

Due diligence: has France really laid the foundations to end corporate impunity?

Friday 28 February 2020, by [COLLINET Julien](#) (Date first published: 19 February 2020).

On 24 October 2013, [the Rana Plaza disaster in Dhaka](#), the capital of Bangladesh, triggered a huge outcry. Over a thousand people were killed when the building, which housed garment factories, collapsed. The tragedy [drew attention to the conditions widely endured by workers](#) employed by the subcontractors of major brands and European companies, such as Carrefour, Mango, Auchan and Primark. None of these multinationals have since been brought to justice. The obstacle lies with the buyer relationship and the difficulty, if not impossibility, of proving that the parent companies were aware of the working conditions of their suppliers' employees.

In 2017, France became the first country to adopt a law on 'duty of care' or due diligence. For the first time, this ground-breaking legislation establishes a criminal relationship between the parent company of a multinational corporation and its subsidiaries and subcontractors in the event of human or environmental rights violations. In short, it seeks to prevent large companies from hiding behind their status as buyers.

"The Rana Plaza disaster played a significant role in raising awareness about the issue, although we had been working on this legal void for some time, as similar incidents had happened before," explains Sabine Gagnier, advocacy officer at Amnesty International France.

Historically, the impunity enjoyed by multinationals also extends to their subsidiaries. From a legal perspective, they do not exist, as Olivier Petitjean explains in his book [Devoir de vigilance, une victoire contre l'impunité des multinationales](#) (Duty of care, a victory over the impunity of multinationals):

"Where we see a coherent and autonomous unit - Total, Apple or H&M - with dozens of establishments, subsidiaries, joint ventures or other business relationships operating under its aegis and managed according to the interests of the whole, [international] law sees a nebula of separate entities."

By way of example, in 2011, a subsidiary of the oil group Chevron [was fined US\\$9.5 billion](#) by the Ecuadorian justice system for the environmental damage caused by its activities in the region. Faced with the US energy giant's refusal to accept the ruling, NGOs, for want of a legal instrument enabling them to prove the link between the parent company and its south American subsidiary, have tried to have Chevron convicted in other countries where it has operations, but to no avail.

Pioneering legislation

Passed in France, in 2017, the law on due diligence seeks to fill this legal void. It is based on the [United Nations Guiding Principles on Business and Human Rights](#), setting out the obligations held not only by companies but also by states to "identify, prevent and mitigate the human rights-related risks" linked to business relationships and activities.

[The law](#) applies to all companies operating in France that employ more than 5,000 employees in metropolitan France or 10,000 worldwide. It seeks to oblige large French companies to prevent the risks and serious violations that their activities may generate with regard to human rights and fundamental freedoms, the health and safety of people and the environment. What makes this text innovative is that this responsibility extends not only to the activities of the parent company, but also to those of its subsidiaries or the subcontractors and suppliers with which it has an established business relationship.

The strength of this law is that it is transnational, that it applies to major buyers and their supply chains at every level, as Delphine Maurel, consultant at Syndex, a consultancy firm supporting workers' representatives within companies, points out.

In concrete terms, the companies concerned are required to publish an annual 'duty of care' or due diligence plan setting out a range of preventive measures. Since most of the companies concerned are listed on the stock exchange, this information is open to the public and available on their websites or on the vigilance-plan.org website.

Three years on, however, and the success of the due diligence law is mixed. The companies concerned are supposed to have produced two annual plans, for the years 2017 and 2018. But some, such as Zara and H&M in the textile sector, or Lactalis in the food industry, have not.

"Companies are playing on the lack of clarity. The law applies to companies operating in France and employing more than 10,000 employees worldwide, but some claim that it only applies to those with 10,000 employees on French territory," explains Maurel. A multinational like McDonald's, for example, whose website boasts it has no less than 74,000 employees in metropolitan France, has not yet seen fit to take part in the exercise.

To clear up these doubts, NGOs and trade unions are asking the French government for a list of the companies required to submit a due diligence plan. "Our request remains unanswered," says Mohamed Lounas, international advisor for the French trade union confederation CGT. "The economy ministry also undertook to monitor the law. The report has been commissioned, but there's no news of it, although it should have been published long ago. It seems that they're putting on the brakes, so as not to upset the business sector."

A long political battle

It has to be said that the passing of this law was the result of a long political struggle. Backed by trade unions, the campaign was originally launched by a group of NGOs, including Sherpa, CCFD-Terre Solidaire and Amnesty International.

"Prior to the 2012 presidential elections, the NGOs had approached a number of candidates. The future president, François Hollande, had committed to make parent companies responsible for the activities of their subsidiaries," recalls Gagnier. Once the new majority was in place, the organisations carried out advocacy work with parliamentary representatives. Three socialist and environmentalist MPs then took up the issue in parliament. A bill was initially introduced in 2014 and again in 2015, but was rejected each time by the government and the Socialist Party (PS), which felt it crossed a number of red lines.

The AFEP, representing France's largest companies, lobbied hard to stop the bill, arguing it would undermine the competitiveness of French businesses. "They lobbied very hard to block it, they even wrote to Emmanuel Macron, who was the minister of the economy at the time, to say that the law was dangerous," recalls Sabine Gagnier.

The deadlock was finally broken when Macron, not yet president, who was reluctant to see the bill enacted, left the government in August 2016. “It was François Hollande himself who pushed for the process to be sped up. Probably out of political expediency, because he was thinking of running again at the time and that this may help with his re-election,” continues the Amnesty representative. The law was passed on 21 February 2017, in the final weeks of the five-year term. It is very rare, in France, that a bill promoted by civil society and taken up by parliament is adopted.

Three years later, mixed results

The due diligence plans have to cover a number of different elements, including a risk map, covering any hazards involved in the company’s activities, procedures for assessing subcontractors and measures to mitigate the risks. The law also requires that an alert mechanism be put in place. This mechanism must enable employees, NGOs and also, for example, people living in the vicinity of a construction site or factory, to inform companies of any unidentified risks or adverse effects that may arise from their activities.

Huge disparities have been found between the plans presented, as shown in a study published by a group of associations. “There are some that map the risks in great detail, but the majority only cover very general risks,” says Gagnier. “They might explain that there are risks of child labour or forced labour, but without giving any indication of the places or the names of the structures where these risks exist. At best, they may specify a continent, but it is far too vague. They should also present the measures required to address these risks.”

The alert mechanism is also problematic, all too often limited to providing an email address to which concerns can be sent, without any information about how alerts are dealt with or what languages are covered. “We don’t know who they are being addressed to. It is often the management or the HR department. How can employees be expected to make use of the system under such circumstances?”

Jurisprudence could strengthen the law

The law is above all based on requirements in terms of means rather than results. For instance, a multinational corporation responsible for an environmental disaster, or whose subcontractors employ child labour, may not be convicted if it can prove that it had a plan in place to prevent such risks. This watered-down version was the price paid to see the law enacted.

The law also has to be seen in the context of the vast body of legal texts protecting the interests of big business, including the various free trade agreements. Moreover, France’s future adaptation of the EU directive on the protection of ‘trade secrets’ poses a serious threat to the progress made with the law on due diligence.

France’s NGOs are nevertheless anticipating a good number of court convictions and intend to monitor the ensuing case law very closely. In the first bill presented, fines of between €10 million and €30 million were foreseen in the absence of a due diligence plan and damages. In the bill finally adopted, no amount is specified. “This could represent an opportunity, because the courts could decide on even higher penalties,” says Gagnier.

The first legal case was launched in November 2019, over [Total’s activities in Uganda](#). Aside from violating the right to food, the oil group’s operations in the region are alleged to have led to the seizure of land and homes from thousands of people. NGOs are using the law on due diligence to file action against Total for failing to monitor the methods used by its subcontractors in the country to acquire land. On 30 January 2020, however, the Nanterre High Court declared itself not competent

to rule on the case, considering it to come under the jurisdiction of the commercial court. “It’s very bad news. We are going to move towards a minimal interpretation of the law,” says Juliette Renaud, head of the Friends of the Earth campaign on regulating multinationals. Commercial courts tend to rule in favour of companies, as their judges are elected by their peers.

Despite this setback, is the French law likely to have a domino effect internationally? The idea certainly seems to be gaining traction in several European countries, especially amongst civil society. A bill has already been tabled in Switzerland, but is stuck at parliamentary level. The situation is similar in Germany, where environmentalist and leftist parties have been pushing for legislation. Although their legislative proposals have not prospered, the German government has not ruled out presenting a bill in the future. Discussions are also taking place within the [United Nations on introducing a legally-binding instrument to regulate the activities of multinationals](#). Progress is, however, very slow, with countries such as the United States, Russia, China and Brazil doing everything they can to block the process.

“Even the European Union is putting up obstacles,” explains Renaud. France, for its part, is trying to promote its law at international level. “It is using it as a diplomatic weapon, but it is more a matter of communication,” says Maurel.

This story has been translated from French.

Julien Collinet

[Click here](#) to subscribe to our weekly newsletters in English and or French. You will receive one email every Monday containing links to all articles published in the last 7 days.

P.S.

Equal Times

<https://www.equaltimes.org/due-diligence-has-france-really?lang=en#.XlioI6gzaHu>