



Tackling Corporate Corruption in France: Does the New Sapin II Bill Target the Right Issues?

■ Anna WINDEMUTH

With insights from:



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Although France signed the OECD's Convention on combating foreign bribery almost 20 years ago, the French judiciary has never convicted a company under its purview¹. At the same time, French companies have sustained fines in the billions from foreign regulatory authorities like the U.S. Department of Justice², and the OECD has published several scathing reports on France's enforcement efforts¹.

"It's the French paradox", August & Debouzy partner Kami Haeri remarked in an interview at his law firm's Paris headquarters. "We already have the laws, but we're just not implementing them".

The French Penal Code has included legislation criminalizing foreign bribery for years, and features provisions that were only recently adopted in the 2010 UK Bribery Act, Haeri noted, yet the UK's system is praised worldwide. Across the Atlantic, the U.S. Foreign Corrupt Practices Act continues to fine companies around the globe³.

Despite its somewhat late arrival to the active fight against corruption, France may have found its own brand of prevention through Sapin II. Named after its original sponsor, Minister of Finance Michel Sapin, the law was approved by the French

Senate in July, and will be subject to public amendments before the General Assembly confirms its adoption in the fall⁴.

Some of the law's most notable features on the fight against corruption include:

1. The creation of a French Anti-Corruption Agency charged with supervising compliance systems, investigating acts of corruption and imposing penalties.
2. An obligation for companies with at least 500 employees and an annual gross profit exceeding € 100 million to implement

corruption charges. Such an agreement would allow companies to avoid a criminal conviction, and thus exclusion from certain public markets, by paying a fine and instituting a compliance program.

3. Enhanced protection for whistleblowers and financial compensation from the new Anti-Corruption Agency for expenses incurred in reporting acts of corruption.
4. Additional fines and sanctions, including a requirement for convicted companies to fund and develop a compliance program under the agency's supervision.

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a compliance program that satisfies a list of criteria. If a company's president, CEO, manager or board of directors member fails to satisfy this requirement, they and the company can be subject to injunctions and respective fines of up to € 200,000 and € 1 million.

3. The creation of a "public interest" agreement, often referred to as a Deferred Prosecution Agreement (DPA) *à la française*, for companies facing

While the law continues to develop provisions of the French Penal Code that existed before, many view its preventative measures, sanctions against top company executives, enhanced whistleblower protection and DPA provisions as reflections of Anglo-Saxon compliance legislation⁵.

"The United States was one of the first OECD signatories to tackle corruption aggressively, and eventually pursued

companies in countries whose enforcement environments seemed lacking", Hughes, Hubbard & Reed partner Bryan Sillaman said in a phone interview.

"I think that the OECD's peer review process, driven not only by the United States but also by a growing international consensus against corruption, finally took hold in France", Sillaman explained.

Although companies that are explicitly targeted by the law probably have sufficient compliance programs in place already, Haeri noted that tweaks to their training programs, compliance budgets and internal sanctions will likely follow if the law is adopted.

"I also think that companies that are not explicitly targeted by the law will become more aware of anti-corruption measures and follow these as guidelines, even if they are not under a legal obligation to do so", Haeri added.

However, others have argued that putting an administrative agency in charge of monitoring companies would hurt the judiciary's authority, and that a determination by an administrative agency might not mean much on the international stage.

"I don't see why this accreditation system would keep a foreign authority from judging differently from the French authority", Altana Law partner Philippe Goossens said in a phone interview. "And what if the agency approves of a company's compliance system, and then two weeks later a prosecutor investigates and finds an act of corruption"?

Goossens said that while a French administrative agency's opinion is not worthless, it does not solve the root of France's problem: a lack of judicial follow-through. Instead of creating another body with a set of compliance criteria which he deems vague, Goossens said he would have increased the powers of French prosecutors, who do not have much investigative authority in the French civil law system.

Unlike in the common law system in Britain and the United States, where prosecutors

collect relevant information for the case and argue their position in front of a judge, French prosecutors supervise the investigation led by a judge, who may act as an inquisitor rather than as an arbiter⁶.

Goossens further suggested enhancing training on corporate operations so that prosecutors can have productive dialogues with companies rather than just impose sanctions.

"I also think there should be a European harmonization of judicial policies in the fight against corruption", Goossens said. "The problem is that each country is very attached to the policies of their own penal system".

Haeri noted that the agency would give more structure to France's authority against corruption, and that it would also embody French anti-corruption efforts on the international stage.

"We have to give the compliance system a stronger identity", Haeri said, adding that the agency would communicate extensively with companies before imposing sanctions.

Although the agency's effectiveness will depend on its final budget and substantive authority, it is not sufficient in isolation, Sillaman said.

"I think it's a very important element of an overall anti-corruption approach, but I think it has to be paired with a more aggressive enforcement environment", Sillaman, a member of his firm's anti-corruption and internal investigations practice group, explained.

He added that the United States initially faced the opposite problem. While the Department of Justice and the Securities and Exchange Commission provided strong enforcement, companies were not given explicit compliance instructions before the FCPA guidelines were released in 2012.

"In France, the question will be whether enforcement picks up as well", Sillaman noted.

The law also aims to personalize the anti-corruption movement by holding corporate leaders liable for their companies' infractions.

Regulators have repeatedly found that by the time corporations are fined, they have already made a sizeable profit from their illegal activities that can offset the penalty. Prison sentences and personal fines are perceived as stronger deterrents⁷.

"Executives will not agree to direct companies if they are personally exposed to sanction risks", Haeri said. "It makes top management the fundamental executors of this project, it implicates them personally", he added, predicting that their compliance budgets will surge in tandem.

While Goossens agrees that "compliance works in a very top-down manner", he noted that a CEO is not in charge of a company's code of ethics or training programs.

"I would have allowed the CEO to delegate this responsibility to a compliance officer", Goossens said, whose expertise he said would be more relevant.

Sapin II also highlights individual engagement in compliance by providing enhanced support for whistleblowers. Although it does not go so far as to compensate whistleblowers with a percentage of the company's fine, as does Dodd-Frank legislation in the United States, where whistleblowers have received millions in compensation⁸, the law ensures compensation for possible costs such as legal fees, anonymity protection, and support in case of retaliation.

The new legislation would consolidate France's various statutes on whistleblowers, Business Integrity Advocate at Transparency International France Baptiste Pécriaux said in a phone interview. However, Pécriaux noted that the law's whistleblowing protection measures only apply to the denunciation of illegal activity, and would therefore exclude individuals like LuxLeaks whistleblower Antoine Deltour.

"Sapin II is definitely progress, but the law's definition of what constitutes a whistleblower is not expansive enough", Pécriaux said, noting that whistleblowers should be held to a standard of "severe threat or harm to the general good" rather than strict legality. However, Pécriaux applauded the notion of reimbursing whistleblowers for their legal fees and

any additional damages they may suffer from denunciation, such as restricted job prospects.

Haeri also supports the new whistleblower legislation, and suggested that France may have lagged on this effort because of a cultural aversion toward denunciation.

"It stems from our history", Haeri said, referring to denunciations against Jews and communists during the Second World War. "In French culture, one does not reward a denouncer".

Transparency International further vouched for the introduction of DPAs in corruption cases – allowing companies to avoid a criminal conviction – and was pleased to see a modified reintroduction of this provision after the Conseil d'État recommended its removal in March⁹.

"The idea is to provide an additional mechanism for prosecutors that is more streamlined", Pécriaux said. France's civil law system is not well suited to pursuing corruption cases on a global scale, Pécriaux explained, citing limited funds, slow procedures and the inherent complexity of financial cases.

At the same time, Pécriaux said that publicizing the outcomes of DPAs and prosecuting natural persons are essential to the legislation's success. Critics have portrayed DPAs as a means for profitable companies to avoid their legal responsibilities, and have expressed concerns that the Anglo-Saxon practice would not translate well into the French penal system¹⁰.

Sillaman agrees that the concept of negotiated settlements "doesn't seem to fit squarely in the French legal system", but said that the provision could help improve efficiency and encourage self-reporting.

"There has to be a very negative consequence hanging over the company's head for this type of resolution to gain traction and to work", Sillaman added, citing the U.S. case against Enron, the American energy company that collapsed after many of its executives were indicted¹¹.

Although Sapin II will still undergo changes before it is approved by the General Assembly, Goossens said that he does not

find the law ambitious enough, and that it does not target France's procedural issues. "It doesn't take a long-term view of the fight against corruption", Goossens said, adding that ensuring an effective compliance system is not enough to vanquish the beast. "Corruption is a culture".

While the regulatory effort is well-intended, Goossens said, he hopes that future measures will be more exhaustive. "The fight against corruption isn't the Tour de France. We don't need all these intermediary stops", he noted.

Although Transparency International France denounced the removal of the DPA provision as a watering down of Sapin II, the organization's periodic reports on the law have grown more supportive since the provision was modified and reintroduced¹².

"Once Sapin II is approved, France will have one of the best legal instruments against corruption in the world, at least in terms of the actual text", Pécriaux said. "The real challenge will be implementing it", he added, noting that France's judicial system has suffered from budget cuts since the 2008 crisis.

Sillaman suggested that the initial interpretation and application of the law probably won't be perfect, like most laws of such magnitude, and that it will take time to determine which aspects of the law are most effective.

"I think it's overall a very positive development", Sillaman said. "That type of self-reflection for companies is essential".

For Haeri, the success of the law will depend on how well the new agency communicates with companies. He is also optimistic about the French DPA provisions, and hopes that France will be able to emulate the UK in its marketing of the law.

"We're heading in the right direction", Haeri said. "The question is whether we will be able to make Sapin II an attraction in the French business world. A real event".

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