France

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On the one hand, 2016 was a year of significant changes within the French legal landscape. The early transposition of the 4th EU directive on anti-money laundering, the adoption of a new law targeting corruption practices and a law reforming the statute of limitations all demonstrate France's willingness to bring its legal standards into line with EU requirements and international practices. These new provisions have yet to be tested in practice.

On the other hand, the French Constitutional Council was reluctant to provide a firm answer regarding the issue of double jeopardy between criminal and administrative sanctions.

The transposition of the Fourth EU Directive on anti-money laundering

By way of ordinance, France implemented the Fourth Directive on anti-money laundering on 1 December 2016.

The reinforcement of the French Financial Intelligence Unit's prerogatives (Tracfin)

Tracfin's objectives have been reshaped and widened. Tracfin now aims 'to collect, assess, enrich and exploit all relevant information that could establish the origin or destination of the funds or the nature of the transaction that has been subjected to a report or a query.'

In addition, Tracfin's rights to communicate with obliged entities have been enlarged, and a new power of alert and access to the criminal records files has been created.

First, Tracfin's right of communication is enlarged to some entities that are not subject to AML-TF rules otherwise. For instance, Tracfin is now entitled to collaborate directly with the French national unions for funds managing barristers' pecuniary settlements (CARPA). As a consequence, Tracfin may request information about the amount, the origin and destination, the purpose or the value of funds deposited by a lawyer into his CARPA-managed account, the identity of the lawyer concerned and the nature of the transaction registered by CARPA.

Second, Tracfin is allowed to transmit collected information to several administrative authorities, ie, customs, tax administration, intelligence services, financial jurisdictions, the anti-corruption agency, the Competition, Consumer Affairs and Prevention of Fraud Unit (DGCCRF), etc.

Third, the ordinance reinforces Tracfin's right to refuse the completion of any suspicious transaction not yet executed. Prior to the entry into force of the ordinance, the transaction could be postponed up to five working days from the date of notification of Tracfin's opposition. Now, Tracfin's right to oppose a suspicious transaction is lengthened to 10 working days, which enables it to pursue further investigations if needed.

Eventually, it is worth noting that in order to help obliged entities in the implementation of their due diligence requirements, Tracfin may point out to these entities, for a renewable six-month period (1) any financial operations that – because of their peculiar nature or due to the geographical zones they impact – pose a high risk of money laundering or terrorist financing, and (2) any person who poses a high risk of money laundering or terrorist financing. In any event, such information must be kept confidential by the obliged entities.

Public record of ultimate beneficial owners

First, Sapin II requires listed companies to disclose details of the identity of their ultimate beneficial owners (UBO) to the Commercial Register of the city where their head office is located. Second, the provisions implementing the Fourth Directive impose such requirements on non-listed companies.

Companies and other legal entities have until 1 April 2018 to record their UBO with the Commercial Register. Notably, the record must mention the UBO's identity and personal address, and the nature of the control exerted on the company.

Likewise, trust administrators should provide adequate, accurate and current information on beneficial ownership regarding the trust – if the trustor or at least one of the beneficial owners is tax domiciled in France. This information shall annually cover the constitution, the change, the extinction, the content, and the current value of property placed in it. Information collected about UBOs of trusts will be held by the Ministry of Economy and Finance.

These two records are both accessible to Tracfin, judicial authorities, customs, tax administration, AML-TF authorities and to professionals themselves.

The scope of the AML-TF legislation is broadened

Prior to the entry into force of the ordinance, the main financial entities subject to AML-TF rules were credit and financial institutions. Some non-financial institutions such as lawyers, notaries or gambling operators were also subject to these rules.

The ordinance broadens the scope of these entities, which now notably includes payment or virtual money institutions conducting business in France, authorised banking intermediaries, virtual money converting platforms, providers of gambling services for transactions above €2,000 and traders of precious commodities when they accept large cash payments. Crowdfunding intermediaries are also submitted to the new legislation.

The reinforcement of supervision and sanction schemes

Firstly, the ordinance provides a more precise definition of what constitutes a 'business relationship'. The French Monetary and Financial Code now specifies that it is 'the professional or commercial relationship with the client and includes, if applicable, a beneficial owner'.

Secondly, the ordinance clarifies risk assessment conducted by subjected entities, including at a group level. It imposes new obligations regarding both internal procedures on information sharing and implementation of due diligence requirements.

In addition, supervisory authorities have extended powers. The French Monetary and Financial Code now specifies that entities subject to AML-TF, as laid down in article L.562-1, embrace both legal and natural persons.

Furthermore, in case of infringement of AML-TF requirements by an obliged entity, the competent authority is empowered to sanction not only directors, but also employees, officers and those acting on behalf of the obliged entity, as a result of their personal involvement. Ultimately, all these sanctions could be made public.

The Sapin II Law

On 8 November 2016, the French parliament passed a law targeting transparency, anti-corruption and the modernisation of the economy, known as the Sapin II Law. This law provides for landmark innovations but also reflects France's aspirations to compete with the US and the UK in the field of the prosecution of criminal offences related to bribery.

A new whistleblowing regime

In 2016, the Council of State had criticised the lack of coherence and protection conferred by the French whistleblowing system. The Sapin II Law followed the recommendations of the Council by setting up a unified legal status for all whistleblowers.

To be entitled to the protection, the whistleblower must meet several criteria and follow a specific procedure.

First, the whistleblower must be a natural person and report selflessly and in good faith what he or she has personal knowledge of. On 8 December 2016, the French Constitutional Council highlighted that this broad definition was not restricted to employees and external or occasional collaborators of the company targeted by the warning. As a consequence, outside the scope of Sapin II, one may wonder whether a person denouncing an offence to the public prosecutor under article 40 of the French Code of Criminal Procedure will be considered as a whistleblower. If so, what kind of protection will this person be entitled to?

In any case, the warning may consist of a wide range of misbehaviours, including but not limited to criminal offences, breach of laws and regulation, a serious and obvious breach of an international commitment duly ratified or approved by France, or a serious threat or harm to the public interest perpetrated by the company. It is worth noting that documents protected by national defence confidentiality, medical confidentiality or legal privilege are excluded from the protection regime, contrary to documents protected by business confidentiality.

Second, under Sapin II, the whistleblower must follow a three-stage procedure. The whistleblower must address the warning to his manager, his employer or a specific person designated by the employer. In the absence of a response within a reasonable time frame, the whistleblower reports the warning to judicial and administrative authorities or professional bodies. In this respect, the whistleblower may consult the Defender of Rights in order to be directed toward appropriate recipients. Finally, in the absence of a response within a three-month period, the whistleblower may disclose the warning to the public.

Third, Sapin II specifies that companies with a workforce of at least 50 employees are required to set up arrangements to gather these warnings. These arrangements will be specified by decree.

Finally, pursuant to Sapin II, the whistleblower status confers a protection under both criminal and labour law. Despite the breach of a secret protected by law, the whistleblower may benefit from criminal immunity under certain conditions. The whistleblower is also entitled to a protection against both discrimination within the workplace and termination of employment. However, contrary to the provisions of the bill, whistleblowers are not entitled to financial support.

Compliance programmes

Sapin II also sets out compliance programmes that have to be implemented by mid-2017. These requirements notably apply to any company with (1) at least 500 employees, or which belongs to any group whose parent company's headquarters are located in France and that has at least 500 employees, and (2) an annual turnover of more than €100 million.

These companies have to implement the following eight measures and procedures: a code of conduct defining and illustrating the different types of prohibited behaviours; an internal system of alerts designed to enable employees to report any violations of the code of conduct; risk mapping, which will be regularly updated and is designed to identify, analyse and rank the company's exposure to any risk related to bribery; an assessment of clients, providers and intermediaries in light of the risk mapping; accounting controls designed to ensure that the company's books and accounts are not used to conceal bribery acts or influence peddling; training for managers and employees exposed to the risks of bribery and influence peddling; disciplinary sanctions against employees in case of violation of the code of conduct; and internal control procedures to assess the efficiency of the compliance programme.

Although many companies have already implemented compliance programmes, notably those falling under the scope of the Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act, the introduction of the Sapin II Law is a good opportunity for companies and their directors to update and adapt these programmes to the French legal landscape. However, given the existence of specific procedures to be followed under French labour law regarding the implementation of compliance programmes, the mere transposition of an existing programme to a French subsidiary of a foreign group is not recommended.

It is also worth underlining that presidents and directors of such companies may be held liable by the new anti-corruption agency for failure to implement compliance programmes.

A new anti-corruption agency and sanctions

Inspired by current laws and regulations relating to anti-money laundering and the fight against terrorism, the Sapin II Law institutes a French anti-corruption agency (AFA) that will control the implementation of compliance programmes within companies.

To fulfil its mission, the AFA will be entitled to request any document or information on the company's premises. Its officers may also communicate with any person whose assistance seems necessary, provided that confidentiality is ensured. Taking into consideration the existing practice of onsite inspections by the French AMF and ACPR, subject entities may worry that the AFA will have a restrictive approach of the right of the defence, and notably of the right to be assisted by a lawyer during on-site controls.

Following its control, the agency will issue comments on the company's compliance programme and, where necessary, make recommendations for improvement.

In the event a company fails to implement or to improve a compliance programme, the agency may issue a warning. Through its sanctions committee, it may also impose sanctions including a fine on any director of up to €200,000 or a fine on any company of up to €1 million. Furthermore, the agency's decisions can be

published, thus exposing the company to adverse publicity. In the current context where investors are increasingly attentive to the ethical reputation of companies, such publicity is likely to have harmful trade implications for any company failing to implement compliance programmes.

The French DPA

Beyond addressing the implementation of compliance programmes and the penalties for failing to do so, Sapin II introduces a new criminal offence of influence peddling of foreign public officials, widens the jurisdiction of French criminal courts and creates an alternative procedure to criminal prosecution.

The creation of the judicial agreement in the public interest has been largely compared to the deferred prosecution agreement (DPA) under US law. Depending on where the criminal procedure stands, the public prosecutor or the investigating judge may propose this agreement to any legal person suspected of having committed bribery, influence peddling or laundering of tax fraud proceeds.

In the event such an agreement is entered into, the company may be ordered to pay a fine up to 30 per cent of its average annual turnover within the last three years at the time the offence was committed. In addition, the company will be compelled to implement a compliance programme under the supervision of the AFA for three years. Notwithstanding any settlement, the representatives of the company may still be held liable for the offences committed.

The judicial agreement in the public interest needs to be validated by the court's president after a public hearing but this validation will not have the effect of a sentencing judgment.

It is worth highlighting that this agreement is applicable to existing criminal procedures. Hence, negotiations of the first judicial agreements in the public interest are currently being held between prosecuted companies and the financial prosecutor. They will set the tone for the forthcoming negotiations and will determine the credibility of this innovative tool.

The French DPA illustrates France's ambitions to become a privileged legal forum for the prosecution of criminal offences related to bribery. Yet, if the first negotiations between prosecuted companies and the financial prosecutor fail or if their outcome remains very smooth for companies, the French DPA will suffer a lack of credibility in relation to the US and the UK, which in turn may decide to prosecute companies for the same facts.

Statute of limitations

On 16 February 2017, the French parliament passed a law aimed at simplifying the statute of limitations for criminal offences. This law is expected to have a real impact on the prosecution of white-collar crime, and to apply to offences perpetrated before its entry into force. On the one hand, the law extends the statute of limitations for white-collar offences from three to six years. On the other hand, the law introduced a 12-year deadline to prosecute such offences. Yet, it is well established under French law that the limitation period to prosecute financial offences generally runs from the moment the offence is uncovered.

As a consequence, although the limitation period to prosecute hidden or concealed abuse of corporate assets still runs from the day the offence is uncovered, from now, however, prosecution must begin within a 12-year period from the commission of the offence. Any action would be time-barred after this period. This reform therefore puts an end to the Court of Cassation's approach according to which, in practice, many white-collar offences could be indefinitely prosecuted.

Double jeopardy

Historically, the French legal system could impose both administrative and criminal sanctions on perpetrators of financial crimes. French and foreign companies doing business in France could be punished by national regulators and also by national criminal courts for the same act.

This approach has been challenged over the last two years before the French Constitutional Council on the grounds of the non bis in idem principle. Paradoxically, the Council adopted different solutions concerning insider trading offences and tax fraud. In the presence of an insider trading offence, the Council had ruled in the *EADS* case in 2015 that a person could not be subject to both a criminal prosecution for insider trading offences and an administrative action for insider trading breach. Based on this decision, defendants' lawyers decided to question the constitutionality of the double jeopardy system in the field of tax fraud. However, on 24 June 2016, in the *Cahuzac* and *Wildenstein* cases, the Council ruled that a person could be prosecuted both by the tax administration and criminal authorities provided that criminal sanctions only apply to the most serious cases of tax fraud and the total amount of the sanctions does not exceed the highest amount between potential administrative and criminal penalties. On 22 July 2016, the Council confirmed this approach challenging the view adopted by the European Court of Human Rights (ECHR) in its landmark *Grande Stevens v Italy* decision. This disobedience has been taken into consideration by the Strasbourg Court. On 15 November 2016, in the *A and B v Norway* case, the European Court moderated its position. The ECHR held that taxpayers could be prosecuted and punished twice in administrative and criminal proceedings provided that there is sufficiently close connection between procedures, both in substance and in time, for them to be regarded as forming part of an overall scheme of sanctions. Thus, in light of the French and ECHR case law, the golden age of pleadings relying on the non bis in idem principle now appears to be over.

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Ludovic Malgrain is a partner in the white-collar crime and regulatory group of White & Case in Paris. Representing clients in criminal courts throughout France, his track record includes a number of high-profile cases, such as the collapse of the gangway of the Queen Mary II passenger ship, the Air France Concorde crash and the *Helvet Immo* case.

Ludovic also advises major industry players and financial institutions, such as banks and investment funds, on their regulation and compliance-related obligations. Drawing on 15 years of hands-on experience, he helps clients to satisfy legal requirements relating to bribery and corruption by adopting appropriate internal procedures, to implement compliant work safety programmes, and to limit their criminal exposure.

Sharing his experience with clients, Ludovic delivers training and seminars on the prevention of corporate criminal liability for individuals and organisations, as well as the prevention of fraud and delegation of powers.

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Jean-Pierre Picca is a partner in the white-collar and regulatory group of White & Case in Paris. A senior legal adviser to the President of the French Republic between 2010 and 2012 as well as Senior Prosecutor, Jean-Pierre Picca held a variety of high-level duties within the French judiciary before joining the firm in early 2013.

Jean-Pierre notably performed functions as a senior liaison legal advisor to the Criminal Division of the US Department of Justice and to the Embassy of France in Washington, DC between 2002 and 2007. He also held a variety of positions at the French Ministry of Justice between 1993 and 2002 and has an in-depth knowledge of the French judicial system.

Jean-Pierre's practice focuses on multi-jurisdictional regulatory, criminal and civil proceedings. He represents leading financial institutions and their senior managers in the context of major investigations driven by the US authorities. He is also advising major banks on the implementation of their compliance programmes.

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