

Sapin II, and France's efforts to tackle corruption

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French Rules

Overview of offences related to corruption (1/2)

- French Criminal Law considers several situations regarding corruption. It distinguishes between corruption affecting public sector, states and international organizations and private sector
- Passive bribery and active bribery are two separate offences, independently prosecuted. Therefore, an offence can be committed on one side but not on the other: e.g. - where one has refused the proposal of the other
- Active corruption refers to the behavior of the person who makes the bribery offer
- Passive bribery refers to the behavior of the person who accepts or solicits the bribery offer

French Rules

Overview of offences related to corruption (2/2)



French Rules

Conditions for incurring criminal liability

Criminal liability of employees

- Employees may be prosecuted provided sufficient independence in decision-making [e.g.: proceedings against Sagem concerning a call for tenders in Nigeria]
- Directors may be held liable for their complicity if instructions have been issued

Criminal liability of the company

- The legal person must act through an organ or representative
- The organ or representative must operate on behalf of the legal person
- Criminal liability of the legal person may be incurred regardless of criminal liability of the organ or representative

Criminal liability of the legal entity as an accomplice

- By help or assistance
- By instructions

Sapin 2 Law

French Anti-Corruption Agency

- Sapin 2 Law was promulgated on 9 December 2016

- Provides for the creation of the French Anti-Corruption Agency (Agence Française Anticorruption - AFA)
 - Consulting and support mission:
 - Assist the relevant authorities and people to prevent and detect corruption
 - Draft recommendations aimed at assisting companies in preventing and detecting corruption

 - Control mission:
 - Preventive control regarding the efficiency of internal compliance programs implemented in companies of 500+ employees with an annual turnover of more than 100 million euros
 - Control of the enforcement of judicial decisions

 - Power of sanction, in case of failure to implement a compliance program, AFA may:
 - Issue a warning
 - Submit the case to the Sanction Commission which is entitled to:
 - Require the company to adopt internal compliance procedures, according to the recommendations it issues, within a period of time
 - Issue a financial fine
 - Require the publication of its decision

Sapin 2 Law

Protection of whistleblowers

- Sapin 2 Law provides for the reinforcement of the protection of whistleblowers

- Broad definition of the whistleblower

“A whistleblower is an individual who reveals or signals, in a disinterested manner and in good faith, a crime or a misdemeanor, a clear and serious violation of an international engagement which was duly ratified or approved by France, of an unilateral action from an international organization taken on the basis of the such engagement, of the laws or the regulations, a threat or a grave prejudice to the general interest, of which he/she has had personal knowledge”

- Anonymity & prohibition against retaliation of whistleblowers
- Confidentiality of information
- Obligation to implement internal reporting procedures for public bodies and private entities with more than 50 employees
- EU DIRECTIVE n°2019/1937 on the protection of persons who report breaches of Union law – 23 October 2019 - to be implemented belatedly in France in early 2022

Sapin 2 Law

Extension of the extraterritorial application of French criminal law in international corruption matters

- Sapin 2 Law provides for the extension of the extraterritorial application of French criminal law in international corruption matters
 - French criminal law is applicable when acts of corruption or influence peddling are committed abroad not only by a French citizen or by a person usually residing in France but also by a person “*carrying out all or part of his economic activity on the French territory*” - Article 435-11-2 of the Criminal Code

Sapin 2 Law

Obligation to set up an anti-corruption compliance program

- Sapin 2 Law establishes an obligation to implement a compliance program to prevent and detect corruption for the companies. Compliance programs must include:
 - A code of conduct
 - An internal alert system
 - Risk mapping
 - Procedures for assessing the situation of customers, first-tier suppliers and intermediaries
 - Accounting control procedures to prevent and detect corruption
 - A training system
 - A disciplinary system
 - An internal monitoring and assessment system

Sapin 2 Law

Judicial Public Interest Agreement (1/2)

- Sapin 2 Law provides for the creation of the Judicial Public Interest Agreement (Convention judiciaire d'intérêt public) – DPA equivalent
 - Procedure enabling the Public Prosecutor to conclude an agreement with a company under investigation for corruption, influence peddling, tax evasion or related offences, or for the laundering of these offences
 - The agreement includes specific obligations whose performance extinguishes the criminal procedure:
 - Payment of a fine: > 30% of average annual revenue
 - Implementation, under the supervision of the French Anti-Corruption Agency, of a compliance program
 - Compensation for the damage caused to the victim, when the latter has been identified
 - Triggers cooperation between authorities, lawyers and prosecuted persons - regarding the scope of facts, qualification, research and resolution of offending practices
 - Addition to the French procedure of comparution sur reconnaissance préalable de culpabilité (CRPC) or “guilty plea” - article 495-7 of the Criminal Code

Sapin 2 Law

Judicial Public Interest Agreement (2/2)

Nov. 2016
French Parliament passed Sapin 2 law to address anti-corruption, transparency and modernisation of economic life

Jan. 2018
French Ministry of Justice issued a circular to provide some guidance on how to conclude a CJIP

Feb. 2018
CJIP entered into by **SAS Set Environnement** and **SAS Kaeffer Wannier** for corruption

Jun. 2019
PNF and AFA published the first joint guidelines on the use of CJIPs

Jun. 2019
Carmignac Gestion enters into a CJIP and pays €30m to settle French tax investigation

Jan. 2020
Bank of China enters into a CJIP for tax evasion laundering and pays a fine of €3m
Airbus enters into €3.6bn settlement with regulators for corruption

May 2020
CJIP entered into by **Swiru Holding AG** for tax evasion complicity

Feb. 2021
Bolloré SE and **Financière de l'Odéon SE** agreed to pay a €12m fine for corruption and breach of trust complicity

2016

2017

2018

2019

2020

2021

Jun. 2017
Sapin 2 law came into force, and implemented effective 1 June 2017

Nov. 2017
First CJIP with **HSBC Private Bank Suisse SA** who agreed to pay a fine of €158m

May 2018
CJIP entered into by **SAS Poujaud** for corruption

Jun. 2018
Société Générale reached agreements with the US DOJ, US CFTC and French PNF to pay penalties totalling \$1.3bn

Sept. 2019
France fines **Google France** and **Google Ireland Ltd** \$500m for tax evasion

Dec. 2019
Egis Avia agreed to pay a fine of €2.6m to end proceedings for corruption

Jul. 2021
French Parliament issued a Report on the evaluation of the impact of Sapin 2 law

Jul. 2021
CJIP entered into by **Systra SA** for corruption

Aug. 2021
CJIP entered into by **JPMorgan** for tax evasion

Internal Investigation, Renewal in French Criminal Practice

- While internal investigation, introduced in France under the impetus of the common law practice, was already practiced in France in the fields of banking law, competition law and labor law, it is now experiencing a new boom in criminal matters
- The practice of internal investigations conducted by the lawyer is developing significantly in France and has become an essential element of a new form of criminal defense in a negotiated justice system
- As a form of private investigation, it challenges the traditional balance of criminal defense: lawyer vs. prosecuting authority
- Paris Bar ethics rules on lawyers (Rapport sur les problématiques et les enjeux liés au statut et au rôle de l'avocat « enquêteur » dans le cadre d'une enquête interne) December 2019

Different roles of the lawyer in assisting economic actors dealing with compliance challenges

- Lawyers can assist economic actors in different ways to face the challenges of compliance:
 - Assist in the creation/implementation/reinforcement of the company's compliance program
 - Evaluate a company's compliance program
 - Specificity of the Monitor/Expert lawyer who does not assist the economic actor because he acts independently but who, as a stakeholder in the negotiations between the multilateral development banks and the companies, assist companies by proposing concrete recommendations to strengthen their compliance program
 - Conduct an internal investigation in order "to shed light on the reality, scope and qualification of the facts denounced and, if necessary, to demonstrate to the authorities their full involvement in the search for and resolution of offending practices"

Relationship with Authorities

- Cooperation is consubstantial to the mission, as it is a matter of obtaining a negotiated settlement (e.g. Judicial Public Interest Agreement)
 - PNF/AFA June 2019 Guidelines specify
 - Spontaneous disclosure of the facts to the public prosecutor's office by the company expected within a "*reasonable period of time*"
 - Transmission of the conclusions of the internal investigation must take place "*within a time frame compatible with the imperatives of the judicial investigation*"
 - In case of parallel judicial and internal investigations "*regular exchanges between the public prosecutor's office and the counsel of the legal entity must allow for good coordination*"

Questions ?



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