

White Paper

Modern Slavery and the French Duty of Care Law



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THE SCALE OF THE PROBLEM

A crime against humanity that has long been universally prohibited, slavery persists today. When we hear the term “modern slavery”, we often think of developing countries, or sex trafficking. But modern slavery extends much further: it happens all over the world, including in developed countries. And it is a hidden crime, whose victims are often afraid to come forward or are insufficiently aware of their own rights to understand that they are in slavery. This is also why it is so difficult to quantify the problem: most of the victims of slavery are never identified as such.

However, organisations around the world are working hard to gather information and fight this serious violation of human rights. According to The International Labour Organization¹, there are about 40.3 million people around the world trapped in modern slavery. Of these, approximately 10 million are children.

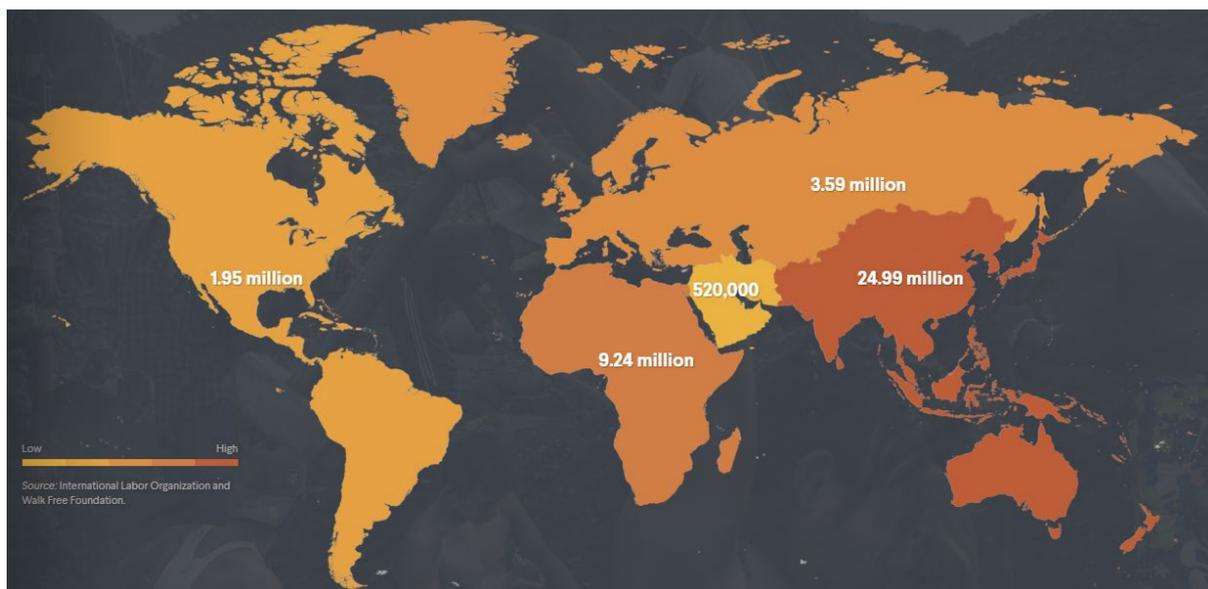


Image taken from Council on Foreign Relations

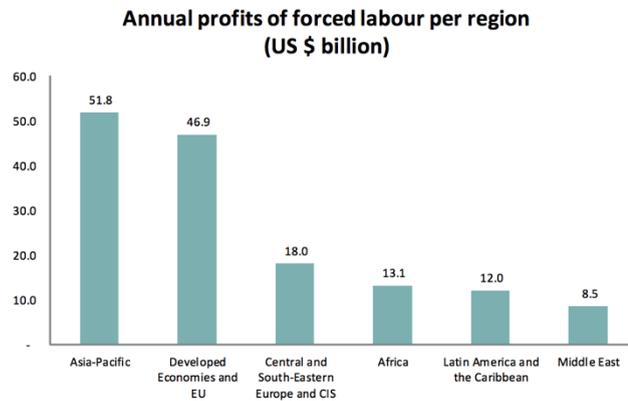
As the map above shows, the problem is most common in poorer regions or areas plagued by war and political conflict. Modern slavery involves people living in extreme conditions, often tricked into labour with no means of escape and bringing profit to their captors. The forms that it takes are bonded labour, domestic servitude, sexual exploitation or forced marriage. Bonded labour is among the leading forms of slavery (50%), in which people are forced to work in often dangerous conditions in exchange for a loan, and in a social situation where there is no other viable option for the survival of the worker and his or her family.

In most cases, slavery goes hand-in-hand with weak or poorly implemented human rights legislation. Countries where the problem is most persistent, for example North Korea, Thailand, Iraq, Syria, or the Democratic Republic of Congo, have either been the subject of economic sanctions or are suffering from internal conflict. Victims often come from ethnical, racial or religious backgrounds that are perceived as lower status and in these cases there is little engagement from people or institutions in the jurisdiction to help them. Populations witness children forced to become soldiers, girls sold into marriage for as little as USD 150, and men working to their deaths in mines and work camps.

¹ 2017, Geneva, International Labour Organisation and Walk Free Foundation, *Global Estimates of Modern Slavery*, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf

Despite the horror of the practice, modern slavery expert Kevin Bales pointed out that: “This is an economic crime: people do not enslave people to be mean to them; they do it to make a profit.”² And this is where the issue essentially becomes a problem of developed countries. Slave trafficking generates around USD 150 billion annually for its perpetrators.

And despite the popular belief that slavery is a problem of developing countries, it brings more profit per victim in developed economies than elsewhere in the world. The table on the right, published by the International Labour Organization³, shows clearly how profit is distributed among regions around the globe.



While much of modern slavery is a domestic matter (for example people forced to do housework or work as sex slaves), a growing concern for governments worldwide is the involvement of corporations. Industries including cotton, tobacco, fishing, mining, coffee and other agriculture have been continuously linked to slave labour, because of the hard work and opaque supply chains involved. And while governments have been focusing on poverty as the root of this issue, there are many more factors at play. Legislation needs to tackle this from many sides, starting with responsibility.

² February 2010, Kevin Bales, *How to Combat Modern Slavery*, Ted2010, https://www.ted.com/talks/kevin_bales_how_to_combat_modern_slavery

³ <http://www.ilo.org/global/topics/forced-labour/publications/profits-of-forced-labour-2014/lang--en/index.htm>

Governments, businesses, & consumers...

12

countries
not taking action

Argentina
Australia*
Canada
India
Indonesia
Japan
Mexico
Russia
South Africa
Saudi Arabia
South Korea
Turkey

G20 countries

need to take action to stop sourcing
goods & services at risk of being
produced by forced labour

7

countries
taking action

Brazil
China
France
Germany
Italy
United Kingdom
United States

**Australia has announced
it will introduce supply
chain transparency laws
in the second half of 2018*

Slavery in supply chains

Government response on Imports, Public Procurement,
Business Supply Chains, Identifying Risk is critical



*This includes 19 G20 countries. The 20th member, the European Union, is a regional grouping so does not have national laws as such.

Image taken from Global Slavery Index

Realising this, countries have begun to draw up laws aimed at increasing both individual and corporate responsibility. Laws to fight modern slavery, especially in supply chains, have already been passed all over the world, from California's Transparency in Supply Chains Act in 2010, through the Netherlands' Child Labour Due Diligence Bill, to Australia and the UK's Modern Slavery Acts. However, for significant results to be achieved, more countries need to join the initiative. As we can see from Global Slavery Index (GSI) graphic on the previous page, only 7 of the G20 countries had, at the time of the GSI report, taken action to stop sourcing goods and services at risk of being produced by forced labour. Legislation has to be considered carefully and take into account the impact it will have on corporations and the public.

The French Duty of Care law, introduced in 2017, is a useful illustration of the issues and complexities involved.

FRANCE AMONG THE FIRST COUNTRIES TAKING ACTION

According to the Global Slavery Index, there were 129,000 people living in modern slavery in France on any given day in 2016. This means that for every thousand people in the country there are 2 victims.⁴ But, as elsewhere, gathering genuine statistics is a challenge. These numbers are estimates – the real victims are likely to number more. Highlighting this disparity, a report commissioned by the Inter-ministerial Mission for the Protection of Women against Violence and Action against Trafficking in Human Beings noted that in 2015, only 1,826 victims of slavery were in fact assisted in France.⁵

The fact that France also imports billions of dollars' worth of products from countries with high forced labour risk was another spur to action.

After the 2015 International Labour Conference, where countries were encouraged by the ILO "50 for Freedom" campaign to fight against modern slavery, on 7 June 2016 France ratified the Protocol of 2014 to the Forced Labour Convention, 1930, becoming the sixth country to do so (after the UK, Norway, Mali, Niger and Mauritania)⁶. One year afterwards, the French Parliament adopted the Duty of Care (or Duty of Vigilance) law, on 27 March 2017.⁷

ESSENCE OF THE DUTY OF CARE LAW

At its core, the Duty of Care law aims to increase transparency in supply chains in order to address the international problem of slavery. It does so by placing regulatory requirements on companies that are exposed to the highest modern slavery risk. The law applies to the following:

- Companies that employ, at the end of two consecutive financial years, at least five thousand employees in their direct or indirect subsidiaries, and whose head office is located in French territory;

Companies that employ, at the end of two consecutive years, at least ten thousand employees in their direct or indirect subsidiaries, whose head office is located in France or abroad.

Approximately 150 entities in France are covered by this regulation. They are obliged to develop and implement a plan that includes "reasonable due diligence measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety as well as the environment, resulting from the activities of the company and those of the companies it controls, as well as from the activities of subcontractors or suppliers with whom an established commercial relationship is maintained".⁸ In short, obliged companies have to publish annual public vigilance plans, including anything that impacts the business of entities under their control, including suppliers and subcontractors.

If companies do not abide by this rule, victims have the right to bring the issue to civil court. Judges have the right to decide on fines for the entities of up to EUR 10 million when vigilance

⁴ The Global Slavery Index, *France*, <https://www.globallslaveryindex.org/2018/findings/country-studies/france/>

⁵ 12 March, 2018, Leclerc, JM 2017, le Firaro, *Traite des êtres humains en France: un portrait-robot des victimes*, <http://www.lefigaro.fr/actualite-france/2017/06/13/01016-20170613ARTFIG00241-traite-des-etres-humains-en-france-un-portrait-robot-des-victimes.php>

⁶ 14 June 2016, International Labour Organisation, *France joins the global movement against forced labour*, https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/forced-labour/WCMS_490780/lang--en/index.htm

⁷ *Eliminating Modern Slavery Due Diligence and the Rule of Law*, <https://www.business-humanrights.org/en/eliminating-modern-slavery-due-diligence-and-the-rule-of-law>

⁸ Business and Human Rights Resources, French corporate duty of vigilance law, <https://www.business-humanrights.org/en/france-natl-assembly-adopts-law-imposing-due-diligence-on-multinationals-to-prevent-serious-human-rights-abuses-in-their-supply-chains/?page=1#c148878>

plans are not published, and up to EUR 30 million if damages caused were preventable.

The law has been subject to significant criticism, from both the public and the obliged companies.

IMPACT ON CORPORATIONS

Above all else, the law is preventive, with penalties that aim to encourage companies to implement and publish their vigilance plans. It imposes periodic penalty payments on companies that fail to establish, publish and effectively implement a vigilance plan. The payment amounts are set by a judge at levels intended to encourage companies to take action.

The due diligence required by this law is a difficult task that takes time and resources, demands regional expertise in relevant areas, and needs a consistent approach. Any discrepancies can easily become public and danger to corporate reputations is inevitable. And although the law currently only applies to around 150 entities, its reach – and the scale of penalties – may increase.

Additionally, as is often the case with new regulation, no clear guidance has been provided by the government on how companies should approach their new due diligence requirements. This could lead to companies implementing inadequate plans, making them vulnerable to penalties later on. Or it could lead to companies putting more resources into their anti-slavery measures in a way that made them less competitive than firms with weaker duty of care programs.

Competition is the biggest concern for most of the obliged entities. A press release from the French Association of Private Enterprises (AFEP, *Association Française des Entreprises Privées*)⁹ pointed out that this regulation is isolated from an international point of view and would therefore have negative consequences for French companies, especially in relation to foreign competitors. AFEP believes that the French economy is already suffering from a lack of competitiveness and that imposing this law would create serious legal issues, bearing in mind the challenges in international supply chains. The press release also claims that “*Large French companies did not wait for this law to implement their duty of vigilance. They are now recognized as the most respectful of international standards in terms of human rights and environmental protection.*”⁹

ONE YEAR AFTER – IS DUTY OF CARE EFFECTIVE?

One year after the law was passed, a report titled “The Law on Duty of Vigilance of Parent and Outsourcing Companies; Year 1: Companies Must Do Better” was published by a number of organisations (ActionAid France-Peuples Solidaires, Amis de la Terre France, Amnesty International France, CCFD-Terre Solidaire, collectif Ethique sur l’étiquette et Sherpa)¹⁰. According to the report, no complete list of obliged entities has been published so far, making it hard for victims to identify themselves as being protected by this law. Another issue was also raised. The threshold of the law (more than 5,000 employees in France or more than 10,000 worldwide) applies to very few companies and excludes many entities that operate in high-risk sectors like the extractive or garment industries. However, we have seen with other regulations that after the appropriate processes are established and have been seen to work well, regulatory reach tends to widen. A good example is the European Anti-Money Laundering Directive, which has been changed continuously over the past few years. The 5th AML Directive has now extended its reach to include more obliged entities, including intermediaries, card payment companies, trusts, high-value businesses like art dealers, oil, arms and tobacco

⁹ 23 March 2017, Association française des entreprises privées, *Réaction à la décision du Conseil constitutionnel sur le devoir de vigilance*, <http://www.afep.com/presse/communiquede-presse-devoir-de-vigilance/>

¹⁰ February 2019, ActionAid France-Peuples Solidaires, Amis de la Terre France, Amnesty International France, CCFD-Terre Solidaire, collectif Ethique sur l’étiquette et Sherpa, membres du Forum citoyen pour la RSE, *Duty of vigilance – Year 1 : Companies must do better*, https://www.amisdelaterre.org/IMG/pdf/2019_collective_report_-_duty_of_vigilance_year_1.pdf

businesses and even archaeological artefacts.¹¹¹²

On the positive side, the French law has a broad scope: it is not limited to a specific sector, for example oil, or to only certain violations such as corruption. Moreover, the Duty of Vigilance recognises parent and outsourcing companies as responsible for their subsidiaries and for third parties, both in France and abroad, which is a huge step in creating an initiative to fight modern slavery that is not limited by borders and jurisdictional reach.

However, in practice, there is still work to do. At the moment, the reports that companies have published are not precise and contain gaps, according to the “Companies must do better” report. Most companies have not defined a clear scope of their plan, especially when it comes to third parties.

Other details have also been criticised. From the victim’s point of view, the new law offers insufficient remedy. The implementation of the law is not monitored or sanctioned by a specific entity and it is open to anyone to take a case to civil court when discrepancies have been found. However, the conditions for establishing civil liability are uncertain and the responsibility for doing so falls on the victim, limiting the possibility to file a civil liability action. In most cases the injured parties are in difficult financial situations and are often not well aware of their rights, lacking access to education and information sources. There are also no resources mentioned in most reports, leaving doubt as to whether they are the result of focused effort or simply comprise other diligence work that has been repurposed. Companies also show insufficient methods for identifying risks relating to slavery or handling it differently to other risks. Their published programs do not offer measures specifically tailored to modern slavery issues, nor do they offer a way to address these issues if they exist in their supply chain.

CONCLUSION

Concerns over the Duty of Care law in France centre around its limited reach, opaque guidelines, the fact that victims are responsible for pursuing their own rights, and that the law limits companies’ international competitiveness. The lack of an independent body to monitor the implementation of the law is also a major drawback. Such a body could not only follow whether companies are compliant, but could also publish all vigilance plans and make the necessary information accessible to help injured parties to build their cases. From a corporate point of view, companies should see it as a chance to move ahead of their competitors, delivering quality and compliance, and using the law as an opportunity to innovate.

Despite these drawbacks, the legislation is evidence that the French government is taking steps to address the modern slavery. And although it is often believed that governments, not corporations, should hold authority and enforce action, the ability to demonstrate fair policies and participate in the fight to eradicate a crime against humanity makes business sense. Companies should not need to be obliged by law to take steps to secure their supply chains.

We have not attempted to review this legislation in light of similar laws such as the UK Modern Slavery Act, because every country has different issues that make comparisons unhelpful. Also, policy creation and implementation is a continuous process and we do not expect this to be the final state of regulation against modern slavery in France. Finally, we hope to see this trend towards combatting modern slavery followed by other jurisdictions in the near future, especially those in which it is a high-profile issue.

¹¹ 22 October 2018, STEP, *Two million UK trusts may have to register by 2020 under 5AMLD*, <https://www.step.org/news/two-million-uk-trusts-may-have-register-2020-under-5amld>

¹² Comply Advantage, *5AMLD – 5th EU Anti-Money Laundering Directive: What You Need to Know*, <https://complyadvantage.com/blog/5mld-fifth-anti-money-laundering-directive/>