

# Outer Temple

Chambers

**NEW YORK STATE BAR ASSOCIATION  
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**Main Criminal Law Aspects of  
New French Anti-Corruption Legislation**

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**“Sapin II” Law**

## Criminal liability of corruption and traffic of influence in France

For individuals: 10 years of imprisonment and a fine of 1 million euros, which can be raised to double the amount of the proceeds of the wrongdoings

### For companies:

- Fixed fine can be multiplied by five
- Business activity can be forbidden (permanent / 5 years)
- Judicial monitoring
- Closure of one or several divisions (permanent / 5 years)
- Exclusion from public adjudications (permanent / 5 years)
- Exclusion from listing on financial markets (permanent / 5 years)
- Confiscation and publication of judicial decision

## Criminal liability of corruption and traffic of influence in France (cont.)

Passive crimes are also punishable

These are “formal crimes,” where the achievement of the actual desired outcome does not matter, in order to qualify the acts as illegal

- As a result, attempts are not punishable

The statute of limitations is six years

Increasing pressure from outside actors to tackle corruption more

OECD statement of 23 October 2014 with respect to France:

*“While acknowledging that 24 new cases have been opened since October 2012, the Working Group remains concerned by the lack of proactivity of the authorities in cases which involve French companies in established facts or allegations of foreign bribery.*

*To this day, no French company has yet been convicted for foreign bribery in France, whereas French companies have been convicted abroad for that offence, and the sanctions for convictions of natural persons have not been dissuasive.”*

Increasing pressure from French public opinion to tackle corruption more

Consequences from the “Cahuzac” scandal

- Law of 6 December 2013 (nbr. 2013-1115) for a specialised public prosecution’s office in financial crimes
- Law of 6 December 2013 (nbr. 2013-1117) against tax fraud and financial criminality

Increasing demand of the French public opinion for more transparency and more severe prosecution regarding public actors and institutions

## New French Anti-Corruption Law – Sapin II law

New French Law (# 2016-1691) **for transparency, the fight against corruption and the modernisation of the economy**, (known as and hereafter referred as the “**Sapin II**” law, named after the economy and budget minister Michel Sapin) entered into force on 11 December 2016

The Sapin II law covers several legal areas, amongst other things, criminal law in order to fight corruption

## Relaxed territoriality rules with Sapin II

Criminal charges can now be brought in France, when corruption acts are committed abroad by a French citizen, resident or by a person with an economic activity in France

- Until now, the French territoriality rules required that (i) the corruption acts were also punishable under the local laws and (ii) the French prosecutor approved the launch of criminal proceedings in France, if the victim wanted to press charges, or if the foreign authorities formally denounced the perpetrators

Accomplices that have assisted from France corruption acts committed abroad, can be prosecuted in France without the need of a foreign conviction anymore (however, the corruption acts should remain punishable under the local laws)

## New Anti-Corruption Agency

### New Anti-Corruption Agency:

- Has the joint means of the Justice and Budget Ministry
- Is led by an independent magistrate for a unique six-year term
- Has a sanctions committee composed of six magistrates

## New Anti-Corruption Agency (cont.)

New Anti-Corruption agency aims, amongst other things, to:

- centralise and diffuse information relating to the fight against corruption
- issue recommendations to prevent and detect corruption
- control and monitor

Hindering the agency in its work can incur a fine up to 30,000 euros

## Legal status of whistleblowers

The law defines a whistleblower as an individual who reports:

- in good faith
- without hoping to receive any financial reward in return
- a felony or misdemeanour, a grave and manifest breach of an international agreement or of a unilateral act taken by an international organisation, of the law or a regulation, or a grave menace or harm to the public's interest
- of which he/she has personal knowledge

## Legal status of whistleblowers (cont.)

Whistleblowers cannot be criminally liable, fired or otherwise disadvantaged for violating a confidentiality privilege (but for national security interests, medical and attorney-client privileges), if the report was necessary and proportionate to safeguard the harmed interests and if a specific reporting procedure was followed

The reporting procedures must guarantee the strict confidentiality of the identities of the whistleblower, of the reported persons and of any information gathered, subject to a prison sentence of two years and a fine of 30,000 euros

## Internal reporting proceedings

Whistleblowers have to report their knowledge in the following order:

- to their superior, or, if existent, to the specifically designated bureau in that matter
- in the absence of any reaction, after a “reasonable delay” (not defined), it can be reported to the judicial authorities or to the professional bodies
- in the absence of any reaction, after a three-month delay, the report can be made public

## Internal reporting proceedings (cont.)

Only in case of “imminent grave danger,” or “risk of irreversible harm” (both not defined), can it be addressed to the judicial authorities, or to the professional bodies, and be made public at the same time

Companies (private and public sector) with more than 50 employees, public administrations, cities with more than 10,000 inhabitants, administrative counties and regions have to set bureaus and specific internal procedures to collect reports from whistleblowers

## New Duty of Vigilance for Companies

Companies that have at least:

- 500 employees (or are part of a group of companies with at least 500 employees) and
- with a turnover (on an individual or consolidated basis) of more than 100 million euros,

have a new **duty of vigilance** with respect to corruption and are required to put in place internal best practices guidelines to tackle corruption

## New Duty of Vigilance for Companies (cont.)

This new duty of vigilance applies also to the French or foreign subsidiaries that are held up to 50% or controlled by the French parent company

If the parent company is compliant, the controlled subsidiaries are deemed compliant, if the measures taken at the parent company level are also applicable at their level

According to first estimates, this new duty of vigilance would concern approximately 1,600 groups of companies in France employing a total of 5.3 million employees

## New Compliance Duties for Companies

Amongst other things, companies are required to put in place:

- an internal code of best practices
- an internal reporting mechanism
- internal risk audits
- specific KYC-measures
- specific training and disciplinary measures for particularly exposed employees and managers

## New Compliance Duties for Companies (cont.)

The new Anti-Corruption Agency can issue fines for non-compliance of up to 200,000 euros for company officers and up to 1,000,000 euros for the companies themselves

A court decision can also force a company to put in place the new compliance duties under the monitoring of the new Anti-Corruption Agency

Officers/directors who fail to comply can be punished with two years of imprisonment and to a fine of € 50,000

## Deferred Prosecution Agreements for Companies Not Complying with Anti-Corruption Laws

The public prosecutor can offer a deferred prosecution agreement (“**DPA**”) to a company not complying with anti-corruption laws, which could be required, in order to avoid criminal charges:

- to pay a fine, that can be up to 30% of its annual turnover averaged on the last three financial years
- to accept an up to three-year long monitoring by the new Anti-Corruption Agency to become compliant
- to pay damages to the victim (if identified)

## Deferred Prosecution Agreements for Companies Not Complying with Anti- Corruption Laws (cont.)

The DPA is a priori only proposed by the public prosecutor

- Even as early as during the prosecution's investigation phase (i.e. before any formal charges)
- The investigating judge (who is an independent judge, as opposed to a public prosecutor, and appointed specifically for an investigation), but only if the company recognises the facts, can, upon agreement of the public prosecutor, transfer the file to the latter to prepare a DPA

## Deferred Prosecution Agreements for Companies Not Complying with Anti- Corruption Laws (cont.)

A court has to validate the DPA between the company and the prosecution

- Review by the court of the course of its conclusion and the proportionality of its content
- Public and contradictory hearing
- If the court approves the DPA, the company has a ten-day delay to retract itself from the DPA, the court's decision cannot be appealed

## Deferred Prosecution Agreements for Companies Not Complying with Anti-Corruption Laws (cont.)

In case of an effective DPA:

- The effective DPA **does not trigger any recognition of any criminal liability** on behalf of the signing company
- The DPA is made public on the Anti-Corruption Agency's website

In case no DPA is reached or validated (or the company retracts itself within the delay):

- No information given (submitted documents, statements made) in the interim can be used against the company at a later stage of the proceedings

## Deferred Prosecution Agreements for Companies Not Complying with Anti- Corruption Laws (cont.)

### Final thoughts on the new DPA:

- It is not yet clear how the company's cooperation will weigh in the prosecution's decision to offer (or not) a DPA
- Also, it is not yet clear how much the company can actually negotiate with the public prosecution the exact terms of the DPA

**Thank you for listening**

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