

The French Law on Duty of Vigilance

Business and Human Rights – From soft law to hard law, the French experience

Since the ‘Guiding Principles on Business and Human Rights’, drafted by Professor John Ruggie, were adopted by the United Nations’ Human Rights Council in June 2011 and became a worldwide body of soft law, respecting human rights has been for companies at least a moral imperative. France has been the first country to transform these principles into legal obligations, moving their status from mere aspirations to hard law, by adopting on 27th March 2017 a law¹, establishing a ‘duty of vigilance’ for companies.

In the Federal Republic of Germany, the government’s coalition agreement² provides inter alia that it will consider legislation if fewer than half of all major German companies adopt satisfactory human rights due diligence processes by 2020. This target has not been reached voluntarily and as a consequence, it seems that the federal government is considering presenting a bill to the Bundestag in this respect, but to the best of the author’s knowledge, a draft bill has not yet been discussed in any cabinet meeting, as of 1st January 2021.

Nevertheless, describing the experience in neighbouring France after three years of existence of a similar law may be informative in this context.

I. Which Companies are Concerned?

The law obliges companies with more than 5,000 employees in France or 10,000 employees worldwide (including the company’s subsidiaries)³ to draw up an annual so-called ‘vigilance plan’ covering due diligence in the parent company, the companies under its control and the suppliers and subcontractors with which the parent company or any of its subsidiaries have an ‘established commercial relationship’ (as this notion of the French Commercial Code has been defined by French courts in abundant cases).

1. Requirement of a Vigilance Plan

Such plan should include procedures to identify and analyse the risk of human rights violations, risks to staff hygiene, health and safety, or environmental harms connected to the company’s operations, procedures to regularly assess risks associated with the supply chain, actions to mitigate identified risks or prevent serious violations, mechanisms to alert the company to risks, and mechanisms to assess measures that have been implemented as part of the vigilance plan and their effectiveness.

In other words, drafting a vigilance plan is not good enough, the vigilance plan must be effectively implemented by the company concerned.

The main components of a vigilance plan are:

¹ Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre

² Koalitionsvertrag Zwischen CDU, CSU und SPD, Chapter XII.6: Human Rights, Crisis Prevention and Humanitarian Aid, 7 February 2018.

³ These thresholds are activated once they are reached in two consecutive financial years.

- A risk-mapping exercise, whereby risks are identified, analysed and prioritised;
- Due diligence carried out regularly over subsidiaries and suppliers (for the latter, only those with which a steady business exists);
- A whistleblowing and up-the-ladder reporting mechanism must be set up (in cooperation with local unions), allowing any stakeholder to draw attention to a risk or to a violation of human rights, and to complain about it;
- The measures which implement the plan must be monitored and their efficiency assessed.

2. Publication

Furthermore, the vigilance plan and the report on its effective implementation must be included in the annual management report prepared by the Board of Directors (or the Management Board) for the company's annual general meeting shareholders, which is in due course filed with the Companies Registry, thus becoming a publicly available document.

A vigilance plan may be re-used by several companies, for instance if it is devised for one particular industry and then adopted as an industry standard by the companies of that economic sector.

So how many such vigilance plans have been published?

In 2019 (last known statistics), 83 were publicly available.

II. What are the Sanctions if the Law's Obligations are not Followed?

The law does not shift the procedural burden of proof (which remains with the plaintiff), but it allows third parties to demand the implementation of its provisions and to seek redress in court if they are not complied with.

Two types of actions are open to plaintiffs:

- A classic action in civil liability
- Injunctive relief at the request of any interested party, after the company has been formally put on notice to comply and has failed to remedy its shortcomings with 3 months of receiving it. Provisional penalties for each day of non-compliance can be ordered in the injunction being granted to give it teeth.

1. Action in Civil Liability

Regarding an action in civil liability, it can only succeed if the following three criteria are met:

- The harm to be remedied is only the one which would have been averted, had the right measures been adopted and implemented;
- There must exist a direct causal link between the harm and the company's shortcoming;
- Only the victims of the harm have standing to sue.

Since unions and NGOs have no standing, it is not surprising that no action in civil liability based on a violation of the law has been initiated since its coming into force.

2. Injunctions

By contrast, an action for injunctive relief has been attempted several times.

First by putting companies formally on notice that their vigilance plans were defective or insufficient.

In 2019, a total of seven such notices were sent to the following companies: Total, Teleperformance, XPO Logistics Europe, EDF, Suez and Casino (two of them to Total)

For instance, the French NGO Sherpa, in cooperation with a federation of trade unions, served a notice to Teleperformance in July 2019, alleging that the company did not make efforts to prevent possible violations of workers' rights in its foreign facilities.⁴

Indigenous human rights defenders and two NGOs also served a notice on the electricity and gas utility EDF in October 2019 in response to a wind farm project in Mexico, which revolved around the lack of measures to prevent the violation of the rights of indigenous peoples⁵.

In October 2019, several federations of trade unions representing transport workers formally gave notice to XPO Logistics Europe⁶ for failing to comply with the provisions of the law.

In due course (i.e. after the 3-month delay had elapsed), 2 court actions were started against oil giant Total:

- A coalition of 14 local authorities and five NGOs initiated court proceedings in January 2020 on the grounds that Total had failed to take appropriate measures to mitigate the implications of its actions on climate change.⁷

That action is still pending in the first instance.

- Another case was initiated in October 2019 by five French NGOs (including 'Les Amis de la Terre') and two Ugandan NGOs in relation to the company's conduct⁸ in two oil-producing projects in Uganda.

The applicants contended that Total's vigilance plan did not identify the potential negative human rights impact of its projects, and did not put into place measures to mitigate the risks.

They chose to sue Total before the summary action judge of the Tribunal judiciaire of Nanterre (civil court) rather than the the summary action judge of the commercial court of the same town. Total's lawyers objected to this choice, contending that only the commercial court had jurisdiction. On 30 January 2020, the civil court issued an Order, ruling that it was not competent to deal with the case, instead referring it to the jurisdiction of a commercial court.

⁴ Sherpa (2019), 'Sherpa and UNI Global Union send formal notice to Teleperformance - calling on the world leader in call centers to strengthen workers' rights', 24 July 2019

⁵ ProDESC (2019), 'Indigenous human rights defenders and NGOs call on EDF Group to comply with its duty of vigilance regarding human rights prescribed by the French "Duty of Vigilance" law', 31 October 2019

⁶ European Transport Workers' Federation (2019), 'Transport giant served notice under duty of vigilance law in landmark legal move', 1 October 2019.

⁷ The Guardian (2020), 'French NGOs and local authorities take court action against Total', 27 January 2020

⁸ EURACTIV (2020), 'Oil giant Total's "corporate vigilance" in Uganda to be vetted by commercial peers', 31 January 2020

The applicants filed an appeal⁹ against the Order in March 2020. The Court of Appeals of Versailles upheld the civil court's decision in a ruling of 10 December 2020. The applicants must now restart their action, if they want to proceed with their claims.

III. Where do We Stand, Three Years after the Entry into Force of the French Law?

1. The French Viewpoint

Enforcing compliance has proven to be complex, as it is often difficult to assess if a company is or not subject the law's obligations, many of the vigilance plans are succinct, and there is no official government monitoring body supervising the implementation of the law.

For its part, the CSO Comité Catholique contre la Faim et pour le Développement-Terre Solidaire felt that the law lacked real impact, insofar as its practical application and the remedies for victims lag behind what was intended.

Accordingly, in the absence of a clear overview of which companies are bound by the law, CCFD-Terre Solidaire, in cooperation with the NGO Sherpa, put in place an online platform¹⁰ where the companies subject to the law are listed, and where the public can easily access the due diligence statements produced so far.

Despite its looking like a half-full (or half-empty) glass, the law has provided civil society with the means to resort to judicial proceedings if a company does not comply with its obligations.

This is maybe its main achievement.

2. The International Viewpoint

In closing, the trend towards hard law in the area of Business and Human Rights is clearly gaining traction, not only in the Federal Republic of Germany, but elsewhere in the European Union (and in Switzerland too).

In this regard, it is worth mentioning the report¹¹ published by the EU Fundamental Rights Agency in October 2020, titled "Business and Human Rights – Access to Remedy", and the study published by the European Parliament's Research Service, also in October 2020, titled "Corporate due diligence and corporate accountability".

Both taken together, plus the public consultations recently launched by the European Commission, certainly look like a harbinger of future EU-wide legislative proposals: stay tuned.

Zusammenfassung

Frankreich hat die Vorreiterrolle bei der Implementierung eines Lieferkettengesetzes innerhalb Europas gespielt. Erfasst werden alle Gesellschaften, die entweder in Frankreich mehr als 5.000 Beschäftigte aufweisen oder weltweit mehr als 10.000. Notwendiger Bestandteil dieses Gesetzes ist ein detailliert strukturierter Plan, in welcher Weise das Unternehmen beabsichtigt, die Gewährleistung der Achtung der Menschenrechte entlang der Lieferkette sicherzustellen.

⁹ Les Amis de la Terre (2020), 'Affaire Total Ouganda: Nous faisons appel dans un contexte de justice au ralenti', 25 March 2020

¹⁰ Called 'Le radar du devoir de vigilance'

¹¹ https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf

Darüber schuldet das Unternehmen auch einen jährlich zu erstellenden Bericht, der der Öffentlichkeit zugänglich gemacht wird. Von besonderer praktischer Bedeutung ist nicht nur die zivilrechtliche Haftung im Fall einer Verletzung der geschuldeten Überwachungspflichten, sondern es besteht auch die Möglichkeit, das seine dritte Partei im Wege des einstweiligen Rechtsschutzes die entsprechenden Schutz- und Abwehrmaßnahmen erzwingt, sofern das Unternehmen diese nicht innerhalb einer Frist von drei Monaten, gerechnet ab Kenntnisnahme, abgestellt hat. Gerade von dieser Möglichkeit haben in Frankreich in den letzten zwei Jahren verschiedene Gruppen – auch NGOs – durchaus regen Gebrauch gemacht. Auch wenn einige Gruppen der Zivilgesellschaften meinen, dass das Gesetz seit seinem Inkrafttreten vor drei Jahren noch keinen wirklichen Durchbruch geschaffen hat, so ist doch festzuhalten, dass die Zivilgesellschaft mit diesem Gesetz ein Instrument in der Hand hält, das für die Durchsetzung der Menschenrechte auf der Ebene der größeren Unternehmen und ihrer Lieferketten ein hilfreiches Instrument darstellt. Doch wird man abwarten müssen, ob nicht in näherer Zukunft dieses nationale Instrument des französischen Rechts durch einen Rechtsakt der EU abgelöst werden wird.