SAPIN II - FRANCE'S WAR ON CORRUPTION

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Foreign Corrupt Practices Act/Anti-Corruption Alert

"In the fight against corruption, France cannot just satisfy itself with the existing situation."
– Michel Sapin, July 2015

INTRODUCTION

In July 2015, Michel Sapin, the French Minister of Finance, summarized his proposals for a new French law prohibiting corruption and seeking "transparency in economic life". That law, modeled after the U.S. Foreign Corrupt Practices Act ("FCPA") and the UK Bribery Act, is named Sapin II after its champion. Sapin II envisaged four main changes to French anti-corruption law: creation of a national anticorruption agency, introduction of new anticorruption offences and penalties, the imposition of obligations on companies and senior management to prevent corruption, and introduction of investigative and enforcement mechanisms and provision of protection for whistleblowers.

In November 2016, Sapin II became law. This article will consider the provisions of the new law, particularly the impact of Article 17, which aims to prevent the occurrence of corruption, as well as practical steps businesses should take to comply with Article 17, which is due to come into force in May of this year.

SUMMARY

- Sapin II represents a fresh and significant commitment by France to tackle corruption.
- The new law, which established the Agence française anticorruption ("AFA") responsible for enforcing the statute, will apply to French companies employing over 500 employees (or belonging to a group employing globally more than 500 employees in France) and with a turnover of more than €100 million.
- All companies subject to Sapin II will be required to implement an anticorruption compliance program which must feature a code of conduct, risk assessment matrix and appropriate third party due diligence in addition to other elements.
- Failure to comply with Sapin II may lead to financial penalties (€200,000 for individuals and up to €1 million for companies) but also perhaps significant reputational damage as the authorities may publish a report of noncompliance.
- The authorities will have an extraterritorial enforcement mandate where there is a connection to France.
- Foreigners living in France or managing a French company may be prosecuted for violations of Sapin II.

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- Companies which fail to take their anticorruption compliance and procedures seriously will face the risk of being "black-listed" by their clients and may be at a significant competitive disadvantage in an increasingly risk-conscious world market.

BACKGROUND

In late 2014, following France's implementation of the Anti-Bribery Convention, the OECD Working Group on Bribery stated that: "After a comprehensive review in October 2012, the OECD Working Group on Bribery asked France, through a series of concrete recommendations, to intensify its actions to fight the bribery of foreign public officials and undertake important reforms." Sapin II is the legislative response to increasing criticism of France's anticorruption legislation and the recent clutch of French companies paying significant fines to the United States Treasury for FCPA violations, the most recent of which was for over $750 million in penalties imposed by the US Department of Justice in relation to allegations of bribery of foreign government officials.

Sapin II represents France's attempt to modernize and consolidate its anticorruption legislation. In March 2016, the new draft law regarding "Transparency, the Fight Against Corruption and the Modernization of Economic Life" was put forward. The preamble encapsulated its purpose: to "elevate French legislation [in the area of anti-corruption] to the best European and international standards and [turn] the fight against corruption into a competitive advantage for business."

COMPLIANCE PROGRAM - ARTICLE 17

The main force of Sapin II lies in the new requirement to implement a compliance program. This obligation will apply to French companies employing over 500 employees (or belonging to a group employing globally more than 500 employees in France) and with a turnover of more than €100 million. Additionally, presidents, managing directors, managers, and members of the economic board (in the language of the UK Bribery Act, the 'senior management') of a state-owned entity, which is engaged in commercial activity, will also be under a duty to prevent corruption. This provision will have a significant effect in France where there are a large number of state-owned entities which carry on commercial activities, such as Renault and Air-France KLM.

A compliance program must include:

- a code of conduct setting out prohibited conduct;
- an internal alert or whistle blowing mechanism;
- a risk assessment matrix;
- appropriate third party due diligence procedures;
- accounting controls;
- training;
- disciplinary procedures; and
- monitoring of the program.

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The new French anticorruption enforcement agency, the AFA, will determine whether or not a company's compliance program meets the aforementioned requirements. If it does not, the AFA Sanctions Commission may issue a warning or an injunction ordering that an adequate compliance program be adopted. Further, the Sanctions Commission may levy a fine of up to €200,000 against an individual and up to €1 million against a company. These penalties may not, however, be imposed until after a company has failed to comply during a safe harbor period that may last up to three years in the AFA's discretion.

GLOBAL REACH

Sapin II extends the reach of the French authorities in corruption cases by removing the previous extraterritorial requirements that the victim be a French citizen, or that the alleged offender was a French citizen and the conduct at issue was an offence in both France and the territory in which the conduct was alleged to have taken place. These were high thresholds. With their removal, the French authorities will now be able to enforce corruption offences with the same degree of vigor as their U.S. and British counterparts. Accordingly, any company which does business in France or has a connection with France should assess its response to the new legislation.

The commercial reality to conducting business in the modern world is that failing adequately to address and to mitigate the risks of corporate corruption will undermine a company's ability to compete in an increasingly risk averse global market. The risk for companies subject to the U.S. FCPA, the UK Bribery Act and now Sapin II in contracting with third parties who do not have appropriate compliance procedures in place will be great. Beyond Sapin II, enforcement agencies around the world are increasingly coordinated and sophisticated in their approaches to tackling international corruption, which is at the top of many a political agenda.

REPUTATION, REPUTATION, REPUTATION

The impetus to implement a compliance program is both legal and reputational. On the one hand, a compliance program is a pragmatic solution to preventing corruption and avoiding liabilities. On the other hand, it is a critical element in maintaining and enhancing the commercial reputation of a company. Brand awareness and the importance of signaling to an increasingly ethics-driven client base that a company conducts its business cleanly is a priority for most FTSE and NASDAQ companies. Increasingly, this should be a priority for smaller sized corporations falling within the scope of Sapin II, which will likely herald an increase in investigations and enforcement in France into potential overseas corruption. In addition to the penalties noted above is the risk of reputational damage, as the Sanctions Commission established under Sapin II may also publish its decision in relation to a company's noncompliance and conduct Sanctions Commission's hearings in public, thereby increasing the risk of adverse publicity.

PRACTICAL APPROACH

Many global companies with operations in the UK or the U.S. will already be familiar with their obligations to put in place appropriate policies and procedures to prevent corruption under the FCPA or the Bribery Act. The introduction of Sapin II with its extraterritorial application is a significant additional concern for French companies, and indeed any company doing business in France. In many respects, Sapin II bears the hallmarks of a Bribery Act blueprint. The establishment of a legal obligation to prevent corruption echoes the language of the Bribery Act and the obligation of company's representatives to put in place specific measures to prevent corruption reflects

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the 'six principles' set out in the Guidance to the Bribery Act (i.e., proportionate procedures, top-level commitment, risk assessment, due diligence, communication and training, and monitoring and review). Although regard to these elements will be helpful in structuring a compliance program, it is important to remember that, in contrast to Section 7 of the Bribery Act, the focus of Sapin II is in implementing an effective program not in providing a defense of "adequate procedures."

The risks Sapin II places on a company's representatives are weighty. The company and its representatives, or "officers" in the words of the Bribery Act, can be held independently liable for failure to comply with this obligation and heavily fined (up to €200,000). It is important that companies identify and implement practical solutions designed to respond to the French legislation. Corporate compliance procedures and policies designed around the UK and U.S. legislation will form a solid foundation for Sapin II compliance. However, any existing program should be reviewed and revised to take account of the details of Sapin II, as well as the specific circumstances and culture of a company.

CONCLUSION

Whether Sapin II fulfils its ambition to "elevate French legislation [in the area of anti-corruption] to the best European and international standards and turn the fight against corruption into a competitive advantage for business" cannot properly be assessed until the legislation has been in force for some time. French companies and any other company carrying on business in France should promptly undertake a targeted, sensitive, and informed review of Sapin II and adjust its compliance programs as needed to comply with it.

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