

December 21, 2016

New French Anti-Corruption Law

French Parliament Adopts Law “Sapin 2” on Transparency, Fight Against Corruption and Modernization of the Economy

SUMMARY

On December 10, 2016, French Law n° 2016-1691 (dated December 9, 2016) on anti-corruption measures (the “Law”, also known as “Sapin 2”) was published in the French *Journal Officiel*. The Law introduces substantial changes to French anti-corruption and transparency laws, in line with international efforts; in promulgating the Law, the French ministry of Treasury noted that France had previously been subject to criticism by the OECD and various NGOs in respect to its anti-corruption measures.

Among other things, the Law mandates French companies subject to its provisions to implement certain anti-corruption policies and procedures, training programs, whistleblower processes, risk-mapping, monitoring procedures and accounting controls to detect and prevent corrupt conduct.

This memorandum provides a high-level summary of certain key provisions of the Law relating to transparency and anti-corruption measures. Many provisions of the Law will be further supplemented by French governmental decrees.

CREATION OF THE AGENCE FRANÇAISE ANTICORRUPTION

The Law creates the “Agence Française Anticorruption” (“AFA”), a national agency charged with detecting and preventing corruption in both the public and private sectors. The AFA will be affiliated with the Ministries of Justice and Treasury and will have a staff of 70 persons, a substantial increase compared to the staff of the previous anti-corruption department of the French Ministry of Justice.

The AFA is charged with broad duties. The first is a general one, consisting of administrative coordination, centralization and dissemination of information in order to prevent and detect corrupt acts,

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such as bribery, influence peddling and embezzlement of public funds. The AFA will also publish recommendations to help French public agencies and administrative bodies detect corrupt acts, and will oversee the quality and efficiency of the related procedures adopted by such agencies and administrative bodies. The AFA will also provide advice to private entities, publish anti-corruption guidelines and monitor the implementation of internal compliance programs. Finally, it will have broad investigative authority and enforcement powers.

IMPLEMENTATION OF ANTI-CORRUPTION COMPLIANCE PROGRAMS

A. SCOPE

Under the Law, chief executive officers and managers of any company (i) headquartered in France and having more than 500 employees or belonging to a group with more than 500 employees and whose parent company is headquartered in France, and (ii) generating more than €100 million in revenue (whether on a legal entity or consolidated group basis) are required to implement internal anti-corruption policies (the “Requirement”), as described below. Accordingly, the Requirement may apply to (i) French companies that are subsidiaries of non-French groups and (ii) non-French subsidiaries of, and companies controlled by, French parent companies. Subsidiaries and controlled companies of an entity subject to the Requirement will be considered in compliance with the Requirement if the parent company implements the necessary anti-corruption measures and applies them on a consolidated basis.

B. REQUIREMENTS

The Requirement includes the preparation and implementation, prior to June 1, 2017, of:

- an internal code of conduct defining prohibited conduct likely to constitute corruption or influence peddling. That code must be integrated within the company’s *règlement intérieur* (or equivalent) and, thus, may be subject to an obligation to consult the company’s employee representatives (“*représentants du personnel*”);
- an internal whistleblowing procedure for reporting suspected wrongdoing and violations of the company’s internal code of conduct;
- a risk-mapping process, which should be periodically updated, in order to identify, analyze and evaluate the company’s risk of exposure to external solicitation for corruption;
- a process for assessing the risk-mapping of clients, main suppliers and intermediaries;
- internal or external accounting controls designed to ensure the accuracy of the company’s books and records and to prevent or detect concealment of corruption or influence peddling in the company’s books and records;
- training programs for managers and staff particularly exposed to corruption risks, to foster compliance with anti-corruption laws;
- an internal disciplinary regime for employees who violate the company’s internal code of conduct; and
- regular internal monitoring and evaluation of the above-mentioned requirements.

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In case of failure to implement these requirements, the AFA may, *inter alia*, (i) order the company or its representatives to update their internal compliance procedures within a time period that may not exceed three years, and (ii) order an administrative fine of up to €200,000 for natural persons and €1 million for legal entities. In addition, the Law provides that in certain circumstances legal entities may be subject to criminal sanctions, consisting of an order by criminal courts to implement, under the supervision of the AFA, a program complying with the requirements described above.

PROTECTION OF WHISTLEBLOWERS

The Law includes provisions designed to preserve the anonymity of whistleblowers and protect them against retaliation.

The Law defines “whistleblower” as a natural person who reveals in good faith (i) a crime or misdemeanor under French law, (ii) a clear and serious violation of (x) an international engagement duly ratified and approved by France, (y) an act by an international organization pursuant to such an engagement, or (z) French laws or regulations, or (iii) a serious threat or damage to public interest, of which he or she has personal knowledge. Medical secrecy, legal privilege and national security matters are expressly carved out from the whistleblower protection.

The Law requires that a whistleblower first alert his or her manager or employer, and in the absence of a reaction from such manager or employer within a reasonable time, judicial, administrative or professional authorities. If such authorities do not react within three months, whistleblowers may then alert the public as a last resort. In the event of a serious and imminent danger or a risk of irreversible damages, however, whistleblowers may directly alert the authorities and make the alert public.

French public agencies and private entities with more than 50 employees are required to draft and implement internal procedures to enable their employees to initiate whistleblower alerts when necessary, on an anonymous basis (“*stricte confidentialité de l’identité*”). Whistleblowers may not be dismissed, sanctioned or subject to direct or indirect discriminatory measures, nor excluded from recruitment processes, internships or professional training, as a result of having initiated a signal or an alert based on the provisions of the Law.

SETTLEMENT AGREEMENTS (*CONVENTIONS JUDICIAIRES D’INTERET PUBLIC*)

Prior to initiation of public criminal proceedings, the French public prosecutor may enter into settlement agreements (*conventions judiciaires*) with legal entities accused of violating the Law’s anti-corruption provisions, similar to so-called “deferred prosecution agreements” or DPAs used in the U.S. The Law provides that such agreements may include (i) payment by the accused company of an amount proportionate to the benefits allegedly derived from the offenses, limited to 30% of the company’s aggregate turnover for the preceding three years; and (ii) the implementation by the company of a compliance program under the control of the AFA. Legal representatives (“*représentants légaux*”) of the

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accused company (which would generally include officers and senior management) will remain personally liable even if such a settlement agreement is entered into by the legal entity.

After approval by the legal entity of a proposed settlement agreement, the public prosecutor must submit the agreement to the President of the *Tribunal de Grande Instance* for his or her approval. If the President approves the agreement, the legal entity then has the right to withdraw from the draft agreement within a 10-day period. The Law provides that the President's approval does not constitute an admission of guilt by the legal entity or have the nature or effect of a legal judgment. In addition, if the President does not approve the settlement agreement or if the legal entity withdraws from the agreement, it is null and void and may not be referenced or admitted in any legal proceeding; and the public prosecutor may not, in the course of a subsequent criminal proceeding, use statements made or documents furnished by the legal entity in the course of negotiating the settlement agreement.

EXTRATERRITORIALITY

The Law substantially expands the extraterritorial scope of certain French anti-corruption laws. In particular, similar to the U.K. Bribery Act, the Law provides that acts of corruption and influence peddling involving government officials by (i) a French citizen, (ii) a French resident, or (iii) a person carrying out all or part of its economic activity in France, will be subject to French criminal law and sanctions even if the underlying acts are committed outside of France.

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