CLEARY GOTTLIEB

ALERT MEMORANDUM

France Implements Sweeping Anti-Corruption Reform

March 22, 2017

On March 14, 2017, France adopted a decree detailing the organization and functioning of its new anti-corruption authority, including its sanctions commission. The broad powers vested in this new agency are part of a series of sweeping measures adopted by the so-called "Sapin II" law of December 9, 2016. These measures strengthen France's anti-corruption legislation, and have far-reaching consequences for French and foreign groups.

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Under French law, corruption, including active and passive bribery (*corruption*) and influence peddling (*trafic d'influence*), is a criminal offense punishable by up to 10 years imprisonment and fines of up to €1,000,000 for individuals and €5,000,000 for legal entities as well as ancillary sanctions. Under the regime in force before the Sapin II law, companies were under no obligation to take affirmative steps to prevent corruption. Furthermore, French authorities had limited means to prosecute acts of corruption committed outside of France. As a result, the legal framework had long been viewed as being deficient, ineffective and generally below international standards, particularly when compared to the U.S. Foreign Corrupt Practices Act ("FCPA") and UK Bribery Act (2010) ("UKBA"). In 2014, both the European Commission and the OECD invited France to adopt and enforce more effective anti-corruption laws.

The key changes are as follows:

I. An **affirmative obligation to prevent corruption**, through the implementation of **anti-corruption compliance programs**, to be put in place by June 1, 2017;

II. A **new anti-corruption authority** with broad powers to **prevent and help detect corruption**, and in charge of **monitoring compliance with the "blocking statute"** in the context of foreign proceedings;

III. An extension of French authorities' power to prosecute and sanction **acts of corruption committed outside of France**; and

IV. The introduction of **deferred prosecution agreements** (*convention judiciaire d'intérêt public*).

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I. OBLIGATION TO IMPLEMENT A COMPLIANCE PROGRAM

A. Who Does this Requirement Apply to?

The obligation to implement an anti-corruption compliance program applies to:

(1) *French companies* having 500 or more employees *and* a turnover above 100 million euros; and

(2) *French companies* belonging to a *group* having a *French parent company*, 500 or more employees in total, *and* a consolidated turnover above 100 million euros.

As a result, any French entity which *belongs to a group which has a French parent company, 500 or more employees in total and a consolidated turnover above 100 million euros* is subject to this obligation.

The obligation to implement the anti-corruption program also applies to *French state-owned industrial and commercial entities* (*établissements public à caractère industriel et commercial*) that (i) have 500 or more employees, or (ii) belong to a state-owned group having 500 or more employees in total, *and* a consolidated turnover above 100 million euros.

The obligation to implement an anti-corruption compliance program also applies to *all subsidiaries*, whether French or foreign, of the French companies referred to above that publish consolidated financial statements.

The *members of the management* of the French companies referred to above are responsible for ensuring that these companies, and if applicable, their subsidiaries, implement the anti-corruption compliance program. Members of management include the chairman of the board (*président du conseil d'administration*), chief executive officer (*directeur général* and *gérant*) and members of the management board (*directoire*).

B. What Should the Compliance Program Include?

The following measures and procedures must be implemented:

1. A code of conduct defining and illustrating prohibited behaviors likely to constitute acts of corruption or similar offenses;

2. An internal alert system designed to collect reports by employees on acts or behaviors contrary to the above code of conduct;

3. A regularly updated risk map designed to identify, analyze and prioritize the risks of exposure to external corruption solicitations, taking into account geographic area and industry sectors where the company has commercial activities;

4. Due diligence and risk assessment procedures for clients and main suppliers and intermediaries;

5. Accounting control procedures (internal or external) designed to ensure that accounting systems are not used to conceal acts of corruption;

6. Training programs for executives and employees most exposed to the risk of corruption;

7. Disciplinary sanctions in case of violation of the code of conduct; and

8. A system aimed at evaluating internally the measures in place.

This list is generally consistent with international standards regarding the contents of anti-corruption compliance programs.

C. What are the Consequences?

(a) Administrative sanctions

If the new anti-corruption authority (the "Authority" - See **Section II** below) determines that a company has failed to implement an anti-corruption compliance program meeting the above requirements, the Authority's Sanctions Commission will have the power to impose administrative sanctions, including (i)

requesting the company and its representatives to improve its compliance program and/or (ii) imposing a fine of up to €200,000 for individuals and €1,000,000 for legal entities. It may decide that the sanction will be published, at the expense of the company. The statute of limitations is three years from the date on which the determination of failure is made.

Conversely, in the context of criminal prosecution of a company, its management or its employees for acts of corruption, the ability of the company to establish that it had a robust compliance program in place should be taken into account as a mitigating factor.

(b) Criminal sanctions

A company that is found criminally liable for acts of corruption committed by its management or employees may be sentenced to a *new type of sanction* (in addition to or as an alternative to a fine) consisting in the *implementation of an anti-corruption program meeting the above requirements*. (This sanction can be imposed to any company, including a company below the thresholds mentioned in Section I.A above and that would therefore not otherwise be required to implement an anti-corruption compliance program.)

When imposed as a sanction in connection with the commission of an act of corruption (as opposed to the general requirement described in Section I.A above), the obligation to implement an anti-corruption compliance program must be performed within a maximum period of five years, under the supervision of the Authority. All the costs incurred by the Authority in carrying out its supervision obligations are to be borne by the company. Furthermore, *in this case*, failure to comply with the obligation to implement an anti-corruption compliance program (and, notably, "abstaining from taking necessary measures or obstruction to the execution of the obligations resulting" from the sanction) is a *criminal offense* punishable by up to two years' imprisonment and a fine of up to €50,000 for individuals and €5,000,000 for legal entities, as well as ancillary sanctions.

D. What is the Deadline to Implement the New Compliance Program?

The companies referred to above must implement the anti-corruption compliance program by June 1, 2017.

II. A NEW ANTI-CORRUPTION AUTHORITY WITH BROAD POWERS

The new Authority is a national agency (*service à compétence nationale*) headed by a magistrate, under the joint supervision of the Ministry of Finances and the Ministry of Justice. Unlike the existing *Service central de prévention de la corruption* (Central service for the prevention of corruption, or "SCPC"), whose functions are essentially of an informative and consultative nature, the Authority has investigative as well as sanction powers.[1]

Sanctions will be imposed by the Authority's Sanctions Commission, i.e., a body which is part of the Authority but presents certain guarantees in terms of independence and impartiality, in order to ensure compliance with due process requirements.

The Authority's prerogatives are of a dual nature.

A. Anti-Corruption Powers

1. *Coordination*. The Authority participates in the administrative coordination, centralization and communication of information, and general assistance to public administrations, private companies and individuals (including whistle-blowers), regarding the *detection and prevention* of corruption and other "public integrity" offenses. The Authority prepares a national multiannual plan including the actions aimed at fighting, among others, corruption and influence peddling.

2. *Guidelines*. The Authority issues guidelines in order to assist private and public entities in detecting acts of corruption. These guidelines, which will be issued by a dedicated department (*Département de*

[1] The SCPC will cease to exist upon the official appointment of the Director of the Authority.

l'Appui aux Acteurs Economiques - Department Assisting Commercial Entities), take into account the size of the entities concerned and the type of relevant risks. They will be publicly available.

3. *Controls over Public Entities*. The Authority carries out controls of public administrations and entities to verify the quality and effectiveness of anti-corruption measures.

4. *Powers with respect to Anti-Corruption Compliance Programs*. The Authority performs controls of private and public entities to assess the adequacy of their anti-corruption compliance program described in Section I.B above. If it determines that an entity has failed to implement an adequate anti-corruption compliance program, the Authority can initiate a sanctions procedure (*see* Section B below).

5. *Notification to the prosecutor*. The Authority can notify the competent prosecutor if the facts it is aware of may constitute a criminal offense.

The Authority performs the controls under items (3) and (4) above on its own initiative or at the request of the Prime Minister, any other minister, the President of the High Authority for Transparency in Public Life (*Haute Autorité pour la transparence de la vie publique*), or certain NGOs fighting corruption (e.g., Transparency International France).

While carrying out these controls, the Authority can request *any relevant document and information*, carry out *on-site inspections* and *interview* relevant individuals. Obstructing such controls is a criminal offense punishable by a fine of up to €30,000.

In connection with such controls, the Authority is required to establish a *report*, to be transmitted to the Ministry having requested the control and to the controlled entity's representatives. This report contains the Authority's *observations* as to the quality of the anti-corruption compliance program, and *recommendations* as to possible improvements.

B. <u>Administrative Sanctions Procedure</u>

If the Authority determines the existence of any *failure* to implement the anti-corruption compliance program, the *head of the Authority* shall communicate the relevant report to the entity concerned, who will have two months to present written observations.

The head of the Authority can then *either* (i) *issue a warning* to the company's representatives, or (ii) *initiate the sanctions procedure* referred to in item (4) above, and *refer the matter to the Authority's Sanctions Commission*.

The entity can be *assisted* by legal counsel before the Sanctions Commissions. Upon receipt of the notice informing about the opening of the procedure, the entity will have two months to present *written observations*. Within eight days, the entity can also *challenge* one or more members of the Sanctions Commission, if it can prove they lack independence or impartiality.

Following the expiration of this two-month period, the entity will have the right to be heard in the course of a public hearing. The Sanctions Commission will then deliberate, and may impose the *administrative sanctions* discussed in Section I.C.a, above.

C. <u>Blocking Statute Monitoring Function</u>

Pursuant to Law No. 68-678 of July 26, 1968 (commonly referred to as the "Blocking Statute"), except as otherwise provided pursuant to international treaties, French citizens or residents, and any entity having its registered office or an establishment in France, are prohibited from communicating to foreign authorities documents or information of an economic, commercial, industrial, financial or technical nature if such communication could affect French national interests. Furthermore, except as otherwise provided pursuant to applicable laws or international treaties, the Blocking Statute prevents any person from requesting, searching for or communicating documents or information of an economic, commercial, industrial, financial or technical nature that *could be used as evidence to initiate or in the context of foreign administrative or judicial proceedings*. The Blocking

Statute requires any person to whom a request is made for any such information or documents to *contact the competent Ministry*.

While a number of French companies have, in the past years, been the subject of such information requests on the part of foreign authorities, including in the context of the implementation of U.S. deferred prosecution agreements, no specific framework exists for the *monitoring of compliance by the relevant company with the Blocking Statute when furnishing information to such foreign authorities*. These monitoring functions had in practice been allocated by the Prime Minister to the SCPC.

The law provides that, if the Prime Minister so requests, the Authority will be in charge of verifying that *companies required to implement or improve internal anti-corruption procedures pursuant to decisions of foreign authorities* comply with the Blocking Statute when furnishing information to such foreign authorities.

III. A BROAD EXTRATERRITORIAL REACH

While the U.S. FCPA and the UKBA have broad extraterritorial reach, the pre-Sapin II criminal law system contained certain obstacles to the prosecution by French authorities of offenses carried out outside of France.[2]

A. Incrimination of Influence Peddling Directed at Foreign Public Officials

Broadly, the offense of "influence peddling" consists in (i) proposing an advantage in any form whatsoever to a person in order for such person to use its actual or presumed influence to obtain benefits, employment, tenders or any other favorable decision on the part of a public authority ("active" influence peddling) or (ii) soliciting or accepting an advantage in any form whatsoever to use one's actual or presumed influence to obtain benefits, employment, tenders or any other favorable decision on the part of a public authority ("passive" influence peddling).

While the offense of bribery currently includes bribery of both French, European, international and foreign officials (and acceptance of a bribe by such officials), the offense of influence peddling was limited to actions undertaken to influence *French* public officials as well as officials of *international* organizations.

In order to follow the recommendations of international bodies such as the United Nations Office on Drugs and Crime (based on the 2003 United Nations Convention Against Corruption), the OECD (in its 2012 and 2014 reports on the assessment of France) and the Council of Europe Group of States against Corruption (GRECO) and in order to reinforce the effectiveness of the French authorities' anti-corruption enforcement framework, the law now incriminates influence peddling when undertaken to influence persons *exercising public functions, carrying out public interest missions or elected*, in a *foreign State*. As was the case for influence peddling directed at French or international officials, this new offense is punishable by up to five years imprisonment and a fine of up to €500,000 for individuals and €2,500,000 for legal entities.

B. Extension of the Extra-Territorial Reach of Anti-Corruption Laws

As a general matter, French criminal statutes are applicable to *perpetrators* of offenses committed *outside of France*, only if certain specific conditions are met, i.e., only if (1) (a) the *victim* is a French citizen or (b) the *perpetrator* is a French citizen *and* the relevant conduct is *an offense both in France and in the jurisdiction* in which it is committed *and* (2) the French prosecutor initiates the proceedings, following a complaint lodged by either the victim or the competent foreign authority.

Furthermore, French criminal statutes are applicable to *accomplices acting in France* of offenses committed outside of France only if (1) the relevant conduct is *an*

[2] While this is not the topic of this alert memorandum, it should be noted that the Sapin II law also introduces a framework aimed at regulating lobbying activities and protecting whistleblowers in France.

offense both in France and in the relevant foreign jurisdiction and (2) a *definitive judgment* in the relevant foreign jurisdiction establishes that the offense has been committed.

The law alleviates these requirements in the context of acts of corruption (including both bribery and influence peddling) committed outside of France, in order to facilitate their prosecution.

Specifically:

- French law now applies to *perpetrators* of acts of corruption *committed abroad* so long as the perpetrator is a *French citizen, a French resident or someone exercising, in whole or in part, business in France* (i.e., regardless of the nationality of the victim, even if the conduct is not incriminated in the foreign jurisdiction and without the requirement that proceedings be initiated by the public prosecutor following a complaint lodged by either the victim or the competent foreign authority); and
- French law now applies to *accomplices acting in France* of acts of corruption *committed abroad, so long as the* relevant conduct is *an offense both in France and in the relevant foreign jurisdiction* (i.e., without the requirement of a definitive judgment in the relevant foreign jurisdiction establishing that the offense has been committed).

IV. DEFERRED PROSECUTION AGREEMENTS

The law introduces a settlement mechanism, the *convention judiciaire d'intérêt public* ("CJIP"), akin to the U.S. deferred prosecution agreement.

The purpose of this mechanism is to (i) incentivize companies to come forward, with respect to offenses that are difficult to detect, while (ii) allowing companies to continue to qualify for public tenders and other forms of licenses in jurisdictions where applicable laws provide for automatic disqualification in the event of criminal conviction.

Under this mechanism, the public prosecutor is entitled to propose to legal entities (but not individuals) to enter into a settlement agreement requiring:

1. The payment of an amount proportionate to the advantages derived from the offenses, capped at 30% of the average annual turnover for the last three years;
2. The implementation of a compliance program under the supervision of the Authority, at the expense of the company; and
3. To compensate the damages suffered by the victim.

The representatives of the legal entity remain accountable as individuals. In this regards, they can be assisted by an attorney before providing their consent to the settlement agreement.

The settlement agreement, which has to be validated by a judge (after having heard both the legal entity and the victim), ends the criminal proceedings without the company being convicted, or having admitted wrongdoing.

If the judge validates the settlement agreement, the company has a right to withdraw within 10 days. Once final, the settlement agreement is published on the website of the Authority.

In case of violation of the settlement agreement, the public prosecutor is authorized to re-open the criminal proceedings.

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