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GETTING THE
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Anti-Corruption

Increased measuring of
'demand' for bribes

*Miller & Chevalier lead the
global interview panel*

2018

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Enforcement priorities • Compliance programmes • Individual v corporate culpability • 2018 trends

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GETTING THE
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market intelligence

Welcome to GTDT: *Market Intelligence*.

This is the 2018 edition of *Anti-Corruption*.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

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ANTI-CORRUPTION IN FRANCE

A member of the Paris and New York Bars, Laurent Cohen-Tanugi is the founder and managing partner of Laurent Cohen-Tanugi Avocats, a boutique international firm focusing on strategic corporate mandates in the areas of cross-border mergers and acquisitions, international arbitration and litigation, white-collar crime, and anti-corruption compliance.

Over a career of 35 years, Mr Cohen-Tanugi has been a partner at major international firms such as Cleary Gottlieb (1982–2003) and Skadden Arps (2005–2007), and senior vice president and general counsel of the global pharmaceutical group Sanofi (2004).

To date, he is the only member of the French Bar to have served as independent corporate monitor on a worldwide FCPA

matter, by appointment of the US Department of Justice and Securities and Exchange Commission. He also recently completed another multi-year independent monitorship on behalf of the World Bank.

Mr Cohen-Tanugi is a graduate of the Ecole Normale Supérieure, Sciences-Po Paris, and the Paris and Harvard Law Schools. He is the author of numerous influential books on the rule of law, European affairs, transatlantic relations and globalisation. He is a regular columnist and international lecturer, and was a visiting lecturer at Stanford Law School from 2012 to 2016.



GTDT: What are the key developments related to anti-corruption regulation and investigations in the past year in your jurisdiction, and what lessons can compliance professionals learn from them?

Laurent Cohen-Tanugi: The past year was a significant one in the field of anti-corruption in France, as it saw the beginning of the implementation of the Sapin II law. This law was adopted in December 2016 in an effort by the French authorities to strengthen anti-corruption law enforcement in response to criticism from the Organisation for Economic Co-operation and Development as well as the enforcement of the Foreign Corrupt Practices Act (FCPA) against French companies by the US authorities. Sapin II entered into force in June 2017 and we are now witnessing the first wave of its enforcement by the French Anti-Corruption Agency (AFA) and the National Financial Prosecutor (PNF).

Along with Sapin II, other developments in French anti-corruption law include the adoption of a decree of January 2018 requiring companies with over 50 employees to implement an internal alert procedure, as well as the continuing implementation of the Law on Transparency in Public Life and the Law on the Fight Against Tax Fraud and Serious Economic and Financial Crime, which came into effect in 2013.

The AFA launched its first company audits at the end of 2017. As a newly established agency – the AFA exists because of Sapin II – it took several months to build its team and begin to execute its mandate. Article 17 of Sapin II bestows upon the AFA the authority to conduct audits of French and foreign companies and subsidiaries that meet certain staff size and annual turnover thresholds to ensure that their compliance programmes are implemented in accordance with the law's requirements. Companies that fail to demonstrate that their compliance programmes are in conformity with the law may be subject to sanctions. The Agency has continued to make headway by engaging in additional audits in 2018 – according to news articles, as of August, 35 audits have been made (among which, eight concern public entities).

In addition, the PNF executed the first few judicial public interest agreements (CJIPs) – the French equivalent of the US deferred prosecution agreement – with several companies. Article 22 of Sapin II allows a company, under certain circumstances, to enter into a CJIP with the PNF in which it agrees to pay a fine to the French treasury, implement a corporate compliance programme that may be monitored by the AFA for up to three years and pay compensation to all identified victims in exchange for non-prosecution. A company is not required to admit to any wrongdoing if the CJIP is signed before the company is formally charged before a judge. The first such agreement was signed with HSBC



Private Bank Suisse SA at the close of 2017 for acts allegedly related to tax evasion. This was followed by four CJIPs in the first half of 2018. Two agreements were concluded in February, and one in May, for bribes paid by the companies to an employee of a public utility entity in order to maintain or receive contracts for the operation of thermal power stations. The fifth, and thus far the largest, agreement was signed with Société Générale in June to resolve a probe into allegations of bribery of Libyan officials to secure investments from Libyan state institutions.

As a result, companies and compliance professionals should prepare themselves for possible audits by the AFA, and those that have acknowledged wrongdoing may now consider the prospect of a negotiated resolution with the PNF.

GTDT: What are the key areas of anti-corruption compliance risk on which companies operating in your jurisdiction should focus?

LCT: In France, like anywhere else, the main risks a company faces depend on various factors, such as the sectors in which it operates, the location of its activities, the kind of operations it entered into and the risk level of the third parties with which it does business.

In France, the industries that are commonly seen to be exposed to the greatest level of compliance and corruption risks are energy, public construction projects, defence, real estate, engineering, and pharmaceuticals and

healthcare. A risk that almost all these industries share is the common practice of using consultants or commercial agents in difficult foreign markets, particularly when government contracts are involved.

Small and medium-sized enterprises may also face heightened levels of risk because they are more likely to economically depend on the business of a single or small number of clients. Thus, they may be more susceptible to the influence of powerful clients who pressure them to engage in illicit behaviour.

A company faces compliance risks regardless of whether its operations are purely domestic or if it has an international presence. On the domestic front, the greatest risk of corruption lies in the procurement of public works projects, especially at the local level. There are risks involved when individual government officials have discretion to determine which companies are awarded projects and for which bidding rates, as they implicate the potential for influence peddling, favouritism and the payment or solicitation of bribes. Companies that work with a lot of third parties, and in particular, third parties that operate abroad, are exposed to another layer of compliance risks.

Companies that have many or large foreign subsidiaries are also susceptible to compliance risks, particularly if those foreign subsidiaries operate in regions with challenging political or economic environments. It is important to bear in mind that one of the goals of Sapin II was to expand the extra-territorial scope of French anti-corruption law, as it applies to foreign nationals who reside in France, acts committed abroad by French nationals or residents and legal entities conducting all or part of their economic activity in France, as well as cases where the victim is a French national, regardless of where the injury occurred. In addition, Sapin II also regulates the activities of foreign subsidiaries of French companies that fall within the jurisdiction of the law.

Global companies with strong compliance programmes that have operations in France must be aware that their programme may not comply with some of the very specific requirements of Sapin II and the AFA guidelines, and supplementary local features may be necessary to address those requirements.

GTDT: Do you expect the enforcement policies or priorities of anti-corruption authorities in your jurisdiction to change in the near future? If so, how do you think that might affect compliance efforts by companies or impact their business?

LCT: As I mentioned earlier, the first corporate audits conducted by the AFA date from the end of 2017. We are only now beginning to see the practical impact of the new French anti-corruption framework.

While these audits are indicative of the approach the Agency may take, at this early stage it is difficult to predict precisely how its enforcement policies and strategies will unfold in the months to come. What is certain is that the AFA has indicated a commitment to executing its mandate in a proactive manner and the push to increase the number of audits conducted on both private companies and public sector entities will continue.

However, I would not say that the new legal framework has had a major impact on French companies and on the resources they devote to compliance yet. One reason may be the limitations on the AFA's own resources, and the relatively low monetary amount of the fine (no more than €1 million). By way of illustration, the Agency had announced that it aimed to conduct 100 audits in 2018 but it is far from that objective. So it remains to be seen whether the enforcement actions of the AFA and the PNF will encourage French companies to take anti-corruption compliance as seriously as their US or UK counterparts; currently, the threat of US or other international enforcement actions remains the strongest incentive to do so.

GTDT: Have you seen evidence of continuing or increasing cooperation by the enforcement authorities in your jurisdiction with authorities in other countries? If so, how has that affected the implementation or outcomes of their investigations?

LCT: Increasing cooperation by the enforcement authorities is another significant development of the past year. In June 2018, the PNF entered into its first joint settlement with the US Department of Justice in the form of a CJIP with French bank Société Générale following a multi-year joint investigation in connection with corruption allegations in Libya. The terms of the settlement included a €250 million fine to be paid to the French treasury and that France would monitor the bank going forward. The latter will be the responsibility of the AFA, which will assess the effectiveness of the bank's anti-corruption programme over two years. Another development is the cooperation between the PNF and the UK Serious Fraud Office in the Airbus corruption probe. These joint investigations indicate that the French authorities have cemented cooperation relationships with two of the leading enforcement authorities in the field of international anti-corruption, which is likely to pave the way towards future instances of collaboration.

This is a very important development that confirms the willingness of the US authorities to let other national authorities regulate their own companies. But it also represents a challenge for the French enforcement authorities, who must establish their effectiveness at the level expected by international standards.

GTDT: Have you seen any recent changes in how the enforcement authorities handle the potential culpability of individuals versus the treatment of corporate entities? How has this affected your advice to compliance professionals managing corruption risks?

LCT: Article 17 of Sapin II provides that presidents, directors and executive board members of companies, and CEOs and presidents of public sector entities with a commercial character and who satisfy minimum size and annual turnover thresholds, can be held accountable under the law's regime. Individuals found to be in violation of the law can be sanctioned.

The French authorities have launched investigations against prominent individuals involved in alleged corruption schemes, such as Vincent Bolloré in connection with certain commercial activities in Africa or a former aid of President Nicolas Sarkozy for his purported involvement in the use of Libyan financing during the 2007 elections. While critics have argued that these investigations are largely symbolic and that it is still rare for actual disciplinary measures to be taken against individuals, these cases demonstrate that French prosecutors will engage in enforcement actions against physical as well as legal persons.

Compliance officers are aware of the impact that Sapin II has had upon their position within a company's structure. On the one hand, they understand that their post gives them a degree of responsibility and they are exposed to the risk of being used as a scapegoat by companies prosecuted for acts of corruption. At the same time, Sapin II has bestowed heightened importance and authority within a company on their role, bolstering their position within the corporate hierarchy. Both of these factors will impact how compliance officers handle their roles going forward.

CJIPs are only available to corporate entities and not to individuals involved in wrongdoing, which is a discrepancy that creates a number of issues.

GTDT: Has there been any new guidance from enforcement authorities in your jurisdiction regarding how they assess the effectiveness of corporate anti-corruption compliance programmes?

LCT: The AFA has provided some insight into this through the guidelines it published in December 2017. These guidelines, which are directed at both private enterprises and public sector entities as well as foreign subsidiaries, include recommendations for ensuring that an entity is in conformity with Sapin II. The recommendations cover a broad range of topics, including the implementation of an internal whistle-blowing system, development of risk maps, key third-party



THE INSIDE TRACK

What are the critical abilities or experience for an adviser in the anti-corruption area in your jurisdiction?

I find experience as a general corporate lawyer, as opposed to purely a compliance expert, to be particularly valuable in advising management on anti-corruption, given the breadth of what is involved. In addition, since France and its lawyers have little experience in anti-corruption enforcement and related advisory work, experience with international, and particularly US, anti-corruption enforcement proceedings are critical in my view, not only because most French multinationals are exposed to US and international enforcement, but also because the French authorities are expected to follow international enforcement standards.

What issues in your jurisdiction make advising on anti-corruption compliance unique?

There are, of course, legal issues that are specific to France and other European countries, such as labour law and data privacy considerations, or the existence of a 'blocking statute' restricting the transfer of sensitive economic information to foreign authorities. But the uniqueness in my view stems more from the novelty of this

whole area in French legal practice, and from the cultural change that anti-corruption and other white-collar crime compliance and enforcement entails for both in-house and external defence counsel.

What have been the most interesting or challenging anti-corruption matters you have handled recently?

These are undoubtedly the independent monitorships I have conducted by appointment of the US DOJ and SEC, as well as the World Bank. These were rather unique three-and-a-half-year worldwide mandates as an independent delegate of public authority. Acting as a monitor over such a long period of time, with the powers associated with it, gives you much deeper insight into corporate behaviour and the expectations of international regulators, and greater leverage to bring about compliance and governance reform, than an in-house chief compliance officer or an external adviser will ever benefit from.

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due diligence procedures and best practices in compliance training programmes.

Although these guidelines are not technically binding, companies and public sector entities alike would do well to familiarise themselves with the recommendations found in this document as the policies it contains represent the AFA's understanding of French anti-corruption law and offer insight into how it will interpret and enforce the relevant provisions. In addition, these guidelines represent a compilation of best practices from the French perspective as they were revised to encompass the suggestions and critiques raised by practitioners who had the opportunity to submit feedback on a draft of the document during a public commentary period, which took place at the end of 2017.

The recommendations found in the guidelines include a fair amount of overlap with the best practices suggested by the US government in its 2017 Evaluation of Corporate Compliance Programs, 2016 Foreign Corrupt Practices Act Enforcement Plan and Guidance, and 2012 FCPA Resource Guide, as well as the UK's 2010 Bribery Act Guidance. However, the AFA guidelines are arguably more rigid and contain provisions that are unique to France's anti-corruption regulation. For example, the guidelines provide more detail on what is required during third-party due diligence

procedures, including which employees should be involved in the process. In addition, it provides greater specificity on the internal alert collection procedure, including the protections that must be offered to whistle-blowers, steps for ensuring the whistle-blower's anonymity and regulations on communication with a whistle-blower.

Furthermore, the AFA's recommendations on risk mapping are more detailed and restrictive than those found under other regimes. Notably, the Agency recommends that all employees that have a managerial, operational or support role should participate in the elaboration and future updating of the risk map and that the risk map should be updated, at a minimum, once a year as well as each time there is a change in the company's activities, including when there are developments in the company's processes.

Companies and public sector entities that fall within the jurisdiction of these laws should familiarise themselves with these recommendations regardless of whether they have already been deemed to be in conformity with US and UK anti-corruption laws, which have long been considered the standard bearers for robust compliance programmes.

The AFA has also made public on its website the questionnaire that it will use during its audit of companies and public sector entities,

as well as the documents that it may request the audited company provide for review should supplemental information be considered necessary. The components that will be examined in the context of an effective corporate compliance programme include a code of conduct, an internal procedure for collecting and treating alerts, regularly updated risk maps, the documentation relative to the evaluation of third parties (notably clients, principal suppliers and intermediaries or agents), detailed accounting and financial controls, a comprehensive training programme with additional support especially for employees exposed to greater risk, and an internal disciplinary regime. The questionnaire also examines whether the entity regularly reviews and revises its internal compliance programme to ensure that it effectively responds to all new compliance risks identified. However, the questionnaire places a considerable burden on the company as it demands a significant amount of information, some of which is of a sensitive nature.

At the same time, a review of the questionnaire reveals certain shortcomings. In particular, the controls in which it seeks to engage seem too bureaucratic and theoretical. The first level of review exclusively involves the company's responses to the questionnaire and a review of requested documents, all of which takes place before the auditor has conducted an on-site visit or employee interviews. This may lead to an incomplete understanding of the state of the company's compliance programme and exposure to risk.

Though neither the guidelines nor the questionnaire are considered binding law, they do act as a window into the elements the AFA will consider when evaluating a compliance programme. This is significant because, ultimately, the AFA is the agency that has the authority to select, review and assess companies' and entities' compliance programmes. It will base its evaluation, and its decision of whether sanctions are in order, upon the company's adoption and enforcement of the topics covered by the audit questionnaires. Companies should bear in mind that the AFA has announced that it will revise its guidelines on a yearly basis, which will allow companies to observe its evolving understanding and enforcement strategy of anti-corruption laws.

Companies would do well to prepare in advance answers to the questionnaire regardless of whether they have been targeted for auditing, in part because it would be quite impossible for them to answer all the questions in the two

weeks allotted for response. Moreover, this will allow them to pre-emptively determine whether, in the eyes of the AFA, they are in conformity with French anti-corruption laws and make the improvements necessary to avoid sanctions.

GTDT: How have developments in laws governing data privacy in your jurisdiction affected companies' abilities to investigate and deter potential corrupt activities or cooperate with government inquiries?

LCT: The EU General Data Protection Regulation (GDPR) came into effect on 25 May 2018. The enactment of this new law has created waves across the continent and the world, as it was seen by many as a thorough overhaul of previous data protection laws. This has created some unease for compliance officers and departments, as their activities are now partly constrained by the rules of the GDPR. In addition, there is a sense that companies have diverted their focus – and resources – towards reforming their internal policies to conform with the GDPR at the expense of Sapin II and other anti-corruption laws because the sanctions that may result from violations of the former are more significant than for the latter.

The impact of the GDPR is broad as it has affected a number of different fields. Though it does not have the purpose of combating corruption, it may have a tangential effect on compliance because it requires companies to compile and catalogue more detailed information regarding third parties, which may allow companies to detect red flags faster and more effectively.

In France, the enactment of the GDPR was accompanied by the adoption of the Law on the Protection of Personal Data, which came into effect in June 2018. One development imposed by this new law is the expansion of the powers of the CNIL, the French data privacy watchdog, including its broadened investigatory powers and ability to participate in joint investigations with other supervisory authorities.

On the whole, both the GDPR and the Law on the Protection of Personal Data have side effects that can enhance a company's ability to identify, deter and address possible instances of corruption. However, in practice, there remains a concern that the emphasis on these new regulations will divert time, resources and motivation from efforts to ensure adherence to Sapin II and other anti-corruption laws.

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