

The anti-corruption battalions on the offensive

INQUIRY The Nanterre public prosecutor recently signed the first negotiated agreements within a corruption case. Whilst the judges and the French anti-corruption agency (*Agence Française Anticorruption*, or “AFA”) have taken on their new powers, some companies are not yet ready to accept this verification trend.

The learning phase leaves room to the offensive. Anticorruption actors have delved into the specifics of the issue, a little more than a year after the implementation of the law on transparency, fight against corruption and modernization of economic life (“Sapin II”, https://www.lesechos.fr/14/11/2017/lesechos.fr/030871515318_hsbc-private-bank-conclut-la-premiere-transaction-penale-a-la-francaise.htm).

Last week, after three months of intense negotiations, the Nanterre public prosecutor signed the first public interest court agreements (*convention judiciaire d'intérêt public*, or “CJIP”) relating to a corruption case. Two French companies decided to negotiate with the judges, whereby they acknowledged the facts while agreeing to pay a fine and fund a legal compliance program. In exchange, no criminal record and the companies could continue to benefit from the access to the public market – a convincing argument.

Last November, HSBC also signed a public interest court agreement (https://www.lesechos.fr/14/11/2017/lesechos.fr/030871515318_hsbc-private-bank-conclut-la-premiere-transaction-penale-a-la-francaise.htm) with the national financial prosecutor (*parquet financier national*, or “PNF”). However, it could not lead to a compliance program because this first transaction of 300 million euros involved a foreign company in a case of money laundering and tax fraud and the law does not provide for such a hypothetical.

The firm form of negotiated justice, a shift in paradigm

https://www.lesechos.fr/14/11/2017/lesechos.fr/030871515318_hsbc-private-bank-conclut-la-premiere-transaction-penale-a-la-francaise.htm

It is different this time and a true first. An inspector (lawyer, auditor or controller of the French anti-corruption agency) must determine and verify that all companies have established a corruption prevention program – the very crux of Sapin II. The file opened by the Nanterre public prosecutor is a textbook case of this.

The fudged markets

The case dates back to 2011. The Nanterre public prosecutor revealed a vast system of rigged markets within the French electricity market (*Electricité de France*, or “EDF”). An employee in charge of purchasing for thermal power stations “*was requesting financial compensation in exchange for him awarding contracts to companies*”, summarizes an investigator. Since 2004,

all the companies were required to give him 1.5% of the maintenance cost of the thermal power plants markets.

In 2010, a company refused to pay the bribe. It warned EDF and the Nanterre public prosecutor opened an investigation. As a result, 47 people and 7 companies and the top executives were indicted. When Sapin II came into play, two companies decided to involve the Nanterre public prosecutor.

EDF's power plants maintenance companies, "*wanted to move on, because of the change in management*", said Guillaume Daïeff, public prosecutor in Nanterre and deputy head of the economic and financial pole of the court, Maxence Delorme, with whom he conducted the negotiations. The first company had a turnover (<https://www.lesechos.fr/finance-marches/vernimmen/definition-business-turnover.html> # xtor = SEC-3168) of 180 million euros, the second one had a turnover of 20 million.

A proportionate fine

The law requires that the fine be proportionate to the profits reaped from the breaches, without exceeding 30% of the average turnover of the previous three years. "*There are three methods to determine the turnover in theory - the market rate, the net profit, or the gross operating surplus* (<https://www.lesechos.fr/finance-marches/vernimmen/definition-surplus-gross-of-exploitation.html> # xtor = SEC-3168). *The latter seems the most accurate to us*", adds Maxence Delorme.

Not only do the companies face the risk of having to pay a fine, but the court can decide in addition to confiscate the proceeds of the offense, that is to say the turnover omitted from the market. This was indeed the outcome of a case ruled on by the Criminal Court of Nanterre on February 8, 2018. Food for thought. The fine was determined according to the gravity, the duration of the events and the extent of the company's cooperation throughout the investigation.

In the end, the largest company will be fined 2.71 million euros, with an additional 290,000 euros for the imposed 18 month monitoring. The latter sum must be registered with the Anti-Corruption Agency, which will then pay the controller responsible for monitoring the implementation of the compliance plan. The second smaller company, devoid of a compliance program, will be fined one million euros including 200,000 euros of monitoring for two years.

The Anti-Corruption Agency will choose the controllers after a call for tenders, unless it decides to send its own personnel. "*This transparent and solid method of determination is very dear to us*", says Catherine Denis, the Nanterre public prosecutor, looking to adopt an "*educational*" method in order to encourage public interest court agreements. All documents should be published on the agency's website on Tuesday.

The second round of verifications

The Anti-Corruption Agency has started monitoring companies' activities (<https://business.lesechos.fr/directions-juridiques/droit-des-affaires/contentieux/030703284401-l-agence-francaise-anti-corruption-launch-his-first-controls-314609.php>). A first round of verifications occurred in early October and without waiting for the first reports, the agency launched its second inspection campaign. The aim was to ensure that the companies concerned by Sapin II (companies with more than 500 employees, or subsidiaries of which the parent company in France has more than 500 employees and a turnover of more than 100 million euros) have correctly implemented the anti-corruption program required by Article 17 of the law. (<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien=id>)

WHAT IS AN ANTICORRUPTION PLAN?

According to Article 17 of Sapin II, an anti-corruption program includes:

- a code of good conduct
- an internal reporting system
- risk-mapping
- measures for determining the situation of customers, suppliers and intermediaries
- accounting control procedures
- a training scheme for employees most exposed to corruption risks
- and an internal control and evaluation system

Overall, nearly 1,600 companies are involved. The Anti-Corruption Agency plans to control 50 private and public companies and 50 public actors (local authorities and public administrations) each year.

Mixed feedback

Until now, opinions differ on the matter (<https://business.lesechos.fr/directions-juridiques/metier-et-carriere/associations-professionnelles-et-reseaux/010211851123-loi-sapin-ii-la-pedagogie-reste-de-mise-312874.php>). Although companies should have established anti-corruption programs by June 11, 2017, some have not done anything yet. This can explain Charles Duchaine's decision, as Director of the agency, to bring forward the first verifications that he said would take place on December 31, 2017. "*This proves the Anti-Corruption Agency's willingness to exercise its powers and to control companies*", explains Benjamin Van Gaver, lawyer at August Debouzy, who assisted two large companies during the first round of verifications.

“Some companies have not yet understood the shift in paradigm”

Those who know the well-intentioned yet firm determination of Charles Duchaine were not surprised at the significant increase in the Anti-Corruption Agency’s workload. However, *“most companies are not ready”* said Charles Duchaine, a former judge in Monaco and Marseille. He nevertheless distinguishes between *“the companies that have already been the subject of international monitoring and the French mid-range or small companies that procrastinate”*.

“Some companies have not yet understood the shift in paradigm”, says Stéphane de Navacelle, lawyer who spent part of his career in the United States. *“The awareness is slow-burning”* adds Antonin Levy, a specialist in financial criminal law at the international law firm Hogan Lovells.

The lawyer nevertheless distinguishes between *“the management and the top management, whose members are generally quite convinced that these anticorruption measures and the operational directions must be applied”* and perceive these rules as additional constraints preventing them from doing business. *“All things considered, we have the same type of discussions today as we had at the time of the first Sapin law on public procurement”* he notes. Except that it does not only concern France today, but also the international market.

A geopolitical weapon

“French companies still think they are safe because they seek political support. This is a misconstrued perception on their part. Today, the law is a geopolitical weapon and the United States do not hesitate to use it”, states Stéphane de Navacelle. Now based in Paris, he continues *“Sapin II ensures that companies have the appropriate means to defend themselves”*. According to him, the worst would be to not seriously put into action *“what the Americans call windowdressing”*.

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However, for the verifications carried out by the agency, *“the list of documents to be provided is very important and mobilizes internally. This ranges from the usual documentation (Kbis, statutes ...) to the verification of all procedures concerning the new duties imposed on companies”*, explains Benjamin Van Gaver.

After a first meeting, more than 150 questions are sent to the company being subjected to verification. The company then has fifteen days to send them to the Anti-Corruption Agency along with its risk mapping. *“It gives the impression of being very intrusive and resembles an investigation. However, this is not the aim of the Anti-Corruption Agency, which does not act*

with the purpose of reprimanding, but of controlling compliance”, reasons Benjamin Van Gaver.

An investigative logic

This is probably where the problem lies. Certain provisions of the law put the companies “*in a position of preliminary investigative logic*”, observes Patrick Maisonneuve, criminal lawyer. “*The inspectors have not yet assimilated their role as controllers - they act as investigators. They must not act in a spirit of distrust, it tenses the company*”, explains a manager of a large French company.

The first statements of Charles Duchaine have not reassured companies either. “*We will try to be patient at first. If we notice that some companies are not doing anything, we will apply the law rigorously*”, says the Anti-Corruption Agency’s Director. “*And in the event that we find facts of corruption as a result of a verification, we will not show indulgence*”, he adds. As a public authority, all offenses must be handed over to the public prosecutor, be they related to facts of corruption or breaches of labor law for instance.

The lack of specifics

On another note, companies still worry about the lack of specifications regarding third-party verifications. For those with thousands of international contracts, “*the Anti-Corruption Agency does not prioritize*”, explains a council who recommends “*using common sense*”. “*The recommendations of the agency are only recommendations. We must not overestimate a mere obligation of means which justifies the lack of proactivity of some entities*”, explains Paul Lignières, partner at Linklaters.

“*Our role is to encourage them, by our verifications, to implement the legal provisions*”, concludes Charles Duchaine, providing for other verifications “*where the state is a shareholder, companies must be exemplary*”. A word to the wise...

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