

A convercent guide



SAPIN II

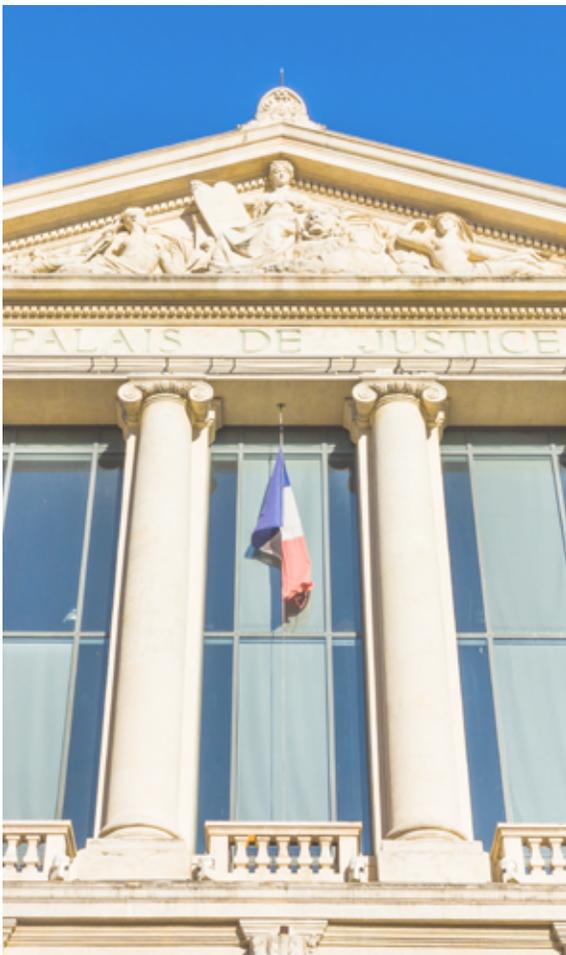
A New Era of French Anti-Corruption Legislation

Almost a full month into 2017 and bribery has taken a surmountable place in compliance and ethics conversations. From the scandal occurring and unfolding at Rolls-Royce, Samsung and other big names, bribery cases are becoming an uncomfortable reality for companies worldwide. The fight against corruption and bribery across industries and throughout countries has been and continue to be a challenge for global compliance and ethics programs. The impact on business when bribery and corruption occur is sometimes irreversible and most certainly damaging.

This short guide, produced in collaboration with our London-based compliance and ethics team, will quickly explain the why and how behind France's new anti-corruption and bribery law, Sapin II, and how it impacts modern compliance and ethics programs in any business sector.

"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 - was made to accompany what was then draft legislation known as the Sapin II Bill.

Since its adoption of the Organisation for Economic Co-operation and Development (OECD) anti-corruption Convention in September 2000, France's domestic enforcement has generally been perceived as limited, particularly, with regard to overseas corruption involving foreign officials. In the meantime, the US and others have enacted extensive legislation to support extraterritorial enforcement with the consequence that Sapin II - named by reference to the Sapin I Bill enacted in 1993 - was needed to bring significant changes to French corruption enforcement.



INTRODUCTION

Prior to Sapin II, there were two main issues preventing anti-corruption enforcement in France:

- 1 Only the French public prosecutor could file a corruption complaint; and,
- 2 The offence had to have been previously prosecuted in the jurisdiction where it took place; these issues essentially prevented France from taking the prosecution initiative. Under Sapin II, this will all change and, for example, interested third-party bodies (such as Transparency International) will be able to file a complaint with the expected consequence that enforcement action will increase significantly.

Additionally, Sapin II will allow for the prosecution of foreigners living in France or managing a French company for corruption, including that committed overseas. Until now, only French citizens could be prosecuted in France for offences committed abroad.

Sapin II became law on 8th November 2016 and, in certain respects, has aligned French anti-corruption law with key aspects of US, UK and Brazilian corruption enforcement practice. French companies will soon have to implement demonstrable measures to prevent, detect and punish corruption. Without doubt, Sapin II will bring significant change and what follows briefly summarises the key consequences of the new law.

SAPIN II - REQUIREMENTS FOR COMPANIES

Strict obligation on companies to 'prevent corruption'

French companies that have 500 or more employees or an annual turnover in excess of €100M will be obliged to implement an Anti-Bribery & Corruption (AB&C) risk management programme; given that the company and its directors will be held accountable against this programme by the newly created Agence Française Anticorruption (AFA) (below), it has to be 'appropriate' to the company, its size and assessed risks.

At first glance, it may seem that the Sapin II approach has parallels with the UK Bribery Act (UKBA). However, under Section 7 of the UKBA, 'Failure of commercial organisations to prevent bribery', there is a stated defence if a company can prove that it had in place 'adequate procedures' designed to prevent persons associated with the company from undertaking such conduct. By comparison, under Sapin II, a company may be sanctioned / prosecuted for non-compliance without any predicate offence (i.e. an action that provides the underlying resources for another, more serious criminal offence). Moreover, it has been noted that Sapin II does not incorporate any formal mechanism for AB&C prevention programmes to reduce the severity of penalties for companies prosecuted for corruption.

Eight Measures to Take for a Mandatory Corruption Prevention Programme

Sapin II currently defines some eight mandatory measures that should be implemented to support a company's AB&C prevention programme.

The eight measures (requirements) are:

- 1** A whistleblower helpline must be provided and available to employees.
- 2** A Code of Conduct must be fully integrated into the governance and operations of the company.
- 3** An ongoing risk assessment programme.
- 4** A training programme commensurate with assessed risks, incorporating both initial and refresher courses.
- 5** A demonstrable due diligence programme, covering customers, clients, suppliers/vendors, intermediaries and other third-parties.
- 6** Demonstrable internal and external controls.
- 7** A specified disciplinary process with sanctions.
- 8** Both internal and external audit of the programme.

Clearly, most French companies of this size will need to consult with their Works Councils and equivalents on these requirements, particularly (2), the integrated Code of Conduct; this may have additional consequences for companies that are already in compliance with US, UK and other country/jurisdictional regulations.



Whistleblowing & Retaliation Protections

Sapin II requires companies to establish a whistleblower helpline process, and also to guarantee confidentiality to whistleblowers and provide protection against retaliation. Taken together, these requirements should provide one of the strongest whistleblower protection regimes globally, with both fines and potential prison sentences for wrongdoers.

SAPIN II - INFRASTRUCTURE

Extra-Territorial Reach for Prosecutors

A key aspect of Sapin II is the expanded extra-territorial reach that it provides for French prosecutors, including potentially, even where an offence has not been committed under local laws. Sapin II applies to corruption by French companies overseas and also foreign companies with a footprint in France, defined as “exercising all or some of its activities on French territory.”

New French Anti-Corruption Agency (Agence Française Anti-corruption (AFA))

Sapin II provides for the creation of this new national agency with the mandate to:

- 1** Provide support to companies regarding AB&C and their obligations;
- 2** Manage breaches of the prevention obligation including formal warnings, injunctions or fines up to €1M for companies and €200k for individuals; and,
- 3** Monitor remediation plans and activities, work which will be performed at the company’s cost. The agency does have the right to disclosure, interview and inspect but does not have powers to investigate nor impose penalties.

New Deferred Prosecution Agreements (DPAs)

Sapin II introduces Deferred Prosecution Agreements, which are intended to utilise civil law to increase perceived anti-corruption enforcement. A DPA will not require an admission of guilt, but will potentially involve implementation of an AB&C programme monitored by the AFA for a maximum of three years plus a fine (capped at 30 percent of a company’s annual turnover) and, potentially, compensation for victims. A DPA, of itself, does not preclude an individual from being investigated.



SAPIN II - WHAT ELSE?

The Sapin II regime has several complexities which will largely only be clarified by cases over time. However, some of those complexities include:

- The whistleblower process requires that whistleblowers first use company internal whistleblowing facilities before blowing the whistle to regulators(s) and then, finally to the press. Whilst this may delay matters, this approach reflects the preventative background to Sapin II and is intended to afford companies the first opportunity to react.
- There are several, marked differences to the US and UK including, for example, that Sapin II affords protection to persons alleged to be involved in wrongdoing by guaranteeing anonymity to those named accused persons until the facts are proven. Additionally, whistleblowers may be provided with financial support to a level determined by an independent authority, but not rewarded.

OVERALL

Without question, Sapin II represents a new era of French anti-corruption legislation and is certainly an innovative step-change in the country's bribery and corruption legislation.

However, questions remain as to the AFA's independence, resourcing and powers, and thus its ability to compel French companies to make a genuine commitment to effective AB&C programmes and state-of-the-art whistle-blower processes.

EXTRACTS, SOURCES & LINKS

Will the Sapin II Anti-Corruption Law Shepherd France Into A New Era Of Transparency?
www.forbes.com

The Sapin II Bill: A Potential Game-Changer in French Corruption Enforcement
www.jonesday.com

Sapin 2 - France strengthens anti-corruption law
www.forensicrisk.com

AUTHOR'S CONTACT DETAILS

Keith Read
keith.read@convercent.com



Learn more about Convercent by
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DENVER | LONDON