

Agence Française Anti-corruption: a new French agency to fight corruption

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By enacting the Sapin II Act, France demonstrated its commitment to strengthen the national anticorruption framework and enforcement powers. One of the key features of this new piece of legislation was the creation of L'Agence Française Anticorruption (AFA). Exercising a wide range of prerogatives, the AFA is an integral element of Sapin II.

French legislator arms itself with a new anticorruption instrument

In 2016, the French legislator enacted Sapin II, a legislative arsenal aiming to provide efficient mechanisms to eradicate corruption. One of the milestones of this law has been the creation of the AFA. Replacing the Central Service for the Prevention of Corruption (SCPC), the AFA has a broader scope to more effectively address corruption issues and comply with international requirements.^[1]

Acting under the supervision of the Ministry of Justice and the Ministry of Budget, the AFA's purpose is to assist authorities in the prevention and detection of corruption offences, influence peddling or embezzlement.^[2]

The strength of this new agency lies in its ability to conduct a two-stage investigation in companies that have more than 500 employees and a benefit exceeding €1 00m. During the first stage, companies have the obligation to forward all relevant documents to the agency.^[3] The AFA will then investigate the facilities of the company – interviewing any employees, clients or subcontractors. At the end of its investigation, the AFA issues a report, which is shared among the parties involved.^[4] Based on its report and the company's observations, the agency will decide whether it should issue a warning urging the company to put an effective compliance programme in place. In case of unlawful conduct, the AFA's Commissions of Sanctions, composed of six magistrates, may issue a pecuniary fine against legal entities (up to €1m) or private individuals (up to €200,000).^[5]

To carry out its mandate, the agency has also other prerogatives. Upon the request of the Prime Minister, the AFA must ensure that French companies that have been convicted in another country comply with requirements.^[6] The AFA may also issue recommendations helping private and public entities to identify misconducts, influence peddling or embezzlement and improve their compliance programmes.^[7] Despite this wide scope, the AFA should not be seen as a sanctioning authority but a preventive authority, as it puts forward the implementation of anti-corruption programmes.

Cooperation trumps prosecution

In an advisory opinion, the highest administrative authority in France, the Conseil d'État, defined the role of the new agency. Although the AFA participates in the fight against corruption, its mandate should not compete with other entities such as the National Financial Prosecutor Office (PNF). The purpose of the AFA is to assist companies in the implementation of compliance programmes and, by doing so, prevent unlawful conduct. For example, in December 2017, the agency issued non-binding guidelines to help companies to address corruption issues and enact compliance programmes. To draft these guidelines, the AFA relied on foreign legislation – more precisely, the Bribery Act 2010 and the Resource Guide to the US Foreign Corrupt Practices Act (the 'FCPA guide').^[8]

In light of the Conseil d'État's advisory opinion, the AFA appears more as an auxiliary, assisting pre-existing anti-corruption key players. Initially, the legislator provided the AFA with the ability to impose measures on the local government. The Conseil d'État disagreed with such provisions, arguing that only the law may compel a public service to take measures.^[9] Recommendations issued by the AFA are therefore only soft law, as it does not have any binding effect.^[10]

Despite its sanctioning power, the AFA increasingly appears as a cooperation instrument aiming to facilitate the implementation of compliance procedures, rather than a repressive organ. The AFA may not prosecute unlawful obligations: it has an obligation to refer violations that are brought to its attention to the PNF.^[11] It is in this aspect that the AFA mainly differs from the US Department of Justice and the UK Serious Fraud Office. Indeed, the AFA has not issued a single sanction since its creation.^[12] It has however started to monitor companies that have entered into deferred prosecution agreements (DPAs).^[13]

Notes

[1] Christophe Rolland, 'Création de l'Agence française anticorruption par la loi 'Sapin 2': quels moyens pour quelle action?' (March 2017) *Actualité Juridique Collectivités Territoriales*, 124.

[2] *Ibid.*

[3] Pauline Dufourq, 'Les contrôles de la nouvelle Agence française anticorruption', *Dalloz Actualité*, 10 November 2017, available at www.dalloz-actualite.fr/flash/contrôles-de-nouvelle-agence-francaise-anticorruption#.W2WZmdhKiRs (<http://www.dalloz-actualite.fr/flash/contrôles-de-nouvelle-agence-francaise-anticorruption#.W2WZmdhKiRs>).

[4] See n 1 above.

[5] Agence Française Anticorruption, 'La commission des sanctions', available at (<http://www.economie.gouv.fr/afa/commission-des-sanctions>) (accessed 25 June 2018).

[6] *Ibid.*

[7] Sarah Farhat, 'Lutte anticorruption - un flou artistique savamment agencé', *Juris Associations* 2018, n°575, p. 36 (accessed 15 March 2018).

[8] Agence Française Anticorruption, 'Guidelines to help private and public-sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism', available at https://www.economie.gouv.fr/files/files/directions_services/afa/French_Anticorruption_Agency_Guidelines.pdf (accessed 20 August 2018) – "These Guidelines complete the arrangements established by the abovementioned Act of 9 December 2016 and are France's official anticorruption policy framework".

[9] Conseil d'Etat, Avis consultatif sur le projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, N°391.262, 30 March 2016, available at www.conseil-etat.fr/Decisions-Avis-Publications/Avis/Selection-des-avis-faisant-l-objet-d-une-communication-particuliere/Projet-de-loi-relatif-a-la-transparence-a-la-lutte-contre-la-corruption-et-a-la-modernisation-de-la-vie-economique (<http://www.conseil-etat.fr/Decisions-Avis-Publications/Avis/Selection-des-avis-faisant-l-objet-d-une-communication-particuliere/Projet-de-loi-relatif-a-la-transparence-a-la-lutte-contre-la-corruption-et-a-la-modernisation-de-la-vie-economique>).

[10] *Ibid.*

[11] Jamie L Boucher et al, 'The Sapin II Act: New Perspectives on Cross-Border Investigations', 22 December 2017.

[12] Agence Française Anticorruption, 'Rapport annuel d'activité 2017', 27.

[13] G Poissonnier and JC Duhamel, 'Convention judiciaire d'intérêt public : le 23 février 2018 fera date!' (3 May 2018) *Recueil Dalloz*, 898.