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WHITE PAPER

Understanding the impacts of the Sapin II Law

The French law targeting transparency, anti-corruption and economic modernization, known as Sapin II Law (named after Michel Sapin, the former French Finance Minister), entered into force on 11 December 2016. It aims to strengthen France's efforts in curbing corruption on a global level, a fight initiated by the United States in the late 1970s, during which time the prosecution of French companies by American authorities increased. This regulation will enable France to become a leading nation in international bribery and corruption prevention. For businesses, it is a revolution, and implies a critical need for an accelerated upgrade of practices.

1. Background: a slow realization jostled by the lawsuits by US authorities

At the end of the 1970s, the investigations into the Watergate scandal revealed the corrupt practices of some American companies engaging with foreign public officials to obtain lucrative contracts. Dating back to 1977, the *Foreign Corrupt Practices Act* (FCPA) prohibits the bribery of foreign public officials by persons or entities with ties to the United States. In the 1990s, US authorities advocated for the transposition of FCPA principles into international treaties, to try and ensure a level-playing field for US companies abroad, and to create a fairer system overall. These efforts lead to the OECD Convention of 21 November 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions. The fight against corruption by the American authorities became even more significant after 9/11 attacks, with the authorities now linking corruption to the financing of terrorism.

In France, FCPA fines are substantial and increasing: $338 million for Technip in 2010, $398 million for Total, $772 million for Alstom in 2014. The 6 December 2013 French Law on the fight against tax evasion and serious economic and financial crime increases the penalties applicable to corruption by establishing a financial prosecutor.

European and French companies have been the targets of the US authorities. Previously, the US had quite a free hand given the weakness of the French anti-corruption system. In 2000, France brought the 1997 OECD Convention into domestic law, but prosecutions are rare, late and not severe, while the US authorities continued to pursue a high volume of cases. In France, FCPA fines are substantial and increasing: $338 million for Technip in 2010, $398 million for Total, $772 million for Alstom in 2014. The 6 December 2013 French Law on the fight against

tax evasion and serious economic and financial crime increases the penalties applicable to corruption by establishing a financial prosecutor. More prosecutions by US authorities, with increasing extraterritorial provisions, such as the $9 billion imposed on BNP Paribas for embargo violations in 2014 pushed the agenda amongst French authorities and led to the launching of a mission of parliamentary information in 2016. Sapin II Law adopts part of its recommendations.

In the event of a breach, it may issue a warning or refer the sanctions committee, which may impose a fine. Thus, even without an actual instance of bribery or corruption, a company can be sentenced in case of absence or failure of the program (fine of €1 million for companies, €200,000 for individuals). Finally, the penalty is likely to be published, creating a reputational risk for the company.

2. Sapin II Law

Ambitious in its range of action and in its severity on the issues of corruption and fraud, this regulation aims at durably changing practices. The main provisions of Sapin II are:

a. The establishment of an anti-bribery agency, the Agence Française Anticorruption (AFA), responsible for drawing up the national anti-corruption strategy, issuing recommendations to public administrations and companies on the implementation of internal corruption prevention programs, and monitoring their implementation. In the event of a breach, it may issue a warning or refer the sanctions committee, which may impose a fine. Thus, even without an actual instance of bribery or corruption, a company can be sentenced in case of absence or failure of the program (fine of €1 million for companies, €200,000 for individuals). Finally, the penalty is likely to be published, creating a reputational risk for the company.

b. The obligation for companies, under threat of sanctions, to adopt a compliance program (Article 17). This applies to any company based in France employing at least 500 persons in France or with consolidated or non-consolidated sales of more than €100 million. Corruption prevention program includes eight mandatory measures:

i. A Code of Conduct defining and illustrating the behavior which constitutes acts of corruption or influence to be prevented. This code of conduct has to be central to a company's culture, and must cover a wide range of topics, such as

relations with third parties, gifts and invitations to customers, lobbying, and the prevention of conflicts of interest.

ii. An internal whistleblowing process, which must allow the collection of reports from employees concerning conduct, behavior or situations contrary to the code of conduct. The implementation of this whistleblowing system will be closely monitored, as it will have to comply with another provision of the Sapin II Law regarding the protection granted to whistle-blowers and the handling of personal data.

iii. Risk mapping. The cornerstone of the law, a company must identify, analyze and classify their risks and potential exposure to acts of corruption, in accordance with the company's operations and countries of operation. Its purpose is also to ensure that there are proportionate internal procedures.

As a result, companies should carry out a baseline due diligence process for all third parties. As well as showing any potential risks, this will help provide more knowledge on the potential partner and its ability to fulfill the expected services.

iv. A due diligence process for customers, suppliers and intermediaries in line with the risk mapping, as Sapin II aims not only at the internal functions of the company, but the whole supply chain. Thus, a company can be held responsible for the corruption of a third party in connection with a contract it has with them. It is therefore essential to ensure the probity of external service providers and customers. As a result, companies should carry out a baseline due diligence process for all third parties. As well as showing any potential risks, this will help provide more knowledge on the potential partner and its ability to fulfill the expected services. The due diligence should be proportional to the risks related to the sector of activity, the location of the project, the existence of links with a politically exposed person or public entity, but there must be a systematic approach to conducting due diligence on all third parties.

v. Accounting procedures, internal or external, to ensure that books, records and accounts are not used to hide the facts of corruption or trading in influence.

vi. A training program for managers and staff most at risk of corruption and trading in influence, with regular sessions.

vii. The adoption of a disciplinary system for sanctions violations of the Code of Conduct by employees; binding on all employees, who must then respond to the disciplinary plan (without prejudice, if necessary, of any legal action) of any violation concerning one or other of its prescriptions.

viii. Finally, the development of a system of internal controls and evaluation of the measures implemented.

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c. The introduction of a Judicial Agreement in the Public Interest (CJIP) modeled on the US Deferred Prosecution Agreement (*DPA*). With this transactional dispute settlement procedure, the public prosecutor can propose to an enterprise suspected of an act of corruption an agreement by which it submits itself to a number of obligations in return for the discontinuation of the proceedings, thus avoiding a long trial with an uncertain outcome. The first CJIP was signed in November 2017 between the Public Prosecutor and HSBC Private Bank, the Swiss subsidiary of the British bank HSBC Holdings, which chose to pay a fine of €300 million to stop the prosecution. Two new CJIPs were signed in February, this time for corruption. Both companies agreed to pay a fine and implement a compliance program, which will be verified by AFA.

d. The extension of French criminal courts jurisdiction for acts of international corruption: French criminal courts can now prosecute, for offenses of corruption or trading in influence committed abroad, not only persons of French nationality or residents, but also the “people having all or part of their economic activity in France” – an extraterritorial provision.

e. Protection for whistleblowers. Sapin II requires the protection of the confidentiality of the whistleblower, the object of the alert and the person concerned, under penalty punishable by two years of detention and €30,000 fine (€150,000 for legal entities).

3. A new era for businesses

The French anti-bribery law is a major turning point in the fight against corruption. It is unique among national anti-corruption laws in that companies may also be fined (up to €1 million) if they fail to develop a robust compliance program. For businesses, this is a revolution, as the prevention of corruption becomes a legal obligation for companies, and their directors may be held responsible if they do not implement the frameworks required by the Law. Even companies that have an existing global anti-bribery program in place to comply with the likes of the FCPA or United Kingdom Bribery Act need to ensure that their measures are in line with the expectations of the law and the AFA recommendations. For example, the FCPA authorizes facilitation payments to the extent that it is made to facilitate a non-discretionary act by an administration, while Sapin II, like the UK law, prohibits it. For medium and intermediate size companies, which can be less used to compliance practices, changes may have to be even more profound.

a. A mandatory and monitored program

The provisions of Article 17 have been applicable since 1 June 2017 and AFA published its recommendations on 22 December 2017. Since then, companies must be able to justify at all times the application of the eight measures. In November 2017, AFA carried out checks on six companies, the conclusions of which have not yet been made public. Around 100 monitorships are planned in 2018. According to the agency, the program assessments will focus on three areas: clear management commitment to support compliance efforts and adequately fund them; a precise and exhaustive assessment of the risks of corruption; and the deployment of an effective corruption risk management system. Given the number of measures that need to be put in place, rolling out a compliance policy at all levels of an organization is a huge task. This is especially true since the list of documents to be provided during the controls will be large and will involve many resources.

b. An essential review of the procedures

For companies, setting up a compliance program can be both resource and time sapping. The process is more than just a review of internal controls. Companies need to examine their overall activities and functions, assess what needs to be done according to the activities and the geographical coverage of the operations as well as equip themselves with specific tools and techniques. All business lines will be affected, from manufacturing to marketing through commercial, IT, finance, legal and HR departments.

As the deadlines were very short, there are still some companies who don't seem ready. Two issues are particularly complex: risk mapping and third-

party evaluation. In this regard, the AFA recommends the implementation of a computerized database of third parties, or, better, a third-party management information system; an evaluation based on objective and quantifiable criteria (using external sources) as well as qualitative data; and updating the third-party evaluation throughout the duration of the contract between the partners. A huge task for companies that have many thousands of international third parties.

c. A profound change of culture

To ensure the respect of compliance programs, a broad shift of ethical culture is needed. Training of staff will be essential. At the management level first, which must infuse changes and support compliance efforts. But also, for all other elements of the business, which must be able to identify risks in their own area, and deploy due diligence capabilities vis-à-vis their customers, partners and suppliers, according to the countries in which they operate.

Commercial practices will also have to be transformed in a country that ranks only 23rd on the latest world corruption index published by Transparency International[1] and where bribes to foreign officials were tax-deductible as recently as 2000. Within businesses, managers seem to have understood the need to instill a culture of compliance, but operational business lines can still be reluctant, as they may see the new rules as additional constraints to prevent them from doing business.

Conclusion

France now has a strong legal framework for the fight against corruption. It remains critical for companies to take control of their procedures, to ensure that they can adapt quickly to this new world of transparency.

* https://www.transparency.org/news/feature/corruption_perceptions_index_2017

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