FRANCE'S LAW ON THE CORPORATE DUTY OF VIGILANCE: PROCESS, PEDAGOGY AND PRAGMATISM AS THE WAY FORWARD

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The publication of the first vigilance plans prepared under France's Law on the Corporate Duty of Vigilance (the "**Vigilance Law**" or the "**Law**") has led to studies that have principally focused on a review of the content of these plans and the identification of certain best practices.[1] This note goes a step further and presents three recommendations to improve the next generation of vigilance plans and the effective implementation of current plans.

These recommendations, which are particularly relevant for the human rights aspect of the Vigilance Law, are centred on three Ps: Process, Pedagogy and Pragmatism. They are based on the author's experience advising companies on the implementation of the Law and a legal review of 25 vigilance plans conducted across 12 industrial sectors and against a set of 57 questions.[2] As explained in the concluding comments of this note, the implementation of the Vigilance Law with processes, pedagogy and pragmatism should be inserted into a larger juridical framework.

INTRODUCTORY COMMENTS: THE ABSENCE OF VIGILANCE PLANS AND THE NEED TO TAKE ACTION

Before turning to these recommendations, it is important and urgent to note that several companies do not have vigilance plans although there is a high probability that they fall under the scope of the Vigilance Law and should therefore have such plans. Some of these companies — including subsidiaries of foreign groups incorporated in France — may not actually be aware that they fall within the scope of the Vigilance Law.

Ascertaining whether a company incorporated in France falls within the scope of the Vigilance Law requires, first, an analysis of both its corporate legal form and the corporate structure of the group to which it belongs. Second, it necessitates a head count of the number of employees per subsidiary within this group. Considering that this information is not always public, and in the absence of a public registry of companies that fall within the scope of the Vigilance Law, it is difficult to identify companies which should have prepared plans.

Accordingly, any global group that has one or several corporate entities in France should verify whether such entities fall within the scope of the Vigilance Law. It should act promptly before the sanctions regime provided for in the Law is triggered. Sanctions may include periodic penalty payments for failure to draft a plan and/or civil liability, should damage be caused which could have been avoided if a vigilance plan had been prepared and effectively implemented.

THE FIRST P: A PROCESS-BASED APPROACH

This note first recommends that companies adopt a process-based approach both at the time of drafting their next vigilance plan and also when implementing their current plan. There are several

* The recommendations provided for in this note have been presented and discussed during a panel entitled "Vigilance Law - Year one: feedbacks on 2018 vigilance plans - focus on human rights" at the Convergences conference in Paris (September 2018). I am grateful to Charlotte Michon (EDH) and the panellists for our discussions, to Stéphane Brabant for his feedback and fruitful conversations, and to Adèle Bourgin for her research and comments on the preliminary versions of this note.

[1] Entreprises pour les droits de l'Homme (EDH) & B&L Evolution, Application de la loi sur le devoir de vigilance, 25 April 2018, available at https://www.e-dh.org/userfiles/Edh_2018_Etude_V6.pdf; EY, Loi sur le devoir de vigilance : analyse des premiers plans de vigilance par EY, September 2018, available at https://www.ey.com/Publication/vwLUAssets/ey-analyse-des-premiers-plans-de-vigilance-du-sbf-120/$File/ey-analyse-des-premiers-plans-de-vigilance-du-sbf-120.pdf.

[2] We conducted research on the format of vigilance plans, their scope of application and risk mapping, the implemented processes for the regular assessment of the situation of subsidiaries, subcontractors, or suppliers, tailored actions to mitigate risks or prevent severe impacts, existing systems monitoring implementation measures, alert mechanisms, and stakeholders.

processes at the core of the Vigilance Law such as risk mapping, regular assessment of entities within the ambit of vigilance plans, grievance mechanisms, alert mechanisms, monitoring, and reporting. The necessity of these processes and the development of related tools have been largely exposed in the United Nations Guiding Principles on Business and Human Rights ("**UNGPs**") — on which the Vigilance Law is expressly based — and in related standards.[3]

Taking the example of the risk mapping process, several companies need to detail the methodologies on which they base their risk mapping. They need to subsequently publish the results of this mapping, that is, the risks that have been identified. This approach is essential to demonstrate that a company is in a situation to *know* what the risks are and *show* such identification has been conducted. In addition, the risk mapping exercise should be focused not on the risks for the company itself, but on risks for the rights-holders (employees, communities, etc).[4]

The same recommendation applies to alert mechanisms [*mécanismes d'alerte et de recueil des signalements*] on the existence or the materialisation of risks. Having anti-bribery alert mechanisms, as required for instance by the French Loi Sapin 2,[5] is not sufficient per se for a company to fulfil the requirement for alert mechanisms as set out in the Vigilance Law. Alert mechanisms for anti-bribery legislation and for the Vigilance Law do not have the same objectives; they do not address the same risks or target the same population (the company on the one side, rights-holders on the other side). Although such mechanisms can be complementary, they cannot be used in lieu of the other without any adjustment.

A process-based approach is also necessary to prepare and conduct stakeholder consultations, as recommended by the Vigilance Law. Vigilance plans should include a definition and then an identification of relevant stakeholders. These plans must also specify how companies intend to consult with these stakeholders. The subsequent report on the effective implementation of such plans should then explain how stakeholders have been consulted.

THE SECOND P: A PEDAGOGICAL APPROACH

Pedagogy is essential to help set up processes to prepare the vigilance plans and ensure their effective implementation. In turn these processes will also serve as pedagogical instruments to raise the awareness and mobilise various internal and external stakeholders.

A pedagogical approach means that a company should not consider the Vigilance Law and its effective implementation as merely a tick-the-box exercise. Admittedly, companies that enter into the scope of the Vigilance Law do not all have the same experience with Business and Human Rights issues. Some businesses will need more assistance than others. For this reason, peer learning and the sharing of best practices and challenges between companies can be a useful resource. The creation of, or recourse to, existing guidance and tool boxes could also help companies draft vigilance plans and implement them effectively. The Shift Reporting Framework as well as guidance currently being drafted by NGOs are examples of such tools.

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[3] AN, prop. of law n° 2578, spec. p. 4 (explanatory memorandum of the draft law: "In accordance with the United Nations Guiding Principles on Business and Human Rights unanimously adopted by the United Nations Council on Human Rights in June 2011, and in accordance with the OECD Guidelines on Multinational Enterprises, the purpose of this draft law is to introduce vigilance obligations for parent companies and instructing companies with respect to their subsidiaries, subcontractors and suppliers"); Office of the High Commissioner for Human Rights, UNGPs, 2011, Principle 15.

[4] Stéphane Brabant, Elsa Savourey & Charlotte Michon, The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance, Rev Int. Compliance, December 2017, p. 9 ("Although the required measures 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") available at https://www.business-humanrights.org/sites/default/files/documents/Law%20on%20the%20Corporate%20Duty%20of%20Vigilance%20-%20Vigilance%20Plan%20-%20Intl%20Rev.Compl .%20%26%20Bus.%20Ethics.pdf ; see also UN, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 16 July 2018, A/73/163, p. 8.

[5] Loi n° 2016-1691 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, 9 December 2016.

An internal pedagogical approach is fundamental to raise a company's staff awareness on the importance of respecting human rights. This includes organising training for each business unit and for each role within such units as well as explaining what human rights are and how they can be affected by the conduct of given activities within the business unit. Pedagogy also means building synergies between the different departments within a company so as to ensure a smooth dialogue at the different levels of a company or a group. Dialogue of this type helps information to flow and facilitates the identification of key interlocutors for the staff to anticipate and report on human rights risks.

An external pedagogical approach requires that the company make public, through its vigilance plan and the reporting of its effective implementation the processes in place and actions that are taken to respect human rights. In particular, a vigilance plan should demonstrate that a company is in a position to know and show it respects human rights. It can know that it respects human rights with the assistance of certain processes. It can subsequently show its efforts to respect human rights and how it addresses related risk by "providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors."[6]

THE THIRD P: A PRAGMATIC APPROACH

Companies also need to be pragmatic when they initiate the processes discussed above. For instance, when encountering implementation or interpretation difficulties, companies should not only persevere in the improvement of their vigilance plan and its effective implementation but also move forward pragmatically, especially as a number of points in the Vigilance Law remain subject to various possible interpretations. Companies should be able to defend their decisions and interpretation of the Vigilance Law in line with the objectives of the Law, the UNGPs and related standards.

A number of companies have been, and still are, faced with a predicament: how much information should they publish in the plans and therefore publicly disclose and what are the risks with such disclosure? There is no denying that the disclosure of what is regarded as confidential business information in the plan, such as, for instance, risks related to a contemplated commercial transaction that has not been made public yet, is difficult for a company. Aside from these particular situations, pragmatism requires a transparent approach when drafting vigilance plans.

There are several justifications for transparency. Overall, companies have more to gain from becoming transparent, at least progressively, about the processes they implement and their results. First, transparency reduces the possibility companies could be subject to periodic penalty payments based on the absence, incomplete content, or non-effective implementation of their vigilance plans. Second, companies whose plans are more comprehensive than those of competitors may be less targeted by new judges (such as NGOs, consumers, ESG investors). Third, vigilance plans based on transparency can serve as a defense for a company when, for example, a civil liability claim is brought against the company. This approach will facilitate the company's ability to find in the plan and the report on its effective implementation the evidence required to show that it has fulfilled the obligations set out in the Vigilance Law.

CONCLUDING COMMENTS: AN OVERARCHING LEGAL APPROACH FOR THE THREE "Ps"

The implementation of the Vigilance Law with processes, pedagogy and pragmatism should be inserted within a larger juridical framework. This framework should be reflected in the work of the companies' task forces drafting vigilance plans and preparing their effective implementation for three main reasons.

First, the scope of the Law and ambit of the vigilance plan are still unclear for a number of companies. A good understanding of corporate law is essential in order to ascertain such scope and ambit. In relation to the scope of the Vigilance Law, several businesses have difficulty identifying whether they fall within the scope of the Law. As to the ambit of the vigilance plan, it is not always clear to companies which entities should be included in the ambit of the vigilance plans they draft.[7]

Second, the interpretation of certain legal provisions of the Vigilance Law remains uncertain. A good understanding of the legal issues underlying the Vigilance Law is essential. This understanding

[6] See Commentary under Principe 21, Office of the High Commissioner for Human Rights, UNGPs, 2011.

[7] In certain rare instances, existing vigilance plans cover subsidiaries, a number of sub-contractors and suppliers but not the companies which are actually drafting the plan, although they should be included.

should be combined with knowledge of the soft and hard law landscape and ecosystem of Business and Human Rights. Such a level of understanding will help better anticipate the difficulties and possible disputes that will arise from the interpretation of the Vigilance Law. It will also help better protect the company while risks for stakeholders are prevented and mitigated on the basis of processes and sectorial best practices.

Finally, because there is a sanction regime provided for in the Law, a legal approach will help a company ensure it fulfils its obligations to draft a plan and effectively implement it. The obligation to effectively implement a vigilance plan is the cornerstone of the civil responsibility mechanism set out in the Vigilance Law. It was specifically introduced as an obligation that companies must use all available steps to reach a certain result [*obligation de moyens*].[8] Lawyers can act as trusted advisors to assist a company in implementing this obligation and thus help it protect itself against the sanctions set out in the Law.

Overall, complying with the Vigilance Law obligations and using the three Ps should not only be viewed as a cost for companies but also as a source of many opportunities. These approaches can help companies reinforce sustainable profitability and also give them a head start. These opportunities are particularly relevant in a context where several other jurisdictions are developing modern slavery or vigilance laws and where companies are increasingly required to demonstrate that they have a positive impact on the people and the planet.[9]

[8] Stéphane Brabant and Elsa Savourey, A Closer Look at the Penalties Faced by Companies, Rev. Int. Compliance, June 2017, p. 2, available at https://www.business-humanrights.org/sites/default/files/documents/French%20Corporate%20Duty%20of%20Vigilance%20Law%20-%20Penalties%20-%20Int%2527l%20Rev.Compl .%20%26%20Bus.%20Ethics .pdf.

[9] As exemplified in France in the debates around the PACTE bill.