[REGULATION]

The Loi Sapin obliges employers to set up a whistleblowing procedure and a code of conduct on corruption issues

Law n°2016-1691 of December 9, 2016 on transparency, fight against corruption and modernization of economic life

This law creates new obligations for the employers, as well as a protection for the whistleblowers.

First the companies employing 50 employees of more are now obliged to set up a whistleblowing procedure that applies to their employees as well to the external and occasional associates when they want to make a report on a violation. This obligation is imposed on private companies as well as on the public companies, the governmental administration and the cities with more than 10.000 people.

This whistleblowing procedure must guarantee a total confidentiality, the breach of which is punished by a criminal sentence of 2 years prison and a €30,000 fine ; this confidentiality is for the name of the whistleblower, on the name of the persons object of the report and on the information received by the people who receive the report. The name of the whistleblower may be divulged only with his/her consent, and the name of the person object of the report only once it is established that the alert was grounded. These names may however be divulged in any case to the judicial authority.

The law of December 9, 2016 ("the Law") does not precise whether the report may be made on an anonymous basis. Neither does it precise whether the report may be limited to facts and avoid giving the name of the person who committed them.

Without going into the details of the whistleblowing procedure that must be set up, the Law states that – except where there is a serious and immediate danger or where there is a risk of damage that cannot be repaired - the reports must be made in the first instance to the employer, directly or through the hierarchical superior, or to the person designated to that effect by the employer. Then, absent a reaction in a reasonable period of time, the report may be sent directly to the judicial authority, the administrative authority such and, where it applies, to the professional associations. Absent a reaction of these bodies within 3 months, the report may be made public.

The application of these rules may give rise to difficulties, since neither the serious and immediate danger that authorizes to escalate directly to the judicial or administrative authority without reporting first to the employer, nor the period left for the employer for the enquiry are defined.

The Law also defines the whistleblower and sets up rules to protect whistleblowers when they are employees. Whereas the definition of the whistleblower adopted by the Law applies to any physical person, and not only to employees, the protection concerns exclusively the employees. This was acknowledged by the *Conseil constitutionnel* in its decision of December 8, 2016.

The whistleblower is defined as a physical person that reports, selflessly and in good faith, any crime or any serious and obvious violation of a Law or a treaty, or any serious threat or damage for the public interest, of which he/she was personally aware. This definition is not limited to whistleblowing on corruption issues.

When the whistleblower is an employee, the Law grants him/her a protection, which prohibits any discrimination, provided the report was made according to the whistleblowing procedure set by the employer.

The second new obligation for the employers is to take appropriate actions for a compliance program, defined by the Law, to prevent and identify corrupt acts or traffic of influence.

This part concerns only the companies with 500 employees or more, or with a turnover above €1,000,000. It also applies where the company is part of a group, with a mother company headquartered in France, employing 500 employees or more and with a consolidated turnover above €1,000,000.

In groups the actions may be taken at group level, which dispenses the subsidiaries to take specific actions. Whether this dispense also applies when the company is part of a foreign group that has taken the required actions in these matters is not clear in the Law.

These companies must take the following actions in order to prevent and identify corruption and traffic of influence in France and outside France:

- Set up of a code of conduct defining the behaviors that may qualify as corruption or traffic of influence, with examples; this code of conduct must be inserted in the internal rules (*règlement intérieur*), and be subject to prior consultation with the works council or staff delegates. Based on the general rules of the labour code, this code of conducted will also have to be filed to the Labour inspector, who may ask modifications, and to the Labour Court.

- Set up a whistleblowing procedure;

- Prepare a documentation identifying, analyzing and hierarchizing the risks of solicitations depending on the activity and geographical territories, that must be periodically updated;

- Set up procedures to evaluate the situation of clients, of main suppliers and intermediaries as part of the above mentioned documentation.

- Set up procedures of internal or external audits to make sure that company books and records are not used to hide acts that are corruption or traffic of influence; the audit may be made by the statutory auditors that certifies the accounts;

- Organize trainings for executives and managers (*cadres*) and for persons most exposed to the risk of corruption and traffic of influence;

- Set up disciplinary rules to sanction violations of the code of conduct.

These obligations are imposed on the legal representative of the company, with a sanction of up to €200,000 in the case of violation. The company may also be sanctioned by a fine of up to 1 million euros. These sanctions are pronounced by a special agency created by the Law (*Agence française anticorruption*). These provisions enter into force on June 1, 2017.

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