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ANTI-CORRUPTION 2022

Global interview panel led by John E Davis of Miller & Chevalier

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

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START READING

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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 and white-collar areas. 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.

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

QUESTIONS

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?

The past year witnessed several important developments in the anti-corruption space.

The Organisation for Economic Co-operation and Development (OECD) released its Phase 4 country monitoring report on France. While acknowledging France's major achievements in the fight against corruption and enforcement of anti-corruption laws thanks to Law Sapin II and its recent non-trial resolution instrument (CJIP), the OECD underlined the need to preserve them through a substantial increase of enforcement resources. It also stressed the risks posed by several recent legislative reforms and proposals.

A Law of 22 December 2021 'on trust in the judiciary' raised controversies as to the boundaries of the French legal privilege in corruption and influence-peddling cases, and the reduction of length of preliminary criminal investigations. Preliminary investigations are now limited to two years, with a one-year renewal upon decision of the prosecutor, except in terrorism and organised crime cases. The statute also recognises the professional secrecy of lawyers in the preliminary article of the Code of Criminal Procedure, both in their defence and advisory activities. However, the professional secrecy for advisory activities is not general, and will not apply when advisory communications may have been instrumental to the commission or facilitation in cases of tax fraud, corruption or laundering of these offenses and financing of terrorism. Pursuant to a circular issued by the French Ministry of Justice on 28 February 2022, the protection of advisory communications will apply when persons have committed or believe they have committed an offence, but not when advice is sought from a lawyer prior to the commission of an offence, even if no criminal proceedings have been initiated. This was widely criticised by French criminal and corporate law attorneys.


Laurent Cohen-Tanugi

In addition, a new Whistleblower Law was promulgated on 21 March 2022 to implement the EU Directive of 23 October 2019. It extends the definition of whistle-blowers by replacing their report 'in a disinterested way' by the absence of financial compensation. It is no longer required that whistle-blowers have 'personal knowledge' of the facts they report. The law also protects facilitators, namely natural persons and non-profit legal persons and unions, when they provide assistance to a whistle-blower. The former may now choose between direct internal reporting within the organisation or external reporting to the judiciary or the Defender of Rights (the authority in charge of ensuring that rights are respected by public administrations). Public disclosure is open in limited situations. Finally, the law strengthens the confidentiality guarantees surrounding a report and adds new

> "In the context of a merger by absorption, the absorbing company may be held criminally liable for the prior conduct of the absorbed company."

prohibited retaliatory measures against the whistle-blower. A whistle-blower cannot be held criminally or civilly liable for damages related to their report made in good faith. Compliance professionals should, therefore, understand the importance of building a trustworthy whistle-blowing procedure to address internally any issue.

The draft AFA-PNF guide on internal investigations of March 2022 is also noteworthy, considering that the Gauvain Bill intended to only regulate them in the context of a criminal prosecution. Unlike the Bill, this draft guide also covers internal investigations outside a criminal procedure context. It suggests granting procedural rights and guarantees to the persons interviewed, such as confidentiality, the right to be assisted by counsel, and that the minutes of the interview can be read and signed by the employee. It also supplements a guide published by the French National Bar Council in June 2020 to assist lawyers in the context of internal investigations.

It is also worth mentioning that the French Cour de Cassation (France's Supreme Court) confirmed its change of jurisprudence regarding corporate successor criminal liability. Departing from existing case law and following the European Court of Justice's position, the French Court ruled that in the context of a merger by absorption, the absorbing company may be held criminally liable for the prior conduct of the absorbed company. This rule only applies to mergers closed after the decision in November 2020. On 13 April 2022, the Cour de Cassation confirmed that successor liability may apply to mergers closed prior to 25 November 2020, in the limited exception of fraud. Therefore, anti-corruption due diligence must be conducted with utmost care by M&A professionals.

In June 2021, the Cour de Cassation also found a holding company criminal liable for an offence committed through its subsidiary. The subsidiary's employees were deemed de facto representatives of the parent company and corporate decision-making bodies such as the Risk Assessment Committee were identified, in order to hold this parent company criminally liable.

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

Companies that exceed the size (500 employees and more) and revenue (€100 million turnover per year) thresholds set forth in article 17 of Law Sapin II must implement preventive measures against corruption and influence-peddling.

They are required in particular to perform an anti-corruption risk assessment, for which the French Anti-Corruption Agency (AFA) has developed a comprehensive methodology. Each company that is subject to the Sapin II Law should be vigilant in mapping its own risks, as there is no uniform risk assessment or one-size-fits-all approach. General risks areas must be addressed, including public procurement, public-private partnerships, commercial agents and other types of intermediaries, and export activities in countries where

corruption is pervasive. Failure to abide by the guidelines may give rise to enforcement actions by the AFA. The Agency pays a lot of attention to this exercise and insists on its very formal nature, so that all stages may be audited. Compliance professionals should keep notes of interviews, the risk calculation methodology and the various steps and versions of the maps.

Moreover, the ongoing due diligence of third parties is an absolute priority for compliance officers. Failure to perform an appropriate screening and monitoring of third parties, in particular agents and consultants, exposes companies to high risks.

Several areas that have seen developments in the past year deserve particular attention.

In addition to the above-mentioned new whistle-blower protections, in November 2021, the AFA published a guide on conflicts of interest in companies. Among other things, the guide encourages a company to consider the risks resulting from the 'links of interest' of the organisation's managers and employees during the risk mapping exercise. This scrutiny should lead it, depending on the risks identified, to define a procedure for managing conflicts of interest, to which its anti-corruption code of conduct may refer.

The AFA also published a guide in April 2022 regarding mandatory accounting controls under article 17 of Law Sapin II. In our experience, accounting controls are not always in place, which makes the guide particularly welcome. One hundred per cent of AFA controls in 2021 revealed failures to implement adequate accounting controls. The guide recommends good practices for the implementation of dedicated, identified and formalised accounting controls that will enable companies to strengthen the security of their activities. Companies should use these tools diligently when conducting their risk assessment, which the AFA reiterated is the cornerstone of any anti-corruption compliance programme.

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In short, companies should focus on documenting their risk mapping process, building a trustworthy whistle-blowing programme, and implementing thorough accounting controls in connection with the outcomes of the risk mapping.

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 loss of momentum in the fight against corruption noted last year seems to be confirmed. A report published by the National Financial Prosecutor's Office (PNF) reflects a decline of its activity in 2021.

First, the number of convictions and arrest warrants was halved between 2020 and 2021. As for sums perceived by the Treasury in 2021 (which include fines imposed, confiscations, damages to the state, and amounts resulting from tax audits), a significant drop

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was observed in 2021. While between 2016 and 2021, an average of €1,980.2 million per year was awarded to the Treasury, with two particularly important years in 2020 and 2019 (when €2,240.3 million and €5,730 million were collected respectively), only €173.1 million was collected by the Treasury in 2021, the lowest amount since 2016. Although central in its role of resolving domestic and foreign bribery cases, the PNF seems to bear the brunt of this loss of dynamism. Following last year's attacks due to the illegal wiretapping scandal and its alleged political instrumentalisation, it received strong support from the OECD, which stressed its lack of resources to proactively prosecute cases.

The AFA is facing setbacks as well. Already criticised by investigative journalists on its failure to communicate to the public prosecutor's office information on alleged acts of corruption, the AFA saw the scope of its missions challenged by a parliamentary report and a bill. The report of July 2021 from MPs Raphaël Gauvain and Olivier Marleix, who reviewed the enforcement of Law Sapin II, proposed the transfer to the French High Authority for the Transparency of Public Life (HATVP) of a large part of its missions, including all advisory and control missions. A subsequent bill tabled by MP Raphaël Gauvain in October 2021 (the Gauvain Bill) less drastically suggested to transfer to the HATVP only the missions of advice and control of public actors. The AFA would keep the missions of advice and control of private companies, as well as the definition and implementation of the anti-corruption policy.

This proposal was of concern for the AFA, as well as for the OECD. Its Working Group on Bribery released in December 2021 its report on the fourth phase of monitoring of the implementation of the OECD Anti-Bribery Convention in France. The report warns against the reshaping of the AFA and of its missions. Added to the limitation of the duration of preliminary investigations to two or three years (adopted by the Parliament on 18 November 2021), the OECD considers that recent advances in the field of anti-corruption may be seriously

undermined. The OECD thus fears a 'saturation' of investigative offices, which would make the fight against corruption less and less effective.

In this context, some recommendations stemming from the evaluation report on the effectiveness of Law Sapin II published in July 2021 seem to pave the way for a shift in enforcement policies.

First, the use of the CJIP is becoming the favoured resolution instrument of anti-corruption prosecutions since its introduction into French law by Law Sapin II in 2016. This significant shift in France's enforcement of corporate liability in foreign bribery cases allowed for the coordinated resolution of two large-scale, multi-jurisdictional cases involving French companies (*Société Générale* and *Airbus* cases). Given their success, CJIPs have been extended to tax fraud (2018), and to environmental law, with three environmental CJIPs concluded in 2022.

This popularity is likely due to a criminal policy that favours negotiated resolutions. For instance, on 20 February 2019, the Criminal Court of Paris sentenced Swiss bank UBS to a fine of €3.7 billion, in accordance with the prosecution's request, after the bank's rejection of a CJIP of around €1 billion. In December 2021, the Paris Court of Appeal upheld the Swiss bank's conviction and reduced the fine to €1.8 billion. Despite that rebate, this confirms to companies that the fine pronounced in a litigation could be higher than the penalty proposed in the framework of a CJIP. Accordingly, the use of CJIP is likely to keep growing.

Second, the loosening of requirements for holding a legal person liable may be expected. Article 8 of the Gauvin Bill intends to make the conditions for the criminal liability of legal persons more flexible. Their criminal liability would be engaged if a 'lack of supervision on their part has led to the commission of one or more offences by one of their employees'. In addition, the conditions for engaging successor's liability were also eased by the French Cour de Cassation. It is also noteworthy that the Cour de Cassation held the parent company of a multinational group criminally liable, by considering that a subsidiary's employees may be de facto representatives of the parent due to the group's cross-functional organisation and the tasks they were assigned. The cross-functional organisation was evidenced by the Group Risk Assessment Committee's validation of illicit payments to consultants.

> "French companies must address to the French Minister of the Economy any discovery request from a foreign authority in order to be compliant with the French 'blocking statute' of 1968."

Compliance professionals and corporate managers should, therefore, maintain an active and consistent role in the development of adequate compliance programmes covering every subsidiary.

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 year 2022 has not (yet) witnessed multijurisdictional resolutions on bribery matters.

Similarly, the launch of the European Public Prosecutor Office in June 2021 has not yet led to the opening of major investigations in France on crime against the financial interests of the EU (fraud, VAT fraud with damages above €10 million, money laundering and corruption). The effectiveness of this new enforcement player, especially in highly sensitive cases, remains to be seen.

Regarding cross-border cooperation between enforcement authorities, a recent Decree of 18 February 2022 is worth mentioning. It provided that French companies must address to the French Minister of the Economy any discovery request from a foreign authority in order to be compliant with the French 'blocking statute' of 1968. That statute restricts the transfer of sensitive economic information to foreign authorities.

The Decree formalises such transfer procedure. Since Law Sapin II, the AFA was entrusted with ensuring compliance with the blocking statute in the context of a foreign anti-corruption monitoring of a French company.

From 1 April 2022 onwards, the French Department of Strategic Information and Economic Security (SISSE), attached to the Ministry of the Economy, is in charge of handling any discovery request from a foreign authority. All persons facing discovery requests from a foreign public authority, or from any person acting on its behalf, must provide the SISSE their foreign queries without delay through in an easily accessible format. French companies will obtain an acknowledgement

"The use of the CJIP is becoming the favoured resolution instrument of anti-corruption prosecutions since its introduction into French law."

of receipt from the SISSE, which must render a formal opinion within once month of its referral, to the addressing company. This opinion determines the applicability of the French blocking statute to the documents submitted by the company, which may not be transferred abroad. Business organisations published guidance to help companies determine their data's sensitivity.

This change reflects the French government's will to better protect French economic interests against 'fishing expeditions' and the growing importance of sovereignty concerns in cross-border dispute resolutions, while complicating cross-border litigation for businesses and their counsel. Not to mention the upcoming revision of the EU Blocking Regulation. Foreign enforcement authorities may now face a new layer of obstacles from the French authorities, which may assess the sensitivity of data that their foreign counterparts want to collect.

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?

Unlike the US or the UK, France does not allow deferred prosecution agreements to benefit individuals. In general, once a CJIP has been signed, individuals involved enter into a guilty plea (CRPC). The link between the prosecution against a company and its executives came up as an issue in the *Bolloré* case of February 2021, where the judge approved the CJIP, but not the guilty plea of the executives. The judge rejected them due to the 'seriousness of the acts' that 'undermined public economic policies'. This case brought to light the uncertainties involved in the prosecution of executives in parallel with the conclusion of a CJIP. It put under threat a compliance system based on the cooperation and self-incrimination of companies, deterring senior management to settle with prosecutors.

Surprisingly, MP Raphaël Gauvain did not propose in his bill to improve the coordination between negotiations with a company and the prosecution of its executives, contrary to the parliamentary mission he co-led. That mission advocated the creation of a specific CRPC procedure, in parallel with a CJIP negotiation and only available in the event of spontaneous disclosure and full cooperation with the investigation of the company.

It is also worth mentioning the CJIP concluded between LVMH and the PNF on influence peddling for €10 million. The CJIP underlined LVMH's cooperation with the PNF and the strengthening of its ethics compliance programme, supported by a substantial budget, to reduce the fine.

The Paris Public Prosecutor also concluded a CJIP with La Financière Atalian in matters related to tax fraud and swindling. The CJIP imposed on the company an AFA compliance monitoring, in contradiction with the Code of criminal procedure that only provides for monitoring in corruption cases.

"It is advisable for companies and compliance professionals facing a PNF investigation to be transparent and demonstrate compliance enhancements."

Finally, the trend towards prosecution and conviction of political figures involved in integrity scandals is still ongoing. In May 2022, the Paris Court of Appeal upheld the conviction of former Prime Minister and presidential candidate François Fillon for embezzlement in a fake job scandal. The French Justice Minister and former top-tier criminal defence attorney Éric Dupont-Moretti is still under threat of a public trial. He is being suspected of using his political influence to order an administrative investigation into three PNF magistrates for their supposedly inappropriate request to tap his phone and those of other lawyers during the investigation into Nicolas Sarkozy's campaign financing. The OECD expressed deep concern about these criticisms of the PNF, which could undermine France's ability to enforce its anti-corruption laws.

It is advisable for companies and compliance professionals facing a PNF investigation to be transparent and demonstrate compliance enhancements in order to get cooperation credit. The issue of senior executives' criminal liability remains unresolved.

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?

Article 17 of Law Sapin II lists eight components of an effective anti-corruption compliance programme: (1) top management commitment; (2) code of conduct; (3) whistle-blowing system; (4) risk mapping; (5) third-party due diligence; (6) accounting controls; (7) training; and (8) monitoring of the programme.

These eight components are developed in non-binding Guidelines, which have been updated in 2021. These 2021 AFA Guidelines rely on three pillars: (1) the commitment of senior management; (2) using risk mapping to raise awareness of the entity's exposure to corruption

risks; and (3) management of the identified risks by means of effective measures.

Attention of compliance professionals must be drawn to the following.

Despite their non-binding nature allowing companies to take a different approach, the AFA Sanctions Commission's case law took the stance that businesses have to demonstrate to the AFA the relevance, quality and effectiveness of their compliance programme. On the contrary, if the company strictly follows the Guidelines, its compliance programme will be presumed compliant with Law Sapin II. It is important to note that the AFA Sanctions Commission refers to considerations enshrined in its non-binding guidance.

As regards risk mapping, the AFA has very strong requirements as to the formal nature of such exercise in order to allow all stages to be audited. Compliance professionals should keep notes of interviews with staff, elaborate on the risk calculation methodology, and keep track of the various versions of the maps. The entire anti-corruption programme must derive from the results of the risk mapping.

As mentioned above, the new Whistleblower Law also poses new challenges to compliance professionals. Companies must build their whistle-blowing system to inspire trust. If the system is trustworthy, employees will be inclined to report internally, even anonymously, rather than to authorities.

The AFA also released several sectoral guides, such as for small and medium-sized enterprises, the construction and non-profits sectors. Guides on the prevention of conflicts of interests, anti-corruption accounting controls were also published.

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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?

In 2018, France amended its Data Protection Act to align it with the European Union's General Data Protection Regulation (GDPR).

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 regulations and integrity-related legislation (anti-corruption, anti-money laundering and tax fraud), certain discrepancies may place companies between a rock and a hard place.

The French Data Privacy Agency (CNIL) had an active enforcement year, with 18 sanctions amounting to €214 million. In January 2022, the Conseil d'Etat (French Supreme Administrative Court) upheld

QUESTIONS

> "Explicit written consent or waiver from the data subject must be collected for transfer to countries with adequate data protection laws."

the €100 million fine imposed by CNIL to Google in December 2020. Another €150 million fine was imposed on Google in January 2022 for breaking cookies-acceptance rules in the framework of its 'equal rules for refusing and accepting cookies' campaign. This is the highest penalty imposed by the CNIL to date.

A new EU-US Privacy Shield, announced in March 2022, is yet to be confirmed. In the meantime, the rules protecting the access, processing and transfer of personal data outside or within the European Union are applicable. Explicit written consent or waiver from the data subject must be collected for transfer to countries with adequate data protection laws, which excludes the US.

For companies, it is key to identify the regulations applicable to the use or transfer of data. These rules may relate to the protection of the data transfer falling under French sovereign interests (eg, the Blocking Statute), the access, processing and transfer of personal data outside or within the European Union (eg, transfers based on international conventions), the rights of individuals subject to internal investigations (eg, information provided to individuals regarding their right to access, rectify or delete data). Companies must be aware of the rules pertaining to the length of time for data storing. Remote work poses new challenges for companies in the conduct of internal investigations.

Finally, the June 2020 guide of the French National Bar Council provided useful tips on data protection obligations in the context of internal investigations.

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QUESTIONS

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 recent 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?

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?

The independent monitorships I have conducted by appointment of 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 match. 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.