



The Sapin II Bill: A Potential Game-Changer in French Corruption Enforcement

“In the fight against corruption, France cannot just satisfy itself with the existing situation.” This statement, made by French Minister of Finance Michel Sapin in July 2015, accompanied draft legislation known as the “Sapin II Bill.” Named by reference to the “Sapin I Bill,” which was enacted in 1993, the Sapin II Bill would bring significant changes to French corruption enforcement. As described below, in certain respects, these changes would align French anticorruption law with aspects of U.S. and UK corruption enforcement practice. The proposed bill was submitted to the French National Assembly on March 30, 2016, and will be scheduled for debate in the French Parliament in the coming weeks.

The Sapin II Bill signals new resolve on the part of French policymakers to ramp up anticorruption enforcement, and the timing of this bill is no coincidence. Indeed, France’s relative passivity in fighting corruption has been openly criticized by the Organization for Economic Cooperation and Development (“OECD”). Accordingly, companies operating in France would be well advised to understand and prepare for the particular changes that the Sapin II Bill portends and, more generally, for stepped-up anticorruption enforcement by French authorities.

Described below is a summary of some of the most notable provisions of the Sapin II Bill related to anti-corruption issues. A government decree will specify the conditions and modalities under which the Sapin II Bill will be implemented.

Extraterritoriality of French Anticorruption/Influence-Trafficking Legislation

France’s existing domestic anticorruption/influence trafficking¹ law is applicable to all prohibited conduct committed within the territory of France. An offense is deemed to have been committed within the territory of France if one of its constituent elements was committed within that territory. Under certain circumstances, however, France’s anticorruption/influence trafficking law can also reach conduct outside France. For example, as currently structured, the law is applicable to corruption or influence trafficking outside France if the victim is a French national. In addition, conduct constituting corruption or influence trafficking under French law engaged in by French nationals outside France can be prosecuted if the conduct would likewise be punishable as an offense under the law of the country in which it was committed. Under the current version of the statute, prosecution of such

extraterritorial conduct may be instigated only at the behest of the Public Prosecutor, and not by a victim alone.²

Notably, as to the conduct of French nationals outside France, the Sapin II Bill would remove the requirement that the conduct at issue be prohibited under the law of the country in which it was committed, and it would also remove the requirement that the prosecution be instigated only at the behest of the Public Prosecutor. This provision thus would expand the authority of French prosecutors to pursue French nationals acting abroad.

Furthermore, the proposed Bill would create the offense of influence trafficking in relation to foreign public officials; currently, French law criminalizes only corruption as to foreign public officials. Those foreign officials cannot be prosecuted on influence-trafficking grounds.

Obligation to Mitigate Risks of Corruption

Under the Sapin II Bill, companies that employ at least 500 employees or that are part of a group with at least 500 employees and have an annual gross profit exceeding EUR 100 million would be required to have in place a compliance program to prevent and detect corruption or influence trafficking. Such a compliance program would have to include and involve:

- A corporate code of conduct defining and illustrating conduct to be avoided;
- A procedure for accepting and investigating whistleblower complaints;
- An updated assessment to identify, analyze, and prioritize the risks of corruption;
- Integrity reviews of clients, suppliers, and third parties;
- Internal and external accounting controls to ensure that the company's records are not covering up corruption or influence-trafficking offenses;
- Training for employees and managers; and
- A deterrent sanctions policy, including disciplinary action against personnel found to have engaged in misconduct.

Should a president, CEO, manager, or *Société Anonyme* board of director's member³ fail to comply with his or her obligation to implement an adequate compliance program,

the individual and/or the company would be subject to injunctions and substantial financial penalties (up to a maximum of EUR 200,000 for individuals and EUR 1 million for companies). The decision imposing the injunction/penalty could be published or otherwise publicly disclosed. This obligation would also be applicable to the aforementioned companies' subsidiaries and other companies under their control (i.e., having at least half of the share capital or voting rights).

Creation of a French Anticorruption Agency

The Sapin II Bill would create a new Anti-Corruption Agency (the "Agency") to replace the existing "*Service Central de Répression de la Corruption*" (the "Service"). The proposed Agency would instantly change corruption enforcement in France, as the Service currently has no investigative power and also lacks the authority to impose penalties. Indeed, the Service is empowered merely to collect information on corruption and to communicate such information to the Public Prosecutor.

The Agency, on the other hand, would be provided with broad supervisory powers relating to anticorruption enforcement. For example, it would have primary authority for ensuring that companies effectively implement anticorruption compliance programs and perform associated activities (e.g., mitigating risks of corruption and assessing new risks). As currently drafted, the Sapin II Bill would also grant the Agency power to carry out investigations and, potentially, impose penalties.

A Reinforced Protection for Whistleblowers

France's current legal framework contains no general provision ensuring the protection of whistleblowers, except in the field of labor law. Should the Sapin II Bill be enforced, retaliation against whistleblowers that convey information on alleged misconduct to the Agency would be prohibited. In addition, whistleblowers who report violations that may constitute corruption or influence trafficking offenses would receive financial compensation from the Agency (e.g., reimbursement of legal fees). This provision mirrors an established practice in the United States, where whistleblowers have become a significant source of new cases for the Department of Justice and other law enforcement agencies.

Enhanced Penalties Tied to Compliance

Under current French law, corruption and influence-trafficking offenses are punished as follows: EUR 500,000 to EUR 1 million and five to 10 years' imprisonment for individuals, and EUR 2.5 million to EUR 5 million for companies.

The Sapin II Bill would create additional sanctions. In particular, convicted entities would be required to implement an anticorruption compliance program under Agency supervision and bear all the compliance costs incurred. Those under Agency supervision who continued not to fulfill their obligations with respect to corporate compliance programs would face additional fines (for individuals, a fine of up to EUR 30,000 and up to a two-year term of imprisonment; for companies, a fine equivalent to that imposed for the underlying offense).⁴ Decisions imposing such additional penalties could be published or otherwise publicly disclosed, further highlighting the conduct, and potentially damaging the reputations, of the companies involved.

The Withdrawal of the “French DPA”

The initial draft of the Sapin II Bill provided for a French version of a Deferred Prosecution Agreement (“DPA”), a mechanism that U.S. and, more recently, UK authorities have used to resolve corruption cases against parties willing to assume the obligations called for by the DPAs. More specifically, the initial draft bill authorized the Public Prosecutor to negotiate DPAs with companies.

At the outset, the Sapin II Bill was expected to lay out a process by which the Public Prosecutor could consider the appropriateness of entering into a DPA with a company involved in corruption and influence trafficking. The proposed French DPA would have allowed companies to avoid a criminal conviction by implementing a compliance program and/or paying a fine. Any such fine was to be proposed by the Public Prosecutor in the first instance, in an amount proportionate to the gains derived from the company's wrongdoing (with the amount of the fine to be capped at 30 percent of the company's annual turnover). According to the initial draft

of the Sapin II Bill, the Public Prosecutor would have been entitled to bring the settlement to the court's president for its final validation. The fine amount was to be disclosed in open court.

This French DPA was removed from the Sapin II Bill by the French *Conseil d'Etat* on March 24, 2016, but the concept of a French DPA continues to generate heated debate in the country. On the one hand, those in favor of a French DPA argue that it would give new impetus to the fight against corruption and influence trafficking; on the other hand, its opponents claim that the implementation of a French DPA would amount to a decriminalization of the relevant offenses. French magistrates have even opined that such settlements resolving criminal allegations would hurt the very essence of the French criminal system.

Given the ongoing and extensive debate on the merits of a French DPA, companies and their counsel should closely follow developments in this regard. Although unlikely, the French DPA may be reinstated following discussions in Parliament.

Conclusion

The Sapin II Bill is currently generating passionate debate among policymakers, companies, lawyers, and other interested parties in France. Even without the inclusion of a French DPA, the adoption of the Sapin II Bill would constitute a landmark step for French anticorruption enforcement. Among other major reforms, the Bill calls for the implementation of anticorruption compliance programs—subject to the supervision of the Anti-Corruption Agency—by both large companies operating in France and France-based companies operating abroad.

For French companies and other companies operating in France, these and other provisions of the Sapin II Bill indicate that French authorities are prepared to get much tougher in their anticorruption enforcement activities and that companies must likewise beef up their corresponding compliance programs. Jones Day will continue to monitor and report on developments with the Sapin II Bill in the coming weeks.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com/contactus/.

Bénédicte Graulle

Paris

+33.1.56.59.46.75

bgraulle@jonesday.com

Mary Ellen Powers

Washington

+1.202.879.3870

mepowers@jonesday.com

Shireen M. Becker

San Diego

+1.858.314.1184

sbecker@jonesday.com

Sion Richards

London

+44.20.7039.5139

srichards@jonesday.com

José Bonilla

Madrid

+34.91.520.3907

jbonilla@jonesday.com

Aldo Verbruggen

Amsterdam

+31.20.305.4246

averbruggen@jonesday.com

Theodore T. Chung

Chicago

+1.312.269.4234

ttchung@jonesday.com

Hank B. Walther

Washington

+1.202.879.3432

hwalth@jonesday.com

Robert F. Mayo

Paris

+33.1.56.59.46.92

rmayo@jonesday.com

Jérémy Attali

Paris

+33.1.56.59.39.54

jattali@jonesday.com

Glyn Powell

London

+44.20.7039.5212

gpowell@jonesday.com

Endnotes

- 1 “Corruption” is defined as inducing someone to carry out or abstain from carrying out an act pertaining to one’s office, job or mandate by offering promises, donations, gifts or advantages. “Influence trafficking” is defined as abusing one’s real or alleged influence with a view to obtaining a distinction, employment, contract or any other favorable decision from a public official.
- 2 Under French law, prosecutions generally may be instigated at the behest of the Public Prosecutor or the victim.
- 3 Under French Law, a board of directors member is appointed by the supervisory board. Alongside other members, a board member oversees the activities of the company and is involved in the company’s decision-making process.
- 4 Under current French law, fines cannot be imposed for both corruption and influence trafficking based on the same underlying conduct; in the case of multiple counts, for example, the total fine cannot exceed the fine applicable to the most serious count.

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