

France's Game-Changing New Anti-Corruption Law

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Since 2010, French companies have paid over \$1.6 billion to the United States Treasury to resolve anti-corruption enforcement actions, and since 2007, two executives of French companies have pleaded guilty to anti-bribery-related violations in the United States. Meanwhile, France's enforcement of its anti-corruption laws has lagged, leading the Organization for Economic Cooperation and Development Working Group on Bribery and others to pressure France to improve its anti-corruption regime.

In March 2016, France introduced draft legislation (known as "Sapin II" after France's Finance and Economy Minister, Michel Sapin, who championed the bill) that aimed to strengthen the country's anti-corruption regime. After months of debate by the French Congress, on Nov. 8, 2016, France's National Assembly adopted the final version of the law, which came into force on Nov. 10, 2016 (with the exception of Article 17 that requires companies to adopt a compliance program, which will come into force in approximately six months).

Sapin II stands to significantly improve France's anti-corruption landscape. The changes include increased jurisdiction for French authorities to prosecute offenses committed abroad, expanded jurisdictional reach, the creation of a new anti-corruption agency, an obligation that companies of a certain size adopt a compliance program, new whistleblower protections, and the introduction of a deferred prosecution agreement mechanism. These changes will close gaps in France's anti-corruption regime and position France to play a more significant role in the global fight against corruption.

This article provides an overview of France's existing anti-corruption framework, explores how Sapin II will improve this framework, and reflects on the potential practical impacts of the law in light of lessons learned from the U.S. Foreign Corrupt Practices Act and the U.K. Bribery Act.

A Brief History of Anti-Corruption Efforts in France

Over the past three decades, France has taken a variety of steps to strengthen its anti-corruption efforts. In 1993, France adopted an anti-corruption law (known as the "Loi Sapin") that established the Central Service for the Prevention of Corruption (abbreviated "SCPC" in French). However, the French Constitutional Council weakened the effectiveness of the SCPC by stripping it of its investigatory authority and denying it the ability to require responses to its requests for information.

In 1997, France adopted a law prohibiting the tax deductibility of bribes paid to foreign officials — decades after the United States prohibited this practice but around the same time many of its European neighbors did so. In 2007, based largely on recommendations from the OECD and the Council of Europe's Group of States against Corruption, France introduced additional reforms that expanded the scope of already established corruption-related offenses, created seven new corruption-related offenses, and allowed for the use of special investigative techniques in corruption-related cases.

In 2013, a new law established a national financial prosecutor (abbreviated "PNF" in French), a prosecution office with special jurisdiction over economic and financial crimes, and increased the fine for the offense of bribing a foreign public official,



Saskia Zandieh

Counsel

szandieh@milchev.com

202.626.5560



Leah Moushey

Associate

lmoushey@milchev.com

202.626.5896

from €150,000 to €1 million for individuals (which can be increased to double the proceeds of the offense) plus up to 10 years imprisonment and from €750,000 to €5 million for companies (which can be increased to 10 times the proceeds of the offense).

France's pre-Sapin II anti-corruption legislation is already quite expansive. It generally prohibits bribery, whether domestic or foreign, in the public and private sector, and whether passive or active. French law also prohibits facilitation payments, and books and records provisions exist. However, certain gaps remain in the law that Sapin II aims to close, including shortcomings that result in a lack of enforcement. The OECD reports that from 2012 to 2014, only three individuals were convicted in two cases relating to the bribery of foreign officials, and only one company had ever been convicted of bribery of a foreign official.

Expanded Jurisdictional Reach

Sapin II will expand French prosecutors' extraterritorial reach in bribery cases. Prior to the adoption of the law, French authorities only had jurisdiction to prosecute offenses committed outside of France if the victim was a French citizen or if the wrongdoer was a French citizen and the conduct at issue was an offense in both France and where the conduct occurred (the so-called "dual criminality" requirement) and a complaint is filed by either the victim or the relevant foreign authority. Sapin II removes all of these requirements, which have constrained French prosecutors in the past. Removing them will allow French prosecutors to take a more active role in enforcing foreign bribery violations.

The Creation of a New Anti-Corruption Agency

Another significant change introduced by Sapin II is the establishment of the "Agence française anti-corruption" ("AFA"), which is a new anti-corruption agency. The agency will be headed by a presidential appointee and will include a six-member Sanctions Commission.

The AFA will be responsible for, among other things: (1) assisting the public and private sectors in preventing and detecting corruption; (2) verifying that companies required to adopt compliance programs have such programs in place; (3) reporting possible violations of law to relevant prosecutors; and (4) overseeing corporate monitorships.

While the Senate tried to limit the AFA's authority during the past months of debate, under the final version of Sapin II, the agency has the power to request documents from companies in the context of its role in ensuring that companies adopt requisite compliance programs, and the AFA's Sanctions Commission may impose fines on companies and individuals for refusing to share information or failing to implement a compliance program, as discussed in greater detail below.

The AFA does not, however, have the authority to investigate bribery nor does it have the authority to impose criminal penalties, which will be handled by French prosecutors. Whether this system will be effective in increasing enforcement of anti-corruption laws remains to be seen, though spreading anti-corruption-related duties among various parts of the government is quite likely to create inefficiencies in the process.

The Compliance Program Requirement

Sapin II generally requires companies and presidents, directors, and managers of companies with over 500 employees and annual gross revenue exceeding €100 million to implement an anti-corruption compliance program.

The program must include: (1) a code of conduct; (2) an internal reporting mechanism; (3) a corruption risk assessment mechanism; (4) third-party due diligence procedures; (5) accounting controls; (6) training programs for employees in high-risk positions; (7) disciplinary procedures; and (8) a mechanism for evaluating the effectiveness of the compliance program.

This requirement will come into force on the first day of the sixth month after the law is adopted. If the AFA determines that a company does not have the requisite compliance program in place, its Sanctions Commission may issue a warning or an injunction ordering individuals or companies to adopt an adequate compliance program. The Sanctions Commission may also impose a financial penalty (not to exceed €200,000 for individuals and €1 million for legal entities) for noncompliance, and the

AFA's decision may be published. However, failure to abide by this requirement constitutes an administrative violation — not a crime. In addition, sanctions will not be imposed unless the company or its executives ignore the recommendations of the AFA and fail to improve the company's program during a grace period set by the AFA that may last up to three years.

While companies subject to the FCPA or the U.K. Bribery Act likely already have compliance programs in place that will satisfy the Sapin II requirements, many smaller companies with limited international operations will have to adopt anti-corruption compliance programs. Whether those programs will deter corruption depends entirely on the extent to which companies embrace their programs. Without adequate "tone from the top" at French companies — which will be influenced by the enforcement environment — the compliance program portion of Sapin II will not change the compliance landscape dramatically.

In addition, Sapin II does not provide a compliance defense like the one provided for under the U.K. Bribery Act that would allow companies with an adequate compliance program in place to benefit from reduced penalties. Therefore, the amount of resources companies will dedicate to developing robust compliance programs remains to be seen.

Whistleblower Protection Provisions

Sapin II will also strengthen whistleblower protections and harmonize a number of France's various whistleblower laws. The law extends whistleblower protections to any disinterested person who reports in good faith a violation of French law or an international treaty to which France is party or any issue that poses a serious threat to the public interest of which he or she has personal knowledge.

The law requires keeping secret the whistleblower's identity and prohibits retaliation against whistleblower, including employment-related retaliation. In order to secure the benefits of the law, a whistleblower must first make his or her report to a direct or indirect supervisor, and cannot report directly to the authorities unless the supervisor does not take steps to address the report within a reasonable period of time or if there is a case of grave and imminent danger. The law sanctions individuals who retaliate against whistleblowers or attempt to prevent whistleblowers from making a report with up to one year's imprisonment and a fine of up to €15,000, while those who disclose a whistleblower's identity can face up to two year's imprisonment and a fine of up to €30,000.

Sapin II does not, however, provide the same financial incentives to revealing wrongdoing as do the Dodd-Frank whistleblower provisions in the United States. Dodd-Frank's whistleblower provisions extend to reports of bribery violations and provide monetary awards to individuals who come forward with original information that leads to enforcement actions worth more than \$1 million. Since 2012, the U.S. Securities and Exchange Commission has awarded more than \$107 million to 33 whistleblowers, with the largest reward valued at more than \$30 million. Whether whistleblowers will report wrongdoing in France without such an incentive remains to be seen.

The Introduction of the DPA

Article 22 of Sapin II introduces U.S.-style deferred prosecution agreements to the French legal landscape in certain cases, including in cases of domestic and foreign corruption. Under Sapin II, companies will have to agree to the facts enumerated in the DPA but will not be required to admit guilt. Sapin II also requires that DPAs be reviewed by a court during a public hearing.

Under a DPA, companies can be fined an amount equal to the benefit secured through the illicit activity, up to 30 percent of the company's average revenue for the past three years, to be paid to the French Treasury. In addition, companies can be required to submit to a form of corporate monitorship that will be overseen — though not necessarily conducted — by the AFA. Companies must also pay the costs the AFA incurs in the execution of these duties (presumably including monitor-related costs), though those costs will be capped in the DPA. Sapin II also provides for the payment of reparations to victims in the context of a DPA in certain circumstances.

It is likely that companies will find DPAs more desirable than other options under French law, as DPAs do not impose a criminal conviction, thus allowing companies to avoid otherwise automatic debarment from public tenders. This is particularly

important in France where many companies are state-owned and, therefore, debarment could result in the loss of significant business opportunities. DPAs will also allow French companies to avoid the costs of litigating such cases.

However, there is also a potential downside to the introduction of DPAs; as in the United States, DPAs may give French prosecutors the ability to negotiate settlements in cases they could not win in court, as companies seek to avoid protracted legal proceedings and the publicity that inevitably surrounds such cases. However, French prosecutors will still lack the advantage of a voluntary disclosure program for companies or bounties for whistleblowers that feed cases to many of their foreign counterparts, so they will have to discover violations on their own, or rely on whistleblowers that may or may not disclose violations.

International Double Jeopardy Considerations

Sapin II is designed to make France a major player in the enforcement of foreign bribery. This effort will inevitably increase the odds that companies doing business abroad will find themselves being prosecuted in different jurisdictions for the same conduct.

While the United States does not protect against duplicate prosecutions by different sovereigns for the same offense, two recent decisions in France suggest France's position on double jeopardy is less clear. In June 2015, a Paris trial court acquitted four French companies after its parent companies signed either a DPA or a nonprosecution agreement with the U.S. Department of Justice in connection with alleged violations of the FCPA. The court held that prosecution in France was prohibited if the defendant had signed a DPA or an NPA with the essential qualities of a final judgment in the United States regarding the same factual basis that would create the basis for prosecution in France. However, in February 2016, the Paris Court of Appeals limited the application of this principle, reasoning that the offense charged rather than the underlying factual basis was dispositive in determining if duplicate prosecution is permissible. Applying that rationale, a company could be charged twice for the same actions if two countries relied upon laws that are not substantially the same to prosecute the party.

As more countries enforce their foreign bribery laws more aggressively, the race to strike the right balance between avoiding double jeopardy and preventing potential defendants from forum shopping will become more urgent. As the international community sorts out this tension, individuals and companies will have to continue to balance requests from multiple jurisdictions in both the compliance and enforcement environments.

Conclusion

With Sapin II, France has the potential to become a major player in anti-corruption enforcement. French prosecutors — rather than their Anglo-Saxon counterparts — could more effectively take the lead in corruption cases, particularly those brought against French companies and individuals. For this to happen, however, the AFA and French prosecutors' offices must be adequately staffed and funded, the AFA must vigorously execute its compliance-and monitor-related duties, French prosecutors must leverage support from the AFA and use DPAs to their advantage, and French prosecutors must work with their foreign counterparts to secure the lead in cases involving French companies and individuals. Otherwise, the law risks being nothing more than lipstick on a pig.

For smaller companies not already subject to the FCPA, the U.K. Bribery Act or other similar laws, Sapin II will force them to adopt compliance programs. Whether such programs are robust and effective in deterring corruption will depend on companies' desire to combat corruption, which will likely be driven largely by enforcement-related concerns. Though larger companies may not need to modify their compliance programs, internal investigations may well become more common in France as companies seek to resolve cases through DPAs.

[Authors' note: After publication of this article, the law was challenged before the French Constitutional Court. The court decided the case, and the final version of the law came into force on December 9, 2016.]

Saskia Zandieh is counsel in Miller & Chevalier's Washington, D.C., office. She previously worked at the World Bank's Legal Vice Presidency and as an attorney-adviser at U.S. Customs and Border Protection. Leah Moushey is an associate based in the firm's Washington office. The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.