The French draft bill on duty of care for parent and subcontracting companies[1]

For many years, a coalition of French NGOs have been advocating for the adoption of a Human Rights due diligence law for parent and subcontracting companies. In March 2015, a draft bill was eventually adopted by the French National Assembly but it later failed to pass the Senate's examination. In March 2016, the draft bill was adopted for the second time by the lower chamber and it is now once again in the hands of the Senate.

Nature, scope and reach of the requirements

The draft bill imposes a duty of care (devoir de vigilance) to companies employing more than 5,000 persons in France or above 10,000 employees in France and abroad. The duty of care is inserted into company law. It relies on the elaboration, effective implementation and disclosure of a Vigilance Plan (Plan de Vigilance).

The Vigilance Plan includes appropriate measures to identify and prevent risks of infringements to human rights and fundamental freedoms, risks of serious injuries or environmental harms or health risks, as well as passive or active corruption, resulting directly or indirectly from company's activities and their business relations. Details on the content of the plan of vigilance and its implementation are subject to a State Council's decree of application.

This duty covers subsidiaries under article L. 233-16, II of the French Commercial Code. Further down the supply chain, it covers "established business relations", which are defined under French law as stable, regular relationships, with or without contract, with a certain volume of business, creating a reasonable expectation that such relation will last[2].

Enforcement and access to justice:

Every person with locus standi can require the competent jurisdiction to order a company, subject to penalty, to establish the Plan, ensure its publication and account for its effective implementation. Failure to establish or appropriately implement the Plan may lead to a fine up to 10 million euros.

Besides, victims of business non-compliance can seek damages for tort. Indeed, the duty of care sets a standard of conduct whose non-awareness can be considered as a civil fault. Companies may thus incur civil liability under French Civil Code Articles 1382 and 1383.

Barriers to justice in the current draft:

- Upstream barriers before human rights violations: according to some advocates of human rights due diligence, the scope of companies concerned by the duty of care bill is too restrictive and thus excludes major companies and lots of potential victims from the scheme. NGOs suggest using the same threshold as EU NFR Directive (companies with a total balance sheet exceeding 20 million euros or a net amount of turnover above 40 mil-

1 In french, « Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre ».
2 See French commercial code article L. 442-6-I-5 and Cour de cassation, chambre commerciale, 18 December 2007.

lion euros and number of employees registered as permanent on the pay roll during the fiscal year greater than 500).

- Downstream barrier in case of human rights violations: the current draft does not provide for any form of class action, notwithstanding common recognition that class actions are necessary to address mass torts. NGOs will still need individual mandates from each victim to seek legal redress on their behalf.

Furthermore, an earlier version of the draft included a rebuttable presumption that linked any damage to a lack or defect of the Vigilance Plan. It thus shifted the burden of proof on the company. But this draft did not match political expectations. Thus, the current draft bill relies on article 1382 of the French civil code, which accrues to an obligation of means and thus puts the burden on the victim to prove the tort. Even though plaintiffs may rely on information disclosed in the Vigilance Plan to alleviate this burden, it might still prove difficult to establish a fault.