

New French law imposing due diligence requirements in relation to human rights, health and safety, and the environment

A bill imposing new due diligence requirements on large companies was adopted by France's National Assembly on 21 February 2017, although it must yet survive review by the Constitutional Court before coming into effect.

Adoption of the bill comes two years after the collapse of the Rana Plaza in Bangladesh that killed more than a thousand people. This bill is aimed at preventing similar catastrophes from occurring by creating new, specific due diligence obligations for large French companies regarding their activities, and those of their subsidiaries and entities within their supply chain, that may result in serious violations of human rights, health and safety protections and the environment.

The bill was pushed by the Government and received strong popular support but was faced with equally strong opposition from the Senate. According to the Senate and most French economic actors, the bill:

- will place a significant and unique burden on French companies. French businesses subject to the requirements will incur costs of compliance and liability risks that could place them at a significant commercial disadvantage as compared to their competitors;
- is unnecessary, given Directive 2014/95/EU of 22 October 2014 that already requires certain large entities to disclose information on their CSR policies. However, the non-financial reporting requirements of the Directive

(see our briefing, [here](#)) are far less prescriptive and onerous than the requirements of the bill. The Directive's reporting requirements may encourage enhanced due diligence in relation to human rights, health and safety and environmental risks, but are readily contrasted with the bill's mandatory features, the scope of its requirements and the potential liabilities for breach, as described below;

- lacks precision and clarity, which will make it very difficult for companies to know exactly what they need to do to comply with their new obligations.

Less than three months ahead of the French Presidential elections, and just before Parliament breaks, the adoption of this text demonstrates the

strong political will of the current parliamentary majority.

However, the constitutionality of the law has been challenged and the French Constitutional Court has one month (i.e. until 23 March 2017) to decide whether it complies with the Constitution. The law will enter into force only if and to the extent that it is approved by the Court. The Court may uphold or reject the bill in its entirety, or could decide to uphold only parts. The Court may also make pronouncements on how the requirements of the bill should be interpreted and applied.

Subject to the outcome of the challenge before the Constitutional Court, here is what the law says:

Which companies are subject to the new requirements?

All *sociétés anonymes* (SA) and *sociétés par actions simplifiées* (SAS) headquartered in France that employ at least 5,000 employees (including employees of French subsidiaries of the company) or that employ at least 10,000 employees (taking account of both French and foreign subsidiaries).

Scope of the new due diligence requirements

Companies subject to the requirements of the new bill will have to draw up a "due diligence plan" ("plan de vigilance"), which must be implemented "in an effective manner". The due diligence plan must include "reasonable measures" to identify risks and to prevent violations of human rights and fundamental freedoms, health and safety and damage to the environment that might result from the activities of the company, its subsidiaries and companies that it controls.

The scope of the due diligence plan will be extensive because it will also be required to encompass activities of subcontractors and suppliers with which the parent company and its subsidiaries have an "established commercial relationship".

The plan is to include "risk mapping", "assessment procedures", "risk mitigation actions" and an alert or reporting mechanism together with a plan to monitor and evaluate the effectiveness of measures taken under the plan.

The plan and the report of its effective implementation are to be published in the management report of the board of directors and available to the annual general meeting of shareholders.

The plan is to be implemented in collaboration with the stakeholders of the company, notably unions. The notion of "stakeholder" is not defined in the law; it is likely that a decree will provide some precision on this aspect.

The text of the bill also authorizes the government to supplement the required elements of the vigilance plan.

Enforcement

Should a court find that a company has failed to comply with its obligations under the new law, it may direct the company to do so and may also impose a civil fine of up to 10 million Euros. The judge will have discretion to decide the appropriate level of fine depending on the circumstances, including the seriousness of the breach and the "personality" of the offender.

Defaulting companies may also be held liable for damages suffered by victims as a result of non compliance with these new obligations. In accordance with general tort law principles, liability will depend on the demonstration of "fault" on the part of the company and a causal link between this fault and the loss. Should a defaulting company be held

liable to victims, the amount of the civil fine imposed by the court may be increased up to 30 million Euros.

Observations

This law is understood to be the first to impose specific due diligence requirements on businesses in the human rights area.

There has been increasing pressure for such legislation in the aftermath of events such as Rana Plaza, to provide legal 'teeth' to the corporate responsibility to conduct human rights due diligence that is an integral part of the 2011 UN Guiding Principles on Business and Human Rights.

The new French law is also significant in placing a direct duty upon a parent company to create a due diligence plan that applies not only to its own operations, but also to those of its subsidiaries and suppliers. It also responds to increasing pressures on governments to regulate corporate activity where they may influence behaviour both inside and beyond their territory.

The French law is particularly interesting in its extension of duties and potential liabilities beyond the corporate group to encompass suppliers as well, although such extension would raise significant practical questions for the companies subject to such requirements. In that respect, compliance would be particularly challenging and potentially open-ended, and this is likely to be a major feature of any constitutional challenge.

The judgment of the Constitutional Court will be awaited with great interest by French businesses, and others who may be affected by it.

Authors



Thomas Baudesson
Partner

E: thomas.baudesson
@cliffordchance.com



Rae Lindsay
Partner

E: rae.lindsay
@cliffordchance.com



Charles-Henri Boeringer
Counsel

E: charles-henri.boeringer
@cliffordchance.com



Arnaud Constans
Associate

E: arnaud.constans
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance, 1 rue d'Astorg, CS 60058, 75377 Paris Cedex 08, France

© Clifford Chance 2017

Clifford Chance Europe LLP est un cabinet de sollicitors inscrit au barreau de Paris en application de la directive 98/5/CE, et un limited liability partnership enregistré en Angleterre et au pays de Galles sous le numéro OC312404, dont l'adresse du siège social est 10 Upper Bank Street, London, E14 5JJ.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.