Market Intelligence

ANTI-CORRUPTION 2020

Global interview panel led by Miller & Chevalier Chartered

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Publisher
Edward Costelloe
edward.costelloe@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

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

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

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Anti-Corruption 2020

France

Founded in 2008 as a boutique international firm, Laurent Cohen-Tanugi Avocats has, within a few years, become one of the leading independent French firms in the compliance area. Along with cross-border mergers and acquisitions and international arbitration, the firm's practice areas include corporate governance and international regulatory compliance, with a strong focus on anti-corruption compliance and transatlantic white-collar criminal proceedings.

A member of the Paris and New York Bars, Laurent Cohen-Tanugi has fulfilled several mandates as independent corporate monitor, including as Foreign Corrupt Practices Act monitor of Alcatel-Lucent, appointed by the US Department of Justice and US Securities and Exchange Commission. He is also regularly involved in international litigation and arbitration proceedings.

Emmanuel Breen has advised numerous French companies in the development of their anti-corruption compliance programmes. He founded and co-chairs the compliance curriculum at leading French law school Paris II Panthéon-Assas.

Laurent Cohen-Tanugi Avocats was recently selected by the French Anti-Corruption Agency as one of its expert consultants in the context of corporate audits to be conducted by the agency pursuant to the Sapin Law II.

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?

Laurent Cohen-Tanugi: With France's recent anti-corruption law, the Sapin Law II, in its third year of operation, the compliance landscape in the country has continued to undergo significant development.

In January 2020, the French government launched an Anti-corruption Plan for 2020–2022 (the 2020 Anti-corruption Plan) promoting corporate transparency and integrity. The plan aims to more efficiently detect and sanction transnational corruption. This plan is emerging in the context of the organisation of the Rugby World Cup in 2023 and the Olympics and Paralympics in 2024 by France, during which all eyes will be focused on the country.

In this context, the Ministry of Justice has issued its first criminal policy circular (the Circular) dedicated solely to the fight against foreign bribery. In addition to encouraging self-reporting of acts of corruption, the Circular provides prosecutors with a toolkit for identifying and prosecuting corruption schemes. It also reflects the paradigm shift within the French criminal legal framework in respect of international corruption and shows the government's will to become a key player in that fight. Among other signals, the Circular sends a message to companies worldwide that France will proactively combat corruption practices. It also signals that France's enforcement priorities are shifting towards transnational bribery, by emphasising the UK-style broad jurisdictional scope of the Sapin Law II that has not yet been used.

Another landmark event was the record-breaking multi-jurisdictional settlement concluded with Airbus in January 2020. The aeronautics giant paid combined penalties of more than €3.6 billion to resolve foreign bribery charges with French, UK and US authorities arising out of the company's scheme of using third-party business partners to bribe government officials.

Finally, the French Anti-Corruption Agency (AFA) Sanctions Commission issued its second decision in February 2020, which provides additional insights into the agency's expectations with regards to Sapin II compliance programmes. Following a comprehensive audit, French company Imerys was referred by the AFA to its Sanctions Commission for an alleged violation of three provisions of article 17 of the Sapin Law II. The commission affirmed two breaches out of the three invoked and issued injunctions for the first time, without any financial penalty.

Since March 2020, compliance activities have largely been put on hold by the covid-19 pandemic. However, in light of the developments I have outlined, companies would be well advised to use this time to bridge their compliance gaps and adapt their compliance systems to the new challenges resulting from the pandemic.


Laurent Cohen-Tanugi


Emmanuel Breen

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

Emmanuel Breen: Obviously, there is no one-size-fits-all risk assessment for French companies and each company should carefully map its own risks, with a specific focus on traditional hot spots such as public procurement, public–private partnerships, commercial agents and other types of intermediaries, and export activities in countries where corruption is pervasive.

In France, this risk assessment is performed in a very regulated environment. It is mandatory for all companies above certain size thresholds, as per article 17 of the Sapin Law II. The AFA pays a lot of attention to this exercise and has developed a comprehensive and strict anti-corruption risk assessment methodology in its 2017 Guidelines (the 2017 AFA Guidelines). The first two AFA enforcement cases alleged breaches of risk-mapping requirements.

That said, companies that are subject to the Sapin Law II should monitor two areas of risk with particular care.

"With increased remote working, companies may have loosened the pressure on their employees and reduced their controls."

First, the vetting and monitoring of a company's third parties should be treated as an absolute priority. French law does not provide for mechanisms of vicarious liability similar to those in the FCPA or the UK Bribery Act, and French executives may be tempted to rely on the idea that not being aware of the exact nature of their business partners' dealings may protect them from legal liability. However, this wilful blindness approach is increasingly dangerous, in light of US and UK policies of extraterritorial enforcement. This was evidenced recently in the *Airbus* case, where a limited US and UK nexus did not prevent Airbus from settling with those two countries in addition to the French settlement, for facts involving alleged bribery through a foreign intermediary.

In France, article 17 of the Sapin Law II now expressly mandates that companies falling within its scope implement 'procedures for evaluating the situation of clients, direct suppliers and intermediaries, in connection with the risk mapping' (article 17 (II), measure No. 4, unofficial translation from French). This should constitute an additional incentive for French companies to tackle their third-party risk.

A second risk area that should be addressed with particular care is the proper design and implementation of anti-corruption accounting controls. A specific

provision of article 17 of the Sapin Law II makes it mandatory to implement these controls and the Circular recommends that in the many cases where bribery could not be proven, the prosecutors should consider relying on other offences such as the lack of sincerity of the annual accounts. In our recent experience, while large companies generally operate with strong internal control and audit departments, the accounting controls that are specifically needed to address key anti-corruption policies such as gifts, invitations and sponsorship are not always in place. Failure to set up a transversal task force within the company between legal, compliance and finance to monitor these controls is in my view a key risk factor.

Generally speaking, also, a sufficient degree of attention should be put on whistle-blowing and alert mechanisms. Today, in France, hotlines are mandatory by law, but while they are effectively set up in many companies, they often remain largely under-utilised. This relatively new tool in the French context will undoubtedly continue to develop and will be used more and more by employees and managers, who may also be tempted to report directly to the authorities or the media, as is now facilitated by the new EU whistle-blowing directive. Companies that have a French and European footprint should, therefore, be prepared to handle a wave of reports, internal or external, which generate specific risks such as cover-up, breach of confidentiality or other forms of inappropriate management of the alerts.

Finally, the circumstances resulting from the covid-19 pandemic pose new compliance risks for companies. With increased remote working, companies may have loosened pressure on their employees and reduced their controls. We, therefore, strongly recommend that companies use this period to identify and fill in any potential control gap resulting from the crisis. It would be a mistake to respond to the economic uncertainties of the time by stepping back the compliance programme and budget, or even cutting corners, thus only risking triggering future compliance crises.

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?

LC-T: I would not speak of a change, but rather of inflexions, based on the content of the 2020 Anti-corruption Plan and the Circular.

France is determined to improve its ability to detect corruption by increasing the involvement of government agencies and developing its data collection capacity.

The government is also looking to strengthen its enforcement actions by providing French prosecutors with detailed instructions on how to prosecute

international corruption. The country is expected to particularly focus on foreign companies, as the Circular details the international reach of the Sapin Law II and confirms that companies of any size may be investigated provided they have a 'link' with France.

CJIPs – the French equivalent of US and UK deferred prosecution agreements (DPAs) – are bound to become the preferred resolution instrument of anti-corruption prosecutions, as they have become in the US these past 10 years. Particularly in multi-jurisdictional investigations, a negotiated resolution allows both the government and companies to benefit from a single joint settlement as illustrated by the *Airbus* resolution. The French government is currently looking to expand the use of CJIPs beyond the areas of anti-corruption, the fight against tax fraud and influence peddling.

The National Financial Prosecution Office (PNF) has become the primary counterpart of foreign enforcement authorities and played a leading role in the *Airbus* investigation and resolution. However, due to alleged illegal wiretapping and surveillance in recent high-profile political scandals, the PNF is now under attack for potential political instrumentalisation. Investigations are in progress, the outcomes of which risk weakening an institution that has so far been at the forefront of France's anti-corruption enforcement.

Another uncertainty involves the AFA, which was originally presented as a core player in the fight against corruption, but plays a lesser role in the 2020 Anti-corruption Plan. The AFA's 2019 statistics indicate that the agency focused more on awareness-raising initiatives and the development of international cooperation agreements than on controls. For example, in 2018, the AFA carried out 43 company audits, compared to 36 in 2019. Also, since 2017, only two companies have been referred to the AFA's Sanctions Commission. This raises the question of whether this shift will continue or whether the AFA will finally take the aggressive stance on the assessment of companies' compliance programmes announced when it was created.

Finally, the covid-19 pandemic has put enforcement activities on hold, including out of a concern about its impact on the financial situation of large sections of the economy. As an example, the AFA's monitoring of Airbus following the settlement reached at the beginning of the year has been delayed in consideration of the challenges facing the group and the entire aeronautics sector as a result of the pandemic. Whether the enforcement activities will resume in the ordinary course following the summer recess remains an open question.

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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?

EB: French authorities are seeking to affirm their leading role in the fight against corruption. One of their key objectives is to strengthen technical and operational cooperation with foreign enforcement agencies. To that end, the AFA recently entered into new cooperation agreements – the latest being with Egypt, Brazil and Kuwait – and was the instigator of a report mapping anti-corruption authorities globally in partnership with the Group of States Against Corruption, the Organisation for Economic Co-operation and Development, and the Network of Corruption Prevention Authorities.

The underlying objective of this policy is highlighted in the Circular. It indicates that the PNF shall systematically verify whether an economic operator involved in an international corrupt scheme is likely to fall within its jurisdiction. Therefore, it encourages the PNF to be proactive in researching, analysing and exploiting the

"Foreign enforcement authorities may be reluctant to cede control to a French governmental agency when their national companies are involved."

information it may gather, in particular within the framework of criminal mutual assistance requests between enforcement agencies.

Another way in which France aims to achieve this is by participating in cross-border investigations, as it did in the *Airbus* case, the largest global foreign bribery resolution to date. The cooperation that took place throughout the investigation sets an important precedent for future cross-border investigations. Initially opened by the Serious Fraud Office in 2016, the centre of gravity of the case progressively shifted to France and the PNF, which played a leading role in the investigation. Another key element was the ability of the enforcement agencies to reconcile the common law legal privilege and French professional secrecy rules throughout the investigation.

Although general cooperation agreements are in force, joint enforcement action remains subject to the increasingly tense trans-Channel and transatlantic relationship, in a context that an increasing number of French commentators describe as 'lawfare'.

In their guidelines, the French authorities have tried to defend the position of France in cross-border cooperation between enforcement agencies. For example, the 2019 CJIP Guidelines state that appointing a single monitor is preferable in multi-jurisdictional settlements and that, if such proceedings involve a company that is headquartered in, or conducts operations on, the French territory, the monitor should be the AFA itself. Although this did not raise an issue in the *Airbus* and *Société Générale* cases (both French companies), foreign enforcement authorities may be reluctant to cede control to a French governmental agency when their national companies are involved. However, practitioners will certainly try to pragmatically carve a solution that would combine the US tradition of appointing an independent monitor with the French approach that mandates the AFA monitoring, with the assistance, as need may be, of experts appointed by the agency.

Finally, it will be interesting to follow cases where French enforcement authorities will use the broad extraterritorial reach of the French anti-corruption legislation to try and settle with foreign multinational companies that operate in France, for misconducts not necessarily committed in France. This French response to extraterritorial enforcement actions by US and UK authorities will undoubtedly occur at some point in the future as part of an increasingly global 'enforcement market'. It should also be kept in mind that three accredited anti-corruption non-governmental organisations (Sherpa, Anticor and Transparency International) have by law the power to initiate enforcement actions in France for facts of transnational corruption. French law thus created a potentially attractive ecosystem for global anti-corruption activists.

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?

LC-T: The balance between enforcement of the French compliance regime against corporate entities and against individuals was uncertain when the Sapin Law II was enacted.

The main headlines concerning the new compliance regime revolve around cases involving entities. However, the treatment of physical persons was mentioned once again in connection with the Sanctions Commission hearings, as it involved claims brought against the companies as well as their presidents. The Sapin Law II provides that the administrative fine for failure to implement an anti-corruption programme applies to the CEO and the company, but the issue is to what extent the CEO can delegate this responsibility.

It is also worth mentioning that, for the past four years, France has been experiencing a trend towards prosecution and conviction of political figures involved in integrity scandals, notably the former prime minister and presidential candidate François Fillon and the former budget minister Jérôme Cahuzac. Also, the AFA recently entered into a cooperation agreement with the High Authority for Transparency in Public Life – an authority responsible for ascertaining and preventing potential conflicts of interest among French civil servants.

These developments suggest that the French authorities are not solely focused on big ticket corporate liability and will prosecute individuals. This trend is confirmed by the Circular, which encourages the prosecution of both legal and physical persons. It rightly provides that prosecution should be considered not only against employees directly involved in the corrupt scheme, but also against senior executives and third parties who were involved in the process of committing the offence.

Compliance professionals and corporate managers should, therefore, maintain an active and consistent role in the development of corporate compliance programmes and red flag response mechanisms, as required by law, and ensure that they are adequately protected by their corporate insurance policies. This is important 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 in place an effective corporate compliance programme. 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. Further, as a reminder, CJIPs are not available

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to individuals, unlike in the United States with DPAs, increasing the potential for conflicts of interests between the corporation and senior management.

Finally, in June 2020, the highly publicised French criminal lawyer Eric Dupond-Morretti, who acted as defence lawyer in several of these cases, was appointed Minister of Justice as a result of a government reshuffle. As a strong advocate of fundamental liberties and being highly critical of certain aspects of the French judicial system, such as the institutional confusion between judges and prosecutors, his mandate might lead to structural reforms regarding individuals.

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?

EB: Article 17 of the Sapin Law II lists eight components of an effective anti-corruption compliance programme:

- upper management commitment;
- code of conduct;

"It remains to be seen whether the AFA will succeed in translating its strong compliance stance into successful enforcement actions."

- whistle-blowing system;
- risk mapping;
- third-party due diligence;
- accounting controls;
- training; and
- monitoring of the programme.

Each of these eight components is detailed in the 2017 AFA Guidelines.

In December 2019, the AFA circulated a guide on the corporate anti-corruption compliance function, which identifies the main tasks that shall be assigned to that function. The guide also highlights the importance of the positioning of the chief compliance officer within the company and of the resources dedicated to this function.

The AFA Sanctions Commission's second decision (*Imerys*) confirms two important aspects of the AFA's enforcement powers.

In line with its first decision, the Sanctions Commission confirms the non-binding nature of the 2017 AFA Guidelines. Companies are, therefore, allowed to take a different approach, but this choice has consequences that should be pondered very

seriously. If the company deviates from the guidelines, it will have to demonstrate to the AFA the relevance, quality and effectiveness of its compliance programme. On the contrary, if the company strictly follows the guidelines, its compliance programme will be presumed compliant with the Sapin Law II.

The Sanctions Commission also maintains, as a principle, that improvements to the compliance programme made after the initial AFA audit but before the decision of the Sanctions Commission may be taken into account in the sanctioning decision. This leaves in practice an approximative 18-month period for the company to improve its anti-corruption programme to the AFA's satisfaction after the initial audit. It would, however, be very ill-advised and risky to adopt a wait-and-see approach to Sapin II compliance.

It should also be noted that only two AFA enforcement procedures have been completed since the enactment of the Sapin Law II in December 2016, with mixed results and only limited case law on what an effective programme should be. It remains to be seen whether the AFA will, in the long run, succeed in translating its strong compliance stance into successful enforcement actions. In the short run, the unprecedented context created by the covid-19 pandemic will also certainly enter into the equation, with a possible temptation of the government to try and protect economically destabilised French companies against potential consequences of more aggressive compliance enforcement.

Finally, the Sapin Law II and the 2017 AFA Guidelines may reasonably be expected to undergo a review process in the coming months. We will monitor these developments closely, in order to understand how they might affect the effectiveness of France's enforcement and compliance framework and the regulatory burden of companies that operate in France.

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?

LC-T: In 2018, France amended its Data Protection Act in order to bring its legislation in line with the European Union's General Data Protection Regulation (GDPR). Thus, certain rules regarding the collection and storage of personal data were modified.

The notion of 'sensitive data' has been expanded and information gathered during a company's third-party screening process or in gifts and hospitality registries, therefore, fall under the GDPR. When a conflict occurs between data protection regulation and integrity-related legislation (anti-corruption, anti-money laundering

and tax fraud), certain discrepancies may place companies between a rock and a hard place with no choice but to breach the law.

In an effort to prevent such situations, the French Data Protection Authority provided useful guidance by publishing in July 2019 standards on the processing of personal data in the context of whistle-blowing systems. Similar clarifications would be welcome, especially in relation to third-party due diligence.

Finally, the covid-19 pandemic poses unique challenges for companies that are conducting internal investigations, particularly in relation to data protection in remote work settings. In June 2020, the French National Bar Council published a guide to assist lawyers in the context of internal investigations and provides useful guidance on their data protection obligations in that context, including the requirement to conduct a GDPR Privacy Impact Assessment prior to starting an investigation.

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

Emmanuel Breen
emmanuel.breen@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?

LC-T: 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 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?

EB: 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 anti-corruption stems from its novelty in the 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?

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

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