

April 03, 2019

FRENCH ANTI-CORRUPTION LAW

How AFA Compliance Program Controls Are Changing the French Anti-Corruption Compliance Landscape

By [Bryan Sillaman](#) and [Anne Gaustad, Hughes Hubbard](#)

International headlines involving French anti-corruption enforcement efforts have largely been dominated by recent ground-breaking and record-setting prosecutions and the use of French-style deferred prosecution agreements, known as *conventions judiciaire d'intérêt public*. Nonetheless, a larger and potentially more significant movement is underway by the *Agence française anti-corruption* (the AFA), a newly-created agency that arose out of French law No. 2016-1691 *relative à la transparence, à la lutte contre la corruption et à la modernization de la vie économique*, commonly referred to as Sapin II.

Through its efforts to enforce Sapin II's affirmative obligation that certain companies adopt and implement effective anti-corruption programs, the AFA has the potential to introduce generational change to France's anti-corruption enforcement landscape and the way that French companies manage compliance. Despite the existence of significant outstanding questions, and the fact that the AFA has been conducting its examinations, or controls, for a relatively limited period of time, the agency is beginning to have a noticeable impact on the French anti-corruption compliance landscape and is seemingly serving the intended purpose as defined in Sapin II.

This article provides an update on the AFA's efforts to date, including highlighting successes and potential areas of conflict or uncertainty that might arise in the future.

See "[An Insider's Take on France's New Approach to Foreign Corruption](#)" (May 16, 2018).

A Hybrid Regulatory Agency With High Ambitions

Sapin II was innovative in several ways. Among other things, it created an affirmative obligation for companies of a certain size to adopt and implement effective compliance programs. Unlike U.S. and U.K. anti-corruption regimes – in which the effectiveness of a company's compliance program is part of the company's defense if corrupt acts are identified – Sapin II makes it mandatory for companies subject to the law to adopt and implement a compliance program containing eight elements, with potential financial penalties for companies and their executives who fail to do so. The AFA is the agency responsible for overseeing compliance with these requirements.

The AFA is formally "a national administrative service" (*service à compétence nationale*), placed

under the dual oversight of the Ministries of Justice and of the Budget. Sapin II defines the AFA's mandate as providing assistance to regulatory authorities and other persons in preventing and detecting acts of corruption, influence peddling and related offenses in the private and public sectors. Specifically, this mission is carried out through (i) administrative coordination, centralization and sharing of information; (ii) the publication of (non-binding) recommendations designed to assist legal entities in preventing and detecting such offences; and (iii) controlling the quality and effectiveness of anti-corruption compliance programs.^[1]

The agency's title, however, is somewhat misleading in that it could suggest that the AFA has broad enforcement powers. Unlike the French criminal enforcement authorities (including the *Parquet* and the specialized *Parquet National Financier*, collectively "Prosecution Services"), and certain independent administrative authorities, such as the *Autorité des marchés financiers*, the AFA's enforcement powers are circumscribed to administrative sanctions. As such, if the AFA, in the course of its activities, learns of potential criminal offenses (such as corrupt payments), it does not have jurisdiction to investigate and/or prosecute such potential offenses, but is required instead to transmit the information to the Prosecution Services.

At first sight, this lack of substantial enforcement authority and the stated mission of the AFA as a provider of "assistance" might lend a false sense of security to companies subject to Sapin II. However, in less than three years' existence, the AFA has sought to establish itself as a serious and aggressive player in the fight against corruption. Under the leadership of AFA Director Charles

Duchaine, a distinguished former investigative magistrate, the AFA has been ambitious in fulfilling its mandate. Although Duchaine has publicly criticized the limited scope of the AFA's enforcement powers and the institutional divide between responsibilities for anti-corruption prevention and enforcement, the French government has made it clear that no extension of the AFA's mandate is currently on the table.^[2]

Nonetheless, the AFA's relatively restricted mandate has not prevented it from rapidly becoming one of the most significant actors in French anti-corruption compliance. To date, the AFA has been extremely active and visible in domestic and international anti-corruption fora. Together with its prolific publications of guidance and recommendations, as well as the volume and scope of its compliance program controls, this demonstrates that the AFA is seeking to profoundly reshape the way companies in France view and implement anti-corruption compliance.

See "[SocGen Reaches Historic Deal With France and U.S., Legg Mason Tags Along](#)" (Jun. 27, 2018).

Scope and Governing Principles of AFA Controls

The Sapin II compliance program obligation applies to select representatives of the largest state-owned entities and private companies. With respect to private companies, the requirement applies to companies that are either:

1. incorporated in France with at least 500 employees and a turnover of more than €100 million; or

2. that are part of a group of companies with a total of at least 500 employees, where the parent company is headquartered in France and has turnover or a consolidated turnover of more than €100 million.

Notably, the requirement also extends to subsidiaries of such entities (including foreign subsidiaries). The responsibility for implementing the compliance program requirement is placed upon executives, specifically designated by the law, including presidents, chief executives (*directeurs généraux*), managing directors (*gérants*) and certain other senior executives (*membres du directoire*).

An estimated 1,700 companies fall within the scope of Sapin II's obligations and are therefore subject to potential AFA controls. In early 2018, the AFA fixed an ambitious target of conducting controls of at least 50 private entities annually. To date, however, only approximately 35 large and mid-sized companies across a broad range of sectors have been subject to controls. Criteria for selecting entities subject to controls have not been formalized, but the AFA has publicly stated that it intends its control activities to encompass entities of all sizes across a wide variety of industries, including, in particular, those that are generally perceived to present corruption risk.

An AFA control is designed to assess the quality and effectiveness of a company's anti-corruption compliance program. In practice, this means an evaluation of compliance with each of the eight pillars of a compliance program defined by Sapin II. Companies subject to and familiar with the requirements of the FCPA or the U.K. Bribery Act should be reassured that the eight pillars largely mirror the elements that are consistently viewed by other international regulators, as central to an effective compliance program. These include:

1. the adoption of a code of conduct;
2. performing regular corruption risk assessments;
3. the establishment of internal whistleblowing procedures of violations of the code of conduct;
4. third party evaluation procedures (i.e., due diligence);
5. internal or external financials controls;
6. compliance training and awareness sessions for senior executives and employees in positions prone to corruption risk;
7. the adoption of appropriate disciplinary procedures; and
8. mechanisms for the evaluation and monitoring of the effectiveness of the compliance program.^[3]

Despite significant overlap between the requirements of Sapin II and other international legal frameworks, companies with established anti-corruption compliance programs may find that they need to adapt their programs to meet the AFA's publicly stated expectations.

The AFA published a series of recommendations in October 2017^[4] to provide further guidance to companies on the agency's expectations regarding implementation of these elements of the compliance program. These recommendations are generally more stringent than the compliance program requirements defined by the Sapin II law itself. By way of example, Sapin II does not address the need to set an appropriate compliance tone. The AFA recommendations, on the other hand, place significant importance on an appropriate "tone at the top." This is also reflected in AFA control reports, which systematically dedicate a section to this area (although in our experience the AFA merely provides observations (and no findings of breach) on this basis).^[5]

Similarly, Sapin II provides that companies must develop third party due diligence procedures for clients, main suppliers and intermediaries. The AFA recommendations, however, extend the scope of such procedures to encompass *all* third parties with whom a company works. The AFA has also set forth highly detailed and quantitative expectations for how companies are expected to perform their corruption risk assessments. Although the recommendations are, in principle, non-binding, they also serve as the basis through which AFA has been and will be evaluating companies in the context of its controls.

Key Steps of AFA Controls

AFA controls can either be commenced by the AFA at its own initiative or at the request of select public officials – including the President of the High Authority for the Transparency of Public Life (*Haute autorité pour la transparence de la vie publique*), ministers or other representatives of the state – or following reports of select licensed organizations.

AFA controls are governed by (i) the provisions of Sapin II, (ii) *Decree No. 2017-329 Relatif à l'agence française anti-corruption* (AFA Decree) and (iii) the October 2017 AFA Charter of Rights and Duties of Parties subject to Controls (AFA Charter). The AFA has helpfully sought to complete the regulatory regime with existing guidance on the conduct of such controls. To date, the most important stages of the controls can be summarized as follows below.

Notice of Control

An AFA control begins when the AFA issues a notice of control by registered mail to the representatives of the controlled entity. The notice identifies the agents in charge, lays out

a tentative schedule and requests that the controlled entity designate a contact person. It also includes an information and document request requiring the company to provide documents and information to the AFA within 15 calendar days.

Completion and Submission of AFA Questionnaire and Supporting Documents

Entities subject to control are requested to complete a questionnaire, which now contains 163 questions (a previous version contained 98 questions and 49 document requests) covering 11 themes related to the controlled entity's activities, risk areas and compliance program, as well as supporting documents (AFA Questionnaire). While the questionnaire has been helpfully made available to the public on the AFA's website, this appears to have raised expectations by the AFA that companies start preparing for a control even before they receive the notice. In our experience, 15 calendar days is an aggressive timeframe in which to prepare a complete response. Requests for extensions are typically not viewed positively.

Preliminary Meeting

While not expressly mandated, practice shows that the AFA usually organizes a courtesy meeting between the AFA agents in charge of the control and the representatives of the controlled entity.

Review of Documentation by AFA Control Team

Upon receipt of the questionnaire and the supporting materials, the AFA control team

engages in an in-depth review of the elements received. Controls have demonstrated that the agents are extremely diligent in their review and often revert with additional questions and requests for supplemental documentation. In some instances, such follow-up requests have been made through an additional questionnaire (which in certain cases has been more detailed, and for which the time line for submission has been even shorter than the AFA Questionnaire).

Notice of On-Site Control

The controlled entity receives an on-site audit notice 15 days prior to the on-site portion of the control. Again, the notice contains helpful information regarding the composition of the control team and the list of interviewees. With respect to the latter, the list of interviewees generally includes senior managers of the relevant business entities, as well as senior managers in charge of key corporate functions (including finance, legal and HR). Of particular note is that interviews are not limited to internal personnel but can also include external parties such as commercial agents or even clients. Indeed, the AFA may request to speak with “any person whose participation appear[s] necessary.”^[6] Individuals who refuse to speak with AFA agents risk being fined up to €30,000 for obstruction of justice.

On-Site Control

The on-site portion of the control provides an opportunity for the AFA to meet with employees and explore topics identified in written materials. This part of the control generally lasts five working days (but in some cases has lasted up to 10 working days) and is punctuated by a closing meeting. The AFA has formally stated that all interviewees may be

represented and lawyers and/or compliance representatives have been permitted in certain interviews, albeit primarily as observers. AFA agents also have broad powers to request access to information, including data systems and information necessary for the performance of their mission. However, they do not have general search and seizure powers.

Control Report

The AFA prepares a control report, which includes an assessment of each of the eight pillars of the compliance program defined by Sapin II, as well as of the tone at the top of the organization. For each theme, the report may contain observations, recommendations and/or findings of breaches. Where the control report does not identify any breaches, the controlled entity can provide written observations to the report within two months. On the other hand, where breaches are found, the controlled entity must provide such written observations within the same time frame. As necessary, the controlled entity can also request to meet with the AFA to discuss.

Issue of Final Report and Decision

At the end of the process, the AFA issues a final report, in which it may address the controlled entity’s observations. The Director of the AFA may then either issue a warning and request that corrective action be undertaken or decide to refer the matter to the AFA’s Sanctions Commission.

Referral to the Sanctions Commission

The Sanctions Commission is composed of six members, all senior judges in France’s highest courts for civil, administrative and public

finance matters. The proceedings before the Sanctions Commission are adversarial and the concerned entity will have the opportunity to present observations. The matter will be subject to a public hearing. In the event of breaches of the obligation to implement a compliance program, the Sanctions Commission can issue an injunction to the company and its representatives to make enhancements to its compliance program. In practice, this amounts to a form of monitoring of the compliance program (which could be in the form of self-reports), for a period of up to three years. The Sanctions Commission may also issue financial penalties, of up to €200,000 for natural persons, and up to €1 million for legal entities. Finally, the Sanctions Commission can also determine to publish the order of injunction and/or financial penalty.

Current Challenges in AFA Controls

While still in their relative infancy, the AFA controls appear to be working as planned. By virtue of its ambitious activities, the AFA has not only transformed the compliance programs of entities controlled to date, but it has driven change for entities who have not yet undergone controls, many of which have undertaken proactive steps to prepare for the eventuality of a control.

More broadly, the AFA controls have been a key impetus for the shift in how French companies generally view compliance. Entities that were not subject to international compliance requirements in the past have had to deploy significant resources to implement compliance programs. Even for companies that have been subject to U.K. and U.S. compliance program requirements, the creation of a highly ambitious French regulatory agency with

specific expectations and views on compliance has been a game-changer. Nonetheless, our experience from such controls demonstrate that significant uncertainties and challenges remain regarding several important aspects of the process.

The Appropriate Scope of the AFA's Activities

First, with respect to the scope of the controls, and the AFA's insistence upon compliance with its recommendations, there is a need to clarify the legal status of the recommendations. While controlled entities do not appear to have challenged the AFA's reliance on the recommendations, future controls and potential referrals to the Sanctions Commission will show to what extent the AFA will be able to impose its interpretation of the compliance program requirements.

A more significant question relates to the potential extraterritorial scope of the control activities. While foreign subsidiaries of entities subject to the compliance program requirements must implement similar controls, the AFA's jurisdiction is national. It is therefore uncertain on what basis the AFA could interview and request information from foreign nationals overseas for purposes of a French administrative control.

This might, at least in part, be solved through the conclusions of international cooperation agreements with other anti-corruption authorities, but to the extent that the AFA's enforcement powers remain circumscribed to administrative sanctions, they are not likely to fully address the issue. It is also likely that not all countries (including countries with a high risk of corruption and influence peddling) will have the ability or desire to enter into such

agreements. A separate, but related issue, is how the AFA could realistically effectively (and in a timely manner) assess the effectiveness of the compliance programs of large French multinationals, some of which operate in more than 100 countries.

With respect to the AFA's temporal jurisdiction, controls have shown that the AFA has asked questions and requested materials relating to projects that took place well before the June 1, 2017, entry into force of Article 17 of Sapin II.

Coordination With Other French Efforts

Second, it remains to be seen how the AFA controls will fit into the broader French anti-corruption enforcement efforts. In particular, it is unclear what due process rights and other fundamental protections, if any, are and should be afforded to persons and companies in the context of AFA controls and criminal proceedings arising out of such controls. Questions remain about whether AFA controls must take into account protections connected to legal privilege, the right to be represented by counsel or union representatives, protection against self-incrimination and the standard of proof required for the transmission of evidence by the AFA to the Prosecution Services.

For example, the AFA Charter does not cover the right for a controlled entity to assert legal privilege over certain materials. While the Director of the AFA continues to maintain that the legal privilege (*or secret professionnel*) cannot be asserted in the context of the controls, criticism by legal practitioners has led AFA agents to publicly state that while it is not formally bound by legal privilege, the AFA has opted for engaging in constructive

dialogue with entities to resolve such situations, rather than forcing companies to provide materials where claims of privilege have been made. Given that the AFA can, and already has, transferred information regarding potential criminal offenses to the Prosecution Services, further assurances from the AFA are necessary to ensure that fundamental defense rights are respected. It also remains to be seen how the AFA and the Prosecution Services will be cooperating and to what extent the AFA can continue its compliance program controls in situations where relevant information has led to the opening of a criminal investigation and/or prosecution.

See "[Despite Anemic Prosecutions, France Moves Toward Increased Anti-Corruption Enforcement](#)" (Oct. 26, 2016).

The Potential Deterrent Effect of Sanctions

Finally, the administrative nature of the sanctions and limited amounts of fines raise the question of the adequacy and deterrent effect of the sanctions. While injunctions to enhance the compliance program and publication of the sanctions decision, in our view, increase the chances of affecting real change in the way companies view and implement anti-corruption compliance, the relatively low level of possible financial penalties (and particularly those imposed on legal entities, which cannot exceed €1 million) may limit companies' incentives to comply with the compliance program requirements.

Despite the existence of significant outstanding questions, and the fact that the AFA has been conducting its controls for a relatively limited period of time, they are beginning to have a noticeable impact on the

French anti-corruption compliance landscape and are seemingly serving the intended purpose as defined in Sapin II.

See “[Lessons Learned From the First-Ever French Convention Judiciaire d’Intérêt Public Concluded With HSBC](#)” (Jan. 24, 2018).

Bryan Sillaman is managing partner of the Paris office of Hughes Hubbard & Reed and a member of the firm’s anti-corruption and internal investigations practice group. He is licensed to practice in New York, Washington, D.C., and Paris. He previously served as an attorney in the Division of Enforcement of the U.S. Securities and Exchange Commission, where he conducted several FCPA investigations.

Anne Gaustad is a partner at Hughes Hubbard & Reed and a member of the firm’s anti-corruption and internal investigations group. Gaustad has broad experience advising multinational companies on a wide range of anti-corruption compliance matters, corporate social responsibility, and international commercial and investment disputes. She is licensed to practice in Norway, Paris, New York and the District of Columbia.

^[1] Sapin II, Article 3(1) – (3).

^[2] Le patron de l’agence anticorruption réclame plus de moyens (December 15, 2017) at <https://fr.reuters.com/article/topNews/idFRKBN1E90XL-OF RTP>; L’exécutif rassure l’agence anticorruption sur ses moyens, (December 19, 2017) at <https://fr.reuters.com/article/idFRKBN1ED1XV-OF RTP>

^[3] Sapin II, Article 17.

^[4] *Recommandations destinées à aider les personnes morales de droit public et de droit privé à prévenir et à détecter les faits de corruption, de trafic d’influence, de concussion, de prise illégale d’intérêt, de détournement de fonds publics et de favoritisme* (October 2017) (« AFA Recommendations »).

^[5] AFA Recommendations at p. 6-8.

^[6] Sapin II Article 4(2).