Sapin 2 Law: The new French legal framework for the fight against corruption

by Aurélien Chardeau

Introduction

Law no. 2016-1691 on transparency, fighting corruption and modernising economic life was published in the Official Gazette on 10 December 2016 ("*Sapin II Law*").

Its main objective is to set up a genuine anti-corruption[1] mechanism in France, particularly 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 mechanism includes many French specificities.

Most of its provisions come into force on 11 June 2017 and will be immediately applicable[2]. The main contributions of the Sapin II Law that follow shall be examined:

- Establishment of a French Anti-Corruption Agency ("*AFA*") responsible for monitoring the implementation of internal corruption prevention programmes ("*anti-corruption compliance programmes*") in the private and public sectors, with powers to investigate and to levy sanctions **(1.)**.
- Compulsory implementation of an anti-corruption compliance programme for French companies of a certain size that may be penalised 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 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 confisqué*s or the French agency tasked with recovering seized and confiscated assets), 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 the 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 programme for companies subject to sanctions and, if necessary, have 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, 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 without any control whatsoever and to maintain France's sovereignty and economy (in particular to prevent divulging the know-how of large French companies).

  For quite some time, French companies, targeted by American procedures, have been caught between a rock and a hard place: on the one hand, US authorities had ordered them to communicate sensitive information, on the other, France was subject to criminal sanctions for communicating it, unless the intended purpose of communicating such information was to comply with international agreements that the American authorities themselves did not bother to 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. It did this by cooperating with foreign authorities and by protecting France's national interests through preventing abusive requests resulting in haphazard 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 piece of mind, in particular with regard to threatening requests made by the American authorities.

2. Implementation of an anti-corruption compliance programme

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,
   - or any company belonging to a group of companies that employs at least 500 worldwide, *but whose parent company is headquartered in France*. The notion a of 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, provided that this subsidiary does not hit the threshold of employing 500 employees.

2) Sales volume:
   - A company with consolidated or non-consolidated sales of more than **€100 million**.
   - When we consider 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 would concern approximately 1,570 French companies[3].

2.2. The objective of the anti-corruption compliance programme

The anti-corruption compliance programme is to include:

1) **A code of conduct**:
   - This code must define and illustrate the behaviours to be prevented that might involve acts of corruption.
   - 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 Labour 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] Official press kit for the bill dated 30 March 2016, p. 41.

3) **Risk mapping**:
   - This mapping often consists of a table identifying, analysing and prioritising 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 the corruption risk of a particular supplier, intermediary or customer in view of risk mapping.

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

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

Three key points:

- This compliance programme 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 programmes such as the COSO 2 standards and especially the ISO 37001 standard of 2016.
- It will be very important to substantiate that this programme 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 programme was implemented over this period.

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

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

- 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 programme.

- In the event of a breach, the AFA can issue a "*warning*" to the company, and through the sanctions committee it might issue an "*injunction*" to make improvements within a maximum three-year time limit.
- The AFA can even prosecute the company concerned and, if necessary, impose a penalty, the amount of which has been capped at €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 programme. The convicted company is to bear 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 that for 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 resisting to implement such a programme; 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 that for 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 programme 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 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 said public prosecutor 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, provided that said company recognises the charges and agrees to the penal classification used. In practice, this corresponds to admission of guilt, even if legally the CJIP does not require a conviction.

- The potential fine[4] amount 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 violation[5]). 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, proof had to be provided to protect whistleblowers in special circumstances, in particular for disclosures regarding acts of corruption, pharmaceutical and health product safety as well as for sexual harassment. As it stands now, this protection has been found to be inadequate because of the disparity between the laws on the books, which essentially protect employees but not other potential whistleblowers.

This is why lawmakers wanted to lay the foundation for rights common to all natural persons who disclose or report a crime, offence or a serious and flagrant violation of an international commitment or a measure taken based on such a commitment, a law or regulation, or a serious threat or prejudice to the public interest about which said person might be aware.

This new status applies regardless of the field of the alert and 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.

[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.

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 said 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 that 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), which 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. This mechanism 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).

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.

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

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 FCPA[7] 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.