Rödl & Partner

Offer France

Compliance - Risk management and compliance

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I. General presentation of the offer

Compliance is necessary to ensure your business is in line with applicable laws and regulations but also to develop performance and value creation.

We can help our clients design, deploy and audit their compliance programmes in the areas of ethics and anti-corruption, personal data, competition, international trade and CSR.

Our approach is rigorous, pragmatic and multidisciplinary. We rely on recognised experts with many years of experience in corporate compliance. In addition, we combine legal and tax expertise with audit, control and risk management professionals. Being part of an international group enables us to offer you services in a multinational context.

We can also help companies design the tools needed to deploy their compliance programmes, in partnership with solution providers, including alert management, training (face-to-face or e-learning) and third party assessment.

Finally, we are able to assist our clients in any internal investigations related to the effective implementation of their programmes, in particular by proposing action plans based on the results of the investigations.

Our services include:

- Designing and implementing compliance programmes according to your company's business model and risk profile;
- Risk mapping and risk audits;
- Programme assessment (scope, governance, gap analysis, recommendations);
- Carrying out compliance due diligence (seller/buyer) during M&A transactions;
- Setting up and monitoring of alert systems;
- Designing and deploying risk management and reporting processes;
- Training for management bodies and employees;
- Drafting or rewriting a code of conduct, a charter of values and internal regulations specific to your company.

II. Anti-bribery compliance

Article 17 of the French Sapin II law of 19 December 2016 requires companies with a turnover of more than 100 million euros and more than 500 employees to set up a system for preventing, detecting and remedying corruption within all the group's subsidiaries in France and also in its subsidiaries abroad. The implementation of this system is monitored by the Anti-Corruption Agency (AFA) created by law, which carries out numerous controls. In the event of non-compliance with the provisions of the law, the directors and the company itself may be fined by the Sanctions Committee of the AFA.

Such a scheme is intended to apply within all enterprises, including SMEs and TWAs below the thresholds of Article 17,

The law was supplemented by Recommendations published by the AFA in 2017 and revised in January 2021. Companies that comply with the provisions of these Recommendations benefit from a presumption of compliance with Article 17.

This compliance scheme rests on 3 pillars, namely :

1. The commitment of the management;
2. A mapping of the risks of the company's exposure to external solicitations for the purpose of corruption;
3. Risk management procedures.

A compliance programme should also include appropriate policies and procedures (gifts and entertainment, lobbying, third party evaluation, conflicts of interest, sponsorship & patronage, etc.).

The purpose of such a system is to prevent and detect possible acts of corruption in order to remedy them.

In addition, the law provides for the possibility for companies to enter into a DPA-like agreement (public interest judicial agreement, in French : CJIP) when corruption is discovered to avoid long and expensive trials. In return for a waiver of criminal proceedings by judicial authorities, companies must agree to pay a fine that may not exceed 30% of their turnover. The scope of offences that may give rise to a CJIP also covers tax fraud offences and has recently been extended to environmental offences (law of 24 December 2020).

The law also provides for:

- An obligation to set up alert systems, beyond anti-corruption alerts, for companies with more than 50 employees;
- the protection of whistleblowers;
- transparency obligations, including declarations of lobbying actions.

We can assist companies in the implementation and monitoring of their anti-corruption compliance systems, both in France and in subsidiaries located outside of France:

- Developing, implementing and monitoring anti-corruption programmes;
- Performing risk mapping;
- Assessment of the internal audit and control system related to the prevention and detection of corruption risks (work carried out by Financial Auditors):
    - accounting entries properly justified and documented
    - proper execution of first and second level anti-corruption accounting controls
    - Assessment of the adequacy and effectiveness of governance: resources allocated, compliance with business requirements, effective implementation and maintenance.
- Assessment of the integrity of third parties (customers, first tier suppliers and intermediaries):
    - Identification of third parties and collection of information
    - Creation of groups of third parties by risk profile
    - Appropriate due diligence measures to be deployed

- Drafting of codes of conduct, policies and dedicated procedures (e.g. gifts and invitations, conflicts of interest, etc.);
- Training programmes, including e-learning ;
- Third party due diligence programmes (suppliers, customers, intermediaries) ;
- Setting up and monitoring of alert systems;
- Conducting evaluations and audits of anti-corruption compliance programmes;
- Reviewing contractual clauses and general terms and conditions of sale and purchase ;
- Carrying out compliance due diligence (seller/buyer) during merger and acquisition transactions;
- Advising on the organisation and governance of the compliance function;
- Preparing and assisting with AFA controls ;
- Assisting in the event of investigations by the judicial authorities.

Examples of missions :

- Assistance in setting up compliance programmes for companies subject to the Sapin II law (mapping of corruption risks and other pillars of the law);
- Assistance in defining the governance of a programme (anti-corruption and other themes): roles and responsibilities of actors, comitology, governance bodies, reporting, control plans, etc.);
- Development of dedicated policies and procedures (conflict of interest, gifts and invitations, third party evaluation, lobbying, etc.);
- Assistance to a group in the context of an AFA audit;
- Extensive assistance on the compliance aspects of a foreign JV subsidiary of an international group, following allegations of corruption against the local partner: reputation survey, internal survey with interviews of employees concerned, forensic analysis of emails over several years with the help of an external service provider, proposal of a remediation plan to the Group's Board of Directors;
- Deployment of a Compliance programme in the various units of an industrial group's region: review of existing programmes, definition of a new programme, adaptation to local constraints (regulatory and linguistic), training of local teams, monitoring of implementation;
- Definition and implementation of action plans and corrective measures, following internal audit assignments, in coordination with the Group's internal audit and internal control teams ;
- Assistance to the foreign subsidiary of an industrial group, faced with situations of racketeering of its activities by armed groups, as well as requests for "contributions" from state authorities;
- Conducting internal investigations (suspicions of fraud and corruption) in several companies, in particular concerning members of the executive committee (CEO, head of legal affairs) of foreign subsidiaries of an industrial group: verification of the reality or otherwise of the allegations, conducting interviews, forensic analyses, proposals for remedial action.

III. Compliance with data protection regulations

The increasing digitisation of activities of public and private bodies is constantly renewing the problems relating to the conformity of personal data processing.

In the event of infringement, organisations face penalties of up to €20 million in fines or 4% of worldwide turnover, but also risks in terms of image and reputation. In France, the processing of personal data is governed by a binding legal framework: the General Data Protection Regulation (“GDPR”) (in France, "RGPD") and the Data Protection Act of 6 January 1978 as amended.

At a global level, many countries outside the European Union are gradually introducing the concepts of the GDPR. It is therefore essential for organisations operating in France and abroad to integrate GDPR compliance into all their "business" processes and to ensure that this compliance is maintained over time.

We support our clients in this matter thanks to an international network of specialised teams:

- Legal audit of the conformity of personal data processing operations;
- Establishment of registers of personal data processing activities;
- Preparation of data protection impact assessments;
- Drafting of DPAs (Data Protection Agreements), charters, privacy policies, codes of conduct, etc.;
- Framework for cross-border flows of personal data;
- Management of relations with subcontractors (conformity assessment, negotiation and drafting of contracts);
- Employee training and awareness-raising;
- Complaints management and assistance in case of complaint to the CNIL (French Data Protection Authority);
- Day-to-day assistance to the Data Protection Officer (DPO) and staff in charge of data protection;
- On-site or remote assistance in the event of a CNIL inspection;
- Advice and assistance in the context of data breach notifications to the CNIL (French Data Protection Authority);
- Advice and assistance in the context of litigation before the restricted formation of the CNIL (French National Commission for Information Technology and Civil Liberties);
- Advice and legal assistance in the event of a breach of information system security (hacking, intrusion, accidental leakage, electronic fraud etc.).

Examples of missions :

- Assistance in setting up compliance programmes with the RGPD and the French Data Protection Act (mapping of personal data processing, establishment of registers of personal data processing activities).
- Definition and implementation of action plans and corrective measures in coordination with the internal teams of a group;
- Assistance in defining the governance of a DMP compliance programme (roles and responsibilities of the DPO and other actors, comitology, governance bodies, reporting, control plans, etc.);
- Development of dedicated policies and procedures (data subject information policy, privacy policies, security policies, data breach management policies etc.);
- Assistance in the context of a CNIL audit;
- Training of DPOs and data protection officers and raising staff awareness.

IV. Anti-trust compliance

Companies are encouraged to implement compliance programmes with the competition rules in order to prevent, detect and, if necessary, remedy violations of the competition rules (cartels, concerted practices, exchange of sensitive information, so-called vertical restrictions, etc.).

While the establishment of an antitrust compliance programme is not an obligation as such, the absence of such a programme constitutes an aggravating factor in the eyes of the competition authorities in the event of an infringement.

In January 2021, the French Competition authority published a notice indicating that it wished to resolutely promote corporate antitrust compliance procedures, based on the conclusions of a working group which was submitted to it in December 2020 (NB: Jean-Yves Trochon, Senior Counsel of Rödl & Partner Avocats, was one of the members of this working group).

As competition rules are particularly complex and evolving, it is essential that companies implement such arrangements. In doing so, they can guide the behaviour of their employees to avoid infringements in France and abroad. Companies can also benefit from reductions in fines or even immunity in the event of infringements (leniency programmes, settlements). Similarly, antitrust compliance procedures provide a secure framework for the conclusion of complex commercial contracts involving competition issues (JVs, distribution agreements, relations with competitors, etc.) or during M&A transactions. Indeed, the negotiation of such transactions is a phase that is closely monitored by the competition authorities.

Penalties for the offending companies are particularly high. The rules of EU competition law are applicable in EU countries and provide for fines of up to 10% of worldwide turnover.

We can assist companies in the implementation and monitoring of their antitrust compliance systems, both in France and in the group's subsidiaries located abroad:

- Design, implementation and monitoring of antitrust programmes (outside or as part of antitrust proceedings);
- Drafting of dedicated programmes, policies and procedures (Do's and Dont's, conduct in the event of investigations by competition authorities, etc.) for companies or trade associations;
- Evaluation of competition risks, through the elaboration of a mapping of such risks;
- Training programmes, including antitrust e-learning;
- Conducting evaluations and audits of antitrust compliance programmes;
- Assistance in the event of investigations by the competition authorities.

Examples of missions :

- Design and assistance in the implementation of an antitrust compliance programme around the world;
- Merger notifications to numerous competition control authorities (French, European and international); interactions with these authorities, in particular on remedial proposals in order to obtain the agreement of the authorities to the notified operation;
- Conducting "Mock dawn-raids" (putting employees in a situation in the event of raids by the competition control authorities) in various French and international companies;
- Creation and deployment of in-house training programmes in competition law: via e-learning and live, aimed at a variety of audiences: members of the executive committee, lawyers, sales teams, other employees.

V. Trade Compliance (sanctions-embargoes, export control)

Companies are facing increasing risks in their international operations.

Indeed, trade compliance regulations are characterised by their complex and evolving nature and are subject to extraterritorial application by certain jurisdictions, primarily the United States.

Significant sanctions can be imposed by US authorities (OFAC) and other authorities around the world for violations of sanctions-embargo programmes (US, EU, UN) and export control rules. They therefore require the establishment of programmes adapted to the risks and business models of companies, depending in particular on their location and export zones. These programmes must enable them to ensure that their products and services do not involve persons (natural or legal) or countries under sanctions.

These programmes must be linked to other company programmes, in particular the anti-corruption compliance programme, which requires due diligence by third parties similar to the Trade Compliance programme (due diligence concerning shareholders, ultimate beneficiaries, politically exposed persons, etc.).

We can assist companies in the implementation and monitoring of their Trade Compliance systems, both in France and in the group's subsidiaries located abroad:

- Design, implementation and monitoring of Trade Compliance programmes;
- Assessments and audits of Trade Compliance programmes;
- Drafting of dedicated policies and procedures (lists of countries under monitoring, export controls, etc.);
- Training programmes, including e-learning;
- Third party due diligence programmes (suppliers, customers, intermediaries);
- Review of contractual clauses and general terms and conditions of sale and purchase;
- Carrying out compliance due diligence (seller/buyer) during merger and acquisition transactions;
- Assistance in the event of investigations by administrative or judicial authorities.

Examples of missions:

- Assistance to a multinational group in the development of a Trade Compliance programme (compliance with the rules on sanctions-embargoes, export control rules, control of operations to countries and persons under sanctions);
- Evaluation of the governance of a Trade Compliance programme (roles and responsibilities of the actors and governance bodies).

VI. Compliance Vigilance / Human Rights Programme

Law n°2017-399 of 27 March 2017 relating to the duty of vigilance of parent companies introduced a new legal framework enabling the French authorities to hold companies accountable for their impact. It is largely inspired by the UN guidelines.

The objectives of this law are to:

- Increase the liability of multinational companies;
- prevent serious incidents of human rights violations or environmental damage in all countries;
- allow any person who can prove an interest in acting to engage the responsibility of the perpetrator, with a duty to compensate the prejudice that the performance of these obligations would have avoided.

The law of 27 March 2017 requires eligible companies to implement a risk mapping and vigilance plan to prevent the risks of serious violations of human rights and fundamental freedoms, the health and safety of persons and the environment, resulting from the activities of the company. This obligation also applies to its controlled companies, directly or indirectly, as well as to the activities of its subcontractors or suppliers.

More specifically, the law states that the vigilance plan must include 5 measures:

- a risk mapping ;
- the establishment of procedures for the regular assessment of the situation of subsidiaries, subcontractors or suppliers with which the parent company or the ordering company has an established commercial relationship;
- Appropriate actions to mitigate risks or prevent serious harm;
- a procedure for alerting and collecting alerts established in consultation with the trade union organisations;
- a system for monitoring the measures and evaluating their effectiveness.

This law should be the subject of a European directive in 2021 and of a law in Germany ("Lieferkettergesetz" project).

Moreover, compliance with the rules of social law is a major challenge given its evolving and often complex nature. Thus, issues relating to the fight against discrimination and harassment, the secondment of employees, health and safety at work, delegation of powers and, more generally, compliance with a harmonious working environment are compliance issues in view of the risks incurred, particularly criminal risks.

Accordingly, companies, including SMEs and TWAs, must put in place systems to prevent their risks, especially when they operate outside Europe.

Such a programme could usefully be embedded in the company's CSR policy, where it exists.
We can assist companies in implementing and monitoring their "Vigilance" compliance systems, both in France and in the group's subsidiaries located abroad:

- Drawing up a CSR risk map and identifying the players (staff representatives, employees, occupational physician, labour inspector, etc.);
- Setting up procedures for the regular assessment of the situation of subsidiaries, subcontractors or suppliers with which the parent company or the ordering company has an established commercial relationship;
- Appropriate actions to mitigate risks or prevent serious harm;
- Alert procedure and collection of alerts established, where appropriate, in consultation with the trade union organisations;
- Mechanism for monitoring the measures and evaluating their effectiveness;
- Training programmes, including e-learning;
- Conducting evaluations and audits of CSR compliance programmes;
- Review of contractual clauses and general terms and conditions of sale and purchase;
- Carrying out compliance due diligence (seller/buyer) during merger and acquisition transactions;
- Integration of employment law issues in compliance programmes.

Examples of missions :

- Assistance to the foreign subsidiary of an industrial group, following allegations of child labour: verification of the allegations, conduct of internal interviews, preparation of a defence plan;
- Assistance to several companies in the context of complaints received for harassment: internal investigation (with the assistance of external service providers), dismissal procedure for serious misconduct and subsequent litigation;
- Assistance to several companies in the context of psychosocial surveys enabling them to "deny" acts of discrimination or harassment that have been wrongly or wrongly reported.

VII. FISCAL COMPLIANCE

The implementation of tax compliance programmes is essential due to the multiplication of tax standards and the complexity they generate.

These programmes have a double advantage:

- minimise the risk of tax adjustments and sanctions;
- improve company management by applying legal measures to reduce the tax burden.

While the establishment of tax compliance programmes is not an obligation as such, the absence of such programmes may prove to be an aggravating factor in the eyes of the tax authorities in the event of controls and infringements.

In addition to the traditional civil and criminal liability, the tax authorities may request that the director be held jointly liable with the company for tax matters. By virtue of article L. 267 of the Book of Fiscal Procedures, a manager who has, in the course of his/her mandate, committed repeated breaches of tax obligations relating to taxes and duties whose collection is rendered impossible can only escape such a conviction if he/she demonstrates either that the causes of the impossibility of collection are multiple or that his/her breaches are not serious.

Case law shows a strict application of this tax liability, without taking into account the personal situations of managers and companies. Judges call into question the liability of the manager even when they are clearly not fraudsters but people who have been overwhelmed by the situation.

In order to manage risks, we can assist companies in the implementation and monitoring of their tax compliance systems:

- Development, implementation and monitoring of "Tax Compliance" systems;
- Drafting of dedicated policies and procedures (Do's and Dont's, control and correction procedures, conduct in the event of a tax audit, etc.);
- Evaluation of risks in terms of tax audits, through the elaboration of a mapping of such risks (principal rights, interest, penalties);
- Training programmes, including tax e-learning;
- Diagnosis and assistance with the certification of the devices implemented;
- Assistance in the event of a tax audit.

Examples of missions :

- Development and assistance in the deployment of a global tax compliance programme;
- Preparation, implementation and follow-up of tax declarations (corporate income tax, VAT, specific tax);
- Drawing up a typology of risks in the company with a view to auditing (VAT, DAC 6, transfer pricing, etc.);
- Implementation of a Tax Compliance Management System: based on a previously established risk matrix, the Tax CMS makes it possible to define the principles and measures aimed at limiting the risks of tax non-compliance and to define the roles and responsibilities of each party involved;
- Creation and deployment of in-house tax training programmes: via e-learning and live, for a variety of audiences: members of the executive committee, lawyers, accountants, other employees, etc.

VIII. OTHER

Other compliance issues include:

Business secrecy

The Business Secrecy Act of 30 July 2018 transposing the European Directive of July 2016 allows companies to set up a system to protect their business secrets as long as the information concerned (i) has commercial value (ii) is known to a limited number of people (iii) is subject to protection measures.

Without constituting a compliance mechanism as such, such measures are particularly useful for groups implementing compliance programmes in the various areas mentioned, given the sensitive nature of the information concerned and the stakes of economic warfare and associated risks.

A reflection on the subject could be initiated because of the traceability requirements imposed by the applicable rules.

Market abuse (Market Abuse Regulation Directive, MAR)

New rules have been introduced by Regulation 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) transposed into the French Monetary and Financial Code. This regulation, known as the Market Abuse Regulation (MAR), came into force on 3 July 2016 and aims to improve market integrity and investor protection by strengthening the current system for combating market abuse.

In particular, it provides for the following obligations (only for companies which are listed or which issue financial instruments, e.g. bonds):

- the publication of inside information, i.e. any "information of a precise nature which has not been made public, which relates, directly or indirectly, to one or more issuers, or to one or more financial instruments, and which, if it were made public, would be likely to have a significant influence on the price of the financial instruments concerned or on the price of related derivative financial instruments";

- the establishment of a list of insiders, i.e. a "list of all persons who have access to inside information and who work for them under a contract of employment or otherwise carry out tasks giving them access to inside information, such as advisers, accountants or credit rating agencies" and the communication of this list to the authority upon request;

- the obligation for executives to report their transactions to the French *Autorité des Marchés Financiers* (AMF).

Mentions légales

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