



Sustainability Belgium

Focus falls on corporate vigilance and accountability in Belgium

Lawmakers push for a framework for mandatory value chain due diligence

May 2021

On 2 April 2021, a legislative proposal entitled “*Proposition de loi instaurant un devoir de vigilance et un devoir de responsabilité à charge des entreprises tout au long de leurs chaînes de valeur*” or “*Wetsvoorstel houdende de instelling van een zorg- en verantwoordingsplicht voor de ondernemingen, over hun hele waardeketen heen*”¹ was introduced by members of various political parties before the Belgian Chamber of Representatives (the **Belgian Vigilance Proposal**). The Chamber of Representatives voted in favour of considering this legislative proposal on 22 April 2021, a few weeks ahead of the 10th anniversary of the unanimous endorsement by the United Nations Human Rights Council of the United Nations Guiding Principles on Business and Human Rights (**UNGPs**).

The Belgian Vigilance Proposal establishes the principle of corporate responsibility to respect human rights, labour rights and the environment as well as mandatory due diligence obligations for all companies established or active in Belgium, with respect to their entire value chain. It further envisages an extensive liability regime, providing for criminal sanctions as well as collective legal redress by victims. It is the first legislative proposal introduced in the area of Business and Human Rights (**BHR**) in Belgium², following repeated calls from both Belgian civil society³ and companies⁴ for a binding legal framework on corporate due diligence, as well as significant legal developments at EU level (see our contribution “Shaping the future: the increasing influence of human rights on business” **here**). Although the Belgian Vigilance Proposal is still at a very early stage in the legislative process, we thought that it would be useful to provide a preliminary overview of its key features, given the significant impact this proposal may have on the Belgian legal landscape and businesses.

1. Scope of application

The Belgian Vigilance Proposal is intended to apply to *all* companies⁵ established or active in Belgium. The lawmakers’ intention behind this wide scope of application is to prevent Belgian companies from relocating in order to escape these new obligations and, conversely, to prevent foreign companies active in Belgium from benefitting from a competitive advantage by being subject to less stringent obligations.⁶ In fact, the range of companies subject to the Belgian Vigilance Proposal is broader than those covered by the

European Parliament’s recently adopted recommendation for a proposal for a directive on corporate due diligence and accountability (the **EP Recommendation**).⁷ More specifically, the Belgian Vigilance Proposal imposes obligations on all sorts of companies, while the EP Recommendation only concerns large companies and small and medium enterprises (**SMEs**) that are publicly listed or operate in high-risk sectors.⁸

The scope of the due diligence obligations under the Belgian Vigilance Proposal is also extensive because of the entities it covers, as it not only

¹ Proposition de loi instaurant un devoir de vigilance et un devoir de responsabilité à charge des entreprises tout au long de leurs chaînes de valeur, *Doc. Parl.*, Chambre, 2020-2021, n° 55-1903/001, available at: www.lachambre.be/FLWB/PDF/55/1903/55K1903001.pdf.

² Aside from the Law of 3 September 2017 which relates to non-financial reporting and applies to certain large companies and some large groups.

³ CNCD, *Mémorandum: Fondements essentiels pour une loi belge sur le devoir de vigilance*, Octobre 2020, available at: www.cncd.be/IMG/pdf/nlfr_memorandum_zorgplicht_final-27-11-2020.pdf

⁴ Business & Human Rights Resource Centre, *Belgique: 60 entreprises demandent au gouvernement un cadre législatif contraignant sur le devoir de vigilance en matière de droits de l'homme et d'environnement*, 12 February 2021, available at: www.business-humanrights.org/de/latest-news/belgique-60-entreprises-demandent-au-gouvernement-un-cadre-l%C3%A9gislatif-contraignant-sur-le-devoir-de-vigilance-en-mati%C3%A8re-de-droits-de-l'homme-et-d'environnement/.

⁵ As defined in article I.1,1° of the Belgian Code of Economic Law.

⁶ Belgian Vigilance Proposal, p. 10.

⁷ European Parliament, *European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL))*, available at: www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf.

⁸ Article 2 of the EP Recommendation.

applies to the companies' supply chain, but extends to their entire *value chain*. Under the Belgian Vigilance Proposal, the term 'value chain' encompasses all subsidiaries, subcontractors, customers and investors with which the company has a commercial relationship.⁹ It therefore covers a much broader group of business entities than 'supply chain'.

2. Duty of vigilance for all companies

The Belgian Vigilance Proposal inserts several new provisions into the Belgian Code of Economic Law in order to impose a duty of vigilance on every company, requiring them (i) to respect human rights, labour rights and the environment^{10 11} and (ii) to continuously identify, prevent, mitigate and cease environmental harm, human rights and labour rights violations, or any risks thereof, throughout their value chain.¹² However, Article 5 of the Belgian Vigilance Proposal and the parliamentary works in this respect set out that the extent of this latter obligation is *proportionate* to the size of the company and to the means at its disposal to identify the risks and to take effective measures to prevent or remedy damage, or proven risks of damage, linked to its activities.¹³

The duty of vigilance requires more effort from large companies, as well as from SMEs operating in high-risk sectors or regions. Therefore, the Belgian Vigilance Proposal imposes additional obligations on these categories of companies: they must

establish, effectively implement and publish a due diligence plan that includes a risk mapping exercise, the assessment methods of subsidiaries and subcontractors, an alert mechanism and a report gathering mechanism.¹⁴

A large company is defined in Article 2 of the Belgian Vigilance Proposal as any company that has more than 250 employees and an annual turnover exceeding EUR 50 million, or an annual balance sheet total exceeding EUR 43 million.¹⁵ As for SMEs, the notions of high-risk sectors and regions are very vague at this stage as there is no list of high-risk sectors and regions yet, which will be established by royal decree once the Belgian Vigilance Proposal becomes law. However, it appears from the parliamentary works on Article 2 of the Belgian Vigilance Proposal that high-risk economic sectors will include, among others, not only industries active in the trade of minerals and metals (such as gold, tin, tantalum and tungsten – covered by the EU Conflict Mineral Regulation 2017/821 of 17 May 2017), but also in agricultural products, clothing, footwear, finance, and extractive industries, for example¹⁶. High-risk regions, on the other hand, will include regions characterised not only by political instability or repression, weak institutions, generalized violence, but also by systemic violations of human rights and international law.¹⁷

The obligations of these companies to develop a due diligence plan is similar to that which is already imposed on companies in France under the French

⁹ Article 2 of the Belgian Vigilance Proposal defines 'value chain' as "*the set of entities with which the company has a commercial relationship, because such entities (a) supply goods or services, including financial services, that contribute to the development of the company's products or services; or (b) receive goods or services, including financial services, from the company*".

¹⁰ Article 5 of the Belgian Vigilance Proposal.

¹¹ It should be noted that at this stage Article 2 of the Belgian Vigilance Proposal only defines 'human rights' and 'labour rights', but does not define the 'environment'. 'Human rights' and 'labour rights' are defined as follows:

¹² human rights: the universal and inalienable rights established by the Universal Declaration of Human Rights of 10 December 1948, the International Covenant on Civil and Political Rights of 16 December 1966 and the International Covenant on Economic, Social and Cultural Rights of 19 December 1966;

¹³ labour rights: the fundamental rights set forth in the Declaration on Fundamental Principles and Rights at Work of the International Labour Organization (ILO), which are protected by ILO conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining, (b) the exclusion of all forms of slavery and forced labour, (c) the effective abolition of child labour, and (d) non-discrimination in respect of employment and occupation.

¹⁴ Article 5 of the Belgian Vigilance Proposal.

¹⁵ See also the Belgian Vigilance Proposal, pp. 10 and 13.

¹⁶ Article 8 of the Belgian Vigilance Proposal.

¹⁷ See Article 2 of the Belgian Vigilance Proposal. This definition is in line with the definition of SMEs in Article 2 of the European Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC), available at: eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003H0361&from=FR.

¹⁸ These are high-risk sectors in terms of human rights violations for which the OECD has published specific sectoral due diligence guidelines.

¹⁹ Belgian Vigilance Proposal, pp. 13-14.

Duty of Vigilance Act of February 2017.¹⁸ The due diligence plan will have to include, at a minimum:¹⁹

1. the identification of the entities in the company's value chain and a description of its business relationships with such entities;
2. a risk mapping exercise in order to identify, analyse and prioritise risks;
3. procedures for a regular assessment of the subsidiaries and entities in the company's value chain (such as subcontractors or suppliers);
4. appropriate actions to mitigate risks or prevent serious harm;
5. a mechanism for collecting reports on risks, including guarantees in terms of whistle-blower protection;
6. an effective complaints and redress mechanism; and
7. a mechanism to follow-up and monitor the effectiveness of the implemented measures.

The due diligence plan must be established based on a public consultation of all stakeholders, such as, for example, their workers, labour unions, and relevant civil society actors involved in human rights, labour rights and the environment.²⁰ Once established, the due diligence plan must be discussed at least once a year and must be published on the company's website (if any).²¹

In addition, Article 30 of the Belgian Vigilance Proposal states that the description of the measures implemented to comply with the duty of vigilance and, where the company is obliged to establish it, the due diligence plan itself, must be included in the company's management report referred to in Article 3:5 of the Belgian Companies and Associations Code. In doing so, the Belgian Vigilance Proposal

goes beyond the non-financial and diversity reporting requirements that stem from the EU Non-Financial Reporting Directive²², as implemented by the Belgian law of 3 September 2017 and incorporated in Article 3:6, §2, 6° and §4 of the Belgian Companies and Associations Code. Indeed, the Belgian Vigilance Proposal introduces this new reporting obligation into Article 3:6, §1, para. 1 of the Belgian Companies and Associations Code, which will therefore apply to every company when drafting a management report, whereas the current non-financial and diversity reporting requirements only apply to listed companies and large public interested entities.

3. Liability and sanctions

As indicated above, the Belgian Vigilance Proposal envisages an **extensive liability regime** for breaching the duty of vigilance, which ranges from criminal liability to collective redress actions.

Criminal liability and sanctions for breach of duty of vigilance

The Belgian Vigilance Proposal provides for a 'level 5' criminal sanction for breaching the obligations arising from the duty of vigilance (see section 2), ie a fine of between EUR 250.00 and EUR 100,000.00 and/or imprisonment of up to one year.²³ As any criminal fine must be multiplied by a factor of 8 for criminal offences committed after 1 January 2017, the maximum fine could be as much as EUR 800,000.00. This means that non-compliant companies could face **criminal fines of up to EUR 1,600,000** for a breach of their duty of vigilance, based on the computation rule of penalties for legal entities.²⁴

Injunctive measures

The Belgian Vigilance Proposal further supplements the list of offences under Article XVII.2 of the Belgian Code of Economic Law that may be subject

¹⁸ Loi n° 2017-399 (FR) 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JO 28 March 2017, www.legifrance.gouv.fr.

¹⁹ Article 8 of the Belgian Vigilance Proposal.

²⁰ Article 8, §3 of the Belgian Vigilance Proposal.

²¹ Article 8, §3-4 of the Belgian Vigilance Proposal.

²² Directive of the European Parliament and the Council nr. 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, Text with EEA relevance, OJEU 15 November 2014, L 330, 1–9.

²³ Article 14 of the Belgian Vigilance Proposal.

²⁴ See Article 41bis of the Belgian Criminal Code.

to a cessation order by the president of the Company Court.²⁵ This allows any person referred to in Article XVII.7 of the Belgian Code of Economic Law, and in particular the interested parties and the Minister of the Economy, to bring an action for an injunctive relief in the event of a company's failure to comply with its duty of vigilance.

Collective redress action

The Belgian Vigilance Proposal also introduces the possibility in Articles XVII.37, 1° and XVII.38 of the Belgian Code of Economic Law of bringing actions for collective redress against companies due to a potential breach of their duty of vigilance.²⁶ This is quite a revolutionary change to the relevant provisions in the Belgian Code of Economic Law, as collective redress in Belgium is currently only available to consumers or SMEs which have sustained harm as a result of a common cause.²⁷ If the Belgian Vigilance Proposal is adopted, actions for collective redress will also be available to **groups of victims** of human rights and environmental damage violations by companies. The representation mechanism is modelled on that currently applicable to collective redress actions brought by consumers and SMEs. However, the possibility is also open to accredited civil society organisations and trade unions to represent victims and to act in court on their behalf.²⁸

Civil liability action for breach of duty of vigilance

Companies may also face civil liability for damages **throughout their value chains**, including through the activities of their subsidiaries and those made possible through their **investments**.²⁹

Article 23 of the Belgian Vigilance Proposal expressly applies the principle that one is entitled to full compensation for any damage caused by a breach of the duty of vigilance. It further introduces a **proportionality principle** in the assessment of a company's lack of vigilance with respect to an entity

in its value chain. According to the parliamentary works on Article 23 of the Belgian Vigilance Proposal, large companies with considerable profit margins have the capacity to commit financial resources to assess risks throughout their entire value chain and to take appropriate action. Similarly, a company with a stake in a company has control over that company. Therefore, companies with **real control and/or influence**³⁰ over an entity in their value chain will have an obligation of *result* to prevent health and environmental damage and human and labour rights violations. Conversely, companies that do not have real control and/or power to influence an entity in their value chain will only have an obligation of *means* to prevent harm.³¹

In order to facilitate legal action against allegedly defaulting companies, Article 24 of the Belgian Vigilance Proposal **reverses the burden of proof** in favour of the victim, on the basis that companies have the necessary information to prove, where appropriate, that they have done everything in their power to prevent violations.

Article 26 of the Belgian Vigilance Proposal states that companies may also face **joint and several liability** (*responsabilité solidaire/hoofdelijke aansprakelijkheid*) in situations where they have caused harm through a common lack of due diligence. Consequently, a company may be held individually liable to compensate the victim in full, even if other companies are also responsible for the harm suffered. In such a case, Article 27 institutes a mechanism allowing for the recovery of all or part of the sum claimed from the co-perpetrator(s).

The out-of-court settlement of due diligence complaints

The Belgian Vigilance Proposal supplements the existing provisions on the **out-of-court handling of complaints** by companies foreseen under Book XVI of the Belgian Code of Economic Law in order to make these provisions applicable to complaints

²⁵ Article 17 of the Belgian Vigilance Proposal.

²⁶ See Articles 18-20 of the Belgian Vigilance Proposal.

²⁷ See Article VII.38 of the Belgian Code of Economic Law.

²⁸ Article 20 of the Belgian Vigilance Proposal.

²⁹ Belgian Vigilance Proposal, p. 11.

³⁰ The Belgian Vigilance Proposal does not contain a definition of these terms, nor does it refer to the concept of 'control' in Article 1:14 of the Belgian Companies and Associations Code.

³¹ Belgian Vigilance Proposal, p. 17.

related to breaches of the companies' duty of vigilance and to enable injured or interested parties to obtain a satisfactory solution, and if necessary, compensation.³²

The parliamentary works on Articles 15 and 16 of the Belgian Vigilance Proposal specify that there is **no hierarchy** between this internal mechanism and the external judicial mechanism discussed above.

Exclusion from public procurement

Last but not least, the Belgian Vigilance Proposal also introduces new **compulsory and optional grounds for excluding** companies from participation in public procurement procedures if they do not comply with the obligations arising from their duty of vigilance (see section 2).³³ Unless the candidate-company has taken sufficient measures to demonstrate its reliability, (i) the contracting authorities *shall* exclude the candidate-company from participation in the procurement procedure when it has been convicted for non-compliance of its vigilance obligations through a judicial decision having *res judicata*³⁴; and (ii) the contracting authorities *may* exclude the candidate-company from participation in the procurement procedure when the company is in breach of its duty of vigilance.³⁵³⁶

4. Regulator

Article 13 of the Belgian Vigilance Proposal states that a regulator will ensure³⁷ that obligated companies comply with their responsibility to respect human rights, labour rights and the environment in the value chain.³⁸ This regulator must be appointed by royal decree and it is likely to be the FPS Economy.³⁹

The Belgian regulator will also be entitled to draft practical guidelines and instructions to assist companies in the proper fulfilment of their duty of vigilance.⁴⁰

5. Jurisdiction and applicable law

The Belgian Vigilance Proposal extends the jurisdiction of Belgian courts under the Belgian Code of Private International Law. Pursuant to Article 28 of the Belgian Vigilance Proposal, Belgian courts have jurisdiction over companies that are active in Belgium, even if the violations occurred in their value chain outside Belgium.⁴¹ The parliamentary works suggest that the lawmakers' intention is to remove any incentive for developing countries to attract foreign investment based on the absence or low level of protection.

Article 29 of the Belgian Vigilance Proposal states that Belgian law will apply if the claimant chooses to bring its claim under Belgian national law. Reference is made in the parliamentary works on Article 29 of the Belgian Vigilance Proposal to Article 16 of the Rome II Regulation, which allows for a mandatory derogation from the general and specific rules of determination of the applicable law.

6. Timeline

While it is difficult to estimate precisely how much time it will take for the Belgian Parliament to adopt a law on corporate due diligence and accountability, the chances are high that things will move relatively quickly as (i) the unicameral procedure is applicable pursuant to Article 74 of the Belgian Constitution and (ii) the Belgian Vigilance Proposal was introduced by representatives of political parties forming the federal Government coalition⁴².

³² Articles 15 and 16 of the Belgian Vigilance Proposal.

³³ Belgian Vigilance Proposal, p. 19.

³⁴ See Article 32 of the Belgian Vigilance Proposal *juncto* Article 67,§1 of the law of 17 June 2016 on public procurement (*Loi du 17 juin 2016 relative aux marchés publics*).

³⁵ See Article 33 of the Belgian Vigilance Proposal *juncto* Article 69 of the law of 17 June 2016 on public procurement.

³⁶ See the Allen & Overy publication "Public Procurement - The European Court of Justice provides guidance on "self-cleaning" measures in its judgment" available [here](#).

³⁷ The Belgian Vigilance Proposal is less detailed in this respect than the EP Recommendation, as the latter explicitly foresees that the Member State competent authority will have the power to conduct its own investigations to ensure that companies comply with their obligations under the directive (see Article 13 of the EP Recommendation).

³⁸ Article 13 of the Belgian Vigilance Proposal.

³⁹ See the Belgian Vigilance Proposal, p. 11.

⁴⁰ See Article 13 of the Belgian Vigilance Proposal.

⁴¹ Article 28 of the Belgian Vigilance Proposal.

⁴² PS, Vooruit, Ecolo-Groen, and CD&V.

As indicated above, the Belgian Chamber of Representatives voted in favour of taking the legislative proposal into consideration on 22 April 2021. The Belgian Vigilance Proposal will now be considered and possibly amended in specialised commissions before being debated and, again, possibly amended, during plenary sessions. Once the Chamber of Representatives has adopted a final text, it will be submitted for formal approval to the King. The law will then enter into force six months after its publication in the *Moniteur belge*.⁴³

7. Take-aways

Both the initiative behind this recent Belgian Vigilance Proposal and its content are in line with the broader movement at EU level and in other EU Member States, as well as at international level, towards greater corporate responsibility and accountability in the area of BHR. Belgian

lawmakers seem anxious to catch up with the rapidly evolving legal frameworks elsewhere, and might even adapt a new law before the EU adopts a directive in this respect.

Companies established in Belgium or active in Belgium with complex value chains will have to monitor these developments very closely in order to timeously adapt themselves to comply with their upcoming vigilance obligations and to mitigate their litigation exposure. To prepare for these changes, companies should already start establishing, adapting and strengthening their due diligence policies and processes based on the existing detailed guidance in the UNGPs and OECD Guidelines for Multinational Enterprises. The ability to demonstrate that significant efforts have been made to prevent and mitigate breaches will be key in any defence.

Author



Camille Leroy
Senior Associate
Tel + 32 2 780 24 93
camille.leroy@allenoverly.com

Other contacts

Gauthier van Thuyne
Partner
Tel +32 2 780 25 75
gauthier.vanthyne@allenoverly.com

Joost Everaert
Partner
Tel + 32 2 780 26 06
joost.everaert@allenoverly.com

Nanyi Kaluma
Counsel
Tel +32 2 780 26 38
nanyi.kaluma@allenoverly.com

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy LLP is authorised and regulated by the Solicitors Regulation Authority of England and Wales. The term partner is used to refer to a member of Allen & Overy LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners is open to inspection at our registered office at One Bishops Square, London E1 6AD.

Allen & Overy is an international legal practice with approximately 5,500 people, including some 550 partners, working in more than 40 offices worldwide. A current list of Allen & Overy offices is available at allenoverly.com/locations.

© Allen & Overy LLP 2021. This document is for general guidance only and does not constitute advice. | 2001297693

⁴³ Article 34 of the Belgian Vigilance Proposal.