*Sherpa

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Expert Hearing on Human Rights and Business

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Question 5

How would you describe the first years of application of France's due diligence law – globally, the most far-reaching legislation regulating corporate due diligence – since it entered into force in March 2017, and which initial lessons can be learned from this experience? (Alliance 90/The Greens)

The French Law on the Duty of Vigilance of Parent and Outsourcing Companies (hereinafter '**Duty of vigilance legislation ' or the 'Law'**), adopted on 27 March 2017, has created a new legal obligation for large French companies to establish, publish and effectively implement a vigilance plan. The vigilance plan shall contain reasonable vigilance measures, adequate to identify risks and prevent serious violations of human rights, fundamental freedoms, the health and safety of individuals, and the environment. The Duty of vigilance legislation is thus the first legislation to ever adopt such a cross-cutting approach, covering both human rights and the environment rather than being limited to specific products (e.g. the EU-Timber Regulation or the EU Conflict Minerals Regulation at a EU-level) or to specific rights (e.g. the 2019 Dutch "Child Labor Due Diligence" law).

The Duty of vigilance legislation is a significant step forward because it imposes a legal obligation on companies that does not only apply to their own activities but also to the activities of distinct entities in their value chain, and that may be judicially enforced. Indeed, any interested party - including affected people and communities – may require judicial authorities to order a company to establish, publish and implement a vigilance plan. Affected parties may also request damages for the harm that could have been avoided if the company had respected its duty of vigilance (civil liability).

The Law entered into force in March 2017, requiring the publication of the first vigilance plans in 2018 and allowing judicial actions only from 2019. It is noteworthy that 7 formal notices have been served to French companies so far, 3 of which have already given rise to litigation, currently pending before the courts. The Law has been relied upon in different legal areas including climate change, workers' rights, freedom of association and indigenous rights.

Although it is relatively early to conduct a full assessment of its implementation and its effectivity, some lessons can already be learned and drawn upon for ongoing processes in other countries and at the European level.

The first lesson relates to the scope of companies covered by the Duty of vigilance legislation. The law only applies to French companies with more than 5000 employees in France, including in their subsidiaries, or more than 10 000 employees worldwide. Not only are these thresholds too high, as they do not cover many large French companies operating worldwide with significant turnovers, but they also are easy to circumvent (e.g. if different French entities are held by a holding companies incorporated in a third country for tax reasons).

And, most importantly, the criterion of 10.000 employees worldwide has been an important obstacle in the implementation and monitoring of the law: because the number of employees of a corporate group is not a public information in France, it is very tricky to calculate and it is thus

difficult to identify which companies are covered by the Law, and the French Government refused to publish an official list. Sherpa, along with another NGO (CCFD Terre Solidaire), has been trying to remedy this shortcoming and compiled a non-exhaustive list of companies, on the basis of publicly available information.[1]

A second lesson relates to the notion of 'vigilance plan' that is specified in the Law.

In our view, the duty of vigilance should be understood as a duty to prevent, that is, as a constant obligation to take adequate measures to identify risks and prevent violations, and to implement these effectively. The vigilance plan is the material support for that obligation. It should enable companies to account for the risks that they have identified and for the adequate prevention measures taken. Although the French Law spells out five specific categories of vigilance measures, the list is not exhaustive, and the duty of vigilance should not be understood as a mere formalistic requirement.

However, the notion of vigilance plan seems to have created confusion between vigilance on the one hand, and compliance or reporting on the other hand.

In the past three years, Sherpa has analysed a number of vigilance plans with respect to various issues, including the risk of deforestation caused by soy used in some French companies' supply chains in the agribusiness sector in 2019,[2] or the risks raised by different minerals used for the energy transition in 2020.[3] Although the plans published in 2020 are generally longer and more detailed that the succinct plans published the previous years, these plans still tend to contain extremely vague statements, give very few information on the concrete risks raised by the company's activities and refer to pre-existing measures such as audits, certification or self-evaluations that are inadequate. All in all, many companies tend to have compiled in their vigilance plans the same statements already made in different CSR declarations or policies.

Another concern is found in companies' answers to formal notices sent under the Law. Some companies seem to suggest that disclosing their existing policies in their vigilance plan is enough to satisfy their duty of vigilance, and that the adequacy and effectiveness of these measures cannot be challenged. Such a restrictive interpretation wholly contradicts the Law's objectives and should, in our view, be squarely dismissed.

These misconceptions could be anticipated and avoided in legislation proposals currently debated at the member states or European levels. It seems crucial to distinguish between the general duty of vigilance with respect to a company's value chain, and any disclosure or reporting obligations. Importantly, the general duty of vigilance should not be defined as any 'process' aiming at addressing risks but as an obligation to take all necessary, adequate, and effective measures to identity risks and prevent violations.

A third lesson relates to the scope of the duty of vigilance, in particular to the notion of 'established commercial relationships' that appears in the Duty of vigilance legislation.

The aim of the legislation was to create a new legal obligation in line with the realities of today's complex transnational value chains. The objective was to avoid repeating tragedies such as the Rana Plaza collapse – as some French textile companies had indirectly been supplied by companies operating in that building. The notion of 'established commercial relationships' in the Law has,

[1] Available on www.vigilance-plan.org.
[2] Sherpa, « Devoir de vigilance et déforestation : le cas oublié du soja », March 2019, https://www.asso-sherpa.org/soja-deforestation-interpellation-entreprises-francaises-de-grande-distribution.
[3] To be published on 29 October 2020 on www.vigilance-plan.org.

however, caused confusion as to the scope of the duty of vigilance, as some have argued that this should limit the duty to direct contractual relationships.

The formal notice sent to Casino in September by an international coalition of NGOs (including Sherpa) and indigenous organisations illustrates the reality of companies' supply chains that the Law precisely intended to regulate.[4] Various recent reports have documented that Casino's subsidiaries in Brazil are sourcing beef from slaughterhouses which in turn are sourcing their supplies from farms involved in illegal deforestation and indigenous land grabbing. As shown by this case, a limitation to tier 1 and direct suppliers would not only wholly contradict the legislator's intention, it would deprive the Duty of Vigilance legislation of most of its effects and incite companies to circumvent the Law by complexifying their supply chains.

Finally, a **fourth lesson** relates to the importance of the judicial mechanisms provided for in the DV law.

As mentioned above, the Law does provide for essential judicial mechanisms. For victims of corporate abuses, it represents a significant change: while victims could so far only invoke soft law principles or self-regulation to hold companies to account for violations occurring in their value chains, they can now, as regards to French companies, rely on hard law provisions.

First, any interested person may request a judge to order a company to comply with the Law, provided it first sent a formal notice to the company, and that the company failed to comply within three months.

The judge's powers under this provision could potentially be broad: a company could be judicially ordered to publish a vigilance plan, to take adequate vigilance measures, or to effectively implement measures stated in its vigilance plan. However, the extent to which judges will exercise this injunctive power, and in particular the specificities of the vigilance measures to be ordered, remains to be seen.

Most importantly, the Law expressly provides that a failure to respect these new obligations may trigger the company's civil liability, therefore creating a new cause of action in tort.

The opening of an available and viable legal basis for litigation to address the impunity of multinationals for human rights violations and environmental abuses committed abroad is unprecedented and is essential for any legislation on corporate accountability.

However, one could imagine mechanisms that would facilitate access to justice for victims even further. The Law only refers to tort law principles under French law: the victims will thus have to prove the company's failure to comply with its due vigilance duty and the damage suffered, and causation between both. This burden of proof is bound to be extremely difficult to meet, as any relevant information is likely to be in possession of the company itself. Facilitating the victims' burden of proof and facilitating access to evidence seems crucial.

[4] Sherpa, "Indigenous organisations and NGO coalition warn top French supermarket Casino: do not sell beef from deforestation in Brazil and Colombia – or face French law", 21 September 2020, https://www.asso-sherpa.org/indigenous-organisations-and-ngo-coalition-warn-top-french-supermarket-casino-do-not-sell-beef-from-deforestation-in-brazil-and-colombia-or-face-french-law-stop-gambling-with-our-forests.

*Sherpa

Question 6

Which aspects of mandatory due diligence in global supply chains should be included in a European Union regulation and a UN binding treaty, and which lessons learned at the national level are particularly relevant to the European Union and United Nations levels? (Alliance 90/The Greens)

There now seems to be a consensus on the need for regulation to strengthen corporate accountability for human rights and environmental abuses. Yet, the different developments at national, European Union and United Nations levels raise issues as to which level is the most relevant to address this question. It also seems that these different developments are used by different actors to delay progresses and maintain the status quo.

In our view, these parallel developments are complementary. Developments at the EU or UN levels should learn from national legislations, but European law and international treaty law should also address legal issues that are best addressed at the inter-state level.

Based in particular on the lessons learned from the first years of application of the DV Law - and on our answer to question 5 - some elements seem essential and should be included.

First, any application thresholds should be as broad as possible, and enable an easy implementation and monitoring process.

Second, the language adopted should explicitly ensure that the obligation covers companies' whole supply chains. Moreover, the concept of "mandatory human rights due diligence" may be misleading. As we have highlighted (cf. Question 5), to have any effect at all, it should not be defined as "processes" put in place by the companies aimed at preventing or addressing risks but as a legal duty to take all adequate and reasonable measures to identify risks and prevent violations and to implement them in an adequate manner. It shall be made clear that any obligation to report on the measures is separate from that main obligation.

Third, to strengthen corporate accountability, civil liability is key: it is only if the duty of vigilance is considered as a general standard of conduct for companies, triggering their liability when in violation of this obligation, that we can expect a change in companies' conducts. Criminal liability should be considered as well. More broadly, easing the burden of proof on the victim is essential. Companies shall be severally and jointly liable for human rights violations caused by entities that they control, without being able to invoke the corporate veil in these matters. When harms result from human rights and environmental impacts caused by entities in a company's value chain, it should be, at the very least, up to that company to prove that it took all necessary measures to prevent those human rights or environmental impacts. In addition, mechanisms for access to certain information held by companies could be introduced (including on the model of the American discovery procedure).

The integration of these obligations and aspects in various regulatory texts, at different scales, can only improve the effectiveness of the protection of human rights and the environment by companies. In addition, as mentioned above, these ongoing processes complement each other, as both their object and the stakeholders involved differ. With regard to the Draft UN treaty, for example, while the principle of civil liability for harms caused in company's value chain should be included, the text should also deal with matters that cannot effectively be dealt with under national law, such as issues of private international law (including forum necessitatis, choice of law or enforcement of judicial

decisions).[5] The Draft UN Treaty is also particularly relevant to address the transnational dimension of value chains and multinational enterprises, including international judicial cooperation in this area. It is also a unique opportunity to create direct obligations for companies, which victims could invoke directly before the courts without it being conditional on whether the treaty has been transposed into national law. Also, at stake are issues of criminal liability of legal persons, particularly for serious international crimes such as genocide, crimes against humanity and war crimes.

Developments at a national level should not wait for legislative processes at EU-level or for the UN binding treaty to be achieved. The more demanding and ambitious the examples of national legislations are, the more hope there is for far-reaching regional and international agreements, which do not question the appropriateness of the contents of national legislation and go beyond these examples, for even greater protection of human rights and the environment. The Duty of vigilance legislation is still to be applauded. Yet, while it appeared at the time as a pioneering law, in today's dynamics it should rather be seen as a starting point.

[5] Sandra Cossart, Lucie Chatelain, "Key legal obstacles around jurisdiction for victims seeking justice remain in the Revised Draft treaty", October 2019, https://www.business-humanrights.org/en/blog/key-legal-obstacles-around-jurisdiction-for-victims-seeking-justice-remain-in-the-revised-draft-treaty/