

The new French anti-corruption law SAPIN II: what is the impact for companies operating in France?

Pursuant to the new French anti-bribery law, companies with more than 500 employees operating in France and their Directors are required to implement a specific French internal compliance program to fight corruption and trading in influence including:

- a specific French Code of Conduct, including anti-corruption rules and procedures, which has to be included in the company's "*Règlement intérieur*";
- an internal whistleblowing process;
- risk mapping regularly updated to identify risks of corruption based on the geographical scope where the company is doing business and the business sector;
- due diligence process for major clients, suppliers and intermediaries;
- internal or external accounting control procedures;
- regular training sessions for employees;
- a disciplinary system to sanction violations of the Code of Conduct;
- an internal control and audit process of the compliance (anti-corruption) procedure implemented.

Faced with pressure from international and non-profit organisations, such as the Organisation for Economic Co-operation and Development ("**OECD**") who have strongly criticised the lack of enforcement of anti-corruption laws in France, the French government promulgated a new anti-bribery law on 9 December 2017, the "*Loi Sapin II pour la transparence de la vie économique*" ("**Sapin II**") to significantly strengthen and improve the anti-corruption system currently in place in France.

Mostly inspired by the UK Bribery Act and the new Brazilian anti-corruption regulation, Sapin II provides a new set of legal obligations, which will significantly impact companies operating in France and their directors. **As of 1 June 2017**, companies with more than 500 employees and their directors will be required to implement a French specific compliance program against corruption and trading in influence in order to comply with Sapin II. Failure to comply with these new provisions will be harshly punished (**I**).

Sapin II establishes a new national agency in charge of preventing and detecting corruption ("*Agence Française de lutte anticorruption*"), and introduces a new criminal penalty of "mandatory compliance" (**II**). Sapin II also reinforces the protection dedicated to whistleblowers and imposes on companies with more than 50 employees to implement specific whistleblowing procedure to ensure confidentiality of the alerts.

Finally, the law has introduced the possibility to enter into criminal settlements with the Prosecutor in corruption and laundering of tax fraud cases (**III**).

I. The introduction of a binding obligation to prevent corruption and trading in influence is the key innovation of Sapin II

Pursuant to Sapin II, the "bound entities" (i.e. companies with more than 500 employees or member of a group, which the parent company is incorporated in France, employing more than 500 employees and recording a turnover superior to 100 million euros), their directors, their subsidiaries, and the companies controlled by the bound entities will be required to implement effective internal procedures to prevent and identify any act of bribery, private corruption and trading in influence committed in France or abroad.

This obligation to prevent corruption would require the implementation of:

- a **specific French Code of Conduct**, including an anti-corruption policy which has to be **included in the company's "*Règlement intérieur*"**. Since the French criminal law not only sanctioned the corruption of public officials but also corruption in the private sector, trading in influence and favouritism, global compliance programs and anti-corruption policies should be amended and reviewed to ensure that they fully comply with Sapin II;
- an internal **whistleblowing procedure**, which aims at collecting and reporting any breach of the Code of Conduct or any domestic and international regulation in force;

- **risk mapping**, in the form of a detailed document regularly updated, identifying, analysing and hierarchizing the risks of corruption notably on the basis of the geographical scope where the company is doing business and the business sector;
- **due diligence process for major clients, suppliers and intermediaries**;
- **internal or external accounting control procedures**;
- **training sessions for employees** with the executive level of “cadre” and the most exposed employees;
- a **disciplinary system** to sanction violations of the code of conduct;
- **an internal control and audit process** of the anti-corruption compliance procedures implemented.

This obligation will enter into force on the **1st of June 2017**. As implementing such program necessarily implies informing and consulting the staff representative bodies, the timeline is very tight and requires companies to amend their compliance documentation, and sometimes, to elaborate from scratch their compliance program on very short notice.

Compliance with the new obligation to prevent corruption will be controlled by a new authority called the “*Agence Française Anticorruption*”. This administrative authority has similar investigating powers to those held by the financial and competition regulators. The agency is empowered to carry out formal investigations, such as conducting onsite searches, conducting interviews and/or requesting the disclosure of any relevant documentation in order to verify that bound entities have complied with their obligation to prevent corruption.

Breach of the obligation to prevent corruption can be subject to heavy administrative penalties imposed by the Sanctions Committee of the “*Agence Française Anticorruption*”. Should internal procedures be deemed inadequate in preventing corruption practices, the director of the bound entity can be fined up to € 200,000 whereas the company itself can incur a fine of up to €1,000,000. These sanctions can be cumulative.

The emphasis on the directors personal liability provided by Sapin II aims at ensuring the implementation of an efficient compliance program to strengthen the prevention of corruption and trading in influence.

It is regrettable that while this new law substantially increases the liability of the directors of important companies, it does not permit them to limit/waive their criminal liability. For example, if a company which has properly implemented an anti-corruption program complying with the provisions of Sapin II were to face corruption accusations, it could not argue that it has properly prevented bribery in order to waive its criminally liability, as is the case in other European countries (i.e., UK, Italy, Spain...).

II. The implementation of the new criminal penalty of “mandatory compliance”

Under Sapin II, a legal entity convicted by a French criminal court on the grounds of corruption or trading in influence either in the public or private sector could be subject to an additional criminal penalty of “*mandatory compliance*”.

This new penalty aims at imposing an obligation on the convicted entity to implement, at its own expense, and within a maximum of five years, effective anti-corruption procedures, under the supervision of the “*Agence Française Anticorruption*”. The prevention measures which they would be required to implement are similar to those above detailed applicable to bound entities, except for an internal control and audit process for the compliance (anti-corruption) procedure implemented.

Non-compliance with the mandatory compliance penalty or obstructing its implementation is in itself a criminal offence, which could be sanctioned by a maximum of 2 years imprisonment and a fine of up to €50,000 for the legal representatives of the company or its directors. The company itself is subject to a fine equal in amount to the fine incurred for the offence under which it was originally convicted (i.e., corruption in the public or private sector, trading of influence...).

The "*Convention Judiciaire d'Intérêt Public*", although insufficient at this stage to be 100% effective, is a step that will familiarise the French prosecutors with settlements in corruption matters. It is very likely that the possibility of entering into criminal settlement will be used in international corruption cases.