

**FRANCE'S COMPLIANCE REVOLUTION:  
THE LOI SAPIN II**

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Prague, April 2017

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**KEY ASPECTS OF THE LOI SAPIN II**

- Overview
- Reinforced anti-corruption measures
  - Requirement to maintain a compliance program
  - Creation of French Anti-Corruption Agency (the « AFA »)
  - Introducing the « DPA » into French law
- Reinforced whistleblower protections
- Analysis and recommendations
- "Duty of care" – new requirement for supply chains

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**OVERVIEW**

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**HISTORICAL CONTEXT**

- France had long been criticized at its **lackluster response** to allegations of foreign bribery
- The OECD expressed concerns as to the **independence of prosecutors** and the **resources** provided to them
- **Four of the top 10 biggest FCPA** settlements have involved French companies
- In the decades following France's passing of initial anti-corruption legislation, **not a single corporation** was prosecuted

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**OVERVIEW OF THE LOI SAPIN**

- The Loi Sapin II was adopted in November 2016 after **much parliamentary debate** and several revisions
- It is seen largely as an effort to **reinforce France's anti-corruption framework following criticism** from international organizations such as the OECD and a number of prosecutions of French companies by the U.S. authorities
- The Loi Sapin II only **applies to corporations**
- The Loi Sapin II creates an **obligation to create a compliance program** for companies over a certain size
- The key additional points that will affect companies of Total's size are therefore the **strong extraterritorial reach** of the law and the introduction of the **"DPA" mechanism into French criminal law**

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**REINFORCED ANTI-CORRUPTION MEASURES**

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**REINFORCED ANTI-CORRUPTION MEASURES: CREATION OF A COMPLIANCE PROGRAM**

- The Loi Sapin II creates for French companies over a certain size an **obligation to prevent corrupt practices**
- Applies to **French companies** with at least 500 employees and over 100 million euros in revenues
- Also applies to **French subsidiaries of non-French companies** whose parent companies fulfill the same criteria
- The law is **rather prescriptive** in the measures to be included in the program, covering eight topics.

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**COMPLIANCE PROGRAMS IN FURTHER DETAIL**

- There is little guidance in the law itself as to the content of the compliance program, although the **key components** are identified:
  - adoption of a Code of Conduct and disciplinary procedures for dealing with violations
  - a mechanism for receiving and treating whistleblower alerts
  - a risk-mapping exercise
  - due diligence procedures for evaluating third-parties
  - procedures for ensuring that the company's books and records do not conceal corruption
  - obligatory training for officers and employees on a risk-weighted basis
  - internal audit procedures
- Companies and their **directors/managers** may be **sanctioned** by the AFA for failing to implement adequate procedures
- The AFA will be able to impose **administrative** (but not criminal) **sanctions**, including injunctions and financial penalties

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**REINFORCED ANTI-CORRUPTION MEASURES: CREATION OF THE FRENCH ANTI-CORRUPTION AGENCY**

- The Loi Sapin II creates a new administrative agency dedicated to anti-corruption matters, known as the **Agence française anticorruption** (the "AFA")
  - Replaces the current agency *Service Central de Prévention de la Corruption* (SCPC)
- The AFA is vested with **broad administrative powers**, including audits of companies as well as within the national and local government (although no criminal investigative authority)
- To be headed by French magistrate Charles Duchaine, previously an investigating judge (*juge d'instruction*)
- Reports are that the AFA will be provided with **greater resources** than the SCPC (70 employees as opposed to 10), and will be directly connected to the Justice and Budget Ministries (**not an independent administrative authority**, despite advocacy by Transparency International)

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**REINFORCED ANTI-CORRUPTION MEASURES:  
INTRODUCING THE "FRENCH DPA"**

- The Loi Sapin II introduces a **fundamental change** into French criminal law: the creation of the *Convention Judiciaire d'Intérêt Public* ("CJIP")
- Modelled after the U.S. DPA, the CJIP was subject to **extensive debate** and was at one point deleted from the draft text
- The CJIP provides for a **settlement** for companies who are under investigation for **corruption, influence peddling and money-laundering** (not tax evasion, which is subject to a separate procedure), and contains three key elements:
  - A **fine of up to 30% of the company's average annual revenues** for the last three years
  - A **three-year period to implement a compliance program**, under the supervision of the AFA and at the company's own expense
  - **Indemnification** of any identified victims
- The CJIP will require the company in question to agree to a **statement of facts** and, assuming the three-year period concludes without incident, **will not create any criminal record** (*casier judiciaire*)

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**REINFORCED WHISTLEBLOWER  
PROTECTIONS**

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**REINFORCED WHISTLEBLOWER PROTECTIONS**

- The Loi Sapin II introduces a **reinforced protections for whistleblowers** so long as a three-step procedure is followed:
  - First, the WB must notify a supervisor, whether direct or indirect
  - If the alert is not resolved in a reasonable timeframe, the WB may notify external parties (administrative authorities, professional organisations, etc)
  - If the alert is not resolved within three months, the WB may alert the information to the general public
- Companies with over 50 employees will need to **modify their procedures** accordingly
- Retaliation against a whistleblower will be subject to both **civil and criminal punishment**

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## ANALYSIS AND RECOMMENDATIONS

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### ANALYSIS

- Much uncertainty still surrounds the Loi Sapin II as the implementing decrees will be published on a rolling basis. Some questions include:
  - Will the AFA's **approach to enforcement** be similar to that of the US (i.e., focus on individual liability and cooperation through Yates Memo / Pilot Program)?
  - Composition of the AFA is expected to be mostly **magistrates**: will there be sufficient consultation with industries?
  - How the AFA will view **compliance certification systems** such as ISO 37001?
  - How will the **liability of compliance officers** be treated?
- Companies listed on international exchanges likely have compliance programs that are **substantially responsive to the Loi Sapin II requirements**; however, thousands of medium-sized companies will need to put programs in place for the first time.
- The Loi Sapin II is expected to have **broad extraterritorial reach** similar to the FCPA, although not entirely clear from drafting; plan accordingly.
- **Key considerations** as to the scope of the law's reach are how the U.S. authorities will view the Loi Sapin II, the extent to which it will defer to French prosecutors and/or whether the CJIP will be used to conduct multi-national settlement agreements (as was the case with U.S./Dutch authorities in VimpelCom)

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### RECOMMENDATIONS

- Review the **application criteria** of the Loi Sapin II: is my company covered?
  - Recall that it applies to **French companies** with at least 500 employees and over 100 million euros in revenues and **French subsidiaries of non-French companies** whose parent companies fulfill the same criteria
- Review the **eight compliance program factors** presented in the Loi Sapin II:
  - Does my global compliance program sufficiently respond to these requirements? Does my French program need to be reinforced?
- Review **implementing decrees and commentary** as and when they are published
- Consider reaching out other players in your industry to **benchmark** your French compliance program

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**“DUTY OF CARE” REQUIREMENT**

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**DUTY OF CARE REQUIREMENT FOR FRENCH COMPANIES**

- In February 2017, the *Assemblée Nationale* passed a new law that requires certain corporations to **create and enforce an action plan on human rights and environmental due diligence** within supply chains.
- This **action plan** includes:
  - Risk mapping;
  - Due diligence on the commercial partners;
  - Mitigation measures;
  - A professional whistleblowing system;
  - A means of monitoring mitigation measures.

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**DUTY OF CARE REQUIREMENT FOR FRENCH COMPANIES**

- The law applies to each supplier that is in **direct contractual privity** with the company in question.
- The law applies only to **activities related to the contract**.
  - For example, in the case of a company in a contractual relationship with only one subsidiary of a supplier, the action plan will only need to be applied with respect to that subsidiary.
- The relevant contract must also include a **clause that requires the partner to apply an action plan** with respect to its own suppliers (i.e., suppliers to the suppliers).

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**QUESTIONS / DISCUSSION**

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