

# **New French Anti-Corruption Law “Sapin II”**

Article By:

Stéphanie Faber

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At the end of 2016, after having undergone the scrutiny of the French constitutional court, French Law n° 2016-1691 of 9 December 2016, also known as “**Sapin II**” after the Finance and Economy Minister behind it, was finally enacted. It will, amongst other things, strengthen French anti-corruption regulations and has been hailed as a “game-changer”.

Over the years, France has built quite an extensive set of regulations to fight against corruption and bribery, prohibiting active and passive corruption (including facilitation payments) or influence peddling, both in the public and private sector, whether domestic or foreign. It also has a long list of ancillary offences, such as, for example, favouritism in public procurement procedures or, more generally, unfair representation of a company’s accounts and abuse of corporate assets. Nonetheless, France is not considered to have efficiently enforced this regulation. The law, Sapin II, aims to implement actual compliance programmes and increased reporting (and hopefully sanctioning) of offences.

## **1. Extended international reach of French anti bribery law**

### **1.1. Offence committed outside of France**

The jurisdiction now extends outside of France where the offence has been committed by a French national or a person residing in France or operating whole or part of its commercial activity in France. Moreover, the requirement of dual criminality (i.e. the action constitutes an offence both in France and in the country where it has been carried out) has completely fallen away. This will allow French prosecutors greater flexibility in pursuing foreign bribery violations.

### **1.2. Influence peddling**

The sanction of active and passive influence peddling is extended to foreign officials (until now, only the influence peddling of a public international organisation’s agent was sanctioned by law).

## **2. Introduction of a compliance programme**

The law obliges certain companies to adopt a compliance programme. These provisions will come into force in May 2017.

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## 2.1 Scope

Compliance programmes have to be implemented by companies (i) with over 500 employees or (ii) that are part of a group, the parent of which has its registered office in France, whose workforce totals at least 500 employees and with annual gross revenue which exceeds €100 million. Their executive management are also caught by these obligations.

Such programmes may also have to be implemented by companies that (i) are ordered to do so by court, having been found guilty of corruption, or (ii) have entered into a CJPI (similar to deferred prosecution agreement – see below).

## 2.2 Content

Companies caught by the requirement must establish the following:

- A code of conduct that has to be part of the company's internal regulations
- An internal reporting mechanism
- A corruption risk assessment mechanism
- Procedures for conducting due diligence on clients, suppliers and third parties
- Appropriate accounting controls
- Training sessions for executives or employees in high risk positions
- Disciplinary procedures for employees
- A procedure for assessing/measuring the effectiveness of the programme

## 2.3 Sanctions

**The French anti-corruption agency, Agence Francaise Anti-corruption (AFA), mainly inflicts:**

- An injunction to adapt the programme within a certain period of time (maximum three years)
- A maximum fine of €200,000 for individuals and €1 million for legal entities
- A publication of the decision

Where the programme is imposed by a court order following conviction of corruption:

- The legal representative incurs a fine of up to two years in prison and a €50,000 fine
- The company incurs a fine corresponding to the offence that gave rise to the order to undergo a compliance programme

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Sapin II does not provide for a compliance defence like the one provided under the UK bribery act.

### **3. Creation of an anti-corruption agency: “Agence Francaise Anti-corruption”**

Sapin II creates the AFA, which replaces the “Service Central de Repression de la Corruption”. The agency will operate under the authority of the French Minister of Justice and Minister of Budget.

The new AFA will have both investigative and supervisory or monitoring powers, as well as the power to impose administrative sanctions in relation to compliance programmes. It does not, however, have the power to investigate or sanction acts of bribery. In particular, it will have the following key responsibilities: i) assisting both the public and private sectors in the prevention of corruption ii) ensuring that particular companies have implemented the required compliance programmes iii) reporting violations to prosecutors iv) monitoring companies.

The agency has the power to request documents from companies and to fine companies and individuals for failing to disclose information or for failing to have the necessary compliance programme.

### **4. Whistle-blower protection**

#### **4.1. Definition of whistle-blower**

Chapter 2 of Sapin II enshrines protection for whistle-blowers, which are defined as “any individual who reveals or reports, disinterestedly and in good faith, a crime or offence; a serious and manifest breach of an international commitment duly ratified or approved by France, of an unilateral act of an international organisation adopted on the basis of such commitment, or a serious breach of a law or regulation; or a serious threat or harm to the public interest, of which he/she has had personal knowledge.”

Facts, information or documents, whatever their form or support, covered by professional secrecy (lawyer or doctor) and national defence secrecy are excluded from the scheme.

#### **4.2. Tiered reporting**

The law provides that a whistle-blower must first make its reports (i) to a direct or indirect supervisor or a person appointed for this purpose and (ii) if this is not followed by any action, to the judicial or administrative authority, or the representative of a professional order. As a last resort, (iii) the report may be made public/reported to the press. The report may also be addressed to the defender of rights (“Défenseur des droits”) that will help direct it to the relevant authority in charge of collecting reports.

#### **4.3. Obligation to implement a reporting scheme**

Internal reporting procedures have to be implemented when certain thresholds are met, including where a company has of more than 50 employees.

Reporting schemes must ensure a strict confidentiality of the identity of the whistle-blower, the identity of the person on which the report is made and the information collected. The disclosure of these elements is sanctioned by up to two years of imprisonment and a €30,000 fine.

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#### **4.4. Prohibition to retaliate**

It is prohibited to discriminate against whistle-blowers, in the hiring process, from the access to an internship or professional courses or even in terms of assignment, salary or else. Interfering with the transmission of a report to the employer, the courts or authorities is punishable by up to one year of imprisonment and a €15,000 fine.

#### **4.5. Financial assistance**

The Défenseur des droits may grant, on request, financial assistance to a whistle-blower in certain circumstances but no incentive.

### **5. Creation of a French equivalent of the US deferred prosecution agreement**

The law creates a “convention judiciaire d'intérêt public” (CJIP), which can be considered as an equivalent of a deferred prosecution agreement as it exists in the US legal system. It can be entered into upon proposal of the public prosecutor before actual prosecution has started.

#### **5.1. Content**

This agreement may impose:

- A fine that is proportionate to the benefits gained from the violations found, in the limit of 30% of the annual average turnover calculated on the last three turnovers known at the date of the finding of the breach
- Implementation of a compliance programme for a maximum period of three years
- Indemnification of any known victim, payment having to be made within one year

The implementation of the programme is monitored by the AFA at the expense of the company within a ceiling.

#### **5.2. Procedure and effect**

The agreement has to be validated by the relevant regional court (“Tribunal de grande instance”) after a public hearing and contradictory debates.

There is no admission of guilt. The decision does not carry conviction and has neither the nature nor the effects of a judgment of conviction. It is not registered in the criminal record, which avoids automatic debarment from public procurement contracts.

The validation order, the amount of the fine and the agreement are published on the website of the AFA.

This puts an end to public action. The victims (except the state) may, however, claim damages before a civil court.

The legal representatives of the legal person accused of corruption are not covered and remain

liable.

The law introduces significant changes, but only practice will tell if this will lead to better compliance and whether the deferred prosecution agreement will become an effective tool.

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