

Developments in the Field

The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All

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I. INTRODUCTION

The difficult journey of the French Bill on the duty of care of parent and subcontracting companies¹ came to an end on 23 March 2017, when the French Constitutional Council (Council) decided in favour of upholding the majority of the law's text.² The new Duty of Vigilance Law has been published in the Official Journal and is now in force, although full compliance with it is required only by the next fiscal year.³

The French law is the result of a four-year strenuous process that involved considerable joint efforts from civil society organizations (CSOs), trade unions and Members of Parliament (MPs). After an intense parliamentary back-and-forth between the National Assembly and the Senate, a compromise was finally reached between MPs and the French government, to which civil society actively contributed. This led to the law's final adoption on 21 February 2017 – a historic step forward for the corporate accountability movement, and a testament of the importance of civil society participation in the law-making process.

During this long process, the Bill was nevertheless watered down. The proposal initially put forth by Sherpa and its partners was meant to introduce a new liability regime and provide for a reversal of the burden of proof from victims to companies. The changes in the Bill's text were mainly due to intense lobbying from business,⁴ and even after its final

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¹ Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id> (accessed 4 April 2017).

² Décision no. 2017-750 DC du 23 Mars 2017 du Conseil Constitutionnel, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017-750-dc/decision-n-2017-750-dc-du-23-mars-2017.148843.html> (accessed 4 April 2017).

³ Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Art 4, para 3.

⁴ See MEDEF, 'Devoir de vigilance: une loi inefficace qui menace notre économie' (1 December 2016), <http://www.medef.com/medef-tv/actualites/detail/article/devoir-de-vigilance-une-loi-inefficace-qui-menace-notre-economie.html>

adoption, the proponents of the text still feared major setbacks. Indeed, 120 right-wing legislators from both chambers of the French Parliament referred the Bill to the Council, France's highest court, on grounds of unconstitutionality. Recent decisions made by the Council had suggested that it was likely to censor the text, and impose a very liberal conception of company law and freedom to trade and do business to the legislator.

Nevertheless, in a landmark ruling, the Council held the majority of the law's text to be in line with constitutional principles. The only exception was the civil fine sanctioning non-compliance with the duty of care. The Council's ruling was welcomed as a very encouraging decision by French and European CSOs.

This piece looks at how this French law fits into the growing trend to embed corporate respect for human rights into different types of legal requirements. After describing its main characteristics, the piece reflects on the Council ruling and a potential political shift that this decision reveals.

II. SITUATING THE FRENCH LAW WITHIN OTHER REGULATORY ATTEMPTS

A. Regulatory Options for Embedding Corporate Respect for Human Rights into Law

There are multiple ways in which corporate responsibility to respect human rights may be embedded in law. Due diligence requirements – which differ in aspects like companies covered, the nature of the requirement, the sanction or incentive, and whether or not failing to act with due diligence triggers a company's liability towards victims – are the most common methods.

In 2012, the European Coalition for Corporate Justice, the International Corporate Accountability Roundtable, and the Canadian Network on Corporate Accountability commissioned a report analysing regulatory approaches that states are already using, by employing due diligence, to ensure that business behaviour meets social expectations.⁵ The report identified several regulatory options – which may be combined – that are illustrated below with concrete examples.

Due diligence requirement as a matter of regulatory compliance

The French duty of care law and the Swiss Responsible Business Initiative's legislative proposal⁶ are examples of civil liability for a company's failure to act with vigilance or due diligence. They establish a duty of care – a legal obligation to adhere to a standard of reasonable care, while performing any acts that could foreseeably harm

(Footnote continued)

(accessed 24 April 2017); CCI Paris Ile de France, 'Proposition de loi instaurant une obligation de vigilance à l'encontre de certaines sociétés' (29 June 2015), <http://www.cci-paris-idf.fr/etudes/competitivite/droit-entreprise/obligation-de-vigilance-etudes> (accessed 24 April 2017); and Association Française des Entreprises Privées (AFEP), 'Proposition de loi sur la responsabilité des sociétés mères et entreprises donneuses d'ordre', Press Release (31 March 2015), <http://www.afep.com/uploads/medias/documents/Communique%20de%20presse%20PPL%20sur%20la%20responsabilite%20des%20soci%C3%A9tes%20m%C3%A8res%20et%20entreprises%20donneuses%20d'ordre.pdf> (accessed 24 April 2017).

⁵ Olivier de Schutter et al, 'Human Rights Due Diligence: The Role of States' (December 2012), <http://corporatejustice.org/hrdd-role-of-states-3-dec-2012.pdf> (accessed 26 May 2017).

⁶ Swiss Coalition for Corporate Justice, 'This is How the Initiative Works', <http://konzern-initiative.ch/initiativtext/?lang=en> (accessed 4 April 2017).

human rights or the environment. Those harmed may bring civil (tort) action and claim remedy.⁷

The French law and Swiss proposal bear many similarities. Unlike other examples provided below, they do not focus on a specific sector or issue. Rather, both the French law and the Swiss proposal apply to all companies of a certain size and deal with all human rights, and the environment. Both have extraterritorial reach, since the duty of care has to be exercised by a covered company throughout its international supply chain, and victims may bring actions in France or Switzerland, even though the harms occurred in another state's territory. The difference is that the Swiss proposal would reverse the burden of proof from victims to companies.

States may also impose criminal responsibility on a company for a failure to properly act with due diligence to prevent certain crimes. The United States' Foreign Corrupt Practices Act⁸ and the United Kingdom's Bribery Act⁹ are such examples.

While civil and criminal liabilities are dependent on judicial mechanisms to provide remedies to victims or impose sanctions for wrongful conduct, administrative regulation presents a third option, which can be combined with the other two options. Administrative regulations are designed to address very specific situations and employ a range of sanctions like fines or withholding operational licences. The ability of victims to initiate enforcement and influence proceedings is limited under these regulations, and so is the remedy that they can access. Under the European Union (EU) trade competence, such regulations with extraterritorial application include the EU Timber Regulation (aiming to exclude the imports of illegally harvested timber)¹⁰ and the EU Conflict Minerals Regulation (requiring EU companies to ensure responsible sourcing of minerals and metal).¹¹

Incentives and benefits to companies in return for due diligence practice

The description of administrative law provided in the previous paragraphs applies in this situation as well, but the contractual relationship between the state and recipient of public money enables the state to extend the reach of its regulatory authority. Having policies in place to ensure respect for human rights may be a condition for award of public procurement, investment of state funds, and trade and investment support.

Reporting, transparency and disclosure requirements to encourage due diligence

This approach is the least effective in ensuring that companies address their human rights risks and impacts. It consists in general disclosure as in the EU Non-Financial Reporting Directive, or focused on specific business and human rights issues such as the

⁷ Juan José Álvarez Rubio and Katerina Yiannibas (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (London: Routledge, 2017). See in particular Part 4 entitled 'Corporate Responsibility to Respect Human Rights vis-à-vis Legal Duty of Care'.

⁸ Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 et seq.

⁹ Bribery Act 2010, sec 23.

¹⁰ Regulation (EU) no. 995/2010 of the European Parliament and of the Council of 20 October 2010, laying down the obligations of operators who place timber and timber products on the market.

¹¹ Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas. COM/2014/0111 final - 2014/0059 (COD).

Transparency in Supply Chains Clause of UK's Modern Slavery Act¹² or the US's Dodd-Frank Act provision addressing conflict minerals.¹³ This approach assumes that market participants will attempt to constrain identified harms on the basis of a corporation's disclosure of risks and harms. The disclosure regulations can be backed by administrative sanctions, which can be effective if the regulations are specific enough and if they require corporations to provide full and truthful information. Unlike the French duty of care law, these reporting laws do not have any civil liability regime attached in case of harm.

B. Ambitious French Law

Nature, scope and requirements

The new French law imposes a duty of care as it sets an obligation of vigilance (*devoir de vigilance*) on companies incorporated or registered in France for two consecutive fiscal years that either employ at least 5,000 people themselves and through their French subsidiaries, or employ at least 10,000 people themselves and through their subsidiaries located in France and abroad.¹⁴

The duty of care under the French law is threefold: elaboration, disclosure and effective implementation of a 'vigilance plan' (*plan de vigilance*). The vigilance plan, which may be drafted in association with stakeholders or within multi-party initiatives, includes 'reasonable vigilance measures to adequately identify risks and prevent serious violations of human rights and fundamental freedoms, risks and serious harms to health and safety and the environment'.¹⁵

The law lists five of these measures: a mapping that identifies, analyses and ranks risks; procedures assessing the situation of certain subsidiaries, subcontractors or suppliers; actions to prevent and mitigate risks and serious harms; an alert mechanism; and a monitoring scheme to follow-up on the plan's implementation and efficiency of measures.¹⁶ Details on the contents of the vigilance plan *may* be subject to a decree of application.

The duty of care has to cover risks and serious harms that derive from the parent and subcontracting companies' activities, the activities of companies it controls directly or indirectly,¹⁷ and further down the supply chain, the activities of its subcontractors and suppliers 'with which the company maintains an established commercial relationship'.¹⁸ An established commercial relationship is defined under French law as a stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last.¹⁹

¹² Modern Slavery Act 2015, sec 54(2)(b).

¹³ Dodd-Frank Wall Street Reform and Consumer Protection Act 2010, sec 1502.

¹⁴ Décision no. 2017-750, note 2, para 3

¹⁵ Loi no. 2017-399, note 1, art 1, para 3.

¹⁶ Ibid, art 1, paras 4–9.

¹⁷ French Commercial Code, art L.233-16 II.

¹⁸ Loi no. 2017-399, note 1, art 1, para 3.

¹⁹ See French Commercial Code, art L. 442-6-1-5 and *Cour de cassation, Chambre Commerciale*, 18 December 2007.

Enforcement and access to justice

The law establishes a mechanism to ensure compliance with the threefold duty of care and a civil liability regime in case of actual harm to fundamental freedoms, health and safety or the environment.

Following an unsuccessful formal notice, every person with *locus standi* may require the competent jurisdiction to order a company, subject to a penalty (*astreinte*) to establish the vigilance plan, ensure its publication and account for its effective implementation. Before the decision of the Council, the Bill had also allowed the judge to impose a civil fine (*amende civile*) up to EUR10 million.

Furthermore, victims of business failing to comply with their vigilance plan, or with an inadequate vigilance plan, can seek damages for negligence. The duty of care sets a standard of conduct, and not implementing it can be considered a breach of legal obligations.

Companies may thus incur civil liability under French Civil Code Articles 1240 and 1241 whenever the failure to comply with their obligations under the law can be linked to the harm suffered by the injured party. As it is an obligation of process (*obligation de moyens*) and not of results (*obligation de résultat*), according to French law, the burden of proof lies on the injured party, who has to prove that the failure to comply led to the harms suffered. Before the Council's decision, the judge could have also imposed a civil fine up to EUR30 million in the above situation.

III. A BALANCED DECISION BY THE CONSTITUTIONAL COUNCIL

The Council decided against the majority of objections brought against the law by a group of at least 120 MPs. By validating the core elements of the Bill, the Council might be signalling a shift in the political paradigm.

A. Council's Validation of the Bill's Core Elements

The Council was straightforward in its decision to reject most of the arguments raised against the law's text, which were more political than legal in nature. According to the MPs who brought the objection, the law contained nine vague and ambiguous expressions and terms. It therefore disregarded the constitutional aim of accessibility and intelligibility of the law, as well as the principle of criminal legality, which requires a clear drafting of the law in order to ensure legal predictability.

The Council did censor the civil fine (which is a criminal sanction under French law) that the Bill had prescribed, on the grounds that some of its terms were not specific enough to comply with the principle of criminal legality and legality of offences.²⁰ The lack of specificity concerns the terms 'reasonable vigilance measures' and 'adapted risk mitigation actions'; the broad reference to violations of human rights and fundamental freedoms; and the range of companies and activities falling under the duty of care scope.

Therefore, the Council judged that the legislator cannot issue a civil fine in this case, despite recognizing the 'obvious public interest goal pursued by lawmakers'.²¹ The fine

²⁰ Article 8 of the French Human Rights and Citizens Declaration of 1789.

²¹ Décision no. 2017-750, note 2, para 13.

would have been a strong incentive for companies to comply with their obligations, and its removal is regrettable in this sense. However, the injunction delivered by a judge to order a company to establish, implement and publish a vigilance plan may still be subject to a penalty for non-compliance with the court's order (calculated according to the number of days of non-compliance).

The Council explained that even if the law is too vague to impose a civil fine, it is nonetheless entirely sufficient and intelligible to impose a civil liability regime on companies, validating therefore all the other substantive aspects of the Bill.

The law's opponents claimed that the liability regime set up by the text violated the requirement of personal liability, the legal prohibition to establish irrefutable presumptions of liability, and the prohibition of third-party standing. They argued that the law would create a vicarious liability, because the parent or a subcontracting company would be held liable for harms caused by a separate entity – a subsidiary, subcontractor or supplier. They also stated that the CSOs which presided over the drafting of the text tried to frame *locus standi* in a way that would allow them to file suits against companies, and not the victims of abuse.

The Council rejected these arguments, quoting Article 4 of the French Human Rights and Citizens' Declaration of 1789 and recalling that the principle of liability that forms the basis of civil liability, negligence and tort regime is in itself very broad and unspecific. The Council confirmed the strength and importance of general civil liability principles, and the ability to apply them worldwide without being inhibited by the corporate veil.²²

Another objection raised against the law was that it contrasted with the freedom to trade and do business, by asking for the disclosure of information that could amount to trade secrets, and requiring significant interference by parent companies into the activities of their subsidiaries and business relationships.

However, the Council stated that freedom to trade and do business may be subject to limitations in the benefit of other constitutional principles or public interest, as long as these limitations are justified by the end goal, and therefore the vigilance plan's publishing was not considered an infringement.

B. A Shift in Political Paradigm?

The Council's decision came against all political odds. Organizations representing employers were strongly opposing the Bill and, even when voted into law, had put a lot of effort into resisting its adoption. Furthermore, although the Council is supposed to be a judicial body, it has been repeatedly criticized for its lack of independence from politics, especially with regard to its structure, its proceedings and the nature of its decisions. The Council's decisions have a direct impact on the work of the French Parliament, as it can prevent adopted Bills from becoming legislation. In addition, the Council's recent rulings enshrined freedom to trade and do business within constitutional principles and showed a clear bias in favour of companies.²³

²² Ibid, para 28.

²³ See, e.g., décision no. 2016-741 DC du 8 Décembre 2016 Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, para 103, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2016741DC2016741dc.pdf> (accessed 24 April 2017).

The French law's supporters were, therefore, worried that the law was facing a final and potentially insurmountable obstacle, fearing a political rather than a juridical ruling over the constitutionality of the text. In the end, however, these fears did not turn out to be true.

While the Council could have fully validated or fully invalidated the law, it ruled that the law mainly complied with constitutional norms – a decision suggesting a desire for compromise at the highest levels of policy making. By specifying what was lacking in the drafting of the text for the civil fine to be imposed, the Council also opened the door for the next legislature to draft tighter provisions and reinstall the civil fine in future.

IV. CONCLUSION

The French law is a major milestone towards improving corporate respect for human rights and the environment. With this decision, the Council acknowledged the need for more balanced and fairer globalization, and for corporations to be held accountable for their activities worldwide, rather than hiding behind the corporate veil. Companies, CSOs and other stakeholders now have strong constitutional grounds to use and implement the law.

France is not alone in striving to improve corporate accountability. As noted above, other legislative developments have taken place, or are currently being discussed at the EU level, and in the Netherlands²⁴ and Switzerland. Legislatures of several other EU states are debating the issue, and international organizations have also put the issue on their agenda.

There are hopes that the duty of care law will follow the path of the 2010 French law on non-financial reporting,²⁵ which was adopted subsequent to the adoption of the 2008 Danish Corporate Social Responsibility (CSR) reporting law.²⁶ These pioneer laws and the political efforts of the governments behind them have been decisive in getting the EU to pass the Directive on Non-Financial Reporting in October 2014. Should the new French government maintain this leading role in Europe and at the international level, and should other states and the European Commission seize this opportunity, the duty of care law could have a similar knock-on effect and steer towards wider convergence.

²⁴ Child Labour Due Diligence (*Wet Zorgplicht Kinderarbeid*) was adopted by the Dutch parliament in February 2017, now awaiting approval by the Senate. India Committee of the Netherlands, 'Child Labour Due Diligence Law for companies adopted by Dutch Parliament' (8 February 2017), <http://www.indianet.nl/170208e.html> (accessed 20 April 2017).

²⁵ Loi no. 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement (Grenelle 2), art 225.

²⁶ Act amending the Danish Financial Statement Act (Accounting for CSR in large businesses), adopted by the Danish Parliament on 16 December 2008.