

## DUTY OF VIGILANCE

### 93 The Vigilance Plan Cornerstone of the Law on the Corporate Duty of Vigilance



**STÉPHANE BRABANT,**

*partner, co-head of the Global Business and Human Rights Practice, Herbert Smith Freehills.*

**CHARLOTTE MICHON,**

*consultant specialised in Business and Human Rights, founder of DDH Entreprises*

**ELSA SAVOUREY,**

*attorney-at-law, firm wide coordinator of the Global Business and Human Rights Practice, Herbert Smith Freehills*

**T**he vigilance plan, cornerstone of the law on the corporate duty of vigilance for parent and instructing companies (the "Law"), must be established by companies falling within its ambit. This plan, through the implementation of reasonable vigilance measures, should "identify the risks and prevent severe impacts on human rights and fundamental freedoms, health and safety of persons and on the environment" (Comm. Code, art. L. 225-102-4, para. 3).

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This article includes contributions from the following companies (in order of contribution): Emmanuelle Bru, Head of Stakeholder Dialogue & Human Rights Issues, BNP Paribas; Maxime Goualin, Business Ethics & Human Rights Manager, Schneider Electric; Sarah Tesei, Social Innovation Director, Vinci; Sheila d'Annunzio,

Corporate Social Responsibility Director, and Julia Genovini, Labour and Human Rights Programme Manager, STMicroelectronics; Carole Hommey, Manager of the Initiative Clause Sociale (ICS); Xavier Hubert, Ethics, Compliance and Privacy Director, ENGIE.

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The plan is focused on three vigilance obligations: the establishment of the plan, its effective implementation and the publication of both the plan and its effective implementation (the "Vigilance Obligations"). There are some outstanding uncertainties regarding numerous matters related to the vigilance plan despite clarifications provided in parliamentary works [*travaux parlementaires*, including both parliamentary debates and parliamentary drafts of the Law]. These questions concern the entities included within the ambit of the vigilance plan that a company is required to establish (1), the content of the plan, as well as its establishment and implementation (2). This article therefore proposes a practical approach to establishing the plan focussing essentially on the theme of human rights<sup>1</sup>. Themed boxes included throughout this article present the approaches of several companies with vigilance plans under preparation [at the time of writing this article].

## 1. An Ambit Difficult to Capture

### A. - *Ratione Personae*: the Entities Included in the Ambit of the Plan

The implementation of the vigilance plan requires first to identify the entities which fall within its ambit. The vigilance plan must not only cover the activities of the company required to establish the plan (the "Relevant Undertaking")<sup>2</sup>, but also the activities of a whole range of entities connected to the Relevant Undertaking. Indeed, the Relevant Undertaking must also include in the ambit of its plan the activities of the "companies that it controls, within the meaning of article L. 233-16 II, directly or indirectly, as well as the activities of subcontractors or suppliers with whom they have an established commercial relationship, when these activities are related to this relationship" (Comm. Code, art. L. 225-102-4, para. 3). This description of the ambit *ratione personae* raises a number of questions, as already suggested by the French Constitutional Court [*Conseil constitutionnel*]<sup>3</sup>.

#### 1. The Concept of Controlled Companies

Controlled companies whose activities must be included in the vigilance plan are determined, as specified in the Law, by reference to article L. 233-16, II of the Commercial French Code [*Code de commerce*]. The concept of control introduced by this article is used by commercial companies for book-keeping purposes in the context of the preparation of consolidated accounts [*comptes consolidés*] and the group management report<sup>4</sup>.

The control envisaged in article L. 233-16, II is classified as

"exclusive control" in that it enables the company to have decision-making power<sup>5</sup>, in particular over the financial and operational policies of another entity. This control can be exercised by different methods<sup>6</sup>: legal control (Comm. Code, art. L. 233-16, II, 1°)<sup>7</sup>, *de facto* control (Comm. Code, art. L. 233-16, II, 2°)<sup>8</sup> or contractual control (Comm. Code, art. L. 233-16, II, 3°)<sup>9</sup>. In the case of contractual control, a company is entitled "to use or to direct the use of assets" of another company in the same way that it controls its own assets, by virtue of a contract or statutory clauses<sup>10</sup>. This concept of exclusive control significantly expands the number of companies to be included within the ambit of the plan, especially given this control can be direct or indirect, as specified by the Law. Therefore, Sophie Schiller emphasises that the companies targeted are those "that are directly and also indirectly controlled, in other words all of those, with no limits to the chain of control, over which a company exercises a decision-making power, whether they are direct subsidiaries [*filles*], second tier subsidiaries [*petites-filles*], or third tier subsidiaries [*arrières-petites-filles*], etc."<sup>11</sup>.

Consequently, it is important for Relevant Undertakings falling under the Vigilance Obligations to properly identify the scope of their accounting consolidation in order to determine and document the companies which will have to be covered by their vigilance plan. Note that it is important to distinguish this concept of accounting control from capitalist control which coexists in the Law<sup>12</sup>.

#### 2. The Concept of Subcontractors and Suppliers

The ambit of the plan also includes "the activities of subcontractors or suppliers with whom an established commercial relationship exists, when these activities are linked to this relationship" (Comm. Code, art. L. 225-102-4, 1, para. 3). This complex wording calls for a number of comments.

The reference to subcontracting [*sous-traitance*] and the uncertainty of its definition can be considered first. This concept may be defined from a wide economic point of view or a more restricted legal

5 See S. Schiller, *Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre*: JCP E 2017, 1193, § 5, p. 21.

6 See *Memento Pratique Sociétés Commerciales 2018*: ed. F. Lefebvre, 2017, § 80571 (on the different types of control).

7 Exclusive control by a company results "from the direct or indirect holding of the majority of voting rights in another company."

8 Exclusive control by a company results "from the appointment, for two successive financial years, of the majority of the members of the administrative bodies, board of directors or supervisory board of a company. The consolidating company is presumed to have made this appointment when it directly or indirectly held a fraction greater than 40% of the voting rights during this period, and no other director [*associé*] or shareholder [*actionnaires*] held a greater fraction than this, directly or indirectly".

9 Exclusive control by a company results from "the right to exercise a dominant influence on a company pursuant to a contract or statutory clauses, when the applicable law permits this". - See also *Memento Comptes Consolidés, Règles françaises, prec.*, § 2025 et s. (which allows the inclusion of certain *ad hoc* entities specifically created to manage one or more operations on behalf of the company).

10 See *Memento Comptes Consolidés, Règles françaises, prec.*, § 2001 and 2024.

11 See S. Schiller, *Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre*: *prec.*, § 5, p. 21.

12 See dossier 92.

1 With regard to the French version of 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.

2 See this issue, dossier 92.

3 *Const. court*, 23 March 2017, n° 2017-750 DC, §13.

4 See *Memento Comptes Consolidés, Règles françaises*: ed. F. Lefebvre, 2017, § 2011 et s. (for an overview of the range of companies covered by this notion within the meaning of the accounting standards).

perspective<sup>13</sup>. The rare comments on subcontracting<sup>14</sup>, including those in the transcripts of parliamentary debates<sup>15</sup>, indicate that we should refer to the concept as defined by the law of 31 December 1975 under which "subcontracting is the operation by which an entrepreneur entrusts another person called the subcontractor [*sous-traitant*], via a subcontractee [*sous-traité*] and under his responsibility, the performance of all or part of the service contract or part of the public procurement contract entered into with the principal [*maître de l'ouvrage*]"<sup>16</sup>.

Whilst the concept of subcontractor seems to be defined and relatively restricted, this does not appear to be the case for the concept of suppliers. The latter does not have "substantially dense prescriptive content"<sup>17</sup> and the rare definitions which exist include a broad range of content<sup>18</sup>. It may refer to "industrial subcontracting" defined as the situation where "a production agent does not personally carry out all of the operations leading to the manufacture of the product from the outset, but uses another agent classified as a subcontractor for all or part of its operations"<sup>19</sup>. It would cover any provision of goods and services to a company by operators (individuals or legal persons). This wide interpretation could add to the more restrictive definition of "subcontractors" defined in the law of 31 December 1975, and could further extend the ambit of the vigilance plan.

Assessing the definitions of subcontractors and suppliers as set in the Law also entails determining whether these concepts encompass the subcontractors and suppliers of solely the Relevant Undertaking, or those of both the Relevant Undertaking and the companies under its control. How to interpret the final redaction of the Law and its use of the passive voice? According to this wording, the Relevant Undertaking must include in its vigilance plan "reasonable vigilance measures to identify the risks and prevent severe impacts [...] resulting from the activities of the company and those of the companies which it controls [...], as well as the activities of subcontractors or suppliers with whom there is an established commercial relationship, when these activities are linked to this relationship" (Comm. code, art. L. 225-102-4, para. 3).

13 See A. Reygrobellet, *Devoir de vigilance ou risque d'insomnies*: Rev. Lamy dr. aff. July. 2017, § 18, p. 39. - See also A. Benabent et L. Jobert, *Sous-traitance. Sous-traitance des marchés des personnes privées*: JCI. Contrats-Distribution, Fasc. 1450 (for a definition of economic subcontracting).

14 See S. Schiller, *Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre*, préc., § 5, p. 21. - See also A. Reygrobellet, *Devoir de vigilance ou risque d'insomnies*, préc., spec. § 18, p. 19.

15 AN, rep. n° 2628, 11 March 2015, spec. p. 65 (defines subcontracting using the definition provided by the law of 31 December 1975 on subcontracting and mentions the risks posed by successive subcontracting).

16 L. n° 75-1334, 31 Dec. 1975 on subcontracting, art. 1: OJ 3 Jan. 1976, p. 148.

17 See A. Reygrobellet, *Devoir de vigilance ou risque d'insomnies*, préc., spec. § 19, p. 40.

18 Directive 2004/18/EC of the European Parliament and Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, since repealed, defined suppliers, entrepreneurs and service providers within the same definition: "any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or work, products or services" (art. 1, § 8).

19 A. Benabent et L. Jobert, *Sous-traitance. Sous-traitance des marchés des personnes privées*, préc., § 1.

The conjunction "as well as" could lead to the conclusion that the ambit of the plan only extends to activities of the Relevant Undertaking (which establishes the plan), the companies which it controls and to its subcontractors and suppliers. However, on reading the transcripts of parliamentary debates and the various versions of the draft law, one could conclude that the plan applies to both subcontractors and suppliers of the Relevant Undertaking and those of the companies which it controls. Indeed, the ambit of the plan would include the "activities of the company and the companies which it controls [...] as well as the activities of their subcontractors or suppliers with whom they have an established commercial relationship"<sup>20</sup>. The possessive determiner "their" would therefore refer to subcontractors and suppliers of both the parent company and the companies that it controls<sup>21</sup>. Can we assume that this determiner was removed from the final text of the Law so as to exclude subcontractors and suppliers of controlled companies ("controlled" being understood within the meaning of article L. 233-16, II of the Commercial Code) from the ambit of the plan? If the interpretation of the transcripts of parliamentary debates is to be retained so far, the concept of an established commercial relationship as applied to the subcontractors and suppliers still requires clarification. In any case, questions arise with regard to the assessment of the concept of an established commercial relationship in the context of application to the subcontractors and suppliers.

### 3. The Assessment of the Established Commercial Relationship

The Law does not clearly specify the entities in relation to which the existence of an established commercial relationship should be determined. The choice of passive voice by the parliamentarians further complicates the reading of article L. 225-102-4, paragraph 3. Should the established commercial relationship be assessed with regard to the relationship between the Relevant Undertaking and its subcontractors or suppliers? Or does it also include the relationship between the companies controlled by the Relevant Undertaking and their subcontractors and suppliers? This is not merely a semantic distinction. If we consider that the assessment of established commercial relationship should only be limited to the Relevant Undertaking, and not with regard to the companies which it controls, an entire range of business relationships escapes the ambit of the plan.

Initially, according to the wording of the first drafts of the Law, parliamentarians may have sought to limit the ambit of the plan, in the hope that the established commercial relationship would only be

20 See AN, draft law n° 708, 23 March 2016, p. 2. - See also in this respect, AN, draft law n° 2578, 11 Feb. 2015, p. 14.

21 In this respect, See AN, rapp n° 3582, 16 March 2016, p. 29: "it is clear that "their" refers to both the subcontractors and suppliers of the controlled companies and to those of the parent company, whether they are in the French territory or abroad, since the obligation itself only covers *in fine* the parent company established in France".

assessed with regard to the Relevant Undertaking<sup>22</sup>. However, later transcripts of parliamentary debates suggest a potentially broader interpretation under which the risks of adverse impacts, specifically to human rights and freedoms which the plan aims to prevent, "are related to the activity of the relevant company [*société assujettie*], but also to the operations of the companies which it controls, as well as those of subcontractors and suppliers with whom they have an established commercial relationship"<sup>23</sup>. Subcontractors and suppliers with an established commercial relationship solely with the companies controlled by the Relevant Undertaking would then enter into the ambit of the plan even if the Relevant Undertaking does not have an established business relationship with these subcontractors and suppliers. The Constitutional Court seems, through the rewording, to have confirmed that subcontractors and suppliers fall within the ambit of the plan when they have an established commercial relationship with the parent company or the companies which it controls<sup>24</sup>. Wouldn't this inclusive interpretation of the "ambit of economic partners"<sup>25</sup> confirm the desire of the legislator, inspired by the philosophy of the United Nations Guiding Principles on Business and Human Rights (the "Guiding Principles"), to ensure compliance with human rights through the company's value chain, including through its relationships with a relatively broad set of business partners? With regards to the rank of suppliers included within the ambit of the plan, the established commercial relationship remains a condition for determining the entities falling within this ambit. The above comments outline potential ways to identify the entities in respect of which the established commercial relationship could be assessed. In this regard, greater clarification is needed on the concept of established commercial relationship.

This concept has been the subject of abundant case law, in particular under article L. 442-6-5, I of the Commercial Code regarding the appreciation of the sudden termination of established commercial relationships<sup>26</sup>. The preparatory works for the Law have referred to this case law jurisprudence to consider that the concept of an

established commercial relationship was sufficiently precise<sup>27</sup>. For example, citing, in particular, a decision by the commercial section of the French judicial court of last resort [*Chambre commerciale de la Cour de cassation*] dated 15 September 2009, the transcripts of parliamentary debates defined the established commercial relationship as "a partnership which each party can reasonably expect to continue in the future"<sup>28</sup>. However, and as rightly emphasised by Charley Hannoun, it is important to consider this earlier case law with caution, since it addresses a purpose different from that covered by the Law. The Law does not aim to protect subcontractors and suppliers from the sudden termination of established commercial relationships, but instead individuals and the environment<sup>29</sup>.

Given the remaining uncertainties with regard to the determination of the ambit *ratione personae* of the vigilance plan, the recommendations of the Guiding Principles could, beyond the letter of the Law, help shed light on the interpretation of the Law. This is all the more appropriate as the Guiding Principles provide, *inter alia*, "an ideal and internationally recognised foundation for the construction of a vigilance plan"<sup>30</sup>.

#### 4. Beyond the Letter of the Law

Firstly, we recall that according to the Guiding Principles, companies are bound to respect human rights "regardless of their size, sector, operational context, ownership and structure"<sup>31</sup>, using policies and processes adequate for their size and circumstances<sup>32</sup>. As the Guiding Principles emphasise, these companies may have adverse impacts on human rights either due to their own activities, or via their business relationships. In order to identify these impacts on human rights, prevent them, mitigate their effects and account

22 Particularly by the use of the singular: "resulting from the activities of the company and those of the companies which it controls within the meaning of II of article L. 233-16, directly or indirectly, as well as the activities of their subcontractors or suppliers with whom it has an established commercial relationship", See AN, TA n° 501, 30 March 2015 (our emphasis). - See also AN, draft law n° 708, prec.: "resulting from the activities of the company and the companies which it controls within the meaning of article L. 233-16, directly or indirectly, as well as the activities of their subcontractors or suppliers with whom it has an established commercial relationship" (our emphasis).

23 See AN, rep. n° 3582, p. 29 and rapp. n° 4242, 23 Nov. 2016, p. 11. Both of these reports show a broad interpretation according to which it is indeed with the parent company or its controlled companies that the subcontractors and suppliers must establish an established commercial relationship, despite the use of the singular in the body of the text of the draft law examined (our emphasis).

24 See Const. court, 23 March 2017, prec., § 11 ("the ambit of the economic partners of the company subject to the obligation to establish a plan [...] includes all of the companies controlled directly or indirectly by this company as well as all of the subcontractors and suppliers with which it has an established commercial relationship, irrespective of the nature of the activities of these companies, their workforce [*effectifs*], their economic weight or the place of establishment of their activities").

25 See Const. court, 23 March 2017, prec., § 11.

26 See in this respect, Const. court, 23 March 2017, prec., § 22 (considers that the notion of established commercial relationship is "sufficiently precise").

27 See AN (Assemblée Nationale – French National Assembly), full minutes of the session on Wednesday 23 March 2016, spec p. 2393 (considers the established commercial relationship as a "precise legal term": "there is no established direct or indirect business link at a legal level. There are established commercial relationships - this is what features in the Law. In the Commission we used a wording allowing for a clarification of scope of subcontracting, which was too extensive and which, in certain circumstances, could cover catastrophes out of the control of the instructing party. We retained what was important: solid contractual relationships, and chose a precise legal term").

28 See AN, rep. n° 2628, p. 36, and p. 71 (it is also surprising that parliamentarians quote this decision in particular when the conclusion they draw from it is set out considerably more explicitly in decisions more recent to the time of the legislative drafting).

29 See C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017: Dalloz soc. 2017, p. 806, spec. p. 810* (discusses the purpose of the Law aiming to protect "third parties and the environment" and also suggests substituting the duration criteria used within the case law relating to the sudden termination of established commercial relationships with the criteria related to importance of the activities subcontracted or the goods supplied to the instructing company. - See also A. Reygobellet, *Devoir de vigilance ou risque d'insomnies, prec., spec. § 20, p. 40* (emphasises that courts hearing a liability action for a breach of the Law may not transpose existing case law solutions, in particular where these had been formulated in different contexts, especially within the framework of anti-competitive practices).

30 See AN, rep. n° 3582, prec., p. 11.

31 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011, principle 14.

32 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., comm. under principle 14 and principle 15*.

for the way in which they remedy them, companies should carry out human rights due diligence<sup>33</sup>. This due diligence requires paying particular attention to the entities with which the company is involved<sup>34</sup>.

Unlike the Law which defines an ambit *ratione personae* which must be covered by vigilance depending on the types of entities (controlled companies, subcontractors and suppliers), the scope of due diligence required under the Guiding Principles depends on the degree of involvement of the companies in the adverse human rights impacts. Therefore, the due diligence "[s]hould cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships"<sup>35</sup>.

In the latter case, the idea of being "directly linked" means that the company is not causing or contributing to the adverse impacts but is involved inasmuch as the adverse impacts are caused by an entity with which it has a business relationship and that these impacts are linked to its own operations, products or services<sup>36</sup>. In other words, the notion of a direct link is assessed with regard to the activities, products and services only, and not with regard to the company itself. If the adverse human rights impacts can therefore be caused by an entity with which a given company has directly or indirectly a business relationship, these adverse impacts may nevertheless be directly linked to the activities, products or services of this company. That means that such a company only escapes all responsibility under the Guiding Principles for adverse impacts when these impacts have no connection whatsoever with the company.

In respect of leverage [understood in the sense of "influence" in French], certain commentators on the Law consider this is essential in determining the ambit of the plan, requiring the company to

exercise vigilance on entities over which it has leverage<sup>37</sup>. However, we recall that according to the Guiding Principles, leverage is not relevant when determining the ambit of the vigilance plan, but is important when a response is to be provided by the company in the event of an adverse impact<sup>38</sup>. It is defined as an advantage that gives a power of influence; the company has the ability to "effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact"<sup>39</sup>.

This approach contrasts with the Law which does not deal with the situation downstream in the value chain (in other words with the company's clients). This contrast may be explained through the Law's intent which is focused on prevention and is associated with quite stringent [*contraignantes*] measures (which also intended to be punitive<sup>40</sup>). The Guiding Principles aim to be a "tool" to prevent and remedy adverse impacts. The Guiding Principles also intend to give companies the means to identify, using due diligence, possible cases of adverse human rights impacts which they could cause, to which they could contribute or more simply to which they could be linked by their activities, products or services. Companies should then draw conclusions on the actions to be considered. They will be required to remedy these impacts only if they have caused them or have contributed to them or, if they are only linked to these impacts, use their leverage.

Thus, a company may be linked to an adverse impact through any of the business partners in its value chain, in particular when this impact is directly linked to its activities, products or services. This value chain is defined comprehensively as including the upstream and downstream of the company's activities<sup>41</sup>. This definition can therefore encompass a large number of entities that can potentially be included in the ambit of the due diligence as envisaged by the Guiding Principles. This ambit therefore goes beyond even first rank suppliers and subcontractors to include the entire value chain of the company. As for the Law, it only seems to cover situations where the company would cause or contribute to the risks and adverse impacts.

33 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., principles 15 b et principe 17* (the Guiding Principles provide for the implementation of a due diligence procedure [called "due diligence" and often translated in French by the term "*diligence raisonnable*"] with regard to human rights aiming to identify the impacts companies can have on human rights and how they can prevent these impacts, mitigate their effects and report on the way in which they remedy such impacts. The processes set in the Guiding Principles seem broader than those provided in the vigilance plan and focus on the "impacts" and not, as provided in the Law, on the risks and severe impacts. Nevertheless, both the vigilance plan and the processes as provided in the Guiding Principles have in common a function of identification and prevention).

34 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide, 2012, p. 17, box 2* (for examples of adverse impacts on human rights).

35 UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., principle 17 a* (our emphasis).

36 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide, prec., question 9* ("How can enterprises be involved in adverse human rights impacts?").

37 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. § 9, p. 2* ("The duty of vigilance is thereby extended to the entire "*sphere d'influence*", in other words to the subsidiary companies and business partners over which the dominant company (parent or instructing) exercises leverage, in other words a power. The duty of vigilance thereby applies in an individual manner on companies "with leverage" [*influence in French*], parent or instructing companies. But, through the leverage [*influence*] they exert, these oblige all of the companies in the production chain to anticipate risks related to the activities and to ensure that they respect the required obligations").

38 See OHCHR, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights, 2014, question 30*.

39 See OHCHR, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights, prec., p. 43* (the definition of leverage, translated as "*influence*" in the French version of this document (for French version, page 50)).

40 In particular, the civil fine was held unconstitutional by the Constitutional Court.

41 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide, prec., question 27* ("What should the scope of human rights due diligence be?"). For a definition of the value chain, See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide, prec., p. 8* ("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").

The notions of value chains, business relationships and business partners could therefore interact with that of the established commercial relationship and once again advocate for a more inclusive, rather than exclusive, vision of entities falling under the ambit of the vigilance plan. This inclusive vision should also be assessed through the prism of risks and severe impacts, as emphasised by the Law and confirmed by the Guiding Principles.

## B. - *Ratione Materiae*: the Risks and Infringements that the Plan Aims to Identify and Prevent

The Law targets a particularly broad ambit *ratione materiae*. Indeed, the vigilance plan must include "due diligence measures meant to identify risks and prevent severe impacts on human rights and fundamental freedoms, health and safety of persons [in French, *personnes* – also understood in English as "individuals"] and on the environment" resulting from the activities of the entities falling within the ambit *ratione personae* of the plan (Comm. Code, art. L. 225-102- 4,1, para. 3). With its large ambit covering a number of risks and serious impacts, the Law therefore stands out from laws with a narrower ambit only targeting limited risks and impacts<sup>42</sup>. The notions of risks [*risques*] and severe impacts [*atteintes graves*] on human rights and fundamental freedoms, health and safety of persons and on the environment need to be further analysed. In particular, should such notions be understood with reference to specific pre-existing norms? How to determine risks and severe impacts?

### 1. The Concepts of Human Rights, Fundamental Freedoms, Health and Safety of Persons and the Environment

It is necessary to better understand the notions in respect of which the risks and severe impacts must be assessed. Firstly, with regard to concepts of human rights and fundamental freedoms<sup>43</sup>, these have been considered as having a "broad and undefined nature" by the Constitutional Court to the surprise of certain commentators<sup>44</sup>. These concepts nevertheless remain part of the Law. The initial parliamentary works emphasised that the "detail of the rights and liberties to be protected and the degree of severity [*gravité*] attached to physical and environmental damages to be prevented" were still to be specified<sup>45</sup>.

42 See AN, rep. n° 2628, p. 15 (note that the Law was initially intended to target an even broader ambit and extend to corruption, but the idea was abandoned by the legislator faced with the imminent definitive adoption of the draft law also known as "loi Sapin 2". - L. n° 2016-1691, 9 Dec. 2016 on transparency, anti-corruption and the modernisation of economic life, called law Sapin 2: OJ 10 Dec. 2016, text n° 2).

43 The distinction between "human rights" and "fundamental freedoms", that may have been inspired by the European Convention on Human Rights and Fundamental Freedoms, seems to remain relatively academic, See *Tchen, Contentieux constitutionnel des droits fondamentaux: JCl. Administratif, Fasc. 1440* (freedom seems to be presented as the object of a right [*l'objet du droit*], and a right would correspond to the implementation of this freedom, such a freedom being specified by positive law). - B. Mathieu and M. Verpeaux, *Contentieux constitutionnel des droits fondamentaux: LGDG, 2002*, p. 17 (the two notions cannot be confused since certain "freedoms" are not regarded as "rights").

44 In this respect, See D. Roman, « Droits humains et libertés fondamentales », des notions « intelligibles » mais « imprécises » ? : à propos du devoir de vigilance des sociétés multinationales: *Rev. dr. trav. 2017, spec. p. 394-395*.

45 See AN, rep. no. 2628, p. 66.

In later parliamentary works, however, it was considered, despite some opposition<sup>46</sup>, that it was not necessary for the *Conseil d'Etat* to clarify, by decree, the "norms of reference against which it would be possible to assess the concept of impact on human rights and fundamental freedoms, severe physical or environmental harms or health risks" due to the "sufficiently precise and comprehensive" nature of the international commitments undertaken by France<sup>47</sup>. The Government, in support of this position, emphasises that the "ambit does not target a corpus of pre-established norms to be imposed on the companies in question. It identifies the nature of the risks which will be included in the vigilance plan"<sup>48</sup>. The absence of a reference list presents several advantages: taking into account the evolving nature of these notions, covering the broad and diverse risks and severe impacts, including with regards to "individuals belonging to specific groups or populations that require particular attention"<sup>49</sup> and which are subject to protection through specific international legislation<sup>50</sup>.

Whilst the norms of reference are not precisely listed, they may nevertheless be determined based on the international commitments undertaken by France. With regard to human rights, for example, the parliamentary works list a number of these commitments<sup>51</sup>, which also appear to overlap with the "International Bill of Human Rights"<sup>52</sup> mentioned in the Guiding Principles. This charter is the basis, *a minima*, of the responsibility to respect human rights and therefore of the due diligence defined by the Guiding Principles and

46 See also AN, full minutes, second session of Tuesday 29 November 2016, p. 8048 (Mr Dominique Tian noting that: "[l]egally, this legislation opens serious breaches in legal stability, a stability which is so necessary to companies: uncertainty regarding the norms of reference on the basis of which the vigilance plan should be drafted [...]"). - AN, rep. n° 2826, prec., p. 39-40 (the joint-rapporteur Mr Philippe Houillon states that there is no information regarding which norms will be used in assessing infringements and emphasises the absence of a referential framework [*référentiel*]).

47 See AN, rep. n° 4242, prec., p. 11.

48 See *Observations of the Government on the Law on the duty of vigilance of parent companies and instructing companies: OJ 28 March 2017, text n° 5*.

49 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., comm. under principle 12*.

50 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework UN, prec., comm. under principle 12*. See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide, prec., question 4* (for a list of United Nations instruments on the rights of individuals belonging to specific groups or populations).

51 See AN, rep. n° 2628, prec., p. 66 (lists the *Déclaration des droits de l'homme et du citoyen* of 1789, the Preamble to the Constitution of 1946 and the Charter for the Environment of 2004. There are also international commitments made by France: the International Declaration of Human Rights of 1948, the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, or the Charter of Fundamental Rights of the European Union of 2000).

52 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., Principles 12* (this charter is composed a minima of the Universal Declaration of Human Rights of 1948 and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966).

interpreted by the legislator in the preparatory works<sup>53</sup>. Besides, the legislator seems to adopt a broad view of these rights which bring together "first-generation rights and public liberties (property right, freedom of conscience, political rights, habeas corpus, etc.), second-generation rights (right to work, access to healthcare, education, right to strike, etc.), and third-generation rights (environment, bioethics, etc.)"<sup>54</sup>. By invoking three generations of human rights it is also possible to cover, at least in part, the risks and severe impacts on health and safety of persons, including workers and also in respect of the environment<sup>55</sup>. Additional and more specific international commitments related to the environment or health and safety of persons may be added to these human rights commitments. Furthermore, it is useful to note that it is indeed the health and safety of all individuals which are targeted and not exclusively of workers, which should enable, depending on the context, the integration into the ambit *ratione materiae* of the vigilance plan of a variety of individuals who may be affected by the activity of the company, in particular local communities.

In the presence of a vigilance plan whose ambit *ratione personae* brings together entities situated in several countries, the notions of human rights, fundamental freedoms, health and safety of persons and the environment may be subject to different legal protections depending on the jurisdictions in which these entities operate. Whilst it is up to the courts to "assess the circumstances to determine whether the company has correctly satisfied the obligation to reach a certain result [*obligation de moyens*] imposed upon it"<sup>56</sup>, the Guiding Principles may once again provide clarification to both the courts and to the Relevant Undertakings subject to the Vigilance Obligations. The Guiding Principles state that if companies are intended to respect both the applicable laws where they operate and "internationally recognised human rights", in the event of a contradiction between local laws and international standards, they are required to "[s]eek ways to honour the principles of internationally recognized human rights"<sup>57</sup>.

The reasoning of the Guiding Principles as applied to the Law acts as a reminder of two points. First, each entity entering within the ambit of the plan must respect the law of the jurisdictions in which it operates, including when this law offers protection in respect of human rights, fundamental freedoms, health and safety of persons and the environment. Second, the Relevant Undertaking subject to the Vigilance Obligations when establishing its vigilance plan will assess the risks and severe impacts with regard to the international commitments undertaken by France in respect of human rights,

fundamental freedoms, health and safety of persons and the environment. In any event, it should also ensure that it respects *a minima* international standards if such standards are more protective than the national standards of the jurisdictions in which the entities entering into the ambit of its vigilance plan operate.

Having discussed norms of reference, the methods for identifying risks and severe impacts [*atteintes graves*] on human rights and fundamental freedoms, health and safety of persons and on the environment must now be considered.

## 2. The Severity of the Impacts

The Law does not specify how and on what scale the notion of severity should be assessed<sup>58</sup>. The Guiding Principles may however offer a possible interpretation<sup>59</sup>. According to these, a severe impact is measured in accordance with its scale, its scope and its irremediable character<sup>60</sup>. "This means that its gravity and the number of individuals that are or will be affected [...] will both be relevant considerations", whilst irremediability means "any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact"<sup>61</sup>. This test of severity may also be applied to impacts on economic, social and cultural rights<sup>62</sup>, health and safety of persons and on the environment. For instance, the above-mentioned analysis of the Guiding Principles takes as an illustration the delayed effects of environmental harm<sup>63</sup>.

The assessment of the notion of severity is also closely related to that of reasonable vigilance [*vigilance raisonnable*] which must specifically enable the prevention or remedying of severe impacts, specifically on human rights. This notion of "*vigilance raisonnable*" is relatively new to the French legislative landscape and is not

53 See AN, rep. n° 2628, prec., p. 3. - See also AN, draft law n° 2578, prec., p. 4 (explanatory memorandum of the draft law [*exposé des motifs*]): "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 in respect of their subsidiaries, subcontractors and suppliers").

54 See AN, rep. n° 2628, p. 66.

55 This coverage is nevertheless anthropocentric and the protection of the environment cannot be thus limited.

56 See AN, rep. n° 2628, prec., p. 66.

57 See UN, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., principle 23.

58 On this point, the transcripts of parliamentary debates do not offer further clarification on the assessment of severity in that they simply emphasise the necessity of defining this notion without actually doing so. See AN rapp. n° 2628, prec., p. 66 (This article should specify details of the rights and freedoms to be protected as well as the severity attached to the physical and environmental damage to be prevented).

59 See M.-C. Caillet, *Du devoir de vigilance aux plans de vigilance ; quelle mise en œuvre?*, Dalloz soc. 2017, spec. p. 825 (referring to the Guiding Principles in order to assess severity).

60 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, prec., p. 8. - See also UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, prec., comm. under principles 14 and 24 (the French translation of such criteria in the French version of the UNGPs is the following: scale [*ampleur*], scope [*portée*], irremediable character [*irremédiable*]).

61 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, prec., p. 8. - See also Dr. J. Zerk, *Corporate liability for gross human rights abuses. Towards a fairer and more effective System of domestic law remedies. A report prepared for the Office of the UN High Commissioner for Human Rights*, p. 25-28 (for a definition of gross human rights abuses that is also related to the severity criterion): <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>

62 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, prec., p. 6 ("economic, social and cultural rights, can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups").

63 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide*, prec., p. 8.

clearly defined in the transcripts of parliamentary debates. This notion seems related to that of due diligence under the Guiding Principles<sup>64</sup>. The company's assessment ability is key: the vigilance measures must allow identification and prevention of risks and severe impacts in respect of which companies have the means and ability to act, which they must therefore act upon in priority<sup>65</sup>. Thus, companies cannot be asked to prevent risks of impacts over which they have no means of action such as when "these risks are external to [their] business relationships"<sup>66</sup>. As for the assessment of "potential risks", it interrelates with how impacts are assessed. Indeed, the assessment of risk depends both on its severity and its probability<sup>67</sup>.

The operational sector and context in which a company operates are therefore essential to appreciate the severity of the impacts<sup>68</sup>. These two factors allow the "most salient human rights" to be identified, that is, the rights which are the most at stake depending on the sector and operating context of a company. In turn, identifying the most salient human rights can allow for the identification of the risks and severe impacts associated with these rights. Thus, the company must concentrate its initial efforts on such rights<sup>69</sup>. These various notions having been discussed, the company can then turn,

in practice, to the identification of the risks and prevention of the severe impacts on human rights and fundamental freedoms, health and safety of persons and on the environment.

## 2. The Vigilance Plan in Practice: a Global Process to Manage Risks to Individuals and the Environment<sup>70</sup>

As we saw previously, to adequately understand the ambit of the plan companies should refer to international standards, and in particular the Guiding Principles<sup>71</sup>. They serve as an inspiration to the Law and companies already refer to such standards in their approach to corporate responsibility.

The use of these standards as a benchmark will be essential in formalising the vigilance plan and determining the practical measures it includes. Indeed, given the extent and novelty of the vigilance approach, this benchmark will provide methodological guidance and help companies on several levels. First, to understand what a vigilance plan is and its specific features in order to establish and implement this plan (A) second, to understand how to publicly report on the plan (B). The following methodological analysis and the examples will more specifically cover the aspects of the Law related to the protection of individuals [*personnes*] (human rights and health and safety of persons)<sup>72</sup>.

### A. - Establishing and Implementing the Vigilance Plan

As a preliminary comment concerning the governance of the vigilance plan, it is difficult to determine *a priori* the most suitable department or person inside a company to steer the plan and ensure its overall coordination. This determination will depend on 1) the company's culture and the individuals already in charge of the areas touched upon in the Law (human rights, health and safety, environment, etc.) or 2) the existing processes already in place within the company and which may support the vigilance plan. In practice, companies have created inter-department working groups which include *a minima* the departments whose missions relate to the fields covered by the Law and the purchasing department in charge of relationships with suppliers. Cooperation is needed to reference existing actions within the company, carry out a

64 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec., principle 17*. See AN, *rep. n° 2628, prec., p. 31* (offering a rewording of due diligence under the Guiding Principles: this is "a series of appropriate measures with the aim of achieving an objective defined in a national or international standard, to respect a minimum level of prudence in taking into account an external standard"). - See also note 33 (on the fact the two notions are not perfectly identical).

65 See AN, *full minutes of the second session of 29 November 2016, prec., p. 8058* ("The word: "reasonable" [*raisonnable*] already allows for a limitation of the scope of the measures taken as part of the vigilance plan to relationships in which the companies targeted by the Law have the means and power to take actions. This word also preserves companies from being imposed to take vigilance measures for activities which would not form part of their business relationships"). - See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., comm. under principle 17* ("Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence").

66 See AN, *full minutes of the second session of 29 November 2016, prec., p. 8058*.

67 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide, prec., p. 8-9*. See C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017, prec., spec. p. 813* (on the notion of risk and notes that the Law excludes what can be viewed as a suspected risk [*risque suspecté*] which relates to precautionary measures, and does not cover proven risk [*risque prouvé*] which refers to prevention measures). - See also M.-C. Caillet, *Du devoir de vigilance aux plans de vigilance; quelle mise en oeuvre?, prec., spec. p. 825* (on the assessment of risk infringements and severe impacts).

68 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide, prec., question 13 and question 15* (on the definition of due diligence).

69 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide, prec. p. 8* (but recalling, nevertheless, as the Guiding Principles emphasise, "that an enterprise should not focus exclusively on the most salient human rights issues and ignore others that might arise.").

70 This part aims to give methodological guidance for the establishment of the plan and its publication. In the absence of regulatory clarifications on the practical details for the implementation of the Vigilance Obligations, guidance can be drawn from international CSR standards and their interpretation by experts and company practices.

71 The OECD Guidelines for multinational enterprises are also a key reference for understanding the concept of vigilance. Quoted in the transcripts of parliamentary debates and government observations, companies also refer to these guidelines as part of their corporate responsibility approach. The OECD has developed sectoral application guides based on the due diligence for companies, as defined by the OECD Guidelines and a general guide on due diligence is currently under preparation, See <https://mneguidelines.oecd.org/>.

72 Naturally, these elements may be extended with regard to the environment, given the underlying purpose and reasoning of the vigilance approach is identical in all sectors.



gap analysis and formalise the vigilance plan. Each department, depending on their attributions, will then have the responsibility to implement relevant actions addressing the risks identified in the plan and their subsequent monitoring.

Whilst the Law is silent on the matter, it is likely that the validation, approval and thus the overall monitoring of the vigilance plan at the highest level of the company will send a strong signal in several regards. First, it will be a signal for the individuals responsible for implementing the plan and related processes (internal staff and external business relations) of the importance the company gives to such processes. Second, it will reinforce the credibility of these processes *vis à vis* stakeholders or even the court, if a case is brought before one<sup>73</sup>.

## 1. Understanding the Specific Features of the Vigilance Plan: an Approach Centred on Individuals

The overriding aim of the vigilance plan is to prevent severe impacts on individuals and the environment which could be caused by the activities of the company (in the broadest sense, therefore including the activities of some of its subsidiaries and business relationships<sup>74</sup>). To fulfil this aim, the Law expressly provides for five measures (set out in detail below) that must be included in the vigilance plan and which specifically aim to identify, analyse, assess and manage the risks of such adverse impacts on individuals and the environment.

Although the required measures<sup>75</sup> may bring to mind traditional risk management processes found in companies, there is, however, a fundamental difference: the purpose of the vigilance approach is to protect individuals and the environment whereas the purpose of classic risk management processes is to protect the company. The vigilance approach does not consist of an assessment of legal, financial, operational, etc. risks for the company but rather the risks (in other words the likelihood) that the activities of the company will have adverse impacts on human rights. Defined as such, the notion of "risk" mentioned by the Law is similar to that of "potential

adverse impacts on human rights"<sup>76</sup>, defined by international standards and frameworks<sup>77</sup>.

Having processes centred on the potential consequences posed to individuals as a result of a company's activities requires an understanding and knowledge of human rights issues. These issues are closely linked to the specific circumstances of the business operating context (country of activity, status of the legislation or societal practices, populations potentially affected, conflict zones, etc.) and the commercial activity (type of project, business relationships, etc.)<sup>78</sup>. Issues related to human rights are not fixed<sup>79</sup>. They depend on circumstances external to the company's environment, as well as on its commercial strategies (to a new sector of activity, establishment in new countries, acquisition of a company, etc.).

It is therefore fundamental that the vigilance plan be:

- **A dynamic process** which allows for the regular assessment of all of the company's activities with regard to potential impacts on human rights. This requires processes for the identification of risks for every new commercial activity, as well as regular risk analyses of existing activities.

- **A process based on targeted risk analyses:** as mentioned, since the challenges are related to specific circumstances, risks must be assessed *in concreto* wherever possible: for example at the level of major operating sites, by business units or by sectors, product category or services used or sold, by type of business relationship, etc.

- **A process based on the consideration of expectations and perspectives of the individuals potentially impacted by the activities of the company,** and whose rights must specifically be protected<sup>80</sup>.

During the drafting of the vigilance plan, companies must therefore pay special attention not to rely solely on known reflexes related to their professional risk management practices. They also need to take into account the above-mentioned principles of action. This does not necessarily involve the creation of *ad hoc* processes

73 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., principle 16* (the approval of commitments and the monitoring of the approach by the highest level of the company are criteria recognised by the international standards as being essential to effective vigilance processes).

74 See *supra* part A.

75 See AN, *rep. n° 4242, spec. p. 14* (details of these measures appeared as part of the last version of the Law presented to the National Assembly and aim to determine the content of the vigilance plan: "[The] presentation [of the measures] is directly inspired by article 17 of the draft law on transparency, la lutte contre la corruption et la modernisation de la vie économique known as "Sapin 2", which introduces a vigilance obligation in relation to corruption and influence peddling. It allows for the structure of the plan to be determined with precision so that the companies concerned can draft them without difficulty"). - See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., principle 17* (these measures are also very similar to the steps recommended by the Guiding Principles to implement the human rights due diligence process: "this process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed").

76 The term "adverse impact" is used both by the Guiding Principles of the United Nations and the Guidelines of the OECD, See for example UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., principle 24*.

77 In this respect, see M.-C. Caillet, *Du devoir de vigilance aux plans de vigilance : quelle mise en œuvre ?*, *prec.*

78 See OHCHR, *The Corporate Responsibility to Respect Human Rights, an Interpretative Guide, prec., question 15* (on the question "[h]ow is an enterprise's sector and operational context relevant to its responsibility to respect human rights?").

79 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., principle 17* ("human rights due diligence:[...] c) [s]hould be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve").

80 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., principle 18* ("[The risk assessment process] should: [...] b) [i]nvolve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation."). - See also *this issue, dossier 94*.

within companies<sup>81</sup>. In practice, companies may rely upon existing risk analysis, information referral or monitoring processes<sup>82</sup>. The bottom line is that they constantly need to remember that the purpose of the vigilance plan is the protection of individuals and the environment. Appropriately assisting staff with the specific nature of the Vigilance Obligations is also key.

## 2. The Content of the Vigilance Plan as Determined by the Risk Mapping

As provided by the Law, the vigilance plan shall contain the following measures (Comm. Code., art. L. 225-102-4):

- 1 Risk mapping [*cartographie des risques*] intended for th[e] identification, analysis and prioritisation [of the above-mentioned risks];
- 2 Processes for the regular assessment of the situation of subsidiaries, subcontractors, or suppliers with whom there is an established commercial relationship, as identified by the risk mapping;
- 3 Tailored actions to mitigate risks or prevent severe impacts;
- 4 An alert mechanism [*mécanisme d'alerte et de recueil des signalements*] on the existence or the materialisation of risks, established in cooperation with trade unions considered as representative [*organisations syndicales représentatives*] within the aforementioned company; and
- 5 A system monitoring implementation measures and evaluating their effectiveness [*efficacité*].

### a) Identifying All Potential Impacts of the Activities

The "risk mapping" of activities is the first step in the drafting of the vigilance plan. This step is the most fundamental one in the sense that its results will determine the subsequent steps and thus the effectiveness of the plan as a whole<sup>83</sup>. The Law is clear: the processes for assessing subsidiaries and business relationships will be carried out "with regard to risk mapping". Actions to mitigate risks and prevent severe impacts must, by definition, be "tailored" to the results of the risk mapping. Then, the vigilance plan must provide an "alert mechanism [*mécanisme d'alerte et de recueil des signalements*] on the existence or the materialisation of risks" (Comm. Code., art. L. 225-102-4).

As defined above, it is not a question of mapping the "risks", in the traditional sense of the term, within companies, but the potential impact of the company's activities on individuals or the

environment. In other words, the activities of the company which may infringe the rights of any individuals (staff, local communities, clients, users, business relationship workers, etc.) must be determined, as well as the manner in which they do so.

In practice, companies must initially identify the risk factors "intrinsic" to their activities based on external or internal company data. Each company activity must be considered in terms of its potential risks for individuals, if the products/services used involve risks related to human rights, or if the business partners related to the activity are likely to infringe human rights when acting within the joint relationship.

### The human rights approach of BNP Paribas

As early as 2012, BNP Paribas has published its Statement on Human Rights<sup>84</sup> in which the Group committed to respect internationally-recognised human rights and to support the United Nations Guiding Principles on Business and Human Rights. Regarding its activities, the Group has identified four areas in which it should exercise human rights vigilance: among its employees, among its suppliers, regarding its individual clients and in the activities financed by the Group. This last issue, specific to the banking sector, particularly requires that BNP Paribas verifies that the activities of major international companies which it finances or in which it invests, do not infringe human rights.

This means ensuring that these companies measure their impacts on human rights and exercise, themselves, due diligence in their activities. In order to do so, BNP Paribas has gradually implemented a risk management mechanism which aims to cover all of its financing activities. This mechanism is based in particular on the integration of human rights criteria into its client assessment tools, its credit policies which frame financing, and in its sectoral policies which frame activities in environmentally and socially sensitive sectors.

### b) Prioritising Issues Identified with Reference to the Severity of the Potential Impact

Once the potential impacts of activities have been identified, they must be assessed and prioritised. Once again, the company must pay specific attention using criteria that are relevant to the ultimate aim of the vigilance approach, namely the protection of individuals and the environment. To this end, severity, as defined above<sup>85</sup>, must be the predominant criteria to prioritise risks<sup>86</sup>.

It is not (once again) a question of managing risk within the company. Even a risk of adverse impact which is already managed by internal actions can remain a "potential adverse impact" and may

81 See OECD, *Guidelines for multinational enterprises: 2011*, § 45, p. 34 ("Human rights due diligence can be included within broader enterprise risk management systems provided that it goes beyond simply identifying and managing material risks to the enterprise itself to include the risks to rights-holders.").

82 It will probably be simpler to adapt existing, internal processes which are known, understood and used by managers rather than creating new ones, particularly since operational managers are often already, and particularly, asked to report on various activities for the purpose of complying with reporting obligations.

83 See Y. Queinnec, *Le plan de vigilance idéal n'existe pas ! Pour être raisonnable et effectif il doit être co-construit*: Rev. Lamy dr. ajf. March 2017, n° 124, p. 22 ("risk identification, a quasi-obligation to guarantee the actual attainment of that result [*quasi-obligation de résultat*]").

84 See BNP Paribas, *Statement on Human Rights*: [https://group.bnpparibas/uploads/file/uk\\_declaration\\_bnp\\_sur\\_droit\\_de\\_l\\_homme.pdf](https://group.bnpparibas/uploads/file/uk_declaration_bnp_sur_droit_de_l_homme.pdf)

85 See *supra* part I.B.2°.

86 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, principle 24 ("Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.").

appear in the risk mapping under the Law. Indeed, as previously explained, the circumstances in which such an impact occurs may change and the risk management actions in place may no longer be sufficient to address such a risk. This risk must therefore appear in the risk mapping and be included in the vigilance plan measures.

## The Schneider Electric risk mapping method throughout its value chain

Following the publication of its Human Rights Policy<sup>87</sup> in June 2017, Schneider Electric set up a "Duty of Vigilance Committee" managed by the CSR department to determine and implement the company's vigilance plan. Made up of representatives of the CSR, purchasing, environment, and health and safety teams, this Committee is specifically in charge of risk mapping. The approach used enables the company to manage its risks throughout its value chain: upstream with its suppliers, internally within its subsidiaries and downstream with its clients and subcontractors.

- **Supplier risk mapping:** Schneider Electric has more than 40,000 tier 1 suppliers. Of these, approximately 1,100 are considered to be strategic suppliers representing 62% of purchasing revenue and benefiting from a specific program based on ISO 26000. This mapping addresses the other suppliers who are subject to a first so-called "inherent risk analysis" based on their geographical location (country of the production entity and not of the head office) and the type of product or solution purchased by Schneider Electric. The risks considered cover human rights, the environment, health and safety conditions and corruption. From this phase, prevention measures will be implemented by buyers for the suppliers located in exposed countries and selling products or services which are at risk. The latter will be subject to a second risk analysis by self-assessment questionnaire. Lastly, those for whom the results are not satisfactory will be subject to a third risk assessment via on-site audits.

- **Subsidiaries mapping:** the health and safety, environmental and human rights internal processes are strengthened for all of the subsidiaries. However, specific work is carried out for subsidiaries located in countries at risk of child and forced labour. For example, subsidiaries using foreign migrant workers must strengthen their prevention and control procedures, particularly if a third party is in charge of recruiting these workers.

- **Clients and subcontractors mapping:** Schneider Electric is currently strengthening its due diligence procedures on its clients and its subcontractors in its project activities. The objective of these measures is that from the beginning of the tender phase, when a project is integrated in management software, if this is located in an exposed country and in a risky activity, the Committee will have to be asked to carry out due diligence on the client and strengthen the control process with regard to subcontractors involved in the project.

This risk mapping exercise is a continuous improvement process, which will evolve regularly on an ad hoc basis and at least once a year.

87 See Schneider Electric, *Human Rights Policy*, June 2017: [https://www.schneider-electric.com/en/download/document/Human\\_Rights\\_Policy/](https://www.schneider-electric.com/en/download/document/Human_Rights_Policy/)

## c) Managing the Identified Risks

Once the risks have been identified, the company must analyse whether the responses which already exist within the company are satisfactory to both manage them and decide, if necessary, what actions need to be implemented.

These actions will be highly dependent on the risks to be managed and a reasonable vigilance approach requires that the measures are graduated and proportionate to the nature of the risk identified and to the assessment of its severity. As indicated above, it also requires a dynamic risk management process: the solutions provided for the risks identified must be questioned and reviewed regularly in order to be effective. This is also the point "of the procedures for the regular assessment of the situation of subsidiaries, subcontractors or suppliers [...] with regard to risk mapping", explicitly required by the Law.

Likewise, as explained above<sup>88</sup>, the notions of causing- contributing-linkage as well as of leverage may determine the actions required to manage identified risks. In order to be effective, these actions must also be suited to the specific operational context.

## Vinci: measures tailored to operational challenges

The Vinci Group favours a pragmatic approach to ensuring the effective application of its commitments at the operational level by seeking to develop solutions tailored to realities on the ground, such as:

- The development of a Human Rights Guide<sup>89</sup> which identifies the main human rights risks related to the Group activities and gives very precise guidelines on how to best manage them at the operational level. Developed in collaboration with the business lines and covering the entire project life-cycle, this guide therefore translates the issues of labour migration and recruitment practices, working conditions, accommodation and human rights practices in the value chain and local communities into concrete actions.

- The conclusion of a specific framework agreement on workers' rights in Qatar, between the Vinci Group, the Qatari company QDVC and the international trade union BWI. This agreement, directly based on international human rights standards and international frameworks available for companies, formalises QDVC's commitments to respect the human rights of workers and its obligations of due diligence on construction sites. It provides for a monitoring, reporting, inspection and audit system to ensure its effective application. Directly adapted to the operational context of the country and the activity in question, this first agreement enables Vinci Group to provide an effective response to an identified risk and is fully integrated into its vigilance approach. The Group wishes to develop other similar measures.

Potential measures may be very diverse: a new policy, the inclusion

88 See *supra* I.A.4°.

89 See Vinci, *Human Rights Guide*, April 2017: [https://www.vinci.com/vinci/developpement\\_durable\\_2011.nsf/index/0805/\\$file/VINCI-Guide\\_on\\_Human\\_rights.pdf](https://www.vinci.com/vinci/developpement_durable_2011.nsf/index/0805/$file/VINCI-Guide_on_Human_rights.pdf)

of human rights criteria in processes which already exist, audits, the development of self-assessment tools, actions to raise awareness or training plans for staff working in the activities which are most at risk, etc. They may apply to a specific right, a particular activity or to a process already applicable throughout the business.

## Forced labour risk management by STMicroelectronics

STMicroelectronics made an early commitment to respect human rights through the adoption of standards going far beyond legal requirements, particularly in the area of risks related to forced labour. We have implemented strict procedures to monitor the practices of all recruitment and employment agencies we use worldwide and we have increased our vigilance for those recruiting migrant workers. We have prohibited the retention of documents that could be used as means of coercion and we ensure that contracts are written in the language of the workers. We also cover all recruitment fees set by agencies in order to reduce the risks of debt on workers. In some cases, our task can be complicated because the recruitment process involves sometimes several levels of agencies and intermediaries and in several countries. For example, in Malaysia where we regularly employ Indonesian, Nepalese and Sri Lankan workers, we audit agencies directly in countries where we recruit migrant workers in order to reduce risks. A key parameter for our success is to rely on our local managers who have the expertise to exercise the required level of awareness and control over our direct supply chain.

When determining the actions to be implemented, the company may find it useful to refer to the expectations of international frameworks and to the best practices set in sectoral initiatives or the best practices of its peers<sup>90</sup>.

## The French initiative "Initiative Clause Sociale" (ICS)<sup>91</sup>

The ICS is an international sectoral initiative whose purpose is to pool social and environmental audit tools (from 2018 onwards) in order to enable its members to deploy their risk prevention plan in supply chains. The ICS includes 37 major French brands in different sectors of activity: textiles, food, home, DIY and electronics. ICS's member companies verify social production conditions on the ground through the implementation of social audits carried out by independent firms approved by the ICS and mandated by its brands and retailers' members. The audit methodology and tools are common: a code of conduct, profile of the production site, audit questionnaire, implementation guide, corrective action plans, alert notification, database. The ICS also offers its members an exchange place to share their experiences and work transparently based on audits results when a production site is identified as common to several members, so that follow-up of corrective action plans can be carried out jointly. Beyond

<sup>90</sup> The website [www.business-humanrights.org](http://www.business-humanrights.org) is a large online library, bringing together all useful information on the subject of business and human rights for companies: news, practical tools, reports from international organisations, reports by NGOs, good practice of companies, etc.

<sup>91</sup> See <http://ics-asso.org/index.php?id=2&L=2>

social and environmental audits, ICS works to strengthen its capacity to offer tools and services adapted to the needs of its members, enabling them to rely on joint methodologies to map risks, address environmental issues and assess audit firms.

## d) Setting Up an Alert Mechanism

As part of the vigilance plan, the Law provides for the implementation of an "alert mechanism [*mécanisme d'alerte et de recueil des signalements*] on the existence or the materialisation of risks, established in cooperation with trade unions considered as representative [*organisations syndicales représentatives*] within the aforementioned company;" (Comm. Code., art. L. 225-102-4, 1, para. 4, 4°).

With reference to the final objective of the Law which is the protection of individuals and the environment, and to the Guiding Principles<sup>92</sup>, it is very likely that this mechanism would firstly be intended for individuals potentially affected by the activities of the company and who wish to alert and question the company on its activities. It should therefore be open to any individuals, internal and external. This alert mechanism must enable the company to receive questions or complaints as early as possible and therefore take the necessary actions to avoid the occurrence of risk or avoid the situation becoming more serious.

In order to be used and therefore to be effective, the mechanism must be communicated proactively and using a means of communication tailored to the individuals likely to use it. Communication on the existence of the mechanism will depend on the previously identified risks. Such risks will determine the individuals potentially affected and thus the main recipients of the alert mechanism. This mechanism must also provide guarantees of predictability, equity and transparency to protect users and encourage them to use it<sup>93</sup>.

## e) Monitoring the Measures Implemented and Assessing their Effectiveness

The last measure to be included in the vigilance plan is "a system monitoring the implementation measures and evaluating their effectiveness [*efficacité*]". Placed at the end of the list of the measures to be included in the vigilance plan this monitoring mechanism must cover all of the measures previously described: from the risk mapping to the alert mechanism. Monitoring the measures and assessing their effectiveness is part of the above mentioned dynamic process on which the vigilance plan is based.

In practice, there will probably be a number of monitoring

<sup>92</sup> See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, prec., principle 29.

<sup>93</sup> See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, prec., principle 31 (the Guiding Principles list, for example, criteria to respect so that grievance mechanisms are effective at an operational level (legitimate, accessible, predictable, equitable, transparent, rights-compatible and based on engagement and dialogue) that companies may transpose into the alert mechanism). - EDH, *Guide to assess human rights risks*, 2013, p. 29 and following: <https://www.e-dh.org/en/evaluate.php> (for a precise description of these criteria).

mechanisms that the company will have to implement:

- Monitoring and assessment of the effectiveness of risk mapping, in other words:
  - Monitoring of risk mapping results: are the risks identified and prioritised still relevant? Have they changed since the initial risk mapping?
  - Monitoring of the process used to identify risks: analysis methodology, quality of information referred, etc.
- Monitoring and assessment of effectiveness of all actions taken to manage the risks identified.
- Monitoring and assessment of the effectiveness of the alert mechanism.

Numerous companies already have systems in place monitoring and evaluating the performance of their policies or processes (internal control system, compliant systems). These mechanisms may be consolidated with several measures taken from the vigilance plan.

### **ENGIE: a human rights policy integrating the ethical principles and compliance procedures of the Group**

From 2014, the ENGIE Group adopted a policy specifically dedicated to human rights. Based on a vigilance approach, it requires all entities in the Group to ensure that their activities respect human rights as defined by international standards. In particular, these entities implement specific processes at the operational level for the identification and management of risk.

Monitoring of this Policy has been integrated in the Group ethical compliance processes to ensure its proper application.

- Quantitative and qualitative indicators on the implementation of the required operational processes are included in the Group ethical compliance procedure. Therefore, each Business Unit reports annually on the progress made in implementing the policy (with a compliance letter from the director of the entity certifying its responsibility and commitment to its implementation).
- Control points related to operational risk analyses have been integrated in the ethical section of the Group internal control system.

These monitoring processes enable ENGIE SA to ensure that the human rights vigilance plan is applied effectively and to determine, if necessary, additional control actions such as internal or external audits.

Once the plan has been established, the company must then publish it and report on its contents in a suitable manner, under the Vigilance Obligations

## **B. - Publicly Report on the Plan: an Exercise Directed to the Stakeholders of the Company**

The Law states that "the vigilance plan and the report of its effective implementation are published and included in the report

mentioned at article L. 225-102" (i.e. the company management report, *See* Comm. Code., art. L. 225-102-4, I, para. 5)<sup>94</sup>. However there is a distinction between 1) the first publication of the vigilance plan, which is to be included in the report covering the financial year underway at the time of publication of the Law, and 2) the following publication (corresponding to the following financial year) which will include the vigilance plan and the report on its effective implementation<sup>95</sup>.

Whilst large French companies are familiar with extra financial reporting<sup>96</sup>, here, it seems that the publication of the plan will, in part, enable stakeholders to verify its existence and its quality under the Law (1), which will require companies to adapt their reporting (2).

### **1. Reporting as a Guarantee of the Plan's Credibility**

Companies are subject to increasing demands in respect of the disclosure of extra-financial information. Such a disclosure can be the result of European regulatory obligations, such as the European directive on the disclosure of non-financial information of 2014<sup>97</sup> or obligations imposed by foreign laws such as the Modern Slavery Act<sup>98</sup>. We note that all these reporting obligations are now centred on the notion of vigilance and therefore require the company to show how their risks (in the sense of adverse impacts) are identified and which processes are

<sup>94</sup> *See also this issue, dossier 92* (for more information on the management report).

<sup>95</sup> *See* Article 4 of the Law ("articles L. 225-102-4 and L. 225-102-5 of the Commercial Code apply from the report mentioned in article L. 225-102 of the same Code for the first financial year opened after the publication of this law. By derogation to the first paragraph of this article, for the financial year during which this law was published, I of article L. 225-102-4 of the aforementioned Code applies, with the exception of the report provided in its penultimate paragraph").

<sup>96</sup> Since the law called "NRE" (L. n° 2001-420, 15 May 2001 on new economic regulations: OJ 16 May 2001, p. 7776), French listed companies are required to publish information on the social and environmental consequences of their activities in their annual management report. This obligation is strengthened by the law called "Grenelle 2" (L. n° 2010-788, 12 July 2010 on a national environmental commitment: OJ 13 July 2010, p. 12905), then with the transposition of directive 2014/95/EU of the European Parliament and Council of 22 October 2014 (EUOJ n°L330, 15 Nov 2014, p. 1). - *See also* the provisions of article L. 225-102-1 of the Commercial Code.

<sup>97</sup> European directive 2014/95/EU requires companies to disclose non-financial information on the impacts of their activities on the environment, society, human rights and related to corruption. It has recently been transposed in France by order n° 2017-1180 of 19 July 2017 (OJ 21 July 2017, text n° 13), supplemented by decree n° 2017-1265 of 9 August 2017 (OJ 11 August 2017, text n° 25). Companies are now required to produce an annual "extra-financial performance statement", pursuant to the provisions of article L. 225-102-1 of the Commercial Code.

<sup>98</sup> *Modern Slavery Act 2015 (UK)*, c. 30, § 54 (designed to tackle modern slavery and human trafficking. It requires that certain companies produce a statement on the measures they take to ensure that there is no slavery or human trafficking in their direct activities and in all of their supplier chains. This law applies to all companies with a turnover in excess of £36 million, exercising a business activity in the United Kingdom, and can therefore include French and foreign companies).

in place to manage them (See e.g. Comm. Code, art. R. 225-105<sup>99</sup>).

Extra-financial reporting allows for increased transparency with the aim of informing investors, consumers and more broadly all stakeholders on company practices, and enabling them to make informed decisions on whether or not to place their "trust" in such companies<sup>100</sup>. This reporting exercise and more generally the information publicly disclosed by companies are today very carefully scrutinised by all of their stakeholders (for example they serve as a criterion for extra-financial rating agencies). The companies are judged and even ranked<sup>101</sup> based on the way in which they publicly report.

Within the framework of the Law, the stakeholders of the company, such as investors, shareholders, extra financial rating agencies will also rely on this public reporting to assess responsible practices of the different companies. Additionally, this public reporting will serve as the starting point for the potential penalty payment procedure provided in the Law for a lack of, or non-effective, plan. We recall that such a procedure is available even in the absence of damage to an individual or to the environment. Indeed, the "new judges— the media, social networks and civil society – [may] request periodic penalty payments, reports on failures to comply and share such reports."<sup>102</sup> They will rely on the items published in the vigilance plan to do so.

Public reporting then becomes a method of monitoring the proper application of the Law and companies must be particularly attentive to the way in which they publish their vigilance plan. International frameworks, which provide a basis for the vigilance approach, will then be useful for companies to establish quality reporting

## 2. Elements for Adequate Reporting

Although the Law provides that the vigilance plan (and later the report on its effective implementation) should be included in the management report, there is no further information on the

publication of the plan, in particular as to its form and substance.

In the absence of specific indications, it is likely that the position of the vigilance plan within the management report<sup>103</sup> or its length<sup>104</sup> is of little importance. What is important, however, is that the vigilance plan is easily identifiable as such (a title of a chapter for example) and includes the measures set in the Law. It will serve to show compliance with the Law and will enable the dissemination of information to the stakeholders likely to read and assess this plan.

The selection of information may be difficult. It requires a return to the fundamentals of an effective vigilance plan: a process of identification and management of risks focused on individuals and the environment. It is not sufficient for the company to show simple compliance with the Law by describing the various measures required by the Law. A company must clearly show for each of these measures 1) how they are articulated with the objective of the vigilance plan and 2) its proper understanding of the processes provided in the Law. Concerning the upcoming report on the effective implementation of the vigilance plan, companies will have to prove, for each new financial year, their developments and progress in the implementation of their respective plans. Such plans must therefore be part of a continuous improvement approach.

Examples of elements to be included in the public reporting of the plan<sup>105</sup>:

- **Elements related to the governance of the vigilance plan:** who is leading the vigilance approach? Which departments are involved? Methodology for drafting and monitoring the plan? Bodies to approve/validate the plan? Consultation of stakeholders?
- **Risk-mapping:** how are the risks for a company identified? How have they been prioritised? Associated stakeholders (internal and external)? What are the priority risks identified? How is the risk-mapping reviewed and updated (system for monitoring and assessment of effectiveness)?

99 The extra financial performance statement must contain for each of the subjects "[a] description of the main risks related to the activity of the company or all of the companies included, where this is relevant and proportionate, risks created by its business relationships, products or services; a description of the policies applied by the company or all of the companies including, where applicable the due diligence procedures implemented to prevent, identify and mitigate the occurrence of risks; the results of these policies, including key performance indicators".

100 See e.g. *Transparency in Supply Chains etc. A practical guide, 2017 (update)*, § 1.8, p. 4: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/649906/Transparency\\_in\\_Supply\\_Chains\\_A\\_Practical\\_Guide\\_2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf) ("It is important for large organisations to be transparent and accountable, not just to investors but to other groups including employees, consumers and the public whose lives are affected by their business activity. Due diligence processes and reporting are essential management tools that improve risk identification and long-term social, environmental as well as financial performance.")

101 See e.g. *the classification of «corporate human rights benchmark» initiatives* (<https://www.corporatebenchmark.org/>), *behind the Brands* (<https://www.behindthebrands.org/>), *KnowTheChain* (<https://knowthechain.org/benchmarks/>), *Ranking Digital Rights* (<https://rankingdigitalrights.org/>).

102 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?]*: *Rev. Int. Compliance 2017, spec. p. 24* [English translation also available on the BHRRC website].

103 The new article L. 225-102-1, III of the Commercial Code amended after transposition of the European directive, specifies that "the declaration [of extra-financial performance] may refer, if applicable, to the information mentioned in the vigilance plan (...)". Therefore, the companies concerned may refer to the vigilance plan for redundant information. We note however, that even for subjects related to the environment, health and safety, or human rights, the vigilance plan is unlikely to be sufficient to cover the information required under article L. 225-102-1 the scope of which is broader, in particular with regards to business relationships (See *supra*).

104 For reasons of space, companies may choose to publish the summary of the plan and its report in the management report referring to more detailed information in other chapters of the management report, other reports by the company or communications tools.

105 See *Shift and Mazars, UN Guiding Principles Reporting Framework, 2015*: <https://www.ungpreporting.org/framework-guidance/> (having inspired this model). All of the information specified herein is not necessarily required in the strict sense of the Law, despite this it aims to show the effectiveness of the vigilance plan adopted by the company.

- **Risk management process:**

- Regular evaluation processes for subsidiaries and business relationships: what regularity? Which entities and why? Which assessment methods (self-assessment, certification letter, audits, etc.)?
- The responses to the major risks identified: what measures have been taken (policies, processes, training/awareness actions, participation in sectoral initiatives, etc.)? What dialogue with the stakeholders? What systems for the monitoring and assessment of their effectiveness, including performance goals and associated indicators?

- **Alert mechanism:** how does the system work (from collection to processing)? Who is responsible for the system? What are the available guarantees for effectiveness/impartiality of the system? How is it communicated to the stakeholders who are potentially affected? How is it assessed and updated (system of monitoring and assessment of its effectiveness)?