

Code of conduct, whistle-blower protection procedure, vigilance plan: New obligations placed on companies

French lawmakers have adopted new obligations to be observed by companies, and in particular:

- **law no. 2016-1691 dated 9 December 2016**, relating to transparency, combatting corruption and the modernisation of economic life (the so-called "Sapin II Law"). This law was supplemented by **decree no. 2017-564 dated 19 April 2017**.
- **law no. 2017-399 dated 27 March 2017** relating to the duty of vigilance of parent companies and subcontracting companies.

The principal obligations arising from these laws are described below.

❖ **Compliance programme: Code of Conduct**

Law no. 2016-1691 dated 9 December 2016 created the obligation to "take measures to prevent and detect the commission of acts of corruption and influence peddling in France and abroad" through a compliance program.

Pursuant to Article 17 of the law, the adoption of a **code of conduct**, which is a part of such programme, is mandatory for "**any company that employs at least five hundred employees, or that belongs to a group of companies whose parent company has its registered office in France and whose workforce is made up of at least five hundred employees, and whose turnover or consolidated turnover exceeds 100 million euros**".

Such code of conduct must:

- define and illustrate the various types of conduct to be forbidden, as they are prone to constitute acts of corruption or influence peddling,
- be included in the company's interior regulation.

Therefore, when adopting this code of conduct, it will be necessary to comply with the procedure applying to amendments of the interior regulation, i.e.:

- be submitted to the employee representatives for an opinion
- be sent to the work inspectorate,
- be filed with the labour court,
- be brought to the attention of employees through posting,
- specify an effective date that is one month after the date the last of the filing and publication formalities have been carried out.

This measure becomes effective on 10 June 2017.

❖ **Whistle-blower protection procedure**

Law no. 2016-1691 dated 9 December 2016 also introduced into French law protective status for whistle-blowers.

Pursuant to Article 8 of the law, “***appropriate procedures for collecting reports made by their personnel and by outside and occasional workers shall be established by private [...] legal entities having at least 50 employees.***”

Decree no. 2017-564 dated 19 April 2017 defined the **mandatory content of this procedure**, which must:

- First, specify the manner in which the person making the report must:
 - direct his/her report to a superior, the employer or the liaison designated by the employer,
 - furnish any information in support of the report,
 - furnish any information allowing there to be, as appropriate, an exchange with the person receiving the report.

- Second, specify the measures taken by the company to:
 - inform without delay the reporting person that the report has been received, the reasonable and foreseeable amount of time necessary for the report to be examined and the manner in which he/she will be informed of the action taken in connection with such report,
 - guarantee the strict confidentiality of the identity of the reporting person, the facts that are the subject-matter of the report and the persons concerned by such report, including in the event of disclosure to third parties when such disclosure is necessary to verify or process the report,
 - destroy the elements of the report file that could allow the reporting person or the persons that are subject of the report to be identified (if no action is taken in respect of the report or at the end of a period that cannot exceed two months commencing on the date the verification or admissibility reviews are completed).

The decree specifies that several companies, notably belonging to the same group, can decide to establish a procedure that is common to several of such companies.

The above provision will take effect on 1 January 2018.

❖ **Vigilance plan**

- **Obligation to put in place a vigilance plan**

Law no. 2017-399 dated 27 March 2017 introduced a duty of vigilance incumbent upon parent companies and subcontracting companies vis à vis their commercial partners, which is codified in Articles L.225-102-4 and L.225-104-5 of the French Commercial Code.

Pursuant to Article 1 of such law, the vigilance plan must be adopted by “**any company that employs, at the end of two consecutive financial years, at least 5,000 employees at the company level and in its direct and indirect subsidiaries whose registered offices are located on the French territory, or at least 10,000 employees at the company level and its direct and indirect subsidiaries whose registered offices are located in France or abroad**”, unless the company that controls the companies in question has established and implemented a plan relating to its own activities and those of all of its subsidiaries and the companies it controls.

The plan must contain reasonable vigilance measures aimed at preventing risks of violations of human rights, fundamental liberties, personal health and safety and the environment.

This plan must be **prepared in association with “the company’s stakeholders”**, which is defined as all persons who participate in the company’s economic life as well as members of civil society who are directly or indirectly influenced by its activities (law no. 2012-1559 dated 31 December 2012 relating to the creation of the *Bank Publique d’Investissement*).

The plan must contain:

- **a mapping of the above risks**, which is intended to identify, analyse and prioritise such risks,
- **evaluation procedures** for the recurring evaluation of, in light of the risk mapping, the situation of subsidiaries, subcontractors and suppliers with whom there is an established commercial relationship,
- **tailored actions to limit risks and prevent serious violations**,
- **a report mechanism and collection procedure** regarding the existence or realisation of risks that has been prepared in consultation with the company’s employee representative bodies,
- **a system for monitoring the measures** put in place and assessing their effectiveness.

A decree may potentially supplement this list and specify the terms for preparing and putting in place the plan.

The vigilance plan and the report on its actual implementation must be made public and included in the management report.

- **Sanctions for a deficient vigilance plan**

If a company does not comply with its duty of vigilance, it **can be formally requested to do so** by any interested party. In the event of the company’s inaction for three months following the formal demand, at the request of any person that has standing, the competent court may **enjoin** the company (under penalty as may be appropriate) to **establish a vigilance plan**.

The president of the court acting in the framework of summary proceedings may be petitioned for the same purpose.

Any violation of the duty of vigilance attracts the liability of the violating person. In the event of any harm, such party will be required to repair the victims’ losses that could have been avoided, had such duty been observed.

In addition, the court may **order the publication, dissemination or posting of its** decision or an excerpt of such decision.

The fine that had been initially provided for in the law was struck down by the Constitutional Court in a **23 March 2017 decision**.

- **Effective date**

All of the new provisions shall become effective **as of the report of the board of directors or the management board presented to the general meeting relating to the first financial year commenced after 28 March 2017**, the date the law was published, **other than the vigilance plan, which must be put in place as of the first financial year following the publication of the law.**