



Compliance in France and the United States: A Combination of Corporate and Social Responsibility

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In the past, French law neither mandated nor provided any material incentives for companies to embrace **compliance, corporate and social challenges**. But things are dramatically changing in Europe, and more specifically in France, so that there are growing similarities between French and American law in this respect.

This fall, the French Parliament inserted a provision into the French Civil Code whereby each company's corporate interest takes account of not only the shareholders' interest but also the company's social and environmental responsibility.^[1] Based on an EU Directive,^[2] French law since 2017 has obliged the country's largest companies to disclose nonfinancial information (regarding social, environmental, human rights and anticorruption issues) in their annual reports.^[3] Last but not least, the enactment of two important recent laws has triggered a radical change in the French compliance landscape.

First, the **Sapin II Law**,^[4] similar to the U.S. Foreign Corrupt Practices Act (FCPA), obliges companies to implement an "**anticorruption program**."^[5] This law brings the French legal framework in line with international standards and expectations in the area, drawing upon the U.S. and UK anticorruption and sanctions regimes.^[6] If anticorruption laws in other EU member states do not specifically oblige companies to adopt a compliance program, however, these member states recognize that such programs can be used as an instrument to mitigate or inhibit liability.^[7]

Second, the **Duty of Vigilance Law**^[8] provides that the parent and other companies have an obligation to adopt and publish a "**vigilance plan**" in order to prevent infringements of human rights, fundamental freedoms, and harm to health or the environment. It is the first law that imposes specific due diligence obligations on businesses regarding human rights. The law comes against a background of disasters like the Rana Plaza collapse, the Bhopal gas tragedy and the sinking of the Erika. To date, certain existing European^[9] and national-level^[10] initiatives only require companies to report on their efforts to preserve human rights risks. Switzerland, however, is expected to adopt legislation that is similar to French law this winter.^[11]

1. **Scope of application**

The Duty of Vigilance Law applies to companies whose parent is incorporated under French law^[12] and that employ, for a period of two consecutive financial years, at least 5,000 employees, including

employees of French subsidiaries, or at least 10,000 employees (taking into account those of both French and foreign subsidiaries).^[13] It is more limited in scope than the Sapin II Law, which applies to entities with at least 500 employees in France, with a yearly turnover of over €100 million.^[14]

Nevertheless, **subsidiaries or controlled companies** that exceed the thresholds set out by the Duty of Vigilance Law are deemed to satisfy the vigilance duties when the vigilance plan of the company that controls them has been established for the whole group.^[15] In the same vein, the French Sapin II Law provides that subsidiaries or controlled companies that exceed the thresholds prescribed by the law are deemed to comply with their anticorruption obligations, provided that the company which controls them implements these measures and procedures at the group level.^[16]

2. Vigilance and anticorruption duties and obligations

Companies falling within the scope of both laws shall implement **effective vigilance and anticorruption compliance plans** built on a common model and methodology.

It might be difficult to determine the most suitable individuals inside a company to develop a vigilance plan. A company may already employ individuals in charge of the areas covered by the law (human rights, health and safety, and the environment) and may already have processes in place.

^[17] Many companies have created interdepartmental working groups, comprising legal, compliance, risks, audit or internal controls personnel,^[18] to develop a vigilance plan.^[19]

Implementing an anticorruption compliance program generally falls within the mission of the entities' legal/compliance departments. Their major challenge might be to ensure a common understanding of the plan's objectives and allocation of resources while implementing the **five measures that must be included in the vigilance plan:**

- A risk mapping
- Procedures to assess, in accordance with the risk mapping, the status of subsidiaries, subcontractors or suppliers with whom the company maintains "*established commercial relationships*"
- Appropriate actions to mitigate risks or prevent serious violations
- A whistleblowing mechanism
- A monitoring system to verify the plan's efficiency^[20]

As such, the vigilance plan resembles in many aspects the **eight anticorruption measures in the Sapin II Law** to be implemented^[21] under the potential control of the French Anticorruption Agency:

- A code of conduct

- An internal whistleblowing mechanism
- A risk mapping designed to identify, analyze and rank the company's risk exposure to bribery
- Procedures for assessing the clients', providers' and intermediaries' status with respect to the risk mapping
- Internal or external accounting control procedures designed to ensure that the company's books, records and accounts are not used to conceal bribery
- A training program for "*the most at corruption risk*" employees
- A disciplinary regime in case of violation of the code of conduct
- Internal controls and procedures designed to assess the efficiency of compliance.[\[22\]](#)

These measures echo what the U.S. **Department of Justice (DOJ)** and the U.S. **Securities and Exchange Commission (SEC)** have laid out in their Guidelines on the **FCPA**,[\[23\]](#) which enumerates similar points to be taken into consideration when evaluating compliance programs:

- Commitment to compliance at the highest level
- Written and widely disseminated compliance programs
- Independence and funding
- Risk assessment
- Training and continuing advice
- Enforcement of policies and disciplinary measures for noncompliance
- Paying attention to third-party relationships
- Confidential reporting and internal investigation
- Periodic testing and review
- Pre-acquisition due diligence and post-acquisition integration[\[24\]](#)

Hence, there are **clear similarities between compliance programs on both sides of the Atlantic.**

In France, where there are in principle two sets of compliance requirements, the Anticorruption Agency has argued that anticorruption measures may also be used to support a vigilance plan.[\[25\]](#)

In addition, even though the Agency dictates that the anticorruption whistleblowing mechanism should be distinct from the one for disclosing other risks specified in the Duty of Vigilance Law

(regarding social, environmental and human rights risks),^[26] companies can set up only one whistleblowing system to deal with these different risks.

Risk assessment and mapping

A company designing Sapin II and vigilance plans should start with a risk assessment.^[27] A risk assessment requires a **documented analysis of the entity's exposure to risks** — corruption, human rights, fundamental freedoms, and harm to health or the environment — as close to the ground as possible.^[28] It may therefore be necessary to understand the local context, carry out sites visits, communicate with the actors on the ground and identify particularly vulnerable groups of employees.^[29] Once identified, the risks have to be prioritized, mapped and properly managed.

Analysis of the first published vigilance plans suggests that not all companies may have correctly identified their risks,^[30] notably because they did so in a very general manner without addressing their business lines. The culture of compliance is rather new in France, and it will take time for companies to adapt to its demands. However, it clearly remains an area for improvement.

Third-party due diligence processes

Processes should be defined for assessing the status of **customers, first-tier suppliers and intermediaries**,^[31] or **subsidiaries, subcontractors or suppliers** with whom **“established commercial relationships”** are maintained.^[32]

Companies should collect information and documents^[33] so as to identify and assess the risk exposure of third parties based on objective and quantifiable criteria (geographic location, business sector, product services, etc.). Moreover, this process should be conducted before starting a relationship with the third party and should be repeated regularly in the course of the relationship, with a predefined frequency based on the level of risk. The process of renewing contracts can also be used to ensure that third parties have complied with their commitments throughout the previous contract term.^[34] Digital tools are, in this respect, obvious allies in the process of risk management.

Awareness-raising measures

Under the Sapin II Law, certain **compliance measures become legal obligations**, such as adopting a code of conduct,^[35] training those most exposed to corruption risks and setting up a disciplinary regime so as to sanction violations of the code.^[36]

The Duty of Vigilance Law is less detailed, although covered risks may be addressed within the Sapin II code of conduct.^[37] Moreover, companies may design **supplier codes of conduct**^[38] and train relevant employees regarding procurement issues.

Detecting wrongdoing and following up on the effectiveness of the plans

Both laws require establishing an internal whistleblowing mechanism^[39] to be communicated proactively and tailored to the individuals likely to use it. Moreover, protective measures should be established (regarding confidentiality, anonymization, protection and security of the whistleblower^[40]).

With regard to **internal or external accounting controls** required by the Sapin II Law to ensure that the company's books, records and accounts are not used to conceal bribery,^[41] the French Anticorruption Agency advises entities to adopt the "three lines of defense" model.^[42] The first-level control involves operational personnel responsible for preparing and approving journal entries, and ensuring that they are properly documented and supported with evidence. The purpose of the second-level control, notably involving risk, legal and compliance functions, is to ensure that the first-level control is correctly functioning. The third-level control is a process of ongoing assessment supported by internal and external audits. Additionally, under both laws, companies should monitor and assess the effectiveness of their plans.^[43]

3. Incurred sanctions

If companies do not fulfill their obligation to adopt and implement a vigilance plan, it is yet unclear what the consequences would be. Only **common civil liability** would apply based on the French general tort law.^[44] As such, interested parties might be able to allege that companies are civilly liable and seek damages,^[45] and/or require the judicial authorities to order a company to develop and implement a vigilance plan.^[46]

In this respect, the Duty of Vigilance Law seems to share some similarities with the U.S. Alien Tort Statute (**ATS**),^[47] which states that "*the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*"^[48] The U.S. Supreme Court recently significantly narrowed the application of the ATS by holding that it may not be used to impose liability on foreign corporations.^[49] It is worth noting that the French constitutional court has similarly limited the impact of the Duty of Vigilance Law so that its scope shall not exceed the usual limits of tort law and thus expose companies to excessive liability risk. To date, no action for noncompliance with the Duty of Vigilance Law seems to have been brought in France. However, some NGOs in March 2018 issued a formal notice on the basis of this law claiming that a number of companies were responsible for the deforestation caused by wrongful soya cultivation in Latin America.^[50]

By contrast, the Sapin II Law specifically provides that if a covered entity fails to implement an effective anticorruption compliance program, it may incur **administrative fines** (independent of any potential criminal prosecution) imposed by the French Anticorruption Agency (up to €1 million for legal persons, and up to €200,000 for individuals).^[51] Moreover, warnings or orders to adapt the anticorruption measures could be imposed.^[52] The French Anticorruption Agency and judges

could order their decision to be published, disseminated or displayed,^[53] thereby causing reputational damages.

As a way of conclusion

The evolution of the French and EU legislative framework illustrates a paradigm shift in the fields of corporate social responsibility and the fight against corruption, with both being reshaped by a transition from soft to hard laws. Given the compliance challenges at stake (including for a company faced with multijurisdictional investigations), companies should be encouraged to rapidly address their important ethics responsibilities by implementing a coordinated, rationalized and cost-effective corporate compliance approach based on international standards shared by the EU and the United States.

[1] Government bill relating to growth and transformation of companies, dated 9 October 2018, Article 61, to be adopted in January 2019.

[2] Directive 2014/95/EU of the European Parliament and of the Council, 22 October 2014, amending Directive 2013/34/EU as regards disclosure of nonfinancial and diversity information by certain large undertakings and groups.

[3] Article L.225-102-1 of the French Commercial Code, modified by the Order No. 2017-1180, 19 July 2017: Information on how companies take into account the social and environmental consequences of their activities, and, for some of them, on the impact of their activities with regard to human rights and the fight against corruption must be disclosed in their annual report; should companies fail to disclose that information, an injunction procedure might be triggered under the same article.

[4] Law No. 2016-1691, 9 December 2016, on transparency, fighting corruption and modernizing economic life.

[5] An anticorruption program sanction has also been created and is provided for in the French Criminal Code.

[6] See notably the U.S. Federal Sentencing Guidelines, the 2010 UK Bribery Act, and related guidelines.

[7] *E.g.*, under Article 31 *bis*, para 2, of the Spanish Criminal Code, an effective implementation of a compliance program is expressly deemed to exempt a company from its liability and Section 31 *quáter* considers it as a mitigating circumstance. Under Section 7(2) of the UK Bribery Act, implementation of a compliance program is a defense for a company to prove that it had “adequate procedures” in place to prevent bribery. Article 6.1.(b) of the Italian Decree No. 231 of 8 June 2008

also provides that companies may avoid the risk of incurring liability provided that they have implemented an effective compliance program.

[8] Law No. 2017-399, 27 March 2017, on the duty of vigilance for parent and other companies, modifying the French Commercial Code.

[9] Directive 2014/95/EU, 22 October 2014, amending Directive 2013/34/EU as regards disclosure of nonfinancial and diversity information by certain large undertakings and groups.

[10] For instance, see the UK Modern Slavery Act 2015; California Transparency in Supply Chains Act of 2010 (SB 657).

[11] SCCJ, “Another step towards the adoption of a mandatory HRDD bill in Switzerland,” 16 July 2018, ECCJ: <http://corporatejustice.org/news/7046-another-step-towards-the-adoption-of-a-mandatory-hrdd-bill-in-switzerland>.

[12] French Const. Court, 23 March 2017, No. 2017-750 DC, para 3.

[13] Art. L. 225-102-4, I, para 1, of the French Commercial Code.

[14] Art. 17, I, of the Sapin II Law.

[15] Art. L. 225-102-4, I, para 3, of the French Commercial Code.

[16] Art. 17, I, 2°, of the Sapin II Law.

[17] S. Brabant, C. Michon and E. Savourey, “The Vigilance Plan. Cornerstone of the Law on the Corporate Duty of Vigilance” (2017) 50 *Revue Internationale de la Compliance et de l’Ethique des Affaires*, 1, 8.

[18] E.g., it seems that the company Orange has relied upon its CSR department, which had been associated with the compliance department created within the context of the Sapin II Law:

<https://www.orange.com/fr/content/download/46451/1361766/version/4/file/Plan%20de%20Vigilance%20%20Orange%202017.pdf>.

[19] C. Michon, S. Berne and S. Boucherand, “Application of the law on the corporate duty of vigilance. Analysis of the first published plans,” 25 April 2018, 1, 8.

[20] Art. L. 225-102-4, I, para 4, of the French Commercial Code.

[21] AN, report No. 4242 of 23 November 2016, 14.

[22] Art. 17, II, of the Sapin II Law.

[23] Criminal division of the U.S. DOJ and the enforcement division of the U.S. SEC, A resource guide to the U.S. FCPA, 2012.

[24] *Ibid.* 57 – 63.

[25] French Anticorruption Agency, Guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism, 2017.

[26] *Ibid.* 11.

[27] Art. 17, II, 3°, of the Sapin II Law; Art. L. 225-102-4, I, 1°, of the French Commercial Code.

[28] Guidelines of the French Anticorruption Agency (n 25) 15.

[29] A. Petitjean and P. Hoerner, “*Devoir de vigilance: quel bilan des premiers plans ? Comment se positionnent les parties prenantes?*” (2018) *Centre Etudes & Prospective du Groupe Alpha* 1, 3.

[30] *Ibid.* 2.

[31] Art. 17, II, 4°, of the Sapin II Law.

[32] Art. L. 225-102-4, I, 2°, of the French Commercial Code.

[33] Guidelines of the French Anticorruption Agency (n 25) 19.

[34] *Ibid.* 24.

[35] Art. 17, II, 1°, of the Sapin II Law.

[36] Art. 17, II, 6° and 7°, of the Sapin II Law.

[37] *E.g.*, Total Code of Conduct:

https://www.total.com/sites/default/files/atoms/files/total_code_de_conduite_vf.pdf.

[38] *E.g.*, Total Fundamental Principles of Purchasing:

https://www.total.com/sites/default/files/atoms/files/fundamental_principles_purchasing.pdf.

[39] Art. 17, II, 2°, of the Sapin II Law; Art. L. 225-102-4, I, 4°, of the French Commercial Code.

[40] U.N., Guiding principles on business and human rights: implementing the United Nations “Protect, Respect and Remedy” Framework, 2011, principle 31; see also Guidelines of French Anticorruption Agency (n 25) 19 and CNIL, Deliberation No. 2017-191 of 22 June 2017 modifying

deliberation No. 2005-308 of 8 December 2005 on the single authorization of data processing in the context of whistleblowing schemes.

[41] Art. 17, II, 5°, of the Sapin II Law.

[42] Guidelines of French Anticorruption Agency (n 25) 27.

[43] Art. 17, II, 8°, of the Sapin II Law (and “French anti-corruption guidelines now available to companies in English,” 15 February 2018, De Brauw Blackstone Westbroek); Art. L. 225-102-4, I, 5°, of the French Commercial Code.

[44] Decision No. 2017-750 DC (n 12) para 27.

[45] Art. 225-102-5, para 1, of the French Commercial Code.

[46] Art. L. 225-102-4, II, para 1, of the French Commercial Code.

[47] 28 U.S.C. § 1350.

[48] 28 U.S.C. § 1350.

[49] *Jesner v. Arab Bank*, 584 U.S. (2018).

[50] Official notice, 26 March 2018 from Mighty, *France Nature Environnement* and Sherpa.

[51] Art. 17, V, para 2, of the Sapin II Law.

[52] Art. 17, V, para 1, of the Sapin II Law.

[53] Art. 17, V, para 4, of the Sapin II Law; Art. L. 225-102-5, para 3, of the French Commercial Code.

Noëlle Lenoir

Co-author

Paris

T +33 (0)1 44 09 16 10

F +33 (0)1 44 09 46 01

nlenoir@kramerlevin.com

Alan R. Friedman

Co-author

New York

T 212.715.9300

F 212.715.8000

afriedman@kramerlevin.com

Hélène Bérion

Co-author

Paris

T +33 (0)1 44 09 46 88

F +33 (0)1 44 09 46 01

hberion@kramerlevin.com

Daniel Lennard

Co-author

New York

T 212.715.9396

F 212.715.8000

dlennard@kramerlevin.com

