French anti-corruption compliance monitoring: differences from US corporate monitorships and implications for multijurisdictional settlements

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Laurent Cohen-Tanugi*
Laurent Cohen-Tanugi Avocats, Paris
laurent.cohen-tanugi@cohen-tanugi.com

Introduction

In December 2016, France adopted a wide-ranging new legal framework to tackle domestic and international corruption, the so-called Sapin II. The new law introduced preventive compliance obligations on major companies, as well as a new non-trial resolution instrument modelled on the United States' approach, a deferred prosecution agreement (DPA).[1]

This new legal framework significantly boosted France's record in fighting corruption, as recognised by the December 2021 OECD evaluation report.[2] It has also allowed French enforcement authorities' participation in a couple of recent multijurisdictional settlements involving Airbus[3] and Société Générale. Nevertheless, Sapin II stopped short of adopting an important institution of the US and international compliance landscape: independent compliance monitorships.

Key features of US-style independent monitorships

As US compliance practitioners are well aware, independent monitorships may be imposed on companies by enforcement authorities in connection with non-trial resolutions such as DPAs. As part of the settlement, companies undertake to implement an effective compliance programme designed to prevent recurrence of wrongdoing, and the monitor's mandate is to ensure compliance with this undertaking.

Monitors may be imposed by US enforcement agencies in connection with a broad range of economic and financial violations. Their mandate is specified by the DPA or other resolution instrument, and typically extends to the entire corporate organisation on a worldwide basis for a three-year duration. Monitorship candidates are proposed by the company and appointed by the relevant enforcement authority after appropriate screening.

A key feature of US monitorships is the monitor's independence from both the appointing authority and the sanctioned company. By delegating compliance monitoring to an independent expert, enforcement authorities expand the resources available to them at the expense of the sanctioned company. At the same time, the ability of companies to propose independent monitor candidates they trust facilitates the cooperative attitude which is expected from them.

As part of their mandate, monitors deliver annual reports on their activity to the appointing authority and the company's board of directors. They also issue compliance-enhancing recommendations that are binding on the company. At the close of the monitorship period, provided that the company has reached the expected level of effective compliance, the monitor certifies to that effect, allowing criminal charges to be dropped.

The US model has by and large been adopted by the United Kingdom in connection with the UK Bribery Act, as well as by international organisations such as the World Bank.

The French model of administrative monitoring

France's Sapin II does not mention the term 'monitor' and entrusts compliance monitoring functions to the French Anti-corruption Agency (AFA), which was also created under Sapin II.[4] The AFA is an administrative service part of the Ministry of the Economy, dedicated specifically to fighting corruption. One of its most important duties is to control companies' observance of the preventive anti-corruption compliance obligations imposed by Sapin II. The AFA is also tasked with the monitoring of compliance obligations imposed on companies in connection with a *convention judiciaire d'intérêt public* (CJIP),[5] the French counterpart to the DPA, or as part of a criminal sentence (*peine de programme de mise en conformité*).[6]

The French version of US/UK-style monitoring therefore presents striking differences to US and international practice:

- The first one is the limited substantive and geographical scope of French-style monitoring, which must specifically be provided by law and inures only to the AFA. It is, therefore, currently limited to violations in relating to corruption, influence peddling and money laundering.[7] The AFA also restricts the scope of its monitoring activities to France, excluding visits to high-risk countries where corrupt activities often prosper.

- To the extent that the AFA may be viewed as the single, centralised French monitor, it is an administrative body that is not even an independent agency.[8] In addition to a lack of independence from the state, this has several negative consequences, such as the potential shortage of resources and professional experience and expertise of the institutional monitor. The AFA is authorised by law to appoint experts. These experts

are selected through a public procurement process but are not independent from the agency.[9] The amount of external monitoring expenses is also capped in advance in the CJIP.[10]

- From the point of view of the company, the cooperative attitude encouraged by the ability to propose a trusted independent expert as monitor gives way to a defensive attitude against a government agency often suspected of investigating violations beyond corruption.

Implications for multijurisdictional settlements

These differences between French and international monitoring practices did not prevent France from participating in two significant multijurisdictional anti-corruption settlements involving French companies Société Générale and Airbus. In these two instances, the US Department of Justice (DoJ) and the UK Serious Fraud Office *de facto* entrusted post-settlement monitoring to France, that is to the AFA.

In the future however, proceedings may not run so smoothly. While the DoJ recently reaffirmed the usefulness of monitorships,[11] the French authorities have taken the position that the AFA should be the sole monitor in any multijurisdictional settlement involving 'a corporation whose reregistered or operational headquarters are located in France, or which carries out all or part of its economic activity on the French territory'.[12] US and/or UK authorities may take a different view in light of the limitations surrounding French monitoring practices, especially in cases involving substantial US or UK interests.

The recent strengthening of the French 'blocking statute' is likely to complicate international judicial cooperation still further. A decree of 18 February 2022 created a one-stop shop, the French *Service de l'information stratégique et de la sécurité économique* within the Ministry of the Economy, to which French companies must address foreign discovery requests, for purpose of assessing their sensitivity against critical French interests.[13] This has tightened the control procedure, reflecting the French government's desire to provide French economic interests with better protection against 'fishing expeditions', and will undoubtedly affect multijurisdictional settlements.

Notes

[*] The author is a former FCPA and World Bank Integrity monitor.

[1] Law No 2016-1691, 9 December 2016, which addresses transparency, anti-corruption and economic progress, the so-called 'Sapin II' Law, see **https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000033558528** accessed 18 April 2022.
[2] OECD, 'Implementing the OECD Anti-Bribery Convention Phase 4 Report France', Dec 2021, see **https://www.oecd.org/daf/anti-bribery/France-Phase-4-Report-EN.pdf** accessed 18 April 2022.
[3] DoJ, 'Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case', 31 Jan 2020, **https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case** accessed 18 April 2022.
[4] Art 41-1-2, I° of the Criminal Procedure Code.
[5] Art 41-1-2, I° of the Criminal Procedure Code.
[6] Art 131-39-2 of the Criminal Code.
[7] Art 131-39-2 of the Criminal Code, and Art 41-1-2, I, 2° of the Criminal Procedure Code. See also, Art 17 of Law No 2016-1691, 9 Dec 2016, Sapin II Law.
[8] Art 1 of Law No 2016-1691, 9 Dec 2016, Sapin II Law.
[9] Art 131-39-2 of the Criminal Code.
[10] Art 41-1-2, I° of the Criminal Procedure Code. See also, Art 8 of Decree No 2017-329 of 14 Mar 2017.
[11] L Monaco, 'Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies', US DoJ, 28 Oct 2021, pp 4-5.
[12] AFA, '*Lignes directrices sur la mise en oeuvre de la convention judiciaire d'interêt public*', p16 **https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf** accessed 18 April 2022.
[13] Decree No 2022-207 of 18 Feb 2022 on the communication of economic, commercial, industrial, financial or technical documents and information to foreign natural or legal persons.