

MONITORAT

26

The Independent Corporate Monitor: Who, What, When and How?

Feedback from Laurent Cohen-Tanugi

A monitorship may be imposed on a company pursuant to a settlement with the DOJ, the SEC, the SFO, the World Bank, competition authorities, or other law enforcement agency. It is an additional sanction usually imposed along with a monetary penalty. An independent monitor is appointed to assess and audit the implementation of the commitments made by the company in the field of compliance. In France, this new instrument is under the control of the French Anticorruption Agency in its area of competence. Laurent Cohen-Tanugi, who has performed several monitorship mandates, has agreed to answer our questions.

International Review of Compliance and Business Ethics: What are the role and missions of a monitor?

Laurent Cohen-Tanugi: A monitor is occasionally imposed on a company as part of a settlement with prosecuting authorities, such as the US Department of Justice (“DoJ”), to ensure that the sanctioned company will abide by its undertakings and implement a compliance program robust enough to avoid future wrongdoing. The fundamental role of the monitor is to perform a systemic and dynamic assessment of the sanctioned company’s compliance program and organization, and to cause the company to bring such program and organization to a level consistent with international best practices.

The monitor is independent from both the company and the authorities, and has significant discretion to perform his/ her mandate according to his/her best professional judgment. But to be effective as an independent professional, the monitor must have the trust of both the company and the prosecuting authorities, as it is a cooperative endeavour.

IRCBE: You were appointed as an independent corporate monitor by the DoJ and the Securities and Exchange Commission for Alcatel-Lucent in 2010. Can you tell us more about the case and the selection process?

L. C.-T.: Alcatel-Lucent, a French-American company listed on the New York Stock



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Exchange, reached a settlement in 2010 in the form of a Deferred Prosecution Agreement (“DPA”) with the DoJ and the Securities and Exchange Commission (“SEC”) in connection with violations of the Foreign Corrupt Practices Act (“FCPA”) in a number of countries. As part of the DPA, the company agreed to appoint an independent compliance monitor for a three-year period. Sanctioned companies are typically invited to propose three candidates, among whom the authorities select and appoint the monitor. As was the case for other French companies

such as Technip and Total, the US authorities agreed to let the company nominate a French monitor. As a French international lawyer fully familiar with the US legal system, I was nominated as the company’s preferred candidate and was appointed by the US authorities following an interview and vetting process.

IRCBE: Can you explain your missions within the company?

L. C.-T.: The first priority is always to gain a good understanding of the company’s business activities and organization, the associated risks, and the existing governance and compliance system, in order to assess the adequacy of such compliance system against those risks. This allowed me and my team to issue a first set of recommendations designed to remedy the most significant gaps. Thereafter, we dived deeper into the assessment of the design, implementation and effectiveness of the company’s compliance functions, followed up on our initial recommendations, and issued further recommendations. We also undertook a significant number of country visits designed to assess the workings of the compliance program on the ground in high risk territories or in significant markets. Throughout the monitorship, we proceeded on the basis of document review, interviews of company personnel at all levels, and transaction and systems testing.

IRCBE: It is the monitor’s duty to report on a regular basis on the progression of the company’s compliance program. Can you tell us more about the content of such reports, if the first report has distinctive features, and at what pace do you submit reports?

L. C.-T.: In a typical FCPA monitorship, reporting is due on an annual basis. The first report includes the initial assessment and recommendations I just mentioned, while the next two involve deeper analysis of the compliance functions and following-up on the implementation of the initial and subsequent recommendations. Recommendations are a key instrument of the monitor as, once discussed and agreed with the company, they become binding on it. The final report also addresses the sustainability of the compliance program beyond the term of the monitorship, so that the monitor can certify that the company’s compliance system has reached a level

of maturity reasonably likely to avoid future wrongdoing.

IRCBE: For Alcatel's monitorship, to whom did you report?

L. C.-T.: To the board of directors and senior management of the company, and to the authorities.

In the case of Alcatel-Lucent, an intergovernmental agreement had been reached between France and the United States, allowing the monitor to deliver his reports to the Service central de prevention de la corruption ("SCPC") which, following a review by an interministerial committee including representatives of the ministries of Justice, Economy and Foreign Affairs, delivered my reports to the US authorities. This arrangement was intended to ensure that the monitor's reports were compliant with the French blocking statute and other French legal requirements. My reports were always transmitted by the SCPC to the US authorities without any redaction.

IRCBE: You have also been appointed monitor by the World Bank of another French group. What are the distinctive characteristics of this monitorship?

L. C.-T.: Following my FCPA monitorship of Alcatel-Lucent, I was indeed appointed

by the World Bank to monitor a French civil engineering group that had been sanctioned for various irregularities in connection with projects financed by the World Bank.

A World Bank monitorship is essentially similar to an FCPA monitorship as far as the mission of the monitor is concerned. There are, however, certain differences. First, the World Bank's focus on integrity is broader than the domain of corruptive practices, and includes fraud, conflicts of interest, etc. Second, as a development agency, the World Bank allows for a greater advisory role of the monitor, especially as sanctioned companies often include small and medium-sized businesses as well as enterprises in developing countries. Third, while the DoJ tends to delegate the monitoring work entirely to the monitor, the World Bank maintains a direct relationship with the company and may conduct its own investigations, with the assistance of the monitor.

IRCBE: What do you think of the monitorship "à la française" under the control of the French Anticorruption Agency?

L. C.-T.: It is too early to assess the way in which the French Anticorruption Agency (Agence Française Anticorruption, "AFA")

will conduct or oversee monitoring activities. However, I note that certain features of the French legal framework in that regard are at odds with international practice. First, the AFA intends to act itself as the monitor or to subcontract this role to experts. This means that sanctioned companies will not be able to nominate candidates they trust. Second, Law Sapin 2 requires the CJIP - the French equivalent to the DPA - to include a cap on the monitoring fees that will be imposed on a company. This requirement can run against the goal of the law, as it is difficult to assess in advance how much work a company's compliance program will require and there is no rationality in favoring sanctioned companies over the objectives of anticorruption enforcement. This may cause the AFA to focus excessively on cost in its monitoring functions. Finally, country visits around the world are critical to an effective monitorship of global corporations, and the AFA's intentions in that regard remain unclear. The Société Générale anti-bribery monitorship recently entrusted by the DoJ to the French authorities will serve as a test case of France's ability to conduct monitorships consistent with international enforcement standards.