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NATIONAL ASSEMBLY

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FOURTEENTHLEGISLATURE

Registered by the President of the National Assembly on 6 November 2013

LEGISLATIVE BILL

*relating to the **duty** and **vigilance** of **parent** and subcontracting companies*

(Referred to the Commission of Constitutional Law, of the Legislation and General Administration of the Republic, save for the formation of a special commission within the timeframe provided in articles 30 and 31 of the Regulation.)

submitted by

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EXPLANATORY STATEMENT

LADIES, GENTLEMAN,

In compliance with the Guiding Principles on Business and Human Rights[1] unanimously adopted by the United Nations human rights council in June 2011, and in accordance with the OECD guidelines, the objective of this bill is to establish an obligation of due vigilance on behalf of **parent and subcontracting companies** with respect to their subsidiaries companies, subcontractors and suppliers. It is thus about making multinational corporations aware of their responsibility to prevent the incidence of

[1] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

dramas in France and abroad and to obtain compensation for victims in the event of damages detrimental to human rights and the environment.

With increasingly globalized and complex supply chains, multinational corporations now play a major role in global economic governance and in international trade. Though the development of world trade contributes to the reputation and economic development of the countries involved, it is clear that this is sometimes accompanied by certain practices that have a negative impact upon human rights and the environment. These practices may constitute an obstacle to economic and human development, as well as a downward pressure on our national standards of social protection, human rights, protection of biodiversity and the environment, and more generally, ethics in business.

On 24 April 2013, a building containing several textile factories collapsed in Bangladesh: 1, 129 people were killed. Thousands of others have been left permanently disabled and unable to work again. Labels belonging to important French and European clothing brands, for which the Bangladeshi subcontractors were working, were found in the debris. Outsourcers have, on occasion, denied their relationships with these subcontractors, proof that they are not in full control of their supply chain.

Over and above this tragic event, examples, recent or not, are cause for concern. Some sectors are particularly affected, such as the extractive sector, which alone could be responsible for 28% of human rights violations committed by companies according to Professor John Ruggie, former Special Representative of the United Nations Secretary General for Human Rights and transnational corporations.

Yet under law, each entity of the group is considered as independent and as having no legal connection to the parent company. Today, if the subsidiary of a European multinational corporation, which is based outside of European boundaries, does not comply with present legislation, commits human rights violations, or causes irreversible environmental damage; this does not entail the legal liability of the parent company. This legal partitioning prevents victims referring their cases to French or European judges even though it is sometimes the decisions of parent or subcontracting companies who are at the origin of the damage.

In response to this problem that extends beyond our borders, many international initiatives, actively supported by France, have specified the need to make economic actors aware of their responsibilities in order to prevent human rights violations and environmental damage in the context of global economic trade.

In June 2011, following a study of nearly twenty years, the United Nations human rights council unanimously adopted the Guiding Principles on Business and Human Rights, with the clear support of French diplomacy. This text has created an obligation for States to protect citizens from the adverse impacts that multinational corporations can have upon human rights. It requires companies to ensure compliance with these rights by the implementation of procedures of "due diligence". The implementation of these principles now depends upon the political will of each state, in the opinion of Professor John Ruggie.

For its part, the OECD has reinforced its Guidelines for Multinational Enterprises, a set of recommendations regarding the conduct of companies as far as human rights and the environment are concerned. Henceforth, OECD member countries will now have National Contact Points, which can be referred to in case of a breach of these guidelines.

Finally, at a European level, the European Commission strongly encourages States to transpose UN Principles into their national law. Thus, on 5 December 2012 the Committee on Foreign Affairs issued a notice explicitly requesting that "the rules of due diligence regarding human rights and the supply chain be established at an EU level [...] particularly in sectors likely to have a significant impact, positive or negative, upon human rights such as global and local supply chains, minerals from conflict zones,

externalisation, land confiscation and areas wherein the labour law and the protection of workers are insufficient as well as production zones that are dangerous for health and the environment. "

The ISO 26000 standard goes beyond the aforementioned texts, because it evokes the notion of the "sphere of influence". This concept goes beyond the relationship of control or domination that a company can maintain with its subsidiaries and subcontractors, since it includes the political, contractual or economic relations through which it can influence the decisions or activities of other companies, entities or individuals.

In addition to this international context, which calls for the establishment of an obligation of due vigilance for parent companies, in France, there is also an equally promising jurisprudential context. Thus, in the Erika case, the Court of Cassation (ruling of 25 September 2012) not only recognized the jurisdiction of the French courts to judge developments outside of French territory, but the parent company was also found to be guilty for the actions of one of its subsidiaries on the basis of a voluntary engagement regarding the control procedures regarding the Condition Assessment Scheme (CAS). This negligence was penalised.

In the case of Areva against Venel, tried in the Melun Labour and Social Security Court on 11 May 2012, the parent company was recognised as a co-employer of its subsidiary COMINAK mainly on the basis of a voluntary commitment which helped justify the responsibility of the parent company for the occupational disease contracted by an employee of its subsidiary. On 24October, the Court of Appeal unfortunately reversed the judgement of the court of first instance, highlighting the legal uncertainty linked to the instability of jurisprudence. That is why it is important to transpose the obligation of due vigilance into French law, both in the interest of victims and in that of companies, in order to clarify the relevant rules and reduce this legal uncertainty.

In view of the international, European and French context, it is a good time to establish a due prior to commercial negotiations
trade to prevent damages, to the utmost extent, and to provide for an accountable government in case such damages should occur. That is the whole purpose of this bill, which transcribes the French diplomatic commitments into French law and clarifies the current legal climate, with the objective to promote respect towards human rights and environmental standards in globalised trade.

This legislative bill intends to recognize that every company has an obligation of due vigilance, which indicates that the company must be aware of the impacts that its activity can generate, even indirectly. This obligation of due vigilance consists of an obligation dependent on means, which signifies that a company is exempt from liability if it proves that it has put in place necessary and reasonable measures to prevent damages.

With regards to civil liability, there are already a number of principles of prudence and vigilance in our laws, inspired by the desire to ensure the safety of persons and property and to ensure the effectiveness of activities that are beneficial to the community. The obligation of due vigilance applies to all types of activities and is an imperative for all individuals in all instances. It requires ensuring the safety of others, but also ensuring one’s own safety and the respect of property, including those of an environmental nature. The obligation of due vigilance must even be taken into account vis-à-vis third parties. For example, the carefulness required of a professional in the practice of his profession is assessed on the uses of this profession, means at his disposal when acting and the attitude that would normally be expected in being a "good professional in one’s own field.”

Due diligence, meanwhile, falls within the principle of anticipation. Thus, a professional should not passively await risky events. In certain sectors, vigilance is increased due to the nature of the acts, particular everything safety-related. This means considering all incidents that could potentially disrupt the performance of a contract, or cause injury to others, in order to prescribe solutions in advance. The idea

proposed here is therefore to extend this principle of vigilance to all types of persons and to all types of companies in their commercial and economic relations.

Similar principles have been transposed into national legislation, in Europe or internationally.

- In the United Kingdom, the UK Bribery Act and Foreign Corrupt Practices act provide that there is infringement when corporations do not fulfill their obligation of due vigilance with regards to corruption. The parent company is therefore not responsible for the act of corruption itself, but for not having taken the necessary steps to avoid an intentional act of bribery committed by a natural person acting within it.

- In Switzerland, in Article 102 of the Penal Code, the liability of the company can be brought to bear "due to a lack of organization in the corporation " and if it is "accused of failing to take all reasonable and necessary organisational measures to prevent such an offense."

- With regards to Italy, it issued on 8 June 2001, a decree imposing administrative liability upon legal persons for the offense of foreign bribery.

- In Spain, the National plan for the adoption of UN Guidelines is very ambitious. It applies to companies domiciled in Spain, but who operate outside of the territory. The plan recommends expanding the powers of the Prosecutor if there is sufficient evidence that the parent company has been involved in human rights violations

- In Canada, Article 217.1 of the Criminal Code provides that a corporation has a legal duty to exercise reasonable care to protect its employees and the public against the risk of physical injury and to take reasonable measures to ensure their safety. In case of serious injury or death, a corporation may be held criminally responsible if "senior management" has not prevented a violation by one of its "representatives", or has encouraged one of its "representatives" to commit a crime with even a partial intent to benefit the organization. The law defines a "representative" as a "director, partner, employee, member, " but also an "agent or promoter of the organisation." This definition extends the liability of the company beyond its legal boundaries to include those with whom it works.

- In the United States, since 1789, the Alien Tort Claims Act (ATCA) allows the jurisdiction of U.S. courts for civil liabilities incurred by non-US citizens who suffer damages committed abroad and against people located on U.S. soil. This law has been used several times against the subsidiaries and subcontractors of transnational corporations domiciled in the United States, for damages or violations that have occurred outside U.S. territory.

These examples prove that such legislation does not impede dynamism in the economy.

On the contrary, strengthening the accountability of multinational corporations is also a real question concerning he competitiveness of our economy and our enterprises. In addition to the unacceptable human and environmental cost in countries where it is practiced, the lowest bidder mentality generally penalises our economy, especially the SMEs in our territories. Just as there is a “social dumping”, there is alo a “dumping” vis-à-vis human rights and environmental standards, with the same negative consequences.

It is first and foremost a question of risk management. Repair costs and compensation for a company can be extremely important and can exceed those related to the upstream prevention of risks. By choosing more complex production lines, which are less and less intelligible, for the consumer and authorities, some companies think that they have found a way around regulatory constraints to their advantage. In reality, they face real and significant risks, such as "uncivlised subcontracting " reputational risks, legal risks with regards to developments in case law, and the risk of having to compensate victims. However,

because of their size and their local roots, French SMEs often prove to be very competitive and therefore favour a global approach (financial and non-financial) to risk, not just an accounting approach, it is therefore a safe bet that it can significantly influence the cost / benefit ratio of relocation, and therefore have a positive impact upon the economic stability of our territories.

Companies are aware of the issues: more and more companies are already equipped with ethical charters, or voluntarily adhere to public or private initiatives in which they undertake to implement some non-financial principles. The vast majority of companies already run both internal and external audits on their production lines to different levels and are already organized to implement their due diligence. Since the NRE law adopted under the Jospin government in 2001, supplemented by the Grenelle II law, some companies are already subject to non-financial reporting obligations. Thus many companies are adopting best practices, but too often they struggle to assert their substantive efforts and find a competitive advantage. This bill will therefore penalises the companies that have not yet implemented these practices, or those who use it only as a display, whilst others will be able to enhance their efforts more easily.

More generally, firms that will thrive tomorrow will be those able that adapt today to the increasing complexity of world trade. States have a duty to encourage them to anticipate regulatory constraints, and to accompany them in this.

Far from being a constraint upon economic development, this bill will in fact enhance good practices implemented by many companies to improve the analysis of risk in our economy, and contribute to the non-cost competitiveness of our country.

This bill proposes to outline common principles. The dialogue with all stakeholders should help to refine the effective implementation of this bill and strengthen its application procedure.

Eleven of the fifty largest European companies (including Switzerland) are French. A particular responsibility rests therefore on the shoulders of our country, whose role must be exemplary in this regard. By virtue of their economic vitality and their investments, French firms play a key role in supporting the development of the countries in which they conduct some of their activities. As such, their efforts in social and environmental issues can contribute to the fight against poverty and improve the working conditions and lives of millions of people.

TITLE 1: ENTERPRISE'S OBLIGATION OF DUE VIGILANCE AS PART OF THEIR ECONOMIC OR COMMERCIAL ACTIVITY

International guidelines require companies to try to prevent or mitigate adverse impacts upon human rights that are directly related to their activities, products or services by their commercial relationships, even if they have not contributed directly to these impacts. As indicated by the UN Guidelines for "commercial relations" mean "relationships with the commercial partners of the company, entities in the chain of value, and any other state or non-state entity directly related to its activities, products or commercial services. "

On the other hand, the concept of the obligation of due diligence is also required by the guidelines that call upon companies to "demonstrate due diligence regarding human rights."

The bill therefore proposes to amend the Commercial Code by adding an article after article L. 233-40 that would encourage companies to manage all of their activities in the context of their economic and commercial relationships and which could affect fundamental rights. It is understood, in paragraph 2 of this article, that these obligations should apply to companies according to the means at their disposal. SMEs obviously cannot implement the same control procedures as multinational enterprises.

TITLE 2: CORPORATE RESPONSIBILITY AS A RESULT OF A BREACH OF THEOBLIGATION OF DUE VIGILANCE IN ECONOMIC OR COMMERCIAL ACTIVITIES

This bill proposes to amend the Civil Code and the Penal Code by creating a liability regime in case of damages occurring in the context of a company's economic or commercial activities and which are detrimental to human rights.

This presumption of liability is not conclusive and the company may be exempted from liability if it proves that it was not aware of any activity that may have had a potential impact upon fundamental rights or if the company proves that it made every effort to avoid it.

LEGISLATIVE BILL

TITLE I

THE OBLIGATION OF DUE VIGILANCE OF ENTERPRISES IN THEIR ECONOMIC OR COMMERCIAL ACTIVITIES

ARTICLE I

Chapter III of Title III of Book II of the Commercial Code, which is supplemented by Section 6, reads as follows:

"Section6"

""Health-related and environmental damages and human rights abuses"

"Art. L. 233-41. - I. - As part of its activities, from those of its subsidiaries to those of its subcontractors, every company has the obligation to prevent damage or proven risks of health or environmental damages. This obligation also applies to damages resulting from a breach of fundamental rights. "

"II. - The liability of the company, in the conditions defined above, is valid unless it proves that it was unable, in spite of its vigilance and effort, to prevent damages by managing the risk or preventing its realization given the power and the means at its disposal. "

TITLE II

THE RESPONSIBILITY OF ENTERPRISES IN CASE IF A BREACH OF THEOBLIGATION OF DUE VIGILANCE IN THEIR ECONOMIC OR COMMERCIAL ACTIVITIES

ARTICLE II

After Title IV *bis* of Book III of the Civil Code, a Title IV b is inserted as follows:

TITLE IVB

THE LIABILITY FOR HEALTH-RELATED AND ENVIRONMENTAL DAMAGES AND VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS

"Art. 1386-19. –Any legal person will be found responsible, who in the course of his or her activities with those of his or her subsidiaries or those of his or her subcontractors, does not demonstrate having taken all necessary and reasonable measures within his or her power to prevent or deter the occurrence of damages or the risk of damages, in particular those health-related, environmental or which constitute a violation of fundamental rights and of which he or she could not have been unaware of the seriousness prior to the fact. "

Article III

The third paragraph of Article 121-3 of the Criminal Code, the words, "of security" are replaced by the words, "of security and vigilance."