

Sapin II Law: The new French legal framework for the fight against corruption

February 2017

Introduction

Law no. 2016-1691 on transparency, fighting corruption and modernising economic life was published in the Official Gazette on 10 December 2016. Known as the *Sapin II Law*, its main objective is to set up a genuine anti-corruption¹ mechanism in France, by requiring companies, under penalty of financial sanction, to get involved in this fight.

Largely based on a long-established US law called the Foreign Corrupt Practices Act (FCPA), the Sapin II Law includes many French specificities.

Most of its provisions come into force on 11 June 2017 and will be immediately applicable². The main contributions of the Sapin II Law include the following:

- Establishment of a French Anti-Corruption Agency ("AFA") responsible for monitoring the implementation of internal corruption prevention programs ("*anti-corruption compliance programs*") in the private and public sectors, with powers to investigate and levy sanctions **(1.)**.
- Compulsory implementation of an anti-corruption compliance programme for French companies of a certain size. Companies may be penalized for failure to comply **(2.)**.
- Establishment of a criminal settlement without admission of guilt (the "*Convention judiciaire d'intérêt public*", "*Judicial Convention in the public interest*" or CJIP), mainly for acts of corruption and for money laundering as well as tax fraud **(3.)**.
- Extension and protection of whistleblower status **(4.)**.
- Significant extension of the jurisdiction of the French criminal courts for international acts of corruption. The underlying issue is a form of international competition between anti-corruption judicial systems **(5.)**.

¹ The law aims to combat corruption in all its forms, including influence peddling, as well as occasionally extortion, conflicts of interest, embezzlement and favouritism. For the sake of convenience, we are using "*corruption*" as a blanket term covering all these illegal practices.

² Some implementing decrees are expected, notably on the functioning of the sanctions committee and the powers of the AFA.

1. Establishment of a French anti-corruption agency

The Sapin II Law establishes a French anti-corruption agency, "*under the joint authority*" of the Minister of Justice and the Minister for the Budget. With a 66-person staff, this agency is directed by Charles Duchaine, former president of the AGRASC (*Agence de gestion et de recouvrement des avoirs saisis et confisqués*), the French agency tasked with recovering seized and confiscated assets. The director is appointed by decree of the President of the French Republic for a six-year non-renewable term.

The AFA (*Agence Française Anti-corruption* or the French Anti-Corruption Agency) essentially has a three-fold mission to:

- Assist the competent authorities and persons concerned in preventing and detecting acts of corruption in the broad sense of the term. This agency plans to issue guidelines in the coming months.
- Control the proper implementation of the anti-corruption compliance program for companies subject to sanctions. If necessary, the sanctions committee - which consists of two members from the Council of State, two advisers to the Court of Cassation and two persons from the Court of Auditors - will levy sanctions against them.
- Ensure compliance with Law no. 68-678 of 26 July 1968, which governs the procedure for communicating sensitive information outside France. The aim of this law is to prevent sensitive information leaks to foreign authorities and to maintain France's sovereignty and economy (in particular to prevent divulging the know-how of large French companies).

In recent years, French companies, targeted by American procedures, have been caught between a rock and a hard place. On one hand, US authorities have ordered them to communicate sensitive information, while on the other, France was subject to criminal sanctions for communicating that information, unless the intended purpose was to comply with international agreements that the American authorities themselves did not follow. For practical purposes, the *Service Central de la Prévention de la Corruption* (SCPE or the Central Service for the Prevention of Corruption – i.e. the AFA's predecessor) gradually intervened to settle these disputes and protect France's national interests. It did this by cooperating with foreign authorities to prevent abusive requests for information transfers unrelated to the disputes in question (A.K.A. "fishing expeditions").

The AFA has been officially tasked with this job, which should give big French groups some peace of mind, in particular with regard to threatening requests made by the American authorities.

2. Implementation of an anti-corruption compliance program

2.1. Who does this concern?

The legislation has instituted a two-fold cumulative criterion:

1. Headcount:

- Any company based in France employing at least **500 persons** in France,
- Any company belonging to a group of companies that employs at least 500 worldwide, *but whose parent company is headquartered in France*. A group of companies is defined as the group formed by a company and its subsidiaries within the meaning of Article L. 2331 of the French Commercial Code or a group formed by a company and the entities it controls within the meaning of Article L. 233-3 of said code.
- In other words, the French subsidiary of a foreign group is not concerned if the subsidiary employs fewer than 500 employees.

2. Sales volume:

- A company with consolidated or non-consolidated sales of more than €100 million.
- For a French group with consolidated sales of more than €100 million, the obligation applies to the group as a whole, including subsidiaries, whether these subsidiaries are located in France or abroad.

Therefore, this obligation will concern approximately 1,570 French companies³.

2.2. The objective of the anti-corruption compliance program

The anti-corruption compliance program is to include:

1. A code of conduct:

- This code must define and illustrate the behaviors which constitute acts of corruption to be prevented.
- It is to be incorporated into the internal rules of procedure and, as such, will be the subject of the consultation procedure for employee representatives stipulated in Article L.1321-4 of the French Labor Code.
- Disciplinary regulations are to be stipulated for anyone who fails to comply with this code of conduct.

2. An internal warning system:

This system is intended to collect employee reports of breaches of the code of conduct (i.e. the whistleblowing system).

3. Risk mapping:

- This mapping often consists of a table identifying, analyzing and prioritizing the risks of the company's exposure to acts of corruption, depending on its business sectors and the geographical areas where it operates.
- This type of tool is well known in the banking sector and its use has recently become widespread in the real estate field and for offshore companies.

4. Assessment procedures:

The assessment procedures consist of assessing and mapping the corruption risk of a particular supplier, intermediary or customer.

- **5. Internal or external accounting controls** to ensure that books, records and accounts are not used to conceal acts of corruption.

- **6. A training program** for managers and staff who are most exposed to corruption risks.

³ Official press kit for the bill dated 30 March 2016, p. 41.

Three key points:

- This compliance program does not have to be the same type and at the same scope for all companies concerned: it must be suited to the size of the entities in question and to the nature of the risks identified.
- There are benchmark standards to help companies set up such programs such as the COSO 2 standards and especially the ISO 37001 standard of 2016.
- It will be very important to substantiate that this program was actually implemented along with the traceability measures taken. Should the time limit for enforcement be voted in as is in the first quarter of 2017, the time-limit for public proceedings for violations (which could be the case with regard to corruption) will be 12 years. To protect themselves, companies should retain proof to substantiate that this program was implemented over this period.

2.3. Sanctions in the absence of a genuine anti-corruption compliance program

For the first time, French lawmakers have set up a highly rigorous and thorough system to supervise and to enforce with a range of coercive measures to ensure the effective and efficient implementation of anti-corruption compliance programs:

- On their own initiative or at the request of a registered association such as Transparency International, AFA agents may decide to audit a company and have the power to order the company to surrender any document in its possession. Any impediment to this audit constitutes a criminal offence punishable by a fine of €30,000.
- As a result of this audit, a report is sent to the company concerned. This report may contain "*recommendations*" to make corrective improvements with a view to complying with the anti-corruption compliance program.
- In the event of a breach, the AFA can issue a "*warning*" to the company, and the sanctions committee might issue an "*injunction*" to make improvements within a maximum three-year time limit.
- The AFA can prosecute the company concerned and, if necessary, impose a penalty of up to €200,000 for natural persons and €1 million for legal entities. The decision may also be publicly disclosed. This conviction can be appealed in the relevant administrative court.
- When a company is convicted of acts of corruption in the broad sense of the term, it may be sentenced to a maximum of five years under the AFA's supervision to implement an anti-corruption compliance program. The convicted company will be responsible for bearing the monitoring costs (i.e. for the AFA's supervision). These costs could become so significant that lawmakers have decided to limit them to the maximum amount for a fine incurred (€1 million or twice the amount of the proceeds from corruption).
- Lastly, if a company is convicted, an executive could face up to two years in prison and a €50,000 fine for failing to implement such a program. For their part, legal entities might also incur heavy fines for acts of corruption defined in the broadest sense of the term (€1 million or twice for the amount of the proceeds from corruption).

Consequently, legal authorities and the AFA have a vast arsenal at their disposal to ensure that companies in violation implement a genuine anti-corruption compliance program and they can also impose financial penalties on executives on a personal basis.

3. Implementing a criminal settlement without admission of guilt

After considerable hesitation, the Sapin II law finally instituted a form of criminal settlement for legal entities called the judicial settlement of public interest ("*convention judiciaire d'intérêt public*" or CJIP) for corruption offences such as influence peddling, money laundering as well as tax fraud and related offences.

The CJIP offers the following advantages:

- It does not require an admission of guilt and does not entail the effects of a conviction. Consequently, it does not prohibit participation in public procurement within the meaning of Article 57 of Directive 2014/14/EU of 26 February 2014.
- It is faster than a typical lawsuit.
- Should the measure fail, the public prosecutor may initiate prosecution but cannot use statements made or the documents submitted by the legal person during this procedure against them.

However, the following disadvantages should also be borne in mind:

- When an investigating judge considers this option, it can only be put forward if the company is under investigation, recognizes the charges and agrees to the penal classification used. In practice, this corresponds to an admission of guilt, even if legally the CJIP does not require a conviction.
- The potential fine⁴ can be quite significant. And its amount must be fixed "in proportion to the benefits derived from the reported breaches". It can, nevertheless, reach up to "*30% of the average annual sales calculated based on the last three known years of sales on the date these breaches were reported*". This amount can be significantly higher than the maximum amount that the legal entity could incur if convicted of acts of corruption (€1 million or double the proceeds of the violation⁵). Unless if the lawmaker intends to make an upward revision to the fines for acts of corruption, this twofold system lacks coherence and does not necessarily lead one to have recourse to the CJIP.
- When the victim has been identified, the company at issue must remedy the damage suffered within a period of less than one year.
- Even if this penalty is tantamount to cancelling the criminal proceedings for the company in question and does not result in conviction, its legal representatives remain criminally liable as natural persons.
- Although the CJIP settlement does not appear in judicial bulletin no.1 of the criminal record, the public prosecutor may send out a press release about it and it is published on the AFA website.

In other words, the French legislature wanted to create a hybrid legal tool, as proposed by the public prosecutor's office or investigating judge, only partially similar to its elder sibling, the deferred prosecution agreement (DPA), which requires recognition of the evidence but does not declare a conviction admissible.

4. Extension and protection of whistleblower status

Originally, whistleblowers had to provide proof in order to be protected, in particular for disclosures regarding acts of corruption, pharmaceutical and health product safety as well as for sexual harassment.

⁴ In addition to having to pay a fine, the company must also implement an anti-corruption compliance programme, under the AFA's supervision for a period of up to 3 years, at the expense of the company involved.

⁵ It has been noted that the expression "*twice the proceeds obtained from the violation*" does not set any limit whatsoever.

As it stands now, this protection is inadequate because of the disparity between the laws on the books, which essentially protect employees but not other potential whistleblowers.

Lawmakers wanted to lay the foundation for rights common to all natural persons who disclose or report a crime, an offence, a serious and flagrant violation of an international commitment, a measure taken based on such a commitment, a law or regulation, or a serious threat or prejudice to the public interest.

This new status applies regardless of the field of the alert. It protects from criminal prosecution those persons who disclose, in a manner necessary and proportionate to the safeguarding of the interests in question, disinterestedly and in good faith in respect of the reporting procedures laid down by the law, a secret protected by the law, with the exception of classified military information, medical secrecy or that pertaining to attorney-client privilege.

In addition, the steps to be followed in the reporting procedure are detailed when this disclosure pertains to an “*employee or to a contractor*”⁶:

- The report will be brought to the direct or indirect superior’s attention, to the employer or a contact person designated by the employer (ethics officer).
- If no action is taken within a reasonable time frame, the alert may be sent to the competent public authorities, which may be either a judicial authority, an administrative authority or a professional body.
- Lastly, an alert can only be made public (i) as a last resort should these public bodies fail to take it into account within a three-month period, or (ii) directly in the event of a serious and imminent danger, or should there be a risk of irreversible damage.

The alert reporting system aims to ensure the strict confidentiality of the procedure and the anonymity of the whistleblower. It prohibits the whistleblower from being punished, discriminated against or treated unfairly. Disclosing confidential information is punishable by two years of imprisonment and a €30,000 fine.

More generally, preventing a whistleblower from sending alerts to the competent persons is punishable by one year of imprisonment and a €15,000 fine.

When a defamation complaint is brought before an investigating judge or the investigating chamber against a whistleblower, the civil fine amount that can be imposed is doubled to €30,000.

The law creates a specific mechanism for the *Autorité des marchés financiers* (AMF) and the *Autorité de Contrôle Prudentiel et de Régulation* (ACP). This mechanism will enable these authorities to receive and process reports relating to breaches of the obligations laid down by European regulations or the AMF’s general regulations with regard to financial instruments and market abuse. It will apply to any person expressly referred to in the French Monetary and Financial Code who considers that he or she has discovered non-public information that may be in flagrant breach of a regulation.

Finally, it should be noted that although this system has drawn significant inspiration from the Anglo-Saxon whistleblowing mechanism, it does not provide for financial incentives for reporting, unlike the provisions of the American Dodd-Frank Act.

5. Significant expansion of the jurisdiction of French criminal courts for acts of corruption

The law makes it so that the Public Prosecutor's Office no longer has a monopoly on prosecuting foreign public officials involved in acts of corruption abroad exclusively (Articles 435-6-2 and 435-11-2 of the New French Criminal Code).

⁶ This is to reiterate concepts specified by the Constitutional Council in its decision of 2016-741 DC of December 8 2016.

As a condition for prosecution, it also removes the filing of a complaint by the victim or an official complaint by the country where the violation was committed.

Prosecutions may therefore be initiated subsequent to a plaintiff's filing of a complaint with an association such as ANTICOR or Transparency International.

Moreover, the French criminal courts can now prosecute not only French nationals or persons having their usual place of residence in France but also "*persons having all or part of their economic activity in France*" for corruption violations or influence peddling. This last statement is most ambiguous (When does a partial economic activity in France begin? With the sale of a single product?) which leaves it open to criticism.

This therefore represents a very significant extension of the territorial scope of the French criminal law, like the FCPA⁷ and the UK Bribery Act in which extraterritoriality is broadly interpreted.

It seems that one of the issues of the Sapin II Law is to compete on an equal footing with the US authorities, which recently imposed a \$1.645 billion fine for corruption on four French groups.

However, the proliferation of these extraterritorial prosecution systems raises the risk of non-compliance with the principle of *non bis in idem*⁸: the risk is that several prosecution authorities, e.g. US and French, may sue a company for the same acts of corruption committed abroad. It is important that clarification is made at the state level.

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⁷ Moreover, the extraterritorial power of the FCPA is not the explicit effect of the law but rather that of its opportunistic interpretation by the US prosecution authorities (to be distinguished even from the judicial authorities which apparently never had to issue a clear ruling on this matter).

⁸ In this circumstance, the principle of double jeopardy applies.