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*The French Attempt to Legalize Human Rights
Due Diligence:*

*Is France leading the European Union in
Business and Human Rights?*

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Summary

This thesis is a comprehensive analysis of the different regulatory designs and arguments shaping French law in order to hold French businesses liable for their human rights abuses occurring in global supply chains. It focuses on the innovative law proposal on the duty of vigilance for parent and ordering companies currently debated within the French Parliament, and France's potential to make human rights due diligence mandatory at the domestic and at the European Union (EU) level.

The thesis starts by recalling that there is a growing demand for regulating businesses at the international level and at the national level in France. There is a need for implementing the United Nations Guiding Principles on business and human rights (UNGP), and overcoming the international and domestic legal barriers that prevent companies to be held liable for their subsidiaries' and subcontractors' human rights abuses. Thus, the proposal on the duty of vigilance carries France's ambitions of making human rights due diligence a binding obligation for French and European businesses, and improving access to remedies for victims of business-related human rights abuses in France and abroad. Thanks to this innovative legal initiative, France is also expecting to become a leader for the European Union in business and human rights.

To assess France's potential to meet these ambitions, the thesis analyses the French regulatory framework applicable to business groups and networks impacting on human rights. It demonstrates that, although they are various mechanisms under different bodies of law that already exist to hold French businesses liable for the negative impacts on human rights and the environment resulting from their subsidiaries' and subcontractors' activities, they are too restricted to cover all human rights abuses and all actors within global supply chains.

Therefore, the proposal on the duty of vigilance tries to fill the gaps of the current regulatory framework by creating a holistic human rights due diligence obligation on the part of parent and ordering companies. Despite a slow genesis within a divided Parliament, the last version of the proposal has been the product of a compromise between the interests of businesses and victims of business related-human rights abuses. The extraterritorial and wide material scope of application of the duty of vigilance is a real improvement in victims' access to remedies, while its restricted personal scope of application and the fault-based liability with the burden of proof on the claimant limit the practical effects of these improvements. Thus, the law proposal has been heavily criticized from a legal perspective. Although the recourse to *hard law* to regulate businesses has been welcome by some lawyers, the proposal was deemed too risky and limited in meeting its objectives. However, for the supporters of the proposal, the compromised framework of the duty of vigilance is necessary to ensure the adoption of the law proposal by both chambers of the Parliament, and advance businesses' respect for human rights.

The thesis will then analyse France's potential to meet its other ambitions to set up an EU standard on duty of vigilance, and to lead the EU in business and human rights. France has already proven to be a model in implementing the EU directives on public procurement and in being the forerunner of the EU directive on non-financial reporting. Furthermore, France is intensifying its lobbying efforts for mandatory due diligence within the EU. Although there is currently no strong political will from EU institutions and other EU Member States for legalising human rights due diligence, Danielle Auroi (the Rapporteur of the proposal in the first reading at the National Assembly) gathered support from three national parliaments and five national parliamentary chambers to launch a Green Card on mandatory due diligence to the European Commission.

Preface

I would like to thank my supervisor Radu Mares, researcher at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, and lecturer of the ‘Business and Human Rights’ course for the Master’s Programme in International Human Rights Law at the Law Faculty of Lund University. It was through attending his lectures and seminars that I developed a strong interest in this field.

Indeed, I believe that businesses are the most powerful actors alongside States that can have substantive positive or negative impacts on human rights wherever they operate. Nowadays, there is no denying that businesses have a key role to play in achieving a more sustainable development respectful of human rights and the environment. On the other hand, if businesses deny human rights and refuse to add a non-financial perspective to their management and trading strategies, they can harm human rights to a worldwide and irreversible extent. Yet, international human rights law has been challenged as not imposing direct legal obligations on businesses and the legal binding effects of *soft law* business and human rights instruments are limited. Thus, it appears that legalising Pillar II of the UNGPs at the domestic level could be an efficient way to impose an obligation on businesses to respect human rights. *Hard law* would give a binding nature to these principles, while domestic law would allow to impose this obligation on businesses, as subject of different domestic regulatory regimes.

When discussing this issue with my supervisor as a potential topic for my thesis, we figured out that France was actually trying to achieve this precise purpose. The legal proposal on the duty of vigilance that France is actually negotiating within the Parliament can be a real step forward to give full effect to the UNGP. However, the debate shaping this revolutionary legal initiative is still confined to France, without much accessibility to business and human rights defenders in other countries. Thus, through my thesis I will try to democratize the on-going debate to non-French speakers, and spread the word outside France, hoping to contribute to changes in redefining businesses’ role in achieving human rights in a globalized world.

I also would like to thank the Swedish diplomat Ingemar Dolfe for putting me in touch with Diana Madunic, the Swedish CSR Ambassador, and Diana Madunic herself, for allowing me to interview her about the Swedish perspective on Corporate Social Responsibility.

Abbreviations

CSR	Corporate Social Responsibility
EU	European Union
NAP	National Action Plan on business and human rights
NGO	Non-Governmental Organizations
TNC	Transnational Company
UNGP	United Nations Guiding Principles
UN	United Nations

1 Introduction

1.1 Background

On 24th April 2013, the Rana Plaza building located in Dhaka (Bangladesh) collapsed, burying 1200 workers. Among the debris were clothes produced on the premises, marked with the brands of big European and American companies - including the French group “Auchan”. Three Non-Governmental Organizations (NGOs) (“Collectif Ethique sur l’étiquette”, “Peuples Solidaires” and “Sherpa”) issued complaints against the transnational company (TNC) in France, but in January 2015, the French judge took no further action on the applicants’ complaints, leaving no chance for the victims to receive compensation.¹ Following this drama, the four left-wing parties in the French Parliament initiated a legal proposal aimed at creating a duty of vigilance on the part of French parent and ordering companies to prevent and mitigate the realisation of adverse impacts on human rights and the environment resulting from their activities, as well as their subsidiaries and subcontractors’ activities abroad.

Indeed, events similar to the Rana Plaza drama became an opportunity to push the agenda for regulating businesses’ conduct at the international and national level. The past decades of liberalization of trade, extensive outsourcing, and domestic deregulation led to the increased chance of TNCs finding themselves in situations where their activities directly or indirectly affect human rights.² Concurrently, the emergence of worldwide access to the Internet and new technologies allowed civil society organizations to

¹ Assemblée Nationale [French National Assembly], 14th legislature, *Rapport n°2504 fait au nom de la Commission des Lois Constitutionnelles, de la Législation et de l'Administration Générale de la République sur la proposition de loi (n°1519) de Mmes Danielle Auroi, Barbara Pompili et M. François de Rugy et plusieurs de leurs collègues, relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Report n°2504 on behalf of the Commission on Constitutional Law, the legislation and the General Administration of the Republic on the law proposal (n°1519) by Mrs Danielle Auroi, Barbara Pompili and Mr. François de Rugy and some of their colleagues on the duty of vigilance for parents and ordering companies] (2015) January 21, 2015 (Auroi, Danielle), pp.6 and 27. Aba, Elodie, 'J'ai parlé de gens qui meurent, on m'a répondu CAC 40: on ne peut pas en rester là ! [I talked about dying people, they responded CAC 40: we cannot leave this!]' (2015) *Rue 89, Le Nouvel Obs* <<http://rue89.nouvelobs.com/2015/02/12/jai-parle-gens-meurent-repondu-cac-40-peut-rester-257653>>. Business and Human Rights Resource Centre, *Auchan Lawsuit (re garment factories in Bangladesh)* (August 27, 2014) <<http://business-humanrights.org/en/auchan-lawsuit-re-garment-factories-in-bangladesh>>.

² See the emblematic cases of Nike, Bhopal, Shell in Nigeria, Yahoo in China: Ruggie, John Gerard, *Just business: multinational corporations and human rights* (W. W. Norton & Co., 2013) pp.3-19.

See the human rights and labour standards violations by the “Vinci” group in Qatar for the preparation of the 2022 Worldcup: Lecadre, Renaud, 'Le Conseil national des barreaux, à la botte des multinationales? [The National Council of Bars, under multinationals' thumb?]' (2015) *Libération* <http://www.liberation.fr/societe/2015/07/23/le-conseil-national-des-barreaux-a-la-botte-des-multinationales_1352687>.

disseminate information and raise public awareness on business-related human rights abuses. The adoption of the 2011 United Nations Guiding Principles on business and human rights (UNGP),³ among other soft law business and human rights instruments,⁴ helped to find consensus on the direction States should take to tackle the issue.

However, *hard law* initiatives are rare and demonstrative of the lack of political will to take innovative legal measures to regulate businesses throughout global supply chains. Therefore, if the French proposal on the duty of vigilance is adopted, France would be the first country to give full legal effect to human rights due diligence and businesses' obligation to respect human rights globally under Pillar II of the UNGP.⁵ It will also improve access to remedies for victims of business-related human rights abuses occurring within global supply chains, according to Pillar III of the UNGP.⁶ Thus, thanks to the proposal, the lawmakers are expecting to make France a forerunner in business and human rights, leading the European Union (EU) in the field.

1.2 Topic

This thesis focuses on France's current proposal on the duty of vigilance, as an attempt to legalize human rights due diligence. It will describe the detailed legal modalities and effects of the current regulatory framework and the law proposal, as a means of holding businesses liable for adverse human rights impacts resulting from their activities throughout the global supply chain, and of ensuring efficient access to remedies for victims of these impacts. It will analyse the innovative devices of the law proposal and their evolution under its different designs. It will evaluate its innovative character and expected efficiency in light with what it really adds to the existing legal framework. In addition, the thesis will assess the potential of France to build an EU standard on human rights due diligence, based on the duty of

³ Ruggie, John Gerard, Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*, 17/31, UN GAOR, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (March 21, 2011).

United Nations, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) [UNGP] <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>: Pillar I: A State duty to protect human rights from businesses' negative impacts, pp. 3-4, Pillar II: A corporate responsibility to respect human rights, pp. 13-16, Pillar III: An obligation of both actors to provide access to remedy for the victims, pp.27-28.

⁴ OECD, 'OECD Guidelines for Multinational Enterprises' (2011) *OECD Publishing* <<http://www.oecd.org/daf/inv/mne/48004323.pdf>>. International Labour Organization, *Tripartite declaration of principles concerning multinational enterprises and social policy* <http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453910:NO>. Nations, United, 'United Nations Global Compact,' (2000)

<<https://www.unglobalcompact.org/>>. *Green paper: Promoting a European Framework for Corporate Social Responsibility 2001* (European Commission) COM(2001) 366 final.

⁵ See *supra* note 3, UNGP (2011), Principle 15 and 17, pp. 15-19.

⁶ See *supra* note 3, UNGP (2011), Principle 26, pp. 28-30.

vigilance proposal, and to become a leader for the European Union in business and human rights.

1.3 Research questions

In order to address the potential of France to meet both expectations to make human rights due diligence mandatory at the domestic and EU level, this thesis will try to answer the two following questions:

- 1. What are the arguments currently shaping French law regarding the imposition of a human rights due diligence obligation on French businesses, and the regulatory designs advanced to hold French businesses liable for their human rights abuses occurring in global supply chains?**
- 2. What is the potential of the French legal innovation on the duty of vigilance to result in the adoption of a duty of vigilance standard at the EU level?**

1.4 Methodology and material

The thesis answers the first question through a comprehensive analysis of the current French legislation and the different regulatory designs of the upcoming proposal on the duty of vigilance for parent and ordering companies. In line with the Advisory Opinion of the French National Consultative Commission on Human Rights,⁷ the thesis starts by assessing the French regulatory framework applicable to business groups and networks impacting on human rights. It analyses the extent to which this framework allows businesses to be held liable for their subsidiaries' and subcontractors' adverse impacts on human rights. For the purpose, it examines French legislation and regulation from different bodies of law, and cases from domestic and regional courts. A legal method is applied to define the modalities, legal effects and legal efficiency of these existing mechanisms. Following the same method, the thesis examines the Parliamentary reports and drafts of the law proposal on the duty of vigilance to evaluate to which extent the innovative design of this duty fills the gaps of the current legal framework and ensure mandatory human rights due diligence throughout global supply chains. The Parliamentary reports on the proposal, journal articles and summary documents from the CSR Platform provide the legal arguments in relation to the proposal's risks and efficiency in meeting its objectives. Additionally, the thesis summarizes the political, social, economic, and diplomatic arguments arising from these documents to offer an interdisciplinary perspective on the proposal to the reader.

⁷ Commission Nationale Consultative des Droits de l'Homme [CNCDH] [French National Consultative Commission on Human Rights], 'Business and Human Rights: Opinion on the issues associated with the application by France of the United Nations' Guiding Principles' (2013), pp.15-18.

To answer the second question on France's potential to make human rights due diligence mandatory at the EU level, the thesis adopts a contextual analysis of the French attempt to legalize human rights due diligence. It recalls the international and domestic pressure for regulating businesses and implementing international standards in business and human rights. These standards are found in United Nations (UN) and EU documents, or other international and regional Corporate Social Responsibility (CSR) policy documents. The thesis also analyses France's role in implementing EU standards and fostering new regulations at the EU level in business and human rights. For the purpose, the thesis compares the EU directives on public procurement and non-financial reporting with the corresponding rules under French law in order to highlight how the regimes are intertwined, and how one arose from the other. It also refers to EU official documents in business and human rights and compares the different National Action Plans on business and human rights (NAP) established by other EU Member States to show the innovative character of the French attempt to legalize human rights due diligence in light of the European context. In this regard, I also had the chance to interview Diana Madunic, the Swedish CSR Ambassador, who provided me with some information about Sweden's plans in CSR, and its position in relation to the French proposal on the duty of vigilance.

1.5 Outline

Thus, the thesis will start by describing the rising demand for regulating businesses at the international level and at the national level in France (2). Secondly, it will assess the French regulatory framework applicable to business groups and networks impacting on human rights, and the extent to which it allows French businesses to be held liable in cases of human rights abuses committed by their subsidiaries and subcontractors (3). Thirdly, it will analyse how the legal proposal by creating a human rights due diligence obligation *à la française* is trying to address the gaps in this regulatory framework, while resulting from a political compromise between the interests of businesses and victims adversely affected by businesses' activities (4). Finally, we will assess the potential of France to establish an EU standard on duty of vigilance, based on this proposal, and to lead the European Union in business and human rights (5).

2 A growing demand for regulating businesses

As described in the introduction, the overwhelming consequences of corporate globalization and deregulation raised the international community's awareness of the necessity to regulate businesses in order to prevent human rights violations. Thus, after the worldwide consensus on John Ruggie's framework, there has been an international pressure for the domestic implementation of the UNGP (2.1). However, France is trying to go beyond this demand, as its ambitions are to legalize human rights due diligence (2.2).

2.1 An international pressure for domestic implementation of the UNGPs

At the end of his mandate, John Ruggie stressed that the adoption of the UNGP was just the "end of the beginning". He qualified the UNGP as "a common global platform of normative standards and authoritative policy guidance for states, businesses and civil society",⁸ which complements in a more practical way the existing business and human rights instruments, such as the UN Global Compact,⁹ or ISO 26000.¹⁰ For John Ruggie, the "next step" was to work on the implementation of the UNGP to pursue his achievement.¹¹ However, similarly to the other soft law business and human rights instruments, the UNGP have no legally binding effects on States, and do not provide legal monitoring mechanisms allowing reparations in cases of non-compliance. Moreover, businesses do not have direct obligations under international human rights law¹². Therefore, the only two effective ways of implementing Pillar II of the UNGP are businesses making their own commitments to ensure their activities do not have negative impacts on human rights, and an imposition of a legal obligation that businesses respect human rights at the domestic level.

Consequently, the UN Human Rights Council created an inter-regional Working Group composed of five persons and aimed at promoting the effective and comprehensive implementation of the UNGP.¹³ The Human Rights Council highlighted that a "weak national legislation and implementation cannot effectively mitigate the negative impacts of globalization on vulnerable economies", and more efforts are necessary in

⁸ See *supra* note 2, Ruggie, John Gerard (2013), p.xxii.

⁹ See *supra* note 4, the UN Global Compact (2000).

¹⁰ See *supra* note 4, ISO 26000 (2010).

¹¹ See *supra* note 2, Ruggie, John Gerard, p.173.

¹² See the debate in Knox, John H., 'The Ruggie Rules: Applying Human Rights Law to Corporations' (2011) *The UN Guiding Principles on Business and Human Rights* 51-83

¹³ United Nations, *Human rights and transnational corporations and other business enterprises*, Human Rights Council Res 17/4, U.N GAOR, 17th sess, Agenda Item 3, UN Doc A/HRC/RES/17/4 (July 6, 2011), para.6. a).

order to fill the gaps of national, regional and international governance.¹⁴ It stated that “proper regulation” of businesses, “including through national legislation” could effectively contribute to the respect, protection and fulfilment of human rights. Thus, the UN working group issued guidelines on how States should elaborate their National Action Plans for the implementation of the UNGP.¹⁵ It recommended that States first “identify and map adverse human rights impacts” resulting from businesses’ activities, occurring within or outside their territory, before proceeding with the implementation of the UNGPs.¹⁶

Following the same logic, the European Commission and the European Parliament encouraged the EU Member States to draft National Action Plans for the implementation of the UNGP, whether stand-alone plans or as part of more encompassing action plans on CSR.¹⁷ In accordance with its Strategy 2020, the EU organized a peer review of Member States’ policies and activities on CSR, in order to share good practices and help standardize policies in Europe.¹⁸

Thus, there is an international pressure for domestic implementation of the UNGP, and for regulation of businesses to ensure that they respect human rights, but France is expecting to go beyond the international demand with an attempt to legalize human rights due diligence (2.2).

2.2 France’s ambitions to legalize human rights due diligence

The French proposal on the duty of vigilance came alongside other initiatives in France aimed at implementing the UNGP. In January 2013, a first draft of the CSR Plan was communicated to the European Commission, and went through the peer review process. However, France finally decided to create a “CSR Platform”, launched in June 2013 to develop a large consultation process involving all stakeholders and build a new pro-active,

¹⁴ See *supra* note 13, Human Rights Council Resolution A/HRC/17/4 (2011), p.1.

¹⁵ Definition of a NAP as “an evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights”: See United Nations Working Group on Business and Human Rights, ‘Guidance on National Action Plans on Business and Human Rights’ (2014), p.3,
<http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf>.

¹⁶ See *supra* note 15, UN Working Group on Business and Human Rights (2014), p.4.

¹⁷ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU strategy 2011-14 for Corporate Social Responsibility 2011* (European Commission) COM/2011/0681 final. *European Parliament resolution of 29 April 2015 on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact 2015* 2015/2589(RSP).

¹⁸ European Commission, *Employment, Social Affairs and Inclusion, Reports- Peer review on CSR*

<<http://ec.europa.eu/social/keyDocuments.jsp?advSearchKey=CSRprreport&mode=advancedSubmit&langId=en&policyArea=&type=0&country=0&year=0>>.

in-depth plan based on the outcome of this consultation.¹⁹ Among the represented stakeholders, civil society organizations, trade unions and public institutions such as the National Consultative Commission on Human Rights (the Commission) have already shown support for taking legal initiatives aimed at regulating businesses and imposing a duty of vigilance on parent and ordering companies.²⁰

In the meantime, the French Government asked that the National Consultative Commission on Human Rights give an advisory opinion “on the issues associated with the application by France of the United Nations Guiding Principles”. In its Advisory Opinion, issued on 24th October 2013,²¹ the Commission recalled that under Pillar I and III of the UNGP,²² the State has to increase its ability to address business-related human rights abuses and enforce Pillar II of the UNGP.²³ It also recalled that Principle 26 of the UNGP requires the State to ensure the effectiveness of internal judicial mechanisms by reducing the number of barriers to victims obtaining access to remedies.²⁴ Indeed, according to the Commission, the principle of legal autonomy still constitutes a veil blocking parent or ordering companies from being held liable for their subsidiaries and subcontractors’ human rights violations committed outside the territory of France.²⁵ This principle, rooted in the French Civil Code,²⁶ constitutes the main barrier to the victims’ access to remedy that France has to address to implement Principle 26 of the UNGP.²⁷ Furthermore, the Commission recommended that the French Government give full effect to Principle 17 under Pillar II,²⁸ by legally imposing human rights due diligence on businesses. It added that, under Principle 15 of the UNGP,²⁹ this obligation should extend to TNCs’ subsidiaries and commercial partners, with the former helping the latter to identify, prevent and mitigate their negative impacts on human rights.³⁰

¹⁹ France Diplomatie, *L’Europe, les droits de l’Homme et les entreprises [Europe, human rights and businesses]* (July 31, 2015) <<http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/diplomatie-economique-et-commerce-exterieur/peser-sur-le-cadre-de-regulation-europeen-et-international-dans-le-sens-de-nos/focus-l-engagement-de-la-france-pour-la-responsabilite-sociale-des-entreprises/l-union-europeenne-et-la-rse/article/l-europe-les-droits-de-l-homme-et-les-entreprises>>.

²⁰ France Stratégie and Plateforme RSE, 'Interview with William Bourdon of October 2, 2014' (2014) *Document de synthèse du GT3 de la Plateforme RSE, Compte-rendu des auditions des juristes intervenus sur la question du devoir de vigilance [Summary document of the GT3 of the CSR Platform, Minutes of the interviews with lawyers expressing their opinions on the duty of vigilance]* pp.10-12, <http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/14-12-22_draft_document_de_synthese_des_auditions_du_gt3_claire_corrige_sylvie.pdf>.

²¹ See *supra* note 7, CNCDH (2013), pp.15-18.

²² See *supra* note 3, UNGP (2011), Pillar I, pp.3-4; Pillar 3, pp.27-28.

²³ See *supra* note 3, UNGP (2011), Pillar II, pp.13-16.

²⁴ See *supra* note 3, UNGP (2011), Principle 26, p.28.

²⁵ Rejection of the complaint issued in France against Auchan for the Rana Plaza human rights violations: See *supra* note 1, Business and Human Rights Resource Centre (2014).

²⁶ *Code civil [French Civil Code]*, (2016), Article 1842.

²⁷ See *supra* note 7, CNCDH (2013), para.47-48. See *supra* note 1, Assemblée Nationale [French National Assembly], *Rapport n°2504* (2015), p.15.

²⁸ See *supra* note 3, UNGP (2011), Pillar II, Principle 17, p.17.

²⁹ See *supra* note 3, UNGP (2011), Pillar II, Principle 15, p.15-16.

³⁰ See *supra* note 7, CNCDH (2013), para.33.

Thus, the law on human rights due diligence should allow businesses to be held liable for the human rights violations committed by their subsidiaries and subcontractors in France and abroad to ensure an effective access to remedies for victims. As the French Government is establishing its National Action Plan on business and human rights based on the participatory consultation with the CSR platform, and the Commission's opinion,³¹ the French NAP is expected to include *hard law* initiatives on human rights due diligence in line with these requirements.

In response to this domestic demand and in reaction to the Rana Plaza drama involving French transnational companies, the four left-wing parties of the French Parliament launched the legal proposal on the duty of vigilance on 6th November 2013.³² With this proposal, the lawmakers are expecting to go beyond the limits of international human rights law, as it does not create direct legal obligations on the part of private actors, and domestic legal barriers such as the principle of legal autonomy, in accordance with the Commission's opinion. Additionally, this proposal carries an international ambition for France to lead the European Union in business and human rights towards a "globalization with a human face".³³ In her report, the Rapporteur of the proposal in the first reading at the National Assembly, Danielle Auroi stated that 20 percent of the largest European companies (including Swiss companies) are domiciled in France, meaning France has a special responsibility to be exemplary in the field of business and human rights. As these businesses play a key role in the development of host countries, their efforts in CSR can have a significant impact in reducing poverty, or in improving the working conditions and living standards of millions of people.³⁴ According to the Members of Parliament carrying the proposal, the EU Member States cannot wait for a decision to be taken at the EU level, and France has to take legal initiatives at the domestic level to push the European Commission and other Member States to take the legal initiative on human rights due diligence.³⁵ The challenges of this legal

³¹ See *supra* note 19, France Diplomatie (2015).

³² *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Law proposal on the duty of vigilance for parent and ordering companies] 2013 (Assemblée Nationale [French National Assembly]) 1524. *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Law proposal on the duty of vigilance for parent and ordering companies] 2013 (Assemblée Nationale [French National Assembly]) 1519. *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Law proposal on the duty of vigilance for parent and ordering companies] 2013 (Assemblée Nationale [French National Assembly]) 1777. *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Law proposal on the duty of vigilance for parent and ordering companies] 2013 (Assemblée Nationale [French National Assembly]) 1897.

³³ Expression by Dominique Potier cited in *See supra* note 1, Assemblée Nationale [French National Assembly], *Rapport n°2504* (2015), p.35.

³⁴ M. Olivier De Schutter, Special Rapporteur on the Right to food who was in favour of creating a duty of vigilance on the part of ordering companies cited in *See supra* note 1, Assemblée Nationale [French National Assembly], *Rapport n°2504* (2015), p.19. See 32, Legal proposal n°1519 (2013).

³⁵ Paul Molac cited in: *See supra* note 1, Assemblée Nationale [French National Assembly], *Rapport n°2504* (2015), p.33. Assemblée Nationale [French National Assembly], 14th legislature, *Rapport n°3582 fait au nom de la Commission des lois constitutionnelles, de la*

proposal are not only moral, social, and environmental, but also diplomatic, in line with the French “cultural tradition of international influence”.³⁶

Consequently, it appears that there is an international pressure to implement the UNGP, but France is trying to go beyond this demand by trying to make human rights due diligence compulsory under its domestic legal framework. By doing so, France is expecting to overcome the limits of international human rights law, and the principle of autonomy in line with the Commission’s opinion, and to lead the European Union in business and human rights. Thus, we will now analyse France’s potential to meet these ambitions. In accordance with the Commission’s Opinion,³⁷ the thesis will assess the French regulatory framework applicable to business groups and networks impacting on human rights, and the extent to which it allows French companies to be held liable for their subsidiaries’ and subcontractors’ adverse impacts on human rights (3).

législation et de l'administration générale de la République sur la proposition de loi (n°3239), rejetée par la Sénat en première lecture, relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Report n°3582 on behalf of the Commission on Constitutional Law, the legislation and the General Administration of the Republic on the law proposal (n°3239), rejected by the Senate in the first reading, on the duty of vigilance for parents and ordering companies] (2016) March 16, 2016 (Potier, Dominique), pp.5 and 8-9.

³⁶ Expression from Mr Jean Dondelinger, Member of the Commission, responsible for audiovisual and cultural affairs, the Summer Communications University at Carcans-Maubuisson, cited in European Commission, 'Press release' (1991) <http://europa.eu/rapid/press-release_IP-91-803_en.htm>.

³⁷ See *supra* note 7, CNCDH (2013).

3 The French regulatory framework applicable to business groups and networks impacting on human rights

As shown by the National Consultative Commission on Human Rights, there are different legal mechanisms under French Law that already exist to hold French businesses liable for their subsidiaries and subcontractors' adverse impacts on human rights in France or abroad. However, a more in-depth analysis of their framework highlights the gaps in these legal mechanisms in relation to providing an efficient legal response to business and human rights cases, and overcoming the obstacles for victims to access remedies. Indeed, the notion of a "group of companies" allows parent companies to be held jointly liable with their subsidiaries, but it implies the idea of "direct control" by the parent company, and therefore excludes situations where human rights violations are committed by subcontractors or suppliers (3.1). On the other hand, an extension of vicarious liability to hold businesses strictly liable for both their subsidiaries and subcontractors' actions could be an efficient way to cover all actors throughout the global supply chain, and all potential human rights abuses, but the mechanism was rejected as implying too many risks for businesses (3.2). Then, judges tried to ground businesses' liability in their voluntary CSR commitments, but the jurisprudence was unpredictable and isolated, and did not allow the creation of a clear legal framework for businesses on human rights issues (3.3). Finally, duties of vigilance related to human rights issues already exist on the part of parent and ordering companies under French Law, but they are very restricted and only cover very specific situations involving the environment and posted workers (3.4).

3.1 A joint liability within "groups of companies" excluding subcontractors and suppliers

First, a company can be held jointly liable with its subsidiaries or subcontractors if it is established that they constitute a "group of companies". This notion is a means of holding businesses liable for negative impacts on human rights resulting from their subsidiaries' and subcontractors' activities. However, it excludes subcontractors and suppliers, as it is based on evidence of "direct control". Indeed, the original concept of a "group of companies" emerged in cases of determining influence (3.1.1), and is now based on "exclusive or joint control" under commercial law (3.1.2), "dominant influence" under labour law (3.1.3), and "control and dependency" under competition law (3.1.4).

3.1.1 The original concept of “group of companies” emerging in cases of determining influence

The notion of a “group” first emerged among scholars who defined it as based on influence and domination. According to them regulating transnational companies in a globalized world increasingly marked by interdependence cannot be achieved efficiently without rethinking the old-fashioned notion of business itself, and encompassing all the complex interrelations it entails.³⁸ They recognized that companies having a separate legal personality could be tied in various ways as part of another big entity.³⁹ Thus, even if the notion of a group has not been legally clarified, scholars define a “group of companies” as an “entity composed of two or more companies having their own legal existence, while being bound in ways characterizing a determining influence of a dominant company on a dominated company”.⁴⁰ Without denying the principle of autonomy, this definition of the concept of group is grounded in the notion of economic dependency⁴¹ and the idea of control⁴² of the dominant company. Thus, in cases of industrial disaster leading to the bankruptcy of subsidiaries, it leaves an open door for suing the parent company and ensuring access to remedy.⁴³ It can be recognized under the law and jurisprudence that the parent company and its subsidiaries can be held “jointly and severally liable in the event of harm, loss or damage”.⁴⁴ However, this definition does not include subcontractors as they are only linked to the ordering company by a contract under which the subcontractor, as an independent company, agrees to provide some portion of the work or services. Even if the contract can imply influence by the ordering company which gives directives and impose results on the subcontractor, the sole contractual link on work performance cannot be evidence of an economic dependency or control of the ordering company over the subcontractor.

Furthermore, the Commercial Chamber of the French Court of Cassation is still reluctant to recognize the existence of a “group of companies” having a

³⁸ Queinnec, Yann and Bourdon, William, 'Regulating Transnational Companies – 46 Proposals, Forum for a new World Governance' (2010) *Forum for a new World Governance*, Sherpa Association, p.9 <http://www.world-governance.org/IMG/pdf_Regulating_Transnational_Companies_web.pdf>.

³⁹ See *supra* note 38, Queinnec, Yann and Bourdon, William (2010), Proposal 2, p.21.

⁴⁰ Le Cannu, Paul and Bruno Dondero, *Droit des sociétés [Company Law]* (LGDJ-Lextenso, 5e ed, 2013), n°1502, p.935. France Stratégie and Plateforme RSE, 'Interview with Anne Danis-Fatome of October 30, 2014' (2014) *Document de synthèse du GT3 de la Plateforme RSE, Compte-rendu des auditions des juristes intervenus sur la question du devoir de vigilance [Summary document of the GT3 of the CSR Platform, Minutes of the interviews with lawyers expressing their opinions on the duty of vigilance]* pp.16-24, <http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/14-12-22_draft_document_de_synthese_des_auditions_du_gt3_claire_corrige_sylvie.pdf>.

⁴¹ See *supra* note 40, France Stratégie and Plateforme RSE, 'Interview with Anne Danis-Fatome of October 30, 2014' (2014), p.16.

⁴² See *supra* note 38, Queinnec, Yann and Bourdon, William (2010), Proposal 2, p.21.

⁴³ See *supra* note 40, France Stratégie and Plateforme RSE, 'Interview with Anne Danis-Fatome of October 30, 2014' (2014), p.16.

⁴⁴ See *supra* note 38, Queinnec, Yann and Bourdon, William (2010), Proposal 3, p. 23.

legal personality accompanied with rights and obligations.⁴⁵ Only the legislature has recognized the concept of group in specific situations of direct control such as “exclusive or joint control” under commercial law (3.1.2).

3.1.2 The condition of “exclusive or joint control” under commercial law

Article L233-16 of the French Commercial Code recognizes the concept of a group under the condition of “exclusive or joint control”⁴⁶ leading to special obligations and responsibilities for the controlling company.⁴⁷

According to this article, a company has an “exclusive control” over another company if it owns directly or indirectly the majority of the voting rights in the second company.⁴⁸ Exclusive control is also recognized if a company designates, during two successive exercises, the majority of the members of the second company’s administrative, management or supervisory bodies. This designation is presumed if the first company holds directly or indirectly more than 40 percent of the voting rights in the second company, with no other associate or shareholder holding a higher percentage of votes.⁴⁹ Finally, the exclusive control of a company over another company can result from a contract or a statutory clause expressly establishing the right for the dominant company to exercise dominant influence on the other company, when law allows it.⁵⁰ Joint control is recognized if a limited number of associates or shareholders also exploits the controlled company in such a way that the decision-making depends on their approval.

Consequently, in a case of exclusive or joint control, the controlling company has special obligations towards the controlled companies constituting the group. Concretely, it has to publish an accounting consolidation and a group management report every year.⁵¹ These reporting and accounting mechanisms can be an opportunity to include a section on human rights impacts assessment in order for the company to assess and mitigate the negative impacts that its activities or the controlled companies’ activities can have on human rights and the environment. However, the requirement of “exclusive or joint” control limits the scope and efficiency of these provisions, as it only extends to entities directly controlled by the parent companies, and excludes subcontractors and suppliers.

⁴⁵ «A « group of companies » cannot, for lack of legal personality, be entitled to rights and obligations, and being subject to a conviction...”: Cour de Cassation [French Court of Cassation], Paris, chambre commerciale, Pourvoi n°10-21701, November 15, 2011).

⁴⁶ *Code de commerce [French Commercial Code]*, (2016), L233-16.

⁴⁷ *Code de commerce [French Commercial Code]*, (2016), L233-16, I.

⁴⁸ *Code de commerce [French Commercial Code]*, (2016), L233-16, II, 1°.

⁴⁹ *Code de commerce [French Commercial Code]*, (2016), L233-16, II, 2°.

⁵⁰ *Code de commerce [French Commercial Code]*, (2016), L233-16, II, 3°.

⁵¹ *Code de commerce [French Commercial Code]*, (2016), L233-16, I.

The notion of “exclusive control” under Article L233-16 of the Commercial Code is also a criterion of dominant influence leading to the recognition of a group of companies under labour law (3.1.3).

3.1.3 The notion of “dominant influence ” under labour law

The notion of a “group” has been recognized explicitly under L2331-1 of the French Labour Code.⁵² This Article refers to the French Commercial Code to define what are the dominant and the controlled companies constituting the group.

A company is dominant if it holds 10 percent of the capital of another company, exercises a dominant influence on this company and if the appearance and importance of the relations between the two companies establishes their belonging to the same economic entity. This dominant influence can be presumed, until proven otherwise, if the first company directly or indirectly nominates more than half of the members of the second company’s administrative, management or supervisory bodies; if it has the majority of the votes attached to the shares issued by the second company; or if it holds the majority of the subscribed capital of the second company.⁵³ A company can also be recognized as controlled in a quality of subsidiary, if a dominant company holds more than half of its capital.⁵⁴ A company is presumed to be controlled by another company if the latter owns directly or indirectly a percentage of more than 40 percent of its voting rights and no other associate or shareholder directly or indirectly owns a higher percentage.⁵⁵

The dominant influence can also arise from an exclusive or joint control as defined under L233-16 of the French Commercial Code.⁵⁶

Thus, in a case of dominant influence, the dominant company and the companies it controls form a group, and the former has to establish a “group committee” within this group.⁵⁷ The group committee is a body providing information and dialogue on the directives of the group. It receives information on the activity, financial situation, and employment situation within the group and from every company that composes it. It also receives the accounts and balance sheets, as well as the auditor’s reports for each company constituting the group. Thus, this concept of group committee could now be adapted and extended to global supply chains. For instance, a group committee could be created when the controlled companies are

⁵² *Code du travail [French Labour Code]*, (2016), L2331-1.

⁵³ *Code du travail [French Labour Code]*, (2016), L2331-1 (II).

⁵⁴ *Code du travail [French Labour Code]*, (2016), L2331-1 (I), referring to Article L233-1 of the French Commercial Code.

⁵⁵ *Code du travail [French Labour Code]*, (2016), L2331-1 (I), referring to Article L233-3 (I) and (II) of the French Commercial Code.

⁵⁶ See Section 3.1.2; *Code du travail [French Labour Code]*, (2016), L2331-1 (I), referring to Article L233-16 of the French Commercial Code.

⁵⁷ *Code du travail [French Labour Code]*, (2016), L2331-1 (I).

located outside the territory of France. The committee could be informed about the negative impacts that the activity of the group, and each company constituting the group, can have on fundamental freedoms, labour standards, and environmental norms. It could allow the dominant company to put in place mechanisms aimed at mitigating these negative impacts. However, to the same extent as under commercial law, these obligations would not extend to subcontractors, as the work performance contract is not an evidence of dominant influence in line with the French Labour Code.

On the other hand, the jurisprudence of the French Court of Cassation recognized that the dominant company of a group could be “co-employer” with the companies it controls. In one important case, the Court of Cassation had to examine Areva’s liability jointly with Cominak, a mining company located in Akouta (Niger) and held by Cogema and Areva NC (a subsidiary held by 100 percent by Areva SA). In this case, an employee working for Cominak issued a complaint against Areva NC for the professional disease he got due to his work in the mine, leading to his death in July 2009. The first instance judge found against Areva NC, but the Court of Appeal overruled the judgement and decided that Areva NC was not liable as co-employer for the employee’s disease, as the labour contract was established by the Nigerian company Cominak and that Areva NC was just a minor shareholder of this company⁵⁸. The Court of Cassation upheld the Court of Appeal’s decision and set out the framework concerning the notion of co-employment. It recognized that a company could be a “co-employer” alongside its subsidiary if there is evidence that the employee exercised his work under the common direction of two persons or legal entities sharing common interests, activities or decisions. Then, the first company would be liable as a co-employer, if it commits an “inexcusable fault”. Nevertheless, the Court decided that in fact, Areva NC did not own the majority of Cominak’s shares and that the common interests, activity and direction between the two companies were not sufficiently established to qualify Cominak as Areva NC’s subsidiary which therefore could not be held liable as co-employer for the professional disease suffered by the plaintiff.⁵⁹ Therefore, this decision shows that the notion of co-employment is of limited practical application and comprises only situations of direct control between a parent company and its subsidiary.

Finally, the concept of a “group” has been explicitly recognized in the case of control under competition law (3.1.4).

3.1.4 The condition of control under competition law

Under the influence of the European Union competition law, the French Competition Authority adopted a functional approach to the notion of

⁵⁸ *Venel* (Court d’appel de Paris [Paris Court of Appeal], Appel n°12/0565024, October 24, 2013).

⁵⁹ *Venel* (Court de Cassation [French Court of Cassation], Paris, 2nd chambre civile, Pourvoi n°13-28414, January 22, 2015).

“enterprises”,⁶⁰ and recognized the notion of a group between the parent company and its subsidiary.⁶¹ Under French and European competition law, the parent company can be held liable and sanctioned for the restrictive practices attributed to its subsidiary, as they constitute a single undertaking. In this regard, there is a presumption that the subsidiary, controlled 100 percent by the parent company enforces most of the instructions issued by the parent company, without having to prove that the parent company effectively exercises this power.⁶² Thus, it is possible to engage the parent company’s liability for its subsidiary’s practices distorting competition, especially if the parent company is responsible for its subsidiary’s bankruptcy.⁶³ Thus, the concept of a group and joint liability between the parent and ordering companies can be a model for holding businesses liable for their subsidiaries’ and subcontractors’ adverse impacts on human rights. However, as it is based on the condition of direct control it would also exclude subcontractors from the mechanism.

Consequently, the notion of a “group of companies” from its origins to its interpretation under commercial law, labour law, or competition law provides an interesting opportunity to hold businesses liable for their subsidiaries’ and subcontractors’ adverse impacts on human rights. However, these regimes are old and disparate, and they only cover relations of direct control between the dominant company and the dominated companies. Although they include relations between a parent company and its subsidiaries, it does not cover other undertakings such as subcontractors, and suppliers. Consequently, the notion of a group cannot address most of the human rights abuses occurring throughout the global supply chain. Companies can still use subcontractors to escape from their liability in cases of gross human rights abuses resulting from their activities. To avoid this side effect of the global supply chains, lawyers thought to extend parent and ordering companies’ vicarious liability to their subsidiaries and subcontractors’ actions, but the mechanism was abandoned as deemed too risky for businesses (3.2).

⁶⁰ *Klaus Höfner and Fritz Elser v Macrotron GmbH* (Judgement of the Court, 6th chamber, C-40/90, European Court reports 1991 Page I-01979, April 23, 1991).

⁶¹ Absence of competition between the parent company and its subsidiary: *Décision de la Commission 69/195/CEE, du 18 juin 1969, relative à une demande d'attestation négative (affaire IV/22548 - Christiani & Nielsen) 1969* (OJ L 165, 5.7.1969, p.12-14).

⁶² *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG contre Commission des Communautés européennes* (Court of Justice Judgment, Case 107/82, European Court Reports 1983 -03151, October 25, 1983). See *supra* note 1, Assemblée Nationale [French National Assembly], *Rapport n°2504* (2015), pp.17-18.

⁶³ *Commission européenne contre Stichting Administratiekantoor Portielje et Gosselin Group NV*. (Court of Justice Judgment Case C-440/11 P., Document 62011CJ0440, July 11, 2013).

3.2 A risky extension of vicarious liability on the part of parent and ordering companies

Vicarious liability is one of the foundations of civil liability in France. It was initially established under Article 1384 of the French Civil Code providing that “a person is liable not only for the damage he/she causes by his/her own acts, but also for that which is factually caused by the persons for whom he/she must answer, or by the things that he/she has under his/her custody”.⁶⁴ Grounded on the notion of dependency, specific cases of vicarious liability were recognized under French civil law including parents/children, masters/workmen, employers/servants, teachers/students, and artisans/apprentices. Thus, as far as a relation of dependency would be recognized between parent companies/subsidiaries or ordering companies/subcontractors, the parent and ordering companies could be recognized liable for their subsidiaries and subcontractors’ actions.⁶⁵

The Catala project,⁶⁶ which was submitted on 22nd September 2005 to the Minister of Justice as a preliminary plan for reforming civil liability law, studied this possibility. The project suggested the introduction of another specific case of vicarious liability where parent companies can be held strictly liable for damage caused by their subsidiaries, subcontractors or suppliers.⁶⁷ The general principle of vicarious liability under the Catala project is stated under Article 1355 as follows: “a person is strictly liable for the damage caused by those whose lifestyle is ruled by him/her and whose activities are organized, framed or controlled in his/her interest”.⁶⁸ This liability is imposed in the specific cases described by Articles 1356 to 1360, and supposes that there is evidence of facts engaging the direct perpetrator’s liability.⁶⁹ Article 1360 covers two different types of situations that interest us. First, Article 1360 paragraph 1 states “a person who frames or organizes another person’s activity and gets an economic advantage from it, is liable for the damage caused by this person while performing his/her activities”.⁷⁰ It concerns situations where employees are “free” and do not receive orders, or instructions, like doctors employed by health institutions.⁷¹ On the other hand, Article 1360 paragraph 2 states that “a person is responsible if he/she controls the economic or financial activity of another professional in a

⁶⁴ *Code civil [French Civil Code]*, (2016), Article 1384. Translation by Christophe Bernasconi, Bernasconi, Christophe, 'Civil liability resulting from transfrontier environmental damage: a case for the Hague conference' (1999) 12 *Hague yearbook of international law*, note 117, p.25.

⁶⁵ See *supra* note 7, CNCDH (2013), para.50 and 51.

⁶⁶ 'Avant-projet dit Catala de réforme du droit des obligations (Articles 1101 à 1386 du Code Civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil) [Draft reforming the law of obligations (Articles 1101 to 1386 of the Civil code) and the law of limitation (Articles 2234 to 2281 of the Civil code)]', *Ministre de la Justice [French Ministry of Justice]*, 2005.

⁶⁷ See *supra* note 66, *Ministre de la Justice [French Ministry of Justice]* (2005), pp.157-158, Articles 1355 and 1360.

⁶⁸ See *supra* note 66, *Ministre de la Justice* (2005), p.157, Articles 1355 para.1.

⁶⁹ See *supra* note 66, *Ministre de la Justice* (2005), p.157, Articles 1355 para.2.

⁷⁰ See *supra* note 66, *Ministre de la Justice* (2005), p.158, Article 1360 para 1.

⁷¹ See *supra* note 66, *Ministre de la Justice* (2005), p.158, Article 1360 para 1, note 39.

situation of dependency, although acting on his/her own account, if the victim can establish that the damaging event occurred in relation with the exercised control".⁷² The second paragraph covers explicitly the parent company/subsidiary relations,⁷³ and the first paragraph could extend to cases where independent contractors and subcontractors are performing part of the tasks for the ordering company's benefit.⁷⁴

Consequently, this proposition of a new vicarious liability for parent and ordering companies could have been very efficient in protecting human rights from subsidiaries and subcontractors' negative impacts and in ensuring victims' access to remedy. Nevertheless, it was deemed too risky for companies, as they could be held strictly liable without any possibility of invoking their good faith or good practices to exempt them from this liability.⁷⁵ A working group of the French Court of Cassation heavily criticized these proposals, characterizing them as imprecise and even dangerous. According to the Court, this new vicarious liability is likely to lead to a relocation of managing and control functions from the French territory in large parts of the economy. Legally, the strict liability of parent or ordering companies for their subsidiaries' or subcontractors' misconduct was deemed to be in contradiction with the principle of autonomy. For the working group, establishing such a liability would lead to a relocation of holding activities already resulting from increased interference with the business conduct of controlled companies.⁷⁶

Creating a new vicarious liability on the part of parent and ordering companies could have been an opportunity to meet France's ambitions to hold businesses strictly liable for their subsidiaries' and subcontractors' human rights abuses, but this mechanism was considered excessive and too ambitious, considering the economic reality of businesses. Thus, to balance the interests of businesses, and victims affected by their activities, judges derived businesses' liability from their own voluntary CSR commitments, but this jurisprudence was isolated and too unpredictable to set up a clear legal framework responding to business and human rights cases (3.3).

3.3 Businesses' unpredictable liability derived from voluntary CSR commitments

As explained in the introduction, businesses are not actors under international law. Thus, Pillar II of the UNGP only has effects if businesses voluntarily commit to respecting human rights. In this regard, the economic and reputational risks resulting from situations similar to the Rana Plaza

⁷² See *supra* note 66, *Ministre de la Justice* (2005), p.158, Article 1360 para 2.

⁷³ See *supra* note 66, *Ministre de la Justice* (2005), p.158, Article 1360 para 2, note 39.

⁷⁴ See *supra* note 66, *Ministre de la Justice* (2005), p.158, Article 1360 para 1, note 39.

⁷⁵ See *supra* note 1, *Assemblée Nationale, Rapport n°2504* (2015), p.23.

⁷⁶ Groupe de travail de la Cour de cassation [Working group of the French Court of Cassation], 'Rapport du groupe de travail de la Cour de Cassation sur l'avant-projet de réforme du droit des obligations et de la prescription [Report of the working group of the French Court of Cassation on the draft proposition reforming the law of obligations and of limitation]' 2007), para.79.

incident urged businesses to develop voluntary CSR codes of conducts, which appear not to have much effect in practice (3.3.1). Thus, in the *Erika* case, the French Court of Cassation derived Total S.A.'s liability from its voluntary CSR commitments (3.3.2).

3.3.1 The limited effect of voluntary CSR codes of conducts

In absence of international regulation in the field of business and human rights, and under the impulsion of NGOs' campaigns, businesses started to adopt codes of conduct as a new governance tool. A code of conduct is defined as a voluntary commitment on the part of businesses that outlines a series of standards and principles intended to govern the way in which businesses conduct themselves in the market".⁷⁷

CSR codes of conduct can be individual or collective, and comprise regulatory acts such as procedural rules or contractual acts, legally binding under private law. However, they constitute unilateral standards, which are often not self-regulated. They only represent a series of voluntary commitments having no binding effect, with no effective monitoring mechanisms verifying the fulfilment of these commitments. Businesses often use their codes of conduct as a communication tools demonstrating their will to be socially and environmentally accountable, but there are no sanctions in place in cases of non-fulfilment, apart from false advertising.⁷⁸ When businesses put in place monitoring mechanisms, they are often internal, inaccessible to the public, and do not offer sufficient guarantees of independence.⁷⁹ Furthermore, the semantics used are usually broad and neutral to avoid creating legal obligations capable of engaging their liability. Thus, these mechanisms do not leave any means for the victims to access remedies in accordance with Pillar III of the UNGP.

The argument of the "unilateral commitment theory" has been put forward to justify the potential recognition of the legally binding value of these codes of conducts. This theory provides that a person is bound by his/her own will if he/she expresses in an act his/her intention to be personally bound with a view of establishing an obligation on his/her part.⁸⁰ However, this commitment needs to be firm and related to a specific action. Therefore, the vagueness of voluntary CSR codes of conduct makes it difficult for judges to reclassify them as a unilateral commitment.⁸¹

Despite this difficulty, the French Court of Cassation derived Total S.A.'s liability from its voluntary CSR commitments in the *Erika* case⁸² (3.3.2).

⁷⁷ See *supra* note 7, CNCDH (2013), para.55.

⁷⁸ See *supra* note 7, CNCDH (2013), para.56.

⁷⁹ See *supra* note 7, CNCDH (2013), para.57.

⁸⁰ See *supra* note 7, CNCDH (2013), para.58, note 38.

⁸¹ See *supra* note 7, CNCDH (2013), para.58.

⁸² See *supra* note 7, CNCDH (2013), para.59.

3.3.2 The *Erika* case: Total S.A.'s liability derived from its voluntary CSR commitments

In the 2012 *Erika* case,⁸³ the judges of the French Court of Cassation issued a historical decision to hold the company Total liable for the severe damage its activities caused to the environment. They decided to attribute a binding force to Total's voluntary CSR commitments, and derived its liability from these commitments.

The facts were as follows. Total Society (Total S.A.), through two subsidiaries, signed a contract of sales with the ENEL Society for the delivery of 280,000 tonnes of fuel on 31st December 1999. To perform its obligations, Total SA signed a transportation contract with Selmont Society, then responsible for the commercial activities of the oil tanker called 'Erika', owned by Tevere Shipping Company.⁸⁴ However, during its last delivery, Erika sank in French Brittany, and caused serious environmental damage with 400 kilometres of polluted coasts and 150,000 birds covered in oil.⁸⁵ Following the incident, victims affected by the environmental damage and the French State sued the Total group before a French tribunal to get compensation. At first instance, the judges recognized Total S.A.'s liability for water pollution under criminal law, but they only applied civil liability to the owner of the tanker.⁸⁶ Finally, on 25th September 2012, the Criminal Chamber of the French Court of Cassation confirmed the judgement of the Paris Court of Appeal, which established Total S.A.'s criminal and civil liability as charterer, jointly with other companies. It sentenced the companies to pay 200.6 million Euros in compensation to the victims and 13 million Euros for "environmental harm", with an obligation to repair the damage caused to the environment.⁸⁷ To recognise Total S.A.'s liability under civil law and criminal law, the French Court of Cassation referred to internal monitoring regulations put in place by the company, and attributed a binding force to Total S.A.'s voluntary commitments.⁸⁸ Thus, this decision appeared as a precedent for the recognition of environmental harm and civil liability in cases of severe impacts on the environment. By deriving liability from Total S.A.'s voluntary CSR commitment, it left an open door for the judge to hold Total S.A. liable for the negative impacts resulting from its subsidiary and subcontractor's activities.

⁸³ *Erika* (Cour de Cassation [French Court of Cassation] Paris, chambre criminelle, Pourvoi n°10-82938, Bulletin criminel 2012, n° 198, September 25, 2012).

⁸⁴ See *supra* note 83, *Erika* case (2012), pp.4-5.

⁸⁵ Legrand, Baptiste, 'Erika : le "préjudice écologique", une révolution juridique [Erika: the "environmental harm", a legal revolution]' (2012) *Le Nouvel Obs, Temps Réel*, <<http://tempsreel.nouvelobs.com/planete/20120925.OBS3499/erika-le-prejudice-ecologique-une-revolution-juridique.html>>.

⁸⁶ See *supra* note 83, *Erika* case (2012), pp.5-6.

⁸⁷ Le Monde, 'Erika: la Cour de cassation confirme la condamnation de Total [Erika: The Court of Cassation confirms Total's conviction]' (2012) *Le Monde.fr with AFP* <http://www.lemonde.fr/societe/article/2012/09/25/la-cour-de-cassation-confirme-la-condamnation-de-total-dans-le-nauffrage-de-l-erika_1765467_3224.html>.

⁸⁸ See *supra* note 7, CNCDH (2013), para.60.

However, the *Erika* case seems to be isolated in light of the following jurisprudence. Indeed, in the *Jerusalem Tramway* case,⁸⁹ the Versailles Court of Appeal refused to recognize the binding force of “codes of ethics” adopted by the companies Alstom and Veolia. The facts were as followed. The two companies signed an agreement with the Israeli government in July 2005 for the construction and exploitation of a new tramway line in Jerusalem. Then, the France Palestine Solidarity Association and the Palestine Liberation Organisation issued a complaint against the companies, and asked for the cancellation of the contract on the ground that it would reinforce the occupation of Western Jerusalem by the Israeli Government and allow the perpetration of war crimes. The Versailles Court of Appeal rejected the complaint in March 2013, on the ground that international agreements only create obligations between States, and that they cannot be invoked against private companies.⁹⁰ In its reasoning, the Court of Appeal clearly stated that “codes of ethics” are only expressions of values that companies wish to see applied by their staff in the framework of their activities within the company”.⁹¹ Thus, the claimant cannot invoke the companies’ code of ethics or membership in the United Nations Global Compact to incriminate them. These codes only consist of a “framework of reference” containing “recommendations and rules of conduct without imposing any obligations or commitments towards third parties that may require such obligations and commitments to be fulfilled”.⁹²

Thus, even though the *Erika* case was qualified as a precedent, it appears as an isolated case that attributes binding force to businesses’ voluntary CSR codes of conduct. In absence of clear jurisprudence, such decisions can only create legal uncertainty for businesses, which risk being unpredictably held liable based on commitments they thought were non-binding. On the other hand, judges will have to face other cases similar to the *Erika* or the Rana Plaza incidents, and it is the responsibility of lawmakers to provide for a legal framework to deal with business and human rights cases. In this regard, the lawmakers have already tried to fill the gaps by establishing duties of vigilance on the part of parent and ordering companies. However, these duties have limited scopes and do not cover all business and human rights cases. (3.4)

⁸⁹ *Jerusalem Tramway* (Cour d’Appel [French Court of Appeal] Versailles, Appel n°11/05331, March 22, 2013).

⁹⁰ Business and Human Rights Resource Centre, *Case profile: Veolia & Alstom lawsuit (re Jerusalem rail project)* (May 29, 2013) <<https://business-humanrights.org/en/case-profile-veolia-alstom-lawsuit-re-jerusalem-rail-project>>.

⁹¹ See *supra* note 7, CNCDH (2013), para.61. See *supra* note 89, *Jerusalem Tramway* case (2013), II) B) 2), p.29.

⁹² See *supra* note 7, CNCDH (2013), para.61. See *supra* note 89, *Jerusalem Tramway* case (2013), II) B) 2), p.29.

3.4 Restricted duties of vigilance on the part of parent and ordering companies

In the past decades, the growing awareness of violations of labour standards and environmental norms committed for the sake of business led to the legalization of duties of vigilance on the part of French TNCs. These obligations cover a wide range of stakeholders involved in supply chains, but they are restricted to specific situations of protection of the environment,⁹³ (3.4.1) and protection of posted workers⁹⁴ (3.4.2).

3.4.1 A duty of vigilance protecting the environment

On 12th July 2010, the Grenelle II Law⁹⁵ was enacted, creating a duty of vigilance on the part of controlling companies under environmental law. Initiated by the *Metaleurop* jurisprudence,⁹⁶ it allows for the court to order reparation by the controlling company of an environmental damage in the event where the controlled company is insolvent. It uses the principle of autonomy to allow reparation, presuming that the controlling company, as a separate entity, is not affected by the controlled company's insolvency and is still in a position to pay for the controlled company's environmental debts.

Article 227 of the Grenelle II Law created the new Article L233-5-1 of the French Commercial Code.⁹⁷ This article applies to parent companies in relation to their subsidiaries,⁹⁸ and companies holding between 10 percent and 50 percent of another company's capital.⁹⁹ It also applies to companies controlling another company by holding the majority of its voting rights.¹⁰⁰ In a case of bankruptcy of the controlled company, the controlling company can decide to take charge of all or part of the prevention and reparation

⁹³ See *supra* note 7, CNCDH (2013), para.50 and para.52-54.

⁹⁴ See *supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.18-19.

⁹⁵ *Law n° 2010-788 of July 12, 2010* Journal Officiel de la République Française [JORF] [Official Gazette of France], n°0160 of July 13, 2010 p.12905.

⁹⁶ The Court of cassation overruled the Court of Appeal decision and recognized that there is no assets merger between the bankrupt subsidiary and its parent company. Thus, the subsidiary's liquidation cannot be extended to the parent company, which is a separate entity and the parent company is still solvent to take into charge its subsidiary's environmental debts: *Métaleurop* (Cour de Cassation [French Court of Cassation] Paris, chambre commerciale, Pourvoi n°05-10094, Bulletin 2005 IV N° 92 p. 95, April 19, 2005). Dode, Graziella, *La loi Grenelle II et la responsabilité environnementale des sociétés mères* [The Grenelle II Law and the environmental responsibility of parent companies] (July 11, 2013), I) A), <http://www.juristes-environnement.com/article_detail.php?id=1092>.

⁹⁷ *Code de commerce* [French Commercial Code], (2016), Article L233-5-1.

⁹⁸ *Code de commerce* [French Commercial Code], (2016), Article L233-1.

⁹⁹ *Code de commerce* [French Commercial Code], (2016), Article L233-2.

¹⁰⁰ *Code de commerce* [French Commercial Code], (2016), Article L233-3.

Razafindratandra, Yvan, *Les dispositions de l'article 227 de la loi du 12 juillet 2010 (Grenelle II) relative à la responsabilité environnementale et à la remise en état et leurs implications* [The provisions of Article 227 of the law of July 12, 2010 (Grenelle II) on environmental liability and rehabilitation and their implications] (March 2011), p.8, <http://www.intersol.fr/pdf2011/Yvan_Razafindratandra-Adamas_Intersol_2011.pdf>.

obligations normally imposed on the controlled company for all the damage caused to the environment, species and habitats.¹⁰¹ For instance, in a case of imminent threat of damage resulting from a bankrupt company's activities, the controlling company's principal obligations would be to take preventive measures without delay, and at its own expense, in order to prevent the realization of such damage and limit its effects. If the threat persists, the controlling company has to inform the authorities about the measures it took and their results.¹⁰² If the damage occurs, the controlling company needs to inform the authorities without delay, take measures to put an end to the causes of the damage, and prevent or limit its aggravation and its impacts on human health and environmental services.¹⁰³ Finally, the controlling company has to repair the damage in order to put an end to all risks for human health, and ensure the rehabilitation of the sites affected by the damage and natural resources.¹⁰⁴

This mechanism could easily be extended to prevent negative impacts on human rights, and provide a legal framework for a human rights due diligence obligation applying both to subsidiaries and subcontractors. However, it is limited to situations where the controlled company is insolvent and where it results from the controlling company's own choice to assume the bankrupt company's environmental responsibility.¹⁰⁵ It also excludes environmental damage that could result from subcontractors' and suppliers' activities.

On the other hand, Article 227 of the Grenelle II Law, modifies Article L512-17 of the French Code of Environment and creates an obligation on the parent company to finance the rehabilitation of its subsidiary's affected sites after its cessation of activity due to insolvency.¹⁰⁶ The obligation only applies between parent companies and subsidiaries as defined by Article L233-1 of the Commercial Code.¹⁰⁷ Moreover, it only concerns the financing of the rehabilitation of polluted sites recognized as classified installations for the protection of the environment.¹⁰⁸ Finally, the parent company's liability in this case requires two conditions: the subsidiary should be placed into compulsory liquidation ordered by a court, and the parent company should have committed a gross negligence leading to its subsidiary's asset shortfall preventing it from financing by itself the rehabilitation of exploited sites after the cessation of its activities.¹⁰⁹

Thus, the recognition of a duty of vigilance on the part of businesses provides a good opportunity to establish a human rights due diligence extending to subsidiaries. However, this mechanism does not solve the

¹⁰¹ *Code de commerce [French Commercial Code]*, (2016), Article L233-5-1, referring to the obligations under L162-1 to L162-9 of the French Code of Environment.

¹⁰² *Code de l'environnement [French Code of Environment]*, (2016), Article L162-3.

¹⁰³ *Code de l'environnement [French Code of Environment]*, (2016), Article L162-4.

¹⁰⁴ *Code de l'environnement [French Code of Environment]*, (2016), Article L162-8 and L162-9.

¹⁰⁵ *See supra* note 100, Razafindratandra, Yvan (2011), p.11.

¹⁰⁶ *Code de l'environnement [French Code of Environment]*, (2016), Article L512-17.

¹⁰⁷ *See supra* note 100, Razafindratandra, Yvan (2011), p.17.

¹⁰⁸ *See supra* note 100, Razafindratandra, Yvan (2011), p.18.

¹⁰⁹ *See supra* note 100, Razafindratandra, Yvan (2011), p.19.

problem of negative impacts resulting from subcontractors' and suppliers' activities and it covers restricted situations of environmental damage. Moreover, it only offers remedies to the environment as such, and ignores access to remedy for individual victims of environmental damage.¹¹⁰ Consequently, the model of duty of vigilance would need to be widely extended to subcontractors and suppliers, as well as other human rights abuses to cover most of the business and human rights cases. Another duty of vigilance protecting posted workers could complement the former duty of vigilance, but it is also restricted to specific situations (3.4.2).

3.4.2 A duty of vigilance protecting posted workers

A posted worker is an employee temporarily sent by its employer, in another company domiciled in France or abroad, considering that the company where he/she is sent is usually a subsidiary of the first company or a company that belongs to the same "group of companies". On 10th July 2014, the Savary Law¹¹¹ was enacted in order to fight unfair competition against posted workers in host countries, and anticipate the transposition of the EU directive on posted workers.¹¹² This text aims at controlling and sanctioning enterprises, which abusively resort to posted workers. It creates joint liability allowing to sue the ordering company for its subcontractors' frauds such as undeclared workers, incomplete wages, use of front-companies, etc. This text also creates a black list with the names of companies convicted for "illegal work", published on the Internet for a maximum of two years after a judge's decision.¹¹³

In March 2015, the modalities of the Savary Law have been codified by an application degree under the Labour Code.¹¹⁴ First, it specifies that companies established abroad and posting workers in France have to notify the Labour Inspectorate, designate a representative in France, and store the documents containing information about working conditions to be able to show them in cases of control.¹¹⁵ The companies should also be able to

¹¹⁰ "A person victim of harm resulting from an environmental damage or from the imminent threat of such damage cannot ask for remedies on the ground of this title" (title on prevention and reparation of certain damages to the environment): *Code de commerce [French Commercial Code]*, (2016), Article L162-2.

¹¹¹ *Law n°2014-790 of July 10, 2014* Journal Officiel de la Republique Francaise [JORF] [Official Gazette of France] n°0159 July 11, 2014 p.11496 text n° 3.

¹¹² *Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation')* Text with EEA relevance 2014 (OJ L 159, 28.5.2014, p.11–31).

¹¹³ Vie Publique, *Loi du 10 juillet 2014 visant à lutter contre la concurrence sociale déloyale [The Law of July 10, 2014 against unfair social competition]* <<http://www.vie-publique.fr/actualite/panorama/texte-discussion/proposition-loi-visant-renforcer-responsabilite-maitres-ouvrage-donneurs-ordre-cadre-sous-traitance-lutter-contre-dumping-social-concurrence-deloyale.html>>.

¹¹⁴ *Decree n°2015-364 of March 30, 2015* JORF [Official Gazette of France] n°0076 March 31, 2015 p.5872 text n° 43. See *supra* note 111, *Law n°2014-790 of July 10, 2014*, Articles 1 to 5, 9 and 10.

¹¹⁵ See *supra* note 114, *Decree n°2015-364 of March 30, 2015*, Article 1, referring to the French Labour Code, new Article R1263-1 (I). *Code du travail [French Labour Code]*,

provide documents showing that they exercise a “real activity” in the host state.¹¹⁶

Then, the application decree defines the modalities of the duty of vigilance of ordering companies, vis-à-vis their subcontractors. Before the subcontractors resort to posted workers, the ordering company must ask them to provide a copy of the posting declaration transmitted to the authorities and a copy of the document designating the representative to verify that it fulfilled its obligations.¹¹⁷ If the subcontractor did not declare all the posted workers, the ordering company must order the subcontractor to restore the situation within seven days. If the ordering company fails to carry out this injunction, or to report within seven days the absence of response from the subcontractor to the controlling agent, it will be jointly liable with the subcontractor. As a consequence, the ordering company will have to provide each worker with proper remuneration and remedies.¹¹⁸ In a case where the controlling agent ascertains dilapidation, improper hygiene, improper equipment in the premises or collective accommodations, the ordering company must order the employing company to rectify the situation¹¹⁹ within 24 hours.¹²⁰ If the employing company does not effectively regulate the situation, the ordering company would have to provide without delay, and at its own expense collective accommodations for the workers in proper premises.¹²¹ Finally, if the ordering company acknowledges a violation of legal provisions applicable to the subcontractors’ employees (working hours, right to strike, level of remuneration, etc.),¹²² it has to follow a process aimed at immediately putting an end to the violation.¹²³ If the ordering company fails to take these

(2016), Article L1262-2-1. Lacas, Florent and Frédérique Vergne, 'Travailleurs detachés: un pas supplémentaire contre la fraude [Posted workers: one more step against social dumping]' (2015) *Le Moniteur* <<http://www.lemoniteur.fr/article/travailleurs-detaches-un-pas-supplementaire-contre-la-fraude-28192734>>.

¹¹⁶ See *supra* note 114, *Decree n°2015-364 of March 30, 2015*, Article 1, referring to the French Labour Code, new Article R1263-1 (III). See *supra* note 115, Lacas, Florent and Frédérique Vergne (2015).

¹¹⁷ See *supra* note 114, *Decree n°2015-364 of March 30, 2015*, Article 6, referring to the French Labour Code, new Article R1263-12. See *supra* note 115, Lacas, Florent and Frédérique Vergne (2015).

¹¹⁸ See *supra* note 114, *Decree n°2015-364 of March 30, 2015*, Article 11, referring to the French Labour Code, new Article R3245-1 and R3245-2. See *supra* note 115, Lacas, Florent and Frédérique Vergne (2015).

¹¹⁹ See *supra* note 114, *Decree n°2015-364 of March 30, 2015*, Article 12, referring to the French Labour Code, new Article R4231-1 and Article L4231-1. See *supra* note 115, Lacas, Florent and Frédérique Vergne (2015).

¹²⁰ See *supra* note 114, *Decree n°2015-364 of March 30, 2015*, Article 12, referring to the French Labour Code, new Article R4231-2. See *supra* note 115, Lacas, Florent and Frédérique Vergne (2015).

¹²¹ See *supra* note 114, *Decree n°2015-364 of March 30, 2015*, Article 12, referring to the French Labour Code, new Article R4231-3. See *supra* note 115, Lacas, Florent and Frédérique Vergne (2015).

¹²² *Code du travail [French Labour Code]*, (2016), L8281-1.

¹²³ See *supra* note 114, *Decree n°2015-364 of March 30, 2015*, Article 17, referring to the French Labour Code, new Article R8281-1 to R8281-4. See *supra* note 115, Lacas, Florent and Frédérique Vergne (2015).

measures, it will have to pay a 1,500 euros fine, or a 3,000 euros fine in the event of renewed breaches.¹²⁴

Thus, this duty of vigilance is efficient as it protects workers from subcontractors' human rights abuses. It applies extraterritorially and allows remedies for posted workers in cases of human rights and labour standards violations. Combined with the duty of vigilance protecting the environment, it can be the foundation for establishing a human rights due diligence obligation in line with Principles 17 and 18 of the UNGP.¹²⁵ However, as these duties of vigilance only apply to very specific situations of precise violations of environmental and labour law under strict criteria, they will have to be adapted and extended to cover other business and human rights cases.

Consequently, all these mechanisms offer opportunities to impose a human rights due diligence obligation on the part of businesses and to hold them liable for their subsidiaries' and subcontractors' human rights violations. However, they present too many gaps to cover fully all the situations of human rights abuses and all actors involved in the global supply chain. They do not ensure an efficient implementation of Pillar II and III of the UNGP, as recommended by the National Consultative Commission on Human Rights. Therefore, France is currently trying to fill these gaps by creating a holistic human rights due diligence obligation *à la française* (4).

¹²⁴ See *supra* note 114, *Decree n°2015-364 of March 30, 2015*, Article 17, referring to the French Labour Code, new Article R8282. See *supra* note 115, Lacas, Florent and Frédérique Vergne (2015).

¹²⁵ See *supra* note 3, UNGP (2011), Principle 15 and 17, p.15-19.

4 The creation of a holistic human rights due diligence obligation *à la française*

The legal proposal on the duty of vigilance currently debated within the French Parliament aims at integrating a human rights due diligence obligation into French law. It creates a holistic duty of vigilance on the part of businesses domiciled in France, in order to fill the gaps in the current regulatory framework, and to cover most human rights cases without crushing businesses. Its main objective is to allow the law to hold French businesses liable for their subsidiaries' and subcontractors' adverse impacts on human rights occurring in France or abroad, in accordance with Principles 15 and 17 UNGP, as required by the Commission. However, the genesis of the proposal has been slowed by a divided Parliament (4.1). As a result, the latest version of the proposal appears as a compromise (4.2), the real efficiency of which is challenged by lawyers (4.3).

4.1 A slow genesis in a divided Parliament

For a law proposal to be adopted, both the National Assembly (the low chamber of the French Parliament), and the Senate (the high chamber of the French Parliament) have to adopt the same text. The law proposal is sent back and forth to both chambers, through the so-called “shuttle” procedure in an attempt to find consensus on the text to be adopted.

On 6th November 2013, the four left-wing parties issued a very ambitious proposal containing a wide responsibility for parent and ordering companies, and an innovative mechanism for victims to access remedies.¹²⁶ However, these ambitious standards had to be lowered to enable the adoption of the proposal in its first reading at the National Assembly in March 2015.¹²⁷ In November 2015, the Senate overwhelmingly rejected the proposal,¹²⁸ but it was finally resurrected in a second reading by the National Assembly in March 2016.¹²⁹ Since then, the proposal is still on the Senate's table, while the majority of the Senate members has already expressed a strong opposition to the proposal (4.1.1). Moreover, the

¹²⁶ See *supra* note 32, Law proposals on duty of vigilance (2013).

¹²⁷ *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre adoptée par l'Assemblée Nationale en première lecture [Law proposal on the duty of vigilance for parent and ordering companies adopted by the National Assembly in the first reading] 2015* (Assemblée Nationale [French National Assembly]) n°501.

¹²⁸ *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre texte rejeté par le Sénat [Law proposal on the duty of vigilance for parent and ordering companies text rejected by the Senate] 2015* (Sénat [French Senate]) n°40.

¹²⁹ *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre adoptée avec modifications par l'Assemblée Nationale en deuxième lecture [Law proposal on the duty of vigilance for parent and ordering companies adopted after modifications by the National Assembly in the second reading] 2016* (Assemblée Nationale [French National Assembly]) n°708.

traditional political divide inherent to legislative processes regulating businesses makes it hard to find a consensus within the National Assembly (4.1.2). However, the supporters of the proposal are relying on the CSR based-argument on competitiveness to provide a response to the opposition's main argument (4.1.3).

4.1.1 A strong opposition expressed by the Senate

After the full rejection on 19th November of the law proposal on the duty of vigilance sent by the National Assembly, the Rapporteur of the text within the Senate, Christophe-André Frassa, stated that the Senate “*give[s] back an empty text because there is absolutely nothing to keep. Legislation cannot be based on feelings and curse.*” He added that the lawmakers “*need a text legally strong and that will not be the result of dogmatism. It is not through great humanistic speeches that one will bring law forward.*”¹³⁰ He also tried to issue a “*motion préjudicielle*” aimed at blocking the debate and legislative process on the duty of vigilance until the European Union takes further legal initiatives in this regard.¹³¹ This practice having a veto effect on the National Assembly's decisions, was deemed anti-democratic by other Members of Parliament and was abandoned under pressure from the President of the Senate.¹³²

After its resurrection in the second reading at the National Assembly on 23rd March 2016, its members communicated again the proposal on the duty of vigilance for a second reading by the Senate. The Senate's public hearing on the proposal is currently planned for the 13th October 2016. If the Senate rejects the proposal in second reading, a Joint Committee composed of seven members of the National Assembly and seven members of the Senate will meet to find an agreement on the text. In the case of disagreement, both chambers will examine the text one last time. If an agreement still has not been reached at that stage, the final word will be given to the National Assembly.¹³³ Thus, the National Assembly and the Senate will have to go beyond the traditional political divide usually inherent in legislative processes regulating businesses to reach a consensus (4.1.2).

4.1.2 The traditional political divide inherent in

¹³⁰ Concepcion Alvarez, 'Devoir de vigilance des multinationales : La loi rejetée par le Sénat [The duty of vigilance on the part of multinationals: the law rejected by the Senate]' (2015) *Novethic* <<http://www.novethic.fr/isr-et-rse/actualite-de-la-rse/isr-rse/devoir-de-vigilance-des-multinationales-la-loi-rejetee-par-le-senat-143703.html>>.

¹³¹ Sénat [French Senate], *Règlement du Sénat et instruction générale du bureau [Regulation of the Senate and general instructions of the office]*, Article 44, para.4, <http://www.senat.fr/reglement/reglement_mono.html#toc123>.

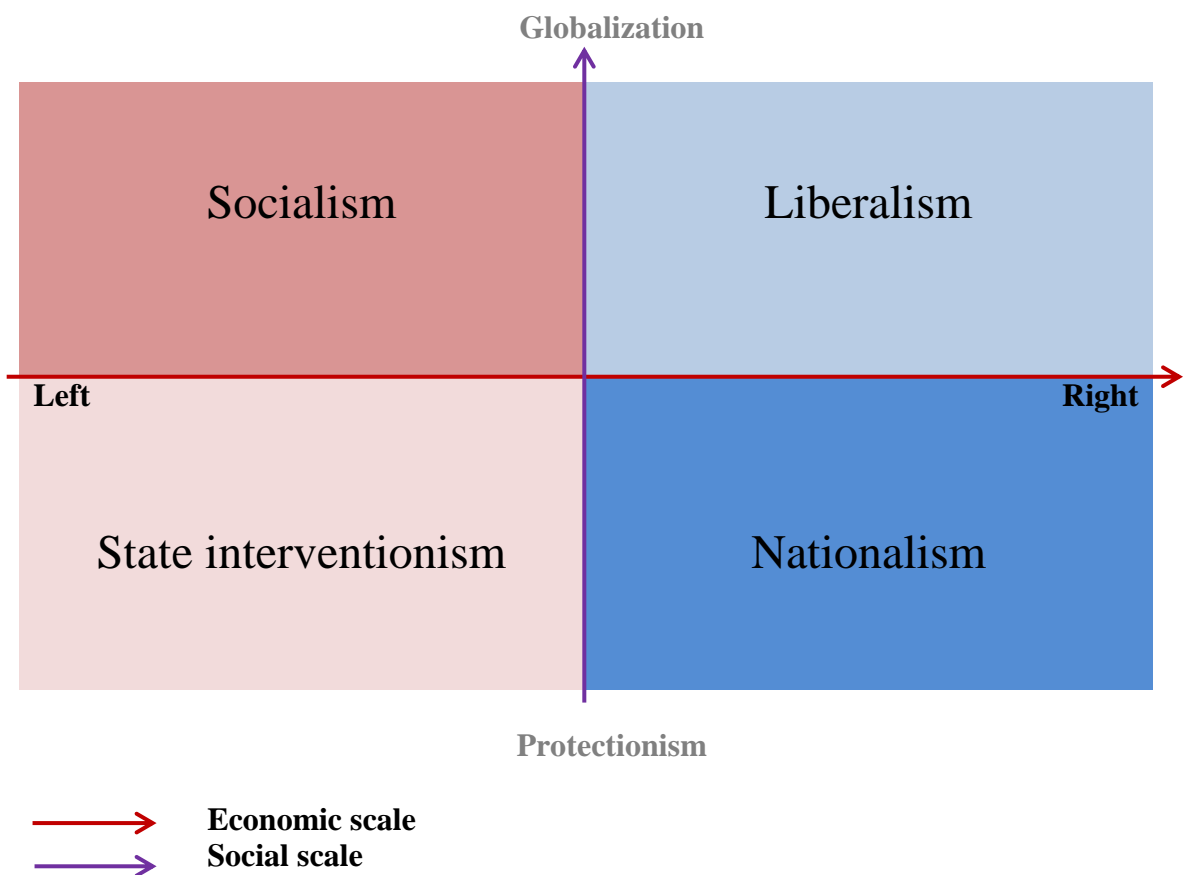
¹³² See *supra* note 35, Assemblée Nationale [French National Assembly], *Rapport n°3582* (2016), p.6.

¹³³ Sénat [French Senate], *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre: Les étapes de la discussion [Law proposal on the duty of vigilance for parent and ordering companies: the steps of the legislative procedure]* <<http://www.senat.fr/dossier-legislatif/ppl14-376.html>>.

legislative processes regulating businesses

Despite an agreement on the overall objective of the law, the proposal on the duty of vigilance is split by the traditional political divide between different political groups representing different stakeholders. We can categorize the competing arguments and interests into four different groups (liberalism, nationalism, socialism, state interventionism). The political compass (below) gives an overview of the position of each group within the political spectrum and their perspective on globalization versus protectionism, before further analysis of the arguments of each groups.

Political Compass



Liberalism

The right-wing members of Parliament are still expressing strong views that legalizing human rights due diligence will have a negative impact on French businesses' competitiveness. Indeed, according to them it is likely to create more legal and financial constraints on and asphyxiate businesses. Moreover, if France is isolated in taking further steps in business and human rights, it will probably lead to outsourcing of directing and management

activities to less demanding countries. They argue that France should wait for the European Union to take a stand before putting the country at risk.¹³⁴ For Christophe-André Frassa, there is also a risk of unfair competition compared to businesses in other countries that do not have to respond to the same constraints. It will have a negative impact throughout the global supply chain, with the parent and ordering companies putting more constraints on their subsidiaries and subcontractors, and offloading their duty of vigilance responsibilities to small and medium enterprises.¹³⁵

In the second reading of the proposal at the National Assembly, liberalists argued that French companies were already exemplary in the field, as 47 percent of French businesses already have a management system based on CSR, against 40 percent in OECD countries. Thus, a response at the French level is not appropriate. The free market already plays a significant role in inciting changes and progress through the reputational risks and sanctions that it can create. Moreover, while French businesses are deemed exemplary in practice in CSR, imposing a duty of vigilance on them will undermine their reputations worldwide, by giving the impression to the international community that French businesses do not have the will or ability to commit themselves to respect for human rights.¹³⁶

Nationalism

Jacques Bompard, an extreme-right deputy in the National Assembly is in favour of regulating businesses to strengthen the fundamental rights attached to the nation. He sees the proposal as a way to bring back businesses' activities and labour force within the French territory. For him, businesses have been using international migration to reduce their costs, and employ workers without any protection, leading to human, family and economic drama. Consequently, the proposal is an opportunity to sanction the behaviour of companies in this regard, and reduce the exploitation of

¹³⁴ Houillon, Philippe cited in *See supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.35. Levy, Geneviève cited in *See supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), pp.29-30. Bechtel, Marie-Francoise cited in *See supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), pp.38. Geoffroy, Guy cited in *See supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), pp.34.

¹³⁵ Sénat [French Senate], Ordinary session of 2015-2016, *Rapport n°74 fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) sur la proposition de loi, adoptée par l'Assemblée Nationale, relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* [Report n°74 on behalf of the Commission on Constitutional Law, the legislation, the universal suffrage, the Regulation and General Administration (1) on the law proposal adopted by the National Assembly on the duty of vigilance for parent and ordering companies] (2015) October 14, 2015 (Frassa, Christophe-André), p.36. Concepcion Alvarez, 'Un devoir de vigilance des multinationales : Une loi au parcours chaotique [A duty of vigilance for multinationals: the chaotic course of the law]' (2015) *Novethic* <<http://www.novethic.fr/isr-et-rse/actualite-de-la-rse/isr-rse/devoir-de-vigilance-des-multinationales-une-loi-au-parcours-chaotique-143657.html>>.

¹³⁶ Hetzel, Patrick cited in *See supra* note 35, Assemblée Nationale [French National Assembly], *Rapport n°3582* (2016), p.21-22.

workers issued from international migration.¹³⁷ On the other hand, he condemns multinationals' business strategies and the financialization of the economy, which reduce man to a machine and create economic exploitation. According to him, this pressure to succeed personally through professional careers destroys the natural frames of society such as family life, relations to the body or traditional structures. Ordering companies impose brutal changes on their subcontractors and suppliers' workers, and strike their lifestyle and living environment. He argues that this financial and commercial cosmopolitanism destroys the living and the transmission of the peoples' traditions, and makes it urgent to go back to localism and rootedness.¹³⁸

Jacques Bompard's perspective can be associated with a protectionist, anti-European and anti-globalization approach, arguing against outsourcing and migration, and encouraging national production and employment. These views are also conservative in a sense that they focus on protecting the existing social framework and people's traditions inside and outside France. His theory that businesses contribute to dehumanization and exploitation of workers can also find roots within the Marxist theories on anti-capitalism and the exploitation of Men by Men.

Socialism

The four left-wing parties (the Ecologist Group, the French Communist party, the Socialist Party and the Progressivists' Movement) all agree on the necessity of the proposal. They argue that the excesses of globalization, such as the distortion of supply chains, and the use of outsourcing and social dumping as a means of profitability leads to gross human rights violations. Therefore, the law has to address and sanction these abuses. The legal proposal is a way to impose an obligation on businesses to respect human rights and a means of preventing drama similar to the Rana Plaza in France or abroad. Moreover, legalizing human rights due diligence is also an opportunity to go beyond the principle of autonomy and extend French businesses' liability to human rights abuses committed by their subsidiaries and subcontractors often used by businesses to hide from their responsibilities.¹³⁹

However, the Rapporteur Dominique Potier wanted to draw a distinction between the socialist perspective and Jacques Bompard's nationalist values and approach. He stated that the proposal does not enshrine nationalist values, but the French Republic's principles based on universal human rights. He insisted on the fact that the proposal is not against businesses and

¹³⁷ Bompard, Jacques cited in *See supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.31.

¹³⁸ Bompard, Jacques cited in *See supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), pp.30-32.

¹³⁹ Paul Molac, Paul cited in *See supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), pp.32-33.

globalization but in favour of a “globalization with a human face”.¹⁴⁰ He advocated for the integration of a new generation of human rights within globalization, to achieve a more fair and sustainable economic system. The proposal is in line with a co-development approach aimed at preserving the social model of industrialized countries while improving the working conditions in developing countries.¹⁴¹

The left-wing deputies also believe that there is an urgent need for redefining the role of TNCs within the international community and a reconciliation of the power of TNCs with their legal responsibilities.¹⁴² Reconciling power and responsibility fits within a risk-profit theory where the actors who accumulate profit share the risks arising from their activities.¹⁴³ This approach is in line with the “2010 Forum for a new World Governance”, and its document issuing different proposals aimed at regulating transnational companies and improving human rights situations where they operate.¹⁴⁴ In this document, the authors state that it is necessary to rethink the notion of businesses and regulate them in their country of origin in order to ensure protection for basic human rights and the environment.¹⁴⁵ Moreover, the proposal on the duty of vigilance contributes to the development of a new approach to the notion of business having not only an economic dimension but also a social and environmental dimension, while taking into account the economic reality of groups of companies and their centralized decision-making.¹⁴⁶

State interventionism

The proposal on the duty of vigilance is also in line with a state interventionist approach. This approach rejects ultra-liberalization as it leads to the abuses the duty of vigilance is trying to address. The principle of legal autonomy and the concept of limited liability of shareholders are two legal

¹⁴⁰ Expression by Dominique Potier cited in *See supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.35.

¹⁴¹ See the role of law on duty of vigilance in the games theory of development politics: Favereau, Olivier and Lyon Caen, Antoine, 'Le devoir de vigilance dans les groupes et réseaux de sociétés, Sur la proposition de loi adoptée par l'Assemblée nationale le 30 mars 2015 [The duty of vigilance within groups and networks of companies, on the legal proposal adopted by the National Assembly on March 30, 2015]' (2015) *Revue de Droit du Travail*, p.446.

¹⁴² Molac, Paul, cited in *See supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.35.

¹⁴³ France Stratégie and Plateforme RSE, 'Interview with Nicolas Cuzacq of October 2, 2014' (2014) *Document de synthèse du GT3 de la Plateforme RSE, Compte-rendu des auditions des juristes intervenus sur la question du devoir de vigilance [Summary document of the GT3 of the CSR Platform, Minutes of the interviews with lawyers expressing their opinions on the duty of vigilance]* p.13

<http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/14-12-22_draft_document_de_synthese_des_auditions_du_gt3_claire_corrige_sylvie.pdf>.

¹⁴⁴ *See supra* note 38, Queinnec, Yann and Bourdon, William (2010).

¹⁴⁵ *See supra* note 38, Queinnec, Yann and Bourdon, William (2010), p.9.

¹⁴⁶ *See supra* note 38, Queinnec, Yann and Bourdon, William (2010).

tools rooted in the 19th century capitalistic economic growth model.¹⁴⁷ This autonomy results from a system of individual thinking and requires the State to allow exceptions by public order rules when some particular interests have to be protected.¹⁴⁸ The market cannot protect the interests of the most vulnerable groups and public interest such as the environment, so the State has to take actions to make businesses accountable. Furthermore, the proposal is in accordance with the State's obligation to encourage businesses to improve their social and environmental performances and to redirect businesses' actions through national legal tools helping them to improve corporate governance. The duty of vigilance would therefore help businesses create a projection tool through a social and environmental plan,¹⁴⁹ an information tool by issuing social and environmental impact reports,¹⁵⁰ and a measurement tool by including non-financial performance data into accounting.¹⁵¹

Consequently, the proposal on the duty of vigilance is split by the traditional divide between liberalism, nationalism, socialism, and state interventionism, serving the interests of competing stakeholders. Furthermore, it appears that the debate hardly goes beyond the level of national interests. For Dominique Potier, the Rapporteur of the proposal in the second hearing at the National Assembly, the human rights values protected by the proposal are fundamentally rooted in France's history, and culture. He refers to the 1789 French Revolution, the Declaration of the Rights of Man and of the Citizen, and the so-called Enlightenment philosophers to demonstrate that the legal proposal serves the interests of the French nation rather than globalized values inherited from the Cold War. He compares the legal initiative with a "small revolution" in the context of liberal globalization.¹⁵² He highlights that this will to promote the French human rights values is the cement between all actors that allows an open dialogue and a common ground between their competing interests.¹⁵³ According to him, all groups within the French Parliament can find consensus on this overall purpose to ensure

¹⁴⁷ France Stratégie and Plateforme RSE, 'Interview of Philippe Stoffel-Munck of November 3, 2014' (2014) *Document de synthèse du GT3 de la Plateforme RSE, Compte-rendu des auditions des juristes intervenus sur la question du devoir de vigilance* [Summary document of the GT3 of the CSR Platform, Minutes of the interviews with lawyers expressing their opinions on the duty of vigilance], p.29,

<http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/14-12-22_draft_document_de_synthese_des_auditions_du_gt3_claire_corrige_sylvie.pdf>.

¹⁴⁸ France Stratégie and Plateforme RSE, 'Interview with Charley Hannoun of November 3, 2014' (2014) *Document de synthèse du GT3 de la Plateforme RSE, Compte-rendu des auditions des juristes intervenus sur la question du devoir de vigilance* [Summary document of the GT3 of the CSR Platform, Minutes of the interviews with lawyers expressing their opinions on the duty of vigilance], p.27

<http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/14-12-22_draft_document_de_synthese_des_auditions_du_gt3_claire_corrige_sylvie.pdf>.

¹⁴⁹ See *supra* note 38, Queinnec, Yann and Bourdon, William (2010), proposal 8, p.33.

¹⁵⁰ See *supra* note 38, Queinnec, Yann and Bourdon, William (2010), proposal 9, p.34.

¹⁵¹ See *supra* note 38, Queinnec, Yann and Bourdon, William (2010), proposal 10, p.35.

¹⁵² See *supra* note 35, Assemblée Nationale [French National Assembly], *Rapport n°3582* (2016), p.17.

¹⁵³ See *supra* note 35, Assemblée Nationale [French National Assembly], *Rapport n°3582* (2016), pp.18-19.

that French businesses respect human rights, and to correct the negative impacts of an excessively liberalized globalization.¹⁵⁴

Nevertheless, there is a remaining point of contention regarding competitiveness. The opposition argue that the legal proposal will create a high burden on French businesses and undermine their competitiveness globally in comparison to foreign businesses who are not constrained by the same legal requirements.¹⁵⁵ Thus, to respond to this argument and reach a consensus, the supporters of the proposal are relying on the CSR based-argument on competitiveness (4.1.3).

4.1.3 The CSR-based argument on competitiveness

There is a growing consensus that CSR as required under the duty of vigilance proposal would probably not undermine French businesses' competitiveness, as argued by the opposition, but rather contribute to the improvement of a new kind of competitiveness. As opposed to the current race to the bottom, the new duty of vigilance is expected to lead to a race to the top, by promoting good corporate governance creating safeguards for shareholders, a business strategy responding to the growing demand for high ethical and environmental standards, and a warranty of fair and transparent competition among businesses in CSR.

Good corporate governance creating safeguards for shareholders

The proposal on the duty of vigilance would constitute an improvement of the legal framework for corporate governance according to the G20/OECD Principles of Corporate Governance (OECD Principles).¹⁵⁶ Requiring businesses to establish and publish a vigilance plan is likely to increase disclosure and transparency, one of the key building blocks for sound corporate governance under the OECD Principles.¹⁵⁷ Indeed, experience has shown that “weak disclosure and non-transparent practices can contribute to unethical behaviour and to a loss of market integrity at great costs, not just to the company and its shareholders but also to the economy as a whole”.¹⁵⁸ Thus, the legal and reputational risks for French businesses operating abroad in situations similar to the Rana Plaza incident combined with a lack of transparency and accountability could severely increase the companies' cost of capital and block their access to the capital market.

Conversely, disclosure regimes have been recognized as a powerful tool to shapes businesses' behaviours and attract capital. It would provide better protection for shareholders and potential investors, who have been

¹⁵⁴ On the consensus about the objective of the law: Geoffroy, Guy cited in *See supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.33.

¹⁵⁵ *See supra* note 135, Sénat, *Rapport n°74* (2015).

¹⁵⁶ OECD, 'G20/OECD Principles of Corporate Governance' (2015) *OECD Publishing* <<http://dx.doi.org/10.1787/9789264236882-en>>.

¹⁵⁷ *See supra* note 156, OECD Principles (2015), V, p.37.

¹⁵⁸ *See supra* note 156, OECD Principles (2015), V, p.38.

demanding greater access to information. Providing them with detailed materials on corporate policies and performance is expected to improve valuation of shares and confidence in the capital markets.¹⁵⁹ Among the requirements, it is essential that the policies and performance comprise information on business ethics, environment, social issues and human rights. This non-financial risks assessment must include the company's relations with the communities likely to be affected by its activities and its implementation plan aimed at mitigating any risks.¹⁶⁰ Therefore, the duty of vigilance would allow disclosure and transparency, and foster good corporate governance with effective supervision and enforcement mechanisms in line with the OECD Principles. It is expected to reduce businesses' cost of capital and create safeguards for shareholders, while inducing more stable financial markets and sources of financing.¹⁶¹

A business strategy responding to a growing demand for high ethical and environmental standards

The duty of vigilance proposal aims at preventing and mitigating negative impacts on human rights and the environment resulting from businesses' activities within the global supply chain. The legal requirements under the proposal are expected to ensure that products and services provided by French companies are imbued with high quality, as well as ethical and environmental standards. For the proposal's supporters, imposing responsible business conduct throughout the entire global supply chains is in line with the consumers' demands. Indeed, according to a survey, 76 percent of the French people interviewed, from across the political spectrum think that TNCs should be more vigilant and held legally liable in cases of humanitarian or environmental catastrophes resulting from their subsidiaries' or subcontractors' activities.¹⁶² The combination of industrial catastrophes such as Rana Plaza with civil society organizations' efforts to raise public awareness of business-related human rights issues, have shifted consumers choices towards more ethical products. They are not motivated only by price in making their purchases, but also by quality and their potential impact on human rights and the environment. Thus, the proposal's supporters argue that the duty of vigilance will improve the quality and

¹⁵⁹ See *supra* note 156, OECD Principles (2015), V, p.38.

¹⁶⁰ See *supra* note 156, OECD Principles (2015), V A. 1. , p.38-39.

¹⁶¹ See *supra* note 156, OECD Principles (2015), p.10.

¹⁶² Institut CSA pour le Forum Citoyen de la RSE, *La responsabilité des multinationales dans les catastrophes humaines et environnementales [The responsibility of multinationals in cases of human and environmental disasters]* (Janvier 2015) p.10, <http://www.ethique-sur-etiquette.org/IMG/pdf/institut_csa_pour_le_forum_citoyen_pour_la_rse_-_la_responsabilite_des_multinationales_vf-2.pdf>. CCFD-Terre Solidaire et al, *Pétition: Rana Plaza, 1138 morts: halte à l'impunité des multinationales [Petition: Rana PLaza, 1138 dead: Stop to multinationals' impunity]* <https://secure.avaaz.org/fr/halte_a_limpunite_des_multinationales/?pv=88&rc=fb>. Auroi, Danielle cited in: See *supra* note 35, Assemblée Nationale [French National Assembly], *Rapport n°3582* (2016).

reputation of the French label in international markets.¹⁶³ It will be an indicator for consumers that employees hired by French businesses are well-qualified and well-treated. According to the proposal's supporters, saying that the duty of vigilance proposal is anti-competitive amounts to saying that negative impacts on human rights and the environment are a condition for competitiveness. The notion of competitiveness is thus reduced to its sole dimensions of cheap price and labour costs.¹⁶⁴

Moreover, the transparency regulations¹⁶⁵ and the multiplication of international requirements for CSR,¹⁶⁶ have increased public expectations regarding the active role that businesses can play in the realization of human rights and sustainable development. There is an urgent need for businesses to align their policies with these legal requirements and with complying competitors' performance. For instance, after Total's prosecution for the environmental damage caused in the *Erika* case, the company had to accelerate the adjustment of its standards, and became later an example of CSR good practices to redeem its reputation.¹⁶⁷ Thus, thanks to the duty of vigilance, French businesses are likely to improve their ethical and environmental standards for an increased quality-based competitiveness in line with consumers' demands.

A warranty of fair and transparent competition among businesses in Corporate Social Responsibility

With the EU requirements on non-financial reporting,¹⁶⁸ transparency becomes an essential dimension of fair competition for businesses. States have to transpose the EU directive on non-financial reporting and ensure that businesses adopt and disclose their codes of conduct according to the legal requirements. Thus, the obligation to establish and publish a vigilance plan is in line with these new EU requirements. It ensures a clearer vision of businesses' policies, codes of conduct and performance, and increases businesses' capacity to comply with the new EU transparency standards.

On the other hand, many businesses have already voluntarily established a CSR plan in line with international CSR standards.¹⁶⁹ According to the Team Sustainable Performance and Transformation EY, 40 percent of the 40 largest companies in France already publish a mapping of their suppliers,

¹⁶³ De Shutter, Olivier, cited in Chaumeau, Christine, 'Responsabilité sociale des entreprises: vers un code de bonne conduite [Corporate social responsibility: towards a code of conduct]' (2014) *Amnesty International France* <<http://www.amnesty.fr/Nos-campagnes/Entreprises-et-droits-humains/Dossiers/Responsabilite-sociale-des-entreprises-vers-un-code-de-bonne-conduite-13002?prehome=0>>.

¹⁶⁴ See *supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.14.

¹⁶⁵ *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups 2014* (OJ L 330, 15.11.2014, p. 1–9).

¹⁶⁶ See *supra* note 3, UNGP (2011); See *supra* note 4, OECD Guidelines (2011), UN Global Compact (2000).

¹⁶⁷ See *supra* note 83, *Erika* case (2012).

¹⁶⁸ See *supra* note 165, EU Directive 2014/95/EU (2014).

¹⁶⁹ See *supra* note 166, UNGP (2011), OECD Guidelines (2011), Global Compact (2000).

and conduct regular audits for more sustainable business conduct throughout the supply chain.¹⁷⁰ According to the proposal's supporters, businesses have already expressed concerns about environmental and social issues within the CSR Platform, even in the absence of a law.¹⁷¹ However, they argue that many businesses currently use their CSR commitments as communication tools and positive advertising, rather than binding obligations. The necessity to take legal initiatives in CSR directly results from the multiplication of these voluntary CSR commitments, which just serve as media coverage for many businesses. Thus, the proposal on the duty of vigilance will allow French judges to prosecute and sanction businesses in breach of their obligations to implement the vigilance plan. It is expected to solve the problem of unfair competition in CSR, and replace the vicious cycle by a virtuous cycle, by rewarding good practices and businesses which already effectively mitigate their negative impacts on human rights, while penalizing less scrupulous businesses still taking advantage of wild social dumping and outsourcing.¹⁷²

To summarise, it appears that the opposition's argument on competitiveness is only true if we adopt an old-fashioned price-based concept of competitiveness. CSR may improve other essential dimensions of competitiveness that this old-fashioned concept ignores, such as good corporate governance creating safeguards for shareholders, a business strategy responding to a growing demand for high-ethical and environmental standards, and a warranty of fair and transparent competition among businesses in CSR.

Thus, the proposal's supporters are relying on this CSR-based argument on competitiveness to find consensus within the Parliament. However, the divide within the Parliament slow down the genesis of the duty of vigilance. Although the majority of the members of Parliament agree on the necessity to regulate businesses, they do not agree on the scope and modalities of the proposal. Consequently, in its last version, the legal framework of the duty of vigilance appears as a compromise between the competing interests of businesses and victims of business-related human rights abuses (4.2).

4.2 The compromised legal framework of the duty of vigilance

The legal framework of the duty of vigilance aims at filling the gaps of current French law in giving full legal effect to human rights due diligence in accordance with the National Consultative Commission on Human

¹⁷⁰ Alvarez, Concepcion, 'Un devoir de vigilance des multinationales : Une loi au parcours chaotique [A duty of vigilance for multinationals: the chaotic course of the law]' (2015) *Novethic* <<http://www.novethic.fr/isr-et-rse/actualite-de-la-rse/isr-rse/devoir-de-vigilance-des-multinationales-une-loi-au-parcours-chaotique-143657.html>>.

¹⁷¹ *Ibid*, Concepcion Alvarez (2015);

¹⁷² *See supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), pp.7-8. *See supra* note 35, Assemblée Nationale [French National Assembly], *Rapport n°3582* (2016), p.10 and 27.

Rights' opinion. However, it is also the result of a compromise between the different stakeholders' interests. Indeed, the March 2016 version of the proposal theoretically offers a wide scope of application to the duty of vigilance, which is however limited in practice (4.2.1). It also lowered the standard of liability to a fault-based liability at the expense of victims' access to remedies (4.2.2).

4.2.1 A wide scope of application limited in practice

The scope of application of a law has four different dimensions. The personal scope of application refers to the persons to which it applies; the material scope of application refers to the situations it covers; the territorial scope of application refers to the geographical area where it applies, and the temporal scope of application refers to the period when it applies. An in-depth analysis of the duty of vigilance's scope of application reveals that, if it appears to be wide, its practical effects are likely to be limited in practice. Studying the temporal scope of application of the duty of vigilance is not relevant here, as it will only apply to situations occurring after the law's entry into force. However, its other dimensions deserve more attention. Indeed, the personal scope of the duty of vigilance is restricted to a small number of businesses (4.2.1.1), while its wide material scope extends to most of the business-related human rights abuses (4.2.1.2), and it has an extra-territorial dimension (4.2.1.3).

4.2.1.1 A personal scope of application restricted to a small number of businesses

In the 23th March 2016 version of the proposal, the duty of vigilance applies to all companies employing at least 5,000 employees, including their direct or indirect subsidiaries that have head office located in France, or those employing at least 10,000 employees including their direct or indirect subsidiaries that have head office located in France or abroad.¹⁷³ Additionally, the location of the new Article L225-102-4 of the Commercial Code, in its Book II, Title II, Chapter 5, testify that the obligation regulates only limited companies¹⁷⁴ established under French Law. This scope is quite far away from the ambitions of the initial proposal, which referred to "enterprises" instead of "companies", and comprised businesses of all sizes, from both the private and public sector.¹⁷⁵ The lawmakers first refused the idea of setting up a threshold, not even referring to the EU Directive on transparency. They saw it as a risk that holding companies would maintain a low rate of persons directly employed to escape their legal obligations.¹⁷⁶ However, they had to review their ambitions and lower the personal scope

¹⁷³ See *supra* note 129, Assemblée Nationale, Proposal on the duty of vigilance n°708 (2016), Article 1 para 2, creating Article L225-102-4 of the French Commercial Code.

¹⁷⁴ "Sociétés anonymes" in French.

¹⁷⁵ See *supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.53.

¹⁷⁶ See *supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), pp.42-43.

of the duty of vigilance in order to reach a consensus in the first reading at the National Assembly.¹⁷⁷

This new restricted scope was deemed insufficient by many actors in favour of regulating businesses, as it would only cover 125 businesses in France, excluding those involved in the Rana Plaza incident.¹⁷⁸ The author of the initial proposal, Danielle Auroi tried to amend the proposal in the second reading at the National Assembly in order to bring it back to its original frame, and lower the threshold to 500 employees in line with the EU directive on non-financial reporting,¹⁷⁹ but the amendment was rejected.¹⁸⁰ In response to the amendment, the Rapporteur of the proposal in the second reading at the National Assembly, Dominique Potier stated that the number of employees as the threshold defining companies falling within the proposal is not an issue in itself. The restricted personal scope of the duty of vigilance is now necessary to find consensus for the proposal's adoption. Once the norm will be integrated into the system and accepted by businesses, the number of employees required will drop naturally, similarly to what happened in the case of the non-financial reporting obligation.¹⁸¹

If the personal scope is restricted to a small number of businesses, the material scope of the duty of vigilance covers most of the business-related human rights abuses (4.2.1.2).

4.2.1.2 A wide material scope of application covering most business-related human rights abuses

The proposal creates a new Article L225-102-4 in the Commercial code, which enacts the obligation for the above-mentioned companies to draw up a vigilance plan. This vigilance plan comprises all the vigilance measures aimed at identifying, and preventing the realisation of risks of physical injuries, grave environmental damage, health risks, and human rights and fundamental freedoms violations resulting from the company's activities. The plan should also contain a section dedicated to "active and passive corruption" within the company and the companies it controls.¹⁸² The material scope of this new duty of vigilance is innovative for three main reasons. Firstly, for the very first time, the law would impose a single duty of vigilance covering all potential human rights damage. Secondly, this new obligation would go beyond the principle of legal autonomy, and extend to impacts of subsidiaries and subcontractors' activities. Lastly, this proposal is

¹⁷⁷ See *supra* note 127, Assemblée Nationale, Proposal on the duty of vigilance n°501 (2015), Article 1.

¹⁷⁸ Laperche, Dorothée, 'Devoir de vigilance des sociétés-mères : la première pierre posée [The duty of vigilance on the part of parent companies: the first cornerstone laid]' (2015) *Actu Environnement* <<http://www.actu-environnement.com/ae/news/devoir-vigilance-societes-meres-adoption-proposition-assemblee-nationale-24238.php4>>.

¹⁷⁹ See *supra* note 165, Directive 2014/95/EU (2014), Article 1(1)1.

¹⁸⁰ See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.31.

¹⁸¹ See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.32.

¹⁸² See *supra* note 129, Assemblée Nationale, Proposal on the duty of vigilance n°708 (2016), Article 1 para 2 and 3, creating L225-102-4 of the French Commercial Code, p.2.

trying to build a duty of vigilance obligation halfway between coercion and incentives.

A single duty of vigilance covering all human rights damages

Contrary to the other duties of vigilance, the proposal aims at covering all human rights damages. The new Article L225-102-4 of the Commercial Code draws up a list of the potential damages, which could be “violations of human rights and fundamental freedoms, physical injuries, grave environmental damage or health risks”.¹⁸³ Some lawyers and the Rapporteur of the Senate find it unfortunate that the proposal lacks specificity to define these potential damages, and particularly those on “fundamental rights”. For them, there is a high risk of creating legal uncertainty for businesses, which would not be able to anticipate their liability.¹⁸⁴ However, it is a principle under French civil law to repair all kind of damage without distinction.¹⁸⁵ The definition of “damage” has never been an obstacle towards establishing liability, since it is the “fault” and the “link between the fault and the damage” that are the difficult elements to prove. These two elements already play this restrictive role in findings of liability.¹⁸⁶ Thus, French civil law underpins the will of the lawmakers to cover all human rights issues, without any need to prioritize some human rights abuses at the expense of others. Moreover, the notion of “fundamental rights and freedoms” has already been enshrined and defined within French law at the Constitutional level.¹⁸⁷ According to the Rapporteur Dominique Potier, the law does not have to and cannot predict every situation of abuses.¹⁸⁸ Article 34 of the French Constitution states that the law determines the fundamental principles of civil and commercial obligations, but does not have to describe them in details. It is the purpose of application decrees and then the jurisprudence, to make these laws enforceable.¹⁸⁹ On the other hand, according to Dominique Potier, these abuses do not necessarily need to be defined by application decree, as the list of abuses under the new Article L225-102-4 of the Commercial Code refers directly to the international standards as expressed in the human rights treaties and other international agreements ratified by France. The OECD Guidelines¹⁹⁰ as well as the UNGPs¹⁹¹ constitute an ideal and internationally recognised legal basis.¹⁹²

¹⁸³ See *supra* note 129, Assemblée Nationale, Proposal on the duty of vigilance n°708 (2016), Article 1 para 3 creating L225-102-4 of the French Commercial Code, p.2.

¹⁸⁴ See *supra* note 135, Sénat, *Rapport n°74 (2015)*, p.29. Périn, Pierre-Louis, 'Devoir de vigilance et responsabilité illimitée des entreprises: qui trop embrasse mal étreint [The duty of vigilance and the unlimited liability of business: the tighter you squeeze, the less you have]' [215] (2015) *RTD Com.* 215, p.223-224, para.2-4.

¹⁸⁵ See *supra* note 40, France Stratégie and Plateforme RSE, 'Interview with Anne Danis-Fatome of October 30, 2014', p.19.

¹⁸⁶ See *supra* note 40, France Stratégie and Plateforme RSE, 'Interview with Anne Danis-Fatome of October 30, 2014', p.22.

¹⁸⁷ See *supra* note 1, Assemblée Nationale, *Rapport n°2504 (2015)*, p.45.

¹⁸⁸ See *supra* note 35, Assemblée Nationale, *Rapport n°3582 (2016)*, p.11.

¹⁸⁹ See *supra* note 35, Assemblée Nationale, *Rapport n°3582 (2016)*, p.11.

¹⁹⁰ See *supra* note 4, OCDE Guiding Principles (2011).

¹⁹¹ See *supra* note 3, UNGP (2011).

¹⁹² See *supra* note 35, Assemblée Nationale, *Rapport n°3582 (2016)*, p.11.

Thus, when applying the law, the judges can refer to these business and human rights instruments. The reference to the international human rights framework attests that the legal proposal is in line with the international efforts to ensure that businesses respect all human rights.

Thus, this proposal is innovative as the duty of vigilance will extend to subsidiaries' and subcontractors' negative impacts on human rights and will go beyond the principle of autonomy.

An extension to subsidiaries and subcontractors' negative impacts

Apart from the section on corruption, which does not cover subcontractors, the vigilance plan must comprise the risks related to the company's own activities, as well as the activities operated by companies it controls, and subcontractors and suppliers with whom it maintains an established relationship.¹⁹³ The notion of subsidiaries will be recognised where at least 50 percent of a company's capital is held by another company (the parent company), according to Article L233-1 of the Commercial Code.¹⁹⁴ Even if the subsidiary is an independent entity, the parent company has a direct control over its subsidiaries. It imposes a trading strategy on its subsidiary, and thus has a responsibility to ensure that its activities do not have negative impact on human rights. It aims at preventing companies from hiding behind the principle of legal autonomy to escape their obligations under domestic law.

On the other hand, an ordering company cannot have the same control and power over a subcontractor or supplier. As defined in Article 1 of the 1975 Law related to subcontracting,¹⁹⁵ subcontracting is the operation through which a business (the ordering company) entrusts the execution of all or part of a contract to another business (the subcontractor). The ordering company and its subcontractors only relate to each other through a contractual relationship defining how the latter should conduct its activities. It is usually through an extended outsourced production and a multiplication of these contracts that companies are trying to escape from domestic regulation imposing high human rights and environmental standards. They take advantage of the lack of rule of law and labour regulation in developing countries to improve their productivity, price-based competitiveness, and increase their profitability. Thus, the proposal cannot fully address the issue if it does not cover the negative impacts that subcontractors' and suppliers' activities can have on human rights. However, to avoid an excessive burden on companies who cannot control all their partners' activities, the lawmakers excluded from the vigilance plan all subcontractors and suppliers who do not have an established commercial relationship with the ordering

¹⁹³ See *supra* note 129, Assemblée Nationale, Proposal on the duty of vigilance n°708 (2016), Article 1 para 3 creating L225-102-4 of the French Commercial Code, p.2.

¹⁹⁴ *Code de commerce [French Commercial Code]*, (2016), Article L233-1.

¹⁹⁵ *Law n°75-1334 of December 31, 1975 JORF [Official Gazette of France] January 3, 1976, p.148, Article 1.*

company.¹⁹⁶ An established commercial relationship is recognized only if the ordering company and the subcontractors or suppliers have collaborated for a certain period in a sustainable way,¹⁹⁷ Thus, the proposal fills the gaps in the previous laws as it covers the major participants in global supply chains likely to be involved in harms to human rights and the environment. Finally, this duty of vigilance is innovative as it creates a due diligence obligation halfway between coercion and incentive.

An obligation of vigilance halfway between coercion and incentive

The duty of vigilance consists of three main legal obligations: an obligation to establish a vigilance plan, to publish the vigilance plan, and to implement it in the case of realization of a risk.¹⁹⁸ An application decree will define the conditions of presentation, implementation, and follow-up of the vigilance plan, but the means to ensure its efficiency are left at the companies' discretion. Then, in the case of litigation, they can justify the means they used as a defence before civil courts, or organs such as the National Contact Points.¹⁹⁹

The most important point for the company is to show that vigilance measures are in place to prevent and mitigate negative human rights impacts in accordance with the principle of prevention and anticipation.²⁰⁰ Under the proposal, the duty of vigilance is framed as an “obligation of means”, meaning that the company must take all necessary measures to prevent the realization of a risk to the extent of its available resources and powers, without having to guarantee that the expected result will be achieved. The company should be able to show that it acted as a “reasonable” person²⁰¹ under French civil law, or with “due diligence” as defined by Principle 17 of the UNGP, before and after the realization of the risk.²⁰²

The company can use several means in order to demonstrate that it complied with this standard. First, a company can put in place a strategy aimed at raising its subsidiaries' and subcontractors' awareness of the risks linked to a project. It can put in place a human rights impact assessment to identify the potential negative impacts its activities can have on human rights, and publish regular reports to disclose their CSR performance. The company can also write and publish a code of conduct to increase transparency, and demonstrate its commitment to respect human rights.²⁰³ To ensure the

¹⁹⁶ See *supra* note 129, Assemblée Nationale, Proposal on the duty of vigilance n°708 (2016), Article 1 para 3 creating L225-102-4 of the Commercial Code, p.2. See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.30.

¹⁹⁷ See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.30.

¹⁹⁸ See *supra* note 129, Assemblée Nationale, Proposal on the duty of vigilance n°708 (2016), Article 1 para 4 creating L225-102-4 of the Commercial Code, p.2.

¹⁹⁹ See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.30.

²⁰⁰ See *supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), pp.43-44.

²⁰¹ Previously “bon père de famille”, removed in 2014, or *Bonus pater familias* in Latin.

²⁰² See *supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.21.

²⁰³ Nike, *Code of conduct*

<http://www.nikeresponsibility.com/report/uploads/files/Nike_Code_of_Conduct.pdf>.

monitoring and follow-up of the vigilance plan, the company can resort to regular audits, and communications on the human rights situations within their global supply chains, and put in place complaints mechanisms for victims of human rights violations resulting directly or indirectly from their activities.²⁰⁴ Finally, contracts are ideal tools for businesses to prevent human rights violations occurring in their relations with States and subcontractors. Indeed, as the relations between a subcontractor and an ordering company are ruled by a contract, the latter can impose a special behaviour on its subcontractors by introducing a clause in their trading agreement, related to human rights, labour standards, and environmental norms compliance. Then, the ordering company can use its leverage to limit negative impacts on human rights, without risking a violation of its subcontractors' commercial freedoms.²⁰⁵ Moreover, the principle of freedom of contract leaves the company free to decide on the conditions, scope, and content of its obligation according to its own ambitions and resources, while being legally bound by the legal value of the contract. Thus, the contract can be a keystone of a duty of vigilance halfway between coercion and incentive.²⁰⁶

Consequently, the duty of vigilance consists mostly of ensuring that a process exists rather than ensuring the outcomes of the process. It leaves businesses with the discretion to decide on their own means to comply with their duty of vigilance. Its material scope is innovative and ambitious, but to address all human rights abuses, the duty of vigilance should cover all actors involved in the supply chain, even those not located in France. Thus, the extraterritorial dimension of the legal proposal is an essential requirement for ensuring the efficiency of the duty of vigilance, according to Principle 15 and 17 of the UNGPs (4.2.1.3).

4.2.1.3 The extraterritorial dimension of the duty of vigilance

In line with the Maastricht principles on Extraterritorial Obligations of States, the "State's duty to protect implies an obligation to regulate the businesses' activities within its jurisdiction, including those operating outside the country, in order to ensure that they uphold human rights at all

²⁰⁴ The possible vigilance measures within the extractive sector: Brabant, Stéphane and Nicolas Heurzeau, 'Les mesures de vigilance du secteur extractif [The vigilance measures in the extractive sector]' [81] (2015) RLDA 2015/104 *Revue Lamy Droit des Affaires Repères* n° 5588, pp.83-84.

²⁰⁵ Chaumeau, Christine, 'Responsabilité sociale des entreprises : vers un code de bonne conduite [Corporate social responsibility: towards a code of conduct]' (2014) *Amnesty International France* <<http://www.amnesty.fr/Nos-campagnes/Entreprises-et-droits-humains/Dossiers/Responsabilite-sociale-des-entreprises-vers-un-code-de-bonne-conduite-13002?prehome=0>>.

²⁰⁶ The contract can be a driver for imposing a duty of vigilance, as well the duty of vigilance generates more contractual commitments: Mekki, Mustapha, 'Contrat et devoir de vigilance [Contract and duty of vigilance]' [86] (2015) RLDA 2015/104 *Revue Lamy Droit des Affaires Repères* n° 5589, pp.86-93.

locations in which they operate”.²⁰⁷ There is no denying that the duty of vigilance applies to French businesses domiciled in France, as they are subject to French Law. However, the extraterritorial dimension of this duty of vigilance is more problematic, as it entails that French courts can preside over cases involving foreign businesses domiciled abroad, and letting them apply the French legislation extraterritorially.

Extraterritorial jurisdiction of the French courts and tribunals

The extraterritorial jurisdiction of French courts and tribunals in civil and commercial matters is possible under the Brussels I Regulation of 12th December 2012.²⁰⁸ Indeed, this EU Regulation deals with the international jurisdiction of European courts and tribunals in relation to intra-European or certain international cases. It allows foreign victims to sue in France, a French company for its subsidiaries’ and subcontractors’ acts committed abroad, inside or outside the European Union.²⁰⁹ One suggestion is to combine Article 4.1 of the Regulation²¹⁰ with Article 63.1²¹¹ to sue a transnational company whose statutory seat, central administration, or principal place of business is located in France, for the harm committed outside the French territory.²¹² According to Article 8.1 of the Brussels I Regulation (recast),²¹³ it is also possible to show that there is a close connection between the activities of the subsidiaries or subcontractors, and the parent or ordering company in order to sue the latter. In this case, it is necessary to show that the proceedings do not constitute a procedural fraud.²¹⁴ Then, the crucial point is to pull away the traditional criterion of

²⁰⁷ See *supra* note 7, CNCDH (2013), para.63. ETOs, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2013) <http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23>.

²⁰⁸ *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2012* (OJ L 351, 20.12.2012, p. 1–32).

²⁰⁹ France Stratégie and Plateforme RSE, 'Interview with Catherine Kessedjian of October 2, 2014' (2014) *Document de synthèse du GT3 de la Plateforme RSE, Compte-rendu des auditions des juristes intervenus sur la question du devoir de vigilance [Summary document of the GT3 of the CSR Platform, Minutes of the interviews with lawyers expressing their opinions on the duty of vigilance]* p.8, <http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/14-12-22_draft_document_de_synthese_des_auditions_du_gt3_claire_corrige_sylvie.pdf>.

²¹⁰ See *supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.20. See *supra* note 208, EU Regulation n.1215/2012 (2012), Article 4.1: “Subject to this Regulation, persons domiciled in a Member State, whatever their nationality, be sued in the courts of that Member State”.

²¹¹ See *supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015, p.20. See *supra* note 208, EU Regulation n.1215/2012 (2012), Article 63.1: “For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:(a) statutory seat; (b) central administration; or (c) principal place of business.”.

²¹² See *supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.20.

²¹³ See *supra* note 208, EU Regulation n.1215/2012 (2012), Article 8.1.

²¹⁴ See *supra* note 209, France Stratégie and Plateforme RSE, 'Interview with Catherine Kessedjian of October 2, 2014', p.8.

the applicant's domicile, or the place where the damage arose, and refocus the proceedings in France by insisting that the obligation at stake is the duty of vigilance, which is held by a parent or ordering company domiciled in France.²¹⁵

Moreover, Article 15 of the French Civil code provides that French jurisdiction applies as soon as the defendant, who has contracted an agreement in another State or with a foreigner, is a French national.²¹⁶ Thus, a French company, which signed a contract abroad with a foreign subcontractor, can be sued before French tribunals and courts.²¹⁷ Finally, the "forum of necessity"²¹⁸ is a jurisprudential guarantee recognized in France and other European countries aimed at avoiding denial of justice. It requires that justice in tribunals normally territorially competent is not possible for legal or physical reasons in the host country. Thus, a trial could be redirected to France if there is evidence that the host State initially competent to judge on the case cannot ensure fair trial or due process of law as defined under international conventions. Then, a link with France will have to exist for French courts to take the matter. In this regard, the French Court of Cassation has recognized very tenuous links, such as the presence of the International Arbitration Court of the International Commercial Chamber in Paris²¹⁹ in the arbitration case called *NIOC*.²²⁰

Thus, the French courts' and tribunals' competence to decide on a TNC's liability for damage arising abroad can be established in many different ways, but it also requires that the French law itself is extraterritorially applicable.

Extraterritorial application of the law on duty of vigilance

Conflicts of law are traditionally solved in accordance with the "lex loci damni" principle meaning that the law of the place where the damage

²¹⁵ See supra note 40, France Stratégie and Plateforme RSE, 'Interview with Anne Danis-Fatome of October 30, 2014', p.23.

²¹⁶ *Code civil [French Civil Code]*, (2016), Article 15.

²¹⁷ See supra note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.20.

²¹⁸ "For de nécessité" in French.

²¹⁹ See supra note 209, France Stratégie and Plateforme RSE, 'Interview with Catherine Kessedjian of October 2, 2014', p.8.

²²⁰ "The claimant's impossibility to access justice, even arbitral... and to exercise a right falling within international public order, enshrined in international arbitration principles and Article 6.1 of the European Convention on Human Rights, constitute a denial of justice justifying the international jurisdiction of the President of the "Tribunal de Grande Instance" of Paris...": *NIOC* (Cour de Cassation [French Court of Cassation], Paris, 1ère chambre civile, Pourvoi n°01-13742 02-15237, Bulletin 2005 I N° 53 p. 45 February 1, 2005).

occurred governs.²²¹ However, few exceptions exist under the Rome II Regulation.²²²

In cases of environmental damage, Article 7 leaves it for the victim to choose between the laws of the country where the damage occurred as provided by Article 4.1, or the law of the country in which the event giving rise to the damage occurred.²²³ In this regard, the “event giving rise to the damage” can be an order or decision taken by a company domiciled in France that affects the subsidiary’s or subcontractor’s behaviour resulting in damages occurring abroad. Then, as the event which caused the damage originates in France, the victim can choose the application of the French law. In a case of non-environmental damage, there is a possibility to apply a law other than the one of the country where the damage occurred, if “it is clear from the circumstances of the case that the tort/delict is manifestly more closely connected with another country”.²²⁴ Thus, in business and human rights cases, it is possible to argue that French Law applies because the parent or ordering company domiciled in France gave the orders and directives to its subsidiaries and subcontractors leading to the damage, especially when the former controlled their activities, and made profits from them.²²⁵ The French Court of Cassation already developed this strategy and recognized a “principle of proximity” by virtue of which the company’s centre of decision located in France allows the extraterritorial application of the French Law.²²⁶

Finally under the Rome II regulation, mandatory provisions²²⁷ or public order legislation,²²⁸ allow exceptions to the “lex loci damni” principle. Mandatory provisions can be expressly stated in the law or can be qualified as such by the judge.²²⁹ Thus, the law on duty of vigilance can be expressly

²²¹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) 2007 (OJ L 199, 31.7.2007).

²²² See *supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.20. See *supra* note 209, France Stratégie and Plateforme RSE, 'Interview with Catherine Kessedjian of October 2, 2014', p.8.

²²³ See *supra* note 221, Regulation n.864/2007 (2007), Article 7.

²²⁴ See *supra* note 221, Regulation n.864/2007 (2007), Article 4.3.

²²⁵ See *supra* note 209, France Stratégie and Plateforme RSE, 'Interview with Catherine Kessedjian of October 2, 2014', p.16.

²²⁶ Cossart, Sandra and Marie-Laure Guislain, 'Le devoir de vigilance pour les entreprises multinationales, un impératif juridique pour une économie durable, Pourquoi le raisonnement juridique ne peut pas constituer un obstacle aux choix politiques [The duty of vigilance for multinationals, a legal imperative for a sustainable economy, Why the legal reasoning cannot constitute an obstacle to the political choices]' [75] (2015) RLDA 2015/104 *Revue Lamy Droit des Affaires* Repères n° 5587, p.8. *Mobil North Sea* (Cour de Cassation [French Court of Cassation], Paris, 1ère chambre civile, Pourvoi n°97-13.972, Bulletin civil I n°233, May 11, 1999).

²²⁷ See *supra* note 221, Regulation n.864/2007 (2007), Article 16: overriding mandatory provisions.

²²⁸ See *supra* note 221, Regulation n.864/2007 (2007), Article 26: public order legislation.

²²⁹ See the qualification of mandatory provisions for Article L442-6 of the French Commercial Code, on the ground that the termination of established commercial relations is sentenced by a 2 Million fine: Cour de Cassation [French Court of Cassation], Paris, 1ère chambre civile, Pourvoi n° 07-15.823, Bulletin civil I, n°233, October 22, 2008).

qualified as a mandatory provision, or present special characteristics such as highly repressive fines to avoid any doubt about its extraterritorial applicability. In this case, the French Law would be applicable without having to show any connecting link.

Consequently, the extraterritorial applicability of the duty of vigilance proposal and the jurisdiction of French judges when damage occurs abroad is not a genuine problem. It is an essential condition to ensure that it covers all potential human rights abuses, even when they occur outside the French territory. Consequently, the wide material scope of the duty of vigilance covering all potential human rights damages, the major actors in global supply chains, and extraterritorial abuses, fills the gaps in the existing regulatory framework applicable to businesses impacting on human rights.

The regime of civil liability presented in the original proposal, also ensured to fill the gaps in the current framework by reducing obstacles for victims' access to remedies, but it had to be lowered to a fault-based liability in order to find consensus, at the expense of victims' access to remedies (4.2.2).

4.2.2 A fault-based liability at the expense of victims' access to remedies

According to the 23rd March 2016 proposal, a company's liability can be engaged if there is evidence that it committed a fault by not complying with one of its duty of vigilance related-obligations.²³⁰ In this regard, the provisions seem very favourable for the victims as they allow any interested person to bring a claim against the company at fault (4.2.2.1). However, contrary to the initial proposal, engaging the company's liability is still very difficult for victims, as the burden of proof remains on the claimants (4.2.2.2). Yet, once the company's liability is engaged, the high level of sanction is exemplary and deterrent (4.2.2.3).

4.2.2.1 A favourable access to justice for any interested person in the trial

The 23rd March 2016 proposal provides that an action can be brought before the competent jurisdiction under French Law, by "any person who has an interest" in the trial. In fact, a direct, indirect or potential victim of damage resulting from a company's activities, or its subsidiaries' or subcontractors' activities can issue the claim. It also applies to associations or unions having an interest in the trial.²³¹ In response to the Senate, the Rapporteur Dominique Potier explained that these provisions will not allow associations and unions to become "private prosecutors engaging companies' liability

²³⁰ See *supra* note 129, Assemblée Nationale, Proposal on the duty of vigilance n°708 (2016), Article 2 para 2 creating L225-102-5 of the Commercial Code, p.3.

²³¹ See *supra* note 129, Assemblée Nationale, Proposal on the duty of vigilance n°708 (2016), Article 1 para 6 creating L225-102-4 II of the Commercial Code, p.2.
See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.33.

before the civil judge for every potential breach of the duty of vigilance”.²³² The association’s or union’s action on behalf of the victims would only be admissible if they can show evidence that they received the victims’ consent. On the other hand, allowing associations and unions to issue complaints and ask for compensation is a way to cover situations of environmental damage where no victims in particular are identified.²³³ It also helps to compensate for the heavy burden of proof on victims, as associations and unions usually have more resources, and means of investigation and communication for seeking evidence.²³⁴ Thus, this extensive access to justice to any interested person is favourable to victims who just have to show that the business’s activities directly or indirectly harmed their human rights to be able to issue a claim against the French company. Nevertheless, even if they have access to justice, it does not necessarily mean that they have an effective access to remedies. Indeed, to engage the company’s fault-based liability, a heavy burden of proof of the company’s fault remains on the claimant (4.2.2.2).

4.2.2.2 A high burden of proof of the company’s fault remaining on the claimant

The 23rd March 2016 proposal states that non-compliance by the company with one of the three obligations to establish a vigilance plan, to publish it or to implement it, constitutes a fault conducive to liability under common civil liability laws, Article 1382 and 1383 of the French Civil Code.²³⁵ It is important to note that the company’s liability can be engaged irrespective of the occurrence of damage. However, in order to establish the company’s liability, the claimant has to prove that the company committed a fault by not complying with one of its three obligations, that damage occurred, and that there is a link between the fault committed by the company and the damage.²³⁶ The latter is very difficult to prove under French law for victims, especially when damage occurs in a foreign country where the company operates through subsidiaries or subcontractors. They have to demonstrate that the company domiciled in France was the one giving orders and benefiting from the subsidiaries’ or subcontractors’ activities which caused the damage in the foreign country.

The first proposal was very ambitious in trying to fill the gaps in access to remedies for the victims. Indeed, in the first reading, the proposal aimed at creating a fault-based liability with a presumption of fault on the

²³² See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.14.

²³³ See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.15.

²³⁴ See Sherpa Association trial against the Vinci group for the human rights and labour standards violations related to the preparation of the 2022 Worldcup: Lecadre, Renaud, 'Le Conseil national des barreaux, à la botte des multinationales ? [The National Council of Bars, under multinationals' thumb?]' (2015) *Libération* <http://www.liberation.fr/societe/2015/07/23/le-conseil-national-des-barreaux-a-la-botte-des-multinationales_1352687>.

²³⁵ See *supra* note 129, Assemblée Nationale, Proposal on the duty of vigilance n°708 (2016), Article 2 para 2 creating L225-102-5 of the Commercial Code, p.3.

²³⁶ See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.33.

company.²³⁷ It established a reversal of the burden of proof shifting it on the company to provide evidence that it fulfilled its obligations.²³⁸ It means that the victim did not have to prove the company's fault, but only bring evidence of the damage to engage the company's liability. The burden of proof remained on the company, which had to provide evidence by any means that it fulfilled its "obligation of means" and took all the necessary measures to prevent the realization of the risk. If the company succeeds in providing such evidence, it rebuts the presumption and avoids being held liable. This approach was really innovative and favourable to the victims who usually do not have access to all of the information about the company's management and strategy, and do not have enough resources to carry out investigations to prove that the company committed a fault.²³⁹ Bringing such evidence is easier for companies, which already own the information internally. However, the first proposal faced heavy criticism from the opposition, who stated that this fault-based liability with a presumption of fault is likely to result in a non-rebuttable presumption due to the impossibility of bringing counter-evidence in cases of damage.²⁴⁰ Moreover, the first draft of the proposal also provided for a possible criminal liability, but both mechanisms were removed in the second version of the proposal due to their extensive and imprecise boundaries.²⁴¹

Thus, the fault-based duty of vigilance with a presumption of fault was replaced by a classical common civil liability less favourable for victims.²⁴² In response to the Senate's criticism,²⁴³ Dominique Potier argued that this liability would not lead to vicarious liability imposing an obligation that parent and ordering companies are responsible for their subsidiaries' and subcontractors' human rights violations. The ordering company would not have to ensure that every single worker employed by the subcontractor is working under satisfactory conditions.²⁴⁴ It would not lead to a security performance obligation.²⁴⁵ The company's liability would only be incurred if there is evidence that it failed to draw up, to publish or to implement the vigilance plan, or that it failed to comply with a judicial injunction. If the company can show that, it established a vigilance plan, published it and had

²³⁷ See *supra* note 126, Assemblée Nationale, Legal proposal on the duty of vigilance n°1519 (2013), Article 2 para 3, creating a new title IV ter under Book III of the French Civil code.

²³⁸ See *supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.48-49.

²³⁹ See *supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.45-46.

²⁴⁰ Bechtel, Marie-Francoise, cited in *See supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.38.

²⁴¹ Replacing the notion of security by « security or vigilance » in Article 121-3 of the French Criminal Code: *See supra* note 126, Assemblée Nationale, Legal proposal on the duty of vigilance n°1519 (2013), Article 3.

²⁴² See *supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.47. *See supra* note 129, Assemblée Nationale, Proposal on the duty of vigilance n°708 (2016), Article 2 para 2 creating L225-102-5 of the Commercial Code, p.3.

²⁴³ Criticism that the fault-liability will shift towards a vicarious liability, with a heavy burden on the part on parent and ordering companies: *See supra* note 135, Sénat, *Rapport n°74* (2015), p.31.

²⁴⁴ See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.27.

²⁴⁵ See criticism that the obligation risks to become a performance or security obligation: Pietrancosta, Alain and Boursican Etienne, 'Vigilance : un devoir à surveiller ! [Vigilance: a duty to monitor!]' [553] (2015) n°19-20 *La Semaine Juridique: Edition Générale*, p.14.

measures to implement it, such as contract clauses, audits, and warning plans, it will be exempted from liability. Thus, according to the proposal's supporters, the proposal is clear enough not to fall within a presumption of fault or vicarious liability on the part of parent and ordering companies.²⁴⁶

The Rapporteur of the first proposal Danielle Auroi tried to amend the text to go back to the original design of a fault based-liability with a presumption of fault and a reversal of the burden of proof onto the company. However, the amendment was rejected in order to preserve the fragile consensus between stakeholders, and the classical fault-based liability with a burden of proof remaining with the claimant, rather than the company was reaffirmed.²⁴⁷ Engaging the liability of the powerful TNCs remains difficult for victims, who have to demonstrate the fault, the damage and the link between the fault and the damage. However, once the claimants have overcome these legal obstacles, the sanction imposed on a liable company is exemplary and deterrent (4.2.2.3).

4.2.2.3 An exemplary and deterrent sanction for liable companies

In the case of a successful trial for the claimant, the judge can order the company to give compensation to the victims, and to the associations or unions representing the victims' interests for damage resulting from its activities. In addition, the company can be sentenced to other exemplary and deterrent sanctions, evolving gradually depending on the company's inability or unwillingness to react promptly to its own non-compliance. First, in a case of a risk of realization of damage listed in the new Article L225-102-4, a single judge can give an emergency ruling ordering the company to put in place a vigilance plan, to publish it or to implement it, under financial compulsion.²⁴⁸ Moreover, in a case of non-compliance with the law or the injunction, the judge can sentence the company to a very high fine up to 10 million euros.²⁴⁹ Finally, the company can be sentenced to the publication of the judicial decision and thus runs the risk of encountering a negative advertisement campaign against its business. This sanction usually has a significant deterrent effect, considering that reputation is usually a business's most priceless asset.

The proposal was considered unclear and imprecise, and was heavily criticised as violating the principle under which offences and penalties must be clearly defined under the law.²⁵⁰ However, for the Rapporteur Dominique Potier, the proposal does not violate this principle as the law's drafters

²⁴⁶ See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.13.

²⁴⁷ Auroi, Danielle and Potier, Dominique cited in: See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), pp.31-32.

²⁴⁸ See *supra* note 129, Assemblée Nationale, Proposal on the duty of vigilance n°708 (2016), Article 2 para 5 creating L225-102-5 of the Commercial Code, p.3.

²⁴⁹ See *supra* note 129, Assemblée Nationale, Proposal on the duty of vigilance n°708 (2016), Article 1 para 8 creating L225-102-4 III of the Commercial Code, p.2.

²⁵⁰ Conseil Constitutionnel [French Constitutional Council], QPC: JCP G 2011, 274, January 13, 2011). See *supra* note 245, Pietrancosta, Alain and Boursican Etienne (2015), p.14. See *supra* note 135, Sénat, *Rapport n°74* (2015), pp.33-34.

elaborate laws aimed at being clarified in an application decree by the executive power. It is also the judge's responsibility to apply the lawmakers' will in accordance with the factual circumstances.²⁵¹ Thus, he argued that the sanctions in a case where damage occurs are clear enough. If a victim, an association, or a union representing the victims' interests bring evidence of the fault, damage, and the link between them, then the company can be sentenced to: compensation, a fine, negative advertisement, and an injunction to draw a plan of vigilance and implement it to mitigate the damage, and prevent other damages. Only in cases of potential damage, the consequences of the duty of vigilance remain uncertain. Probably, one can ask the judge to issue an injunction and requiring the company to draw up a plan, publish it or implement it to prevent the realization of a risk. In this case, the failure to comply with the injunction could engage the company's liability and lead to a fine.

To summarize, the proposal offers a wide access to justice for victims, but the requirement to bring evidence of the fault, the damage, and the link between them, restrains access to remedies in practice. On the other hand, the level of sanction resulting from the company's liability is exemplary and deterrent, but these effects are illusionary, since engaging the company's liability remains difficult for the claimants in practice. Moreover, the material and extraterritorial scope of the duty of vigilance are very innovative and favourable for the victims but its effects are limited in practice since it only applies to a small number of businesses. Thus, it appears that the legal framework of the duty of vigilance tries to address the gaps in the current French law, while being the result of a compromise between the competing interests of victims and businesses. As a consequence, the efficiency of the proposal in ensuring that businesses conduct human rights due diligence in accordance with the UNGP and the Commission's opinion has been widely challenged from a legal perspective (4.3).

4.3 The efficiency of the proposal from a legal perspective

Thanks to the CSR Platform, many lawyers from different backgrounds had the occasion to comment on the proposal and its expected efficiency. The two main aspects of the debate deal with the essential role that *hard law* can play in regulating CSR (4.3.1), and the risks and limits of the proposal in meeting its objective (4.3.2).

4.3.1 The essential role of *hard law* in regulating CSR

The role of *hard law* in regulating CSR is at heart of the discussion related to the proposal on the duty of vigilance. While some lawyers are sceptical

²⁵¹ See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.12.

about the new opportunities *hard law* can create for CSR, many lawyers reaffirmed its role. According to them, *hard law* allows the limits of voluntary CSR to be overcome, it is a guarantee of legal certainty for CSR stakeholders, and it is in line with the evolution of French civil law.

The ability of hard law to overcome the limits of voluntary CSR

Some lawyers expressed their fear that resorting to *hard law* in order to impose a human rights due diligence obligation on businesses might break the dynamics of CSR, characterized by its voluntary character.²⁵² However, for Yann Queinnec and William Bourdon, representing the Sherpa Association, the binding force of *hard law* is likely to overcome the limits of its voluntary dimension. Indeed, voluntary commitments lack binding force and monitoring mechanism, and prevent victims from accessing proper remedies. As mentioned previously,²⁵³ the discrepancy between companies applying CSR tools voluntarily and those that are still reluctant to implement their own commitments creates a situation of unfair competition, justifying the needs for a legal framework.²⁵⁴ According to them, legal regulation is also necessary for three specific reasons. First, “the increasing influence of TNCs on States and their effects on the principle of the rule of law” requires legal regulation to rebalance the power of States, and impose human rights obligations on businesses. Secondly, there is an “international consensus on the necessary contributions by TNCs to the public interest” under international business and human rights instruments such as the UN Global Compact, the OECD Guidelines, the ILO tripartite declaration or ISO 26000. Finally, only the law allows “significant conceptual and structural” obstacles to be overcome, such as the principle of legal separation that enables businesses to get profit from their subsidiaries while avoiding liability for the consequences of their activities.²⁵⁵ They add that CSR is a complex multifaceted phenomenon with economic, philosophical, sociological, and even mathematical dimensions. Thus, the “abstractive force of the law is best suited for providing the structuring tools that meet a diverse plurality of needs”.²⁵⁶

The Sherpa Association became the mother figure of a struggle for a deterrent and efficient legal framework that will put an end to the economic actors’ impunity.²⁵⁷ For the founder of the association, there is an urgent

²⁵² Périn, Pierre-Louis, 'Devoir de vigilance et responsabilité illimitée des entreprises: qui trop embrasse mal étreint [The duty of vigilance and the unlimited liability of business: the tighter you squeeze, the less you have]' [215] (2015) *RTD Com.* 215, para.2, p.221, para 2.

²⁵³ See Section 4.1.3, *A warranty of fair and transparent competition among businesses in Corporate Social Responsibility.*

²⁵⁴ See *supra* note 38, Queinnec, Yann and Bourdon, William (2010), pp.16-17.

²⁵⁵ See *supra* note 38, Queinnec, Yann and Bourdon, William (2010), p.15-16.

²⁵⁶ See *supra* note 38, Queinnec, Yann and Bourdon, William (2010), p.18.

²⁵⁷ France Stratégie and Plateforme RSE, 'Interview with William Bourdon of October 2, 2014' (2014) *Document de synthèse du GT3 de la Plateforme RSE, Compte-rendu des auditions des juristes intervenus sur la question du devoir de vigilance [Summary document of the GT3 of the CSR Platform, Minutes of the interviews with lawyers expressing their opinions on the duty of vigilance]*

p.10, <http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/14-12-22_draft_document_de_synthese_des_auditions_du_gt3_claire_corrige_sylvie.pdf>.

need to address the contradictions between the general interest and short-term business strategies exacerbated by the financialization of the economy.²⁵⁸ They argue that the regulatory tools should have a hybrid character in order to allow for reconciliation of the divergences between the “profit motive and the public interest”. These tools need to be “dissuasive and binding, adapted to extra-territoriality, lack of transparency in corporate behaviour and diffuse decision-making”.²⁵⁹ Its members advocate for a law that will homogenize good practices and reduce unfair competition between virtuous companies already implementing a vigilance plan, and those that just use the argument as a communication tool.²⁶⁰ Thus, they are actively supporting the legal proposal on the duty of vigilance, which represents a real improvement in meeting the above-mentioned objectives.

Finally, according to the Lambert Boulard report, the proposal, as a hybrid mechanism between *hard law* and *soft law*, is not likely to undermine the CSR dynamics. Indeed, the duty of vigilance proposal uses *hard law* to require that businesses put in place mechanisms to meet the objectives of human rights due diligence, but leaves to businesses the choice of deciding what procedure they want to follow to achieve the objectives.²⁶¹ In this way, it makes human rights due diligence mandatory without affecting the spirit of voluntary CSR. Consequently, *hard law* would be able to overcome the limits of voluntary CSR.

A guarantee of legal certainty for CSR stakeholders

In the CSR field primarily ruled by soft law agreements and voluntary commitments, *hard law* can create a framework guaranteeing certainty for stakeholders. Indeed, *hard law* is essential for homogenizing the potential outcomes of an unpredictable jurisprudence deriving liability from businesses’ voluntary CSR commitments.²⁶² The *Erika* decision showed that there was an appetite for recognising the binding force of businesses’ voluntary commitments, but the following judgements did not follow the same trend, and left the CSR stakeholders in state of uncertainty regarding the potential legal effects of their voluntary CSR commitments.²⁶³ Thus, the law can put an end to the discussion by resolving the debate over when these commitments have legal binding force leading to businesses’ liability.

Moreover, *hard law* provides a guiding framework to assist judges and lawyers in their work related to sophisticated issues concerning groups and

²⁵⁸ See *supra* note 257, France Stratégie and Plateforme RSE, 'Interview with William Bourdon of October 2, 2014', p.12.

²⁵⁹ See *supra* note 38, Queinnec, Yann and Bourdon, William (2010), p.18.

²⁶⁰ See *supra* note 257, France Stratégie and Plateforme RSE, 'Interview with William Bourdon of October 2, 2014', p.10.

²⁶¹ See *supra* note 143, France Stratégie and Plateforme RSE, 'Interview with Nicolas Cuzacq of October 2, 2014', p.15.

²⁶² See *supra* section 3.3.

²⁶³ The uncertainty created by the *Erika* case, See *supra* section 3.4.2. De Shutter, Olivier, cited in Chaumeau, See *supra* note 163, Chaumeau, Christine (2014).

business law.²⁶⁴ It can provide the legal tools to deal with business and human rights cases in accordance with international instruments. Then judges would be able to use the law as a basis and adapt it to factual cases. Indeed, they have already dealt with different liabilities arising from complex damage such as that arising from car accidents. They can use their powers and means to exploit the flexibility of the law, and adapt the provisions to situations depending on the country where the company operates, and whether the damage resulted from the subsidiaries or subcontractors' activities.²⁶⁵ Consequently, the law and jurisprudence on the duty of vigilance will complement each other. The law will reinsure stakeholders and guide lawyers in balancing the interests of victims and businesses. It will also drive legal experts towards new changes in business and human rights.

A proposal in line with the evolution of the French civil law

According to different lawyers, the proposal imposing a duty of vigilance on businesses is in line with the evolution of French civil law. For Anne Danis-Fatome, the mechanisms offered by the proposal are part of a constant evolution of French civil liability since the 19th century. Such security and information obligations have already been established for professionals such as doctors, bankers, and car mechanics. A vigilance obligation also exists to prevent and mitigate environmental damage, or protect posted workers.²⁶⁶ Thus, imposing vigilance obligations on industrials and service providers operating abroad through outsourcing would fall within this movement.²⁶⁷

For Charles Hannoun, the new duty of vigilance is similar to the adoption of the modern accounting principle, creating the auditor function. At the time of its adoption, the new modern accounting was seen as a threat for French competitiveness, as it put into question French businesses' reliability. However, when we consider modern accounting nowadays, we can observe that it increased transparency and trust between actors for the achievement of a healthier economy. Thus, the new vigilance standard falls within the same spirit. It would create a human rights and environment-based accounting obligation as a condition for a fair, human and prosperous economy.²⁶⁸

For Olivier Favereau, this law contributes to the historic effort of integrating the labour force into the notion of businesses. It creates a shift in businesses' boundaries. Indeed, there is a distinction between the notion of "company" as a legal entity having precise boundaries, and the notion of "enterprise", as an economic organization without a precise content and frame. Nowadays,

²⁶⁴ See *supra* note 143, France Stratégie and Plateforme RSE, 'Interview with Nicolas Cuzacq of October 2, 2014', p.13.

²⁶⁵ See *supra* note 40, France Stratégie and Plateforme RSE, 'Interview with Anne Danis-Fatome of October 30, 2014', pp.23-24.

²⁶⁶ See *supra* section 3.4.

²⁶⁷ See *supra* note 40, France Stratégie and Plateforme RSE, 'Interview with Anne Danis-Fatome of October 30, 2014', p.19.

²⁶⁸ Hannoun Charles and Potier, Dominique, cited in: See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.27.

only the company is a proper legal entity under French law. Thus, the proposal will contribute to the efforts trying to create a new shift of businesses' boundaries in order to integrate subcontractors' employees into the notion. It focuses on the notion of "enterprise" as extending to employees working for suppliers in the supply chain. It contributes to integrating the labour force into the economic dimension of businesses in a way other than through a contract.²⁶⁹

To conclude, for these lawyers, the proposal on the duty of vigilance is in line with the general evolution of French civil law, it allows to overcome the limits of voluntary CSR, and provides a guarantee a legal certainty for CSR stakeholders. Thus, according to them, *hard law* and CSR do not contradict each other but reinforce and legitimize each other. However, although the essential role of *hard law* in regulating businesses was reaffirmed, the proposal on the duty of vigilance faced heavy criticism concerning the risks and limits it presents in meeting its main objective to hold businesses liable for their negative impacts on human rights (4.3.2).

4.3.2 The risks and limits of the proposal in meeting its objectives

Many lawyers argue that the proposal on the duty of vigilance will be risky and limited in meeting its objectives. Indeed, the duty of vigilance could create frictions with businesses' rights and freedoms. It could be an isolated unilateral legal initiative for France, or just create another reporting obligation with a limited effect.

A risk of frictions with businesses' rights and freedoms

For some lawyers, the proposal on the duty of vigilance can constitute an interference with businesses' freedom of trade and entrepreneurship. They argue that this duty of vigilance is likely to force parent or ordering companies to interfere with their partners' organization and management. Thus, it is necessary to analyse the efficiency and legitimacy of the administrative controls by the parent and ordering company over their subsidiaries and subcontractors, as well as their costs in terms of resources and administrative expenses to ensure that it does not constitute a disproportionate interference with freedom of trade and entrepreneurship. Particularly, small and medium enterprises should be protected from interference by ordering and parent companies. For these lawyers, not repairing the damage caused by businesses' activities is not socially acceptable, but autoregulation through the market is a better way to allocate resources efficiently, while still creating a prevention culture to minimise social harm.²⁷⁰

²⁶⁹ See *supra* note 141, Favereau, Olivier and Lyon Caen, Antoine (2015), p.446.

²⁷⁰ See *supra* note 147, France Stratégie and Plateforme RSE, 'Interview of Philippe Stoffel-Munck of November 3, 2014', pp.29-30.

On the other hand, the duty of vigilance can create frictions with the principle of autonomy, and separation of legal entities.²⁷¹ Many lawyers highlighted that allowing businesses to be liable for their subsidiaries and subcontractors' human rights violations, could be in contradiction with the principle of autonomy.²⁷² However, some exceptions to the principle can be justified for two main reasons. On the one hand, exceptions need to be institutionalized in order to improve the working conditions of subcontractors' employees. This exception would be locally limited and would only concern working conditions. Moreover, it would ensure equilibrium between the partnership contract and the employment contract. It would give pre-eminence to the employment contract, when its philosophy is threatened by the partnership contract. On the other hand, it follows the logical reflection on the notion of the person. In social sciences and humanities, a natural person exists through its relations with others. To the same extent, legal persons cannot survive the market without relating to other persons, whether natural or artificial persons.²⁷³ Thus, the duty of vigilance can conflict with the principle of autonomy, but legal exceptions can be created to avoid conflict with the principle.

The risk of an isolated unilateral legal initiative for France

For many lawyers, there is a risk that France would be isolated if it takes the legal initiative to legalize human rights due diligence unilaterally. Indeed, no other countries have developed such a large notion of liability on businesses with an extraterritorial dimension covering the company's partners within their territory and abroad.²⁷⁴ According to these lawyers, the response to businesses' violations of human rights must occur at the international or European level before taking domestic action.²⁷⁵ In May 2015, the General Assembly of the National Council of Bars issued a Resolution stating that the UNGP must be the reference framework for realizing business and human rights. However, the translation of these principles into *hard law* should only happen at the European level in order to avoid a lack of efficiency and coherence, and a risk for French competitiveness. They consider that the proposal does not allow its ambitions to be met and they encourage the National Assembly and the Senate to postpone the legislative process until further initiatives are taken at the EU level for the implementation of the UNGP.²⁷⁶ However, as we

²⁷¹ See *supra* note 26, *Code civil [French Civil Code]*, (2016), principle of autonomy.

²⁷² France Stratégie and Plateforme RSE, 'Interview with Laurent Leveneur of October 2, 2014' (2014) *Document de synthèse du GT3 de la Plateforme RSE, Compte-rendu des auditions des juristes intervenus sur la question du devoir de vigilance [Summary document of the GT3 of the CSR Platform, Minutes of the interviews with lawyers expressing their opinions on the duty of vigilance]* p.3<http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/14-12-22_draft_document_de_synthese_des_auditions_du_gt3_claire_corrige_sylvie.pdf>.

²⁷³ See *supra* note 141, Favereau, Olivier and Lyon Caen, Antoine (2015), p.449.

²⁷⁴ See *supra* note 245, Pietrancosta, Alain and Boursican, Etienne (2016), p.14.

²⁷⁵ See *supra* note 209, France Stratégie and Plateforme RSE, 'Interview with Catherine Kessedjian of October 2, 2014' (2014), p.6.

²⁷⁶ Conseil National du Barreau, *Entreprises et droits de l'Homme proposition de loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre [The*

have seen previously, the Rapporteur Dominique Potier brought a response to this argument, namely that France cannot wait for the EU to take a stand in this field. The evolution needs first to occur at the domestic level of Members States to incite the EU to harmonize practices.²⁷⁷ This is why France is expecting to set the standard at the domestic level while lobbying for a legal initiative by the European Commission.

The risk of creating another reporting obligation with limited effects

For Sandra Cossart and Marie-Laure Guislain, representing the Sherpa Association, the duty of vigilance is just another very bureaucratic reporting obligation. They regret that the law is not precise enough to be efficient in providing access to remedies for victims. They fear that the fixing of the vigilance plan modalities by the application decree will postpone the final application of the law. They suspect it to be a strategy from employers' organization to bury the application of the duty of vigilance. Moreover, the idea that the CSR platform should define the content of the proposal will also be of limited efficiency as it is very difficult to find a consensus between the actors on the platform.²⁷⁸ They regret that the ambitions of the first proposal had to be reduced, as it would have enabled the imposition of a real prevention obligation to be imposed, proportional to the means and powers of TNCs. Indeed, the duty of vigilance with the reversal of the burden of proof was an obligation of means and the judges could have adapted the provisions in facts according to the real resources, and material and human means available for each business. With the second draft of the proposal, the judge can only ask for the establishment of the vigilance plan, its publication or its implementation. It leads to transforming the duty of vigilance into an "upgraded reporting obligation."²⁷⁹ Moreover, they argue that the withdrawal of the presumption of fault and reversal of the burden of proof just leads to a *status quo* for the victims. In order to address the gaps of access to remedies for the victims, the proposal should remove the reference to Article 1382 and 1383 of the Civil Code, and allow the predetermination of the "link between the fault and the damage". Then, the parent or ordering company should be held jointly liable with the entity that committed the damage.²⁸⁰

Finally, they argue that the restricted personal scope of the proposal leads to a "showcase duty of vigilance". The Government cannot call this proposal the "Rana Plaza Law" if it does not cover the French groups Auchan and Camaieu, which operated in the Rana plaza premises before the accident. The notion of "established commercial relations" and the notion of control as defined under L233-16 of the Commercial Code are too restrictive and

business and human rights law proposal on the duty of vigilance of parent and ordering companies] (May 30, 2015) <http://cnb.avocat.fr/Devoir-de-vigilance-des-societes-meres-et-entreprises-multinationales-donneuses-d-ordre-visant-a-prevenir-les-atteintes_a2318.html>.

²⁷⁷ Potier, Dominique, cited in *See supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.6.

²⁷⁸ *See supra* note 226, Sandra Cossart and Guislain, Marie-Laure (2015), p.76.

²⁷⁹ *See supra* note 226, Sandra Cossart and Guislain, Marie-Laure (2015), p.77.

²⁸⁰ *See supra* note 226, Sandra Cossart and Guislain, Marie-Laure (2015), IV, pp.77-78.

too difficult to prove for victims who have unsurmountable obstacles to access evidence. The members of the Sherpa Association hope that the judges will allow the recognition of an indirect control, and victims would be able to ask the company for evidence of this control,²⁸¹ to improve their access to remedies.²⁸²

As expressed in Pierre Périn's Article, the proposal risks being of limited efficiency as only healing the symptoms of the problem, without addressing its root causes.²⁸³

To summarize this section, the genesis of the proposal creating a duty of vigilance is slowed down by a divided Parliament. Although the members of Parliament agree on the overall objective of the law, the traditional political divide and the contention on competitiveness of French companies makes it hard to find a consensus on the modalities of the proposal. Consequently, the legal framework of the duty of vigilance proposed in its latest draft is the result of a compromise between the competing interests of stakeholders. If the material scope and extraterritorial scope of the duty of vigilance are intended to fill the gaps in the current French legal framework, the limited personal scope of the obligation and the fault-based liability restrict victims' access to remedies in practice. From a legal perspective *hard law* would allow for the regulation of businesses in an efficient way, but the modalities of the proposal are either risky or limited in meeting their objectives. For the Rapporteur of the proposal Dominique Potier this compromised framework is necessary to ensure the adoption of the law, and France's ability to meet its ambitions. He said "*I prefer a law slow to hatch and having a worldwide impact than an ideal law that will never come up out of our Parliament*".²⁸⁴

Indeed, as expressed in the second Chapter, France is also planning to set a EU standard on the duty of vigilance based on the French proposal, and to lead the EU in business and human rights. Thus, the next section will assess France's potential to meet these ambitions (5).

²⁸¹ See *supra* note 226, Sandra Cossart and Guislain, Marie-Laure (2015), IV, p.79.

²⁸² See the difficulty to find evidence for victims of human rights violation by the Group Vinci, operating in Qatar for the 2022 Worldcup: See *supra* note 2, Lecadre, Renaud (2015).

²⁸³ See *supra* note 252, Périn, Pierre-Louis (2015).

²⁸⁴ Potier, Dominique cited by Laperche, Dorothee, 'Devoir de vigilance des sociétés-mères: la première pierre posée [The duty of vigilance on the part of parent companies: the first cornerstone laid]' (2015) *Actu Environnement* <<http://www.actu-environnement.com/ae/news/devoir-vigilance-societes-meres-adoption-proposition-assemblee-nationale-24238.php4>>.

5 The potential of France to set a duty of vigilance standard at the EU level

As we have seen in the second Chapter, both Rapporteurs of the proposal in the first and second reading at the National Assembly insisted on the potential of France to become a leader in the EU in business and human rights if the proposal on the duty of vigilance is adopted.²⁸⁵ Thus, we will now analyse the potential of France to meet these ambitions in light of its background in regulating businesses (5.1), and its lobbying efforts for mandatory human rights due diligence in the EU (5.2).

5.1 France's background in regulating businesses

For the past decade, France has adopted new public policies in favour of sustainable development and increased social and environmental responsibilities for both public and private actors. Indeed, in its efforts to regulate businesses, France became a model for implementing the EU directives on public procurement (5.1.1), and a forerunner of the EU directives on non-financial reporting (5.1.2).

5.1.1 A model for implementing the EU directives on public procurement

The EU acknowledged that around 14 percent of more than 250,000 public authorities' Gross Domestic Product is spent on the purchase of services, workers and supplies from companies in all different sectors.²⁸⁶ Thus, it decided to create minimum standards regulating public procurement in order to harmonize national legislation, and to promote the EU strategy for transparent, fair and competitive public procurement within the Single Market.²⁸⁷ In February 2014, the EU issued two directives on public procurement²⁸⁸ that France implemented in July 2015.²⁸⁹

²⁸⁵ See *supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.19. See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), pp.5, 9 and 17-18.

²⁸⁶ Energy, transport, waste management, social protection and the provision of health or education services, public authorities are the principal buyers: European Commission, *Public Procurement* (May 12, 2016) <<http://ec.europa.eu/growth/single-market/public-procurement/>>.

²⁸⁷ *Ibid.*

²⁸⁸ *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance 2014* (OJ L 94, 28.3.2014, p. 65–242).

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance 2014 (OJ L 94, 28.3.2014, p. 243–374).

²⁸⁹ *Act n°2015-899 of July 23, 2015* 2015 JORF [Official Gazette of France] n°0169 July 24, 2015 p.12602 text n° 38.

The requirements of the EU directives on public procurement

The directives 2014/24/EU²⁹⁰ and 2014/25/EU²⁹¹ on public procurement aim at ensuring that public procurement processes take into account social and environmental considerations such as social responsibility, climate change, employment, or public health, as common societal goals.²⁹² Under the directives, one of the main principles of procurement is that Member States must take all appropriate measures to ensure that economic operators comply with the environmental, social and labour standards established at the national, European and international level when performing a public contract.²⁹³

The directives provide different specific requirements. First, when selecting the suppliers, the contracting authorities should put in place appropriate safeguards against corruption and conflicts of interest.²⁹⁴ They should exclude suppliers convicted for corruption,²⁹⁵ or child labour and other forms of human trafficking²⁹⁶ from participating in a public procurement procedure. Moreover, the directives recommend the performance specifications include equality, social and environmental standards.²⁹⁷ When it comes to the contract award, the price-quality ratio defining the most economically advantageous tender should include qualitative, environmental and social aspects in relation to the subject matter of the contract. In that sense, the contracting authorities can consider the full life-cycle costing of the product or service when awarding the contract, in order to promote long-term value and sustainable procurement.²⁹⁸ The public authorities can also ask for certifications, labels or other equivalent evidence of social and environmental requirements before awarding a contract with social and environmental objectives²⁹⁹. Regarding competition, certain contracts in social and health sectors can be “reserved” to organizations such as mutual

²⁹⁰ See *supra* note 288, Directive 2014/24/EU (2014).

²⁹¹ See *supra* note 288, Directive 2014/25/EU (2014).

²⁹² European Commission, *EU public procurement directives* (June 8, 2016) <http://ec.europa.eu/environment/gpp/eu_public_directives_en.htm>.

²⁹³ See *supra* note 288, Directive 2014/24/EU (2014), Article 18. 2. See *supra* note 288, Directive 2014/25/EU (2014), Article 36. 2.

²⁹⁴ See *supra* note 288, Directive 2014/24/EU (2014), para 100. See *supra* note 288, Directive 2014/25/EU (2014), para 105. Crown Commercial Service, 'A brief Guide to the EU Public Contracts Directive (2014)' (2015), para.5.10, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472985/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Oct_2015__1_.pdf>.

²⁹⁵ See *supra* note 288, Directive 2014/24/EU (2014), Article 57)1b). See *supra* note 288, Directive 2014/25/EU (2014), Article 80.1.

²⁹⁶ See *supra* note 288, Directive 2014/24/EU (2014), Article 57)1f). See *supra* note 288, Directive 2014/25/EU (2014), Article 80.1.

²⁹⁷ See *supra* note 288, Directive 2014/24/EU (2014), Annex VII, 1)a). See *supra* note 288, Directive 2014/25/EU (2014), Annex VIII, 1)a). See *supra* note 294, Crown Commercial Service (2015), para.20.1.

²⁹⁸ See *supra* note 288, Directive 2014/24/EU (2014), Article 67-68; and Directive 2014/25/EU, Article 82-83.

²⁹⁹ See *supra* note 288, Directive 2014/24/EU (2014), Article 43-44. See *supra* note 288, Directive 2014/25/EU (2014), Article 61-62. See *supra* note 294, Crown Commercial Service (2015), para 5.20, 5.21 and 20.1.

and social enterprises meeting certain criteria.³⁰⁰ Finally, in the case a tender is considered abnormally low or suspected to be in breach of international environmental or social law, the contracting authorities have an obligation to seek an explanation of the price and costs proposed by the tender, and to reject it if the evidence is not satisfactory to explain the low tender.³⁰¹ These criteria represent the minimum requirements on public procurement that the EU Members States had to transpose into domestic legislation by April 2016.³⁰² France, however, went beyond these minimum requirements and became exemplary in implementing the EU directive under French law.

An exemplary implementation of the EU directives under French Law

In July 2015, the French Parliament adopted the Public Procurement Act,³⁰³ to replace the former Code of Public Procurement. The 2015 Act aims at gathering and simplifying the rules applicable to public procurement, and implementing the EU directives on public procurement in French Law.

First, the 2015 Act recalls that public procurement processes should take into account social and environmental standards, as previously stated in the repealed Code of Public Procurement. Indeed, Article 30 of the Public Procurement Act, previously Article 5 of the repealed Code of Public Procurement, requires that the public authorities take into account the Sustainable Development Goals when defining their needs.³⁰⁴ Furthermore, Article 38 of the 2015 Act, previously Article 14 of the repealed Code of Public Procurement, states that during the execution of the contract, social and environmental characteristics should be taken into account in line with the Sustainable Development Goals, in order to conciliate economic development, environmental protection and social progress.³⁰⁵

Additionally, the 2015 Act strengthens and extends the already existing social and environmental clauses in public procurement contracts. First, Article 38 of the 2015 Act recalls the possibility for contracting authorities to include in public procurement social and environmental clauses linked to the subject matter of the contract, in order to promote social inclusion and

³⁰⁰ See *supra* note 288, Directive 2014/24/EU (2014), Article 77. See *supra* note 288, Directive 2014/25/EU (2014), Article 94. See *supra* note 294, Crown Commercial Service, para 11.2.

³⁰¹ See *supra* note 288, Directive 2014/24/EU (2014), Article 69. See *supra* note 288, Directive 2014/25/EU (2014), Article 84. See *supra* note 294, Crown Commercial Service, para 20.2.

³⁰² See *supra* note 288, Directive 2014/24/EU (2014), Article 90.1. See *supra* note 288, Directive 2014/25/EU (2014), Article 106.1.

³⁰³ See *supra* note 289, Act n°2015-899 of July 23, 2015.

³⁰⁴ *Ancien Code des marchés publics [Former French Code of Public Procurement]* (2006), repealed by the Act n°2015-899 of July 23, 2015, Article 5. See *supra* note 289, Act n°2015-899 of July 23, 2015, Article 30.

³⁰⁵ See *supra* note 304, *Ancien Code des marchés publics [Former French Code on Public Procurement]* (2006), Article 14. See *supra* note 289, Act n°2015-899 of July 23, 2015, Article 38.

sustainable development policies.³⁰⁶ Secondly, Article 36 and 37 of the 2015 Act extends the mechanism of “reserved” procurements to “social and solidarity economy” undertakings. Previously, the provisions only concerned social structures employing at least 50 percent of disabled persons.³⁰⁷ Now the “reserved” market mechanism extends to inclusion structures employing a minimal proportion of so-called “disadvantaged workers” that would be defined later by application decree.³⁰⁸ The conditions that need to be met to be entitled to “reserved” procurement are: it concerns only social, health and cultural services other than defence and security services; that the objective of the undertaking is to discharge a public service linked to the subject matter of the contract; and that the undertaking was not entitled to a similar public procurement within the past three years.³⁰⁹

Finally, the 2015 Public Procurement Act extends the existing mechanism of *abnormally low tenders* to subcontractors, in order to reduce social dumping. The original mechanism was provided by Article 55 of the former Code of Public procurement, now Article 53 of the 2015 Act, which states that if a tender is considered abnormally low for the contracting authorities, they must require the supplier to provide specifications and justifications explaining the low price and costs presented by the tender. Then, the contracting authorities have to reject the tender if they still find that it is abnormally low, despite the provided justifications.³¹⁰ Now, Article 62 of the 2015 Act extends the mechanism to subcontractors, requiring that the undertakings provide information on the supply costs that are considered abnormally low. Moreover, the provisions allowing the contracting parties to pay the subcontractors directly are extended to all public procurements regardless of the contracting authorities.³¹¹ The public authorities can also ask the subcontractors to perform some tasks directly on their behalf in order to reduce the number of outsourced activities.³¹²

Consequently, most of the EU standards were already in place under French Law before the EU directives on public procurement. However, the 2015 Act on Public Procurement raised the bar in order to include more issues such as outsourcing and social dumping. France adopted exemplary measures on public procurement, and is now a model of “good practice” in this regard. In addition, France has played the role of a forerunner in the establishment of an EU directive on non-financial reporting (5.1.2).

³⁰⁶ See *supra* note 304, *Ancien Code des marchés publics [Former French Code on Public Procurement]* (2006), Article 14. See *supra* note 289, *Act n°2015-899 of July 23, 2015*, Article 38.

³⁰⁷ See *supra* note 304, *Ancien Code des marchés publics [Former French Code on Public Procurement]* (2006), Article 15.

³⁰⁸ See *supra* note 289, *Act n°2015-899 of July 23, 2015*, Article 36.

³⁰⁹ See *supra* note 289, *Act n°2015-899 of July 23, 2015*, Article 37.

³¹⁰ See *supra* note 304, *Ancien Code des marchés publics [Former French Code on Public Procurement]* (2006), Article 55. See *supra* note 289, *Act n°2015-899 of July 23, 2015*, Article 53.

³¹¹ See *supra* note 289, *Act n°2015-899 of July 23, 2015*, Article 62.

³¹² *Rendez-vous expert : L'ordonnance no 2015-899 du 23 juillet 2015 relative aux marchés publics [Expert meeting/ Act no 2015-899 of July 23, 2015 on public procurement]* (Directed by Seban et Associés, YouTube, 2015), minutes 19:52 to 28:07.

5.1.2 A forerunner of the EU directive on non-financial reporting

The non-financial reporting obligation requires large businesses to “disclose in their management report relevant and useful information on their policies, main risks and outcomes relating to at least environmental matters, social and employee aspects, respect for human rights, anticorruption and bribery issues, and diversity in their board of directors”.³¹³ France was the forerunner of the EU standard on non-financial reporting as the obligation first appeared in 2001 within the French Parliament and inspired the EU directive on non-financial reporting.

The genesis of the non-financial reporting obligation under French law

The non-financial reporting obligation on the part of companies quoted on the stock exchange operating in France was born in 2001, under Article 116 of the Law on New Economic Regulations (NER).³¹⁴ This law was initially aimed at improving businesses’ transparency and comparability in relation to businesses’ social and environmental performance. Its application conditions were specified by an application decree in February 2002.³¹⁵ In 2010, Article 225 of the Grenelle II Law³¹⁶ extended the personal scope of application of non-financial reporting to non-quoted companies.³¹⁷ In 2012, the application decree stated that, from 31st December 2013, the non-financial reporting obligation would apply to non-quoted businesses with a turnover of at least 100 million euros and employing at least 500 employees.³¹⁸

According to new Article L225-102-1 of the Commercial Code, the non-financial obligation requires these businesses to integrate information on the way that they take into account social and environmental consequences arising from their activities, as well as their commitments for sustainable

³¹³ European Commission, *Non-Financial Reporting* (July 1, 2016)

<http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm>.

³¹⁴ *Law n°2001-420 of May 15, 2001* JORF [Official Gazette of France] n°113 of May 16, 2001 p.7776, text n° 2, Article 116 creating a new Article L225-102-1 in the French Commercial Code.

³¹⁵ *Decree n°2002-221 of February 20, 2002* JORF [Official Gazette of France] n°44 February 21, 2002 p.3360 text n° 16.

³¹⁶ *Law n° 2010-788 of July 12, 2010* Journal Officiel de la République Française [JORF] [Official Gazette of France], n°0160 of July 13, 2010 p.12905.

³¹⁷ See *supra* note 316, *Law n° 2010-788 of July 12, 2010*, Article 225, modifying new Article L225-102-1 of the French Commercial Code;

³¹⁸ *Decree n°2012-577 of April 24, 2012*, JORF [Official Gazette of France] n°0099 April 26, 2012 p.7439 text n° 18: Application of the decree: By 31 December 2011 : 1 billion euros of turnover and minimum 5000 employees, by 31 December 2012 : 400 million euros of turnover and minimum 2000 employees, and by 31 December 2013: 100 million euros of turnover and minimum 500 employees: KPMG, 'Décret d'application de l'article 225 de la loi Grenelle II, publié le 24 avril [Application Decree of Article 225 of the Grenelle II law published on 24 April]' (2012)

<<https://www.kpmg.com/FR/fr/IssuesAndInsights/ArticlesPublications/Press-releases/Documents/20120521-Decret-Grenelle-II.pdf>>.

development and the promotion of diversity in the annual board of directors report. The report must comprise information regarding the parent company, as well as subsidiaries and controlled companies.³¹⁹ The Grenelle II Law extended the amount of information that businesses have to publish, and required that an independent third-party body verify the quality of the published information.³²⁰ The application decree established the list of specific information that needs to appear in the report. Regarding social information, the report must cover employment, labour organization, social relations, health and security, training, and equal treatment. When it comes to environmental information, it must comprise data on general environmental policy, pollution and waste management, sustainable use of resources, global warming, and protection of biodiversity. Finally, the information related to the company's commitments for sustainable development, must focus on the territorial, economic and social impacts of the company's activities, the company's relations with persons and organizations interested in the company's activities (for example environmental associations), and subcontractors and suppliers.³²¹ This list of necessary information is in line with the main international standards on CSR reporting, including ISO 26000, Global Compact, UNGP, OECD Guidelines, and Global Reporting Initiative.

The Grenelle II Law is the result of a large consultation process that started in 2007 with all stakeholders involved in CSR. It is innovative as modified Article 225-102-1 leaves the companies free to use the indicators they find most relevant for their business strategy. Moreover, it provides a "comply or explain" approach, which means that businesses can choose not to submit some information, but they have to provide explanations for this choice.³²² A global survey issued on CSR by the audit company KPMG in 2011, showed that France ranks fourth worldwide in non-financial reporting by large companies.³²³ According to the survey, the number of companies declaring their environmental, social and governance action shifted from 59 percent to 94 percent in three years.³²⁴ The third annual review on the implementation of the Grenelle II Law highlights a qualitative and quantitative improvement regarding disclosure of non-financial information.

³¹⁹ *Code de commerce [French Commercial Code]*, (2016), New Article L225-102-1. See *supra* note 318, *Decree n°2012-577 of April 24, 2012*, Article 1, creating Article R225-105 of the Commercial Code.

³²⁰ See *supra* note 316, *Law n° 2010-788 of July 12, 2010*, Article 225, modifying new Article L225-102-1 of the French Commercial Code.

³²¹ See *supra* note 318, *Decree n°2012-577 of April 24, 2012*, Article 1, creating Article R225-105-1 I of the Commercial Code.

³²² France Diplomatie, *La législation française en matière de reporting extra-financier [The French Law related to non-financial reporting]* (July 31, 2015)

<<http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/diplomatie-economique-et-commerce-exterieur/peser-sur-le-cadre-de-regulation-europeen-et-international-dans-le-sens-de-nos/focus-l-engagement-de-la-france-pour-la-responsabilite-sociale-des-entreprises/la-politique-domestique-de-rse-en-france/article/la-legislation-francaise-en-matiere-de-reporting-extra-financier>>.

³²³ Behind the United Kingdom, Japan, and South Africa;

³²⁴ KPMG, 'International Survey of Corporate Responsibility Reporting' (2011) <<https://www.kpmg.com/PT/pt/IssuesAndInsights/Documents/corporate-responsibility2011.pdf>>.

The only issue is that the key items and their indicators need to be more clear and specific for each sector of activities to improve homogeneity. Moreover, smaller, non-quoted businesses experience difficulties in issuing reports. Thus, the largest and quoted companies, which have more than ten years of experience with non-financial reporting, have a crucial role to play in sharing this experience with smaller businesses and improving the quality of reporting, especially regarding social issues. As a result, this non-financial reporting obligation increased businesses' accountability and transparency regarding their impacts on the environment, the economy and society in line with the ISO 26000 principles on CSR.³²⁵

A culmination of the non-financial reporting obligation at the EU level

The French experience on non-financial reporting made France the forerunner in establishing a non-financial reporting standard at the EU level. Indeed, France played a significant role in the negotiations that led to the entry into force of the 2014 EU directive on disclosure of non-financial and diversity information³²⁶ for almost 6,000 enterprises.³²⁷

The directive calls for a coordination of national provisions on non-financial reporting within the EU Member States. It emphasizes that this coordination is crucial especially when undertakings are operating in more than one Member States.³²⁸ Thus, according to the directive, undertakings exceeding the average number of 500 employees should include in their management report a non-financial statement containing information on the “undertaking’s development, performance, position and impact of its activity related to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters”.³²⁹ The directive lists the minimum requirements of this statement, which are that it must include a brief description of the business model, a description of the policies in relation to the above-mentioned matters, the outcome of those policies, a risk assessment in relation to those matters, and non-financial key performance indicators relevant to the particular business.³³⁰ This obligation is based on the “comply or explain” approach,³³¹ and should cover subsidiaries.³³²

Thus, the genesis of a non-financial reporting obligation within the French Parliament led to the requirements of the EU directive on non-financial reporting. In addition to its exemplary implementation of the EU directive

³²⁵ Fabre, Bathilde and Camille Saint Jean, 'Troisième année d'application du dispositif français de reporting extra-financier: Bilan et perspectives [Third year of application of the French scheme on non-financial reporting]' (2015) *OREE*.

³²⁶ *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups 2014* (OJ L 330, 15.11.2014, p. 1–9).

³²⁷ See *supra* note 322, Fabre, Bathilde and Camille Saint Jean (2015).

³²⁸ See *supra* note 326, EU Directive 2014/95/EU (2014), para.4.

³²⁹ See *supra* note 326, EU Directive 2014/95/EU (2014), Article 1 (1) 1.

³³⁰ See *supra* note 326, EU Directive 2014/95/EU (2014), Article 1 (1) 1. a) to e).

³³¹ See *supra* note 326, EU Directive 2014/95/EU (2014), Article 1 (1) 1.

³³² See *supra* note 326, EU Directive 2014/95/EU (2014), Article 1 (1) 3.

on public procurement, it played the role of a forerunner in establishing an EU standard on non-financial reporting and regulating businesses to ensure sustainable business conduct. Consequently, the French lawmakers are expecting to reproduce this precedent with the duty of vigilance proposal and affirm France's leadership within the EU in business and human rights. Following the launch of the legal proposal on the duty of vigilance, France intensified its lobbying efforts for mandatory human rights due diligence in the EU (5.2).

5.2 France's lobbying efforts for mandatory human rights due diligence in the EU

To succeed in its attempt to set up an EU standard on duty of vigilance, France is intensifying its efforts to find support within the European Union. As there is a lack of political will for legalizing human rights due diligence at the EU level (5.2.1), France is trying to gather support and issue a green card to encourage the European Commission to take legal initiative for mandatory human rights due diligence for European businesses (5.2.2).

5.2.1 A lack of political will for legalizing human rights due diligence at the EU level

Although there is a strong movement within the EU for achieving CSR in practice, there are no innovative incentives for legalizing human rights due diligence among the EU institutions and the EU member states.

Among the EU institutions

In its 2011 CSR Strategy,³³³ the EU recalls its commitment to the UNGP and their implementation. It affirms that a "better implementation of the UNGP will contribute to EU objectives regarding specific human rights issues".³³⁴ However, in practice, the Commission only expects European businesses to respect human rights in line with the UNGP, and invites Member States to develop their National Action Plans for the implementation of the UNGP in line with a Peer Review process.³³⁵

In its July 2015 Staff Working Document, the European Commission presented its activities aimed at implementing the UNGPs for the promotion of business and human rights within the EU.³³⁶ It recognizes the UNGP as

³³³ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU strategy 2011-14 for Corporate Social Responsibility 2011* (European Commission) COM/2011/0681 final.

³³⁴ See *supra* note 333, *European Commission Communication* COM/2011/0681 final (2011), p.14.

³³⁵ See *supra* note 333, *European Commission Communication* COM/2011/0681 final (2011), p.14.

³³⁶ *Implementing the UN Guiding Principles on Business and Human Rights - State of Play. Commission Staff Working Document 2015* (European Commission) SWD(2015)144 final.

“the authoritative policy framework” in achieving sustainable business conduct.³³⁷ It states that there have been many specific initiatives aimed at implementing States’ obligation to protect human rights under Pillar I of the UNGP, and improving access to justice under Pillar III.³³⁸ Due diligence is qualified as “one of the guiding themes of the UNGP [...] with a potential of ensure effective responsible supply chain management”.³³⁹ However, Pillar II is qualified as “corporate responsibility to respect human rights” and CSR as “the “responsibility of enterprises towards their impacts on society”, meaning that States do not have any obligations to impose that businesses respect human rights according to Pillar II of the UNGP.³⁴⁰ The EU’s only legally binding regulations and directives to ensure mandatory due diligence are the proposed Conflict Minerals Regulation,³⁴¹ the Non-Financial Reporting Directive, the Data Protection Regulation, and the Timber Regulation?³⁴² They concern only specific sectors and companies and do not provide any response for other business-related human rights abuses. Therefore, there are no planned mechanisms or incentives among EU institutions to create a holistic standard for mandatory human rights due diligence within the EU. Similarly, States have been unwilling or unable to impose legal obligations on businesses to respect human rights.

Among EU Member States

Few States Parties have been proactive in establishing their NAP, but the legal initiatives aimed at ensuring businesses’ respect for human rights are either inexistent or weak. Only the Finnish NAP³⁴³ and Dutch NAP³⁴⁴ mention considerations for a new statutory obligation on due diligence for companies, which includes legally binding measures. However, the Finnish NAP states that extending national legislation to the international activities of businesses is too challenging and does not allow for replacement of due diligence by a legally binding obligation.³⁴⁵ This identification problem was also the reason why the consultation process in the Netherlands failed to

³³⁷ See *supra* note 336, *Commission Staff Working Document* (2015), p.2.

³³⁸ See *supra* note 336, *Commission Staff Working Document* (2015), pp.36-59.

³³⁹ See *supra* note 336, *Commission Staff Working Document* (2015), p.34.

³⁴⁰ See *supra* note 336, *Commission Staff Working Document* (2015), p.22.

³⁴¹ The proposed Conflict Minerals Regulation aims at imposing mandatory due diligence checks in line with the OECD due diligence guidelines for importations of tin, tungsten, tantalum and gold and their ores from conflict zones and high-risk areas: European Parliament, *Conflict minerals: MEPs secure mandatory due diligence for importers* (June 16, 2016) <<http://www.europarl.europa.eu/news/sv/news-room/20160615IPR32320/conflict-minerals-meps-secure-mandatory-due-diligence-for-importers>>.

³⁴² See *supra* note 336, *Commission Staff Working Document* (2015), p.34.

³⁴³ Ministry of Employment and the Economy, 'National Action Plan for the implementation of the UN Guiding Principles on Business and Human Rights' (Finnish NAP No 46/2014), <<http://tem.fi/documents/1410877/3084000/National%20action%20plan%20for%20the%20implementation%20of%20the%20UN%20guiding%20principles%20on%20business%20and%20human%20rights/1bc35feb-d35a-438f-af56-aec16adfcbae>>.

³⁴⁴ Ministry of Foreign Affairs, 'National Action Plan on Business and Human Rights' (Dutch NAP April 2014) <<https://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>>.

³⁴⁵ See *supra* note 343, Finnish NAP (2014), p.25.

produce consensus on “whether the obligations of Dutch companies in relation to CSR are adequately regulated by law, or whether more specific provisions are necessary”.³⁴⁶

Under the other NAPs, States do not consider that Pillar II of the UNGP and human rights due diligence should be integrated into their domestic legal framework. Indeed, the Lithuanian NAP, under its objective two, only recalls that CSR is based on voluntary compliance and that the State encourages enterprises to secure respect for human rights.³⁴⁷ Similarly, the United Kingdom NAP recalls that it is the companies’ responsibility to respect human rights, and that the State can only provide for tools and services to help businesses in human rights due diligence.³⁴⁸ On the other hand, the Italian NAP only covers Pillar I and Pillar II of the UNGP, with no potential for State’s responsibilities under Pillar II of UNGP.³⁴⁹

When it comes to the Scandinavian States, the Danish NAP shows that Denmark shares the same ambitions as France in becoming a global front-runner in CSR,³⁵⁰ but the State is just intending to “provide guidance and encourage businesses to respect human rights”.³⁵¹ The only legal initiatives to ensure that businesses respect human rights relate to non-financial reporting³⁵² or public procurement,³⁵³ as required by the EU directives. Similarly, the Swedish NAP³⁵⁴ just issues a list of recommendations for businesses to conduct human rights due diligence, on a voluntary basis, but there are no legal mechanisms planned under Pillar II and III of the UNGP.³⁵⁵ The Swedish CSR Ambassador, Diana Madunic, explained that it appeared from the consultation process for the establishment of the NAP, that there is no strong demand for legalizing human rights due diligence in Sweden. She highlighted that Sweden is supporting the implementation of

³⁴⁶ See *supra* note 344, Dutch NAP (2014), p.28.

³⁴⁷ Permanent Mission of the Republic of Lithuania to the United Nations Office and other international organizations in Geneva, *Regarding the implementation of the United Nations Guiding Principles on Business and Human Rights*, HRC Res 17/14, UN Doc No.1801.91)580-22 (9 February 2015) (Lithuanian NAP 2015)

³⁴⁸ HM Government, 'Good business: Implementing the UN Guiding Principles on Business and Human Rights' (British NAP September 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf>.

³⁴⁹ Italian Government, 'The Foundations of the Italian Action Plan on the United Nations “Guiding Principles on Business and Human Rights”' (Italian NAP still in progress) <<https://business-humanrights.org/sites/default/files/media/documents/foundations-ungps- nap-italy.pdf>>.

³⁵⁰ Danish Government, 'Danish National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights' (Danish NAP March 2014) <http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf>.

³⁵¹ See *supra* note 350, Danish NAP 2014, 2.3, p.11.

³⁵² See *supra* note 350, Danish NAP 2014, p.14.

³⁵³ See *supra* note 350, Danish NAP 2014, 2.4, p.16.

³⁵⁴ Government Offices of Sweden, 'Action Plan for Business and Human Rights' (Swedish NAP August 2015) <<http://www.government.se/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf>>.

³⁵⁵ See *supra* note 354, Swedish NAP 2015, pp.13-17.

the UNGP through other means than *hard law*, and that it would not be willing to legalize human rights due diligence, unless the EU takes a stand in this regard.³⁵⁶

Thus, as there is no political will for mandatory human rights due diligence within the EU institutions and EU Member States, France intensified its lobbying efforts on the topic to gather support from other national Parliaments, and launched a Green card to the European Commission (5.2.2).

5.2.2 France's Green Card to the European Commission

Following the legal proposal, the Rapporteur Danielle Auroi initiated a "Green Card" procedure. The Green Card is a new informal procedure allowing EU national parliamentary groups to gather and collectively ask the European Commission to take legal or non-legal initiatives or to amend existing legislation. Through this mechanism, Danielle Auroi is thus expecting to foster a legal initiative by the European Commission in favour of a duty of vigilance on the part of businesses domiciled in Europe.³⁵⁷ Thus, the French National Assembly, first launched a European Resolution in June 2015, before seeking support from other national Parliaments on the matter.

In the 25th June 2015 European Resolution, the French National Assembly recalled the Rana Plaza drama and the existing European and international legal instruments in business and human rights.³⁵⁸ It stated that CSR is in line with the EU Charter on Fundamental Rights, and the EU policy on sustainable development, economic growth, and respect for human rights. Moreover, it explained that if the existence of NAPs show progress, their discrepancy in scope and effect do not offer a proper response to the environmental, human and social issues resulting from the global supply chains. In the Resolution, the French National Assembly criticised the limited scope of the EU directive on non-financial reporting and other regulations only dedicated to specific sectors, or businesses. It reaffirmed the necessity to harmonize CSR at the EU level in line with the French proposal on the duty of vigilance, in order to prevent severe human, social and environmental impacts resulting from businesses' activities in Europe and worldwide. It recalled its role in implementing the EU directive on non-financial reporting, and required the European Union to make CSR mandatory under EU law. It asked the European Commission to take legal initiative on a regulation that should:

³⁵⁶ Eckert, Vanina, Interview with Madunic, Diana, CSR Ambassador of Sweden (Lund-Stockholm, April 13, 2016).

³⁵⁷ See *supra* note 35, Assemblée Nationale, *Rapport n°3582* (2016), p.9.

³⁵⁸ Assemblée Nationale [French National Assembly], *Résolution européenne n°545 relative à la responsabilité sociétale des entreprises au sein de l'Union européenne [European resolution no 545 on corporate social responsibility within the European Union]* (2015) June 25, 2015.

- Apply to all businesses domiciled within the EU, and with no regard to their activities, and with a threshold that would exclude small and medium businesses, but include parent or ordering companies;³⁵⁹
- Include precise obligations for businesses under a duty of vigilance covering all human, social and environmental impacts resulting from their direct or indirect activities, and their subsidiaries and subcontractors' activities;³⁶⁰
- Have effective, deterrent and proportionate sanctions in cases of non-compliance.³⁶¹

Finally, the National Assembly called for a collective action among national parliaments to support the resolution and foster this initiative at the EU level.³⁶² On the 18th May 2016, Danielle Auroi obtained the support of three national parliaments including Estonia, Lithuania, Portugal, and five national parliamentary chambers, including the House of Lords of the United Kingdom, the Chamber of Representatives of the Netherlands, the Italian Senate, and the French National Assembly. Together, they launched a Green Card calling the European Commission to create a duty of vigilance on the part of European businesses towards individuals and communities whose fundamental rights and local environments have been adversely affected by their activities.³⁶³ If the Green Card succeeds, the European Commission will follow the Green Card, and issue a legal proposal for mandatory human rights due diligence as a first step in the European legislative process. Then, the outcome could be similar to the precedent on non-financial reporting and lead to an EU directive on mandatory human rights due diligence on the part of European businesses, reaffirming France as the leader in business and human rights within the EU.

³⁵⁹ See *supra* note 358, Assemblée Nationale, Résolution européenne n°545 (2015), 1.1), p.4.

³⁶⁰ See *supra* note 358, Assemblée Nationale, Résolution européenne n°545 (2015), 1.2), p.4.

³⁶¹ See *supra* note 358, Assemblée Nationale, Résolution européenne n°545 (2015), 1.3), p.4.

³⁶² See *supra* note 358, Assemblée Nationale, Résolution européenne n°545 (2015), 2.-4., p.4.

³⁶³ Héraut, Béatrice, 'Devoir de Vigilance: 8 Parlements européens lancent l'initiative « carton vert » [The duty of vigilance: 8 European Parliaments launch the initiative]' (2016) *Novethic* <<http://www.novethic.fr/breves/details/devoir-de-vigilance-8-parlements-europeens-lancent-linitiative-carton-vert.html>>.

6 Conclusion

The proposal on the duty of vigilance responds to a growing demand for regulating businesses, as expressed at the international level and at the national level in France. It aims at implementing the UNGP by giving legal effect to human rights due diligence, and overcoming the limits of international human rights law which does not create direct binding obligations for private actors to respect human rights. On the other hand, it is expected to overcome domestic legal barriers such as the principle of autonomy to improve access to remedies for victims in line with the National Consultative Commission on Human Rights' opinion. In that sense, the proposal on the duty of vigilance aims at allowing businesses to be held liability in cases of adverse human rights impacts when they operate abroad through subsidiaries and subcontractors. The proposal also carries France's ambitions to set up an EU standard on mandatory human rights due diligence and to become a leader in the EU in business and human rights. To meet these ambitions, the new law on the duty of vigilance has to address the gaps in the French regulatory framework applicable to business groups and networks impacting on human rights, and allow French businesses to be held liable for their subsidiaries' and subcontractors' negative impacts on human rights occurring in France and abroad.

Different mechanisms under different bodies of law already exist and can be used as a basis for legalising human rights due diligence. However, the existing mechanisms are not sufficient to meet France's ambitions as they do not cover all business and human rights cases. Indeed, the notion of a "group" recognized under different bodies of law allows businesses composing a group to be held jointly liable, but this notion is fundamentally grounded in the idea of "direct control", which excludes cases where the perpetrators of human rights abuses are subcontractors and suppliers. On the other hand, vicarious liability can be extended on the part of parent and ordering businesses towards their subsidiaries and subcontractors to cover global supply chains, but the idea was rejected for being too risky for businesses. Moreover, judges recognised the binding nature of businesses' voluntary CSR commitments to hold them liable for human rights impacts resulting from their activities in global supply chains, but this jurisprudence was isolated and its unpredictability created legal uncertainty for businesses. Finally, duties of vigilance on human rights issues already exist on the part of parent and ordering companies, but they are restricted to specific situations involving the environment and posted workers. Consequently, it appeared that the duty of vigilance is the best option to legalize human rights due diligence, but that the mechanism has to be extended in order to cover all business and human rights cases and match France's ambitions.

Therefore, to legalize human rights due diligence, the proposal on the duty of vigilance is intended to create a holistic duty of vigilance aimed at filling the gaps in the current regulatory framework. However, the genesis of the duty of vigilance is slowed by a divided Parliament. The Senate strongly rejected the law in the first reading, and it has been blocking the legislative

process since March 2016. It will examine the proposal on the duty of vigilance on 13th October 2016, but might reject it as it did one year ago. In addition, the proposal is split by the traditional political divide inherent to the legislative process regulating businesses. Although the Members of Parliament agree on the overall objective of the law to ensure that businesses respect human rights, a last point of contention persists on competitiveness. For the opponent of the proposal, the law risks undermining the competitiveness of French businesses, but the supporters of the proposal are relying on the CSR-based competitiveness argument to show that the duty of vigilance will improve another kind of competitiveness for French businesses. It is expected to replace the race to the bottom by a race to the top for a general improvement of French economy.

In this context, the legal framework of the proposal after its adoption in the second reading is the result of a compromise between the competing interests of stakeholders. On the one hand, its material and extraterritorial scope of application covers most of the human rights abuses occurring throughout global supply chains, in favour of victims. Moreover, the wide access to justice and the deterrent sanction also has symbolic value for victims currently deprived of access to remedies. On the other hand, the restricted personal scope of the duty of vigilance and the fault-based liability with the burden of proof on the claimant limit the practical effects of these improvements. Consequently, as the law proposal tries to address the gaps in the existing regulatory framework, the framework of the duty of vigilance appears as compromised by the competing interests of victims and businesses. From a legal perspective, the recourse to *hard law* to regulate businesses has been welcomed. Indeed, it allows the limits of voluntary CSR to be overcome, and provide a guarantee of legal certainty for CSR stakeholders in line with the evolution of French civil law. However, some lawyers criticised the proposal as being risky or limited in meeting its objectives. Indeed, the duty of vigilance is likely to create frictions with freedom of trade, entrepreneurship, and the principle of legal autonomy, and France risks being isolated in legalising human rights due diligence unilaterally. On the other hand, as the standard of the proposal had to be lowered to find consensus within the National Assembly, the new draft of the duty of vigilance risks being just another reporting obligation with limited effects.

Thus, although the idea of legalising human rights due diligence through a holistic duty of vigilance is an innovative and revolutionary idea to hold businesses liable for their human rights abuses occurring throughout global supply chains, the modalities of the latest draft of the proposal undermine this potential. It restrains the practical effects of the duty of vigilance and undermines access to remedies for victims. For the supporters of the proposal, this compromise is necessary to ensure the adoption of the law as a first step for regulating businesses. Then, as with the obligation on non-financial reporting, the law is intended to be extended gradually, while fostered by an international and European framework following the trend of the initial French obligation. This is why France is expecting to meet its

second ambitions to create an EU standard on the duty of vigilance, in order to support and secure its first ambitions.

Indeed, the second challenge for France will be to make human rights due diligence mandatory in line with the French duty of vigilance and become a leader in business and human rights within the EU. France has already proved to be a model in implementing the EU directives on public procurement and has already been a forerunner for the EU directives on non-financial reporting. Simultaneously with the legislative process within the Parliament, France is also intensifying its lobbying efforts for mandatory due diligence within the EU. Although there is currently no strong political will from EU institutions and EU Member States for legalizing human rights due diligence, the Rapporteur Danielle Auroi already managed to gather support from three national parliaments, and five national parliamentary chambers, and launched a Green Card on mandatory due diligence to the European Commission. This Green Card is the first small step of a very slow and complicated process that could lead to a future directive on a duty of vigilance at the European level. In any case, the support from the other European Parliaments demonstrates that there is a political will for change in business and human rights. Moreover, the other Member States have expressed an issue in identifying what human rights due diligence entails concretely, and the need for a leader that would show the way towards a new statutory obligation of due diligence (a role that France is already committed to carrying out).

To conclude, we can observe that France's ambitions to create mandatory human rights due diligence at the national level and at the EU level are intrinsically linked. As the European Union needs impulsion from Member States to take further legal initiatives, France needs support from the EU and its Member States to legitimize its actions at the domestic level. Both ambitions are interdependent and reinforce each other in an attempt to regulate French and European businesses operating globally and to achieve a "globalization with a human face"³⁶⁴.

³⁶⁴ Expression by Dominique Potier cited in, *See supra* note 1, Assemblée Nationale, *Rapport n°2504* (2015), p.35.

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