

New French Anti-Corruption Legal Framework

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Introduction

A new French law titled “Transparency, the Fight Against Corruption and Modernization of the Economy,” which was published in the *French Official Journal* on December 10, 2016 (known as Sapin II, as it was named after the French minister of finance, Michel Sapin), aims to bring landmark changes to France’s anti-corruption laws by strengthening the detection and prevention of corrupt business practices and improving enforcement mechanisms (the New Anti-Corruption Provisions); most of these provisions will enter into force on June 1, 2017.

In many ways, Sapin II will bring France closer to the U.K. and the U.S. in its approach to international anti-corruption enforcement, but there are also significant differences. By creating a new anti-corruption framework in France, Sapin II will impose new obligations on certain businesses throughout Europe and further complicate multijurisdictional anti-corruption investigations.

Key Aspects of Sapin II

The key aspects of Sapin II include:

- introducing mandatory internal anti-corruption compliance programs for large French companies;
- establishing a new French anti-corruption agency, whose mission includes monitoring compliance programs and compliance with the French Blocking Statute;
- adopting a deferred prosecution agreement procedure;
- expanding French anti-corruption law to cover certain extraterritorial conduct; and
- enhancing the status and protection of whistleblowers.

Scope

Companies Subject to the New Anti-Corruption Provisions

The New Anti-Corruption Provisions apply to:

- French companies, including state-owned 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; and
- subsidiaries¹ and controlled companies,² whether French or foreign, of the aforementioned French companies when the latter publish consolidated financial statements.³

Liability for Senior Management

If a company falls within the statute, the New Anti-Corruption Provisions also will apply to its senior management, *i.e.*, the chairman, CEO, the managing director, and, under certain circumstances, members of the management board of companies that have management and supervisory boards.

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

² Within the meaning of Article L. 233-3 of the French Commercial Code.

³ These provisions apply also to “industrial and commercial public establishments” if they meet either of the two size or control/filing conditions mentioned above.

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New Anti-Corruption Requirements

New Mandatory Requirements

Companies subject to Sapin II will be required to implement robust anti-corruption compliance programs that include, at a minimum:

- a code of conduct, which must be annexed to the internal policies and procedures, to define and illustrate prohibited conduct;
- a corruption risk assessment, which must be reviewed regularly, based on geography, sector and clients and/or use of third parties;
- a review of customers, suppliers, business partners and intermediaries taking into account the corruption risk assessment;
- training for executives and employees exposed to the risk of corruption and influence peddling;
- internal and external accounting controls to ensure that the company's books, accounts and records are not being used to cover up corruption or influence peddling;
- a disciplinary procedure for employees who breach internal policies and procedures;
- an internal whistleblowing mechanism; and
- monitoring and review of these internal policies and procedures.

In many respects this mandatory compliance framework mirrors acknowledged best practices in the U.S.⁴ and the guidance issued by the U.K.'s Serious Fraud Office regarding the procedures that should be put into place by a commercial organization to prevent bribery.⁵

New Recommended Requirements

In addition to the above mandatory requirements, each covered company is encouraged to undertake the following additional steps:

- understand and prepare for the entry into force of the New Anti-Corruption Provisions;
- carry out an audit of its existing compliance program, if any, and assess its effectiveness;
- involve the board of directors, and consider the possibility of setting up board committees for the purposes of (a) assessing current compliance status and corruption risks, (b) implementing the anti-corruption policies and the compliance program, (c) assessing their implementation, and (d) periodically monitoring existing programs and policies;

⁴ See, for example, DOJ's "[Resource Guide to the U.S. Foreign Corrupt Practices Act](#)," p. 57.

⁵ See the "Six Principles" described in the [Bribery Act 2010 Guidance](#) published by the U.K. Ministry of Justice, p. 20 *et seq.*

- review its "tone from the top" message to demonstrate a commitment to compliance;
- appoint a head of compliance and provide for direct and periodic reports to both the CEO and board of directors, including to any specific committees that may have been established;
- include compliance with anti-corruption rules as part of remuneration and promotion procedures;
- analyze potential exposure to risks in the context of French-connected activities;
- determine conflicts, or potential conflicts, between the New Anti-Corruption Provisions and compliance with the rules of jurisdictions other than France; and
- establish the validity and the appropriateness of delegating authority in connection with the New Anti-Corruption Provisions, and more generally for compliance purposes.

Effective Date

These New Anti-Corruption Provisions will become effective on June 1, 2017.

Monitoring the New Requirements

Creation of a New Authority

Sapin II has created a new French Anti-Corruption Authority, called the *Agence française anticorruption* (the AFA), with broader powers than the previous French Central Service for the Prevention of Corruption (*Service Central de la prévention de la corruption*) (the SCPC).

Powers of the AFA

The powers of the old SCPC were limited, for example, it did not have any investigation powers. Its authority essentially was limited to collecting information on corruption and communicating that information to the public prosecutor.

The new AFA has significantly broader powers and is designed to:

- ensure the centralization and communication of information aimed to prevent corruption and to assist any legal entities, including the French state, with respect to such purpose;
- issue guidelines to facilitate compliance with obligations and to adopt adequate internal procedures to prevent and detect corruption;
- ensure that companies implement and monitor their compliance programs in a manner consistent with their risk profiles; and
- ensure that French companies under foreign investigation comply with the French Blocking Statute of July 26, 1968, which

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generally prohibits the production of commercial information from France in connection with a foreign judicial or administrative proceeding. In the past, some U.S. courts have found that the likelihood of French civil or criminal sanctions being imposed for violations of the French Blocking Statute was minimal (only some rare decisions of French courts have sanctioned violations of the French Blocking Statute), and that the French Blocking Statute is not a bar to ordering a party subject to U.S. jurisdiction to produce evidence from France (see *In Re AIG, Inc.*, 2008 Securities Litigation, N° 08 Civ. 4772; *In re Vivendi Universal S.A. Securities Litig.*, N° 02 Civ. 5571). The enactment of this provision may signal to French prosecutors and judges that they should step up their enforcement of the French Blocking Statute. If that happens, this new provision may significantly impact investigations being conducted by non-French authorities, in that it seems likely that such authorities will have to resort to bilateral agreements to obtain documents or testimony, whereas in the past cooperating defendants often construed the French Blocking Statute narrowly or developed various work arounds to produce documents despite the facial limits of the statute.

The AFA benefits from new enforcement powers, including the authority to launch investigations on its own initiative. During these investigations the AFA may request any information it considers relevant, as well as carry out on-site investigations to verify that the information provided is accurate and to conduct interviews. A decree, yet to be published, will, among other elements, detail the conditions under which these powers are to be exercised.

Effective Date

The powers of the AFA will become effective on June 1, 2017. The AFA will have the ability to enforce French Blocking Statute violations that occur on or after June 1, 2017. Under general principles of French law, the law should not have retroactive effect.

Sanctions

New Offenses and Remediation

If a company's compliance program is deemed insufficient, the enforcement committee of the AFA may:

- order the company and its legal representatives to improve the company's compliance program in accordance with the enforcement committee's recommendations in a time limit of up to three years; and
- issue fines of up to €1 million for the company and up to a maximum of €200,000 for directors and officers.

The AFA may make such penalties public.

When a company is found guilty of either (a) corruption or (b) influence peddling, as an additional penalty a court may require it

to implement internal measures remediating its internal failures at its own expense for a maximum five-year term. These remediation measures may include the setting up of a compliance program. The AFA will be responsible for monitoring the implementation of any remediation measures in coordination with the public prosecutor. No similar sanctions were previously applicable.

French DPA

Sapin II creates a settlement agreement procedure that will be known as a Judicial Convention of Public Interest, a mechanism similar to the deferred prosecution agreements (the DPAs) used by U.S. and, more recently, U.K. authorities to resolve criminal investigations. Under this new procedure, the public prosecutor may propose that companies settle, either (a) during the course of criminal proceedings, in which case the company would have to plead guilty, or (b) before criminal proceedings are initiated, to avoid a criminal conviction, provided they agree to take certain actions, including:

- the payment of a fine (capped at 30 percent of the company's average revenues over the last three years);
- the implementation of a compliance program at the expense of the company; and/or
- payment of damages to the victims of the offence.

French DPAs may be used in cases involving corporate corruption, influence peddling and money laundering relating to tax fraud. In that sense, they have a broader application than the new compliance requirements, which apply only in cases involving corruption and influence peddling.

As in the U.S. and the U.K., the potential benefits of French DPAs do not extend to directors and officers, who remain subject to prosecution even if the company enters into an agreement; and as in the U.S. and the U.K., French DPAs must be approved by a judge. If the French DPA is not approved, the information shared by the company during the proceedings cannot be used during future criminal proceedings.

Extension of Existing Offenses

Sapin II extends the territorial reach of corruption and influence peddling involving foreign officials.

Influence peddling can now be prosecuted when committed against foreign officials, whereas the previous regime covered only cases involving French officials.

French authorities will now be able to bring charges for corruption and influence peddling occurring outside of France, not only against French nationals, but also against persons who mainly reside in France or against individuals and legal entities

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having all or part of their business in France. This constitutes a significant extension of the extraterritorial application of French criminal law.

New Whistleblowing Provisions

Sapin II introduces new whistleblowing rules, harmonizes existing laws and prohibits retaliation against a whistleblower. A whistleblower acting in good faith is protected if he or she reports a violation of French law or of an international treaty to which France is a party, or any issue that poses a threat or damage to the public interest. These protections are not limited to allegations involving corruption or influence peddling.

Pursuant to Sapin II, a whistleblower first must file a report to a line manager or compliance officer within the company. If the latter fails to respond appropriately to the report, or where there is serious and imminent danger, a whistleblower may disclose the information to the appropriate judicial or administrative authorities, as well as to the relevant professional association. The information may be made public only as a last resort.

Appropriate whistleblowing procedures must be implemented by all companies with at least 50 employees that are incorporated in or operate in France. A decree will further detail this obligation. Companies must ensure that the identity of the whistleblower

remains confidential. Anti-retaliation protections for whistleblowers also are provided. Both of these new provisions are punishable by a fine or imprisonment if not adhered to. Contrary to the Dodd-Frank whistleblowing provisions in the U.S., Sapin II does not provide financial incentives for exposing wrongdoing.

Conclusion

Sapin II has significantly strengthened the anti-corruption regime and powers of enforcement in France, including through the creation of a specific DPA mechanism. Many French companies will now face new compliance requirements and, for the first time, will have to implement anti-corruption compliance programs whose scope will extend to foreign affiliates. Implementation of the New Anti-Corruption Provisions will require close monitoring by companies, which should prepare well in advance of June 1, 2017, when Sapin II becomes effective.

Sapin II also may signal that France will soon join the growing list of countries that are seeking to step up global anti-corruption enforcement. One thing is certain: Multiple prosecutions by different sovereign states is becoming ever more likely, which increases the risk that companies may find themselves being investigated and prosecuted in different jurisdictions for the same conduct.

[This alert is also available in French.](#)

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