# CHRONIQUE

# International Financial and White Collar Crime, Corporate Malfeasance and Compliance

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*This section edited by Margot Seve in Paris and Michel Perez in New York aims at presenting and analyzing legal developments related to cross-border enforcement actions in financial and white collar crime cases. It also focuses on the growth of compliance and corporate governance regulatory standards. Comments and suggestions are welcomed, including articles proposals.*
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## Sapin II: Is the era of Compliance and criminal settlements upon France?

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On December 9, 2016, France adopted law n° 2016-1691 on transparency, the fight against corruption, and the modernization of the economy[2]. As previously discussed in this review (see RTDF n° 2 – 2016), the law has been commonly called the "Sapin II" law, after French Minister of Finance Michel Sapin who, in 1993, authored the first Sapin law on transparency in politics and public procurement,[3] and sought in 2016 to further enhance transparency and combat corruption.

While France has in recent years certainly made efforts towards more severe punishment for corruption-related offenses, it has nonetheless been criticized for its weak enforcement track record. For example, while the sanctions for active and passive corruption of domestic officials,[4] active and passive corruption in the private sector,[5] corruption of foreign officials,[6] and influence peddling[7] were increased in 2013, only one company (Total) was fined between 2000 and 2016 for acts of corruption of foreign public officials[8]. This lack of enforcement efficiency has led the OECD, as part of its monitoring of countries' implementation and enforcement of the OECD Convention on Combatting Bribery,[9] to report serious concerns regarding "*the lack of foreign bribery convictions in France*"[10]. Shortcomings in France's corruption cases enforcement are due, in part, to the limited scope of powers granted to France's pre-Sapin II anti-corruption body, the "Corruption Prevention Central Service" (*Service Central de Prévention de la Corruption* - "SCPC"). Indeed, the SCPC was never granted investigation or prosecution powers, only corruption prevention missions[11]. Consequently, as noted in the "Impact Report" of the Sapin II draft bill, "*France does not have to date a specific agency capable of preventing and helping to detect acts of corruption.*" In contrast, most of France's neighboring countries (*e.g.*, the Netherlands, Italy and the United Kingdom) have set up dedicated agencies that detect, prevent, coordinate on, and sanction corruption-related offenses[12].

Moreover, the widespread view in France that French companies would not have been fined by U.S. authorities if France had implemented a more competitive, efficient international anti-corruption enforcement framework, has been one of the main rationale put forth for passing

1 The views expressed in this article are those of the author alone.

2 The Sapin II law is available in French at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien=id.

3 Loi n° 93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques.

4 Since 2013, individuals convicted for corruption may be subject to ten years' imprisonment and a fine of up to EUR 1 M (against EUR 150.000 previously) or double the amount gained. Judges have discretion to impose sentences up to the maximum amount. Under certain circumstances, such as recidivism or aggravating elements (such as taking advantage of a minor) enhanced sanctions may be applicable. Corporate entities may be subject to fines of up to EUR 5 million or tenfold the amount gained, as well as additional penalties listed in article 131-39 of the penal code.

5 Sanctions are identical to those applied to corruption of domestic officials.

6 Sanctions are identical to those applied to corruption of domestic officials.

7 Since 2013, individuals who are convicted for influence peddling may be subject to five years' imprisonment and a fine of up to EUR 500,000 (against EUR 75,000 previously) or double the amount gained. Judges have discretion to impose sentences up to the maximum amount. Under certain circumstances, such as recidivism or aggravating elements (such as taking advantage of a minor) enhanced sanctions may be applicable. Corporate entities may be subject to fines of up to EUR 1 million or tenfold the amount gained. Corporate entities can also be punished by one or more of additional penalties.

8 Total was fined EUR 750,000 in 2016 for corruption of foreign officials in the Oil-for-Food matter.

9 France adopted the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention") in 2000.

10 See OECD, "*OECD seriously concerned at lack of foreign bribery convictions in France, but recognises recent efforts to ensure independence of prosecutors*", October 23, 2012, available at http://www.oecd.org/corruption/oecdseriouslyconcernedatlackofforeignbriberyconvictionsinfrancebutrecognisesrecenteffortstoensureindependenceofprosecutors.htm. Full OECD report available at: http://www.oecd.org/corruption/oecdseriouslyconcernedatlackofforeignbriberyconvictionsinfrancebutrecognisesrecenteffortstoensureindependenceofprosecutors.htm.

11 The SCPC was created by the Sapin I law, but was deprived of any investigation or prosecution powers by a decision of the Constitutional Court of January 20, 1993 (Décision n°92-316 DC).

12 See *Étude d'Impact – Projet de Loi relative à la transparence, à la lutte contre la corruption, et à la modernisation de la vie économique*, 30 mars 2016, p.16.

Sapin II. Indeed, levelling the playing field between France and the U.S. has been at the heart of the Sapin II parliamentary discussions[13].

In light of the shortcomings highlighted by the OECD (and NGOs such as Transparency International), as well as the increased regulatory competition created by U.S. enforcement actions against French companies, the French government's declared ambition in drafting Sapin II has been to "*bring France into line with the highest international standards in the area of transparency and the fight against corruption*"[14].

To reach that goal, the authors of Sapin II created a new set of *ex ante* measures, and reinforced France's *ex post* framework. *Ex ante*, Sapin II sets up a set of measures requiring companies to take on compliance obligations with respect to corruption (I) – a first in French law. *Ex post*, Sapin II reinforces France's sanction and enforcement framework (II), in part by creating the "*convention judiciaire d'intérêt public*" – roughly translated as "judicial agreement of public interest."

In many regards, Sapin II is a small revolution in France's legal culture, namely because it (i) consecrates the culture of compliance in France, (ii) paves the way towards more extraterritorial French regulations, and (iii) innovates on how certain white collar crimes will be enforced and settled.

# I. *Ex Ante* Measures

## 1. Scope of Sapin II

In defining its scope, Sapin II first and foremost addresses the top tier management of in-scope companies, not companies themselves. Indeed, Sapin II explains that chairmen, CEOs, managing directors, and, depending on the type of company, members of the management board, of French companies with certain revenues and employees (the "Management"), are responsible for taking measures towards preventing and detecting acts, in France or abroad, of corruption or influence peddling. This focus on individuals, which derives from a post-crisis focus on individual accountability on both side of the ocean, and sends a strong message to companies' top managers that they will not be exempt from liability should their company be fined for corruption or influence peddling[15]. As discussed below, this focus on individual liability is also echoed in the new judicial transaction mechanism (*convention judiciaire d'intérêt public)* set up by Sapin II, which will not be made available to individuals, only to companies. In distinguishing between individual and corporate liability, Sapin II tried to avoid endorsing "too big to jail" mechanisms.

Only in the second instance does Sapin II explain which companies will fall under its scope: companies with revenues or consolidated revenues exceeding €100 million that (a) have at least 500 employees, or (b) are part of a group of companies employing at least 500 people with a parent company incorporated in France. This obligation also applies to subsidiaries[16] and controlled companies,[17] whether French or foreign, of the aforementioned French companies when the latter publish consolidated financial statements[18] (the "In-Scope Companies"). In choosing this scope, Sapin II, while taking a first step towards extraterritoriality, should apply to over 1,600 French companies[19].

## 2. New Compliance Obligations

Under Sapin II, the Management of In-Scope Companies shall implement the following internal measures and procedures (the "Compliance Obligations"):

- A code of conduct defining and describing the different types of conduct that could raise corruption or influence peddling issues. The code of conduct will have to be fully integrated into the company's *règlement interieur* (internal conduct policy);
- An internal whistleblowing procedure, allowing employees to raise concerns regarding conduct in breach of the company's code of conduct;
- An internal risk assessment/mapping, to be regularly updated, aimed at identifying, analyzing and prioritizing situations where the company might be exposed to external solicitations leading to corruption practices (taking into account the various locations and sectors where the company does business);
- Procedures to assess clients, first-row suppliers and intermediaries;
- Dedicated accounting controls (external or internal) to ensure that the company's books and records are not used to hide acts of corruption or influence peddling;
- Training programs for white collar employees and any employees exposed to risks of corruption or influence peddling;
- A disciplinary procedure for employees in breach of the company's code of conduct;
- A monitoring process to review the existence and efficiency of the aforementioned policies and procedures.

Both the Management as individuals and the In-Scope Companies as legal persons can be held accountable for

13 See *Rapport fait au nom de la Commission des lois sur le projet de loi (n° 3623), relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, et sur la proposition de loi organique (n° 3770) relative à la compétence du Défenseur des droits pour la protection des lanceurs d'alerte par M. Sébastien DENAJA*, available at: http://www.assemblee-nationale.fr/14/rapports/r3785-tI.asp

14 "Sapin II Law: transparency, the fight against corruption, modernisation of the economy", April 6, 2016, available at http://www.gouvernement.fr/en/sapin-ii-law-transparency-the-fight-against-corruption-modernisation-of-the-economy.

15 See for example, in the United States, the so-called "Yates Memo", published in September 2015 by Sally Q. Yates, then Deputy Attorney General at the U.S. Department of Justice, on individual accountability for corporate wrongdoing. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to All U.S. Att'ys *et al*., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), available at http://www.justice.gov/dag/file/769036/download, archived at http://perma.cc/A9RM-6HDD. In the European Union, post-crisis directives and regulations have increasingly focused on individual liability as well. For example, the Fourth Anti-Money Laundering Directive establishes the accountability of the Head of compliance for failure to comply with anti-money laundering requirements (June 5, 2015, the Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing).

16 Within the meaning of Article L. 233-1 of the French Commercial Code.

17 Within the meaning of Article L. 233-3 of the French Commercial Code.

18 Skadden, Arps, Slate, Meagher & Flom LLP, "New French Anti-Corruption Legal Framework," December 20, 2016, available at https://www.skadden.com/insights/new-french-anti-corruption-legal-framework.

19 "Sapin II Law: transparency, the fight against corruption, modernisation of the economy", *op. cit*.

failures pertaining to the Compliance Obligations. The Compliance Obligations will enter into force on June 1, 2017 – although since the law was passed in December 2016, French companies falling under the scope of Sapin II have already started preparing for these requirements. Large international companies, such as financial institutions, will not necessarily be the most affected by Sapin II Compliance Obligations, since they often previously had to set up policies and procedures close to those required by Sapin II, to comply with international standards or other foreign regulations.

In creating these Compliance Obligations, the French government explicitly indicated that it was working towards harmonizing France's legal framework with "*a number of countries, including the United Kingdom and Switzerland.*"[20] For example, the Sapin II Impact Report cites Section 7 of the UK Bribery Act of 2010 and article 102 of the Swiss penal code, which both punish the absence of internal corporate measures to prevent corruption[21]. In this regard, by implementing in hard law compliance-related standards that previously only existed as international standards or in foreign countries, Sapin II certainly consecrates the culture of compliance in France.

## 3. Supervision and Enforcement of Compliance Obligations

In order to properly supervise and enforce the Compliance Obligations set forth in the bill, Sapin II creates a new "Anticorruption Agency" (the "Agency"), which will take the form of an office reporting to the Ministry of Justice and Ministry of Budget. The Agency's primary role will be to assist in their duties authorities and individuals in charge of preventing and detecting corruption, influence peddling, misappropriation, undue advantage, misuse of public funds and favouritism. While the organization of the Agency, in particular the number of agents and its budget, will be defined by decree (*décret en Conseil d'État*), Sapin II already provides that the Head of the Agency will be a magistrate (with no hierarchical reporting to the judiciary) with a non-renewable six year mandate. Moreover, the Agency will comprise a disciplinary board, of which the Head of the Agency will not be a member (to secure its independence).

The main duties of the Agency are as follows:

- Participate in the coordination, gathering and circulation of information that helps prevent and detect acts of corruption, influence peddling, misappropriation, undue advantage, misuse of public funds and favoritism;
- Draft recommendations (and regularly update them) to help companies prevent and detect acts of corruption, influence peddling, misappropriation, undue advantage, misuse of public funds and favoritism. The Agency's recommendations must be drafted on a risk-based basis, *i.e.* they must be adapted to the size of the company, and the nature of the risks;
- Inform the prosecutor of any conduct that appears to constitute an offense or a crime;
- Control, by conducting on-site and off-site controls, the quality and efficiency of the Compliance Obligations implemented by In-Scope Companies.

Should the Agency find that a company is in breach of one of the Compliance Obligations, it can, in the first instance, issue a warning to the company's legal representative. The Head of the Agency can also suggest to the disciplinary board of the Agency to inflict a penalty on the company or on any individual responsible for the breach of the Compliance Obligations. Such penalty – which is to be paid to the French Treasury, not the Agency – cannot exceed EUR 200,000 for individuals, and EUR 1 M for companies. The Agency's disciplinary board can also enjoin the company to amend its compliance procedures based on recommendations provided by the disciplinary board, and according to a schedule that cannot exceed three years. The disciplinary board can also order the publication of its decision (the costs of which will be borne by the company)[22]. Decisions of the disciplinary board can be appealed before first degree courts.

Last but not least, the Agency will be responsible for monitoring, at the request of the Prime Minister (*i.e.* not at its own initiative), whether French companies comply with the "French Blocking Statute"[23] when implementing post-settlement remediation plans by order of foreign authorities. However, Sapin II does not go as far as requesting that the Agency monitors such compliance *during* investigations that French companies must sometimes conduct in advance of settling corruption cases with foreign authorities. It is also unclear whether Sapin II allows the Agency to monitor compliance with the French Blocking statute in cases other than corruption ones (such as, for example, economic sanctions, money laundering or tax cases). This contrasts with the broader scope of the *convention judiciaire d'intérêt public* discussed below, which shall be used to settle cases involving offenses other than corruption, such as laundering of tax fraud proceeds.

In light of the broad missions the Agency is invested with by Sapin II, the efficiency of the Agency will depend on its budget (which is expected to average EUR 10-15 M a year), the number of agents (the Sapin II Impact Report suggested recruiting 70 agents – against 12 currently working at the SCPC), and the qualification of its agents (for example, rather than recruiting exclusively from the public sector, the current Head of the SCPC has called for hiring agents from

20 "Sapin II Law: transparency, the fight against corruption, modernisation of the economy", *op. cit.*

21 *Rapport d'Impact, op.cit.*, p. 30.

22 All decisions by the disciplinary are motivated, and no decision can be taken without hearing or proper summons of the company/individual.

23 *Loi n° 68-678 du 26 juillet 1968 relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères.* The Statute establishes a double prohibition: (i) Prohibition, except in case of otherwise applicable international treaties and agreements, to any person of French nationality or usual resident in France, and to any officer, representative, agent or employee of a corporation who has its registered office or branch in France, to communicate in writing, orally, or in any other form, in any location whatsoever, to foreign public authorities documents or economic, commercial, industrial, financial or technical intelligence, whose communication is likely to undermine sovereignty, France's essential economic interests or its public order (art 1). (ii) Prohibition, except in case of otherwise applicable treaties or international agreements and of the laws and regulations in force, to any person to request, gather or communicate, in writing, orally or in any other form, documents or information of economic, commercial, industrial, financial or technical nature for the purpose of gathering of evidence in the context of judicial or foreign administrative proceedings. (art. 1 bis). Any breach of articles 1 and 1 bis is punishable by imprisonment of six months and a fine of 18 000 euros or to one of these two sanctions (art. 3). See Frederic Echenne, "The French Blocking Statute and the legal constraints of US extraterritoriality," RTDF n°4 – 2016.

the private sector with corporate expertise[24]). The efficiency of the Agency will also depend on the decrees that will complete its organization and how the missions of its agents and of its disciplinary board will be carried out. These aspects are even more relevant in that the Agency will also have an important part to play in the *ex post* framework that Sapin II reinforces.

# II. Ex Post Provisions

## 1. New Extraterritorial Offenses and Enforcement

In order to align France with international standards, Sapin II extends the geographical scope of corruption and influence peddling offenses to cases involving *foreign* officials. Previously, French law only applied to cases involving the corruption of *French* officials. This will allow French prosecutors to prosecute foreign officials living in France for acts of corruption or influence peddling committed abroad, which was not previously possible (new articles 435-2 and 435-4 of the penal code).

Further, Sapin II now authorizes French authorities to prosecute corruption and influence peddling conduct that occurred outside of France and that was committed either by (i) French nationals, but also (ii) by individuals residing in France or (iii) by individuals and legal persons that have all or part of their business in France (new articles 435-6-2 and article 435-11-2 of the penal code). This provision was openly intended to compete with U.S. and U.K. legislation. For example, as described by the Sapin II Impact Report, U.S. law can apply when a foreign company is listed in the U.S. (in the case of the U.S. *Foreign Corrupt Practices Act* of 1977 and the *Internal Anti-Bribery Act* of 1998), and U.K. law can apply when a foreign company has a close connection with the United Kingdom (UK Bribery Act, Sections 12 and 7)[25]. Levelling the playing field in this area was one the main recommendations of the October 2016 "Rapport Lellouche" on the Extraterritoriality of U.S. law[26].

Moreover, accomplices in France of a crime committed abroad shall also fall under the scope of French prosecution authorities who will no longer have to wait, as was previously the case, for the prior recognition of the offense by foreign authorities to prosecute the individual (new articles 435-6-2 and article 435-11-2 of the penal code).

Finally, Sapin II takes away the monopoly that prosecutors previously had (upon request of the victim or the state where the offense occurred) on prosecuting cases of corruption of foreign officials committed entirely abroad. Prosecution shall now also be triggered upon charges being pressed by an NGO, such as Transparency International.

24 Xavière Siméoni, "Genèse du Projet de loi Sapin 2", *Compliance & lutte anticorruption en France: à l'aune de la loi Sapin 2*, October 27, 2016, Sorbonne, Paris.

25 *Rapport d'Impact*, *op. cit.*, p. 40.

26 *Rapport d'information déposé en application de l'article 145 du règlement en conclusion des travaux de la mission d'information commune sur l'extraterritorialité de la législation américaine n° 4082 déposé le 5 octobre 2016 (mis en ligne le 11 octobre 2016 à 12 heures 45) par Mme Karine Berger*, 5 octobre, 2016, n°4082, pp.84-87.

This new set of measures constitutes "*a significant extension of the extraterritorial application of French criminal law*"[27], and brings France's "*criminal procedure in line with the issues raised by transnational corruption*".[28]

## 2. Importing Remediation Measures

In many aspects, Sapin II aims at implementing mechanisms already operating in other countries, namely the U.S. In the first instance, Sapin II creates a new penalty that can be imposed on companies found guilty of corruption and influence peddling offenses. Inspired by the "remediation" and "monitorship" requirements often found in settlement agreements negotiated with U.S. authorities, Sapin II creates a "remediation" penalty ("*mise en conformité*") whereby companies shall, for a maximum period of five years, implement a remediation plan built to ensure the company abides by the Compliance Obligations (code of conduct, whistleblowing procedure, risk assessment/mapping, client risk assessment, accounting controls, and training)[29]. The company's remediation efforts will be "monitored" by the Agency. Any costs borne by the Agency in its control of the company's remediation program (calling on experts, qualified authorities, and legal, financial or tax analysis[30]) shall be borne by the company itself. However, for fairness and proportionality reasons, these costs will be limited to the maximum amount of the fine associated with the offense the company was found guilty of[31]. Of note, it does not appear that the capped costs discussed in Sapin II include those that the company itself will have to spend on building and implementing its remediation plan, which will require hiring its own expert, such as a law firm – whose work is covered by the French attorney-client privilege (*secret professionnel)*. To accompany lawyers in this new area of practice and so that clients are best represented, the Paris bar recently published ethics guidelines on internal investigations for lawyers to follow[32].

## 3. Creating the "French DPA"

Along the same lines as the "remediation" sanction discussed above, Sapin II sets a milestone in French criminal procedure by creating a settlement mechanism similar to that used in the U.S. and the UK. As described in the Sapin II Impact Report, France previously had no mechanism

27 Skadden, Arps, Slate, Meagher & Flom LLP, *op. cit.*

28 "Sapin II Law: transparency, the fight against corruption, modernisation of the economy", *op. cit*.

29 While the remediation program is set up under the review of the Agency, it is ultimately executed under the control of the prosecutor. The Agency will report to the prosecutor on the status of the remediation plan at least once a year. As noted by Marie-Emma Boursier, the monitoring of a sanction by an administrative entity (be it under the control of the prosecutor) is a first in French law, and could have systemic effects in other legal fields. Marie-Emma Boursier, "L'impact de la loi n°2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique sur la corruption dans le secteur bancaire et financier : de la sécurisation à l'innovation", *Revue de droit bancaire et financier*, novembre-décembre 2016.

30 A decree will define the process for the Agency to hire and rely on experts, including the ethics rule applying to such experts.

31 This poses the question, raised by Ms. Boursier, of what will happen once the Agency runs out of funds to conduct its monitoring of the company's remediation plan. Will the monitoring end even if the company's remediation plan has not yet been executed in full?

32 Appendix XXIV of the Paris Bar Code of Conduct (*Reglement Intérieur du Barreau de Paris*).

comparable to that of "Deferred Prosecution Agreements" ("DPAs") used in the U.S. to settle certain white collar cases, including corruption cases[33].

Under Sapin II, prosecutors[34] will be able to offer to companies suspected – but not yet indicted – of corruption, influence peddling, but also laundering of tax fraud proceeds (but not tax fraud), to enter into a "*convention judiciaire d'intérêt public*" ("CJIP"). Because this new mechanism will not require the company to plead guilty, and will defer the prosecution until the agreement's provisions are executed, it has been described in France as the "French DPA". As noted above, CJIPs shall only be offered to companies (legal persons), not to their representatives or any other natural person. Individuals shall indeed remain personally liable for the relevant offense.

Upon signing a CJIP, companies shall pay the French Treasury a fine based on the revenues derived from the offense, capped at 30 % of the company's average revenues over the last three years. In addition to this fine, companies could be required to pay damages to the victims of the offense, when victims have been identified. Finally, CJIPs may also contain provisions requiring the company to set up a remediation plan for a maximum period of three years, to establish or reinforce the company's compliance with the Compliance Obligations (code of conduct, whistleblowing procedure, risk assessment/mapping, client risk assessment, accounting controls, and training). Similar to the remediation penalty discussed above, the remediation plan shall be set up under the control of the Agency. Any costs borne by the Agency in its control of the remediation plan (calling on experts, legal and financial analysis, etc.) shall be borne by the company, but limited by a maximum amount defined in the CJIP. Here again, it does not appear that Sapin II tried to cap the costs that the company itself will have to spend to implement its remediation plan, for example by hiring consultants or law firms. Of note, the Sapin II draft bill initially provided that the remediation plan would be set up under the control of an independent "monitor", chosen by the company with the approval of the Agency. However, this article was taken out of the final version of the bill[35]. Yet, it remains unclear whether the Agency, by hiring "experts", will be able to delegate its monitorship mission, in part or in full, to an external party, such as a law firm or a consultants firm. Therefore, while the principle of a third party monitor, similar to U.S. practice, might still very well be what the final version of the bill intends on allowing in a less explicit manner, only future practice will tell whether the Agency will ask third parties to take on its monitorship mandate.

Once the company (represented by its lawyer) has discussed and agreed to the terms of the prosecutor's CJIP offer, the CJIP must go through judicial scrutiny. CJIPs are not "ratified" (*homologation*) but rather "validated" (*validation*) by a judge during a public hearing. Indeed, the judge will review both the substance and the procedural aspects of the CJIP (including the facts of the case). Once the CJIP is approved, the judge's decision cannot be appealed – although the company has 10 days to retract its agreement. As mentioned above, the validation of the CJIP does not entail any guilty plea on the part of the company, thereby avoiding French companies being excluded from certain international markets financed by international organizations, from certain contracts (private contracts such as hedge funds, public contracts such as public market offers), or from certain activities (*e.g.* banking and other regulated activities). However, Sapin II does not completely depart from criminal law practices, as it requires that CJIPs be published on the Agency's website, and publicly commented upon by the Prosecutor. The full execution by the company of the obligations set forth in the CJIP officially terminates the prosecution[36]. The CJIP mechanism will be fully effective following the publication of its implementing decree (expected in March 2017).

While the creation of the "French DPA" has been described as groundbreaking because it departs from France's traditional legal culture[37], France's white collar crime enforcement framework remains one step removed from that of overseas jurisdictions. Indeed, investigations preceding the execution of DPAs in the U.S. are most often conducted by the companies themselves (using for example the services of a law firm). In contrast, gathering the relevant facts and evidence that will support and lead to a CJIP will continue to be handled by the prosecution office, not by the company. The costs for companies eventually taking a CJIP offer will therefore remain, for the time being, much less significant than in DPA-like cases. But where French companies will be saving investigation costs, they might end up losing in procedural efficiency/rapidity. And, although companies have preferred in the past to engage in lengthy trials and appeals for strategic purposes, white collar cases are those that companies have been increasingly wanting to settle in a timely and out-of-court manner. Putting the burden of proof on the company would expedite the investigation phase and relieve the prosecutor's office from a substantial part of its workload (thus allowing prosecutors to take on more white collar cases – thereby favoring the fight against corruption even more so). Yet, it remains unclear whether such a shift in investigatory burden will soon be proposed in France, particularly as it would depart from France's inquisitorial system.

## Conclusion

There is no doubt that Sapin II is a groundbreaking piece of legislation, first and foremost because the culture of compliance, which it sets in hard law, requires companies to internalize the public functions of rule-making and enforcement. This changes the way companies need to look at compliance and legal risk, including how companies need to

33 Rapport d'Impact, *op. cit.*, p. 34.

34 CJIPs will also be made available to investigating magistrates (*juges d'instruction)*, who will, with the agreement or upon suggestion of the prosecutor, order the transmission of the procedure to the prosecutor in order for him to offer a CJIP to the indicted company. In this case, the company will have to recognize the facts at stake as well as the criminal qualification proposed by the investigating magistrate.

35 Draft bill available at: http://www.economie.gouv.fr/files/files/PDF/projet-de-loi_transparence.pdf.

36 On the contrary, if the judge refuses to validate the CJIP, if the company retracts its approval of the CJIP, or if the company does not fully execute the obligations set forth in the CJIP, the prosecution can resume. In such case, the fine paid by the company is reimbursed, but not the costs borne by the Agency.

37 *See*, for example, Avis consultatif du Conseil d'État (March 24, 2016) n°391.262. In its advice, the State Counsel noted that while the CJIP would go against France's legal culture, it would also be an efficient tool to prosecute international corruption cases. Similar mechanisms are already used by regulatory agencies to settle administrative sanction cases, such as the antitrust cases (*Autorité de la concurrence)* or market abuse cases (*Autorité des Marchés financiers - AMF)*. Sapin II actually extends the *composition administrative* used by the AMF for insider trading cases.

organize their compliance and risk functions. Moreover, internal policies and procedures will not only become the object of corporate liability, but also of corporate value, as they will, for example, need be reviewed and upraised as part of M&A deal due diligences. As for the creation of the CJIP transaction, it is also a game changer, which could very well be extended to other offenses if proven efficient.

However, it remains to be seen whether, as hoped by the authors of the law, French companies that sign CJIP agreements in France will be able to claim the application of the *ne bis in idem* principle to shield themselves from foreign prosecution. Indeed, "*corruption cases often involve a foreign nexus, and numerous are the situations where a company could be prosecuted for the same conduct by different authorities. Because the* ne bis in idem *principle is not one of international law, a company may end up paying several fines to different foreign authorities.*"[38] While only future cases will tell whether the *ne bis in idem* principle will be recognized by foreign authorities, the implementation of the CJIP mechanism might at the very least lead foreign and French authorities to cooperate in their investigations, and eventually agree to share a single fine imposed on the same company[39]. Such was, for example, the case for Siemens in December 2008, where the U.S. and German authorities shared the USD 1.6 B fine paid by the company for having engaged in corruption of foreign government officials[40]. The impact of CJIP transactions in international cooperation, and the likelihood that CJIP transactions will rebut foreign authorities from prosecuting the same company twice will be further discussed and analyzed in this review later this year.

38 Xavière Siméoni, *op. cit.*

39 Rapport Lellouche, *op.cit,*, pp. 84-87.

40 Siemens paid USD 350 M in disgorgement to settle Securities and Exchange Commission ("SEC") civil charges, and a USD 450 M fine to the U.S. Department of Justice to settle criminal charges. Siemens also paid a fine of approximately USD 569 M to the Office of the Prosecutor General in Munich, to whom the company previously paid an approximately USD 285 M fine in October 2007. See SEC Press Release, "SEC Charges Siemens AG for Engaging in Worldwide Bribery," December 15, 2008, available at https://www.sec.gov/news/press/2008/2008-294.htm.

# Framework to implementing an "effective" compliance program: the example of anti-bribery programs

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"Compliance programs today concern companies in all sectors of the economy"[41].

Lawyers practicing in the area of Global Financial Crimes, which includes the anti-bribery area, should discuss and implement "effective" compliance programs with their corporate clients at the earliest opportunity to avoid and/or prevent prosecution.

However, what does compliance mean and what is an "effective" compliance program?

## Introduction: compliance and compliance programs

According to Paul McNulty, the former US Deputy Attorney General and presently a partner at Baker & McKenzie, "*compliance is the system of self-governance established by a business organization seeking to conform its conduct to the demands of public policy. Practically speaking, it is the means by which a company transforms its ethical values into the more tangible reality of ethical conduct*"[42].

"*Compliance covers a broad spectrum of preventative and remedial efforts, and it must address a potentially wide range of legal risks depending on the nature of an organization's commercial activity*"[43].

But "*the subject of compliance is by no means a new concept. For decades, and specifically in the US, government restrictions on trade, monopolies, and other issues have encouraged companies to establish internal controls to prevent employee misconduct. Many companies operate in highly regulated industries, such as transportation, insurance, and banking, that have long been the subject of extensive*

41 "*La conformité réglementaire et les programmes de compliance*", *Cahiers de droit de l'entreprise* – March 2010, No 2.

42 Paul McNulty, Partner at Baker & McKenzie, and former US Deputy Attorney General, "What is Compliance?" in Corporate Compliance Practice Guide: The Next Generation, Chapter 1, Carole Basri, Release 8, 2016.

43 Paul McNulty, Partner at Baker & McKenzie, and former US Deputy Attorney General, "What is Compliance?" in Corporate Compliance Practice Guide: The Next Generation, Chapter 1, Carole Basri, Release 8, 2016.