

LEGAL FINANCIAL SECURITY HEAD OFFICE | GROUP DISPUTE RESOLUTION

SAPIN II LAW – BASICS

AN OVERVIEW OF ANTI-BRIBERY AND CORRUPTION ASPECTS

LEGAL

MAY 2018



BNP PARIBAS

The bank
for a changing
world

Corruption is a key element in economic under-performance. It distorts markets, and allows organised crime and terrorism and their financing.

Corruption also significantly impacts democracy that it undermines, and leads to violation of human rights.

Because corruption is an insidious and evolving phenomenon, impacting all countries and all organisations -whether private or public, big or small- we must remain vigilant.

The 3 “Sapin I Law - Basics” offer a first and simple way to understand the new French Anti-corruption legal framework, which widely impacts BNP Paribas.

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THE SAPIN II LAW IN A NUTSHELL

The Sapin II Law will bring France in line with the highest international standards regarding transparency and the fight against corruption.

Michel Sapin

The 'Sapin II' Law* - enacted on 9 December 2016 - includes important reforms in a number of areas, in particular the fight against corruption. The law is based on 3 pillars: transparency, modernisation of the economy and anti-corruption.

The Sapin II law aims to align French anti-corruption legal framework on the best international standards, in

particular with the UK Bribery Act and the U.S. FCPA (Foreign Corrupt Practices Act). The French legislator aims at protecting French companies, and shielding them from foreign authorities sanctions and requests for information.

In many ways, the Sapin II Law will bring France closer to the UK and the U.S. systems in their approach to international anti-corruption

enforcement: in particular, creation of a new settlement agreement procedure and new monitoring, extension of the territorial reach of corruption and influence peddling involving foreign officials.

All these important changes came as a response to the criticisms made by the OECD which considered that France's efforts to combat corruption were limited**.

Whistleblowing: a duty of care.

Whistleblowing is a cornerstone of transparency and the fight against corruption.

The Sapin II Law introduced a legal protection for all whistleblowers, complying with the

best international standards: prevention, protection, confidentiality, reversed burden of proof. France became one of the most protective country for whistleblowers.

* Named after the Law's main proponent, former French Minister of Economy and Finance, Michel Sapin.

** Organisation for Economic Cooperation and Development, 23 October 2014.

SAPIN II LAW MAJOR REFORMS

1 Preventing corruption and influence peddling

Large French companies must implement -for the group of companies- an anti-corruption compliance program, in order to detect and prevent corruption and influence peddling.

2 Controls and sanctions

A newly created French Anti-corruption Agency -*Agence Française Anticorruption*- (AFA), with the ability to help, investigate and levy sanctions.

3 Enforcement

A new French-style amicable settlement and monitoring.
Extraterritoriality: powers to prosecute corruption and influence peddling abroad.

4 Protecting whistleblowers

Speak-up according to a 3 stage procedure.

AT FIRST GLANCE

9.12.2016	01.06.2017	Oct.2017	Dec.2017	Jan.2018	Feb.2018
The Sapin II Law is enacted.	Anti-corruption compliance program must be implemented.	First French Amicable Settlement EUR 300 Million to settle laundering of tax evasion. The AFA started its first controls.	The AFA's guidelines are published.	The whistleblowing procedures must be implemented.	French prosecutors reach first ever <i>convention judiciaire d'intérêt public</i> settling bribery charges.

ANTI-CORRUPTION COMPLIANCE PROGRAM

The Top Management of large French companies must implement a compliance program, in order to detect and prevent corruption and influence peddling. This program consists in 8 measures as a minimum requirement.

1 Code of conduct to fight corruption



To define and illustrate prohibited conducts. The Code of conduct is incorporated into the company rules and regulations.



2 Internal set-up

To report any breach of the Code of conduct.



3 Risk mapping

Designed to identify and classify the company exposure to any risk of bribery & influence peddling.



4 Due diligence

Clients, intermediaries, first-line suppliers.



5 Accounting controls

Designed to ensure that the company's books and records are not used to conceal acts of bribery.



6 Training

For employees and executives particularly exposed to the risks of corruption and bribery.



7 Disciplinary regime

For breach of the Code of conduct to fight corruption.



8 Internal control mechanism

To assess the effectiveness and adequacy of the compliance program.



The anti-corruption compliance program is inspired by the key principles of the UK Bribery Act and the U.S. Foreign Corrupt Practices Act: Top Level Commitment ; Risk Assessment ; One Size does not fit all ; Due Diligence ; Monitoring ; Testing and reviewing on a regular basis ; Training and Communication.

The French Anti-corruption Agency (AFA) has a very extensive interpretation of the Sapin II Law.

The risk mapping is the pillar of the anti-corruption compliance program. It should be regularly updated, and communicated to the Top Management.

According to the AFA, due diligence should be conducted on any third party.

AML due diligence is distinct from anti-corruption due diligence.

WHO MUST IMPLEMENT THIS ANTI-CORRUPTION COMPLIANCE PROGRAM?



Senior Management

Chairman, CEO, Managing directors and, depending on their missions, the members of the executive board of companies.



Companies

All French based companies which employ at least 500 employees, or are part of a group of companies employing at least 500 employees, with a parent company incorporated in France, and with a gross annual revenue or consolidated revenues of over EUR 100 million.



Compulsory implementation of the anti-corruption compliance program

The scope includes all subsidiaries and companies under the control of the parent company located in France –irrespective of their location- in France or abroad.

The anti-corruption compliance program may be organised, as a whole, by the French parent company.

SANCTIONS



Failure to implement the anti-corruption compliance program may lead to caution notices addressed to the Top Management, injunctions to implement the anti-corruption compliance program and penalties on both individuals (EUR 200.000) and companies (EUR 1 million).

A NEWLY CREATED FRENCH ANTI-CORRUPTION AGENCY (AFA)

The AFA helps French authorities and companies to prevent and detect bribery, corruption and influence peddling, as well as misappropriation of public funds, collusion, embezzlement and favouritism.



Missions

The AFA is responsible for:

- Monitoring the implementation of the anti-corruption compliance program, and controlling its effectiveness and adequacy, with powers to investigate and levy sanctions.
- Ensuring, at the Prime Minister's request, that companies under foreign investigations comply with the French Blocking Statute requirements.
- Centralising and communicating information related to the prevention of corruption.
- Issuing recommendations to help companies to prevent corruption. The AFA will also publish an annual report on its activities.
- Informing the public prosecutor of facts likely to constitute a crime or an offence.



L'Agence Française Anticorruption is a service with a national jurisdiction, affiliated with the Ministries of Justice and Budget. The AFA is chaired by a magistrate outside the judicial hierarchy, appointed by the French *Président de la République*, for 6 years. Charles Duchaine has been appointed as the first *Directeur* of the AFA, in 2017.

The AFA is composed of two main committees: a Sanctions Committee and a Strategy Committee.

The AFA controls have started since October 2017.

The AFA has published very demanding guidelines on the anti-corruption compliance program, in December 2017, going beyond the mere legal requirements.

A questionnaire, available on the AFA's website, specifies the information and documents which may be required in case of control.

SCOPE AND PROCESS OF THE AFA CONTROLS

1

- ▣ The French government.
- ▣ *Haute Autorité pour la Transparence de la Vie Publique*.
- ▣ Certain associations.

Request the AFA to control companies.

The AFA may also decide to investigate on its own.

2

The AFA controls the **effectiveness and the adequacy of the anti-corruption compliance program**.

3

If the company's anti-corruption compliance program is not implemented, adequate or effective, the *Directeur* of the AFA may:

- ▣ Address caution notices to the Top Management.
- ▣ Refer to the Sanctions Committee of the AFA, in order to:
 - > **Compel** the company to adapt the anti-corruption compliance program.
 - > **Order** financial penalties: EUR 200.000 (individuals), EUR 1 million (companies).

**SCOPE OF THE CONTROLS:
ANY ENTITY
OF THE GROUP
(EVEN LOCATED ABROAD)**

The AFA may request any information or document, and conduct interviews with employees. It may also appoint experts.

Agents controlling on its behalf are legally bound by confidentiality.

Legal interference is punishable by a EUR 30.000 fine.

ENFORCEMENT: FRENCH-STYLE MONITORING AND AMICABLE SETTLEMENT IN A NUTSHELL

Monitoring: injunction to implement an anti-corruption compliance program.

1

Company is found guilty of either corruption or influence peddling.

2

As additional penalty, the company may be ordered to implement a compliance program similar to the anti-corruption compliance program*.

If the company has already implemented an anti-corruption compliance program, the effectiveness and adequacy of the measures and the procedures will be considered in the sentence.

Convention Judiciaire d'Intérêt Public **(Amicable settlement)**

1

Company is charged of corruption, influence peddling or money laundering relating to tax fraud offences.

2

Public Prosecutor may suggest that the company settles, to avoid a criminal conviction before criminal proceedings are initiated. If they already are, the company will have to plead guilty.

The compliance program is undertaken under the French Agency supervision, for a maximum 5 years-period.

Non-compliance with the injunction : imprisonment (2 years) and EUR 50.000 fine for individuals.

COMPANY SHOULD AGREE TO:

- > Pay a fine (capped at 30% of the company's average revenues).
- > Implement an anti-corruption compliance program.
- > Pay damages to the victims of the offence.

* Except for the internal control mechanism.

WHISTLEBLOWING

Sapin II Law introduces two alerts mechanisms, which may be addressed in one set-up:

- Large French companies must implement an internal set-up to report any breach of the Code of conduct to fight corruption (see *supra*).

- French companies employing at least 50 employees must implement internal procedures to protect whistleblowers (see *infra*): employees, external or occasional staff.

Definition

The Sapin II whistleblower is an **individual**, who signals (internally) or reveals (externally), **selflessly** and in **good faith**, facts that he/she became **personally** aware of, and which constitute :

- An offence or a crime, or any other serious breach of law.
- A serious breach to an international treaty to which France is party.
- A threat or serious damage to the public interest.

Scope

The scope of information is very large, and only facts, information, or documents covered by defense secrecy, medical secrecy, and attorney-client privilege are excluded.

SAPIN II LAW OFFERS A ROBUST PROTECTION TO WHISTLEBLOWERS:

Criminal liability of the whistleblower cannot be sought for disclosure of confidential information, as long as legal conditions are met.

Anti-retaliation protection for the whistleblowers: in particular with respect to discrimination, dismissal, harassment.

Confidentiality: the identity of the whistleblowers is confidential. A similar protection exists for individuals targeted by the alert. In addition, data enabling to identify them should be destroyed or archived (after redaction) 2 months after the end of investigations, or at the end of proceedings.

Speak-up: a 3 stage escalation process

INTERNAL ALERT

The whistleblower should raise the alert with his/her line managers (direct or indirect), employer or the person designated by the employer for that purpose.

AUTHORITIES

Failing a response from the employer within a reasonable time period, the whistleblower may alert the relevant administrative or judicial authority, or the professional authorities.

PUBLIC

If the alert is still not addressed within 3 months, the whistleblower can disclose it to the public

Where there is a serious and imminent threat or risk of irreversible damage, the whistleblower may bring the alert directly to the attention of the administrative or judicial authority, or to the professional authorities. The whistleblower may also alert the public directly.



GLOSSARY

Source: OECD, Transparency International

Basics

There are as many different definitions of corruption or bribery as manifestations of the problem itself.

Bribery : promising, giving, soliciting an advantage as an inducement for an action which is illegal, unethical or a breach of trust. It may take many forms: gifts, loans, fees, rewards or other advantages (taxes, services, donations,...).

Active bribery : offering, promising, giving an undue advantage.

Passive bribery: soliciting, accepting an undue advantage.

Corruption: abuse of public or private office for personal gain.

Collusion: a secret agreement between parties to conspire to commit actions aimed to deceive or commit fraud with the objective of illicit financial gain.

Embezzlement and misappropriation: appropriating, using or trafficking dishonestly, or illegally, funds or goods public official or other individuals have been entrusted with, for personal enrichment or another activity.

Favouritism: unjustified restriction of access to public contracts to favour certain bidders.

Influence peddling: Trading in influence occurs when a person who has a real or apparent influence on the decision-making of a public official exchanges this influence for an undue advantage.

In practice, it may be difficult to distinguish illegal influence peddling, from lobbying which is legal.

Associated offences

Money laundering: process of concealing the origin, ownership or destination of money illegally or dishonestly obtained, by hiding it within legitimate economic activities to make them appear legal. While money laundering and corruption may be linked, they are different offences.

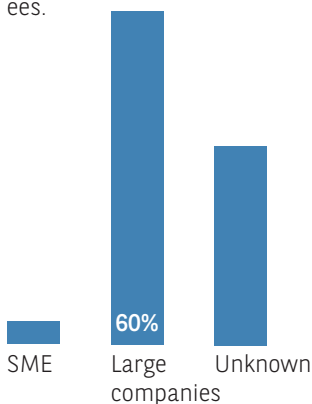
Failure to maintain financial record-keeping

A STEP FURTHER: UNDERSTANDING THE WHO, WHAT, WHERE, WHY AND HOW

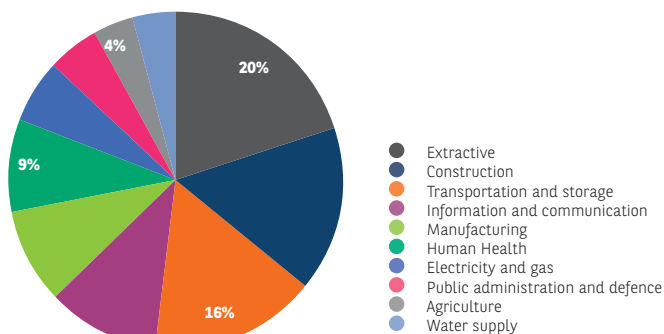
Source: OECD, GAFI

Who is bribing?

In **60%** of cases, the company associated with the corrupt transaction is a large one, and had more than 250 employees.



Almost two-thirds of foreign bribery cases occurred in 4 sectors : extractive, construction, transportation and storage, information and communication.



Who is receiving the bribe?

95% of bribes were paid to officials in 5 categories.



- 80%** to State Owned or Controlled Entities
- 7%** to Head of State
- 4%** to Minister
- 3%** to Defence Official
- 1%** to Customs Official

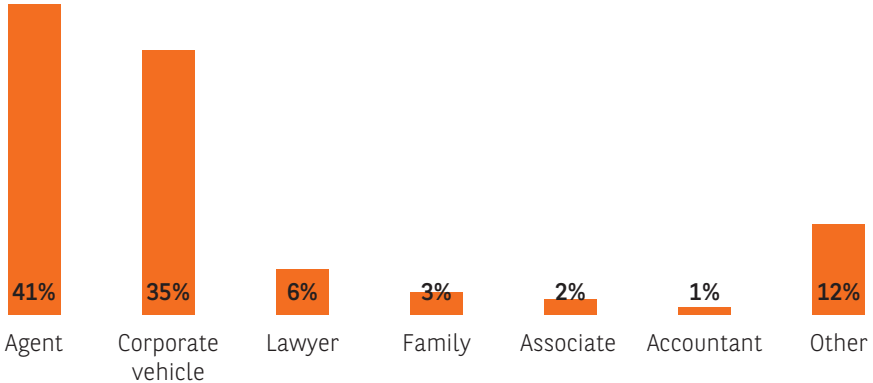
Senior Management is involved in over 50% of cases.



- 41%** Management
- 12%** President/CEO
- 22%** Non management
- 16%** Unknown
- 9%** Third party agent

How are bribes being paid?

In the vast majority of foreign bribery cases, the bribery was carried-out via an intermediary: **3 out of 4 foreign bribery cases involved payment through intermediaries.**



Agent (local or foreign) was used in 41% of the cases

This category includes sales and marketing agents, distributors and brokers.

Corporate vehicle was used in 35% of the cases

This category includes subsidiaries, trusts, non-profit entities, local consulting firms, companies located in offshore financial centres or tax havens or companies with public official beneficial ownership, shell companies.

Gatekeepers

Gatekeepers are individuals who protect the gates to financial system (legal and financial experts). The gatekeepers skills are important in creating legal structures that could be used to launder money and for their ability to manage and perform transactions efficiently and to avoid detection.

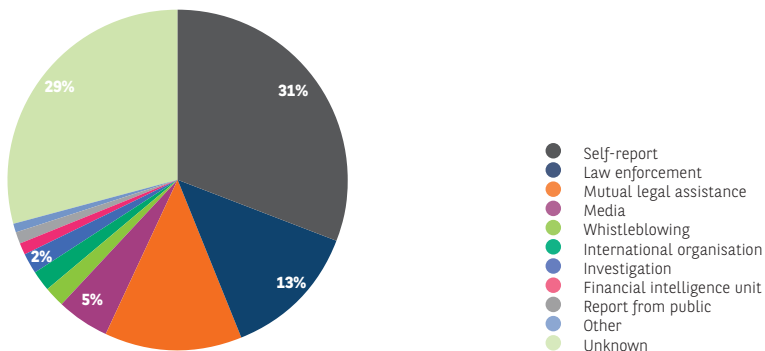
Why are bribes being paid?

In the majority of cases, **bribes were paid to obtain procurement contracts (57%)**, followed by clearance of customs procedures (12%), favourable tax treatment (6%), license/authorisation (6%) and access to confidential information (4%).

Where are bribes paid?

One in two cases involved bribery of foreign public officials from countries with high to very-high levels of human development.

How is foreign bribery detected?



Red flags



Politically Exposed Persons



Sanctions Targets



Intermediaries



Payment
amount (consistency, adequacy), origin, channel, accounts location, forms (cash, crossborderers,...)



Country Risk



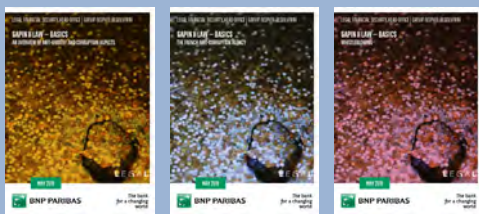
Sector Risk

PLEASE READ

- 1 Jean-Laurent Bonnafé's anti-corruption Statement (January 2018).
- 1 The "Code of conduct: fighting corruption", incorporated into the Group Code of conduct (January 2018).
- 1 Compliance policies.

All these documents are available on the BNP Paribas Echonet or website.

- 1 Sapin I Basics, available on GDR > LFS > LEGAL portal.



- 1 The AFA Guidelines and other useful documents are available on the AFA website.

ANY QUESTIONS?

Happy to help, [please contact us](#).

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