# DUE DILIGENCE

## What do NGOs think of France's 2017 Duty of Vigilance Act?

### Is it adequate? Is it effective?

**by Diane de Saint-Affrique**

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# INTRODUCTORY REMARKS TO THE STUDY

At a time when the European Commission is addressing the issue of due diligence, and given the crucial impact of this reform on European companies and the continuation of various international commercial exchanges, the SKEMA PUBLIKA Think Thank considered it vital to carry out an in-depth study with the main stakeholders – non-governmental organisations (NGOs) and companies affected by the regulation – to get their feedback on the application of France's 2017 Duty of Vigilance Act and its impact in economic and commercial terms, and find out their views on this new EU draft directive.

On 23 February, the European Commission presented its proposal for a directive on Corporate Sustainability Due Diligence (CSDD), geared to oblige companies to manage social and environmental impacts throughout their supply chain, including when these arise from their own business operations.

The proposal aims to foster companies' sustainable and responsible behaviour throughout the global value chain, as these companies play a key role in building a sustainable economy and society. The directive requires companies to identify and, where appropriate, prevent, end or mitigate the adverse impacts of their activities on human rights and the environment.

The companies and sectors targeted by the directive are divided into two groups:

- Group 1: All large EU companies "à responsabilité limitée" (limited liability companies) with significant economic power (employing more than 500 people and with a net worldwide turnover of over EUR 150 million).
- Group 2: Other limited liability companies operating in defined high impact sectors, which fall below the two previous thresholds, but employ over 250 people and have a net turnover of EUR 40 million or more worldwide.
- Non-EU companies operating in the EU with a turnover threshold aligned with that of the above companies (Groups 1 and 2) and with a turnover in the EU.

Lastly, the directive specifies that small and mid-sized enterprises (SMEs) do not fall directly within the scope of this proposal. This highly ambiguous wording could imply that they are indirectly involved.

The proposal applies to the operations of companies, their subsidiaries and their value chains (commercial relations established directly and indirectly).

To comply with corporate due diligence duties in terms of sustainability, companies will have to integrate due diligence into their policies, identify actual or potential adverse impacts on human rights and the environment, prevent and mitigate potential adverse impacts, end and minimise actual adverse impacts, set up and maintain a complaints procedure, monitor the effectiveness of their due diligence policies and measures, and publicly communicate on due diligence.

The directive stipulates that national supervisory authorities must monitor the situation, and that fines will be imposed for non-compliance with the new rules. Legal sanctions are planned in addition to current reputational sanctions, with the possibility for victims to sue for damage that could have been avoided by appropriate due diligence measures.

In addition, Group 1 companies will have to introduce a plan to ensure that their business strategy is compatible with limiting global warming to 1.5 °C in accordance with the Paris Agreement.

Finally, a requirement is introduced for directors to introduce and oversee the integration and deployment of due diligence into their corporate strategy, factoring in the consequences of their decisions on human rights, climate change and the environment.
In many respects, this directive is far more demanding than the national rules addressing this issue, which in most cases were limited to acting on specific human rights violations, as in the Netherlands, where child labour was targeted, or in the UK, where modern slavery was targeted.

Only France's Act No. 2017-399 of 27 March 2017 on the duty of vigilance of parent and contracting companies had a comprehensive approach with highly extensive requirements. Most of these are taken up in the directive.

Although SMEs (which along with VSEs [very small enterprises] account for 98.8% of French companies) do not fall directly within the scope of this European proposal, it could impact them indirectly. This is why the proposal also includes accompanying measures designed to support all businesses that could be indirectly affected, including SMEs.

Given the increasing legal requirements imposed on companies, it seems essential to consider the relevance of these rules as regards both the inner workings of companies and international competition. Concerning the now central issue of due diligence, a survey needed to be carried out with both NGOs and the companies directly and indirectly targeted by the Acts of 2017 and the European Directive of February 2022, so that an approach could be initiated with stakeholders to start a constructive dialogue in view of implementing commonly agreed good practices.

**The first phase of the study involved pinpointing the main NGOs working on this issue of the duty of vigilance. When they were interviewed, the following four questions were put to them:**

1. In your view, is the 2017 act adequate (the scope of application, the monitoring of its application and sanctions) and sufficiently effective?
2. Should the act only apply to very large companies (as is currently the case)? Wouldn't it be better if it covered all companies of any size (mid-cap companies, SMEs and VSEs)?
3. What are NGOs' minimum requirements for companies to be considered "on the right road"?
4. What actions should be taken so that companies and NGOs can work together for the "common good"?

# KEY INSIGHTS

## 1. IS THE 2017 DUTY OF VIGILANCE ACT ADEQUATE AND SUFFICIENTLY EFFECTIVE?

**As regards the adequacy and effectiveness of the 2017 Act, NGOs expressed a number of converging views on the relevance of the 2017 Act and its application.** However, their recommendations are as follows:

- **The thresholds defined must be lowered** as they are too high and exclude companies that should legitimately be covered by the Act by virtue of their activities.
- **All companies, regardless of their corporate form, must be covered by the Vigilance Act** when they exceed the thresholds so as to prevent circumvention strategies.
- **The notion of an established commercial relationship must be redefined more clearly** by taking the entire value chain into account, including indirect suppliers.
- **Assessment of the duty of vigilance needs to be changed** by including a map of the type of activity and risks inherent to operations as well as a risk map, thus going beyond the sole criterion of a company's size.
- **The public authorities must set up an appropriate body** in charge of drawing up, publishing and annually updating a list of companies subject to the duty of vigilance, making all vigilance plans accessible on a public database, and strengthening transparency requirements, so as to make financial and extra-financial data on companies more accessible.
- **A reversal of the burden of proof must be implemented** for the Act to be truly effective.
- **A dissuasive civil fine should be introduced**.

## 2. WHAT SCOPE OF APPLICATION?

**It is clear that as regards the scope of application of the 2017 French Duty of Vigilance Act (which currently only applies to the largest companies), the NGOs consulted have very varying views.** Some want to limit the law to multinationals, while others want to extend it to all companies. Some favour differentiating criteria linked to the number of employees, turnover or the level of risk involved in operations. For others, the terms of the law and in particular the notion of "reasonable vigilance" remain to be clarified.

**This raises a major question about the standard.** This is because, to meet associations' expectations, the legislator could be tempted to exponentially increase the number of standards designed to respond to the concerns and demands regarding the technical points raised by these associations in their varied fields of expertise. One essential point of vigilance in this sphere is undoubtedly to resist this temptation, otherwise companies without sufficient financial resources to address these issues seriously will go under, and companies with the resources to take expert advice will adopt effective circumvention strategies.

## 3. WHAT ARE NGOS' MINIMUM REQUIREMENTS FOR COMPANIES?

NGOs have made the following observation: **companies often see their due diligence plan as a communication plan rather than a strategic development tool** designed to map and prevent risks and to implement a strategy tailored to CSR issues.

NGOs want companies to change their attitude and genuinely comply with the obligation of monitoring the entire value chain, which implies:

- mobilising all the stakeholders,
- disseminating information transparently,
- introducing precise indicators and
- significantly changing the corporate culture.

## 4. WHAT COULD BE DONE TO ENABLE NGOS AND COMPANIES TO WORK TOGETHER FOR THE COMMON GOOD?

Some NGOs believe that their position as whistleblowers rules out the possibility of working with companies to help them achieve the objectives of the French Duty of Vigilance Act 2017, as their independence must be totally guaranteed. Since the government has not taken up the option offered by the legislator to create an administrative authority responsible for setting and monitoring the framework for the application of the act, legal channels seem to be the only efficient way to get things moving.

The NGOs maintain that the **State should provide more support to companies** by:

- offering companies appropriate training,
- facilitating the creation of various common tools, such as the very detailed guide by NGO Sherpa on how the act should be interpreted and what an appropriate vigilance plan would look like,
- demonstrating greater transparency by centralising the vigilance plans of companies subject to the act available in a single, easily accessible place.

# I. IS THE 2017 DUTY OF VIGILANCE ACT ADEQUATE AND SUFFICIENTLY EFFECTIVE?

**In response to the first question on the adequacy and effectiveness of the 2017 Act, NGOs expressed a number of converging views on the relevance of the 2017 act and its application.**

All the NGOs welcomed the adoption of this text as a basic and necessary tool to ensure the respect of fundamental freedoms, the health and safety of individuals, human rights and the environment.

The 2017 Act resulted from the powerful mobilisation of NGOs and a lengthy fight, aided by various parliamentarians. William Bourdon, a lawyer and the founder of Sherpa, who was highly active in this preliminary work, believes that fighting the impunity of major economic players is one of the biggest challenges of the 21st century. In his view, soft law is not enough to protect the general interest; It is crucial to combat the purely financial, short-termist rationale that drives multinationals. From this point of view, the NGOs saw the adoption of the Act as a real victory.

One of the main strengths of the Act is the wide scope of violations covered.

The definition is broad. The obligation of vigilance imposed on companies exceeding the above-mentioned thresholds must make it possible to identify the risks and prevent serious violations of human rights, fundamental freedoms, the health and safety of individuals and the environment caused by their own activities, those of their subsidiaries and controlled companies, and those of subcontractors or suppliers with which they have established commercial relationships.

As the NGO Les Amis de la Terre points out, these terms, which may seem vague to some, enable the Act to cover *"all possible situations and any violations that occur over time "*.

Nonetheless, there are still several unsatisfactory aspects criticised by the NGOs concerned by this issue.

### THE SCOPE OF THE ACT IS NOT NECESSARILY ADEQUATE

The chief weakness of the Act according to the NGOs interviewed – Les Amis de la Terre, Collectif Éthique sur l'Étiquette, CCFD-Terre Solidaire, Sherpa and Mighty Earth – lies in **the thresholds it has set**. It applies to companies with over 5,000 employees in France, or over 10,000 employees both within and outside France. These NGOs believe that the thresholds defined and the opacity of companies make it difficult to identify the firms concerned by these obligations. The text applies to SAs (public limited companies), SEs (European companies), SCAs (limited stock partnerships) and SASs (simplified joint stock companies).

While the corporate form of a company can easily be found in the SIRENE (National Identification System and Directory of Companies and their Establishments), it is far more complex to determine the number of employees in a company and its subsidiaries. It means identifying all the direct and indirect subsidiaries of a French company within and outside France and knowing how many people are employed in each of these entities. As pointed out by Les Amis de la Terre, this is a major challenge given the opacity surrounding corporate activity in a globalised economy.

Moreover, the text does not include **all companies**. This is because Article L 225-102-5 of the Commercial Code is inserted into Chapter V of the Commercial Code on SAs (public limited companies). As no such article is reproduced in Chapter III on limited liability companies (SARLs), it could easily be deduced that the latter are not covered. This could lead some companies to make use of strategies to sidestep the Act, said CCFD-Terre Solidaire. On the basis of French law, given their corporate form (SARL: limited liability company), the multinationals ZARA and H&M, regularly challenged by civil society for the environmental and ethical consequences of their

production model, need have no fears if any violations of social or environmental standards in their production chain are identified.
All corporate forms should thus be covered by the Vigilance Act so that circumvention strategies can be foiled.

Another weak point of the text is that for a company to be held liable in terms of the duty of vigilance, **an established commercial relationship must be proved.**

The NGOs consider that some companies will slip through the legislative net, which is not necessarily right. This is because the terms used in the Act are very vague.

As emphasised by the NGO Mighty Earth, the idea of "established business relationship" can be interpreted in various ways. Most companies believe that this relationship should only be understood as strictly limited to the N-1 link in the chain, whereas the NGO maintains, citing the impact of cattle farms on deforestation (for which action has been brought against the CASINO group) that this relationship should apply to the entire chain, as the most serious impacts are often at the production level, which involves indirect suppliers.

For the NGO, the crucial point is an end player's responsibility for its chain as regards practices. At present, there are too few sufficiently robust legal elements to be able to quantify the impacts and define the extent of an end player's responsibility for an entire chain.

Thus, as well as the risk mapping provided for in the text, direct and indirect impacts should also be mapped throughout the chain.

## NGOS POINT TO THE STATE'S FAILURE TO VERIFY ITS APPLICATION

Danielle Auroi of the Collectif Ethique sur l'Étiquette, who was a member of parliament at the time and introduced the Act, believes, like other NGOs (CCFD-Terre Solidaire, Sherpa, Amis de la Terre), that the State has failed in its duty to check the proper implementation of the text since its adoption.

The departments of the Directorate of Competition, Consumer Affairs and Fraud Control do not check sufficiently or at all that the multinationals targeted by the law comply with its provisions – which, in her view, is not always the case.

Furthermore, some companies that should be bound by this Act are evading it, mainly because the French government has not provided the necessary means to draw up a list of the companies concerned, which should be its responsibility.

The NGOs deplore that a commission to assess the application of the act has not been set up to guarantee its effectiveness. They feel it is crucial for a dedicated structure to be created to ensure that the entire value chain complies with legal requirements, including subsidiaries located on the other side of the world.

This situation led them to join forces to create the "Duty of Vigilance Radar", a kind of observatory for the application of the Act, chiefly to identify any shortcomings in its application – thus standing in for what really ought to be a public service mission. According to the Duty of Vigilance Radar[1] which currently acts as a citizens' watchdog: *"Some large companies escape analysis because of the opacity in which companies operate and the lack of consistency in the public data available."*

The NGOs believe that it is the State's responsibility to implement laws and say that France should take inspiration from Germany, whose due diligence act of 16 July 2021 provides that an authority, the BAFA

[1] CCFD-Terre solidaire, Sherpa, *« Le radar du devoir de vigilance : identifier les entreprises soumises à la loi »* (Duty of Vigilance Radar: identifying companies subject to the law), June 2019: https://plan-vigilance.org/wp-content/uploads/2019/06/2019-06-26-Radar-DDV-16-pages-Web.pdf

(Bundesamt für Wirtschaft und Ausfuhrkontrolle, or "Federal Office for Economic Affairs and Export Control"), is responsible for checking that the companies concerned actually meet their obligations.

The NGOs participating in the Duty of Vigilance Radar are calling on the public authorities:

- To draw up, publish and annually update the list of companies subject to the duty of vigilance.
- To make all vigilance plans accessible on a public database.
- To strengthen transparency requirements in order to make financial and extra-financial data on companies more accessible.
- To lower and simplify the thresholds for the application of the Act and extend its scope to all commercial companies, to ensure that French companies really respect human and environmental rights throughout their value chain.
- To change the assessment of the duty of vigilance, which should be dictated by the type of activity and risks inherent to operations, not a company's size.

## NGOS CONSIDER THAT THE ALLOCATION OF THE BURDEN OF PROOF IS UNSATISFACTORY

The Duty of Vigilance Act provides for two types of recourse.

The first type can apply if the obligation to draw up, publish and implement a vigilance plan is breached. A two-stage procedure applies in this case: formal notice and injunction.

Firstly, after noting the breach, the interested party (an employee, trade union organisation, NGO, etc.) can send written notice to the company to comply with its obligation within three months. If the company has not yet drawn up or implemented a vigilance plan, it is required to comply with this obligation promptly.

If it does not comply within three months, *"any person with a legitimate interest in this regard*" can then submit the matter to the courts, requesting it to order the company to meet its obligations, subject to a fine if necessary, i.e. by ordering it to pay a sum of money for each day of delay.

A second action can be taken, this time to incur the liability for tort of the company at fault. More specifically, the latter may be held liable if damage caused by a subsidiary or subcontractor has been observed and could reasonably have been avoided with an effective vigilance plan, i.e. one that includes reasonable vigilance measures to identify and prevent risks, and which has actually been implemented. The liability in question here is civil liability for fault under ordinary law, as laid down in articles 1240 and 1241 of the Civil Code.

The burden of proof lies with the victim, who must demonstrate three things.

Firstly, the existence of a fault. According to the 2017 Act, the event giving rise to the damage corresponds to the failure to draw up, publish and effectively implement a vigilance plan. Consequently, it has to be proved that the absence of a plan, its failure or its non-implementation constituted the cause of the damage suffered.

Secondly, the victim must provide proof of the damage. The Act refers to serious damage as well as certain specific types of offences. Thus, the damage must correspond to a serious infringement of human rights and fundamental freedoms, or the health and safety of individuals or the environment.

Lastly, the victim must establish that there is a causal relationship between the fault and the damage suffered. The failure to comply with the obligations of vigilance incumbent on parent and contracting companies must have led to the damage caused. In this respect, the Constitutional Council has specified the need to establish a direct causal link between breach and damage (Cons. Const. 23.03.17, decision no. 2017-750 DC, § 27).

Only the fault of the parent or contracting company can incur its liability.

Action for liability may be brought by "*any person with a legitimate interest in this regard"*.

For Les Amis de la Terre, Notre Affaire à Tous, FIDH and CCFD-Terre Solidaire, the reversal of the burden of proof is one of the key elements lost in the battle against lobbies during the adoption process for the Duty of Vigilance Act. It would have obliged companies to demonstrate that they are not responsible for the actions of which they are accused, thus re-establishing a form of equality of arms between the parties affected and the multinationals.

Les Amis de la Terre believe that: *"Without this reversal of the burden of proof, access to justice continues to be a positive assault course, as it is very difficult for the people and civil society affected to gather the evidence needed to incur a multinational company's legal responsibility, as much of the key information is held by the company itself – even more so when such companies are located abroad. Added to this are the dangers and difficulties of collecting evidence and testimonies in the field in countries like Uganda."*

The NGOs would like to see the burden of proof reversed for greater effectiveness.

## HIGHLY INADEQUATE SANCTIONS

Some NGOs, including Les Amis de la Terre, believe that one of the Act's strong points is that any person with a legitimate interest is able to take legal action before any damage occurs, enjoining the company to respect its obligations, if necessary subject to a fine. However, they have considerable reservations about the sanctions provided for.

From the NGOs' point of view, the 2017 text stipulates merely minimum sanctions: if the civil liability of the parent or principal company is incurred, it only permits the courts to order a parent or contracting company to pay damages as compensation for the loss suffered, and to order the publication, dissemination or posting of its decision.

The initial bill stipulated far heavier sanctions than those adopted in the final text. In the event of a breach of obligations, the act provided for a triple mechanism. Firstly, a formal notice to comply with these obligations was to be sent to the company concerned. Secondly, the courts applied to by the party sending the formal notice could issue an injunction and impose a civil fine on the company of €10 million, "*reflecting the seriousness of the breach, and giving due consideration to the circumstances of the breach and the personality of its perpetrator*". Lastly, the fine could be increased to €30 million if the damage caused was considered highly significant.

The measure concerning the fine was censured by the Constitutional Council, which indicated that "*the imprecision of the terms used by the legislator to define the obligations it was creating*", did not allow for such a heavy penalty. In view of these imprecisions, the Constitutional Council declared the provisions of the Act stipulating these fines to be contrary to the Constitution. This was because it considered the terms used by the legislator in drafting the text, such as *"reasonable vigilance measures"* and *"appropriate risk mitigation actions",* to be too general. Meanwhile, the reference to *"human rights*" and *"fundamental freedoms"* was broad and undefined and, lastly, the scope of companies concerned by the offence was very extensive.

The NGOs interviewed, including Sherpa and the Collectif Ethique sur l'Étiquette, argued that the fines "*would have created a stronger incentive for companies to comply with this Act*".

In this respect they consider this position disappointing, because it was a strong inducement for companies.

The NGOs and the presenter and rapporteur of the act, member of parliament Dominique Potier, who deplore the censure of the civil fine, are calling for a reform of this point during the next term of office.

## CONCLUSION AND NGOS' RECOMMENDATIONS

**In conclusion, as regards the adequacy and effectiveness of the 2017 Act,** the recommendations are as follows:

- **The thresholds defined must be lowered** as they are too high and exclude companies that should legitimately be covered by the Act by virtue of their activities.

- **All companies, regardless of their corporate form, must be covered by the Vigilance Act** when they exceed the thresholds so as to prevent circumvention strategies.
- **The notion of an established commercial relationship must be redefined more clearly** by taking the entire value chain into account, including indirect suppliers.
- **Assessment of the duty of vigilance needs to be changed** by including a map of the type of activity and risks inherent to operations as well as a risk map, thus going beyond the sole criterion of a company's size.
- **The public authorities must set up an appropriate body** in charge of drawing up, publishing and annually updating a list of companies subject to the duty of vigilance, making all vigilance plans accessible on a public database, and strengthening transparency requirements, so as to make financial and extra-financial data on companies more accessible.
- **A reversal of the burden of proof must be implemented** for the Act to be truly effective.
- **A dissuasive civil fine should be introduced**.

# II. WHAT SCOPE OF APPLICATION?

Should the 2017 French Duty of Vigilance Act only apply to very large companies (as is currently the case)? Wouldn't it be better if it covered all companies of any size (mid-caps, SMEs and VSEs)?

As regards the scope of application of the French Duty of Vigilance Act, which was significantly extended by the directive on corporate sustainability due diligence adopted by the European Parliament on 1 June 2023 and currently awaiting the decision of the trialogue, NGOs do not hold a unanimous position.

The NGOs consulted have diverging opinions as to whether the act should apply to only very large companies, as is currently the case, or involve all companies regardless of size. For a better understanding of the debate and to shed greater light on it, the nature of the texts governing the issue needs to be considered.

### WHAT THRESHOLDS ARE IMPOSED BY THE 2017 ACT AND WHAT DOES THE DRAFT DIRECTIVE PROPOSE?

In the 2017 text, only very large companies are targeted. Article L. 225-102-4.-I. specifies that: "*Any company that employs, at the close of two consecutive financial years, at least five thousand employees within the company and in its direct or indirect subsidiaries with registered offices located in France, or at least ten thousand employees within the company and in its direct or indirect subsidiaries with registered offices located within or outside France, must draw up and effectively implement a vigilance plan. […] Subsidiaries or controlled companies that exceed the thresholds indicated in the first paragraph are deemed to meet the obligations stipulated in this article if the company that controls them, within the meaning of Article L. 233-3, draws up and implements a vigilance plan concerning the activity of the company and all the subsidiaries or companies it controls*."

The draft directive significantly lowers these thresholds by targeting:

- European Union (EU) companies with more than 500 employees and a worldwide net turnover of over €150 million;
- EU companies with more than 250 employees and a worldwide net turnover of over €40 million, if more than half their net turnover is generated in a high-risk sector (high-risk sectors being the manufacture of textiles, leather and related products, agriculture, forestry and fishing, and the extraction and manufacture of mineral products);
- non-EU companies with a net turnover of more than €150 million in the EU;
- companies in third countries (i.e. outside the EU) with a net turnover of more than €40 million in the EU and at least half of whose worldwide turnover is generated in one of the high-risk sectors indicated above.

Although small and mid-sized enterprises do not fall directly within the scope of the directive, they are indirectly affected, since as suppliers they will be required to provide guarantees to the large companies to which it applies, and which will not take the risk of working without guarantees of compliance with legal provisions.

The European directive on corporate sustainability due diligence contains new obligations for companies operating in the EU, notably by significantly broadening the scope of the structures covered. In addition to the joint-stock companies and limited stock partnerships already targeted under national law, it includes limited liability companies, regulated financial institutions and insurance companies.

It also provides that compliance professionals will be responsible for managing social and environmental impacts throughout the value chain, including those of direct and indirect suppliers, in addition to the impacts of their own operations, products and services.

## HOW ARE NGOS RESPONDING TO THESE DEVELOPMENTS?

**Some consider that the act should apply only to very large companies, as is currently the case. Others feel it would be preferable to extend its scope to all companies, whatever their size.**

**Why are there such widely differing views?**

### 1. Limiting the law to multinational

Some NGOs, such as Notre Affaire à Tous, which is particularly interested in climate issues, believe that **in terms of action, only challenging multinationals will have any effect**. This is because large groups have the means to control their emissions throughout their value chain and reduce them directly, unlike governments, for example, which can only act very indirectly through regulation alone. It is thus far more effective to take legal action against multinationals than against governments, which accounts for the increasing number of formal notices and proceedings brought against them since the act was passed.

Notre Affaire à Tous feels that the inclusion of SMEs and mid-caps in the scope of the Vigilance Act or the future directive is not progress as such. For since the directive covers more companies but limits its ambitions as regards substance, there will be no benefits in terms of impact. Furthermore, the NGO posits that when a company is asked to integrate CSR standards in application of this act, the cost involved is extremely high and there comes a time when this is not relevant, or is even counterproductive if it concerns a company that is too small or generates little turnover.

In addition, as multinationals move towards the systematic application of the Vigilance Act, the companies with which they have commercial relations will naturally be led to incorporate the desired measures themselves, on pain of disqualification. So, since multinationals are now responsible right through to the end of the chain, they are inclined to work with companies that comply with CSR rules.

### 2. Lowering the threshold for the number of employees

**Other NGOs, like Les Amis de la Terre, believe that the threshold should be much lower, with a minimum of 250 employees within companies and in their subsidiaries.**

This position is stricter than those proposed by France and the European directive, as the European threshold is only defined for each company, and does not include subsidiaries.

The fact that various organisations do not share the same vision of the Act's scope and maintain that all companies should be involved and impacted is not necessarily contradictory, according to the NGO Notre Affaire à Tous. This position can be explained by the fact that these organisations work on different issues.

For if we look at the value chain of the textile industry, which is radically different from the climate sector's, it may be relevant and consistent, as pointed out by the NGO Mighty Earth, to consider including companies other than multinationals.

To counter the argument that small companies are put at risk because they do not have the means to ensure compliance with all these new vigilance standards, a support system could usefully be introduced, either by each Member State or by the EU via the Commission or another institution, through a back-up body offering services and guidelines to help companies that find it difficult to interpret the act. However, the States, and France in particular, would still have to be able to pinpoint the companies concerned by this act in order to ensure compliance with it, which is far from being the case today, according to CCFD-Terre Solidaire. The NGOs criticise the lack of traceability regarding the number of companies concerned, the fact that the content of vigilance plans is not rigorously audited, and what they consider the often inadequate risk mapping produced by companies subject to the act.

### 3. Turnover as a differentiating criterion

Some NGOs, like CCFD-Terre Solidaire and Sherpa, also stress that, rather than workforce numbers, **companies' turnovers should be taken into account** to ensure the proper application of the act. In their view, this indicator is much more relevant because it reflects the company's size more accurately than the number of employees, which is actually very hard to determine, depending on a company's legal structure.

They also believe that, for greater consistency, all companies working in high-risk sectors (extractive industries, minerals, textiles, agri-food) should fall under the act, whatever their size or corporate form.

For these organisations point out that the Duty of Vigilance Act, included in Book 2, Title 2, Chapter 5 of the French Commercial Code, which applies only to SAs ("societés anonymes": public limited companies), effectively excludes other corporate forms from its scope, such as SARLs (limited liability companies) and cooperatives. As a result, some companies that may have a negative impact on social, societal or environmental aspects escape its application because of their corporate purpose, turnovers and subcontracting networks. This is notably the case with ZARA France, a ready-to-wear clothing company with a turnover of €1.3 billion and a workforce of 6,443, which has strategically chosen to operate as a SARL (limited liability company), thereby avoiding the application of the Vigilance Act.

Given this situation, the NGOs want companies, regardless of their corporate form, to be subject to the act as soon as they reach the legal thresholds (which should be revised downwards once the directive is adopted). They are also calling for the introduction of an alternative criterion stipulating a minimum turnover, which would make it possible to inhibit the avoidance strategies of legally well-advised companies that take advantage of loopholes to sidestep the regulations.

### 4. Extending the law to all companies

Lastly, other NGOs such as CCFD-Terre Solidaire believe that all companies should be covered by the duty of vigilance, as the aim of the text is systemic. This is because the duty of vigilance seeks to promote respect for human and environmental rights throughout the value chain. It concerns all types of players, both private and public, when they operate in the economic sphere. They must be able to respect human and environmental rights regardless of the long-term nature of the commercial relationship, not just in the context of an established commercial relationship as specified in the 2017 act.

### 5. Introducing a new criterion: risk inherent to operations

**The NGO FIDH indicates that the extent of the duty of vigilance should depend on the risk inherent to operations.** These risks may be linked to the location of the source, the type of product involved in the value chain, the co-contracting parties involved throughout the value chain, the type of operations carried out and the methods used. The NGO considers that in terms of financial and human resources, an SME is perfectly able to question itself in terms of assessing these risks in its value chain and then to implement its duty of vigilance. In the end, this must be proportionate to the type of activity, and fundamentally concerns risks and damage, not the size of the company.

FIDH, taking the example of SMEs that sell surveillance software to repressive regimes like those of Libya and Syria, which are responsible for serious human rights violations, believes that a company acting in this way cannot be completely exonerated from responsibility on the pretext of its size.

CCFD-Terre Solidaire maintains that the argument of the administrative and human cost of applying an act like this to SMEs put forward by some is not acceptable. Although this cost would probably hit hard at first, once appropriate support was introduced, these new practices would fit in with the rationale, and constitute an approach for growth attractive to younger generations keen to work in a meaningful environment aligned with values of respect for people and the environment. It would also attract consumers, now increasingly demanding as regards the conditions in which their product or service has been produced. Some SMEs are on the right track, in fact, and are making major changes to become more respectful and move towards a fair ecological, social and societal transition.

### 6. Establishing a solid body of case law

**The NGO "Mighty Earth", while in complete agreement with the other NGOs on the points raised above, nonetheless stresses that the most urgent issue lies elsewhere.**

It considers it a priority to introduce **a solid body of case law** to ensure that the act applies to players potentially dangerous in terms of impact other than those expressly targeted by the texts, and which are keeping under the radar as a result. The courts will have a major role to play in interpreting and defining the legislation's scope of application.

For the Vigilance Act to be applied fairly, the fundamental point is to be able to measure a product's impact throughout its production chain when analysing its life cycle. The greatest impact is generally at the production stage.

According to Mighty Earth, if we take the example of beef and deforestation, the problem is not so much the transport of the beef from A to B, or the machines that process it, but the consequences of producing this beef in a given area, particularly the deforestation and social problems arising during production. The NGO's argument is based on several studies, which show that the proportion of the impact linked to the production area is between 60% and 90%, taking all impacts into consideration. In its view, then, the root of the evil lies very largely in production.

Although the Duty of Vigilance Act places responsibility on the end players, which must provide proof to consumers of a certain rigour in complying with the rules set by the legislator, it does not explicitly target intermediaries, although these have an established, direct commercial relationship with the players involved in deforestation and various social and environmental impacts in the production area. Consequently, the key point for NGOs concerned about this issue is to show that an established commercial relationship does not stop at the next level down from the company, which is what companies brought before the courts seek to defend, but extends to the entire chain.

If we take the example of beef again, we can see that the biggest impacts are found at the production level, with indirect suppliers. The beef chain is complex. Before slaughtering there is a fattening phase, which is generally well regulated by law and relatively respectful of animal welfare. However, the preceding "intermediate" phases – when the cattle, as calves, are raised on different farms – are the ones that pose the most problems in terms of CSR. Yet they are not taken into account in the legislation.

If the impact of human activities is mapped correctly, we are supposed to see that beef farming is the main cause of deforestation, and as concerns the main beef retailers in a country like Brazil, where this problem is extremely critical, the question of indirect suppliers is a crucial one. But according to the NGO, nothing to date has been put in place in this respect.

The central issue of impact and risk mapping has not yet been addressed, or has not been properly dealt with. The Vigilance Act does not allow for a broad interpretation of the law, which is of great concern to activists, who believe that risks should be considered at every level of the chain, thereby making the companies acting as principals responsible overall.

As it stands, the act enables players unwilling to make all the financial and structural efforts required to set up a truly effective CSR policy to argue that the text only targets the commercial players with which they have an established business relationship – which they consider to be only the next level down and no further.

### 7. Clarify the terms of the law

**Lastly, the act uses the expression "reasonable vigilance", which raises problems in interpretation.**

The NGOs consider that the term "reasonable" should be understood as **reasonable in relation to the level of global issues.** Given that, as a result of deforestation, the Amazon may well reach a tipping point and risk losing the battle against climate change in the next few years, it seems reasonable to the NGOs that the leaders in mass

distribution and the main meat retailers in Brazil should tackle this issue head on by introducing sufficient tools and people to be able to properly address this issue, not just one or two, as is too often the case today. Genuinely proactive compliance departments need to be set up to influence policy and make this aspect the compass for steering the company, not merely an issue dealt with on the sidelines.

The way the act is drafted allows for different levels of interpretation, which confuses the issue. Real clarification is essential and can only come about through case law.

This is how NGOs justify the legal action they take. In 2022, 23 proceedings (17 formal notices and 6 summonses) were initiated on the basis of the Duty of Vigilance Act in France, i.e. twice as many as in March 2021.

## CONCLUSION

**It is clear that as regards the scope of application of the 2017 Act, the NGOs consulted have very varying views. This raises a major question about the standard.** This is because, to meet associations' expectations, the legislator could be tempted to exponentially increase the number of standards designed to respond to the concerns and demands regarding the technical points raised by these associations in their varied fields of expertise. One essential point of vigilance in this sphere is undoubtedly to resist this temptation, otherwise companies without sufficient financial resources to address these issues seriously will go under, and companies with the resources to take expert advice will adopt effective circumvention strategies.

# III. WHAT ARE NGOS' MINIMUM REQUIREMENTS FOR COMPANIES?

**What are NGOs' minimum requirements for companies to be considered "on the right road"?**

The 2017 act requires the companies targeted by the text to provide proof that they have drawn up a vigilance plan naming all the risks and that they have warned their subsidiaries, subcontractors and suppliers of their obligation to comply with a whole series of social, environmental and societal regulations.

The NGOs have made the following observation: **Companies merely submit to the vigilance plan rather than use it as a strategic development tool.** This document is more often used for show and communication purposes than as a real management tool designed to map and prevent risks and to implement a strategy tailored to CSR issues. It is seen as a constraint. Often totally unreadable, it is unsuitable as a means a means by which to guide a company.

When it is considered an obligation, companies try to minimise its impact by isolating it, to avoid the risk of being held liable. In many companies, for example, the vigilance plan is treated as a separate document, thereby reducing the risk of legal action against the company.

We can cite the example of a famous oil company which introduces scope 3 in the non-financial declaration section of its universal registration document, but only integrates scopes 1 and 2 in the vigilance plan[2]. This implies that its legal liability, if it were incurred on the basis of the 2017 act, would be limited to the first two scopes. Because of the uncertainty surrounding the legal nature of the vigilance plan, which has yet to be clarified by the courts, this approach shows a tendency to make much more cautious commitments as regards the vigilance plan than in other parts of the registration document.

The NGOs want companies to change their attitude and genuinely comply with the obligation of monitoring the entire value chain, which implies mobilising all the stakeholders, disseminating information transparently, introducing precise indicators and significantly changing the corporate culture.

### TRANSPARENCY

To be considered on the right road, a company's first step is to demonstrate transparency, in particular by making public, via the vigilance plan, information that is still not accessible today.

It is noteworthy that a number of plans do not meet the act's requirements, i.e. they have not drawn up and integrated real risk mapping based on rigorous methodologies. Risks are often defined in fairly generic terms and, with most companies, the information provided in the document is not precise.

The act provides for companies to come together in a sector-based initiative to produce a document of this kind. This is the case with the major French banks which, in their very first vigilance plan, indicated that they had joined forces to draw it up in view of the common risks inherent to their sector of activity. However, according to the NGOs, this allows them to remain very general, which is not satisfactory. This is because the vigilance plan as defined by the 2017 act is not that of a particular business sector (e.g. banking or the extractive sector). It must be that of the company concerned, highlighting information on its concrete activities (countries, activities and projects at risk), which is far from always being the case.

[2] Scope 1 corresponds to the company's direct emissions, scope 2 to emissions linked to energy consumption and scope 3 to indirect emissions, emanating from the entire supply chain, upstream and downstream.

Likewise, as regards the description of actions rolled out to deal with risks and the implementation of monitoring procedures, there should be a certain number of indicators and results linked to them, which again is often lacking.

**The first significant step forward would thus be greater transparency in compliance with the act's stipulations, i.e. a risk map included in the vigilance plan, containing precise information on the company producing it, a description of the actions taken to counter the risks identified and, finally, the quantified production of monitoring measures.** Transparency means, of course, that the information must be genuine.

### PRECISE, REGULARLY UPDATED INDICATORS

**Companies should include a precise definition of the indicators in their document,** rather than simply confirming that they exist, so that NGOs can judge their relevance and be able to measure the results in terms of achieving the objectives set. Today, according to the NGO Les Amis de la Terre, the information provided is woefully inadequate, and the vigilance plan – one of whose aims, as expressed during the parliamentary debates, was to counterbalance the lack of reversal of the burden of proof by providing stakeholders with a certain amount of information (in view of litigation, among other things) – is not playing its role.

To compensate for companies' shortcomings, a number of NGOs that take an interest in climate issues (including Notre Affaire à Tous) have set up measurement tools to benchmark climate vigilance.

Companies are given a score from 0 to 100. A company with a score of 100, for example, would be fully compliant with the rules on climate issues, subject to a future interpretation by the courts. In this way, the NGO has succeeded in making climate issues not included in the vigilance plans – because the act did not explicitly provide for them – an essential part of these plans. Although all companies now include climate issues in some detail, the implementation of vigilance plans remains deeply unsatisfactory. This is prompting organisations to issue more and more formal notices and take legal action to combat the feeling that companies are acting with impunity. It is thus very important for the courts to take a stand and make binding decisions, so that companies stop focusing solely on profit and adopt socially responsible behaviour.

Mighty Earth considers that going through legal channels, i.e. a lawsuit, makes it possible to have a real impact on the various stakeholders. For the NGO, this is an essential phase if companies are to become truly aware of their responsibilities and the financial fallout and risk to their image that a conviction would inevitably entail. Writs and formal notices not only frighten companies, which fear reputational damage in particular, but also have a genuinely positive aspect.

This is because today, if a company is challenged in this way, it endeavours to provide an extremely detailed response to the points in dispute. For "Notre Affaire à Tous", this demonstrates an awareness of the risk and the issues at stake; the fact that the companies being sued are responding on the merits without evading the issue, even though they could do so as regards the climate issue (not included in the 2017 act), is a truly significant step forward.

Lastly, it seems that at present, vigilance plans and the indicators incorporated into them are only published once a year alongside the non-financial performance declaration in the management report. But the NGOs believe that, logically, as the indicators are supposed to evolve with the processes and risks identified by the company, it would be preferable for the plan to evolve and be amended accordingly each time a company pinpoints a new risk, as part of a continuous improvement process. It has to be said that this is not the case.

### STAKEHOLDER PARTICIPATION

The NGO CCFD-Terre Solidaire observes that, in most cases, vigilance plans are not drawn up in consultation with the people potentially affected, the stakeholders and the trade unions, because this is not a legal obligation. If stakeholders were to be consulted when the vigilance plan was drawn up, this would be a significant improvement to the Act. This would enable more relevant, better-constructed plans to be drawn up in line with

the various parties' expectations. For example, there are very few vigilance plans that detail a company's established relationship with its subcontractors, country by country, whereas normally this should be the case. Likewise, consultation with local civil society organisations, associations, indigenous peoples' organisations and local communities would be a legitimate way of building an effective and consistent plan.
Furthermore, again as part of this approach including stakeholders, it would be logical for the vigilance plan to be published in all languages of the countries where the company operates. For this plan is primarily intended to protect people in territories where legislation is not necessarily up to date on CSR issues. This is a major issue as regards accessibility for indigenous populations and local associations working to protect their rights, notably being able to check that the company has correctly mapped its value chain and identified all the risks in the area concerned.

## CHANGING CORPORATE CULTURE

The NGOs point out that, all too often, the way in which CSR issues are addressed in major groups is not equal to the challenges. The teams working on these issues are generally very small and the financial resources dedicated to projects in the field are often derisory compared to the revenues of these companies.

Furthermore, as the NGO FIDH points out, one of the difficulties in drawing up a truly serious vigilance plan is that the teams who design them often have a particular status in the company. In general, they are not part of the management bodies, have no power to set the board's priorities and have limited means to convince people internally. In addition, they are often subject to contradictory injunctions.

The fundamental question then is how to change the corporate culture. The 2017 act and the directive currently under discussion aim to change the way companies behave in the social, societal and environmental spheres. To achieve this, a number of NGOs are advocating the adoption of measures that would make management truly accountable if a company failed to implement a vigilance plan. They believe that fundamental work on governance will only be initiated if stringent measures are introduced. Accountability must exist throughout the company's internal chain.

# IV. WHAT COULD BE DONE TO ENABLE NGOS AND COMPANIES TO WORK TOGETHER FOR THE COMMON GOOD?

**What could be done to enable NGOs and companies to work together for the common good?**

Would it be possible for NGOs and companies that are genuinely convinced, and have adopted a continuous improvement approach to achieve the goals of the 2017 French Duty of Vigilance Act, to get together to work for the common good? Wouldn't this pragmatic approach be more effective than waiting for new standards to be imposed that will not necessarily be appropriate for the issues addressed or the scope under consideration, and will thereby maintain an ambiguity that can only be dispelled by a court decision?

## THE DIFFICULTY IN WORKING TOGETHER DUE TO DIVERGENT INTERESTS

Some organisations, including Les Amis de la Terre, believe that it is not their task to sit down with multinationals and coach them. The latter know what is required to achieve the desired results and have ample resources to draw up a proper risk map. However, according to the NGOs, they are falling far short of the mark, not because they do not understand the texts, but because they adopt strategies to avoid producing and publishing a document that is too precise and therefore too binding.

The same NGOs also feel that it is not up to them to allow for the fact that mid-cap companies and large SMEs, which will be affected either directly by the probable reduction in thresholds or indirectly through pressure from their customers, do not have the human resources to deal with ever more numerous regulations. It is their responsibility to organise themselves to factor in these new obligations.

For Notre Affaire à Tous, working meetings between companies covered by the 2017 Act and NGOs are more often for show than driven by a genuine desire to make substantial changes to their strategies or vigilance plans by factoring in comments made by these organisations. This is explained by the opposition in principle that exists between these two worlds. The main concern of a profit-making company is to meet its shareholders' expectations. In this respect, it is not essential for them to take NGOs' views into account when drawing up their strategies.

The final point that explains the difficulty of working together is the divergence of the parties' interpretations of the act. The Act can be seen as either restrictive, as understood by the companies targeted, or extensive, as desired by the NGOs. **Since the government has not taken up the option offered by the legislator to create an administrative authority responsible for setting and monitoring the framework for its application, the courts have become the player that decides between them.**

The first court ruling on the duty of vigilance in the long-awaited Total Energie/Eacorp Tilanga case was a disappointment for the six NGOs involved in the case, as the urgent applications judge declared the complaint inadmissible on several counts and declined jurisdiction over the case.

The complexity of the 2017 act lies mainly in the fact that virtually every paragraph in the text is open to discussion and interpretation. The judge in the Total case forcefully emphasised, *"the difficulty of enforcing legislation on the duty of vigilance"*. In particular, he explained that: *"This legislation assigns monumental goals for the protection of human rights and the environment to certain categories of companies, specifying the minimum means that must be implemented to achieve them"* and added that: *"the act does not directly specify any guiding principle, or any other pre-established international standard, nor does it include a list or classification of the duties of vigilance imposed on companies"*.

## THE IMPORTANCE OF THE GOVERNMENT'S ROLE IN SUPPORT AND SUPERVISION

The NGOs maintain that the government should provide support **by introducing services that would not only offer companies appropriate training but also facilitate the creation of various common tools.** It has to be said that the public sector is not proactive in monitoring the implementation of the act at present. However, it is the government's responsibility to educate. In this respect, the work of associations like SHERPA, which has **produced a very detailed guide on how the act should be interpreted and what an appropriate vigilance plan would look like, could be a source of inspiration**.

The government should also seek to **achieve a degree of transparency by centralising the vigilance plans of companies subject to the act in a place easily accessible through a search engine, so that all the stakeholders can find out what they contain.** This kind of work should be incumbent on the government, not NGOs.

Finally, NGOs believe that in working for the common good, their mission lies not in dialoguing with companies but in providing warnings and vigilance. According to some, their position as whistleblowers rules out the possibility of sitting at the table with the companies concerned, as their independence must be totally guaranteed. They consider that we need to go much further and make environmental protection and social and societal CSR issues central to corporate strategy, which is at present far from being the case. **Transparency, the carbon footprint and impact, measured using reliable indicators, must be at the heart of the governing body's decision-making process.**

The Duty of Vigilance Act is currently being used as a tool, and this is not satisfactory. Dialogue with companies is constructive and necessary, but not truly effective. To have a real impact and bring about change in the structures and players involved it is vital to use legal channels, because the lines will only move if external pressure is applied.

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