ALERT MEMORANDUM

France Introduces Sweeping Anti-Corruption Reform

April 19, 2016

On March 30, France released a draft bill (so-called "Sapin II" bill) aimed at strengthening its anti-corruption legislation. If adopted, this reform will have far-reaching consequences for French and foreign groups.

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. However, under the current regime, companies are under no obligation to take affirmative steps to prevent corruption. Furthermore, French authorities have limited legal means to prosecute acts of corruption committed outside of France. As a result, the current framework has 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 effective anti-corruption laws.

The Sapin II bill, currently under review in Parliament, would, if adopted, involve the following key changes:

I. an **affirmative obligation to prevent corruption**, through the implementation of **anti-corruption compliance programs**;

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; and

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

Contrary to initial drafts of the bill, the Sapin II bill does ***not*** at this stage propose to introduce **deferred prosecution agreements** (**IV**).

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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 would apply to:

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

(2) *French companies* belonging to a *group* having 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 500 or more employees in total and* a *consolidated turnover above 100 million euros* would be subject to this obligation, regardless of the number of employees or turnover of the *French* entity, and regardless of whether the group is *headed by a French or foreign entity*.

The obligation to implement an anti-corruption compliance program also applies to *all subsidiaries*, whether French or foreign, of the French companies referred to in (1) and (2) that publish consolidated financial statements.

The *members of the management* of the French companies referred to in (1) and (2) 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 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; and
7. Disciplinary sanctions in case of violation of the code of conduct.

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 **Part 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 3 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 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

The draft bill provides that 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 Part 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 Part I.A above), the obligation to implement an anti-corruption compliance program must be performed within a maximum period of 5 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 is a *criminal offense* punishable by up to two years' imprisonment and a fine of up to €30,000 for individuals and €5,000,000 for legal entities as well as ancillary sanctions.

In its advice on the Sapin II bill dated March 24, 2016, the French Council of State (*Conseil d'Etat*) notes that due to the constitutional requirement that offenses liable to criminal prosecution be clearly defined, the definition of what constitutes a failure to comply with the obligation to implement an anti-corruption compliance program had to be narrowed down and rendered more precise. It is currently defined as "abstaining from taking necessary measures or obstruction to the execution of the obligations resulting from [the sanction]", which arguably remains fairly broad.

II. A NEW ANTI-CORRUPTION AUTHORITY WITH BROAD POWERS

The new Authority would be 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* or "SCPC" (Central service for the prevention of corruption), whose functions are essentially of an informative and consultative nature, the Authority would have investigation as well as sanction powers.

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

The Authority's prerogatives would be of a dual nature.

A. Anti-Corruption Powers

The Authority would be in charge of:

1. Participating 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" offences;

2. Issuing *recommendations* in order to assist (i) public administrations and entities in detecting acts of corruption and (ii) private companies in the implementation of anti-corruption compliance programs;

3. On its own initiative or at the request of any competent Minister, carrying out *controls of public administrations and entities* to verify

the quality and effectiveness of anti-corruption measures;

4. On its own initiative or at the request of the Ministry of Finances or the Ministry of Justice, *carrying out controls of private companies* to verify compliance with their obligation to implement an anti-corruption compliance program, where applicable; and

5. In case it determines that *a company* has failed to implement an anti-corruption compliance program, initiating an administrative sanction procedure.

When carrying out its functions under items (2) to (5), the Authority would be required to act *independently* from governmental authorities.

When carrying out the *controls* referred to in item (4) above, the Authority would be entitled to have *access to any relevant document and information*, to carry out *on-site inspections* and to *interview* relevant individuals. Obstructing such controls would be a criminal offense punishable by a fine of up to €30,000.

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

If the Authority determines the existence of any failure in the implementations of the anti-corruption compliance program, the *head of the Authority* would be entitled, after giving the person concerned an opportunity to present observations, to *issue a warning* to the company's representatives.

If necessary, the *head of the Authority* would be able *initiate the sanction procedure* referred to in item (5) above, in which case *the matter would be referred to the Authority's Sanctions Commission*, which may result in the imposition of the *administrative sanctions* referred to in Part I.C(a) above.

B. Blocking Statute Monitoring Function

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 draft bill now 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 existing French penal law system contains certain obstacles to the prosecution by French authorities of offenses carried out outside of France.[1]

A. Incrimination of influence peddling directed at foreign public officials

Broadly, the offence 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 offence 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 is 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 reinforce the effectiveness of the French authorities' anti-corruption enforcement framework, the draft bill proposes to incriminate influence peddling when undertaken to influence persons *exercising public functions, carrying out public interest missions or elected*, in a *foreign State*. As is currently the case for influence peddling directed at French or international officials, this new offense would be punishable by up to 5 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 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 draft bill proposes to alleviate these requirements in the context of acts of corruption (including both bribery and influence peddling) committed outside of France, in order to facilitate the prosecution of these offenses.

Specifically:

- French law would apply to *perpetrators* of acts of corruption *committed abroad* so long as the perpetrator is a *French citizen or a French resident* (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);

[1] While this is not the topic of the present alert memorandum, it should be noted that the Sapin II bill also proposes to introduce a framework aimed at regulating lobbying activities in France.

- French law would apply 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. WILL THE LAW INTRODUCE DEFERRED PROSECUTION AGREEMENTS?

Earlier drafts of the Sapin II bill had proposed to introduce a settlement mechanism, akin to the U.S. "deferred prosecution agreement" ("DPA").

Under this mechanism, the public prosecutor would have been entitled to propose to legal entities (but not individuals) to enter into a settlement agreement requiring: (i) 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, and (ii) the implementation of a compliance program under the supervision of the Authority, at the expense of the company. This agreement would have been required to be validated by a judge (with a 10-day withdrawal right exercisable by the company) and would have put an end to the criminal proceedings without the company being convicted or having admitted any wrongdoing. In case of violation of the settlement agreement, the public prosecutor would have been authorized to re-open the criminal proceedings.

The purpose of this mechanism was 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.

In its March 24, 2016 opinion, the French Council of State (*Conseil d'Etat*) expressed reservations as to the proposed settlement mechanism, insofar as it would be contrary to one of the aims of criminal justice, which is to determine the actual facts of the case, and would deprive the victim from participation to the establishment of these facts. The Council of State also noted that it would introduce an dissymmetry in the treatment of companies and individuals, which was not in the interest of the victims and the administration of justice, given that these offenses are by nature "bilateral" (a person proposes and another accepts a bribe). The Council of State nevertheless highlighted that, if this settlement mechanism were to apply exclusively in the context of transnational corruption acts, the benefits would outweigh the drawbacks.

Despite this position, the settlement mechanism was removed from the Sapin II bill, although it could be reintroduced during the parliamentary process.

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