CHRONIQUE

International Financial and White Collar Crime, Corporate Malfeasance and Compliance

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This section edited by Margot Seve in Paris and Michel Perez in New York aims at presenting and analyzing legal developments related to cross-border enforcement actions in financial and white collar crime cases. It also focuses on the growth of compliance and corporate governance regulatory standards. Comments and suggestions are welcomed, including articles proposals.
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Sapin II: Is the era of Compliance and criminal settlements upon France?

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On December 9, 2016, France adopted law n° 2016-1691 on transparency, the fight against corruption, and the modernization of the economy[2]. As previously discussed in this review (see RTDF n° 2 – 2016), the law has been commonly called the "Sapin II" law, after French Minister of Finance Michel Sapin who, in 1993, authored the first Sapin law on transparency in politics and public procurement,[3] and sought in 2016 to further enhance transparency and combat corruption.

While France has in recent years certainly made efforts towards more severe punishment for corruption-related offenses, it has nonetheless been criticized for its weak enforcement track record. For example, while the sanctions for active and passive corruption of domestic officials,[4] active and passive corruption in the private sector,[5] corruption of foreign officials,[6] and influence peddling[7] were increased in 2013, only one compar (Total) was fined between 2000 and 2016 for acts of corruptio of foreign public officials[8] T.his lack of enforcement efficien has led the OECD, as part of its monitoring of countries' in plementation and enforcement of the OECD Convention o Combatting Bribery,[9] to report serious concerns regarding "*t lack of foreign bribery convictions in France*"[10]. Shortcomin in France's corruption cases enforcement are due, in part, to th limited scope of powers granted to France's pre-Sapin II an corruption body, the "Corruption Prevention Central Servic (*Service Central de Prévention de la Corruption* - "SCPC" Indeed, the SCPC was never granted investigation or prosec tion powers, only corruption prevention missions Consequently, as noted in the "Impact Report" of the Sapin draft bill, "*France does not have to date a specific agen capable of preventing and helping to detect acts of corruption* In contrast, most of France's neighboring countries (*e.g.*, th Netherlands, Italy and the United Kingdom) have set up dec cated agencies that detect, prevent, coordinate on, and sanctio corruption-related offenses[12].

Moreover, the widespread view in France that French compani would not have been fined by U.S. authorities if France ha implemented a more competitive, efficient international an corruption enforcement framework, has been one of the ma rationale put forth for passing Sapin II. Indeed, levelling th playing field between France and the U.S. has been at the hea of the Sapin II parliamentary discussions[13].

1 The views expressed in this article are those of the author alone.

2 The Sapin II law is available in French at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033

7 Since 2013, individuals who are convicted for influence peddling may subject to five years' imprisonment and a fine of up to EUR 500,000 (agai EUR 75,000 previously) or double the amount gained. Judges have discreti to impose sentences up to the maximum amount. Under certain circumstan es, such as recidivism or aggravating elements (such as taking advantage o minor) enhanced sanctions may be applicable. Corporate entities may be su ject to fines of up to EUR 1 million or tenfold the amount gained. Corpora entities can also be punished by one or more of additional penalties.

8 Total was fined EUR 750,000 in 2016 for corruption of foreign officials in t Oil-for-Food matter.

9 France adopted the 1997 OECD Convention on Combating Bribery Foreign Public Officials in International Business Transactions (the "Conve tion") in 2000.

10 See OECD, "*OECD seriously concerned at lack of foreign bribery conv tions in France, but recognises recent efforts to ensure independence prosecutors*", October 23, 2012, available at http://www.oecd.org/corruption/oecdseriouslyconcernedatlackofforeignbrib yconvictionsinfrancebutrecognisesrecenteffortstoensureindepend enceofpr ecutors.htm. Full OECD report available at: http://www.oecd.org/corruption/oecdseriouslyconcernedatlackofforeignbrib

In light of the shortcomings highlighted by the OECD (and NGOs such as Transparency International), as well as the increased regulatory competition created by U.S. enforcement actions against French companies, the French government's declared ambition in drafting Sapin II has been to "*bring France into line with the highest international standards in the area of transparency and the fight against corruption*."[14]

To reach that goal, the authors of Sapin II created a new set of *ex ante* measures, and reinforced France's *ex post* framework. *Ex ante*, Sapin II sets up a set of measures requiring companies to take on compliance obligations with respect to corruption (I) – a first in French law. *Ex post*, Sapin II reinforces France's sanction and enforcement framework (II), in part by creating the *"convention judiciaire d'intérêt public"* – roughly translated as "judicial agreement of public interest."

In many regards, Sapin II is a small revolution in France's legal culture, namely because it (i) consecrates the culture of compliance in France, (ii) paves the way towards more extraterritorial French regulations, and (iii) innovates on how certain white collar crimes will be enforced and settled.

I. *Ex Ante* Measures

1. Scope of Sapin II

In defining its scope, Sapin II first and foremost addresses the top tier management of in-scope companies, not companies themselves. Indeed, Sapin II explains that chairmen, CEOs, managing directors, and, depending on the type of company, members of the management board, of French companies with certain revenues and employees (the "Management"), are responsible for taking measures preventing and detecting acts, in France or abroad, of corruption or influence peddling. This focus on individuals, which derives from a post-crisis focus on individual accountability on both side of the ocean, sends a strong message to companies' top managers that they will not be exempt from liability should their company be fined for corruption or influence peddling[15]. As discussed below, this focus on individual liability is also echoed in the new judicial transaction mechanism (*convention judiciaire d'intérêt public)* set up by Sapin II, which will not be made available to individuals, only to companies. In distinguishing between individual and corporate liability, Sapin II tried to avoid endorsing "too big to jail" mechanisms.

Only in the second instance does Sapin II explain which companies will fall under its scope: companies with revenues or consolidated revenues exceeding €100 million that (a) have at least 500 employees, or (b) are part of a group of companies employing at least 500 people with a parent company incorporated in France. This obligation also applies to subsidiaries[16] and controlled companies,[17] whether French or foreign, of the aforementioned French companies when the latter publish consolidated financial statements[18] (the "In-Scope Companies"). In choosing this scope, Sapin II, while taking a first step toward extraterritoriality, should apply to over 1,600 French companies[19].

2. New Compliance Obligations

Under Sapin II, the Management of In-Scope Companies shall implement the following internal measures and procedures (the "Compliance Obligations"):

- A code of conduct defining and describing the different types of conduct that could raise corruption or influence peddling issues. The code of conduct will have to be fully integrated into the company's *règlement interieur* (internal conduct policy);
- An internal whistleblowing procedure, allowing employees to raise concerns regarding conducts in breach of the company's code of conduct;
- An internal risk assessment/mapping, to be regularly updated, aimed at identifying, analyzing and prioritizing situations where the company might be exposed to external solicitations leading to corruption practices (taking into account the various locations and sectors where the company does business);
- Procedures to assess clients, first-row suppliers and intermediaries;
- Dedicated accounting controls (external or internal) to ensure that the company's books and records are not used to hide acts of corruption or influence peddling;
- Training programs for white collar employees and any employees exposed to risks of corruption or influence peddling;
- A disciplinary procedure for employees in breach of the company's code of conduct;
- A monitoring process to review the existence and efficiency of the aforementioned policies and procedures.

Both the Management as individuals and the In-Scope Companies as legal persons can be held accountable for failures pertaining to the Compliance Obligations. The Compliance Obligations will enter in force on June 1, 2017 – although since the law was passed in December 2016, French companies falling under the scope of Sapin II have already started preparing for these requirements. Large international companies, such as financial institutions, will not necessarily be the most affected by Sapin II Compliance Obligations, since they often previously had to set up policies and procedures close to those required by Sapin II, to comply with international standards or other foreign regulations.

In creating these Compliance Obligations, the French government explicitly indicated that it was working toward

14 "Sapin II Law: transparency, the fight against corruption, modernisation of the economy", April 6, 2016, available at http://www.gouvernement.fr/en/sapin-ii-law-transparency-the-fight-agai nst-

tries, including the United Kingdom and Switzerland."[20] For example, the Sapin II Impact Report cites Section 7 of the UK Bribery Act of 2010 and article 102 of the Swiss penal code, which both punish the absence of internal corporate measures to prevent corruption[21]. In this regard, by implementing in hard law compliance-related standards that previously only existed as international standards or in foreign countries, Sapin II certainly consecrates the culture of compliance in France.

3. Supervision and Enforcement of Compliance Obligations

In order to properly supervise and enforce the Compliance Obligations set forth in the bill, Sapin II creates a new "Anticorruption Agency" (the "Agency"), which will take the form of an office reporting to the Ministry of Justice and Ministry of Budget. The Agency's primary role will be to assist in their duties authorities and individuals in charge of preventing and detecting corruption, influence peddling, misappropriation, undue advantage, misuse of public funds and favouritism. While the organization of the Agency, in particular the number of agents and its budget, will be defined by decree (*décret en Conseil d'État*), Sapin II already provides that the Head of the Agency will be a magistrate (with no hierarchical reporting to the judiciary) with a non-renewable six year mandate. Moreover, the Agency will comprise a disciplinary board, of which the Head of the Agency will not be a member (to secure its independence).

The main duties of the Agency are as follows:

- Participate in the coordination, gathering and circulation of information that helps prevent and detect acts of corruption, influence peddling, misappropriation, undue advantage, misuse of public funds and favouritism.
- Draft recommendations (and regularly update them) to help companies prevent and detect acts of corruption, influence peddling, misappropriation, undue advantage, misuse of public funds and favouritism. The Agency's recommendations must be drafted on a risk-based basis, *i.e*. they must be adapted to the size of the company, and the nature of the risks;
- Inform the prosecutor of any conduct that appears to constitute an offense or a crime;
- Control, by conducting on-site and off-site controls, the quality and efficiency of the Compliance Obligations implemented by In-Scope Companies.

Should the Agency find that a company is in breach of one of the Compliance Obligations, it can, in the first instance, issue a warning to the company's legal representative. The Head of the Agency can also suggest to the disciplinary board of the Agency to inflict a penalty on the company or on any individual responsible for the breach of the Compliance Obligations. Such penalty – which is to be paid to the French Treasury, not the Agency – cannot exceed EUR 200,000 for individuals, and EUR 1 M for companies. The Agency's disciplinary board can also enjoin the company to amend its compliance procedures based on recom-

Last but not least, the Agency will be responsible for monito ing, at the request of the Prime Minister (*i.e*. not at its ov initiative), whether French companies comply with the "Fren Blocking Statute"[23] when implementing post-settlement remed ation plans by order of foreign authorities. However, Sapin does not go as far as requesting that the Agency monitors su compliance *during* investigations that French companies mu sometimes conduct in advance of settling corruption cases wi foreign authorities. It is also unclear whether Sapin II allows t Agency to monitor compliance with the French Blocking statu in cases other than corruption ones (such as, for example, ec nomic sanctions, money laundering or tax cases). This contras with the broader scope of the *convention judiciaire d'intér public* discussed below, which shall be used to settle cas involving offenses other than corruption, such laundering of ta fraud proceeds.

In light of the broad missions the Agency is invested with b Sapin II, the efficiency of the Agency will depend on its budg (which is expected to average EUR 10-15 M a year), the numb of agents (the Sapin II Impact Report suggested recruiting 7 agents – against 12 currently working at the SCPC), and t qualification of its agents (for example, rather than recruitin exclusively from the public sector, the current Head of t SCPC has called for hiring agents from the private sector wi corporate expertise[24]). The efficiency of the Agency will als depend on the decrees that will complete its organization an how the missions of its agents and of its disciplinary board w be carried out. These aspects are even more relevant in that t Agency will also have an important part to play in the *ex po* framework that Sapin II reinforces.

II. Ex Post Provisions

1. New Extraterritorial Offenses and Enforcement

In order to align France with international standards, Sapin extends the geographical scope of corruption and influen peddling offenses to cases involving *foreign* officials. Previou ly, French law only applied to cases involving the corruption *French* officials. This will allow French prosecutors to prosecu foreign officials living in France for acts of corruption or infl ence peddling committed abroad, which was not previous possible (new articles 435-2 and 435-4 of the penal code).

Further, Sapin II now authorizes French authorities to prosecu corruption and influence peddling conduct that occurred outsi

23 *Loi n° 68-678 du 26 juillet 1968 relative à la communication de documents renseignements d'ordre économique, commercial, industriel, financier technique à des personnes physiques ou morales étrangères*. The Statute e tablishes a double prohibition: (i) Prohibition, except in case of otherw applicable international treaties and agreements, to any person of French n tionality or usual resident in France, and to any officer, representative, age or employee of a corporation who has its registered office or branch France, to communicate in writing, orally, or in any other form, in any loc tion whatsoever, to foreign public authorities, documents or econom

of France and that was committed either by (i) French nationals, but also (ii) by individuals residing in France or (iii) by individuals and legal persons that have all or part of their business in France (new articles 435-6-2 and article 435-11-2 of the penal code). This provision was openly intended to compete with U.S. and U.K. legislation. For example, as described by the Sapin II Impact Report, U.S. law can apply when a foreign company is listed in the U.S. (in the case of the U.S. *Foreign Corrupt Practices Act* of 1977 and the *Internal Anti-Bribery Act* of 1998), and U.K. law can apply when a foreign company has a close connection with the United Kingdom (UK Bribery Act, Sections 12 and 7)[25]. Levelling the playing field in this area was one the main recommendations of the October 2016 "Rapport Lellouche" on the Extraterritoriality of U.S. law[26].

Moreover, accomplices in France of a crime committed abroad shall also fall under the scope of French prosecution authorities who will no longer have to wait, as was previously the case, for the prior recognition of the offense by foreign authorities to prosecute the individual (new articles 435-6-2 and article 435-11-2 of the penal code).

Finally, Sapin II takes away the monopoly that prosecutors previously had (upon request of the victim or the state where the offense occurred) on prosecuting cases of corruption of foreign officials committed entirely abroad. Prosecution shall now also be triggered upon charges being pressed by an NGO, such as Transparency International.

This new set of measures constitutes "*a significant extension of the extraterritorial application of French criminal law*"[27], and brings France's "*criminal procedure in line with the issues raised by transnational corruption*".[28]

2. Importing Remediation Measures

In many aspects, Sapin II aims at implementing mechanisms already operating in other countries, namely the U.S. In the first instance, Sapin II creates a new penalty that can be imposed on companies found guilty of corruption and influence peddling offenses. Inspired by the "remediation" and "monitorship" requirements often found in settlement agreements negotiated with U.S. authorities, Sapin II creates a "remediation" penalty ("*mise en conformité*") whereby companies shall, for a maximum period of five years, implement a remediation plan built to ensure the company abides by the Compliance Obligations (code of conduct, whistleblowing procedure, risk assessment/mapping, client risk assessment, accounting controls, and training)[29]. The company's remediation efforts will be "monitored" by the Agency. Any costs borne by the Agency in its control of the company's remediation program (calling on experts, qualified authorities, and legal, financial or tax analysis[30]) shall be bor by the company itself. However, for fairness and proportionali reasons, these costs will be limited to the maximum amount the fine associated with the offense the company was fou guilty of[31]. Of note, it does not appear that the capped co discussed in Sapin II include those that the company itself w have to spend on building and implementing its remediati plan, which will require hiring its own expert, such as a law fir – whose work is covered by the French attorney-client privile (*secret professionnel)*. To accompany lawyers in this new ar of practice and so that clients are best represented, the Paris b recently published ethics guidelines on internal investigatio for lawyers to follow[32].

3. Creating the "French DPA"

Along the same lines as the "remediation" sanction discuss above, Sapin II sets a milestone in French criminal procedure creating a settlement mechanism similar to that used in the U. and the UK. As described in the Sapin II Impact Report, Fran previously had no mechanism comparable to that of "Deferr Prosecution Agreements" ("DPAs") used in the U.S. to set certain white collar cases, including corruption cases[33].

Under Sapin II, prosecutors[34] will be able to offer to compani suspected – but not yet indicted – of corruption, influen peddling, but also laundering of tax fraud proceeds (but not t fraud), to enter into a *"convention judiciaire d'intérêt publi* ("CJIP"). Because this new mechanism will not require t company to plead guilty, and will defer the prosecution until t agreement's provisions are executed, it has been described France as the "French DPA". As noted above, CJIPs shall on be offered to companies (legal persons), not to their represent tives or any other natural person. Individuals shall inde remain personally liable for the relevant offense.

Upon signing a CJIP, companies shall pay the French Treasury fine based on the revenues derived from the offense, capped 30 % of the company's average revenues over the last thr years. In addition to this fine, companies could be required pay damages to the victims of the offense, when victims ha been identified. Finally, CJIPs may also contain provisio requiring the company to set up a remediation plan for a max mum period of three years, to establish or reinforce t company's compliance with the Compliance Obligations (co of conduct, whistleblowing procedure, risk assessment/mappin client risk assessment, accounting controls, and training). Sim lar to the remediation penalty discussed above, the remediati plan shall be set up under the control of the Agency. Any cos borne by the Agency in its control of the remediation pl (calling on experts, legal and financial analysis, etc.) shall borne by the company, but limited by a maximum amou defined in the CJIP. Here again, it does not appear that Sapin tried to cap the costs that the company itself will have to spe to implement its remediation plan, for example by hiring co

25 *Rapport d'Impact, op. cit.*, p. 40.

26 *Rapport d'information déposé en application de l'article 145 du règlement en conclusion des travaux de la mission d'information commune sur l'extraterritorialité de la législation américaine n° 4082 déposé le 5 octobre 2016 (mis en ligne le 11 octobre 2016 à 12 heures 45) par Mme Karine Berger*, 5 octobre, 2016, n°4082, pp.84-87.

30 A decree will define the process for the Agency to hire and rely on exper including the ethics rule applying to such experts.

sultants or law firms. Of note, the Sapin II draft bill initially provided that the remediation plan would be set up under the control of an independent "monitor", chosen by the company with the approval of the Agency. However, this article was taken out of the final version of the bill[35]. Yet, it remains unclear whether the Agency, by hiring "experts", will be able to delegate its monitorship mission, in part or in full, to an external party, such as a law firm or a consultants firm. Therefore, while the principle of a third party monitor, similar to U.S. practice, might still very well be what the final version of the bill intends on allowing in a less explicit manner, only future practice will tell whether the Agency will ask third parties to take on its monitorship mandate.

Once the company (represented by its lawyer) has discussed and agreed to the terms of the prosecutor's CJIP offer, the CJIP must go through judicial scrutiny. CJIPs are not "ratified" (*homologation*) but rather "validated" (*validation*) by a judge during a public hearing. Indeed, the judge will review both the substance and the procedural aspects of the CJIP (including the facts of the case). Once the CJIP is approved, the judge's decision cannot be appealed – although the company has 10 days to retract its agreement. As mentioned above, the validation of the CJIP does not entail any guilty plea on the part of the company, thereby avoiding French companies being excluded from certain international markets financed by international organizations, from certain contracts (private contracts such as hedge funds, public contracts such as public market offers), or from certain activities (*e.g.* banking and other regulated activities). However, Sapin II does not completely depart from criminal law practices, as it requires that CJIPs be published on the Agency's website, and publicly commented upon by the Prosecutor. The full execution by the company of the obligations set forth in the CJIP officially terminates the prosecution[36]. The CJIP mechanism will be fully effective following the publication of its implementing decree (expected in March 2017).

While the creation of the "French DPA" has been described as groundbreaking because it departs from France's traditional legal culture[37], France's white collar crime enforcement framework remains one step removed from that of overseas jurisdictions. Indeed, investigations preceding the execution of DPAs in the U.S. are most often conducted by the companies themselves (using for example the services of a law firm). In contrast, gathering the relevant facts and evidence that will support and lead to a CJIP will continue to be handled by the prosecution office, not by the company. The costs for companies eventually taking a CJIP offer will therefore remain, for the time being, much less significant than in DPA-like cases. But where French companies will be saving investigation costs, they might end up losing in procedural efficiency/rapidity. And, although companies have preferred in the past to engage in lengthy trials and appeals for strategic purposes, white collar cases are those that companies have been increasingly wanting to settle in a timely and out-of-court manner. Putting the burden of proof on the company would expedite the investigation phase and relieve the prosecutor's office from a substantial part of its workload (th allowing prosecutors to take on more white collar cases – ther by favoring the fight against corruption even more so). Yet, remains unclear whether such a shift in investigatory burden w soon be proposed in France, particularly as it would depart fro France's inquisitorial system.

Conclusion

There is no doubt that Sapin II is a groundbreaking piece legislation, first and foremost because the culture of complianc which it sets in hard law, requires companies to internalize t public functions of rule-making and enforcement. This chang the way companies need to look at compliance and legal ris including how companies need to organize their compliance a risk functions. Moreover, internal policies and procedures w not only become the object of corporate liability, but also corporate value, as they will, for example, need be reviewed a upraised as part of M&A deal due diligences. As for the creati of the CJIP transaction, it is also a game changer, which cou very well be extended to other offenses if proven efficient.

However, it remains to be seen whether, as hoped by the autho of the law, French companies that sign CJIP agreements France will be able to claim the application of the *ne bis in ide* principle to shield themselves from foreign prosecution. Indee "*corruption cases often involve a foreign nexus, and numero are the situations where a company could be prosecuted for t same conduct by different authorities. Because the* ne bis idem *principle is not one of international law, a company m end up paying several fines to different foreign authorities*." While only future cases will tell whether the *ne bis in ide* principle will be recognized by foreign authorities, the impl mentation of the CJIP mechanism might at the very least le foreign and French authorities to cooperate in their investig tions, and eventually agree to share a single fine imposed on t same company[39]. Such was, for example, the case for Sieme in December 2008, where the U.S. and German authoriti shared the USD 1.6 B fine paid by the company for havi engaged in corruption of foreign government officials[40]. T impact of CJIP transactions in international cooperation, and t likelihood that CJIP transactions will rebut foreign authoriti from prosecuting the same company twice will be further di cussed and analyzed in this review later this year.

35 – Draft bill available at:

Framework to implementing an ~~-~~"effective" ~~efficient~~ compliance program: the example of anti-bribery programs

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"Compliance programs today concern companies in all sectors of the economy"[41].

Lawyers practicing in the area of Global Financial Crimes, which includes the anti-bribery area, should discuss and implement "effective" compliance programs with their corporate clients at the earliest opportunity to avoid and/or prevent prosecution.

However, what does compliance mean and what is an "effective" compliance program?

Introduction: compliance and compliance programs

According to Paul McNulty, the former US Deputy Attorney General and presently a partner at Baker & McKenzie, "*compliance is the system of self-governance established by a business organization seeking to conform its conduct to the demands of public policy. Practically speaking, it is the means by which a company transforms its ethical values into the more tangible reality of ethical conduct*"[42].

"*Compliance covers a broad spectrum of preventative and remedial efforts, and it must address a potentially wide range of legal risks depending on the nature of an organization's commercial activity*"[43].

But "*the subject of compliance is by no means a new concept. For decades, and specifically in the US, government restrictions on trade, monopolies, and other issues have encouraged companies to establish internal controls to prevent employee misconduct. Many companies operate in highly regulated industries, such as transportation, insurance, and banking, that have long been the subject of extensive government oversight. For some time, the risk of financial mismanagement dominated the compliance concerns of corporate leaders, especially those publicly-traded companies*"[44].

In recent years, compliance has moved to the forefront of glob corporate business strategy as government enforcement actio against corporations have increased due to the broad and extr territorial scope[45] of the Foreign Corrupt Practices A (hereinafter referred to as the "FCPA") - the first US federal la adopted in 1977 - which expressly applies to bribery of foreig public officials by US entities and other entities with a U nexus, including French companies, such as Total and Techni which paid respectively $398 and almost $338 million to sett bribe charges with the US enforcement authorities.

Compliance programs can be defined as the formal systems policies and procedures adopted by corporations and oth organizations, designed to detect and prevent violations of la by employees and other agents and to promote ethical busine cultures[46].

A company should have a corporate compliance program f several reasons[47]: 1) an effective compliance program will set ethical tone and create a corporate environment which discou ages wrongdoing, reduces the likelihood that employees w commit crimes; 2) an effective compliance program can dete misconduct at an earlier stage, allowing the organization to a quickly to minimize adverse consequences; 3) corporatio under government investigation can use the existence of effective compliance program to show good faith and thus avo or minimize possible governmental action against the corpor tion; and 4) a convicted corporation with an effecti compliance program in operation at the time of the offense w benefit from reduced exposure under the Federal Sentencin Guidelines, as explained below.

The American approach

Beginning in the mid-1970's in the US, it became increasing common for companies to adopt programs to attempt to preve and detect certain types of legal violations, such as violations the antitrust or anti-bribery laws[48].

44 Paul McNulty, Partner at Baker & McKenzie, and former US Depu Attorney General, "What is Compliance?" in Corporate Compliance Practi Guide: The Next Generation, Chapter 1, Carole Basri, Release 8, 2016.

45 Nicolas Maziau, "*L'extraterritorialité du droit entre souveraineté et mondia*

Moreover, in 1991, with the promulgation of the United States Sentencing Guidelines for Organizations (hereinafter referred to as the "US Sentencing Guidelines"), the United States government offered companies an important incentive to implement broad-based programs to prevent and detect violations of law[49].

The US Sentencing Guidelines achieved this by making the existence of an "effective" compliance program a potentially significant factor in determining the penalty assessed against an organization for corporate crimes[50], including bribery.

For instance, in the famous Morgan Stanley declination from prosecution, the US Department of Justice held that:

> *"Morgan Stanley maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign government officials. Morgan Stanley's internal policies, which were updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment. Morgan Stanley frequently trained its employees on its internal policies, the FCPA and other anti-corruption laws. Between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies 54 times. During the same period, Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times. Morgan Stanley's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments. Moreover, Morgan Stanley conducted extensive due diligence on all new business partners and imposed stringent controls on payments made to business partners (…)*
>
> *After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley"*[51].

Conversely, the US Securities and Exchange Commission held on March 2016 that the company Novartis "*failed to devise and maintain a sufficient system of internal accounting controls and lacked an effective anti-corruption compliance program to detect and prevent the schemes*"[52] and the entity, hence, agreed to pay $ 25 million to the aforementioned authority to resolve China FCPA offenses.

International moves towards "effective" compliance; the French new legal framework

The United Nations Convention against Corruption expressly provides that "*Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies*

ples of the rule of law, proper management of public affairs a public property, integrity, transparency and accountability"[53].

Thus, "*in the global market place, an effective complian program is a critical component of a company's internal co trols*"[54] and there are some outstanding global demands toda for implementing such programs.

Many countries around the world have embraced this idea of a "effective" compliance program. For instance, the 2015 Spani Criminal Code, entered into force on July 1st, 2015, provides f an exemption from criminal liability if the charged company ha effectively implemented an effective compliance program[55]. addition, the 2016 French Sapin II bill, namely the "*law transparency, anti-corruption and economic modernization*" has introduced relevant changes.

Under the control of the new French Anticorruption Agenc (*Agence Française Anti-corruption*), French companies havin 500 or more employees and a turnover above 100 million euro shall implement anti-corruption compliance programs[57] by Ju 1, 2017. This obligation also applies to any subsidiaries - Frenc or foreign - belonging to French groups having 500 or mo employees and a turnover above 100 million euros, as well as their top management employees.

Furthermore, in accordance with this law, such compliance programs shall include:

- A code of conduct included in the company's intern regulations that defines prohibited acts and behaviors like to constitute bribery or influence peddling;
- An internal whistleblowing system that enables employe to report any violation of this code of conduct;
- Risk mapping, in the form of a document regularly update which aims at identifying, analyzing and prioritizing t company's risk of exposure to any external requests for t purposes of bribery, notably according to the business lin and the geographic areas in which the company operates;
- Due diligence procedures applied to the company's client top-tier suppliers and intermediaries regarding the ris mapping;
- Internal or external accounting control systems to avo fraud, including acts of concealment and influence pe dling;
- Training procedures intended to be provided to the seni managers and the staff most often confronted with bribe and influence peddling risks;
- Disciplinary sanctions to be imposed in case of breach internal rules and procedures;
- A control system and an internal assessment of the impl mented measures.

Failure to implement these measures might lead to fines up EUR1 million for a legal entity and EUR200.000 for its leg

representatives[58] to be imposed by the French Anticorruption Agency's sanctions committee.

Moreover, a new criminal statute has been enacted and included into the French Criminal Code concerning implementing a compliance program where a crime - such as bribery or money laundering - has been committed[59]. According to Article 131-39-2 of the French Criminal Code, and subject to conditions, the Court may impose the obligation to create or refocus an existing compliance program under the control and/or monitorship of the French Anti-corruption Agency. Such a penalty can be imposed for a maximum period of five years in order to ensure the existence and the implementation of the aforementioned measures and procedures.

Furthermore, the newly enacted Article 434-43-1 of the French Criminal Code provides that non-compliance with Article 131-39-2 might lead to a fine up to EUR 50.000 and two years of imprisonment. It should be noted that this amount might be increased up to the amount of the fine incurred for the crime the company was initially found guilty of and resulting in the penalties including the monitorship provided in Article 131-39-2.

However, while the regulators welcome "effective" compliance programs designed to prevent and detect wrongdoings, the issue is how to ensure these compliance programs are effective? How to ensure they work in the real world?[60] Many choices are available to designated chief compliance officers and/or compliance committees in order to choose the most "effective" framework for a company's anti-bribery corporate compliance program. They might want to look at the major compliance standards (laws, regulations, and/or "soft laws") that can be found in neighboring European countries, as well as overseas, as detailed below. Nevertheless, this remains a difficult task since these frameworks are often not practical and/or effective upon implementation.

The US compliance standard

The aforementioned **US Sentencing Guidelines** constitute the major general compliance standard in this country. Specifically, Section 8B2 starts with seven elements and was expanded to include creating a culture of ethics and a part C risk assessment. These elements are extremely useful in creating an "effective" compliance program, notably while implementing an "effective" anti-corruption program. In fact, as explained above, the US Sentencing Guidelines were the first guidelines for creating a compliance program and to use the term "effective" compliance program, which is now a term of art to define a compliance program that meets the test of acting as a shield to prosecution for companies from US regulators where a rogue employee is found to have undermine the program.

In a nutshell, the following constitute the elements of an "effective" compliance program under Section 8B2:

- Risk Assessment;
- Policies, Procedures and Internal Controls;
- Reporting Lines and Organizational Charts;
- Updating the Compliance Program and Protocols for Inte nal Investigations.

The major international compliance standards

The **OECD Good Practice Guidance on Internal Control Ethics, and Compliance**[61] provides a specific framework f implementing an effective anti-bribery compliance progra According to the OECD, companies should consider the follo ing good practices for ensuring "effective" internal contro ethics, and compliance programs or measures for the purpose preventing and detecting foreign bribery:

- Strong, explicit and visible support and commitment fro senior management to the company's internal controls, et ics and compliance programs or measures for preventi and detecting foreign bribery;
- A clearly articulated and visible corporate policy prohib ing foreign bribery;
- Compliance with this prohibition and the related intern controls, ethics, and compliance programs or measures the duty of individuals at all levels of the company;
- Oversight of ethics and compliance programs or measur regarding foreign bribery, including the authority to repo matters directly to independent monitoring bodies such internal audit committees of boards of directors or of supe visory boards, is the duty of one or more senior corpora officers, with an adequate level of autonomy from ma agement, resources, and authority;
- Ethics and compliance programs or measures designed prevent and detect foreign bribery, applicable to all dire tors, officers, and employees, and applicable to all entiti over which a company has effective control, including su sidiaries, on, *inter alia*, the following areas:
    - gifts;
    - hospitality, entertainment and expenses;
    - customer travel;
    - political contributions;
    - charitable donations and sponsorships;
    - facilitation payments; and
    - solicitation and extortion;
- Ethics and compliance programs or measures designed prevent and detect foreign bribery applicable, where appr priate and subject to contractual arrangements, to thi parties such as agents and other intermediaries, consultan representatives, distributors, contractors and suppliers, co sortia, and joint venture partners (hereinafter "busine partners"), including, *inter alia*, the following essential e ements:
    - properly documented risk-based due diligence pertai ing to the hiring, as well as the appropriate and regul oversight of business partners;
    - informing business partners of the company's cor

accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery;

- Measures designed to ensure periodic communication, and documented training for all levels of the company, on the company's ethics and compliance program or measures regarding foreign bribery, as well as, where appropriate, for subsidiaries;
- Appropriate measures to encourage and provide positive support for the observance of ethics and compliance program or measures against foreign bribery, at all levels of the company;
- Appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company's ethics and compliance program or measures regarding foreign bribery;
- Effective measures for:
    - providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance program or measures, including when they need urgent advice on difficult situations in foreign jurisdictions;
    - internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and
    - undertaking appropriate action in response to such reports;
- Periodic reviews of the ethics and compliance programs or measures, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, taking into account relevant developments in the field, and evolving international and industry standards.

ISO 37001[62] specifies anti-bribery measures that companies must implement in a reasonable and proportionate manner. This anti-bribery management system standard is designed to help an organization establish, implement, maintain, and improve an effective anti-bribery compliance program. It includes measures and controls that represent global anti-bribery good practice.

The standard is flexible and can be adapted to a wide range of organizations, including large organizations, small and medium sized enterprises, public and private sector organizations, and non-governmental organizations. It can be used by organizations in any country in a reasonable and proportionate manner to help prevent, detect, and deal with bribery.

ISO 37001 calls for:

- Implementing an anti-bribery policy and program;
- Taking reasonable and proportionate steps to ensure th controlled organizations and business associates have im plemented appropriate anti-bribery controls;
- Verifying as far as reasonable that personnel will comp with the anti-bribery policy;
- Controlling gifts, hospitality, donations and similar benef to ensure that they do not have a corrupt purpose;
- Implementing appropriate financial, procurement and oth commercial controls so as to help prevent the risk of bri ery;
- Implementing reporting (whistle-blowing) procedures;
- Investigating and dealing appropriately with any actual suspected bribery.

Moreover, **ICC Rules on Combating Corruption**[63] provide t following elements of an effective anti-corruption complian program[64]:

- Strong, explicit and visible support and commitment to t compliance program by the directors or other body ul mately responsible "tone at the top";
- A clearly articulated and visible policy reflecting the rul and binding for all directors, officers, employees and thi parties and applied to all controlled subsidiaries, foreig and domestic;
- Periodical risk assessments and independent reviews compliance with the rules and corrective measures or po cies, as necessary by the directors or other body ultimate responsible;
- Making it the responsibility of individuals at all levels comply with the policies and procedures and to participa in the compliance program;
- Appointment of one or more senior officers (full or pa time) to oversee and coordinate the compliance progra with an adequate level of resources, authority and ind pendence, reporting periodically to the directors or oth body ultimately responsible, or to the relevant committ thereof;
- Guidelines to be issued, as appropriate, to further elicit t behavior required and to deter the behavior prohibited b the policies and procedures and the compliance program;
- Appropriate due diligence based on a structured risk ma agement approach;
- Financial and accounting procedures for the maintenance fair and accurate books and accounting records to ensu they cannot be used for the purpose of engaging in or hi ing of corrupt practices;
- Proper systems of control and reporting procedures inclu ing independent auditing;
- Periodic internal and external communication regarding t anti-corruption policy;
- Training in identifying corruption risks in the daily busine

- Channels to raise, in full confidentiality, concerns, seek advice, or report in good faith established or soundly suspected violations without fear of retaliation or of discriminatory or disciplinary action; all *bona fide* reports should be investigated;
- Appropriate corrective action or disciplinary measures and appropriate public disclosure of the enforcement of the policy where violations are reported or detected;
- Improvement of the compliance program by seeking external certification, verification or assurance; and
- Supporting collective action, such as proposing or supporting anti-corruption pacts regarding specific projects or anti-corruption long term initiatives with the public sector and/or peers in the respective business segments.

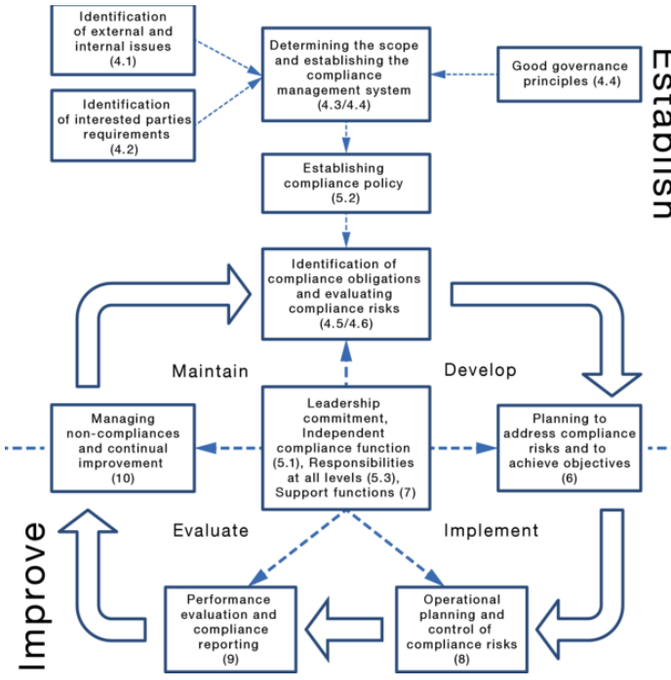
In addition to the above, other frameworks must be highlighted, even if they do not specifically relate to anti-corruption compliance.

Frameworks: COSO and ISO

The **COSO** framework[65] illustrates the requirements for a COSO based compliance program. This framework has an accounting/auditing methodology rather than a legally oriented terminology.

Rather than providing the text of the requirements under COSO, the cube below illustrates the COSO elements for an "effective" compliance program around five key elements:

- Control Environment;
- Risk Assessment;
- Control Activities;
- Information & Communication;
- Monitoring Activities.



Source: COSO

ISO 19600[66] provides guidance for establishing, developin implementing, evaluating, maintaining and improving an effe tive and responsive compliance management system within organization. Its guidelines on compliance management syster are applicable to all types of organizations and the extent of the application depends on the size, structure, nature and complexi of the organization.

ISO 19600 is based on the principles of good governanc proportionality, transparency and sustainability. Its framework illustrated in the chart below (entitled "flowchart of a comp ance management system"), which interestingly not only shov the elements for an "effective" compliance program but al illustrates the flow of actions to create the compliance progra including establishment of the program and improvement of t program.

Source: ISO 19600

The major European compliance standards

Under **Section 7 of the UK Bribery Act**[67], it is a defense for company to prove that it had in place adequate procedures rather than using the term "effective" compliance program designed to prevent persons associated with it from undertaki bribery.

In addition, **Section 9 of the UK Bribery Act**, entitled "Gui ance about commercial organizations preventing bribery"

CHRONIQUE

These guidelines[69] provide the elements for a so-call "adequate" compliance program. As an indicative but not exhaustive list, an organization may wish to cover, in its policies:

- Its commitment to bribery prevention;
- Its general approach to mitigation of specific bribery risks, such as those arising from the conduct of intermediaries and agents, or those associated with hospitality and promotional expenditure, facilitation payments or political and charitable donations or contributions;
- An overview of its strategy to implement its bribery prevention policies.

The procedures put in place to implement an organization's bribery prevention policies should be designed to mitigate identified risks, as well as to prevent deliberate unethical conduct on the part of associated persons. The following is also an indicative and not exhaustive list of the topics that bribery prevention procedures might embrace depending on the particular risks faced:

- The involvement of the organization's top-level management;
- Risk assessment procedures;
- Due diligence of existing or prospective associated persons;
- The provision of gifts, hospitality and promotional expenditure; charitable and political donations; or demands for facilitation payments;
- Direct and indirect employment, including recruitment, terms and conditions, disciplinary action and remuneration;
- Governance of business relationships with all other associated persons including pre and post contractual agreements;
- Financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure;
- Transparency of transactions and disclosure of information;
- Decision making, such as delegation of authority procedures, separation of functions and the avoidance of conflicts of interest;
- Enforcement, detailing discipline processes and sanctions for breaches of the organization's anti-bribery rules;
- The reporting of bribery including "speak up" or "whistle blowing" procedures;
- The detail of the process by which the organization plans to implement its bribery prevention procedures, for example, how its policy will be applied to individual projects and to different parts of the organization;
- The communication of the organization's policies and procedures, and training in their application;
- The monitoring, review and evaluation of bribery prevention procedures.

Moreover, **Articles 6 and 7 of the Italian Decree No. 231/2001** prescribe specific types of behaviors, which do not entail any

Specifically, Article 7 provides that an entity would be releas from liability if it has adopted and effectively implemente prior to the occurrence of the crime, a model suitable to preve the perpetration of crimes while:

- Identifying the activities within which crimes may committed;
- Prescribing specific protocols aimed to plan the trainin and the implementation of the decisions of the entity in r lation to the crimes to prevent;
- Identifying the management procedures of the financi resources suitable to prevent such crimes;
- Prescribing the obligations to inform the supervisory body
- Introducing a disciplinary internal system adequate punish the non-observance of the measures specified in t model.

Plus, companies shall ensure that:

- The governing body has adopted and effectively impl mented prior to the occurrence of the event, "organizati and management models suitable to prevent the perpetr tion of crimes of the type of that occurred";
- The surveillance of the effectiveness and of the observan of the models and the proposal to update them has been e trusted to the Entity's Supervisory Body which h autonomous powers of initiative and control;
- Those who have committed the crime have acted by fraud lently disregarding the models;
- The supervisory body has not failed to carry out or inad quately carried out the surveillance.

Article 31bis of the 2015 Spanish Criminal Code[71] tends follow the structure of the aforementioned Italian Decree. Co panies might be released from criminal liability when:

- The board of directors has adopted and implemented organizational, management, and control model designed prevent the type of offenses committed;
- The supervision of the model is entrusted to a body wi independent powers of initiative and control, or to a pers legally entrusted with the function of supervising the effe tiveness of the internal controls;
- The individual authors of the crime committed the offen while intentionally and fraudulently evading the organiz tional and prevention models;
- There has been no omission or insufficient exercise of supervisory, monitoring and control functions by the bo referred above.

In addition, this model must include the following requirement

- Identifying the activities within the company that m represent a risk;
- Implementing training policies, procedures;
- Implementing financial resources management systems

changes in the organization, control structure, or the company's activities make them necessary.

The **German Attestation Standard (AssS 980)**, Audit of Compliance Programs, also provides the following seven key principles of an "effective" compliance and ethics program:

- Compliance culture;
- Compliance objectives;
- Compliance organization;
- Compliance risks;
- Compliance program;
- Compliance communication;
- Compliance monitoring and improvement.

Finally, the **Framework-Document on Antitrust Compliance Programs**[72] issued by the French Antitrust Authority (*Autorité de la concurrence*) in order to comply with Section III of Article L. 464-2 III of the French Commercial Code, empowers this Authority to reduce financial penalties when the legal entity "*does not contest the truth of the alleged antitrust allegations and undertakes to change its future behavior*".

The Authority thus considers that the company shall implement an effective antitrust compliance program tailored to each company's particular situation in terms of risks and individual characteristics, its size, its activity and the market, as well as on its organization, governance and culture, including the following elements:

- The existence of a clear, firm and public position adopted by the company's management bodies and, more broadly, by all managers and corporate officers;
- The commitment to appoint one or more persons empowered, within the company or organization, to develop and monitor all aspects of the compliance program;
- The commitment to put in place effective information, training and awareness measures, in ways compatible with labor legislation;
- The commitment to set up effective control, audit and whistle-blowing systems;
- The commitment to set up an effective oversight system;
- Informing and training corporate officers, managers, supervisors and other employees or agents of the company or organization with respect to antitrust rules.

Conclusion: the need for creating a universal compliance framework

It shall be noted that the companies' global commitment to abide by compliance laws and regulations, specifically in order to combat bribery, constitute a "*wonderful growth lever of economic attractiveness*"[73], but also enable them to escape from huge sanctions. Concerned professionals are thus given the essential and valuable components. For instance, no backgrou checks or any incentives must be included as part of the ne legal French anti-bribery compliance program[74] while this mig be required in the US.

Therefore, in line with the framework of the Three Lines Defense, universally accepted[75], the key might be creating simple enough and global framework for the creation of "effective" compliance program, even if it would have to tailored to the country and the industry at stake.

Taking into account the above, the following appears to be t most suitable universal framework:

- Risk Assessment, including how to conduct a risk asses ment:
  - Inventory documents;
  - Interview questions, interviews, interview reports;
  - Heat maps and dashboards (including measuring inhe ent risk minus internal control equals residual risk);
  - Risk assessment report.
- Tone at the Top:
  - Ethics awareness for the directors, officers, manage and employees;
  - Creating a culture of ethics;
  - Performing a culture audit.
- Report Lines and Compliance Structure:
  - Creating the compliance office;
  - Appointing the chief compliance officer and complian officers;
  - Job descriptions;
  - Reporting lines including:
    - Direct and indirect;
    - Centralized and decentralized;
    - Specialist and generalists.
- Internal Controls, Written Policies and Written Procedures
  - Values;
  - Mission Statement;
  - Code of Conduct;
  - Third Party Code of Conduct;
  - Corporate Compliance Program Guidelines;
  - Written policies;
  - Written procedures;
  - Internal controls (including all auditing policies);
  - Alignment.
- Background Checks:
  - Employees;
  - Third Parties (including Supplies, Contractors, a

  - Train the Trainer (training for ethics).
- Auditing, Monitoring, Testing and Surveillance, and Reporting:
  - Hotlines – anonymous, not confidential;
  - Audits of Third Party Supplies, Contractors and Agents.
- Incentives and Discipline:
  - Performance evaluations;
  - Understanding how employees are incentivized.
- Updating the Compliance Program and Internal Investigation Protocols.

It should also be kept in mind that any universal framework to be adopted needs to be clear, transparent and user friendly. It should include steps, which are easily translatable into the process and allow for local applicability and global standardization.

Remember: the Three Lines of Defense promote using a framework that can be understood clearly, even by the First Line of Defense, your business people, as well as by regulators and prosecutors, who are often lawyers. Therefore, we recommend the framework suggested above.