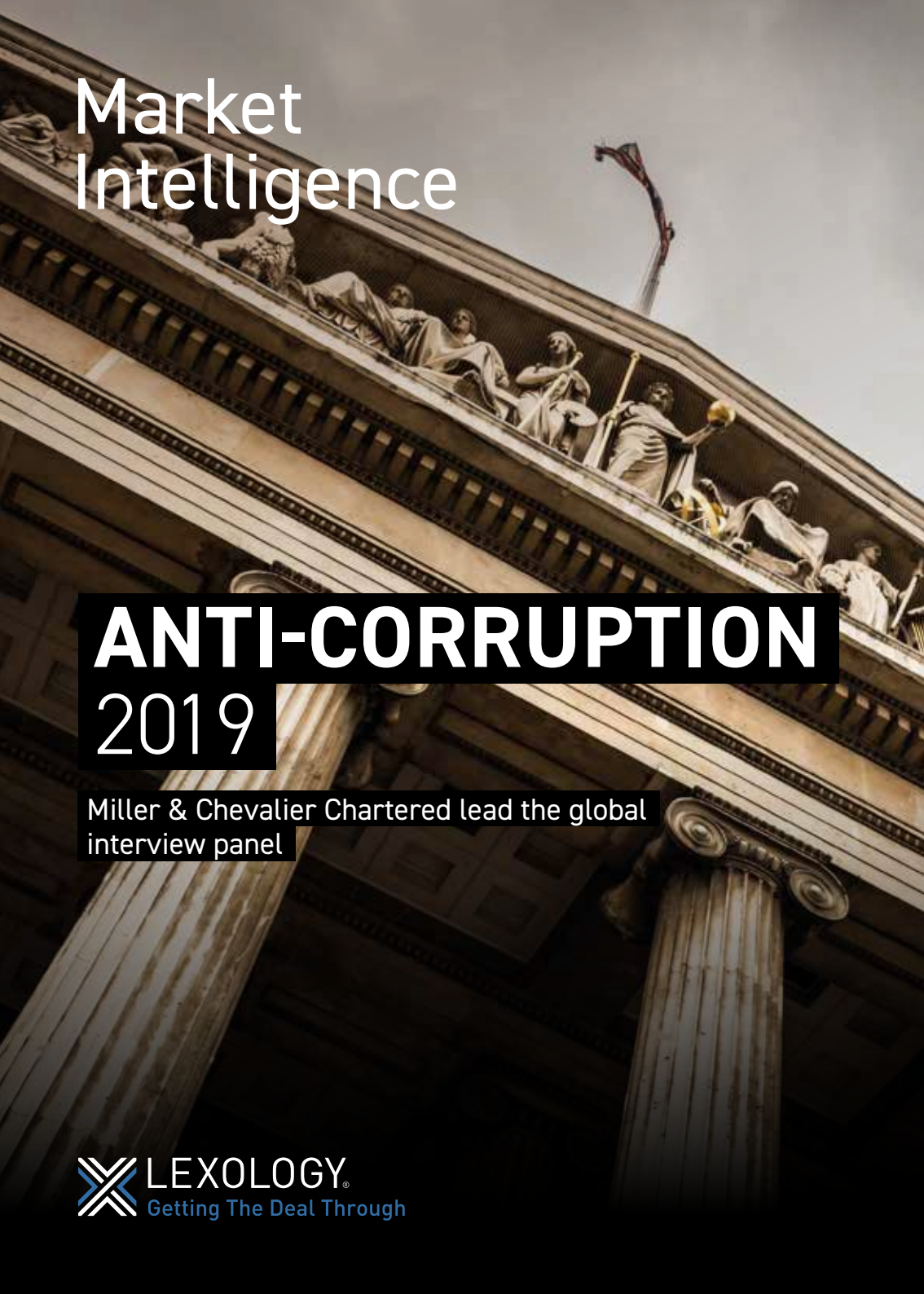


Market Intelligence

ANTI-CORRUPTION 2019

Miller & Chevalier Chartered lead the global interview panel

LEXOLOGY®
Getting The Deal Through

LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Business development manager
Dan Brennan
dan.brennan@gettingthedealthrough.com

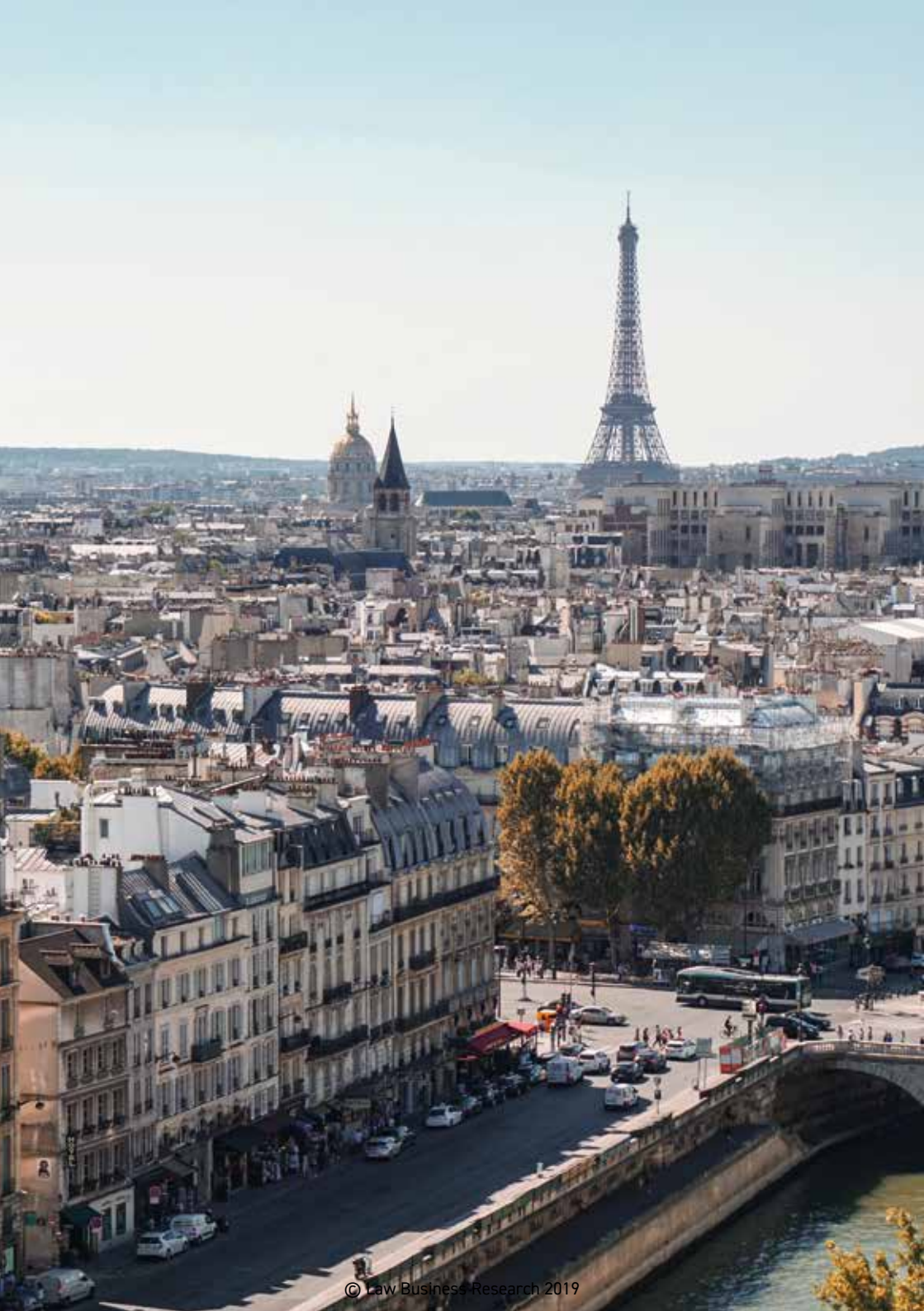
Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

Cover photo: unsplash.com/@pichler_sebastian

ISBN: 978-1-83862-194-0

Printed and distributed by Encompass Print Solutions

Anti-Corruption 2019



France

Laurent Cohen-Tanugi has fulfilled several mandates as independent corporate monitor, including as FCPA monitor of Alcatel-Lucent appointed by the US Department of Justice and US Securities and Exchange Commission. He also recently completed a three-year monitorship under appointment by the World Bank.

Based on its unique monitorship experience, Laurent Cohen-Tanugi Avocats also advises multinational companies on designing, implementing and assessing their compliance programmes, and in handling internal investigations and compliance crises.

Photo by Alexander Kagan on Unsplash

1 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?

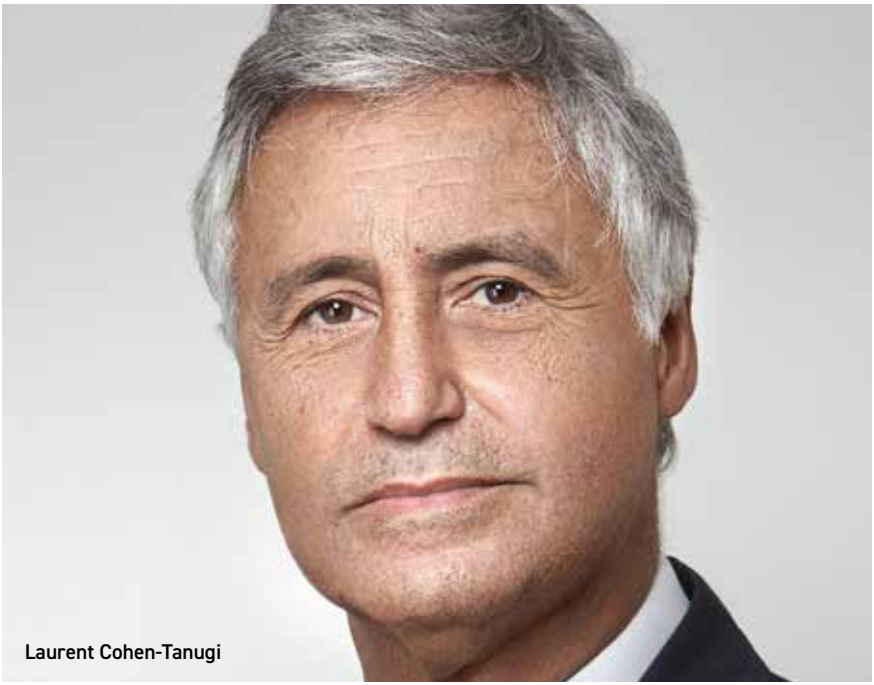
With France's new anti-corruption law, Law Sapin II, in its second year of operation, the compliance landscape in the country has continued to undergo significant development.

First, the French Anti-Corruption Agency (AFA) continued to ramp up its level of activity and its staff size. In 2017, the AFA conducted just six corporate audits; that figure increased to 43 in 2018. While only one of the 2017 audits involved a state-owned company, 15 state-owned enterprises were audited in 2018. In addition, 11 of the 2018 audits involved French subsidiaries of foreign companies. The message communicated by the range of entities selected in 2018 is clear: while the agency's focus remains on private companies, all entities are subject to review, regardless of whether they are controlled by governmental authorities or a foreign parent.

Thus, all entities should take steps to determine whether they meet the criteria requiring the implementation of a corporate compliance programme and, if so, whether their programme meets the standards of Law Sapin II. Even if a company does not meet the thresholds necessitating the implementation of a compliance programme by law, it may be advantageous to have one in place as that can be considered a mitigating factor, should the company be investigated and sanctioned.

Another noteworthy development was the AFA Sanctions Commission's first hearing, held in June 2019. The Sanctions Commission is the authority within the AFA with the power to sanction individuals and entities for failure to implement an adequate compliance programme. It may impose a monetary fine or require entities to adopt a compliance programme. Its six members are not full-time AFA employees but representatives appointed from France's three highest courts.

The hearing took place after the AFA conducted a company audit on a company named Sonepar at the end of 2017. The findings of the investigation were communicated to the director of the AFA in 2018, who seized the Sanctions Commission in March 2019. The agency claimed that its initial investigation revealed eight instances of non-compliance with Law Sapin II and that even after Sonepar provided additional information to counter the agency's claims, five instances of non-compliance remained. Chief among these were the lack of a risk map and insufficient internal accounting controls. As a consequence, the director of the AFA requested the Sanctions Commission to enjoin the company, as well as its legal representative, to implement a compliance programme meeting Law Sapin II's requirements; and were the company to fail to do so, the director requested the Commission to sanction it. The Sanctions Commission concluded that none of the allegations were justified and



Laurent Cohen-Tanugi

refused to pronounce an injunction or impose a monetary fine, a notable setback for the AFA's enforcement practices.

Finally, and perhaps most importantly, in June 2019 the AFA also published, together with the National Financial Prosecutor's Office (PRF), guidelines on the use of the newly created French settlement agreements – the Judicial Settlement in the Public Interest (CJIP and the CJIP Guidelines). I will come back to this later.

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

In its 2018 report, the AFA commented on the areas of compliance that it found companies particularly struggled with based on an aggregate review of its audits. It is possible that the agency will devote sustained attention to these areas. In particular, it pinpointed three shortcomings: an insufficient level of engagement by management, gaps in risk management systems and a lack of understanding of the main risks that a company is facing, particularly with respect to internal controls, third-party evaluations and the treatment of whistle-blowers. The agency further

observed that, at times, even when all these policies and procedures existed on paper, they were not implemented in an effective manner. It also identified three areas of weakness in state-owned entities: inadequate codes of conduct, gifts and invitations policies, and conflicts of interest procedures.

It is noteworthy that the agency devoted a subsection of its 2018 review to the need to combat corruption in organised sports, indicating that this could be a sector of interest, particularly given that all eyes will turn to France when it hosts the Olympics and Paralympics in 2024.

In April 2019, the AFA circulated a draft guide on mergers and acquisitions, which it followed with a draft guide on gifts and hospitality in July. This suggests that the agency considers these matters to be both important for an effective compliance programme and complex to implement, and that it may devote at least a portion of its focus to these two topics. The draft guide on mergers and acquisitions details the types of controls that should be effectuated. The draft guide on gifts and hospitality states that relevant corporate policies have to be sufficiently detailed and include examples to help employees understand the content of the policies. While these guides are useful, they remain drafts open to public comment and subject to change.

3 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?

The French authorities' future enforcement actions will likely be influenced by a number of recent developments, including the publication of the CJIP Guidelines. The Guidelines provide valuable insight into what the AFA and French prosecutors will consider when determining whether to prosecute a company and calculating the value of the monetary fine. They bring French enforcement policy closer to the US practices in several ways. This alignment does not come as a surprise as the CJIP is based on the US deferred prosecution agreement and the Guidelines herald a shift towards US-style enforcement.

The CJIP Guidelines' emphasis is on corporate cooperation, the missing link in Law Sapin II. When assessing the quality of cooperation, the authorities will consider various factors, including:

- whether the company conducted its own internal investigation and, if so, its effectiveness;
- the company's degree of participation in the governmental investigation and its willingness to provide information requested;
- whether the company self-reported and the timeliness of this disclosure; and

"Of particular interest is the requirement that a company have a pre-existing effective compliance programme in order to be eligible for a CJIP."

- whether the company indemnified known victims before required to do so by law.

In line with US practice, in order for cooperation to be considered complete, the company needs to supply evidence of individual employee liability.

The CJIP Guidelines have no legally binding authority, but provide valuable insight into the enforcement policy and goals of the French authorities. Specifically, they point to what the PRF will look at when determining whether to offer a CJIP or proceed to prosecution. Companies would be well advised to familiarise themselves with the policies contained in this document and ensure that they have the capacity to meet the requirements that would weigh in favour of non-trial resolution, should they be prosecuted. Of particular interest is the requirement that a company have a pre-existing effective compliance programme in order to be eligible for a CJIP.

The incentive to enter into a CJIP has been greatly increased by the record-setting fine the Paris Criminal Court imposed on the Swiss bank UBS in February 2019 for its role in aiding its clients commit tax fraud. It is reported that UBS had initially hoped to settle as the French bank Société Générale had done in 2018. However, it declined the settlement proposed by the French authorities and is

now facing a staggering €3.7 billion fine. While not involving a corruption case, this outcome, which may still be reversed on appeal, will encourage companies to cooperate during settlement negotiations rather than going to litigation and risking considerable fines.

Let me mention a couple additional developments. First, the AFA Sanctions Commission's rejection of all claims brought by the agency in the much-anticipated first sanctions hearing constitutes a public defeat for the agency. It is possible that going forward, companies and their lawyers will seek to resist the AFA's demands related to audits, which would likely result in litigation. Second, the PRF is preparing for new leadership following the retirement of Eliane Houlette in June 2019. Ms Houlette is credited with establishing the PRF and bringing it to the forefront of the national fight against economic crime. Her replacement has not yet been officially named and it remains to be seen whether the new leadership will be as dynamic and internationally-minded as the initial one.

4 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?

The French authorities are seeking to cement their role as a leader in the fight against corruption. One way in which it aims to achieve this is by participating in cross-border investigations, as it did in the *Société Générale Libya* corruption case that resulted in an important deferred prosecution agreement where the French bank agreed to pay a fine to both US and French authorities. In addition, in 2017, the PRF announced that it would begin investigations into Airbus for acts of corruption. This came on top of an investigation already launched by the UK Serious Fraud Office against Airbus, with which the PRF is cooperating. At the end of last year, the US Department of Justice announced it too had opened an investigation on the company for alleged corruption and had requested relevant information from its French and UK counterparts. The ongoing teamwork of three key anti-corruption enforcers will be a test case for the efficacy of cross-border governmental cooperation.

The CJIP Guidelines provisions regarding the French Blocking Statute may indirectly foster multi-jurisdictional proceedings. The Blocking Statute, a 1968 law amended in 1980, prohibits French nationals and habitual residents from communicating business information deemed sensitive to foreign authorities, even when faced with a direct request from a foreign authority. The CJIP Guidelines provide that the AFA, who is tasked with enforcing the Blocking Statute with respect to information transmitted by corporate monitors appointed by foreign enforcement authorities,

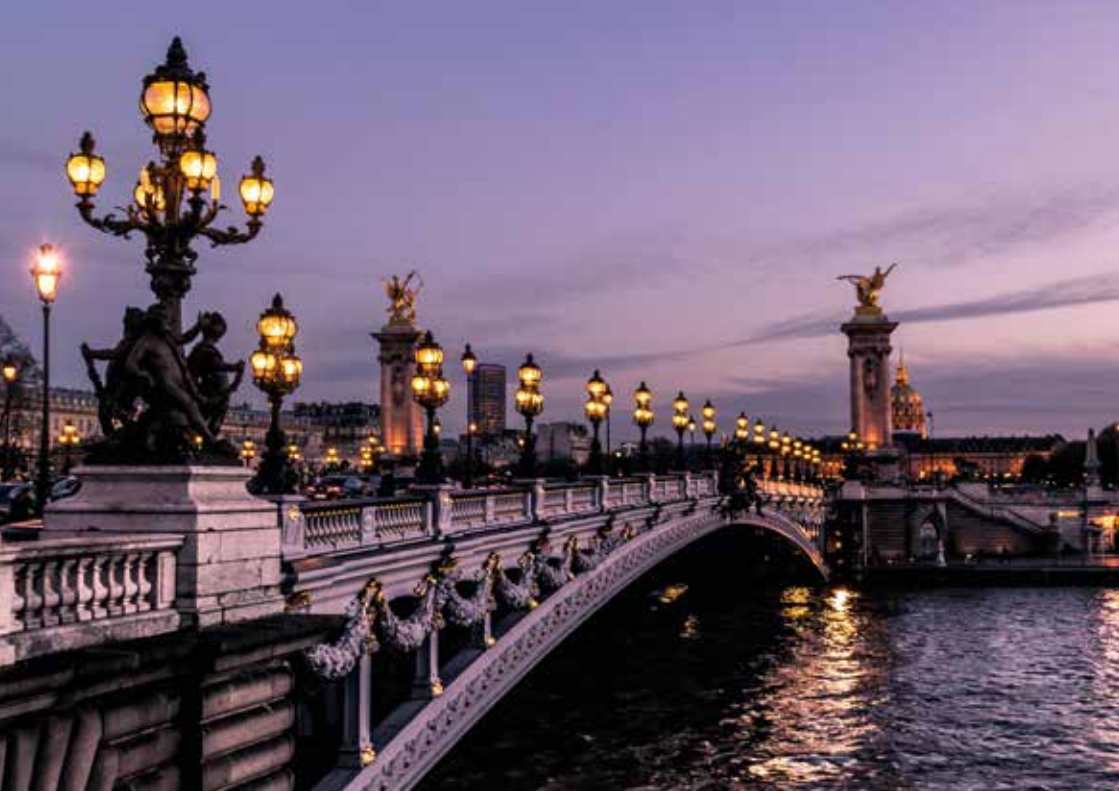


Photo by Léonard Cotte on Unsplash

is required to disclose the information collected to the French prosecutors, which may prompt them to initiate their own investigation. The Blocking Statute has been criticised in the past for not being diligently enforced by the French government. Earlier this year, parliamentary member Raphaël Gauvain voiced this concern in a report to the Prime Minister, where he called for better enforcement of the Blocking Statute while taking steps to ensure that this does not impede international cooperation.

That said, certain positions taken in the CJIP Guidelines regarding international cooperation raise questions about the ability of the French authorities to engage constructively in cross-border cooperation. For example, the guidelines state that the appointment of a single monitor is preferable in multi-jurisdictional proceedings but if such proceedings involve a company that is headquartered in or conducts operations on French territory, the French Criminal Code requires this single monitor to be the AFA. The enforcement authorities of other countries may be reluctant to relinquish this level of control to a foreign governmental agency, in particular considering that certain authorities favour monitoring of a company's compliance programme by an independent third party.

"CJIPs are not available to individuals, which increases the potential for conflicts of interest between the corporation and senior management."

Though the AFA stated in its 2018 annual report that it will continue to engage in cross-border investigations and cooperation, whether it has the resources required to fulfil this objective remains to be seen.

5 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?

The balance between enforcement of the French compliance regime against corporate entities as opposed to individuals was unclear when Law Sapin II was enacted. The main headlines concerning the new compliance regime during the first year and a half of its existence revolved around cases involving entities. However, the treatment of physical persons was brought back into the spotlight with the June Sanctions Commission hearing, which involved claims brought not only against the company Sonepar, but also its president. Law Sapin II provides that the administrative fine for failure to implement an anti-corruption programme applies to the CEO as well as to the company; the issue is to what extent the CEO can delegate this responsibility. The *UBS* case in February also resulted in sanctions for five of the six former executives who were prosecuted along with the bank. The convicted individuals received suspended prison sentences and were ordered to pay monetary fines between €50,000 and €300,000.

Both of these cases suggest that French authorities are not solely focused on big ticket corporate liability and will prosecute individuals. In a speech at the 2019 Organisation for Economic Co-operation and Development Integrity Forum, Ms Houlette, then the head of the PRF, stated that her office did not intend to leave individuals out of the enforcement focus. I would, therefore, advise compliance professionals and corporate managers alike to maintain an active and permanent role in the development of the corporate compliance programme and the red flag response mechanism, as is required by law, and to make sure that they are adequately protected by their corporate insurance policies. This is critical because the potential for individual liability for acts of corruption in France remains a possibility for a variety of violations, including the failure to have an effective corporate compliance programme in place. The risk may be heightened for mid-level managers who may find themselves put forward as scapegoats by senior management to obtain a corporate resolution and protect themselves during a government investigation. And, as a reminder, CJIPs are not available to individuals, unlike in the US, which increases the potential for conflicts of interest between the corporation and senior management.

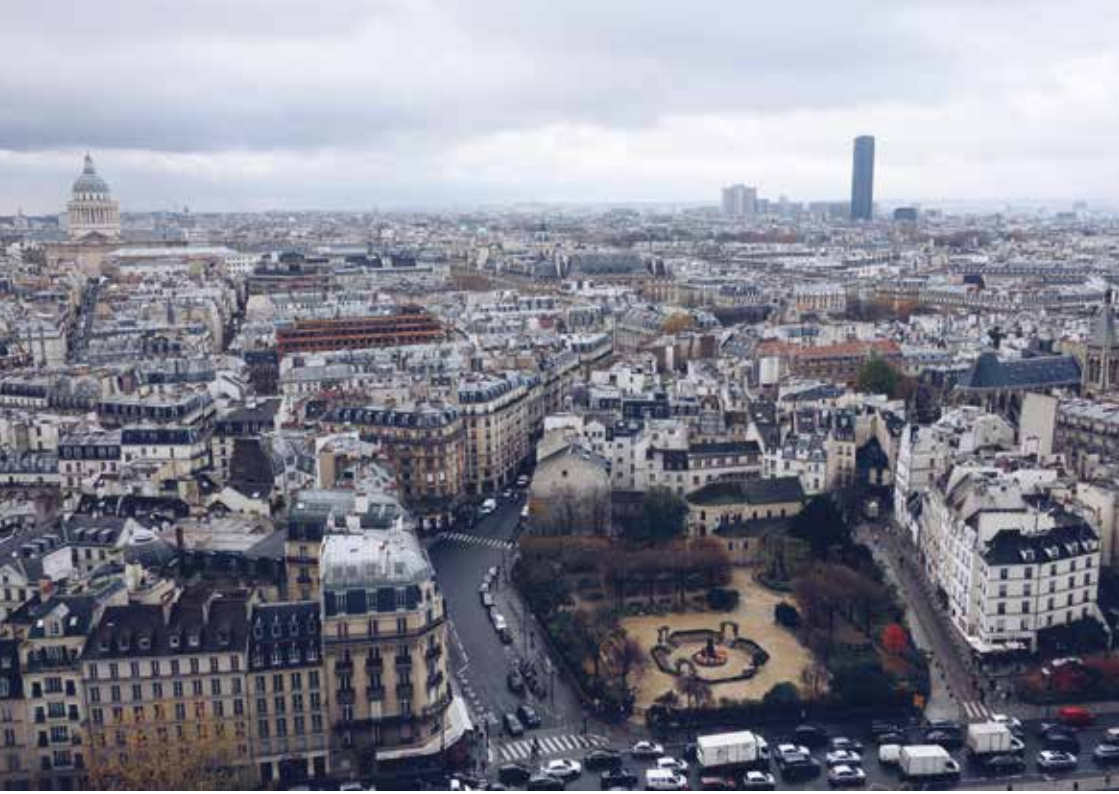


Photo by George Kantartzis on Unsplash

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

The components necessary for a compliance programme to be considered effective are listed in article 17 of Law Sapin II and explained further in the 2017 AFA Guidelines. As discussed above, the AFA also circulated draft guides on mergers and acquisitions, and gifts and hospitality earlier this year.

The analysis in the Sanctions Commission's first decision also provides some insight into future enforcement practices. The compliance community was keen to observe the rollout of the first sanctions procedure and, in particular, to see which company would be selected as the first to be brought before the Sanctions Commission, as the choice may indicate the direction of the AFA's focus going forward. It is interesting that the first company does not possess the profile that the AFA had generally been expected to target. Sonepar is a family-owned French company engaged in the sale of electronic products and services. Though it has an annual turnover of upwards of €20 billion and operates in 44 countries, with 45,000

employees and a largely French presence, it is not the multinational conglomerate that it was expected the AFA would use to set the standard. This is particularly true as most of its product orders are for relatively small amounts and it has minimal governmental clients.

The allegations against Sonepar were that its compliance programme did not meet the standards laid forth under Law Sapin II, particularly with respect to its risk map, code of conduct, third-party evaluation procedures, accounting procedures, and internal controls and evaluations. While not a guidance per say, the elements that the Sanctions Commission focused on during its evaluation can inform companies of what authorities may consider when assessing the same compliance programme prongs in the future. For example, the Sanctions Commission appreciated the detailed nature of the risk map, which included over 40 different risk scenarios. A pilot version of the risk map was deployed in three selected foreign subsidiaries to test its efficacy outside of France. Its code of conduct was also considered effective in part due to the breadth of topics it covered, such as embargoes and international sanctions, corruption and the traffic of influence, conflicts of interest and facilitation payments.

Regarding the third-party evaluation procedures, the Sanctions Commission noted with satisfaction the existence of a procedure for mergers, reinforcing the purpose of the guide on mergers and acquisitions. The commission also applauded the evolution of the third-party evaluation, accounting and internal controls procedures, which were revised with feedback from management of foreign subsidiaries and based on the results of the risk map.

Ultimately, the Sanctions Commission found no violation, which in my view sends a negative signal to an already reluctant business community. As we have only seen one decision rendered thus far, it is difficult to determine which will prevail between the increasingly demanding enforcement trend of the AFA and the more lenient approach of the commission.

7 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?

France amended its Data Protection Act in 2018 in order to bring its legislation in line with the European Union's General Data Protection Regulation. The revised legislation changed some of the policies regarding the collection and storage of personal information. For example, the notion of 'sensitive data' has been expanded, so companies need to ensure that the information gathered during a due diligence procedure does not violate the regulation. Moreover, the transfer of personal data

outside of the European Economic Area is subject to new restrictions. The National Commission for Informatics and Liberties (CNIL) – the French data protection agency – may request the French administrative courts to temporarily suspend the transfer outside the area until it has been determined that adequate safeguards are in place.

The CNIL has recently sanctioned several large French and international companies, including Uber and Bouygues Telecom, for violations of data privacy regulations. It topped this off with a €50 million fine on US tech giant Google in January 2019 for its failure to provide users with sufficient information on how their data will be collected and processed. This sanction represents the largest monetary fine the CNIL has ever imposed and, at the time, was the heaviest financial sanction by an EU country for a violation of the GDPR.

These enforcement actions signal that the CNIL is taking this new piece of legislation seriously and that data privacy is likely to be a focus going forward. Companies should ensure that their data collection, processing and storage procedures are in line with the GDPR and French law to avoid hefty fines, including in connection with internal investigations and cooperation proceedings.

Laurent Cohen-Tanugi
laurent.cohen-tanugi@cohen-tanugi.com

Laurent Cohen-Tanugi Avocats
Paris
www.laurentcohentanugiavocats.com

The Inside Track

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

Experience as a general corporate lawyer is most valuable when advising management on anti-corruption compliance, given the breadth and depth of what is involved. In addition, as French lawyers still have relatively little experience in anti-corruption enforcement, internal investigations, non-trial resolutions 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 increasingly aligning with international enforcement standards.

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

Beyond the 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, the uniqueness of advising in that field stems from its novelty 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. Many issues remain unsettled and the landscape is constantly evolving, which makes the practice challenging and exciting.

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

The independent monitorships I have conducted by appointment by the US Department of Justice and the Securities and Exchange Commission, as well as the World Bank, for seven years straight remain a unique experience that is hard to beat. Acting as a monitor over such a long period of time, with the powers associated, gives you invaluable insight into corporate behaviour and the expectations of international regulators. Recently, we have had the opportunity to combine our international arbitration and anti-corruption expertise, as my colleague Emmanuel Breen and I have served as expert witnesses in international arbitration proceedings centred on anti-corruption compliance.

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Miller & Chevalier Chartered, this *Anti-Corruption* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

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 significant cases and deals.

International enforcement trends
Compliance programmes
Data privacy
2020 outlook

an LBR business

ISBN 978-1-83862-194-0