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French Anti-Corruption Law

Evaluating the French Regulators' Draft Anti-Corruption Internal Investigation Guidance

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It has been five years since France adopted its ground-breaking anti-corruption law, known as *Sapin II*^[1], and the anti-corruption and compliance environment within France continues to evolve rapidly. Although France had laws criminalizing foreign corruption since the early 2000s, following the adoption of provisions in its criminal code (*Code Pénal*) to bring it in line with the OECD Convention, its enforcement environment was noted to be severely lacking, and several high-profile prosecutions of large French multinationals by the U.S. authorities prompted legislative action that resulted in *Sapin II*'s adoption.

Sapin II altered the anti-corruption enforcement environment in several key ways. From a “preventative” perspective, it required large French companies (i.e., those meeting certain criteria^[2] on their own and/or together with the companies that they own and/or control, regardless of whether those are based in France or abroad) to adopt and implement compliance programs to prevent and detect corrupt activities. The absence of such a compliance program, even without an underlying act of corruption, can be sanctioned through administrative fines and penalties. To assess companies' compliance with this requirement, *Sapin II* created a new agency: the *Agence Française Anticorruption* (AFA), to (among other things), conduct detailed “controls” of relevant companies' compliance programs. These changes and the proactivity of the AFA which reports to have conducted a total of 120 such controls as of December 2021, have resulted in a significant upheaval in how large companies approach and dedicate resources to their compliance programs.

Most relevant to this article, however, was the paradigm shift that *Sapin II* introduced in terms of how companies approach and potentially resolve corporate wrongdoing (in this case, specifically, acts of corruption) *vis-à-vis* the authorities. First, by imposing the implementation of a whistleblowing system, *Sapin II* indirectly requires companies to set up the proper framework to appropriately address corresponding reports of potential wrongdoing – i.e., through conducting internal investigations. Second, it must be noted that prior to *Sapin II*, there was no legal mechanism through which French companies could negotiate and resolve allegations of corruption with French prose-

cutting authorities. While internal investigations were de facto conducted by companies willing to shed light on certain situations, there was little incentive to (i) conduct thorough and in-depth internal investigations; (ii) self-disclose wrongdoing; and/or (iii) cooperate with the prosecution authorities in uncovering potential acts of corruption. *Sapin II*'s introduction of a mechanism for negotiated resolutions – the *Convention judiciaire d'intérêt public* (CJIP) – altered this landscape dramatically.

Often compared to U.S. or U.K. deferred prosecution agreements (DPA), the CJIP now permits French companies (not individuals) to resolve certain corporate offenses, including corruption, through a negotiated resolution, often containing conditions familiar to those in a DPA, such as (i) the payment of fines and penalties; (ii) commitment to adopt a robust anti-corruption compliance program; (iii) agreement to the monitoring of the adoption of such compliance program (which, in France, is performed by the AFA); and (iv) the indemnification of the victim, as the case may be.

With the introduction of the CJIP, stakeholders in France, including the authorities, lawyers and company counsels, have been increasingly focused on the role and importance of conducting internal investigations. It is in this context that the AFA and the *Parquet national financier* (PNF) released a draft Practical Guide Relating to Anti-Corruption Internal Investigations in March 2022 (hereinafter, the AFA/PNF Draft Guide) and opened it to public consultation for one month. While a notable contribution to the enforcement landscape, and still in draft form, an assessment of the AFA/PNF Draft Guide offers some insight into the manner in which the French anti-corruption landscape may continue to evolve, and considerations that companies and counsel based outside of France should consider if they are confronted with an inquiry within France.

See “[How to Assess Risk Under Sapin II](#)” (Dec. 11, 2019).

Overview of the AFA/PNF Draft Guide on Internal Investigations

The AFA/PNF Draft Guide is not the first document whereby the two organizations address the issue of internal investigations within France. In their [guidelines](#) relating to the entry into a CJIP, issued in June 2019, the AFA and the PNF advised companies that wished to avail themselves of this negotiated resolution to, among other things, undertake a thorough internal investigation and cooperate with the authorities through the provision of documents and relevant findings.

Also in June 2020, the French National Bar Council – an organization that represents French lawyers throughout the country – issued a guide on the role of French lawyers when conducting internal investigations (the CNB Guide). The objective of the CNB Guide was to ensure that French lawyers in private practice – who have been playing an increasingly important role in conducting internal investigations, notably because in-house lawyers do not benefit from the legal privilege in France – who are not necessarily experienced in such activities, did so taking into account various considerations stemming from legal principles and best practices and relating to (i) relevant areas of law (labor law, data protection law, criminal law, etc.); (ii) strategic aspects (current or potential involve-

ment of authorities, foreign jurisdiction, etc.); and (iii) ethical obligations (mainly the relevant National Bar Rules and the Paris Bar recommendations to lawyers conducting internal investigations).

The AFA/PNF Draft Guide builds upon these prior efforts and covers three main categories, with sub-categories under each:

- (i) factors (both internal and external) that can prompt an internal investigation;
- (ii) points of vigilance when conducting an internal investigation; and
- (iii) steps to consider following conclusion of the internal investigation.

In a jurisdiction like France, where the anti-corruption enforcement environment is still rapidly evolving, any guidance that continues a dialogue among stakeholders is welcome, and as noted above the AFA/PNF Draft Guide remains in draft form, with the potential for further refinement. Nonetheless, there are certain noteworthy points within the AFA/PNF Draft Guide that warrant attention and illustrate some of the challenges associated with conducting an internal investigation in France or involving French activities.

See [“How AFA Compliance Program Controls Are Changing the French Anti-Corruption Compliance Landscape”](#) (Apr. 3, 2019).

Areas of Attention

Scope

Given that it was issued by French authorities, it is not surprising that the AFA/PNF Draft Guide appears to focus (i) on internal investigations that arise in the context of a company’s implementation of a *Sapin II*-compliance program, and (ii) on aspects of French law (including labor law) that can impact a company’s investigation.

It would be useful for the AFA/PNF Draft Guide to clarify the scope of its application and audience – including whether it is intended to cover all internal investigations or only those conducted in France – since internal investigations can often cover multiple jurisdictions. In the same vein, the AFA/PNF Draft Guide should acknowledge that companies’ whistleblower alert systems often cover conduct beyond potential corruption, and that an internal investigation conducted in response to an alert can cover a number of topics. This would be all the more relevant considering that, in its recommendations on how an anti-corruption compliance program should be articulated, the AFA invites companies to implement, to the extent possible, a single whistleblowing system covering all types of alerts. As such, the AFA/PNF Draft Guide should be clear that its guidelines relate to investigations conducted into potential corruption-related offenses, and that the policies, procedures and processes that it recommends companies to implement may address/capture a wider scope of potential wrongdoing.

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

Adaptability and Flexibility

In certain places, the AFA/PNF Draft Guide could benefit from recognizing that, particularly in large multinationals, the process through which an internal investigation is conducted can vary depending on the circumstances. For example, the AFA/PNF Draft Guide recommends that companies formalize a procedure for conducting internal investigations; while useful, it could benefit from clarifying that for large companies, a procedure may be adopted at the central level, and implemented throughout subsidiaries with local legal or cultural specificities taken into consideration. In other instances, the AFA/PNF Draft Guide makes recommendations that could benefit from the general caveat that each internal investigation should be customized to the particular facts and circumstances, recognizing that there are judgment calls and discretion that make a one-size-fits-all approach impractical. The Draft Guide recommends, for example, that minutes of an interview with an employee contain both the questions and answers, and that such minutes be read and signed by the employee.

While this may make sense in certain contexts, in other contexts having minutes of an interview signed off by an employee may not be necessary or advisable, particularly if the individual is going to be intimidated by such formalism or if the employee has reluctantly conceded wrongdoing and might have second thoughts about his or her concession. In addition, when such minutes are prepared by external lawyers, they are covered by legal privilege and thus should not be submitted to the interviewee for review and/or confirmation.

See “[Navigating French Internal Investigations and Self-Reporting Post-Sapin II](#)” (May 15, 2019).

Communications With Authorities

Perhaps the most controversial (and potentially impractical) aspect of the AFA/PNF Draft Guide is that it recommends that companies inform the authorities of any potential criminal acts it identifies *sans délai* (without delay), even before it has concluded its internal investigation. It also notes that producing any report of its internal investigation, when concluded, will be factored into the consideration of cooperation by the authorities when considering whether to conclude a CJIP with the company. This recommendation raises a number of concerns, including the fact that self-reporting remains, in France as in other jurisdictions, a discretionary act and one that must be undertaken after careful consideration of the costs and benefits of such a self-report. Weighing these costs and benefits can only pragmatically be done once the internal investigation has been concluded, and the company has a full appreciation of the facts and circumstances of the particular conduct.

Suggesting to companies that they should self-report *potential* criminal conduct without delay would (i) weaken the utility of conducting an internal investigation in the first place; and (ii) may result in the reporting of conduct that turns out not to have been criminal in the end, thus adding burden to the already strained resources of many prosecuting authorities.

The recommendation to provide the report of the investigation also raises concerns, particularly in the context of legal privilege (*secret professionnel*), since many internal investigations (or at least those with potential criminal consequences) may be conducted by or with the assistance of external

legal counsel. The U.S. DOJ went through its own evolution on conditioning cooperation credit on the waiver of privilege and production of privileged materials.^[3] It ultimately decided, with good reason, that while waiver of privilege always remains in the company's discretion, it would not make such requests and would not require or expect it when evaluating a company's cooperation in the context of an investigation.^[4] This balance of expecting companies to cooperate while respecting and maintaining sacrosanct legal privileges is one that the AFA/PNF Draft Guide could benefit from recognizing as well.

See "[Filip Factor Presentations in the Wake of the Monaco Memo](#)" (Apr. 13, 2022).

French Law Specificities

There are several aspects of French law that can make conducting an internal investigation challenging, and the intersection of these different, and sometimes competing, principles could be further explained by the AFA/PNF. The first relates to French labor law, which can be particularly favorable to employees, including those who are implicated in potentially corrupt conduct.

While the AFA/PNF Draft Guide rightly references situations that may constitute a challenge for the companies, the guidance does not always accurately reflect the nuances and subtleties arising from all the applicable rules. For instance, the AFA/PNF indicates that messages exchanged by an employee through a messaging system made available by his/her company are to be treated the same as messages that an individual would have exchanged through a private messaging system, when this appears contradicted by current jurisprudence.

The second relates to data protection rules, which in France and Europe more generally, are much stronger and individual-focused than in the U.S. The AFA/PNF Draft Guide could benefit from further clarity on the potentially competing interests of data privacy rules and the need to conduct internal investigations with a level of confidentiality. For instance, companies could benefit from guidance as to whether there is room for flexibility with respect to the information to be provided to data subjects depending on the circumstances, such as when the data collected is not relevant to the alert and immediately deleted or when data subjects have already been informed that their personal data may be processed in case of an internal investigation but are not necessarily aware that an actual internal investigation is underway.

See "[AFA Sanctions Commission Considers Risk Mapping Requirements in Its Second Case](#)" (Mar. 4, 2020).

More Transparency and Cooperation

Other jurisdictions, including the U.S., have gone through decades-long evolutions with respect to internal investigations, and France is undergoing its own evolution, in an accelerated and increasingly complex international enforcement environment. French authorities appear to be seeking to balance the need for thorough internal investigations with the specificities of its legal landscape

(and perhaps also seeking to avoid mirroring other jurisdictions' systems too closely). In this respect, the relevant guidance could benefit from more transparency on the points identified above, as well as on the cooperation credit that companies can expect to receive if they conduct thorough internal investigations.

In addition, the AFA/PNF could consider inviting authorities from other relevant areas of law (including data protection) to contribute to the guidance with a view to providing comprehensive and practical tools to companies.

While there remain, in our view, areas of further clarification that could be usefully integrated into any final draft of the AFA/PNF Draft Guide, the initiative itself and the aim of providing companies, and their counsel, with further guidance on this evolving topic should be applauded.

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[1] Law No. 2016-1691 dated December 9, 2016, relating to transparency, the fight against corruption and the modernization of economic life.

[2] I.e., those with more than 500 employees and revenues exceeding €100 million.

[3] See evolution from the Holder Memo in 1999 (Memorandum from Eric Holder, Deputy Att'y Gen., US Dep't of Justice, to All Competent Heads and United States Attorneys (June 16, 1999)) and the Thompson Memo in 2003 (Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Department Components and United States Attorneys, (Jan 20, 2003)) to the McNulty Memo in 2006 (Mem. From Paul J. McNulty, Deputy Att'y Gen., US Dep't of Justice, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006)).

[4] DOJ, Justice Manual, §9-47.120: "eligibility for cooperation or voluntary self-disclosure credit is not in any way predicated upon waiver of the attorney-client privilege or work product protection". See also Justice Manual, §9-28.720: "Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct."