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Article

LEGAL ALERT

BUSINESS AND HUMAN RIGHTS: THE DUTY OF VIGILANCE FOR BUSINESSES



Introduction

In recent years, there has been a growing emphasis on the role of businesses in protecting and promoting human rights. One of the ways in which businesses can fulfill this obligation is through the duty of vigilance. This duty requires businesses to be proactive in identifying and addressing potential human rights impacts of their operations, supply chains, and business relationships. This article discusses the scope and extent of the duty of vigilance for businesses.

The duty of vigilance

The concept of the duty of vigilance originated in French law. In 2017, the French Parliament adopted a law that requires French companies to take serious human rights challenges into account. It is called 'Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre' ("law about the duty of due diligence of parent companies and main contractors").

The law requires large French companies to implement an effective 'vigilance' or due diligence plan that directly and practically addresses environmental, health and security, and business-related human rights risks. The scope of the law extends to all French companies that have more than 5,000 employees domestically or employ 10,000 employees worldwide. Failure to comply attracts damages and suspension of their projects.

The duty of vigilance has gained international recognition through the United Nations Guiding Principles on Business and Human Rights (UNGPs). The United Nations Guiding Principles (UNGPs) are grounded in recognition of:

- (a) States' existing obligations to respect, protect and fulfill human rights and fundamental freedoms;
- (b) The role of businesses as specialized organs of society performing specialized functions required to comply with all applicable laws and to respect human rights; and
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

The UNGPs define the duty of vigilance as the obligation of businesses to “identify, prevent, mitigate, and account for how they address their adverse human rights impacts.”

Corporations have since been held accountable for any potential and actual human rights violations that arise from their activities.

The Role of Businesses in Observing Human Rights Under the Duty of Vigilance



In order to fulfill the duty of vigilance, businesses need to take a number of steps to observe human rights. These include:

1. Conducting Human Rights Impact Assessments

Conducting human rights impact assessments (HRIAs) is one of the crucial measures in upholding the obligation of vigilance. These evaluations assist businesses to identify the potential human rights impacts caused by their operations, suppliers and business relationships. By doing so, businesses take a proactive approach in identifying risks and can take action to minimize them before they result in real human rights breaches.

2. Establishing Policies and Procedures.

Businesses should also establish human rights policies and procedures in accordance with international standards and best practices. Policies should address issues such as discrimination, gender equality, accessibility for persons with disabilities, work hours and work safety and health.

To ensure compliance, these policies should be communicated to employees, suppliers, and other stakeholders and should be reviewed and updated on a regular basis. In addition, senior management should demonstrate commitment through their actions to comply with organizational policies and procedures.

A consistent and compliant tone from the top will create and drive a culture of respect and compliance with human rights protections.

3. Building Capacity and Providing Training.

To ensure that human rights policies and procedures are effectively implemented, businesses should build their own capacity and that of their stakeholders to observe human rights. This includes employees, suppliers, partners and clients. Regular training enables relevant stakeholders to have a good understanding of the contents of the company's human rights policies and the roles and responsibilities of each stakeholder involved.

4. Monitoring and Reporting.

Another important step in fulfilling the duty of vigilance is to monitor and report on human rights impacts. Businesses should have systems in place to track their own human rights performance, as well as that of their suppliers and business partners. This involves setting clear and measurable performance indicators and collecting relevant data to assess performance. Businesses should also be transparent about their human rights practices and report on their performance to stakeholders.

Applicability of the duty of vigilance

One of the most recent examples is the East African Crude Oil Pipeline Project that came under fire for failure to adhere to the duty of vigilance.

In 2019, Friends of the Earth, Survival, Africa Institute of Energy Governance, National Professional Environmentalists, Navigators for Development, and Civic Response on Environment and Development filed a suit against Total Energies in France challenging the development of the East African Crude Oil Pipeline. They argued Total did not take into account the social and environmental impacts of the oil project. The claimants sought an order to halt the project activities and to require Total to establish, publish and implement a set of measures in its due diligence plan.

On 28th February 2023 court ruled that the case was "inadmissible", on grounds that the plaintiffs submitted accounts to the court that were "substantially different" from those that were presented to TotalEnergies in a formal notice in 2019 when the case was initiated.

It was the first case of its kind in France, and activists had believed that it would set a legal precedent to halt projects considered detrimental to the environment and human rights. However, the case focused on procedural aspects and the applicability of the duty of vigilance was not applied in the decision.

Conclusion

Though the applicability of the duty of vigilance in the Total Energies matter was not successful, it still highlights the need and awareness of business and human rights. This is due to the fact that stakeholders are increasingly holding businesses to account for their practices and any human rights violations can no longer be ignored. However, the non-binding nature of the United Nations Guiding Principles on Human Rights which form the legal basis for the duty of vigilance in respecting human rights creates difficulty in implementation especially in countries that do not have specific substantive

laws on the same. In addition, the scope and extent of the duty of vigilance is yet to be demystified.

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