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Duty of vigilance. What are the results of the first plans? What is the position of stakeholders?

Introduction

French Law 2017-399 on the duty of vigilance, promulgated on 27 March 2017, is the result of historical and ideological developments, four years of debate, and a collective multi-stakeholder combat. This law that was drafted in response to the horrific collapse of Rana Plaza on 24 April 2013 killing 1 138 and injuring 2 000 workers. According to Nayla Ajaltouni, '*Rana Plaza reminds us that companies do not regulate themselves*'. This opinion is shared in a more global context that resulted in the adoption of the *Modern Slavery Act* in 2015, the Green Carton Initiative, and a draft international treaty.

The French Duty of Vigilance Law is a pioneering world first which imposes on parent companies and principals head-quartered in France employing more than 5 000 people on their premises and those of its subsidiaries as well as companies employing more than 10 000 people whether head-quartered in France or abroad to implement a vigilance plan.

This newsletter reviews the first vigilance plans and reveals real compliance and quality shortcomings. It focuses on the inclusion, consultation, and consideration of the views of stakeholders. It suggests areas of progress for companies. Finally, it stresses the key role of trade unions in better implementing vigilance plans.

1. What happened to the stakeholders?

The French Duty of Vigilance Law requires companies to prevent the risk of serious abuse/damage of human rights and fundamental freedoms, health, safety, and the environment. They must use as many means as possible to prevent abuses/damage. To achieve this, the law recalls that '*companies develop the vigilance plan in association with stakeholders, as well as with multi-stakeholder initiatives in subsidiaries or nationally*'.

The plan includes the following measures:

- Risk mapping,
- Regular assessment procedure,
- Risk mitigation and prevention actions,
- Implementation of an alert system,
- An action follow-up system.

Stakeholders can be defined as '*individuals or groups of individuals who can affect or be affected by the achievement of the company's organisational objectives*'. The law clearly and specifically specifies the role of trade unions in implementing the alert mechanism. However, it does not provide a precise definition of stakeholders and merely evokes a form of consultation. The identification of risks for others remains a unilateral corporate decision.

It is clear that the first vigilance plans published in management reports in 2018 do not go into much detail about consultation with stakeholders.

Methodology used to analyse the fifty vigilance plans published before May 2018

This study is divided into **two parts**. The first part consists in a table analysing plan **compliance** with the law. The second part consists in a **qualitative analysis** of the vigilance plans. This section does not just observe whether companies are simply complying with the specific terms of the text, it also assesses whether they have understood the spirit of the law, i.e. **to put an end to unilateralism and irresponsibility throughout the value chain,** and see whether they have adopted a **proactive approach** in this regard.

2. Compliance with the law: disappointing results

The compliance table was structured based on the five points of the law. Assessment of compliance was then divided into subcategories of the actions specified by the law, i.e.

	Assessment of compliance		
Risk mapping	Identification	Analysis	Prioritisation
Regular assessment procedures	Subsidiaries	Subcontractors	Suppliers
Adequate actions	Risk mitigation	Prevention of serious violations	
Alert	Alert mechanism	Reporting system	Dialogue with trade unions
Systems	Action follow-up	Assessment of their effectiveness	

On the whole, the results are rather disappointing and include three major shortcomings.

First, the majority of companies identified risks that remain very general and are not specific to their trade, type of business, or industry. Several companies even consider that their business does not generate any risks or identify

risks for their suppliers but not on their premises. Therefore, very few companies correctly analysed their risks. Even fewer provided a risk assessment methodology. Finally, few companies established a cross-ranking of their risks according to their severity, likelihood, and reversibility.

Second, companies have not really developed regular assessment procedures for their subsidiaries, and some of them are shying responsibility for the activities of their subsidiaries.

Subsidiary assessment procedures are often in the form of audits, ethics guides, codes of ethics, and self-assessment questionnaires, despite the ineffectiveness of self-assessment questionnaires no longer needing to be proven. Similarly, very few companies mention their subcontractors and suppliers let alone describe a procedure for their regular assessment. In general, even when the vigilance plan evokes a regular assessment procedure, it is not explained.

Third, few companies differentiate between mitigation and prevention of serious abuses.

The alert mechanism seems to be the biggest flaw of these first generation vigilance plans. Overall, vigilance plans almost always mention an alert mechanism but few companies describe it. Similarly, if companies do mention the alert mechanism, there is little explanation as to what their reporting system is.

Trade union consultation is also a major shortcoming in these first generation vigilance plans. Very few companies consulted or planned to consult trade unions.

Mechanisms to follow up actions and assess their effectiveness are mostly absent. Nothing seems to have advanced. No company distinguishes between following up actions and assessing their effectiveness.

To summarise, 2018 vigilance plans are characterised by *a lacking in risk definition, value chain scope, and the stakeholders concerned*. Similarly, the company's methodology and perspective are never explained. *Therefore, there is significant room for improvement for companies*.

3. Quality: inadequate vigilance plans

The question is whether, beyond mere compliance, which, as we saw earlier, is not always the case, the company has understood the spirit of the law and has made a sincere effort to adapt to it. Some plans are just a few lines long and several vigilance plans indicate that this law will only strengthen already existing actions, such as labelling procedures. As such, many companies have not planned to implement additional actions that are more in line with the spirit of the law.

Many companies have not integrated the stakes and the context of the law, namely to reduce the risks of serious abuses/damage to human rights, fundamental freedoms, health, safety, and the environment in a context of extending value chains and increasing and constant complexification.

In general, companies do not use the law's vocabulary, despite each term having been the subject of lengthy academic debates. They do not differentiate between *risk* and *serious abuses*, or between *mitigation* and *prevention*. In addition, many companies have not understand the concept of risk. The law effectively refers to risks for stakeholders and not risks for the company ...

The majority of vigilance plans follow the five points of the law in order, which allows better visibility for readers. Very often, the size of the paragraphs on the five points of the law decreases as each point is addressed. Companies have a lot to say about risks, less about the alert mechanism, and even less about action follow-up systems.

Vigilance plans make very little reference to subcontractors, trade unions, local communities, or stakeholders in general. It seems clear that companies have no intention of consulting their stakeholders, or at least not all of them and not regularly. This is a shame as this is the core of the spirit of the law. Nothing is said about how stakeholder engagement will be implemented or whether stakeholder input will be taken into consideration either.

4. Areas for improvement

This study has identified several areas for improvement. To better comply with the law, companies could adopt the following practices.

Define a relevant risk map

The vigilance plan should specify who coordinates risk mapping and at which level of the company. It is essential that the different departments of the group as well as the employees and their representatives are involved in this mapping.

To fully understand the risks, all stakeholders that could potentially be affected by the company's activities should be identified beforehand. For this, understanding the local context, identifying relations with the public and private authorities in the country, visiting the sites, communicating with the actors in the country, and identifying particularly vulnerable groups would be necessary. Some companies, such as Areva, Danone and EDF, mentioned training local management in dialogue with stakeholders in their previous CSR reports.

After identifying the stakeholders, it would be pertinent to consult and engage with them. Potential and proven impacts on stakeholders should be identified. Environmental and human rights impact assessments by external actors, like those already done for socio-economic issues in some companies, would be useful for this.

Once the risks have been identified, the impacts should be cross-prioritised according to their severity, scope, likelihood, and reversibility. Identification itself should be cross-referenced, according to country, sector, trade, and actor. Risks should also be identified in the different business units - on operating sites - to ensure that risks from the parent company or principal are taken into account. The more detailed mapping is, the better it will be.

Constantly assess the value chain and prevent abuses

Before proceeding with any regular assessment, all members of the value chain should be identified. The identification of value chain members should be regularly updated.

Several procedures could be implemented. Upstream, CSR standards should be contractualised throughout the value chain, for example through supplier charters, codes of ethics, codes of conduct, and contractual provisions. Entering into commercial relationships or merger-acquisitions should be subject to prerequisites.

Then, pre-announced, unannounced, internal, and external audits should be regularly conducted. For this, the quality of the auditors and the audit itself would need to be verified. Sites should be visited by members of the parent company but also by independent experts or NGOs and environmental, human rights, health, and safety impacts should be assessed.

To assess its value chain, the company should be in constant dialogue with workers and employee representatives as well as with local and international civil society.

Companies have significant room for improvement. All stakeholders should be informed about the law. This could be through training. The managers of the parent company should receive training in the Duty of Vigilance Law. Training should also be organised for local managers and local workers of subsidiaries, subcontractors, suppliers, and direct buyers.

The company should be in constant dialogue with its stakeholders regarding the plan via the alert mechanism and a feedback channel. The risk mitigation strategy should be regularly updated based on stakeholder feedback.

The company should exchange and communicate with other companies and civil society. For example, it could join CSR initiatives and principles, sign global framework agreements, set up partnerships with NGOs, or interact with companies in the same sector or in similar situations.

The company should be transparent about its plan with stakeholders. It should extensively publish information on the actions implemented and the results obtained. Publications should be clear, legible, and informative.

Implement an alert mechanism accessible to all

The alert mechanism should imperatively be implemented in consultation with the company's trade union organisations. Alert is a traditional tool used by trade unions and employee representatives. In addition, many companies have implemented whistleblowing procedures under the Sarbanes-Oxley Act in the US, and the Sapin II Law in France on corruption. While consultation on alert mechanisms provided for in the Duty of Vigilance Law does require training it also requires constant trade union involvement in its improvement and the system's operation should be regularly tested. Several alert mechanisms adapted to specific contexts and situations could also be created. Alert mechanisms should be accessible to all stakeholders. These mechanisms can be a telephone line or an email address with translators. Measures to protect the confidentiality, anonymity, protection, and safety of the whistleblower should be taken. Deadlines should be short and everyone's responsibilities clear.

Remedies for abuses and sanction mechanisms should be clearly defined beforehand.

Constantly test the effectiveness of actions

Upstream, the desired impacts of each action should be defined and effectiveness indicators developed. It would also be constructive to seek the views of stakeholders on what impact they think the action has.

The best solution would be to diversify perspectives through external controls, site visits, targeted audits for each action, and pre-announced and unannounced audits. Ideas and suggestions for improvement and change should be collected.

A person or committee, including staff members, should be appointed to follow up actions. Environmental impact and human rights studies should also be implemented.

5. Key role of employees and their representatives

Trade unions and staff representatives have a key role in risk prevention, alerting in the event of abuse of workers' rights or damage to their health or to the company more generally.

Trade unions should have a central role in the implementation of the vigilance plan. It should also be considered that, in the future, vigilance plans should be negotiated with the trade unions of the head office and with the trade unions of subcontractors and suppliers. Transnational trade union federations could also be involved.

In addition, as part of vigilance, it would be appropriate for trade unions to take action, often complementary, in parallel with NGOs and associations.

Employees and their representatives are key players and French law gives them special protection in this respect:

– The development and implementation of the vigilance plan could fall within the scope of the '*annual consultation on social policy*' (Article L. 2323-15 of the French Labour Code);

– During works council meetings or a specific consultation '*concerning working conditions resulting from work organisation* [...]' (Article L. 2323-46 of the French Labour Code);

– The works council's consultation procedure regarding the company's annual report required for companies with more than 300 employees (Article L. 2323-20 of the French Labour Code);

– The WHSC could also, under Articles L. 4612-8-1 of the French Labour Code, demand involvement in the vigilance plan's development;

– It is explicitly provided that representative trade unions are involved in the development of alert reporting procedures.

Alert mechanism: trade union leverage

French law already has *ordinary law constructions of alert*:
– Sapin II law no. 2016-1691 of 9 December 2016 on transparency, the fight against corruption, and modernising the economy;
– Decree no. 2017-329,, 14 March 2017 on the French Anti-Corruption Agency.

The systems provided for in the Sapin II Law seem relevant with regard to vigilance. The unions should therefore push leaders and managers to integrate such systems. Trade union teams should, first of all, raise the awareness of salaried members on boards of directors because of their special role. Effectively, they are entitled to vote in Board meetings and, therefore, they can ensure that the alert mechanism is relevant. Similarly, they can ensure that trade unions are involved in setting up the alert mechanism.
It would also be pertinent to inform and consult European and international bodies. Very often the alert may concern events taking place partly abroad. The issue of the alert procedure should therefore be discussed and debated by the European Works Council or by international bodies. International framework agreements could form a relevant basis to combine with the Duty of Vigilance Law. Buy-in of the alert mechanism by employee representatives from all the countries in which the company has operations is essential to guarantee the effectiveness of the alert procedure.

Conclusion

Duty of vigilance is only an obligation of means and not an obligation of results, contrary to the hope of the NGOs, trade unions, and parliamentarians which/who fought for this law. However, as things currently stand, companies have not implemented the means to ensure appropriate vigilance and reasonable due diligence under their vigilance plans.

Companies have made no effort to adopt the vocabulary of the law or even to understand it. Most of them have restricted themselves to a narrow compliance process, which is not always a success. Neither the spirit of the law nor its stakes seem to have been understood at this point. Will companies take their CSR policies and, more particularly, vigilance further in the future?

Based on the current disappointing results of the vigilance plans, it is essential that employees and trade unions appropriate the law and its vocabulary and make the best use of the right to consultation offered and imposed by the Duty of Vigilance Law. This is a way for them to assert their role as part of the company.

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