



The French duty of vigilance law: a new legal instrument for a fairer globalisation

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Over the last few decades, the sharp rise in the activities of multinational corporations has been accompanied by the creation and development of global supply chains characterised not only by their diversity but also, in many cases, by their complex and fragmented nature. The multiplicity of entities involved in the production chain of a single parent company often makes it more difficult to define the company's scope of activities. Not only that, its accountability is watered down among its numerous suppliers. Yet, as contractors, multinational corporations can clearly have an impact on the conditions under which their subsidiaries, subcontractors and suppliers carry out their business.

International standards for responsible business conduct by multinational corporations have begun to emerge in response to these realities. These standards derive from three international organisations: the Organisation for Economic Co-operation and Development (OECD), the International Labour Organisation ILO and the United Nations (UN). The OECD *Guidelines for multinational enterprises* (Ministry for Europe and Foreign Affairs, 2017) were drawn up in 1976 and revised more recently in 2011. Today, 48 countries adhere to these guidelines: 35 OECD members and 13 non-members. In 1977, the ILO adopted the *Tripartite declaration of principles concerning multinational enterprises and social policy* (ILO, 2017), which has also been revised, most recently in March 2017. Lastly, the UN's *Guiding Principles for Business and Human Rights* were adopted in 2011. These principles aim at states and all businesses, irrespective of their size and location. Their purpose is to implement the *Protect, Respect and Remedy* framework, which rests on state protection of human rights, respect of human rights by businesses, and access to remedies for victims of human rights abuse (ITUC, 2012).

These multilateral instruments set out guidelines for businesses and states regarding the protection of human rights and the environment. The concept of due diligence set forth in these texts indicates that parent companies can influence the behaviour of entities operating within their value chain. However, these instruments are not legally binding.

NGOs and trade unions therefore campaigned for the adoption of a French duty-of-vigilance law for parent and contracting companies. The Rana Plaza tragedy in April 2013 put the spotlight on their activities. The general public as well as political leaders have become more conscious of the need to ensure that parent companies do not ignore human rights in their subsidiaries and supply chains to save costs. Following the tragedy, the trade unions and NGOs embarked on four years of advocacy in support of the duty-of-vigilance bill. Employers' organisations and business lobbies pressured members of parliament to reject the bill which, as a result, went through four readings in the French national assembly and three in the senate. It was also amended during the legislative process.

Despite the counter pressure, the national assembly finally adopted the bill on 21 February 2017. Two days later, some members of parliament and senators appealed to France's highest constitutional authority, the Constitutional Council, to censure the bill, which they deemed incompatible with the principle of free enterprise. Finally, on 23 March 2017, the Constitutional Council ruled that the bill was, in its majority, consistent with the Constitution. Nevertheless, it censured the possibility of imposing a maximum civil fine of ten million euros on enterprises not respecting the obligations set out in the law, going up to thirty million euros if the enterprise was held civilly liable for damages caused by a failure to fulfil its obligations. This is unfortunate.

Content of the law

The French duty-of-vigilance law for parent and contracting companies was enacted on 27 March 2017. It is applicable to companies that:

- employ 5 000 people themselves or through direct and indirect subsidiaries, and are headquartered in France;
- employ 10 000 people themselves or through direct and indirect subsidiaries, and are headquartered either in France or abroad and have activities in France.

In addition, the companies must have been in business for at least two consecutive financial years.

If they meet these criteria, they are bound by law to publish and implement a vigilance plan containing measures to prevent serious violations of human rights, fundamental freedoms, health and safety rights, and environmental regulations. The plan must also cover the company's subsidiaries, suppliers and subcontractors with whom it has an established commercial relationship, regardless of whether they are located in France or abroad.

Moreover, the plan must be established in collaboration with the company's stakeholders, and must include the following five components:

- risk mapping;
- a procedure to regularly assess the company's subsidiaries, subcontractors and suppliers;
- adequate risk-reduction measures;
- an alert mechanism for such risks developed with representative trade unions in the company;
- procedures for monitoring the measures taken and assessing their efficiency.

Companies that fail to publish or implement a vigilance plan are subject to sanctions. A judge can compel the company to publish or implement a vigilance plan if it has not already done so and can also impose periodic penalty payments on the company as long as it does not comply.

Moreover, should harm occur in the value chain of a company covered by the plan, the parent company's civil liability may be engaged if the harm is proven to have been caused by failure to produce or properly implement an adequate plan. The company may therefore be required to pay damages for the harm suffered, if it is proven that the harm could have been avoided or minimised.

Companies subject to the law must publish their first plan in 2018, as part of their first annual report following the adoption of the law.

What's in it for workers and communities?

The duty-of-vigilance law for parent and subcontracting companies is innovative in several respects.

First, it addresses the risks affecting workers, communities and the environment in every location where the extended company (including subsidiaries, suppliers and subcontractors) does business, be it in France or abroad.

Second, vigilance plans are intended to be developed in consultation with the company's stakeholders, including trade unions. They therefore provide an opportunity to stimulate democracy in the company and to promote cross-border social dialogue along value chains.

Lastly, the law legally establishes that multinational corporations may not pursue profitability at any costs with no regard for human rights and the environment. They must adopt a sustainable development approach in which social and environmental concerns have their own place alongside economic considerations.

The duty-of-vigilance law confirms that the competitiveness of a multinational corporation should not be defined solely by its financial profitability, but also by its social and environmental responsibility performance (Berger, 2017).

The next steps

The law raises new challenges for the trade union movement. It is an important tool for promoting social dialogue throughout global supply chains, thus protecting workers' rights, human rights and the environment. However, it will only have a significant effect if trade unions use it to its full effect, both within parent companies and their networks of subsidiaries, subcontractors and suppliers. Representatives of workers' organisations will have a key role to play in raising awareness about the duty of vigilance at every level of the company, in conjunction with existing social dialogue mechanisms and bodies such as employee representation bodies at local and national levels, European works councils, international committees, and bodies associated with international framework agreements. Trade union networks should be created and strengthened across global supply chains, including their ability to report information from different business locations such as identifying subcontractors and suppliers, identifying risks, and reporting human rights violations and environmentally harmful practices.

Finally, it is important to continue campaigning for the adoption of binding rules on corporate social and environmental responsibility outside of France, at both the regional and international levels. Such rules are necessary to effectively hold multinational corporations accountable across their value chains, regardless of where their head offices are located. In this respect, the business and human rights treaty currently discussed by the UN is a step in the right direction.

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References

Berger L. (2017) 'Finally, a law to no longer focus only on profitability and profit but at last on the human' (in French), *Huffpost*, https://www.huffingtonpost.fr/laurent-berger/loi-devoir-vigilance_a_21876365/, accessed 27 May 2018

French Ministry for Europe and Foreign Affairs (2017) 'The OECD guidelines for multinational enterprises' (in French), *France Diplomatie*, <https://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/diplomatie-economique-et-commerce-exterieur/peser-sur-le-cadre-de-regulation-europeen-et-international-dans-le-sens-de-nos/l-engagement-de-la-france-pour-la-responsabilite-sociale-des-entreprises/les-referentiels-internationaux-et-la-participation-de-la-france-a-leur/article/les-principes-directeurs-de-l-ocde-a-l-intention-des-entreprises>, accessed 27 May 2018

ILO, (2017) *Tripartite declaration of principles concerning multinational enterprises and social policy, (Fifth edition)* Geneva: International Labour Organisation,

ITUC, (2012) *Protect, Respect, Remedy: Framework for Business and Human Rights and the United Nations Guiding Principles for Business and Human Rights, A Guide for Trade Unionists*, Brussels: International Trade Union Confederation, https://www.ituc-csi.org/IMG/pdf/12-04-21_ruggie_briefing_note_mk_3.pdf, accessed 31 May 2018

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