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Sapin I to II – French anti-bribery law, an evolution

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From its position as corruption enforcement 'also rans', with Sapin II legislation France has sought to place itself firmly on the enforcement map and to create a regulator and prosecutor with real teeth, says ***Quinton Newcomb*** *of Fulcrum Chambers and* ***Olivier Lopez*** *of TsL Avocats.*

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L'histoire

In order to understand the significance of Sapin II it is first necessary to appreciate something about the history of France's stuttering, and much maligned, historic efforts to tackle corruption.

Law Sapin I [1] was implemented in 1993 by Michel Sapin, when he was the Minister for Economic Affairs and Finance in François Mitterrand's government. This law focused on the financing of political parties and implemented a stronger requirement for transparency in order to prevent corruption on the French territory. The law also created the Central Corruption Prevention Department (SCPC). The SCPC has historically focused upon preventive measures whilst another body, the French Financial Investigation Unit (TRACFIN), has gathered suspicious transaction reports made in the area of money laundering and terrorist financing.

Subsequent to Sapin I, in December 1997 France signed the OECD Anti-bribery Convention ("the Convention"), which was ratified by the Parliament (constituted of the Assemblée Nationale and the Sénat) in May 1999, [2] and came into force in September 2000. [3] In order to meet the Convention requirements, the Criminal Code was amended [4] by inserting the offence of bribery of foreign public officials in connection with international business transactions. Moreover, in 1999, France joined the Group of States against Corruption (GRECO), of the Council of Europe's anti-corruption monitoring body, shortly followed, in July 2005, by France's ratification of the UN Convention Against Corruption (UNCAC), promoted by the UN Office of Drugs and Crime (UNODC), which required state parties to the treaty to implement several anti-corruption measures on prevention, law enforcement, international cooperation, asset recovery, and technical assistance and information exchange. The relevant implementing legislation entered into force on 14 December 2005.

France continued to take actions to strengthen its anti-corruption efforts. Following the "Cahuzac Affair" [5], on 6 December 2013 [6], François Hollande's government significantly raised penalties [7] for the offence of bribery of a foreign public official (article 435-3 of the Criminal Code). In addition, this law [8] established a National Financial Prosecutor (PNF), the High Authority for Transparency in Public Life (HATVP) and the Central Bureau of Anti-corruption and Investigation of Financial Crimes. [9] The PNF has special concurrent jurisdiction to pursue foreign bribery cases over the whole French territory as opposed to its predecessor, the Inter-Regional Specialist Courts (JIRS) [10], which had only local jurisdiction.

Despite the recent legal evolution, France has been lagging behind for the implementation of anti-corruption regulations. As commentators have observed, "France is the bad student in the class when it comes to enforcement". [11] Indeed, in October 2014 [12], the OECD expressed serious concerns about French efforts to comply with the Convention due to the low volume of prosecutions, moderate fines and suspended or partly suspended prison sentences. These concerns were made in comparison to the existing or emerging legal framework of other signatory countries such as the United Kingdom [13] and Spain [14]. Furthermore, according to Transparency International's Corruption Perception Index (CPI), in 2015, France was ranked 23rd over 104 countries [15] along with Estonia, Chile and the United Arab Emirates. This left the field for other countries to sanction France's delay. A blatant example is the US Department of Justice (DOJ) 'long arm' jurisdiction applying the *Foreign Corrupt Practice Act* (FCPA) to the Alstom case, the French engineering giant, and forcing the company to pay $772 million fine. [16]

It was with in this context that, in March 2016, Michel Sapin, Minister for Economic Affairs and Finance in François Holland's government, proposed a new draft law for "Transparency, Fight against Corruption and Modernization of the Economy" - so called Law Sapin II. [17] The adoption of this law was the cause of various disagreements between the two Chambers of Parliament: l'Assemblée Nationale and the Sénat, which resulted in several legislative shuttles between July and November 2016, before the constitutional approval of the French Constitutional Council [18] on 8 November 2016 and the final publication of the law in the Official Journal (JO) on the 9 of December 2016. Law Sapin II incorporates new laws establishing:

1. the obligation for companies to prevent and detect corruption practices that could arise in their daily activities (article 17) ("ABC Compliance");
2. an additional criminal penalty for failing to implement a compliance programme under the supervision of the Anticorruption Agency (article 18) ("Failure to Implement Offence");
3. a deferred prosecution agreement (DPA) equivalent: the public interest agreement (article 22) ("Public Interest Agreement"); and
4. extraterritoriality reach of the French anti-corruption law (article 21) ("Extraterritoriality").

Law Sapin II – The central features

"With corruption, France cannot remain complacent about what it is witnessing now," according to Michel Sapin.

Law Sapin II stands to significantly improve France's anti-corruption landscape and should succeed in filling the gaps in the French anti-corruption regime in order to position France's anti-bribery laws at the same level as the *UK Bribery Act* or the *US Foreign Corrupt Practice Act*. Alongside the establishment of the new anti-corruption body, the Agence Française Anticorruption (AFA), the changes promise to elevate France's role in the global fight against corruption.

The AFA, which will enforce the obligation for companies to prevent and detect corruption, replaces the SCPC and promises to be more proactive than its predecessor. It will be subject to the supervision of the French Ministry of Justice and the Minister for the Budget. The AFA will be led by a judge, appointed by the President of the French Republic for a term of six years. In order to ensure independence, the judge appointed cannot be removed from his position except in response to clear evidence of an inability to perform the role and/or serious misconduct. The AFA will be empowered to conduct off-site and on-site reviews of companies' procedures, impose injunctions and impose administrative penalties up to €1 million for legal entities and €200,000 for individuals in the event that it determines that processes to detect and prevent corruption show a lack of robustness.

Below we identify some of the most significant features of the Sapin II laws that AFA will be enforcing and set out some observations as to how companies can best ensure their compliance.

ABC Compliance

Companies must ensure that their ABC compliance procedures incorporate the following features, which are substantially in common with the UK Ministry of Justice's Guidance on the UK Bribery Act.

(i) Code of Conduct

Companies must draft and adopt a Code of Conduct that describes prohibited and unlawful behaviours. The code must go beyond general statements and descend into specific provisions to prevent bribery and corruption. The Code of Conduct shall be annexed to the company's Internal Regulations Handbook. [19] The AFA is expected to issue guidelines on the required content.

(ii) Whistleblowing Procedure

A whistleblowing procedure must be set up in targeted companies (as well as in all companies with more than 50 employees, municipalities with more than 10,000 inhabitants and territorial collectivities). The procedure shall be open to all employees (including employees from direct and indirect subsidiaries) and must enable employees to report any violations of the relevant company's Code of Conduct. In establishing their procedures, companies must comply with the French *Data Protection Act*, and will refer to the responsible regulatory authority, the Commission Informatique et Libertés (CNIL) [20] and any foreign law applicable. If the procedure complies with CNIL requirements, the company will be able to use the single authorization (AU-004 [21]) issued in December 2005 (amended January 2014). If the process does not meet the CNIL requirements, the company must use a more onerous mechanism of individual request. [22]

(iii) Risk Mapping Procedure

Each risk identified in the development of proportionate ABC procedures must be assessed according to the applicable risks associated with geographic areas and industry, in addition to the specific clients, suppliers and intermediaries involved. Whilst Article 17 does not prescribe the frequency with which risk assessments must be conducted, companies would be well-advised to do so on a regular basis (monthly, quarterly or yearly) depending on the nature of each risk, as well as on an 'as needed' basis. Triggers that may demand an 'as needed' review of risk assessments include enforcement action against the company, or to undertakings operating in the same industry, changes in the legal or regulatory environment, increasing regulatory focus on a specific sector or business practice, results of external and/or internal audit processes, or the discovery of an internal breach of the company's ABC procedures, or relevant misconduct.

(iv) Counterparty Due Diligence Procedure

Companies shall implement a screening procedure for third parties. That includes clients, suppliers and intermediaries. The bill doesn't further specify background checks requirements but the AFA is expected to provide guidance in due course. However, in the meantime companies would be advised to develop procedures that include the following steps:

1. Collection of relevant documentation and information;
2. Review and evaluation of these documents and information;
3. Recording of risk assessments, the commissioning of due diligence reports, and the decisions made.

Depending upon the level of risk identified with each counterparty in question, standard or enhanced due diligence should then be applied, as appropriate. Companies must place themselves in a position to justify, through comprehensive records, the level of due diligence applied in each case.

(v) Internal and External Accounting Controls

Companies must develop accounting controls in order to ensure that inaccurate and/or fraudulent books and records cannot be used as a means to cover unlawful practices such as bribery or corruption. These controls shall be applied by accounting or finance teams or by external counsel, pursuant to Article L.823-9 of the French Code de Commerce. [23] In most instances, and particularly when first developing controls, companies would be advised to commission a completely independent review by external counsel.

(vi) Targeted ABC Training

Companies must provide targeted (risk-based) training to employees whose roles and responsibilities present high bribery and corruption risks, such as staff who have frequent contacts with government officials and those who are in charge of charitable donations or sponsorships. Companies will need to implement systems that reliably facilitate the identification of both existing and new employees who require training, in addition to the appropriate level for that training. For example, those with higher exposure to ABC risks should generally be provided with rigorous face-to-face training, whilst many employees in lower risk roles can be trained using appropriate online courses, which are tailored to the particular risks faced by the company. In order to be effective, training should be delivered on a regular basis and records of such trainings must be maintained.

(vii) Disciplinary Sanctions

Like the Code of Conduct, this document must comply with Labour Law requirements. The AFA may issue recommendations upon sanctions for breaches of the relevant laws and the company's Code of Conduct. However, in the meantime companies should, within the constraints of the relevant Labour Laws, proceed to implement disciplinary actions against employees who unreasonably ignore, fail to prevent or report corruption practices.

(viii) Implementation of an Internal Control System

Companies must implement an internal control system to determine whether the seven measures identified above are accurately implemented. This will allow companies to monitor their ABC compliance and, where necessary, make suitable adjustments to their ABC procedures in order to ensure that they are compliant and invulnerable to AFA enforcement action.

Failure to Implement Offence

Sapin II states that legal entities sentenced for corruption practices could be subject to an additional penalty for failure to implement a compliance program within a maximum of five years of conviction. Failure by the management of the company to implement the program will be a criminal offence carrying a maximum of two years' imprisonment and/or a fine of €50,000.

Public Interest Agreement

Pursuant to the new law, prior to the commencement of a prosecution, a prosecutor may propose, to a company under investigation for corruption practices, that they should enter into a public interest agreement.

Whilst for the British deferred prosecution agreement (DPA) process there are factors (such as the seriousness of the offence, the fact of self-reporting and the extent of cooperation) that the prosecutor must consider when deciding whether to offer DPA, [24] there is no equivalent guidance for French prosecutors. However, in reality, the common-sense factors identified in the UK DPA Code of Practice are all likely to be persuasive.

The public interest agreement will impose requirements including the following upon the company in question: (i) the payment of a fine of up to 30% of the company's annual turnover and/or (ii) a requirement to implement an anti-corruption compliance program under the supervision and control of the AFA for maximum three years (monitoring).

Extraterritoriality

Sapin II eliminates the dual criminality standard that has hitherto restricted enforcement action by the French authorities, [25] and extends French jurisdiction to prosecute corruption practices committed abroad if the perpetrator is: (i) a French national; (ii) a foreign national established in France; or (3) any company which operates all or some of its activities in France. This is a significant extension of the French corruption offence's scope and it mirrors the equivalent provisions in *section 7* of the the *UK Bribery Act*, which will apply to any foreign company carrying on even part of its business in the UK, notwithstanding the fact that the corruption in question took place outside of the UK, and involves non-UK nationals.

Practical consequences for companies and achieving compliance

More than ever, companies are exposed to multiple anti-corruption laws across multiple jurisdictions, and they must apply genuine rigour in setting-up, and maintaining, adequate procedures to prevent and detect corrupt practices. For most multinational companies this means identifying a single global standard that provides protection against the most onerous ABC legislation applicable. Commentators commonly identify the *UK Bribery Act* as the most rigorous standard and, in reality, companies can expect the requirements imposed by Sapin II, *in practice*, to broadly mirror those imposed by the *UK Bribery Act*.

Recent enforcement action by the Serious Fraud Office (for example, the recent Rolls-Royce DPA [26]) has demonstrated the agency's appetite and ability to give real teeth to the legislation. What is evident, in every case, is that the root of the problems was not so much in the financial investment in the procedures in place at the time things went wrong and their *form* but, rather in the 'tone from the top', the resultant culture of the business, and the impossible challenges that this posed to effective practical implementation of compliance procedures with real *substance*.

Companies newly subject to the provisions of Sapin II would be well-advised to seek counsel from both French and UK consultants in order to ensure compliance before the AFA has chance to prove its own mettle. In particular, companies would be well advised to seek to benefit from the learning available from the recent UK DPAs, which, in each case, have resulted in a spotlight being shone upon the respective companies' compliance procedures.

Notes

1. Law n° 93-122 of 29 January 1993 "Relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques"
2. Law n° 99-424 of 27 May 1999 "Autorisant la ratification de la convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales"
3. Decree n° 2000-948 of 28 September 2000 "portant publication de la Convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales"
4. Law n°2000-595 of 30 June 2000 "modifiant le code pénal et le code de procédure pénale relative à la lutte contre la corruption"
5. French Minister of the Budget and the Economy who was accused of tax fraud and money laundering in December 2012 and was convicted on the 8 December 2016 [the sentence: three years' imprisonment and five years of ineligibility – is appealing]
6. Law No. 2013-1117 "relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière"
7. The fine for individuals bribing a foreign public official was raised from €150,000 to €1 million which can be increased to double the proceeds of the offence by articles 435-1 and 435-3 of the Criminal Code. For legal entities, article 435-15 of the Criminal Code raised the penalty from EUR 750,000 to EUR 5 million, which can be increased to ten times the proceeds of the offence.
8. Law n° 2013-1117 of 6 December 2013 "relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière"
9. Decree n° 2013-960 of 25 October 2013 creating "l'Office central de lutte contre la corruption et les infractions financières et fiscales" (OCLCIFF)
10. Law Perben II n° 2004-204 of 9 March 2004 "portant adaptation de la justice aux évolutions de la criminalité"
11. Daniel Lebègue, President of Transparency International France, interview with *The New York Times*, on 6 April 2015
12. Statement of the OECD working group on bribery on France's implementation of the Anti-Bribery Convention, 23/10/2014
13. The UK Bribery Act (UKBA), which received the Royal Assent on 8 April 2010 and entered into force on 1 July 2011
14. On 20 September 2013, the Spanish Minister of Justice published a proposal to amend the Spanish Criminal Code in order to comply with the OECD recommendation and would lead to the amendment of the Organic Law on 31 March 2015.
15. http://www.transparency.org/cpi2015
16. https://www.nytimes.com/2015/04/07/world/europe/france-lets-us-lead-in-corruption-fight.html
17. Law n° 2016-1691 of 9 December 2016 "Relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique"
18. Decision n° 2016-740 DC of 8 December 2016. http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-740-dc/decision-n-2016-740-dc-du-8-decembre-2016.148326.html
19. According to article L.1321-4 of the French Labour Code, the Code of Conduct will have to be endorsed by employees' representatives in order to apply. Under French Labour Law, the Internal Regulations Handbook cannot be amended without a prior review and endorsement by the Works Council or the employees' representatives (if the company doesn't have a Works Council) and by the Health and Safety Committee. Once the Internal Regulations Handbook has been amended it must be communicated to the Labour Inspection.
20. The CNIL regulates the whistleblowing mechanism because it involves collection, registration and storage of data.
21. To benefit from the single authorization AU-004, data collected shall be limited to the facts of the concern, the whistleblower, individuals who are involved in the report and individuals who will conduct the review. Also, data's recipients shall be strictly limited. Lastly, the whistleblower should be given clear information about the consequences of its use such as the identity of the data's recipients or the eventuality of data transfer outside of the European Union.
22. Under article 25-1-4 of the French Data Protection Act no 78-17 of 6 January 1978, a plenary committee shall review the request for individual authorization within two months.
23. External counsels under article L.823-9 of the French Code de commerce are statutory auditors.
24. Deferred Prosecution Agreements Code of Practice edited by Crime and Courts Act 2013.
25. Under Article 113-6 of the French Criminal Code, a French prosecutor has jurisdiction to prosecute offences and crimes committed abroad if (1) the wrongdoing is a crime or an offence in the country where it has been committed: (2) the victim is a French national: (3) the perpetrator is a French national: and (4) a complaint was raised by the victim or the foreign authority.
26. https://www.sfo.gov.uk/cases/rolls-royce-plc/

Quinton Newcomb (+44 (0)20 7186 0420, quintonnewcomb@fulcrumchambers.com) is a barrister and director of Fulcrum Chambers (www.fulcrumchambers.com); **Olivier Lopez** (+33 (0) 177 379 484, olopez@tslavocats.com) is founding partner of TsL Avocats (www.tslavocats.com).

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