FS-P+B, n° 18-10.380.

27. Beau De Loménie Tiphaine, Cossart Sandra et Lubrani Antoine, « Extension du domaine de la vigilance, la loi sur le devoir de vigilance, au-delà de la compliance » , *Revue des juristes de Science Po* n° 16, January 2019.

28. Juliette Tricot et Tatiana Sachs, « La loi sur le devoir de vigilance : un modèle pour (re)penser la responsabilité des entreprises », Droit et Société, n° 106/2020.

29. Sherpa, « Le secret des affaires invoqué par le Ministère de la transition écologique : Sherpa saisit le juge administratif », press release, 14th of October 2020.

30. Directive (UE) 2019/1937 du Parlement européen et du Conseil du 23 octobre 2019 sur la protection des personnes qui signalent des violations du droit de l'Union