Compliance & Ethics Professional®

April 2017

A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

www.corporatecompliance.org

Meet Joseph Suich

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See page 18

31
The right questions, the right way, the right time
Joe Koenig

39
The Compliance & Ethics profession and why it matters to Millennials
Colleen Dorsey

43
The framework for developing an effective compliance program
Emily Dyer and Femi Richards

55
FCPA due diligence: Starting 2017 on the right note
David P. Nolan

by Maria Lancri

Anti-corruption issues: New French Sapin II Law on transparency

» The Sapin II Law provides for a compliance obligation and describes what a compliance program should be.

» The Sapin II Law provides for some extraterritorial reach.

» To issue recommendations and control the implementation of this program, the law creates an anti-corruption agency.

» The French DPA has now been enacted, very much inspired by the UK procedure.

» Are all these new tools going to be convincing enough to consider that France's fight against corruption has reached international standards?

Now that the *Conseil constitutionnel* has validated the Sapin II Law and the law has been enacted and published on the 10th of December 2016,[1] it is time to see what is going to change in France in matters involving corruption. As this is the tradition in France, the law deals also with other issues, all of which are in relation with transparency.

Lancri

As a consequence, the present article will deal with issues relating to corruption but also with surrounding issues such as whistleblowing, compliance programs, the anti-corruption agency (*Agence française anticorruption,* or the Agency), the deferred prosecution agreements (DPAs), and the registry of beneficial ownership.

This law is going to be accompanied in the coming months by application decrees that aim at detailing some of the provisions, and we will mention it whenever a decree is due to complete an article of the law. Other provisions will be supplemented by recommendations to be issued by the Agency as part of its missions.

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Preliminary remarks

The drafting of the law raised a lot of opposition, from the *Conseil d'état* which is in charge of reviewing the draft prior to its submission, to the Parliament which was opposed to implementing a DPA in the French legal system, and to some deputies and/or senators who thought to limit the powers of the new Agency and reinstate wider powers to the court when validating the DPA. It is

important to take this background into account when analyzing the law and to recall that it is the result of a compromise.

In its two latest reports on the implementation of the Anti-Bribery Convention,[2] the OECD strongly criticized the French anti-corruption framework for its lack of efficacy in combatting corruption of foreign public officials. A first step towards a meaningful reform was made with the law on the 6th of December 2013,[3] which increased significantly the sanctions for corruption offences.

However, in its Phase 3 report from December 2014,[4] the OECD deemed the measure insufficient. In particular, the OECD pointed to the insufficient number of cases pursued and the requirement under French law for a certain number of obstacles to legal actions, such as the requirement of reciprocity of criminalization contained in articles 113-6 of the *Code pénal*.

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It is in this context that the Sapin II Law was introduced. The law aims to update the French law to put it in line with international standards and to increase its credibility in the fight against corruption, and thus, moving forward, to allow French businesses being prosecuted abroad to invoke the principle of *non bis in idem* (i.e., not punishing twice for the same crime) with reasonable chances of success.

Extraterritorial reach of French anti-corruption law

On the model of what is being done in other countries, the Parliament accepted to extend the jurisdiction of French anti-corruption law to violations committed overseas by a French national, a person usually residing in France, or an entity that has at least a part of its business activity in France.

Note that this provision was inserted in order to place France on a level playing field with other countries and, considering that several important French companies have been prosecuted in foreign countries over the last years (mainly in the U.S.), on the basis of a similar law.

The law also deletes the obligation, in case a person in France is considered an accomplice to a corruption violation committed in a foreign country, to await a definitive decision of a foreign court prior to engage a procedure in France.

Note that this modification was made to comply with the recommendations from OECD that considered that the former system slowed down prosecution of corruption acts in France.

The French anti-corruption agency

A study on potential methods of modernizing the French system of detection, prevention, and co-ordination of the fight against corruption by the Ministry of Justice concluded that France's neighboring countries had a "'*modern* and effective approach to anti-corruption,' including notably the creation of internal detection and prevention frameworks within businesses, the absence or insufficiency of which can be penalized."[5,6]

As a matter of fact, when preparing the draft bill, the government went to visit the British Serious Fraud Office (SFO) to see what could be implemented in the French system of law, while at the same time respecting the allocation of roles and responsibilities with the prosecutors and the courts.

The *Agence française anticorruption* is a service with national jurisdiction that reports to both the Ministry of Justice and the Ministry of Budget.

Note that it is not an independent administrative authority such as the *Autorité de la concurrence* (the competition authority) or the *Commission nationale informatique et libertés* (the data protection authority). As such, it shall not have sanction powers as wide as those authorities, except for the implementation of the compliance programs.

The main missions of the Agency will be to:

- Centralize and spread information in order to help to prevent and detect acts of corruption;
- Make recommendations to help public and private bodies to prevent and detect corruption (recommendations adapted to the size of the entities and the nature of the risks identified);
- Control measures taken by the administration to prevent and detect corruption;
- Control the compliance by private bodies with the obligation to prevent/detect anti-corruption;
- Sanction non-compliance to said obligation;
- Control the implementation of the compliance obligation sanction;
- Supervise the application of the blocking statute when foreign decisions are being executed;
- Inform the public prosecutor; and
- Release an annual report.

To perform its obligations for the control of compliance programs, both with the public bodies and with private corporations, the Agency may have access to any professional document. The Agency may request the disclosure of any professional document by the organization being controlled, proceed to on-site verifications of the documented information, and interview any person whose participation appears necessary. The Agency may be assisted by third-party experts.

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Note that at this stage, it is not considered that the Agency is authorized to proceed to dawn raids as the prosecutors remain in charge of controlling and prosecuting corruption acts. As for the third-party experts, a decree should come to detail the conditions for their appointment, certainly to ascertain their qualification and independence.

One of the main missions of the Agency, once it is set up (until then the current *Service central de prevention de la corruption [SCPC]* remains in force), is going to make sure the compliance programs are properly implemented by corporations. It will then

issue a report with recommendations to the controlled corporation. (Note: This article went to press just before the decrees were published in March 2017.)

In the event the controlled corporation does not comply with adaptations requested to their compliance program, the Agency may use a whole set of sanctions, from warning and injunction, to pecuniary sanctions up to €200,000 for individuals and €1 million for corporations. The injunction and the pecuniary sanction may be published by the Agency.

The sanctions will be pronounced by the Sanctions Committee whose functioning is due to be detailed in a decree. In addition, in the case of a corruption or influence-peddling offence, the law provides for an additional penalty of compliance where the company must put in place an anti-corruption compliance program. The implementation of this program is controlled by the court, in application of general criminal law, with the help of the Agency.

The law has an extraterritorial effect, as it provides that the aim of the compliance program is to detect and prevent corruption and influence-peddling matters, both in France and overseas.

In the event the company does not comply with this complementary sanction, a new monetary sanction may be decided by the court. The monetary sanction will be the same as the one that applies to the offense for which they were originally condemned to implement a compliance program.

The compliance program

Contrary to what exists in other countries, where it is the guidelines that provide for what should be in a compliance program, in France the law itself envisions an obligation on businesses to put in place an anti-corruption compliance program. The French government believes that this obligation will increase businesses' competitiveness and development, and maintain a fair, level playing field for all businesses in relation to anti-corruption.

Scope of application

Companies will have to implement a compliance program if they (1) have more than 500 employees or belong to a group with their headquarters in France that has more than 500 employees, and (2) achieve a consolidated turnover of more than €100 million.

Thereby, French subsidiaries of foreign companies that are above the thresholds must submit to the law. Smaller ones are not required to submit, but they still should follow programs issued in application of the country from which their mother company is from.

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Note that the law covers both corruption and influence-peddling matters. As a consequence, companies may have to amend their applicable code of conduct to make sure they cover this specific incrimination.

Note that this obligation of prevention is the responsibility of the management of the company, the corporate officers (e.g., presidents, managers, executive board members) and not of the corporate structure

itself, although when it comes to the sanction for failing to implement a program, then it applies both to the corporate structure and to the management. The drafters of the law are thereby following the current trend, which is to engage the personal responsibility of the corporate officers. The administration added several times that clearly this responsibility cannot be delegated, for instance, to a compliance officer. This issue is still being discussed.

Scope of the program

The companies in the scope have to implement "measures and procedures" that form a compliance program very similar to what is already stated in other systems of law:

- **Code of conduct**
  This code should define and detail the different types of behaviors that are forbidden, because they may be qualified as corruption or influence-peddling acts. Note that in order to ensure the enforcement of this code, the law also specifies the code should be an annex to the work rules of procedure. As such it shall be subject to a process of consulting the staff representatives/works council as mentioned in article L 1321-4 of the Labor Code. As a consequence, prior to any interpretation from the administration, it is considered that corporations that had already consulted their staff representatives to implement their code of conduct, but who did not attach the code as an exhibit to the rules of procedure, will have to consult their staff representatives again.
- **Whistleblowing scheme**
  The aim of this scheme is to gather information from employees regarding misconducts or situations that are contrary to the company's code of conduct. A whistleblower hotline needs to be implemented in most of the companies. Note that this measure is different from the one we describe in the "Protection of the whistleblowers" section below, although the technical implementation of both whistleblowing lines of report may be done through one sole line.
- **Risk mapping**
  This mapping should take into account the economic sector and geographical zone. The provision specifies that the documentation should be regularly updated and should identify, analyze, and prioritize the risk exposure of the company to external solicitations of a corrupt nature.
- **Third-parties due diligence**
  The due diligence procedure should be used to evaluate the situations of clients and first-tier suppliers as well as intermediaries with reference to the risk mapping. Note that to comply with the obligation, corporations may have to collect sensitive personal data on the said third-parties. It is going to be necessary that the authorities clearly state what kind of personal information corporations are allowed to retain, maybe through a modification of the data protection law.
- **Accounting control procedures**
  The provision specifies that it should be ensured that the books, records, and accounts are not used to mask corruption or influence-peddling. The controls could be carried out by the company's own accounting and financial oversight services, or by an external auditor in the case of the completion of auditing on the certification of accounts, referred to in article L823-9 of the *Code de commerce*.
- **Training Program**
  This program has to be of a general application, but it should aim at training employees who are exposed most to risks of corruption and influence-peddling.

- **Disciplinary system**
  To allow for sanctioning of company employees in the case of a violation of the company code of conduct. Note that in application of French Labor Law, to be able to enforce the sanctions, a company should first submit its code of conduct to the staff representatives in order to make the code part of the company's rules of procedure as mentioned above.
- **Internal audit and evaluation mechanism**
  To control the implementation of the rules.

The new Agency would hold the initiative to publish recommendations to guide companies in the creation and implementation of anti-corruption measures and procedures, and to allow them to conform to their obligation of prevention and detection of acts of corruption. These recommendations are to be adapted to the size of the entities and to the nature of the risks identified and should be updated in view of the evolution of practices. For the time being, the guidelines issued by the SCPC in 2015 are still to be referred to.[7]

The French DPA

One of the innovations of the law is that it provides for a DPA procedure entitled "C*onvention judiciaire d'intérêt public"* (public interest judicial convention). During the judicial investigation and before the public action is initiated, this convention can be proposed by the prosecutor in charge, on the basis of his discretionary prosecution power, to the corporate entity in violation of corruption provisions under the condition it accepts the following obligations:

- To pay a monetary penalty of a maximum amount of 30% of the annual turnover, calculated on the basis of the advantages provided by the violations;
- To implement, under the monitoring of the Agency, a compliance program for a duration of 3 years;
- To compensate the Agency for the costs incurred by the Agency in this process in an amount limited in the convention; and
- To compensate the victims, whenever they are identified.

Once the corporate entity accepts the proposed convention, it is submitted for validation to the judge who is going to verify that the judicial convention is justified and whether it is in accordance with the above.
Some more details about the convention:

- The judicial convention is a procedure that can be used to settle several types of violation of the criminal law: active or passive corruption; public or private, national or international corruption; influence-peddling; or laundering of tax fraud proceeds;
- This judicial convention is entered into with the corporate entity and does not prevent prosecution of the individuals who would be liable for the violations. This provision was essential to reassure opponents to this new procedure that it was going to be used as a tool to avoid personal liability;
- This judicial convention does not entail any recognition of liability on the part of the corporate entity or any mention in the criminal report. It was necessary that this provision be explicit in order to avoid having corporate entities who enter in this judicial convention from being prevented from participating in public procurements processes;
- The judgment validating the judicial convention, the convention, and the amount of the sanction will be published on the Agency's website to ensure publicity.

Note that in the end, the drafters did manage to introduce a DPA in the

law. However, the drafting is not fully satisfactory because:

- Powers to enter and to validate a settlement are divided between different public bodies;
- No national jurisdiction was specifically granted by the text to the National Financial Prosecutor, which is going to slow down the building of a consistent approach; and
- The prosecutor or the judge who approves the settlement is given no guidance by the law to determine the amount of the penalty to be awarded.

Hopefully, the Ministry of Justice will issue guidance to (1) urge the competent public bodies to work together to build a consistent practice of this new law, and (2) provide some kind of framework to be used by magistrates.

The beneficial owner registry

The law creates a registry of beneficial owners of all registered companies that have headquarters in France and establishments of foreign companies registered in France, adding thereby another tool to fight against terrorism, money laundering, and corruption.

The beneficial owner is defined by the financial and monetary code as "the individual that controls, directly or indirectly, the client, or the individual for which the transaction or an activity is conducted."

Note that a decree will specify what information needs to be filed with the registry, which will be held by the Registry of Companies (RCS), and what information will not be rendered public but remain accessible to the administration.

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The protection of whistleblowers

In a section that is totally independent from the corruption chapter, the law provides for the implementation of a mechanism to protect whistleblowers when they reveal information. To be protected by this mechanism, the whistleblower must be an individual who selflessly and in good faith reveals or signals a crime or an offense; a serious and clear violation of an international commitment (ratified or approved by France); an international organization's unilateral decision entered into on the basis of said commitment, law, or a regulation; a serious threat; or prejudice for the general interest that this individual is personally aware of.

Facts, information, or documents, whatever their format or support, covered by national security, medical secret, or legal privilege are excluded from the protection of this regime.

The protection granted to the whistleblowers who conform with the obligations above are such that:

- No one can be barred from a recruiting procedure, terminated, or be discriminated against, directly or indirectly, in particular in terms of compensation or advancement;
- A person who signals a secret protected by law is not criminally responsible if such revelation is

necessary and proportionate to the safeguarding of the interests at hand and is in compliance with the law;
- If the whistleblower made the revelation in good faith or in compliance with the law, it is the responsibility of the accused party to prove that the decision to reveal was justified by objective elements foreign to the revelation.

Note that the term *whistleblower* is widely defined and can be an employee or not. Also, the scope of the information a whistleblower can reveal is very wide on purpose, because it covers general interest issues. That notion is not defined by the law and was introduced in the law to protect whistleblowers, such as the ones in the Luxleaks matter[8] who revealed questionable conducts rather than crimes or offenses.

This mechanism operates as follows for companies:
- Private organizations of 50 employees or more have the obligation to set up a whistleblowing mechanism (hotline);
- The mechanism should receive alerts from employees and also outside and temporary partners;
- This mechanism must ensure the confidentiality of the identity of the whistleblower, of the accused person, and of the information collected;
- In the event of a violation of this confidentiality obligation, the sanctions applied may be up to 2 years of imprisonment and €30,000 of monetary penalty.

Note that a decree will be entered into to detail other functioning conditions.

To set up this mechanism, the company needs to follow two procedures:
- Inform and consult the works council about the project;
- Because the mechanism is going to collect personal data, comply with the data protection obligations and file a request for authorization with the data protection agency (the CNIL), if the mechanism does not comply with the general authorization AU-004.

In the event the employer does not answer on the admissibility of the alert within a reasonable time, the whistleblower can signal the alert to the judicial or administrative authorities or to professional organizations.

An alert can be received, directly or indirectly, by an employer or a representative appointed by the employer. In the event the employer does not answer on the admissibility of the alert within a reasonable time, the whistleblower can signal the alert to the judicial or administrative authorities or to professional organizations. If they do not answer within three months, then the whistleblower can go public. In case of a serious and imminent danger, the alert can be brought directly to the authorities.

Conclusion

As for corruption matters, the law aims to elevate the country's laws with regards

the fight against corruption to the highest international standards, following on from the progress made with the law of the 6th of December 2013. Is the law going to satisfy foreign authorities and the OECD who have oftentimes criticized France for its failure to grasp the issue seriously enough? It might be too soon to say and we should wait for the law to be actually implemented by all the stakeholders to judge whether it is a success or not.

The success of the law will depend largely on several factors among which: (1) the Agency is granted the appropriate means (i.e., budget and people) to be efficient; (2) the law is accompanied by an active policy of pursuing cases of corruption; and (3) judges to whom the DPAs are going to be submitted for validation agree on the process.

One must recall that a lot of French judges believe that a settlement in a criminal matter does not allow them to exercise fully their criminal jurisdiction or to take into account all particularities in the application of the principle of individualization of sentences. For them, it is also a way to make corporations less willing to take their responsibilities, especially when the law provides for an absence of guilt on their part when accepting the settlement.

This reform, in and of itself, may not offer protection against prosecution to French companies abroad. It does however serve the important function of obliging them to put in place anti-corruption programs. This should, at the very least, allow companies to prevent corruption and present them with the means to best defend themselves in front of judges overseas, provided their compliance program is effective and appropriately adapted. ✳

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2. OECD: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. 2011. Available at http://bit.ly/oecd-combating
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