BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT

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Corporate Due Diligence and Civil Liability: Some practical insights from the French Experience

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Transcript of the intervention by Christian Dargham and Solène Sfoggia in the webinar on Corporate Due Diligence and Civil Liability organised by the Nova Centre on Business, Human Rights and the Environment with the support of the Portuguese Presidency of the Council of the European Union in partnership with the British Institute of International and Comparative Law, the Portuguese Ombudsman (Provedor de Justiça), the Teaching Business and Human Rights Forum, and NOVA 4 The Globe on the 28th of January 2021.

Question: *How is the French Law on the duty of vigilance working in terms of connecting due diligence to corporate liability*

(Christian Dargham) First of all, we now have a kind of accountability Professor Ruggie was referring to at the beginning of the session and we have some concrete actions. Indeed, the French Duty of Vigilance Law is a law enacted in March 2017 that makes it mandatory for French companies that have either more than 5000 employees in France or 10 000 employees globally to identify and prevent severe impacts on human rights and fundamental freedoms, health, safety and environment resulting from their activities, as well as from their controlled companies, subcontractors and suppliers' activities. It is very concrete.

The law provides for five monitoring measures to be put in place. The first one is a risk mapping in terms of human rights; the second, a process for regular assessment of the situation of the subsidiaries, subcontractors or suppliers with whom there is an established commercial relationship, in light of the risks that have been identified in the risk mapping; the third, tailored actions to mitigate risks or prevent severe impacts; the forth, an alert process (whistleblowing); and fifth, a system for monitoring the implementation of these measures and evaluating their effectiveness. There is a kind of concrete guidelines to what is expected.

How is it linked to civil liability? In two ways. First of all, a company that fails to design and to put in place this Vigilance Plan could be put under notice for a three-month period by any stakeholder that has an interest (NGOs, Trade Unions, Public authorities, etc.) to regularize the situation and to put in place the Vigilance Plan. Otherwise, the stakeholder can go to court and ask the company to do so under penalty. The second way is a more classical tort

liability: when a company has not put in place the Vigilance Plan and this Plan could have avoided or prevented the damage that happened, the company can be liable. This requires the existence of a link between the lack of putting in place that plan and the damage.

There are very concrete aspects here. I would say perhaps at this stage the most important one is the reputation one. Each time there has been either a dispute or notice that was delivered, it became public. Many French companies are now under pressure in this respect and let me say two words about this. Accountability is absolutely key, but it needs to come with two things. First of all, concrete guidance. I will give you a quick example. In France we had, at the same time than this Vigilance Law, the Law on Anti-corruption. There is a specific dedicated authority in France (the French Anti-corruption Agency) that came with very specific guidelines and recommendations. In this area that is still new to a lot of companies, there is a real need for things that are concrete, for example, how to conduct the risk mapping, which is an exercise that is not easy. The second thing that is absolutely key as well is a kind of fairness in terms of competition. A lot of French companies now say that they have an economic burden (not all of them are approaching this negatively, just to be fair) and their competitors do not. To convince companies to go beyond cosmetic things they also need to feel that everyone is treated the same.

Question. *In your practical experience, how could a civil liability enforcement mechanism be valuable for companies, as well in terms of aligning with their responsibilities under the United Nations Guiding Principles on Business and Human Rights?*

(Christian Dargham) First of all, there is a need for accountability. Secondly, awareness. This is a new area and when you go into the companies and discuss with people, for example, when conducting a risk assessment, you see that they are not all aware of what human rights are really. For them, human rights are about politics and something very abstract. By raising awareness, you work with them and help them identify their concrete human rights issues and how they could have a remedy to them. The more they discover, the more – in their vast majority – they want to prevent bad things from happening, although sometimes there are some people who are aware and still do not want to make the effort to allocate resources.

The last two points are the carrot and the stick. The carrot is that more people (the stakeholders, the clients, the employees, etc.) wants to work in clean companies, so it is used as a competitive differentiator. There are 4 or 5 French companies that are really active in this area and leaders of the markets. They are aware that things need to be 'clean'. The stick is, of course, the risk of prosecution and having a negative media coverage.

I think PWC conducted a study two years ago that showed that CEOs had to leave their position in the vast majority of cases not because they have not met the financial targets, or been inconsistent with the policy of the shareholders, but for ethical issues. This is something that people listen to more carefully than three, four or five years ago.

Question. *What does it mean in terms of advising companies and in particular has the kind of advice you give companies changed since the introduction of the French Duty of Vigilance Law?*

(Solène Sfoggia) We saw a real change compared to our practice even just three years ago where this topic was often considered as accessory. As Christian said, this Law closely follows the Law on Anticorruption in France that requires companies to have an anti-corruption plan. In light of these two laws, in three years, it is quite striking to see how companies now invest more time and resources to this challenge. They really structure their way to address these issues, meaning that they now have compliance officers, compliance teams, follow-up committees, policies, due diligences processes, etc.

In terms of advice, we see that companies now request our help on a daily basis (to help them on their risk identifications, processes, trainings, follow-ups committees, etc.) but also on specific projects and strategic decisions in terms of human rights impacts, which is an important aspect as well.

In this respect, it is interesting to note that this law did not only impact large companies (the companies subject to this law), but also many small and medium companies. In fact, these small companies and suppliers sometimes cannot work with instructing companies anymore if they do not meet their standards and compliance requirements. As such, even the small companies who are not subject to this law can ask us to help them improving their compliance and human rights policies to be able to continue working with these instructing companies.

In a French case one year and a half ago, the French Court confirmed that an instructing company could terminate its relationships with a supplier that did not meet the compliance standards that was required, without being liable for the sudden termination of established relationships. The Law had very concrete impacts on a large scope of companies, and we can hope that this virtuous circle will keep growing.

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