

## DUTY OF VIGILANCE

91 Law on the Corporate Duty of Vigilance  
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**T**he law on the corporate duty of vigilance for parent and instructing companies (the "Law") is part of an international movement to ensure that companies respect human rights in their activities and throughout their value chains worldwide<sup>1</sup>. The "business and human rights movement"<sup>2</sup>, which has particularly developed over the past ten years, has at its roots a body of strong principles and standards. The Law, which has been influenced by this movement and also enriched it, inspires recent national and supranational initiatives<sup>3</sup>.

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Understanding the business and human rights movement allows the Law to be put in context and is an essential prerequisite for

understanding, interpreting and implementing it<sup>4</sup>, as well as making it known in the international sphere and within national legal systems made up of diverse legal traditions.

The explanatory memorandum [*exposé des motifs*] of the draft law contains a clear reference to the United Nations Guiding Principles

AN The authors would like to thank Stéphanie Tchanon for her research and comments on the preliminary versions of this article.

- 1 See OHCHR, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, 2014, spec. p. 47 ("A business enterprise's value chain encompasses the activities that convert input into output by adding value. It includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services that contribute to the enterprise's own products or services, or (b) receive products or services from the enterprise.").
- 2 With regard to the French version on this article, it should be noted that the United Nations, in their official translations, use the term "*droits de l'homme*" (without capitals) whilst the Law uses the term "*droits humains*". The two expressions therefore coexist in the original version in French of this article.
- 3 See Chairman of the Open-ended inter-governmental working group, *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, Sept. 2017 (the draft international treaty currently drafted by an intergovernmental working group steered

by Ecuador within the United Nations Human Rights Council, provides for the implementation of a "vigilance plan" by companies) See *Popular Federal Initiative "Entreprises responsables: pour protéger l'être humain et l'environnement"* (the Swiss proposal, to be subject to a public vote, plans to require "diligence raisonnable" from companies headquartered in Switzerland and the possibility for victims to bring a civil liability action, See <http://konzern-initiative.ch/de-quoi-il-s-agit/texte-initiativeRlang-fr>).

- 4 Similarly, see M-C. Caillet, *Du devoir de vigilance aux plans de vigilance; quelle mise en œuvre ?*, *Dalloz soc.* 2017, p. 819, spec. p. 821 ("Understanding the origin of these legislative developments and knowing their sources allows us to refer to them in order to answer questions raised by this law").

on Business and Human Rights (the "Guiding Principles")<sup>5</sup>, presented as a source of inspiration for the Law. These Guiding Principles, which also permeate several sectoral initiatives, serve as a frame of reference for the business and human rights movement. This movement has confirmed that there are new risks and opportunities for companies (1). Developments in positive law on a regional and national scale have emerged from these soft law initiatives. These developments are principally focused on reporting obligations and are increasingly accompanied by a requirement of effectiveness associated with penalties. The Law is at the crossroads of these trends (2).

## 1. The Emergence of the Business and Human Rights Movement

### A. - From Voluntary International Standards to Universally Applicable Standards

The Global Compact, introduced in 2000 under the leadership of the United Nations and its Secretary-General Kofi Annan represents one of the first steps in the business and human rights movement<sup>6</sup>. Companies, which are members of the Global Compact, undertake to comply with ten principles. Two of these principles are related to the respect of human rights, four are also linked to human rights as they concern the respect of international working standards, three are related to the environment and one to anticorruption. Companies must report, in an annual report, the manner in which they integrate these principles in their activities. Nevertheless, this undertaking remains voluntary and relies on a system of self-declaration via this annual report.

The drafting and implementation of the Guiding Principles by the United Nations between 2005 and 2011 marks a second step in the business and human rights movement. Appointed in 2005 by the United Nations as "Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises", Professor John Ruggie proposed the framework "protect, respect and remedy" in 2008, after three years

of research and consultations. This framework relies on three pillars: 1) the State duty to **protect** human rights, 2) the corporate responsibility to **respect** human rights by not infringing these rights and remedying any adverse impacts which they may have caused or to which they may have contributed, and finally, 3) **access by victims to effective remedy**, judicial and non-judicial<sup>7</sup>. Thereafter, from 2008 to 2011, John Ruggie's mandate focused on implementing this framework with the drafting of the Guiding Principles<sup>8</sup>. These bring together a set of processes to enable companies to respect human rights and to manage the risk of adverse impacts on these rights. They are the result of extensive consultations with stakeholders<sup>9</sup>, as well as empirical studies<sup>10</sup>. The Guiding Principles, in particular those related to "due diligence", were tested on several companies, and their content was debated among corporate law experts with expertise in almost 40 jurisdictions<sup>11</sup>. The Guiding Principles, and their commentaries, were unanimously endorsed by the Human Rights Council on 16 June 2011<sup>12</sup>. They are intended to apply universally and to all companies, regardless of their size<sup>13</sup>.

### B. - Soft Law Developments: New Judges, New Risks, New Opportunities

The Guiding Principles have gradually been incorporated into new standards<sup>14</sup>. These standards include, for example, the revised version of the OECD Guidelines for Multinational Enterprises<sup>15</sup>

5 AN, draft law n° 2578, 11 Feb. 2015, p. 4 ("In accordance with the United Nations Guiding Principles on Business and Human Rights unanimously adopted by the United Nations Human Rights Council in June 2011, and in accordance with the OECD Guidelines for Multinational Enterprises, the purpose of this draft law is to introduce a vigilance obligation for parent companies and instructing companies with respect to their subsidiaries, sub-contractors and suppliers").  
6 See Address of Secretary-General Kofi Annan to the World Economic Forum in Davos, Switzerland, on 31 January 1999, Secretary-General Proposes Global Compact On Human Rights, Labour, Environment, In Address To World Economic Forum In Davos ("You can uphold human rights and decent labour and environmental standards directly, by your own conduct of your own business. Indeed, you can use these universal values as the cement binding together your global corporations, since they are values people all over the world will recognize as their own"): <https://www.un.org/press/en/1999/19990201.sgsm6881.html>.

7 See J. Ruggie, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Protect, Respect and Remedy: a framework for Business and human rights: A/HRC/8/5, Human Rights Council, 7 April 2008* (presenting the frame of reference "protect, respect, remedy").  
8 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 2011*.  
9 Namely "Governments, business enterprises and associations, individuals and communities directly affected by the activities of enterprises in various parts of the world, civil society, and experts in the many areas of law and policy that the Guiding Principles touch upon." See J. Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: A/HRC/17/31, 21 March 2011, spec. p. 4*.  
10 See John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, prec., spec. p. 5*.  
11 See J. Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, prec., spec. p. 5*. - See also J. Ruggie, *The Social Construction of the UN Guiding Principles on Business & Human Rights Working Paper No. RWP17-030, June 2017* (summarising the implementation process of the Guiding Principles).  
12 See UN, *resol. A/HRC/17/4, Human rights and transnational corporations and other business enterprises, 16 June 2011*.  
13 The Global Compact remains in place to enable companies that voluntarily agree to demonstrate, through their membership, their attachment to the values of the Global Compact and the way in which their activities respect human rights.  
14 See OHCHR, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights, prec., question 14* (presenting several international standards influenced by the Guiding Principles).  
15 See OECD, *OECD Guidelines for Multinational Enterprises, 2011*.

and a series of sectoral standards, concerning, in particular, the extractive<sup>16</sup>, textile<sup>17</sup>, and financial<sup>18</sup> industries.

The Guiding Principles and these international standards are considered to be soft law. They do not create legal obligations such that non-compliance cannot be penalised *per se* by national or international courts<sup>19</sup>. However, the normative force of the Guiding Principles is derived from their acceptance by States, combined with the support of stakeholders and companies<sup>20</sup>. The responsibility of companies to respect human rights, which itself, is "a global standard of expected conduct for all business enterprises wherever they operate"<sup>21</sup>, is enshrined in these standards and is increasingly establishing itself as a standard in business conduct.

These standards are regularly invoked by the "new judges"<sup>22</sup>; in particular civil society, non-governmental organisations, local communities, shareholders, financial institutions and consumers<sup>23</sup>. These new judges act in multiple forums: through reports and media

coverage via the press and social networks, as well as before national courts<sup>24</sup>, including through class actions<sup>25</sup>, before arbitration tribunals<sup>26</sup> and before non-judicial bodies, such as the OECD national contact points<sup>27</sup>.

The increasing number of soft law instruments and the existence of these "new judges" create a heightened risk for companies that do not respect human rights in their activities and value chains. These risks are not only reputational, but also legal, operational and financial. They may therefore lead to judicial or arbitration proceedings lasting several years<sup>28</sup>, paralysing social movements, the refusal of banks or international financial institutions to finance a project, the withdrawal of funding<sup>29</sup>, the suspension of projects

16 See e.g. OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 2016. - OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, 2017. - *International Council on Mining and Metals, Human rights in the mining and metals industry Integrating human rights due diligence into corporate risk management processes*, 2012. - *China Chamber of Commerce of Imported & Exported Metals, Minerals and Chemicals, Chinese due diligence guidelines for responsible mineral supply chains*, 2015.

17 See e.g. OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, 2017.

18 See e.g. *Equator Principles, Equator Principles III - a financial industry benchmark for determining, assessing and managing environmental and social risk in projects*, June 2013, p. 2 (recognising in its preamble the inspiration that the Guiding Principles were). - OECD, *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*, 2017.

19 For a perspective on soft law, See *Conseil d'Etat, Étude annuelle 2013, Le droit souple. Doc. fr., May 2013* (proposing a definition of soft law, which comprises "all the instruments satisfying three cumulative conditions: their purpose is to modify or direct the behaviour of their intended recipients so they adhere to such instruments, where possible; they do not, themselves, create rights or obligations for their intended recipients; their content and method of drafting present a degree of formalisation and structuring similar to legal rules." They may also have indirect legal effects).

20 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, p. 1 -2.

21 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *spec. p. 15, comm. under principle 11*. - See also OHCHR, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, *prec.*, question 25.

22 *Les droits humains, nouvelle préoccupation des entreprises : Les Echos*, 26 Jan. 2017, quoting Stéphane Brabant : "Companies no longer face court judges alone; they also face "new judges" such as NGOs, civil society, as well as institutions and financial markets, which increasingly require that they respect human rights" [our translation of the original version in French: « Les entreprises ne font plus uniquement face aux juges des tribunaux mais aussi aux « nouveaux juges » que sont les ONG, la société civile, mais aussi les institutions et marchés financiers, qui exigent de plus en plus le respect des droits humains »].

23 Note, however, the risk of strategic lawsuits against public participation (SLAPPs). See S. Fontaine, S. Savry-Cattan and C. Villette, *Les poursuites stratégiques altérant le débat public, quelle régulation face au phénomène des poursuites-bâillons en France ?*, *Clinique de l'École de Droit de Sciences Po*, 2016: <http://www.sciencespo.fr/ecole-de-droit/sites/sciencespo.fr/ecole-de-droit/files/rapport-final-slapp.pdf>

24 See e.g. *Choc v Hudbay Minerals Inc.*, 2013, ONSC 1414, *Superior Court of Justice* (Ontario Superior Court of Justice authorised the holding of proceedings against the mining company Hudbay Minerals Inc., regarding the accusations, by local communities, of human rights violations committed by its Guatemalan subsidiaries), <https://business-humanrights.org/en/hudbay-minerals-lawsuits-re-guatemala-0>, for more information. - See also *infra* note 54 (for this case and other examples).

25 Concerning action before the Chilean courts related to the suspension of works on the Pascua-Lama mine for environmental questions and on the class action related to this situation introduced in the United States by shareholders who had purchased shares of the mining company between 2009 and 2013, See *Reuters, Barrick Gold reaches \$140 million accord in U.S. investor lawsuit*, 31 May 2016, <https://www.reuters.com/article/us-barrick-gold-lawsuit/barrick-gold-reaches-140-million-accord-in-u-s-investorlawsuit-idUSKCN0YM2LI> - See also the website *Barrick Gold Securities Litigation*, <http://www.barrickgoldsecuritieslitigation.com/courtdocs> (providing several documents on the case, this website does not represent the position of the courts or of the defendant). - See also *Barrick, press release, Barrick Reaches Settlement Agreement in Class Action*, 31 May 2016: <http://barrick.q4cdn.com/808035602/files/press-release/2016/Barrick-Reaches-Settlement-Agreement-in-Class-Action.pdf>

26 See *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA case No. 2012-2 (2016), § 6.99 - 6.102 and 11.4: <https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf> (the Permanent Court of Arbitration found that Ecuador had unlawfully expropriated Mesa Copper Mining Corporation's two mining concessions, but nonetheless reduced the compensation granted to the claimant for one of the concessions by 30%, as it considered that the company had contributed to its own damage by using premeditated violence against the local population). - *Pac Rim Cayman v. The Republic of El Salvador*, ICSID, 2016: <https://www.italaw.com/cases/783> (The International Centre for Settlement of Investment Disputes (ICSID) rejected the Pac Rim Cayman LLC mining company's request according to which El Salvador had unjustly rejected its concession request for the exploitation of gold. El Salvador stated that the company had failed to obtain the necessary authorisations required by law, specifically regarding environmental matters. The ICSID found in favour of El Salvador and ordered the company to pay US\$8 million to cover the costs of the proceedings).

27 See OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2016, 2017*, *spec. p. 25* (chapter 3 presents the backlog of cases before the National Contact Points).

28 See *supra* notes 24, 25, 26.

29 In 2015, the World Bank cancelled the remaining payment of an initial loan of US\$265 million, granted for the construction of a road in Uganda, due to human rights abuses which called into question the personnel working on the project (sexual violence against women). See *World Bank, press release*, 15 Dec. 2016: <http://www.worldbank.org/en/news/press-release/2015/12/21/wb-statement-cancellation-uganda-transport-sector-development-project>

blocked by conflicts with local communities<sup>30</sup>, or the decrease in the stock valuation of a company<sup>31</sup>.

These examples show the potential cost resulting from not respecting human rights in value chains. This cost is usually difficult to quantify especially given that it is often related to a loss of opportunity or reputational damage<sup>32</sup>, and where it has been quantified, it is often not made public, notably in the case of a settlement or arbitration. In cases where the cost is known, several examples show that it can represent extremely high sums, calculated in millions of US dollars. Such is the case for a company whose compensation for expropriation was reduced because the tribunal held that it had contributed to its own damage by using premeditated violence against local populations<sup>33</sup>. Or the case of the devaluation of an asset affected by conflicts with local communities<sup>34</sup>. This is also the case for millions owed in damages following a class action initiated by investors in the United States regarding information disclosed to them, specifically on environmental matters, in respect of a mining project<sup>35</sup>. "Soft" law is thus associated with penalties which may themselves be "hard", even in the absence of binding national legislation, an idea which may be summarised by the expression "soft law but hard sanctions"<sup>36</sup>.

Although there are costs and risks, the respect of human rights by companies and the inclusion of soft law standards in their activities may also be seen as opportunities both in the short-term and long-term. In practice, it could mean easier access to funding for international projects, the support of investors in adopting a responsible investing approach, fostering the loyalty of business partners and consumers who are increasingly sensitive to

the production conditions of the goods they buy, attracting and retaining talented and committed employees, and finally, success in calls for, or participation in, tenders with companies which require that their partners respect human rights and environmental standards. The "new judges" may then also become partners and work alongside companies to ensure human rights are respected by companies, including *vis-à-vis* stakeholders.

The business and human rights movement also requires taking a stance with regard to a new way of doing business in the 21st century, in a context where the trend in many countries is leading towards the emergence of new expectations regarding companies' contributions to society, whether through sustainable investments or corporate citizenship. Furthermore, in jurisdictions that subject companies to obligations related to the respect of human rights, compliance with these requirements represents a competitive advantage. These companies can distinguish themselves from competitors who do not apply these requirements and anticipate coming developments – especially in the current climate, a climate in which the business and human rights movement is increasingly embedded in regional and national law.

## 2. Embedding the Business and Human Rights Movement in Regional and National Law

### A. - A Growing Trend Towards Reporting

The adoption of the Guiding Principles and other standards of soft law, combined with the activities of the "new judges", including in the event of judicial disputes, have helped embed the business and human rights movement in positive law. This recent trend is more specifically based on the requirement that companies report on their respect of human rights<sup>37</sup>. This process enables them to communicate the manner in which they respect human rights in their activities and value chains. Companies are thus required to carry out internal audits and report on them. This development is inspired by the idea of "know and show" recommended by the Guiding Principles. Accordingly, in order to respect human rights, companies must be aware of these rights and show that they respect them by having "policies and processes in place"<sup>38</sup>. This approach is therefore essentially aimed at preventing the most severe adverse impacts on human rights.

30 See *supra* note 24.

31 See *Tahoe Resources*, press release, *Guatemala Lower Court Issues Ruling on Tahoe's Mining License*, 5 Jul. 2017 : <http://www.tahoeresources.com/guatemalan-lower-court-issues-ruling-on-tahoes-mining-license/> (regarding the anticipated financial consequences of the provisional decision by the Guatemala Supreme Court to suspend the company's mining permit in a dispute regarding the consultation rights of indigenous communities). - *Mining.com*, *Tahoe Resources forced to halt Escobal mine in Guatemala*, Jul. 2017: <http://www.mining.com/tahoe-resources-forced-halt-escobal-mine-guatemala/> (regarding the drop in stock values of the company Tahoe Resources Inc. which could be correlated to the Guatemala Supreme Court's decision). - See also BBC, *Chile fines Barrick Gold \$16m for Pascua-Lama mine*, May 2013: <http://www.bbc.com/news/world-latin-america-22663432>

32 See e.g. R. Davis and D. Franks, *Costs of Company-Community Conflict in the Extractive Sector: Corporate Social Responsibility Initiative Report n° 66*. Cambridge, MA: Harvard Kennedy School, 2014 (seeking to identify and assess the costs of conflict with local communities within the context of mining projects).

33 See e.g. *Copper Mesa Mining Corporation v. The Republic of Ecuador*, *prec. supra* note 26.

34 See *supra* note 24, the case of *Hudbay Mineral*: <http://www.hudbayminerals.com/English/Media-Centre/News-Releases/News-Release-Details/2011/Hudbay-Minerals-Announces-Sale-of-Fenix-Project/default.aspx> (regarding the resale, in 2011, of the mining project linked to disputes with local communities for US\$170 million, a price below the original purchase cost) and <http://www.chocversushudbay.com/> (according to the victims' legal counsel, the difference between the purchase price of the mine in 2008 and the sale price in 2011 was US\$290 million).

35 See *supra* note 25.

36 As we have already explained in several contributions. - See e.g. J. Wood, *Soft Law, Hard Sanctions: In-House Lawyer*, p. 95, *spec. p. 96* (interview with Stéphane Brabant).

37 To put these French obligations relating to the RSE into perspective, See generally, K. Martin-Chenut and R. de Quenaudon, *La RSE saisie par le droit, perspectives interne et internationale*: ed. Pedone, 2016.

38 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec., spec., comm. under Principle 15.- OHCHR, Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, *prec.*, question 26.

In line with this trend, the European directive on the disclosure of non-financial information adopted in October 2014, and recently transposed in France by way of an order [*ordonnance*], requires that companies communicate certain extra-financial information, including, for some, information on the effects of their activities in relation to the respect of human rights<sup>39</sup>. This reporting is to be based on a multitude of non-financial indicators. More specifically, following the path opened by the enactment of the California Transparency in Supply Act<sup>40</sup> in 2010, the Modern Slavery Act 2015 imposes on companies, whose turnover exceeds a certain threshold, to carry out due diligence processes in their supply chains and to prepare a statement for each financial year. The objective of these requirements is notably to identify modern slavery risks and the steps taken to assess and manage these risks<sup>41</sup>. The implementation of laws on modern slavery reporting, based on the English model, is a continuing trend which has most recently reached Australia<sup>42</sup>.

By no means an exhaustive list, certain targeted initiatives are also worth highlighting, notably those which focus specifically on the interrelation between the upstream and downstream value chain. The February 2016 reform of the American Tariff Act eliminated an exception which had enabled companies to circumvent the prohibition on the importation of goods involving forced labour (including child labour) in the United States<sup>43</sup>. By linking consumers and the supply chain, article L. 113-1 of the French Consumer Code [*Code de la consommation*] gives consumers of goods sold in France, "who [are] aware of serious elements that cast doubt on whether goods were manufactured in conditions compliant with international human rights instruments [these instruments being specified by decree]", the possibility to have the manufacturer, producer or distributor of said goods provide a series of information about these goods. This includes information

regarding the geographical origin of the minerals and components used in the manufacturing of the goods, quality controls and audits, as well as the organisation of production chains and the identity of subcontractors and suppliers (Cons. Code, art. L. 113-1 and L. 113-2, introduced by order n° 2013-301 of 14 March 2016. – Cons. Code, art. D. 113-1, introduced by decree n° 2016-884 of 29 June 2016<sup>44</sup>).

The law on the corporate duty of vigilance is in line with this trend and is a result of the "progression of the notion of due diligence from the UN sphere to the French national sphere"<sup>45</sup>. There are three obligations set out in the Law which relate to reporting: establish a vigilance plan, effectively implement the plan and finally, make public and include the plan and the report on how the plan is effectively implemented in the company's annual management report (the "Vigilance Obligations"). However, the Law goes beyond merely reporting by seeking the effective implementation of the vigilance plan, thus confirming a recent trend in legislative developments relating to the business and human rights movement.

## B. - The Search for Effective Reporting and the Introduction of Penalties

A relatively recent trend involves the search for effective reporting. The objective is for reporting to represent a tangible tool to prevent adverse impacts on human rights. The introduction of penalties also participates in this search for effectiveness and prevention.

The Law, as we will see, is part of this trend, which, like other initiatives, connects reporting obligations with penalties. Amongst these initiatives, two are currently under examination: the draft law in the Netherlands on child labour in supply chains, under discussion in the Dutch Senate<sup>46</sup>, and proposals to amend the

39 *EP and EU Council, dir. 2014/95/EU, 22 Oct. 2014 amending directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups: EUOJ n° L 330, 15 Nov. 2014, p. 1. - ord. n° 2017-1180, 19 July 2017 on the publication of non-financial information by certain large undertakings and groups of companies: OJ 21 July 2017, text n° 13. - D. n° 2017-1265, 9 August 2017 for application of order n° 2017-1180 of 19 July 2017 on the publication of non-financial information by certain large undertakings and groups of companies: OJ 11 August 2017, text n° 25.*

40 *California Transparency in Supply Chains Act of 2010* (imposing a requirement for certain companies to communicate on the measures taken to eliminate slavery and human trafficking in their supply chains).

41 *Modern Slavery Act 2015 (UK)*, c. 30, § 54 (the law applies to commercial organisations that supply goods or services in the United Kingdom and have a turnover of not less than £36 million). - *See Statutory Instruments 2015 No. 1833, The Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015* (regarding the turnover threshold).

42 *See Joint Standing Committee on Foreign Affairs, Defence and Trade, Modern slavery and global supply chains, Interim report of the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into establishing a Modern Slavery Act in Australia, 2017.*

43 *Trade Facilitation and Trade Enforcement Act of 2015, spec. section 910, signed by the President in February 2016* (law repealing the "consumptive demand" clause of 19 U.S.C. § 1307).

44 *See I. Buiflier, De l'information sur les conditions sociales de fabrication des produits. Mythe ou réalité pour le consommateur ? : Rev. int. Compliance 2016, étude 64.*

45 *See K. Martin-Chenut, Devoir de vigilance : inter normativités et durcissement de la RSE : Dalloz soc. 2017, p. 799.* - We emphasise that the vigilance appears to be distinct from the idea of "due diligence" of the Guiding Principles, the two procedures not being identical. On this, *See OHCHR, Frequently Asked Questions About the Guiding Principles on Business and Human Rights, prec., p. 42 - See this issue, dossier 93.*

46 A failure to comply with this law may give rise to an injunction or a fine of a maximum amount of €750,000 or 10% of the annual turnover of the company, *See Mvoplatfom, Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law, Apr. 2017: https://www.mvoplatfom.nl/bestanden/FAQChildLabourDueDiligenceLaw.pdf*

Modern Slavery Act that are aimed at adding penalties to the existing injunction, which only the Secretary of State may seek<sup>47</sup>.

In keeping with this trend, the 2016 European General Data Protection Regulation (GDPR) is an interesting example, although too often omitted from the business and human rights movement<sup>48</sup>. This regulation focuses, inter alia, on the protection of the right to privacy, which applies both offline and online<sup>49</sup>. The breach of certain provisions can lead to penalties including an administrative fine of up to 20 million euros or equal to 4% of the annual worldwide turnover, whichever is higher, as well as compensation, from the entity in question, for material or moral damages suffered as a result of the breach<sup>50</sup>.

These initiatives are increasingly providing the means necessary to guarantee their own effectiveness, and the Law clearly joins this trend in two ways. Firstly, the mandatory publication of both the vigilance plan and the report on its effective implementation serves to show that the plan is not merely declarative, but also enables stakeholders to monitor whether a company respects the Vigilance Obligations. Secondly, the penalties provided for by the Law can strengthen its effective implementation. On the one hand, if a company fails to comply with the Vigilance Obligations, a periodic penalty payment can be sought against it by any party with standing. Therefore, these periodic penalty payments appear to be the primary tool available for civil society to ensure the existence and effectiveness of the vigilance plan. On the other hand, as for civil liability, "despite the difficulties faced by victims wishing to bring an action before the courts, the very existence of such a possibility and the uncertainties as to its actionability could lead companies to fear both legal and financial risks"<sup>51</sup>. The publication of the civil

liability decision presents an additional risk. The company may be wary of the potential reputational damage related to the publication of a decision, thereby strengthening the preventative objective of the Law<sup>52</sup>. The quest for an effective implementation of the plan is thus one of the characteristics of the Law. Another point of interest is that the Law can also be interpreted as challenging the corporate veil.

### C. - The Corporate Veil Challenged?

The embedding of the business and human rights movement in positive law is also part of a trend seeking to challenge the corporate veil and therefore to "thwart the effects of the principle of legal autonomy in relation to corporate liability, within groups of companies and worldwide supply chains"<sup>53</sup>. Indeed, adverse impacts on human rights within the value chain may ultimately affect the company that is meant to prevent such events by way of its human rights reporting obligations. This challenge to the corporate veil, in cases of adverse impacts on human rights within the value chain, is currently the subject of significant legal disputes abroad as victims of said violations seek means for redress<sup>54</sup>.

Can the law on the corporate duty of vigilance be part of this movement which seeks to challenge the corporate veil, specifically through the Vigilance Obligations which it imposes? The Law may allow the "circumvention" of the corporate veil through penalties, as emphasised in the National Assembly's first preparatory works [*travaux préparatoires*] for the Law<sup>55</sup>, even if some legal commentators appear to reject this hypothesis<sup>56</sup>. Nevertheless, the vigilance plan must cover a spectrum of entities, including several

47 See *Business & Human Rights Resource Centre, First year of FTSE 100 reports under the UK Modern Slavery Act: Towards elimination?* Oct. 2017: <https://business-humanrights.org/en/first-year-of-ftse-100-reports-under-the-uk-modern-slavery-act-towards-elimination> (mentioning certain problems of the effective implementation of the Modern Slavery Act). - See recent proposals for amendments, in particular with regard to extending the reporting requirements; subject of section 54 of the *Modern Slavery Act*, including a proposed amendment aiming to exclude companies which have not produced their slavery and human trafficking statement. - See *Modern Slavery (Transparency in Supply Chains) Bill (HL Bill 57)*: [https://publications.parliament.uk/pa/bills/cbill/2016-2017/0105/cbill\\_2016-20170105\\_en\\_2.htm#llg2](https://publications.parliament.uk/pa/bills/cbill/2016-2017/0105/cbill_2016-20170105_en_2.htm#llg2), introduced in July 2017 and *Modern Slavery (Transparency in Supply Chains) Bill (HC Bill 105)*: [https://publications.parliament.uk/pa/bills/cbill/2016-2017/0105/cbill\\_2016-20170105\\_en\\_2.htm](https://publications.parliament.uk/pa/bills/cbill/2016-2017/0105/cbill_2016-20170105_en_2.htm), introduced in the House of Commons in November 2016. - See also A. Crockett, O. Elgie and J. Wootton, *Potential Amendments to the UK Modern Slavery Act*, Herbert Smith Freehills Legal Briefings, Sept. 2017: <https://www.herbertsmithfreehills.com/latest-thinking/potential-amendments-to-the-ukmodern-slavery-act>

48 *EP and EU Council, reg. (EU) 2016/679, 27 Apr. 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC: EUOJ n° L 119, 4 May 2016, p. 1.*

49 See UN, GA, *resol. A/RES/68/167, The right to privacy in the digital age, 18 Dec. 2013 2013* (stating that "rights that people have offline should also be protected online, including the right to privacy").

50 See *EP and EU Council, reg. (EU) 2016/679, prec., chap. VIII, art. 82 and 83.*

51 See S. Brabant and E. Savourey, *A Closer Look at the Penalties Faced by Companies [Loi relative au devoir de vigilance: des sanctions pour prévenir et réparer?]*, *V. Rev. Int. Compliance 2017*, p. 24 [English translation also available on the BHRRRC website].

52 See S. Brabant and E. Savourey, *A Closer Look at the Penalties Faced by Companies, prec.*, p. 24.

53 See M.-C. Caillet, *De devoir de vigilance aux plans de vigilance ; quelle mise en œuvre ?*, *prec., spec.* p. 820.

54 See C. Bright, *Le devoir de diligence de la société mère dans la jurisprudence anglaise: Dalloz soc. 2017, p. 828, spec. p. 830.* - B. Parance, E. Groulx, *Regards croisés sur le devoir de vigilance et le duty of care: JDI 2018, forthcoming* (regarding the recognition of a duty of care in Common law countries). A number of proceedings initiated in the United Kingdom and in Canada have been particularly scrutinised, notably on the question of the courts' jurisdiction to hear cases in the parent company's jurisdiction for human rights violations that took place abroad, in the supply chain. - For examples, See *Araya v. NevSun Resources Ltd, 2016, Supreme Court of British Columbia*, authorised proceedings brought against the mining company NevSun Resources Ltd. by Eritrean refugees before the courts of British Columbia, regarding a dispute on human rights violations in Eritrea: <https://business-humanrights.org/en/nevsun-lawsuit-re-bisha-mine-eritrea> (presents the case, its most recent developments and centralises all documentation related to the litigation). - See *Garcia v. Tahoe Resources Inc., 2017, Court of Appeal for British Columbia*, in January 2017, the British Columbia Court of Appeal held that a case, more specifically a human rights dispute brought against Tahoe Resources Inc. for acts committed on the company's mining site in Guatemala, could be heard in Canada: <https://business-humanrights.org/en/tahoe-resources-lawsuit-reguatemala> (presents the case, its most recent developments and centralises all documentation from the company and the NGOs).

55 See AN, *rep. n° 2628, 11 March 2015, spec. p. 78* ("The main difficulty encountered in the implementation of a vigilance obligation of instructing companies arises out of the principle of separate legal personality. [...] Article 2 [of the draft law] overcomes this difficulty using a smart mechanism referring to general civil liability law, based on articles 1382 and 1383 of the French Civil Code").

of those identified in the third paragraph of article L. 225-102-4,1 of the French Commercial Code [*Code du commerce*]. This would therefore cause parent companies and instructing companies, required to establish this plan, to also seek to avoid damages within entities that have a separate legal personality.

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56 See M. Lafargue, *Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordres : l'entrée dans une nouvelle ère ?*: JCP S 2017, 1169, spec. p. 5 (emphasising the inadequacy of personal liability system [*responsabilité du fait personnel*] introduced by the Law in attempting to avoid the issue of separate legal liability). - See also C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*: 2017, p. 806, spec. p. 807 (considering that the civil liability mechanism of the Law does not achieve the goal expressed in Parliament's preparatory work of lifting the corporate veil).

Thus, the Law aims to implement effective reporting accompanied by measures that identify and prevent the risks of adverse impacts on human rights and fundamental freedoms, health and safety of persons and the environment. It is currently one of the most advanced mandatory initiatives which coexist with voluntary initiatives within the business and human rights movement. Even though the future of this voluntary/mandatory dichotomy may be the subject of further in-depth discussions, it must not curb the resolution of the challenges posed by corporate globalisation, as highlighted by John Ruggie<sup>57</sup>.

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57 See J. Ruggie, *Multinationals as global institution: Power, authority and relative autonomy: Regulation & Governance*, 2017, p. 13-14 ("in light of the multinationals power, authority, and relative autonomy, the time-worn mandatory/voluntary dichotomy inhibits rather than advances our coming to grips with the challenges posed by corporate globalization").