

THE DUTY OF VIGILANCE LAW

THIS NEW LAW ALLOWS UNIONS TO HELP DEVELOP VIGILANCE PLANS TO PREVENT HUMAN RIGHTS AND HEALTH AND SAFETY VIOLATIONS AND ENVIRONMENTAL HARM.
EXPLANATION.

The law of March 27, 2017 is an important step toward fairer globalization. By requiring large companies to develop “vigilance plans” to prevent human rights and health and safety violations and environmental harm that may be caused by their operations, it fills a legal void in the area of corporate accountability. In concert with the NGOs in the Forum citoyen pour la RSE [Citizens’ Forum for CSR (corporate social responsibility)], the CFDT worked hard throughout the long legislative history of the bill on a duty of vigilance for parent companies and subcontracting companies.

Our hard work paid off. The law was passed and a certain number of the CFDT’s concerns were taken into account : stakeholders will be involved in developing vigilance plans, and unions will play a special role in the whistleblowing procedure.

“DUTY OF VIGILANCE”: WHAT ARE WE TALKING ABOUT ?

WHAT IS A VIGILANCE PLAN?

The law provides for instituting “vigilance plans”: a vigilance plan is a system designed to prevent human rights and health and safety violations and environmental harm.

It must be developed with a company’s stakeholders, the first of which are the unions, and it must have the following five components :

- a risk map,
- a procedure for regularly evaluating subsidiaries, subcontractors, and suppliers,
- appropriate risk reduction procedures,
- a whistleblowing system developed jointly with the representative unions, and
- a system for monitoring the measures taken and assessing their effectiveness.

WHICH COMPANIES DOES THE LAW TARGET?

The law sets out two application thresholds. The obligation to develop a vigilance plan applies to :

- parent companies that have their registered office in France and have 5000 employees in their group (in the parent company or in its direct or indirect subsidiaries located in France);
- parent companies that have their registered office in France or abroad, have 10,000 employees in their group, and have direct or indirect subsidiaries in France or abroad. In other words, if the parent company’s registered office is in France, the law applies. If its registered office is located elsewhere but it has subsidiaries in France, the law must apply.

WHAT MUST A PLAN COVER ?

Vigilance plans must cover all subsidiaries, subcontractors, and suppliers with which the company has a commercial relationship, whether in France or elsewhere.

WHEN DOES THE LAW BECOME EFFECTIVE ?

Companies subject to the law must start complying with this new obligation in 2018 (first annual report following publication of the law).

WHERE WILL THE VIGILANCE PLAN BE PUBLISHED ?

The vigilance plan and implementation report must be made public and included, along with the statement on extra-financial performance, in the board of directors’ annual management report concerning the company.

WHAT REMEDIES ARE AVAILABLE ?

The law provides for two types of remedies :

1-An injunction requiring the company to comply with its obligations :

This remedy may be sought if the company breaches its obligation to develop and implement a vigilance plan. The law provides for a two-step procedure.

First, after seeing that there has been a breach, a party with standing (an employee, union, NGO, etc.) sends written notice to the company to comply with its vigilance plan obligation.

In other words, if the company has not yet developed and implemented a vigilance plan, it is put on notice to quickly comply with that obligation.

Second, if the company does not comply within three months, “anyone who can prove standing” can take legal action. The relevant court must enjoin the company to comply with its obligations, subject to a fine if necessary (that is, by ordering the company to pay an amount of money for every day of delay).

2-A suit to hold the company liable if harm has occurred :

a company may be held liable where harm has been caused by a subsidiary or subcontractor located in France or elsewhere and such harm could reasonably have been avoided by implementing an effective vigilance plan (that is, a plan that includes reasonable measures). In such a case the company is held liable for tort pursuant to French Civil Code articles 1240 and 1241. The victim must prove :

- **wrongful conduct** : for example, there was no vigilance plan, it was defective, or it was not implemented;
- **harm**, and
- **a causal link** between the wrongful conduct and the harm.

WHO MIGHT HAVE STANDING TO SUE ?

Anyone who can prove standing can file a tort suit. It is therefore foreseeable that a person who lives in Bangladesh and works for a subcontractor might be a victim. That victim can file a suit for lack of vigilance in a French court against a parent or subcontracting company located in France. The legal proceeding may also be initiated by a French or foreign NGO, or even a union, to defend the rights of victims of harm caused by a subcontractor located outside France.

Direct and indirect victims of harm caused by a breach of the vigilance obligations set out in the law.

Unions : to defend the general interest of employees or of an occupation (for example, violation of the right to join or to choose a union, discrimination, or forced labor). In addition, a representative union may take legal action in the place and on behalf of an employee without having to prove it was appointed to do so (this is called an action en substitution, where the union substitutes for the employee), but only in specific areas (including discrimination, concealed work, and dismissal for economic reasons). The union must inform the employee, who must not object to the substitution.

Not-for-profit organizations and NGOs : the purpose of such organizations, as stated in their bylaws, determines whether or not they have standing.

WHAT ARE THE PENALTIES?

Courts can order companies to pay fines (money) if they do not fulfill their obligation to develop and implement a plan. But where harm has occurred, the court will order a company that has breached its vigilance obligation to compensate the victim(s) for the harm suffered. In that case, the company must pay damages and may also be ordered to provide in-kind compensation.

Details of penalties:

- **finances** (see above),
- **damages** (the court assesses damages according to the usual tort rules, that is, full compensation of the victim);
- **in-kind compensation** (for example, the court may order a company to render the buildings in which its subsidiary or subcontractor conducts operations compliant with safety standards);
- **publication of the ruling :** if a company is held liable, the court may also order publication, dissemination, or posting of the ruling or of an excerpt.

INCLUDING UNION MEMBERS IN THE DEVELOPMENT OF THE VIGILANCE PLAN

The law provides that the vigilance plan may be developed “in cooperation with the stakeholders,” and unions are at the top

of the list of stakeholders. Even though including them is not required, unions have an important role to play in developing and monitoring vigilance plans. Moreover, the law requires that vigilance plans include a system that enables whistleblowers to report on potential risks or actual harm, and **that system must be devised jointly with the representative unions.**

AT WHAT LEVEL ?

National union activity provides various ways for members to contribute to and be involved in developing the vigilance plan, regardless of their activity level. One of the key activities is to negotiate the plan’s content and the appropriate consultation level.

The central union delegates (CUD) must negotiate a group agreement.

That agreement must :

- provide that the group’s Social and Economic Committee (SEC) will be consulted with respect to the strategic direction; and
- explain how the opinion of the group’s SEC will be transmitted to the SEC of each of the group’s companies and establishments, as well as to the board of directors or the supervisory board of the group’s main company.

At the European level : the role played by the European Works Council (WC).

If a company falls within the scope of the duty of vigilance law, the CFDT recommends that during a meeting of that body, members of the European WC ask management about instituting such a plan and about how they will be involved in both developing that plan (risk identification and prevention, and whistleblowing systems) and monitoring its implementation. Members of these committees who represent employees in the different European Union member states, and even in countries outside the European Union (as observers), have specific experience and can help identify a subsidiary’s risks and prevent them.

At the global level : the group’s worldwide committee.

We recommend the same thing as for the European WC.

On committees that monitor international framework agreements (IFAs) : see below how vigilance plans are related to IFAs.

THE ROLE OF INTERNATIONAL UNION COOPERATION

The duty of vigilance law is **another way to improve the international social dialogue.** To do so, parent-company union members must work with production-chain union members in France and abroad. To foster such cooperation, a network has to be set up. The networks of the International Trade Union Confederation and the European Trade Union Confederation, which the CFDT is a member of, can be particularly helpful.

The CFDT can also rely on **the international trade union federations.**

AND IN VERY SMALL, SMALL, AND MEDIUM-SIZE COMPANIES?

How can a subcontractor's employees be involved in the vigilance plan ?

Vigilance plans may concern VSEs/SMEs that are subsidiaries or subcontractors of a company that falls within the law's scope. The orders provide that in companies that have fewer than 300 employees, unless there is a specific agreement, an industry-wide agreement can provide for the organization, architecture, contents, and operating methods of the Economic and Social Database (ESD).

How ? What tools can be used ?

What is the relationship between a vigilance plan and an IFA ?

International framework agreements elaborated as part of the international social dialogue between multinationals and workers' representatives can be used as models for such companies' vigilance plans because they contain provisions on how they will be monitored and how disputes will be resolved.

What should the relationship be between vigilance plans and ESDs ?

The orders of September 2017 allow labor-relations partners to negotiate their social program, in particular the schedule for and the contents and level of consultations, as well as the contents of the ESD. CFDT members should negotiate the ESD through a group agreement.

If there is no group agreement the company constitutes the ESD, and in companies that have a central SEC, the ESD includes information that the employer is making available to that central SEC and to the establishments' SECs. Without prejudice to the obligation to create a company ESD, a group agreement can provide for creating a group-level ESD and for how the ESD will be organized and structured and what its contents will be. Useful indicators must be defined, such as :

- **Subcontracting** : information that makes it possible to assess the degree of interdependence between the

subcontracting company and the subcontractor.

- **Suppliers** : information on whether the purchasing policy takes social and environmental issues into account.
- **Service providers** : reasons for using them, volumes, costs, safety and security measures, working conditions for providers' employees, reference to social and/or environmental conditions in calls for service-provision bids.
- **Environmental investment** : investment in sustainable development and in CSR.

QUESTIONS TO ASK YOURSELF

Is my company subject to this law ?

What must the vigilance plan cover ?

Does the company have subsidiaries, subcontractors, or suppliers ? In what countries? Are there unions in those companies ?

As a reminder, a vigilance plan has 5 components :

- a risk map (risk of human rights and/or health and safety violations and/or of environmental harm caused by a company's operations),
- a procedure for regularly evaluating subsidiaries, subcontractors, and suppliers,
- appropriate risk-reduction measures,
- a whistleblowing system developed jointly with the representative unions,
- a system for monitoring the measures taken and assessing their effectiveness.

How can union members be involved ?

- When developing a vigilance plan, it is essential that you work with all employee representatives to obtain the concrete information you need to conduct a critical analysis of the entire plan.
- Employee representatives can provide the indicators and the means for monitoring the measures taken and assessing their effectiveness.