



Compliance Law in the French Context: New Horizons For Legislative Policy

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Abstract. This article presents legal aspects of compliance law in France. The article analyses the distinctive and connected aspects of compliance and corporate law. It has been stated that compliance law has theoretical and legal expression, which are not only interconnected but also complement one another. The article's discourse emphasises that national (French) legislation, in order to be effective, reflects the tendencies of the Anglo-Saxon concept of compliance law. The article looks at this issue not only from a legal point of view, but also with an emphasis on the humanist aspect of legal order. The article concludes that compliance law not only benefits companies and markets, who sometimes confuse compliance law and financial law, but also contributes to the upholding of humanistic ideals.

Keywords: French legislation policy, French penal law, Compliance law, corporate law

Introduction

The notion of compliance is at the core of higher-stakes legal activity, such as the fight against money laundering, tax fraud, human trafficking, and conservation of the environment. On a very practical level, compliance allows to switch from a “culture of suspicion” to a “culture of trust”.

The key concept of compliance is the creation of a bridge between the present and the future in the business community. It contributes to building stronger trusted relationships between private companies and public authorities with information sharing contributing towards a common goal: protecting human beings. The state alone cannot assume this role. The weakening of governments has resulted in the empowerment of private companies, which now play a leading role in global market security.

However, a core question remains: To what extent is compliance a bet on the place of human beings in global markets and on the need to reconnect with reality? This article uses comparative and systematic methods to examine this question, drawing from sources of including legal acts (national and international laws) and scientific material (articles, monographs, results of sociological research).

1. Overview of compliance law

If there is a strong temptation to consider compliance as a US attempt to enforce its model on Europe as a juridical “subjection”², this study means to understand this notion and its potential positive effects on global markets.

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² The question of compliance as a tool of U.S. domination could be asked. Indeed, when a compliance procedure of a French company is validated, it must be confirmed that this procedure complies with obligations established by the U.S. Department of Justice, by the Serious Fraud Office (SFO), by the State Department and by the Office of Foreign Assets Control (OFAC) regarding exports, for example. The globalization of law is the most obvious in the case of compliance law. As a result, companies entrust international firms specialized in

1.1. Definition of compliance

Originated in English-speaking countries, “compliance” was born in the mid-1990s in regulated sectors such as banking and other industries (i.e. pharmacy, energy). It was a key concept among banks, which are subject to very stringent regulatory requirements.

The risk of non-compliance with American and British anti-corruption standards has become a major issue for French companies. For a long time, French companies have been less competitive than American or British ones because they were unable to comply with public demands of the same conditions. Compliance law is often considered a mechanistic, ineffective procedure, without any concern for humanism.

If compliance law constitutes rules regarding information and helps decrease systemic risks on global markets, a key requirement is to “know your customer”.

In this regard compliance law will inevitably come into conflict with corporate law regarding the notion of legal entity. Compliance law compels companies to know the identity of their clients and to report it to the necessary governing bodies. What is exceptionally sanctioned -- the creation of a fictitious company -- is now often part of the work plan of business moralization.

1.2. Confrontation between compliance law and corporate law

In understanding the relations between compliance law and corporate law, it is important to expose the origin of compliance law. It can be considered the heir or the continuation of regulation law. Just like regulation law, compliance law discards the artificial or rigid constructions of law.

Compliance law aims to achieve two distinct but coordinated goals: knowing the identity of the “beneficial owner” and knowing everything about said owner. The revolution of compliance is the ability to prosecute and penalize legal entities for infractions committed on their behalf by their bodies or representatives.

This vigilance duty is most often referred to as “know your customer” (KYC). It means that when taking on a new customer, there is a need to know them fully -- not only their “true identity”, but also what in practical terms constitutes the organization, including their activities, relationships, estate, and projects.

For example, Article 139 of the French law 2016-1691 of 9 December 2016 (the Sapin II Law) introduced a new obligation for trading companies, civil companies, economic interest grouping and other entities such as associations and collective investment undertakings that need to register to the Trade and Companies Register. This obligation is to identify their beneficial owners.

To fight against corruption, in 1989 the G7 established the Financial Action Task Force (FATF) of which the French Agency TracFin is part. When a company acts for a “customer”, it must know the “beneficial owner” of the operation, that is to say “the natural person(s) who own or control effectively a client AND/OR the natural person on whose behalf a transaction is done”.

Though all public international organizations, such as the World Bank, the OECD or the FATF, attempt to prevent the establishment of fictitious entities, only the brutal mechanism of whistleblowers (Courret, Rapp, 2000) acting

compliance and having global expertise based on their investigations, their effective monitoring procedures, and the harmonization of procedures in different markets.

“*ex-post*” seem to be taking this important step, though this fact³ need to be further explored⁴.

1.3. Confrontation between compliance law and penal law

Before moving into an analysis, we must examine how the French notion of compliance came to be. It has been observed that although an offense committed by a physical person could be attributed to their personal history, weaknesses or toxic relations, this mode of reasoning was not transferable to a legal entity, in essence devoid of morality. It was therefore relevant to take an interest in the internal organization of a legal entity via ethical charters, a compliance program, or an internal audit.

Legal entity companies have become just as responsible, on a penal level, for offences committed on their behalf by their organs or representatives, as physical persons.

This has brought about several interesting results: the necessity of developing a culture of negotiation with the public Ministry, the rise of a culture of professional confidentiality for internal jurists and auditors⁵, as well as putting motivational, positive feedback mechanisms in place to reward efforts made by moral persons.

In addition, compliance law is characterized by its legal origins: *ex post*⁶ is transferred into *ex ante*⁷. *Ex post* repression is somewhat transferred to a company that watches itself, evaluates itself, and even denounces itself. A punitive aspect exists, but it punishes beforehand much more frequently than it repairs after the fact. If some researchers have deemed it to be in violation of French law, we should note that the political dimension of corporate law is thus reinforced, and that the position of a partner becomes central, thus benefiting from expertise on both an economic and political level. The partner, instead of remaining passive, becomes proactive politically, which benefits the company’s internal policies first, before spreading via a generalization of those codes of conduct to every company in a given sector, and then to all the companies receptive what it at stake when it comes to compliance.

2. Overview of compliance law in France

Compliance comprises all procedures ensuring respect of rules by salaried employees, executives, management and commercial partners.

France has been long decried because of the vulnerability of its compliance disposals, especially regarding the fight against corruption. As a result, the French regulation against corruption and financial crime has been reinforced with binding commitments.

³ On the 20 November 2018, the members of the Committee on Legal Affairs at the European Parliament adopted the project of the European Commission aiming to enforce protection of whistleblowers in the EU. They agreed to extend this protection to the journalists and everyone helping whistleblowers.

⁴ Whistleblowers must first report to their hierarchy before informing public authorities or the media, in case of lack of due diligence (except in case of serious or imminent danger or risks of irreversible damages). For example, for Kernaghan et John W. Langford (1990), there are whistleblowers strictly speaking only outside of the organization.

⁵ Regarding reports that could be seized during an administrative search. “*ex post*” in economic theories, corresponds to “*a posteriori*” in law and indicates a reaction to a situation or a behavior. Every sanction, transaction or mediation corresponds to “*ex post*”.

⁶ “*ex post*” in economic theories, corresponds to “*a posteriori*” in law and indicates a reaction to a situation or a behavior. Every sanction, transaction or mediation corresponds to “*ex post*”. “*ex ante*”, in economic theories, corresponds to “*a priori*” in law and indicates every attempt to grasp a situation before it happens.

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In this regard, 2018 was a milestone in contemporary history of compliance law, with necessary adjustments made to the legal framework and the establishment of dedicated agencies and institutions. French companies had very limited time to comply with new French and European rules.

A brief presentation of major evolutions of the French legal framework enabling France to comply with new stakes of compliance will follow. The new legislation complies with the best international existing standards regarding compliance.

The enactment of Law n°2016-1691 of 9 December 2016 (the Sapin II Law) , regarding transparency, the fight against corruption, and the modernization of economic life enables France to catch up with international standards and to indicate its willingness to fight effectively against corruption.

2.1. France in the new era of compliance: the Sapin II Law

Companies and economic groups whose parent company is French, reaching the double condition provided by Article 17 of the Sapin II law (500 employees and a turnover of 100 million euros) must implement measures to detect and prevent corruption or influence peddling committed in France or abroad.

For example, they can adopt a code of conduct listing prohibited actions and behaviors; implement an internal warning system⁸ by gathering reports from employees; establish a cartography of potential corruption and insider influence; put procedures in place to evaluate their clients; examine the activities of primary and intermediary providers; put accounting control procedures in place; offer training sessions to executives and exposed personnel; adopt disciplinary measures to punish employees who violate the company's code of conduct; ensure those procedures can be controlled and evaluated internally.

The Agence Française Anticorruption (AFA) ensures those obligations are met and through its mission to advise and support economic actors. Also aims to help the relevant entities to prevent and detect corruption.

In case of negligence, the AFA may deliver a warning or take it up to the commission handling sanctions, which might then issue an order of compliance or a financial sanction that can amount to one million euros for legal entities, and two-hundred thousand euros for physical persons. The AFA can also inform the competent prosecutors of its findings in the context of its mission, if they potentially constitute a crime or misdemeanor.

In addition to its mission of control, the AFA also acts as an adviser to companies in the form of verbal and written recommendations regarding the best way to put internal procedures of control in place, and to put together an anti-corruption program suited to the company's activities. Those recommendations would, in time, evolve into the creation of practical guidelines.

2.2. The Judicial Agreement in the Public Interest (convention judiciaire d'intérêt public CJIP): a major innovation from the Sapin II Law

The Sapin II law introduced the judiciary convention of public interest into French penal law. It is directly inspired from the US "deferred prosecution agreement". The CJIP is a penal transaction without any prior guilty plea, provided by the article 41-1-2 of the French Penal procedure Law. It refers to legal entities prosecuted for corruption, bribery, (serious) money laundering, and fiscal fraud laundering.

⁸ Initially reserved to criminal convictions, the disposal progressively included threats of disclosure and serious harm of general interest.

It allows the termination of a public prosecution against legal entities under conditions such as paying heavy fines, implementing a compliance work plan under the control of the French Anticorruption Agency, or reparations to victims if they are identified.

The first CJIP signed quickly after enforcement of the Sapin II Law sent a clear and deterring message: the penal courts can penalize quickly and with force. Companies were encouraged to comply with new laws and to fight corruption effectively.

2.3. Law on duty of care of 27 March 2017: Respect of human rights

This law aims to prevent social, environmental and governance risks of specific companies, their subsidiaries, their commercial partners (subcontractors and suppliers).

Reacting to the 2013 Savar Building Plaza collapse⁹ and the forced labor scandal on the World Cup construction sites in Qatar, the law on duty of care aims to bind multinational companies to respect human rights. Those events were the starting point of global awareness and desire to enforce social responsibility on big industrial European companies.

This law compels French companies employing more than 5,000 employees in France or 10,000 salaries worldwide, including their affiliates, to implement and enforce a duty of care plan (Sherpa, Vigilance plans Reference guidance).

The duty of care plan must include due diligence measures to identify risks and prevent serious harm of human rights, fundamental freedoms, environment, safety and security that the company or its direct or indirect affiliates, subcontractors or regular suppliers may cause.

For this reason the duty of care plan includes the following measures: mapping of identified analyzed and hierarchized risks; periodic assessments of subsidiaries, regular subcontractors and suppliers; actions to prevent serious harm; a rapid reaction mechanism collecting reports on potential and existing risks, established with local unions; and a follow-up and evaluating mechanism.

This duty of care plan and its reports are published by the company. Finally, the law provides a civil liability mechanism in case of failures.

2.4. Law of the 23 October 2018 regarding fight against fiscal fraud: consolidation of compliance tools

This law aims to reinforce the means to fight against social and fiscal fraud. More than imposing a fine, the law aims to sully the reputation of a company convicted of fiscal fraud. “Naming and shaming” prevents companies from committing fiscal fraud by deterring them not to comply with fiscal rules.

Article 18 of the law provides for the public stigmatization of legal entities or natural persons convicted of serious fiscal fraud. The tax administration, only with reasoned assent of the Committee on Tax Infringements, is allowed to publish on its website the tax penalties imposed on convicted natural persons or legal entities. Moreover, Article 16 of the law provides that a criminal judge¹⁰ must publish every conviction of fiscal fraud (in the past this was optional) .

⁹ A building with structural failure housing garment factories working for several international brands collapsed in April 2013 with a death toll of 1 134 workers.

¹⁰ The judge can exempt themselves from publishing their judgment only with a special motivated decision, regarding circumstances and the personality of the perpetrator.

Furthermore, the law of 23 October 2018 also reinforces criminal and administrative punishments by adapting the so-called “verrou de Bercy”¹¹. Previously only the fiscal administration was allowed to complain, and only with the approval of the Committee on Tax Infringements¹². Article 36 of the new law obliges the tax administration to complain to the Public Prosecutor in several cases of fiscal fraud according to specific criteria (from 100, 000 euro of tax adjustments, with high penalties sanctioning bad faith or fraudulent means). The new law also allows judges to release tax officials from their duty of professional secrecy, even without any prosecution of a taxpayer.

This law increased criminal sanctions against fiscal fraud. According to Article 23 of the law, a perpetrator incurs five to seven years of imprisonment and a 500, 000 to 3 million euro fine. In every case, the court can decide to fine a perpetrator for twice the assessed value of the proceeds of crime stemming from the offence.

Also, the law extended the CJIP (cf. above) to fiscal fraud of legal entities, while natural persons can plead guilty and avoid trial by accepting an appearance with prior admission of guilt.

The prior 2018 set of rules ensured the primacy of the United States in the fight against corruption. As seen above, compliance law has roots in business law of English speaking countries.

The first law compliance comes from the United States: the 1977 federal law entitled the Foreign and Corrupt Practices Act (FCPA) sanctioned corruption of foreign civil servant by companies or people, either from the US or from any nationality, with large connecting criteria to the US jurisdiction. The FCPA is an extraterritorial law which has effects outside of the US territory and constitutes a primary tool of American economic and diplomatic domination. It allowed the American courts to impose very heavy fines to foreign companies, including French ones.¹³

For almost 20 years, the FCPA was the only rule regarding fight against corruption and compliance. As a result, the American justice was triumphed around the world as tough but always negotiable.

International bodies and organizations¹⁴ have invested in the compliance sphere regarding the fight against corruption; these include such as the Organization of Economic Co-Operation Development (OECD)¹⁵ with the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 December 1997, the UNO with the United Nations Convention against Corruption of 14 December 2005 and the

¹¹ Literally it means “the lock of Bercy”. Bercy is the name given to the French Ministry of Finances, referring to the name of the quarter where the ministry is housed.

¹² Before this new law, the Attorney Generals couldn’t prosecute fiscal fraud without a complaint from the tax administration, which had a discretionary power to prosecute or not. There wasn’t full disclosure on the criteria used by the tax administration to prosecute some perpetrators and not others. The new law also allows the tax administration to complain without the approval of the Committee on Tax Infringements in case of deception, of fictitious or artificial foreign tax domicile, of forgery or of use of foreign legal or natural entities or of foreign bank accounts to conceal proofs.

¹³ These companies prosecuted under the FCPA were fined hundreds of millions of dollars after as part of deferred prosecution agreements. These fines undermine deeply capacities of these companies to develop and maintain their activities and profitability.

¹⁴ Following those international recommendations, France implemented a financial intelligence service, called the Tracfin unit, under the authority of the Minister of Public Action and Accounts. Tracfin evaluates in an annual report the trends and risks of money laundering and terrorist financing, following the recommendations of the Financial Action Task Force. This unit helps develop a safe economic environment by fighting against illicit financial circuits, money laundering and terrorist financing. It collects, analyzes and completes expressions of suspicions from finance professionals compelled to declare by the law, but it cannot collect any information from natural persons.

¹⁵ If France ratified the OECD convention in 1999, the legislative framework was unsatisfactory due to a missing transactional mechanism and a lack of obligation for public authorities to collect proofs abroad without sufficient human and financial means, as well as ineffective sanctions and to legal and procedural barriers preventing from prosecuting acts committed abroad.

Council of Europe with the establishment of the Group of States against Corruption, known as GRECO in 1999¹⁶. In this framework, France had to adapt its legislation to prevent and fight corruption among its national companies and to extend compliance law to protect human rights.

2.5. Overview of compliance law in France: Encouraging initial results

At first glance, compliance can be seen as a US domination tool in a “juridical” cold war.

On the political side of compliance law, beyond obligations for companies to implement a stringent Compliance Work Plan, the Sapin II Law aims to show that France can regulate, control, prosecute and penalize its own companies in a sovereign manner.

As a result, the French anti-corruption agency works to legitimize the role France played on an international level and to limit US court intrusion. The CJIP stands with some credibility on the international level¹⁷.

In the Corruption Perceptions Index 2018, published by Transparency International, France ranks at 21st place, ahead of the USA .

On the economic side of compliance law, beyond the implementation costs and administrative barriers of the anti-corruption compliance work plan, it is a competitive player at national and international levels.

Furthermore, more than 85% of companies within the scope of the Sapin II Law accepted to implement a compliance work plan. In 70% of cases, the legal department of the company is in charge of the compliance implementation.

85% of companies reported having implemented a compliance work plan and half of them with the help of lawyers or specialized consultants (Map of legal, 2018).

2.6. Potential evolutions of compliance law: Towards more humanity in regulatory laws

Compliance is required and will soon become a competitive tool, since it protects or even increase a company’s reputation. A company’s market value consists primarily in its reputation. Its reputation includes corporate social responsibility, business ethics as well as compliance. Compliance is a trust factor between a company and its clients or suppliers, implying measures against corruption, fiscal fraud and a level of social and environmental responsibility. Shareholders are sensitive to good governance guarantees.

Compliance must be a tool of motivation and growth in companies and must insert humanity into regulatory laws.

2.7. Potential evolutions of compliance law: Towards a more cross-disciplinary approach regarding regulatory laws

One must remember national companies are constantly exposed to foreign laws. Lawyers, as the natural partners of companies, can support companies in implementing compliance law with a cross-disciplinary approach,

¹⁶ The Group of States against Corruption (known as GRECO) was created in 1999 by the Council of Europe to control compliance with anti-corruption norms among member States.

¹⁷ As an example, a CJIP has been signed on the 24th May 2018 between the French Financial National Prosecutors (known as Parquet national financier – PNF) and the Société Générale bank, after joint investigations of US Department of Justice and the French Prosecutors ended with a CJIP and a “deferred prosecution agreement”. The Convention specifies that the U.S. Department of Justice and the French PNF shared their proofs and decided a common resolution from their own investigations. It is interesting to note that the French CJIP doesn’t require a guilty plea, in contract to the US “deferred prosecution agreement”.

including penal, social, corporate, competition, industrial property laws.

In the long run, compliance implies a strengthened European legal arsenal to limit the intrusions of US courts, justified by the weakness of the legal mechanism of anti-corruption in France and Europe. The new French laws (see above) should result in deterring US courts in prosecuting and penalizing French companies, now monitored by the French Anti-corruption Agency and the French Financial National prosecutors. However, this legal mechanism must be consolidated and standardized at the European level.

Without a real “non bis in idem” mechanism at the international level, a multinational company can be investigated in many countries using the same facts. This would result in several examinations and searches with potentially increased negative media impact on its reputation.

At the European Union level, a regulation or a binding directive should enforce standardization of fight against corruption among all member states and implement cooperative mechanisms between public authorities with a multilateral agreement recognizing the “non bis in idem” principle regarding judgments by courts outside of Europe. The European Union would have capacity to penalize companies for corruption.

Such a European legal mechanism against corruption would balance the asymmetric relationship between the European Union and the United States regarding compliance, which remains an opportunity to consolidate a social and economic system respecting ethical values.

Conclusions

Compliance is an undeniable asset for companies because it helps them preserve their reputation¹⁸, their image, their performances, their competitiveness and as a result, their sustainability. Though the real revolution lies in the trusted environment developed between the private sector and public authorities thanks to compliance law. Compliance is a political asset and gives humanity a role in the global market. In the long run compliance can help Europe and France to stand against the USA in the global markets in a sovereign manner. While compliance was born from the impotence of a given state to fight against corruption, to protect human rights, or to enforce environmental laws, it may also serve to reinforce the same state on the international level.

Compliance law benefits not only companies¹⁹ and markets, which can sometimes confuse compliance law and financial law²⁰, but also provides benefits to individuals themselves.

A comprehensive European approach would consider compliance a cutting edge for worker protection, gender equality, access to culture and education, and preservation of heritage. Europe has to draw from its humanist tradition.

References

- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).
Corruption Perceptions Index 2018. Available at: <https://transparency-france.org/wp-content/uploads/2019/01/IPC-2018-classement-global.pdf>
Courret, A. et Rapp, L. (2000). Les 100 mots du Droit des affaires, coll. "Que Sais-Je ?". Paris: PUF.
French Law on duty of care (2017).

¹⁸ Reputation implies a form of indirect reciprocity and contributes to maintain a high level of cooperation. The best example remains the meetings where companies share their “best practices”. (Milinski et al. 2002): “A public resource that everybody is free to overuse – the tragedy of the commons”.

¹⁹ Compliance must result from will at the highest level of the company but must also be shared at every level. Compliance needs interactions between top management and employees.

²⁰ In its comprehensive American approach, compliance aims to protect markets from systemic risks.

French Law on fight against fiscal fraud (2018).

Kernaghan, K. et Langford, J.F. (1990). *Responsible Public Servant*. Halifax: Institute for Research on Public Policy; Institute of Public Administration of Canada.

LEXqi Conseil (2018). *Map of legal 2018*. Available at: <https://www.lexqi.com/en/home/>

Milinski, M, Semmann, D. et Krambeck, H. J. (2002). Reputation helps solve the 'tragedy of the commons'. *Nature*, 415: 424-426.

Sherpa (2017). Vigilance plans Reference guidance. Available at: <https://www.asso-sherpa.org/publicatio-de-referenceplan-de-vigilance>

The Agence Française Anticorruption. Available at: <https://www.agence-francaise-anticorruption.gouv.fr/fr>

The Committee on Legal Affairs at the European Parliament (2018). *Project of the European Commission aiming to enforce protection of whistleblowers in the EU*.

The Sapin II Law (2016). 2016-1691 of 9 December 2016.

The United Nations Convention against Corruption (2005).

The United States federal law entitled the Foreign and Corrupt Practices Act (FCPA) (1977).

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