DUTY OF VIGILANCE: "A (NOT SO) REASONABLE DRAFT BILL"

24 March 2017 | Paris
Legal Briefings – By **Stephane Brabant**

The draft bill on the duty of vigilance (sometimes translated as "duty of care") owed by parent and contracting companies was passed by the French National Assembly on 29th November 2016 after a new reading, and went back to the Senate on Tuesday 17th January, only to be rejected by the Law Committee.

A public session is now scheduled for Wednesday 1st February and, once the last round of back-and-forth is over, the National Assembly will have the last word on its adoption which is expected in mid-February.

However, the draft bill expected to be passed by the French Parliament is not quite convincing as it currently stands, and there is room for improvement between now and February. In practice, the draft bill would only apply to around 150 companies in France yet most have already put in place procedures for complying with the international principles in this arena, such as the United Nations Guiding Principles on Business and Human Rights.

Since 2011, these internationally authoritative Guiding Principles have set out the basic concepts for ensuring human rights are protected by all companies. They notably provide that every company is responsible for exercising "reasonable human rights due diligence" to prevent, mitigate, and remedy any negative impact on the human rights of anyone who is affected by the business of a company or of its subsidiaries, suppliers, and subcontractors.

THE CONCEPT OF "VIGILANCE"

Why, then, does the draft bill refer to reasonable "vigilance" rather than "diligence"? The choice of words could generate uncertainty as to how the law is to be interpreted with regard to the UN Guiding Principles, despite the latter being similarly applicable to all companies in France – and indeed, worldwide.

The concept of "vigilance" may have been chosen to reinforce the responsibility of companies, including a civil fine of up to €10 million that can be increased to the point of being tripled. Whether these provisions are consistent with the Constitution is open to debate.

The specific approach taken in the draft bill is enforcement-minded (even though it says the court "may" order the company to pay a fine) and limited to certain companies. It does not seem well-suited to potential victims or the companies themselves, especially when compared to established, universally applicable international principles.

Concerning the penalties set out in the draft bill to incite companies to apply these principles, studies have shown that companies – and particularly large companies – already operate under serious threat of reputational, financial, operational and market sanctions, not to mention potential penalties and remedies that can be sought against them in domestic and international civil and criminal courts. A civil fine contributes nothing to this climate – and without the fine, the text might have more easily covered a larger number of companies while protecting a larger number of potential victims.

BRITISH PRAGMATISM

While the basic idea of this type of law is surely worthwhile, perhaps it would be more suited to purpose if the law 1) covered more companies, especially companies (or their subsidiaries, suppliers and subcontractors) that conduct business in countries where little respect is afforded to human rights (safety, health, local community rights, land-grabbing, etc.), 2) did not contain a civil fine, and 3) focused on the pedagogical goal of increasing the awareness of these companies of how important it is for them to respect human rights, and of guiding them – as the companies themselves hope and expect – in putting in place useful procedures for anticipating, avoiding, mitigating and remedying the negative effects on human rights they may be involved in through their subsidiaries, contractors and subcontractors. The draft bill is at least clearer on this point than the original draft, expressly leaving it to a future decree to "specify the method of developing and implementing the vigilance plan."

The British demonstrated a more practical attitude when they passed the Modern Slavery Act in 2015. The law contains no financial penalties but requires public statements from companies and allows specific performance injunctions for non-compliance. The results are already in: the companies covered by the law – around 12,000 – are genuinely paying attention to complying with the very recently enacted law and to progressively improving their practices, despite the lack of any financial penalty.

It is true that, to date, apparently only 10% of companies have published their statements, but this rate already represents at least 1,200 companies and not 150 as would be the case in France under the draft bill as it currently stands. Just as importantly, companies that have not yet complied should soon follow suit, given the procedures in place to encourage or compel them to do so.

AMBIGUITIES

There are other ambiguities in the draft bill that detract from its credibility – such as the reference to "effective" implementation of the vigilance plan as the basis for liability. It could be feared that the slightest negative impact caused by a company's business or its value chain, could mean a company is "presumed" to have failed to "effectively" implement the vigilance plan.

This would basically mean that the affected companies are subject to a specific performance obligation, as initially envisioned in the first draft of the bill. Although the draft bill does include a mechanism for putting defaulting companies on official notice to satisfy their duty to effectively implement a vigilance plan, the liability such companies would incur for any harmful event remains unclear.

In any event, the mechanism is not essential; according to the UN Guiding Principles, a mechanism will be set up to handle complaints in order to secure effective recourse for victims and remedies for negative effects on human rights. Lawmakers could have sought inspiration here in the interests of both victims and companies.

A DIFFERENT APPROACH

The draft bill is likely to generate legal uncertainty for business rather than setting clear, useful instructions for all companies on how to respect human rights in their businesses and value chains. The law is trying to achieve a praiseworthy objective, but it would have benefitted from a more pragmatic approach, one that is well-considered and effective, in the interest of both victims and companies.

It is surely not too late to change approach so a law can be passed that will stand the test of time, not to mention being acceptable – indeed, accepted – by all stakeholders, including companies and civil society. The law could apply more broadly and draw on the UN Guiding Principles and a text such as the Modern Slavery Act in terms of its objectives and approach.

French lawmakers have an opportunity to set an example. Why not take advantage of the chance to move towards a solution that offers support to all stakeholders, including companies and civil society?

No companies would declare they do not care about respecting human rights and they increasingly have an interest in human rights for the sake of their continued existence. At the same time, many do not know how to implement their commitments effectively, and would therefore benefit more from a framework that focuses on pedagogy rather than enforcement.

The original French translation is available on the Herbert Smith Freehills Business and Human Rights hub.

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