ECCJ
European Coalition for Corporate Justice

French Corporate Duty Of Vigilance Law

FREQUENTLY ASKED QUESTIONS

The question of what should be the legal obligations on business to ensure respect for human rights throughout their activities and business relationships is at the centre of the business and human rights debate.

In the past years, this question has gained important political momentum, and initiatives to improve corporate accountability have increased at national, European and international level.

The new French corporate duty of vigilance law shows that respect for human rights and the environment can be legally mandated into business activities.

1. Why is the french corporate duty of vigilance law an important step in making business accountable?

The French corporate duty of vigilance law establishes a legally binding obligation for parent companies to identify and prevent adverse human rights and environmental impacts resulting from their own activities, from activities of companies they control, and from activities of their subcontractors and suppliers, with whom they have an established commercial relationship.

The companies covered by the law – it only applies to the largest companies established in France - will assess and address the risks of serious harms to people and the planet under annual, public vigilance plans. Liability would apply when companies default on their obligations, including the absence of a plan or faults in its implementation.

With this new law, interested parties – including affected people and communities – are empowered to hold companies accountable. They can require judicial authorities to order a company to establish, publish and implement a vigilance plan, or account for its absence. Interested parties may also engage the company's liability through civil action and ask for compensation if the violation of the legal obligation has caused damages.

The law is an important step forward in a global context where achieving corporate accountability is hindered by the complexity, scale and reach of corporate structures; the absence of a level playing field; the legal and practical barriers faced by victims to access remedies; or the lack of enforcement of existing standards especially concerning transnational corporations with a myriad of subsidiaries and suppliers.

The duty of vigilance law will ensure better prevention of adverse impacts by companies, and it will also help victims of corporate abuse overcome some of the hurdles they face in achieving justice. The law requires companies to identify key risks of severe impacts, either linked to its activities or to those of business partners and take actions to prevent them. This makes it easier for victims to argue that a company could have influenced the production of harmful impacts, and that it should have taken appropriate measures to prevent them.

The law mandates companies to practice human rights due diligence, seen by the **UN Guiding Principles on Business and Human Rights** (UNGPs) as the main operational principle to put companies' responsibility to respect human rights into practice.

Efficient human rights due diligence plans are key to more responsible business practices. They allow companies to identify and assess their existing and potential adverse impacts, to prevent or mitigate these impacts, and to track and report on the outcomes of their actions in a transparent way.

Making human rights due diligence mandatory for businesses could help gradually shift focus towards prioritising risks to people rather than risk to the company. While it could equally help companies get ahead of potential risks – which have legal, financial and reputational implications – and capture new opportunities.

Self-regulation and voluntary measures to foster corporate respect for human rights have proved insufficient thus far. A binding framework is needed to protect people and the planet, and ensure fair competition for companies who act responsibly. These problems need to be addressed with urgency, and the French duty of vigilance law is an important step in the right direction.

2. Which risks on society and business sectors are covered under the law?

The law covers serious violations of all human rights and fundamental freedoms – identical to the full spectrum of human rights enshrined in the UN Guiding Principles on Business and Human Rights – the health and safety of people, and the environment. It also covers all business sectors.

3. Which companies are covered under the law?

The law covers any company established in France that:

- at the end of two consecutive financial years employs at least five thousand employees within the company head office and its direct and indirect subsidiaries, whose head office is located on French territory;

OR

- employs at least ten thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory or abroad.

According to the most recent information available at the time of publishing, an estimated 100 - 150 large companies meet the above conditions.

4. What is the law's scope?

The law applies to a company's activities and that of its business relationships as defined by the law. These activities cover those of:

- Parent company itself;
- Companies it controls directly or indirectly, as defined by the French Code of Commerce Article L 233-16 II (i.e. directly or indirectly holding a majority of voting rights; appointing for a period of two consecutive financial years the majority of the members of the administration, management or supervisory bodies, or over which it exercises a dominant influence by virtue of a contract or statutory clauses);
- Subcontractors and suppliers with whom it maintains an 'established business relationship'. Under French law, the concept of established business relationship covers all types of relations between professionals, defined as stable, regular relationships, with or without contract, with a certain volume of business, creating a reasonable expectation that such relation will last. Article L. 442-6, I, 5 ° of the French Commercial Code applies equally to the purchase and sale of products and to the performance of services.

The recitals of the law specify that the establishment and implementation of the vigilance plan corresponds to the concept of human rights due diligence outlined in the UN Guiding Principles on Business and Human Rights (UNGPs). The scope of due diligence is determined in the UNGPs based on "*whether [the activity] causes or contributes to an adverse impact, or its operations, products or services are directly linked to adverse impact through a business relationship*", and by the severity or salience of these actual and potential impacts.

According to the UNGPs, ***business relationships*** are understood to include business partners, entities in the value chain, and any other non-State or State entity directly linked to a company's

business operations, products or services.

The UNGPs' Guiding Principle 17, the **UNGPs Interpretive Guide** developed by the Office of the UN High Commissioner for Human Rights, and the **UNGPs Reporting Framework Guidance** provide explanations regarding the process of identifying severe or salient human rights issues.

5. What is the law asking from companies?

The companies covered by the law must establish, publish and implement a ***vigilance plan***. The vigilance plan must include appropriate measures to identify and prevent risks of serious infringements to human rights and fundamental freedoms, serious bodily injury, health risks or environmental damage, resulting directly and indirectly from a company's activities and those of its business relations (as defined by the French Commercial Code).

The vigilance plans, as well as the reports on their implementation, will be public and included in the company's annual report.

According to Article 1 of the law, which incorporates Art. L. 225-102-4 of the French Commercial Code, the vigilance plan has to include:

1. A mapping that identifies, analyses and ranks risks;
2. Procedures to regularly assess, in accordance with the risk mapping, the situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship;
3. Appropriate actions to mitigate risks or prevent serious violations;
4. An alert mechanism that collects potential or actual risks, developed in working partnership with the trade union organisations representatives of the company concerned;
5. A monitoring scheme to follow up on the measures implemented and assess their efficiency.

6. What if a company does not publish a vigilance plan or publishes incomplete or incorrect information?

Article 1 of the law (i.e. the new Art. L. 225-102-4 of the Commercial Code) provides that if a company under the law's scope fails to establish, implement or publish a vigilance plan, any concerned parties can file a complaint with the relevant jurisdiction.

After receiving formal notice to comply with the law, a company is given a three-month period to meet its obligations. If the company still fails to meet obligations after the three-month period is over, a judge could oblige the company to publish a plan.

The judge also rules on whether a vigilance plan is complete and appropriately fulfils the obligations described in the law.

7. What happens when the risks identified in the plan materialise and they result in damages?

Article 2 of the law – which incorporates an article of the French Commercial Code (Art. L. 225-102-5) - sends a strong signal to judges. Article 2 refers to the provisions of the French Civil Code (1240 and 1241) and states that in the event of a breach of the obligations laid down in Article 1 (i.e. Art. L. 225-102-4), when harm occurs, the company can be held liable, and will have to compensate for the harm that proper fulfilment of the obligations – publishing an adequate vigilance plan – would have avoided.

However, the law does not address one of the main barriers faced by victims seeking justice. The burden of proof still falls on the claimants, meaning victims will still need to prove a fault by the company and a causal link between the fault and the damage they have suffered. And the fault has to results out of violations of the obligations stipulated by Article 1. Hence, if a company implements a vigilance plan, respecting the binding content and quality of the plan, it should not be held liable, even if damages occur.

8. Is this the only attempt to embed human rights due diligence into national or European legislation?

The French law represents the most effective response to date to the existing business and human rights governance gaps. Several other European and national level legislative initiatives are also evidence of a growing trend towards regulating human rights due diligence, either through transparency requirements, or through obligations to conduct due diligence.

Legislation similar to the French duty of vigilance law is currently being considered in Switzerland, where ECCJ member, the Swiss Coalition for Corporate Justice collected the necessary signatures for a referendum on mandatory human rights due diligence (over 100,000). The Federal Council, and subsequently the Parliament, will now discuss the initiative, also known as the **Responsible Business Initiative**, before putting it to popular vote.

Reporting requirements are another way to embed due diligence into law. Under the **EU Non-Financial Reporting Directive**, 8,000 large EU companies and financial corporations have to report on their principal impacts and risks regarding human rights, environmental, social and labour, and anti-corruption matters, including the due diligence processes implemented to address these issues. Companies will start providing this information as part of their annual reports for 2017.

In 2016, the UK adopted the **Transparency in Supply Chain Clause of the Modern Slavery Act**. This provision requires companies domiciled or making business in UK to report on the measures they take to prevent slavery or human rights trafficking in their supply chains.

Several European countries, as well as the EU institutions, have taken steps beyond enhancing transparency, requiring the conduct of due diligence for specific issues or sectors. In 2013, the EU adopted the **Timber Regulation**, which prohibits the placing of illegally harvested timber on the EU market, and requires EU traders to exercise due diligence.

The EU Parliament and the EU Council are expected to adopt the **Conflict Minerals Regulation** before summer 2017. The law will require European companies to ensure their trade of minerals from conflict-affected areas is not linked with human rights abuses.

Finally, in February 2017 the Dutch Parliament adopted the **Child Labour Due Diligence Bill**. The law, if approved by the Dutch Senate, would require companies to identify whether child labour is present in their global value chains and – if this is the case – to develop a plan of action to combat it.

9. Are national, European or international institutions expressing support for mandatory human rights due diligence?

With the unanimous adoption of the UN Guiding Principles on Business and Human Rights in 2011, human rights due diligence was established as a global expectation from companies. Over the past two years, several international and European institutions, as well as national Parliaments, have asked for a Business and Human Rights framework that embeds human rights due diligence into law.

In March 2016, the **Council of Europe Recommendation** called on States to require business enterprises to conduct mandatory human rights due diligence where risks are significant, also recognizing the need to enhance access to justice for victims of corporate abuse.

The **EU Council Conclusions on Global Value Chains** (May 2016) highlighted the joint responsibility of governments and business to foster responsible supply chains, and called on the Commission and Member States to enhance the implementation of due diligence in order to achieve a global level playing field.

Furthermore, the **EU Council Conclusions on Business and Human Rights** (June 2016) recognized that enhanced corporate respect for human rights, notably by better integrating human rights due diligence into business operations, is indispensable to sustainable development and achieving the **UN Sustainable Development Goals**.

In October 2016, the European Parliament adopted the **Report on corporate liability for serious human rights abuses in third countries** with an overwhelming cross-party majority. This report stresses that non-binding private sector initiatives are not sufficient by themselves. Accordingly, it calls on the EU and Member States to lay down binding and enforceable rules setting out that companies must respect human rights throughout their operations by establishing mandatory human rights due diligence.

The **G7 Leaders Declaration** (June 2015) put forward the need to enhance corporate transparency and accountability and recognized the joint responsibility of governments and business to foster sustainable supply chains.

In May 2016 the ***Green Card Initiative*** launched by eight Member State Parliaments (France, UK, Italy, Estonia, Lithuania, Slovakia, Portugal and the Netherlands) called on the EU Commission to replicate progress made in France, and move towards mandatory human rights due diligence at EU level.

Regrettably, the European Commission has so far failed to address this growing number of calls to enhance legal standards of responsibility for human rights abuses and environmental damages caused by EU companies.

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