Anti-corruption and economic sanctions: private acquisitions (France)

by *Nicolas Tollet* and *Olivier Dorgans*, Hughes Hubbard & Reed LLP - Paris

Practice notes | Law stated as at 21-Dec-2020 | France

An overview of French anti-corruption law and issues to consider relating to French and EU economic sanctions when acquiring a private company or a business in France.

© 2021 Thomson Reuters. All rights reserved.

Scope of this note

This note explains:

- The anti-corruption legislation and regulatory provisions in France and the applicable economic sanctions.
- The importance of conducting a due diligence on compliance issues.
- Contractual safeguards to be added in acquisition documents.
- Specific offences and who can be liable.

Legislation and regulatory provisions

Anti-corruption

Traditionally, under French law, an acquirer is not liable for any violations made by the target company before an acquisition.

Criminal liability does not extend to an acquirer as this is attached to the person who committed the crime and cannot be transferred or extended to someone else (*théorie de la personnalité des peines*) (*article 121-1, Criminal Code*). However, the criminal chamber of the French *Cour de cassation* found on November 25 2020 that in the context of a merger, the absorbing entity is liable for the acts committed by the absorbed entity before the merger. This new interpretation of French criminal laws will apply to mergers from November 25 2020 for certain types of corporations (that is, *sociétés anonymes* and *sociétés par actions simplifiées*) and only covers certain types of penalties (that is, fines and confiscations) (see *C.cass n°2333 of 25 November 2020 (18-86.955)*).

Besides, an acquirer would also be liable if the court found that it continued benefitting from advantages resulting from any acts of corruption after the acquisition. It is therefore important for a French acquirer, or for an acquirer of a French target, to assess the liabilities it might face if the acquisition goes through.

The Sapin II law (*Law 2016-1691 of 9 December 2016 on transparency, anti-corruption and economic modernisation*) (Sapin II Law) requires companies meeting certain thresholds to set up and implement an anti-corruption compliance program. It has also established a French anti-corruption agency, the *Agence Française Anticorruption* (AFA), which oversees company compliance programmes. Although the Sapin II Law does not specifically require acquirers to conduct due diligence on target companies, the AFA strongly recommends assessing acquisitions from an anti-corruption standpoint. It has issued detailed guidance on how best to do this, which is available in English, on its website (*https://www.agence-francaise-anticorruption.gouv.fr/fr/guides-et-chartes*).

Economic sanctions

Economic sanctions regimes may be classified in three categories:

- Sectorial economic sanction regimes (see *Sectorial economic sanction regimes*).
- Individual economic sanction regimes (see *Individual economic sanction regimes*).

© 2021 Thomson Reuters. All rights reserved.

- General economic sanctions regimes (see *General economic sanctions regimes*).

Sectorial economic sanction regimes

Sectorial economic sanction regimes restrict specific activities in certain countries (for example, arctic oil and gas exploration in Russia).

Individual economic sanction regimes

- Individual economic sanction regimes target designated entities, groups, organisations and individuals.

General economic sanctions regimes

- These are regimes that restrict most imports from, or exports to, a given country (for example, North Korea).
- Economic sanctions are either enacted by:
- The EU through EU regulations, which can either implement the United Nations Security Council's resolutions or reflect the EU's common foreign policy.
- France, which can supplement individual economic sanction regimes (for example, measures relating to freezing national assets).

The role of the French *Direction Générale du Trésor* (a Directorate within the French Ministry for the Economy and Finance) is to:

- Practically implement EU and French economic sanction regimes (through the granting of licences).
- Enforce the economic sanction regimes with the support of the competent prosecutor.
- Provide support to companies, notably through FAQs published on its *website* or answers to email requests.

In contrast to the Sapin II Law requiring anti-corruption compliance programmes to be implemented in companies, there are no equivalent provisions requiring companies to develop programmes aimed at preventing breaches of economic sanctions and export controls. However, the diversity and complexity of economic sanctions and export controls, as well as the impact of their potential infringement, make it very important (if not essential) for an acquirer to consider when acquiring a company in France.

As with anti-corruption due diligence, economic sanctions and export controls due diligence should be conducted before investing in a company. This is to identify, among other things:

- Which activities of the target company may contravene applicable economic sanctions.
- Which of the target company's clients, suppliers, intermediaries or agents may be targeted by individual economic sanction regimes.
- Whether any of the target company's shareholders, legal representatives, directors, employees may be subject to individual economic sanction regimes.

© 2021 Thomson Reuters. All rights reserved.

Importance of conducting compliance due diligence

General counsel and compliance officers, as well as private equity investors, have a growing understanding of the importance of conducting due diligence on compliance issues (these include anti-corruption, economic sanctions, anti-money laundering, data privacy and, to a certain extent, human rights). In particular, the actions of the AFA to ensure compliance with anti-corruption measures is helping to change the market's perception of compliance issues.

However, it appears that the decision to involve a company's compliance team still often happens late on in the process. This does not always allow for enough in-depth due diligence to be carried out. Corporations and private equity funds should involve compliance teams to determine the appropriate scope of the due diligence at the earliest stage possible and, in any event, before launching the due diligence phase.

The consequence of the shift in thinking in France to place greater emphasis on the importance of compliance makes M&A professionals better equipped to deal with compliance issues. Foreign sellers of French target companies, or in negotiation with a French acquirer, should be aware that existing liabilities are now more likely to be uncovered during due diligence. This may have an impact on the transaction or on eventual post-acquisition self-reporting to the French authorities (see *Contractual safeguards* and *Self-reporting*). Sellers should conduct their own compliance due diligence before deciding to sell a target to verify the absence of corrupt activities within the organisation.

Scoping anti-corruption and economic sanctions due diligence

Anti-corruption due diligence

For a French acquirer or the acquirer of a French target, scoping the due diligence should be done in the same way as for any M&A transaction. Depending on the structure of the deal (that is, whether it is a share deal or an asset deal), the industry sector, the geographical areas of operation of the target, the interactions with public administration or instrumentalities (that is, government-controlled companies), and the business model, the scope of due diligence will vary.

There are some specific issues to consider when establishing the scope of due diligence.

Statute of limitation

The statute of limitation is six years after the day the corrupt act was committed, if the prosecutor was aware of it, and 12 years in any other circumstances. Based on practice, acquirers tend to limit their review to around five years considering the constraints and the short period of time for the due diligence process.

Companies owned by the French state

The French state owns, fully or partially, a significant number of companies that would qualify as instrumentalities under the US Foreign Corrupt Practices Act (FCPA). The latest census of public companies was made in 2014 (See *National Institute of Statistics and Economic Studies: Tables of the French economy (2016 edition)*). As of 2014, the French state directly controlled 89 companies, and indirectly controlled 1,632 French companies employing in total 795,000 persons. Seven companies in the primary sector, 447 companies in the secondary sector and 1,112 companies in the tertiary sector. French law prohibits both public and private corruption, although French courts tend to be more inclined to prosecute public corruption and sanctions for public corruption are higher (see *Liability under French Law*). French law does not consider all employees of state-owned or partially state-owned

© 2021 Thomson Reuters. All rights reserved.

entities in France as public officials. It must be a person entrusted with a public service function. For example, an employee of a public transport operator or a journalist working for French national television. The notion of a public service depends on the imperative public service mission with which the organisation is entrusted, and not on the legal structure in which the activity in question is exercised (*Cour de cassation, Cass. Crim., October 28, 2015, n °14-82186*).

Company subject to Sapin II Law

French companies can be subject to the Sapin II Law if they meet certain criteria. This is essentially if they generate a revenue of at least EUR100 million and employ at least 500 persons. If the acquirer or the target is subject to the Sapin II Law, as part of the due diligence, the acquirer should include the existence and implementation of an anti-corruption compliance program that meets the expectations of the AFA; a code of conduct, a risk mapping, internal controls including due diligence processes and accounting controls, trainings, a disciplinary regime, a whistleblowing system and a protocol for monitoring and testing.

Economic sanctions due diligence to be conducted in the context of an acquisition audit

As with anti-corruption due diligence, economic sanctions and export controls compliance risks must be identified as part of the preliminary acquisition audit.

To adequately scope the economic sanctions and export controls acquisition audit, the acquirer must determine which sanctions regimes may apply to the target company and its activities.

EU economic sanctions regime

All EU economic sanctions regulations contain a standard jurisdiction provision (always drafted in the same terms) that determines their scope.

This standard jurisdiction provision provides that EU economic sanctions regulations apply:

- On the territory of the EU, including its airspace.
- On board any aircraft or vessel under the jurisdiction of a member state.
- To any national of a member state in or outside the territory of the EU.
- To any legal person, entity or body, in or outside the EU, incorporated or constituted under the law of a member state.
- To any legal person, entity or body for any business done in whole or in part within the EU.

For example, Article 13 of the *Russia Sanctions Regulation (833/2014)*.

French individual economic sanctions regime

French individual economic sanctions regimes apply to French nationals wherever located, as well as any legal persons within the French territory.

US economic sanction and export control regimes

© 2021 Thomson Reuters. All rights reserved.

Given their significant extra-territorial reach, US economic sanction and export control regimes may also apply to the target company and its activities.

US economic sanction and export control regimes are primarily applicable to US persons (see 31 CFR § 589.312. Persons means any:

- US entity and its foreign branches.
- US branch and subsidiary of a foreign entity.
- US citizen or permanent resident (green card holder), wherever they are.
- Non-US person (including any non-US director, officer or employee) while in the US.
- See, for example, *31 CFR § 589.312*.

Since virtually all transactions in USD must be settled through a corresponding US account, transactions in USD, even when a US person is not directly involved, may be subject to primary US economic sanctions. Non-US persons may violate primary economic sanctions for causing the violation of economic sanctions by a US person, including a US correspondent bank in a USD transaction.

Therefore, the following non-US companies are concerned by US primary economic sanctions:

- Companies at the origin of or complicit in a violation committed by a US person. For example, a French investor who carries out transactions on behalf of a US company that would be prohibited if they were carried out directly by that US company.
- Companies that re-export US origin goods, technologies or services to entities or individuals under economic sanctions. Note that US export control rules may also restrict certain exports, re-exports and transfers of goods subject to US jurisdiction. The list of goods subject to US export control regulations includes:
    - goods of US origin;
    - goods manufactured abroad containing US components above the de minimis threshold;
    - goods that are or have been physically present on US territory (including during transit); and
    - certain limited categories of goods manufactured abroad using US technology or programmes.
- When, in the context of their commercial with entities subject to economic sanctions, one of the following elements comes into play:
    - the use of the USD (a clearing transaction that takes place in the US in such a case);
    - the use of US origin funds (for example, funds raised from US investors);
    - the presence of a hidden US person (for example, the company employs a foreign person who also holds a US green card); or
    - when the action is carried out from US territory (for example, sending an email from US territory concerning an operation subject to economic sanctions).

© 2021 Thomson Reuters. All rights reserved.

To assess the scope of the preliminary acquisition audit, a company must also consider the statute of limitation regimes under EU, French and US laws.

The French statute of limitation rules described above (see *Statute of limitation*) apply similarly to EU and French economic sanction and export control regulations. US economic sanction and export control regimes are subject to a five-year statute of limitation.

Conducting due diligence

Document review

The document review should be based on the scoping as previously described (see *Scoping anti-corruption and economic sanctions due diligence*). The acquirer should tailor the document request to cover the existence and the implementation of the target's anti-corruption compliance program, as per the following pillars of the Sapin II Law.

Anti-corruption code of conduct

The target should provide a copy of this code in the languages that it has been published in, together with copies of any documents evidencing how it is binding on the employees in the countries it operates in. In France, the code of conduct must be annexed to the internal rules (*règlement intérieur*) of the company to be binding on employees. Therefore, a copy of the internal rules should be provided.

Whistleblowing

The target should provide a copy of all of the following:

- Any procedures in place to collect and investigate whistleblowing reports.
- Any relevant documents evidencing the enforceability of the procedures against the employees.
- Any confidentiality undertakings for the persons responsible for handling whistleblowing reports.
- A copy of the investigation files.

The acquirer should be mindful of certain applicable restrictions under French data privacy law (see *dispositifs d'alerte professionnelles: publication du référentiel pour les traitements de données personnelles*).

Risk mapping

French companies subject to the Sapin II Law must conduct an in-depth anti-corruption risk assessment of all their operations. The results must be set out in a report showing risks listed in order of importance and regularly updated. A copy of the risk mapping and any updates should be reviewed as well as, if possible, the documents used to draft it (for example, the methodology used or any interview notes).

Due diligence

The target should provide a copy of any due diligence procedures and of the available due diligence files for certain transactions of interests (for example, commercial agents or joint venture partners).

© 2021 Thomson Reuters. All rights reserved.

Internal controls and accounting procedures
The target should provide copies of the internal control and accounting procedures, the gifts and invitations registers, and sponsorship and donations files. The acquirer should also review the accounting ledgers, particularly in the highest risk countries, to identify the transactions presenting red flags (for example, payments to natural persons, undisclosed sponsorships and donations). The acquirer should review the DAS2 document that includes all payments of fees by French legal entities.

Training
The target should provide a copy of any training materials relating to anti-corruption and attendance sheets for such sessions.

Disciplinary regime
The target should provide a list of employees that have been dismissed for ethical reasons (such as fraud or violation of the code of conduct).

Monitoring and improvements
The target should provide copies of any documents concerning internal audits relating to its anti-corruption compliance program.

Acquirers should be aware that most French companies subject to the Sapin II Law have completed a questionnaire from the AFA and should request a copy of it (see AFA: Questionnaire et pièces à fournir aux contrôles des entités assujetties à l'article 17).

For economic sanctions and export controls, as no law or regulation provides for the compulsory implementation of a compliance program, the acquirer should tailor its document request to identify the scope of activity of the target company (including its clients, suppliers, intermediaries and agents) that may expose the acquirer to economic sanction and export control risks.

This should include documents relating to:

- The geographical scope of the target company's activities over the past five to six years (to incorporate any statute of limitation restrictions).
- Clients, suppliers, intermediaries, distributors and agents with which the target has conducted business over the past five to six years.
- The target's products, technology and services provided over the past five to six years.
- The target's governance structure.
- The target's anti-corruption compliance program. This is to enable the acquirer to assess whether it covers economic sanctions risks and identify any due diligence conducted, policy and procedures implemented, human resources dedicated to the program and training sessions conducted.

Background research into target

The due diligence should include background research to verify the reputation of the target.

© 2021 Thomson Reuters. All rights reserved.

Keywords research
Examples of keywords that could be used in a search engine to do this include "bribe", "corruption", "fraud", "economic sanctions" or "scandal" in the relevant languages depending on the geographic location of the target and of its operations. Similar keywords in French are "*pot-de-vin*", "*corruption*", "*fraude*", "*sanctions économiques*" or "*scandale*".

Other relevant keywords should be used depending on the document review. These keywords should be associated to the name of the target, the sellers, the beneficial owners, the target's senior management, and any other individual of relevance identified in the document review. Local search engines should be used rather than global ones.

Politically exposed persons
For politically exposed persons (PEPs), under French law (*article R. 561-18, Monetary and Financial Code*), they include a person of French or foreign nationality, who exercises one of the following functions:

- Head of state, head of government, member of a national government or of the European Commission.
- Member of a national parliamentary assembly or of the European Parliament, member of the body leader of a political party or a foreign political party or group.
- Member of a supreme court, constitutional court or other high court whose decisions are not, except in exceptional circumstances, open to appeal.
- Member of a court of accounts.
- Officer or member of the governing body of a central bank.
- Ambassador or *chargé d'affaires*.
- General or senior officer commanding an army.
- Member of an administrative, management or supervisory body of a public company.
- Director, deputy director, board members of an international treaty organisation, or a person who occupies an equivalent position within it.

Persons closely associated to politically exposed persons
The person who exercises one of the above functions is a PEP and will remain so for one year after ceasing to exercise that function. Direct family members of PEPs, and persons known to be closely associated to PEPs, are also considered PEPs.

Direct members of the family of a PEP are:

- A spouse, a co-habiting partner, a partner of a civil union (PACS) or other partnership that is registered under foreign law.
- Children, as well as their spouse, or partner bound by a PACS or other partnership that is registered under foreign law.

© 2021 Thomson Reuters. All rights reserved.

- First degree ascendants.

Persons considered "closely associated" with a PEP are:

- Natural persons who, together with the PEP, are the beneficial owners of a legal entity, a collective investment, a trust or a comparable legal device under foreign law. This includes partners of a joint venture.
- Natural persons who are the sole beneficial owners of a legal person, an investment collective, a trust or equivalent legal arrangement under foreign law that has been established for the benefit of the PEP. This covers "nominees" who appear to act or receive advantages on their own behalf, whereas in reality they are acting on behalf of the PEP.
- Any natural person known to have close business links with the PEP.

(*Article R. 561-18, Monetary and Financial Code.*)

Interviews with key individuals

As part of the due diligence phase, there should be an interview with the target's general counsel or chief compliance officer to clarify or confirm, as necessary, the findings from the document review.

In particular, the scope of the discussions should cover the implementation of the Sapin II Law compliance program, any investigations disclosed, and any potential acts of corruption detected as well as infringements of economic sanctions. External counsel should conduct the interview to benefit from legal privilege.

Contractual safeguards

In previous acquisition contracts, a broad compliance language was often drafted unless a specific issue was identified during the due diligence. Today, detailed compliance clauses are sometimes used to cover the risks of corruption, economic sanctions, money laundering and, to a certain extent, human rights violations.

Asset deals

If the acquisition is a share deal, the acquired entity remains liable for any pre-closing liability, despite the contractual arrangement with the seller. However, if the acquisition is an asset deal, liabilities pre-dating the closing are generally not transferred to the acquirer and will remain those of the selling entity. The parties may agree that all, or some of, the pre-closing liabilities associated with the business will be specifically assumed by the acquirer.

Conditions precedent

If an issue identified during due diligence can be resolved before closing, the acquirer will insert a condition precedent. For example, this could be to terminate a contract, or to carve-out of the target any part of the business that is corrupt or subject to economic sanctions.

Representations and warranties

© 2021 Thomson Reuters. All rights reserved.

Drafting representations

Investigation clauses in a sale and purchase agreement are increasingly common as companies seek insurance against unwittingly buying criminal investigations as part of an acquisition. The acquirer can address the issue by requiring the seller to represent specifically that the target, and its representatives:

- Have not violated any anti-corruption laws or economic sanctions regulations of the jurisdiction where the target does business.
- Are not the subject of any ongoing investigation.

The share purchase agreement also often includes a representation confirming that the target complies with the Sapin II law and EU economic sanctions regulations. Acquirers should be aware that the Sapin II Law is very broad and does not just cover the topic of corruption.

Besides, the Sapin II Law does not prohibit corruption (the infraction of corruption is prohibited under the criminal code). Instead, as mentioned above, it requires companies meeting certain thresholds to set up and implement a comprehensive compliance program to prevent and detect corruption and it is controlled by the AFA. It appears that, based on observing previous controls by the AFA since 2017, no companies have been considered as being fully compliant with anti-corruption compliance obligations by the AFA.

Repeating representations and warranties at closing

Repeating the representations and warranties at closing, to cover the period from the signing of the agreement until the closing of the transaction is fairly common in French deals. However, any inaccuracy of those representations on closing would only entitle the acquirer to be indemnified by the seller, but not to walk away from the transaction.

Specific termination rights and pre-closing covenants

If there is a high chance of there being undiscovered bribery issues or economic sanction infringements, the acquirer should consider obtaining a specific termination right in case of breach (or material breach) of the anti-corruption and economic sanctions representations and warranties before closing. The acquirer should supplement it with specific covenants of the seller to promptly notify the acquirer of any corruption concerns identified before the closing as well as of any potential breach of the representations and warranties. Even if this does not trigger a termination clause, it would allow the acquirer to be able to initiate immediately appropriate measures to mitigate exposure after the deal closes.

Specific representation: books and records, financial statements

In addition, as the FCPA also imposes record-keeping requirements on public companies that are enforced by the Securities and Exchange Commission (SEC), it may be useful for an acquirer to try to add a specific representation covering the books and records of the target.

This is in addition to the general representation on financial statements. It is particularly important as French law requires similar obligations from French companies (*articles L.241-3 3°, L.242-6 2°, L.242-30, Commercial Code*) and the Ministry of Justice oriented its penal policy towards enforcing it more vigorously (*Circular of June 2, 2020 on penal policy in respect of international anti-corruption, Ministry of Justice*).

Purchase price adjustment mechanisms

© 2021 Thomson Reuters. All rights reserved.

If the target has built its business on corrupt acts, or has conducted business with sanctioned countries or sanctioned entities or individuals, an acquirer can only accurately assign a value to the target if it knows about those acts and can factor the associated liabilities into its value. This is why the due diligence steps outlined in *Conducting due diligence* are so important. In practice, on the French market, some acquirers have lowered prices based on discovered liabilities, and some deals have even fallen through.

Evaluating the consequences of corrupt practices or infringements of economic sanctions and export controls

Evaluating the consequences of corrupt practices or infringements of economic sanctions and export controls is not an easy exercise.

There are several issues to consider. These include the following:

- Is the negative conduct over?
- Is it likely that other bribery or economic sanctions and export control violations are as yet undiscovered?
- Will ending the bribes or transactions with sanctioned countries, or sanctioned entities or individuals, significantly impact the target's business?
- What proportion of the target's revenue is based on corrupt practices or infringements of economic sanctions and export control regulations? Is the business sustainable without it?
- If it appears that the acquirer will need to terminate personnel who was involved in the illicit practices, how important is the personnel to the operation of the target?
- What would be the impact of a more compliant approach of the management on expected growth?
- Where it appears that third-party agents, suppliers, distributors, joint venture partners and other business partners are involved, what will be the impact of amending or terminating relationships with those parties?
- What will it cost to ensure that, going forward, the target complies with all relevant anti-corruption practices?

Addressing issues before closing

Addressing known corrupt practices and businesses dealing with sanctioned countries, entities or individuals in an acquisition agreement is usually easier than having to provide for contingent liability. This is because due diligence may be considered when offering a price.

Issues can also be addressed through pre-closing covenants (see *Specific termination rights and pre-closing covenants*), or through specific drafting providing that the costs of disclosure to government bodies, remediation and, as the case may be, settlement of the matter in question will be borne by the seller. This can be borne as an adjustment of the purchase price.

Addressing issues after closing

Corrupt and restricted activities that are only discovered after closing are more difficult to address. They are generally dealt with through indemnity clauses. This is either based on a breach of the anti-corruption and economic sanction and export control representations and warranties, or a specific indemnity granted by the seller. However, there will

© 2021 Thomson Reuters. All rights reserved.

remain uncertainty as to the amount recoverable. Also, if an acquirer relies on a standard indemnity provision, the obligation of the seller is generally limited in time, amount and scope. For example, loss of business opportunity and indirect damages would usually not be covered by sellers.

Drafting issues

Other typical indemnity provisions may also need to be adjusted to provide appropriate protection against corruption and economic sanctions and export control related liabilities. In particular, acquirers should avoid broad "no trigger" language that prohibits voluntarily self-disclosure to government authorities of corrupt and sanctioned practices of the target. Similarly, the acquirer may wish to retain control of the defence of any related third-party claims asserted against the target, even though the seller, who may ultimately pay the bill, will resist such request (see *Assessing and Protecting Yourself from the Corruption Risks When Acquiring an Industrial Business, International In-house Counsel Journal, 2014*).

For economic sanctions and export control risks, representations and warranties can be negotiated by the acquirer with the target to cover fines that may be levied against the target for violations of economic sanctions and export control regulations. This is if they are not barred by statute limitations. To assess potential financial exposure, see *Liability under French law*.

Integrating compliance programmes post-acquisition

On closing, the acquirer should be in position to have a reasonable understanding of the quality and effectiveness of the anti-corruption compliance program in place within the target.

Regarding anti-corruption, the AFA is likely to ask about post-acquisition compliance integration as part of its monitoring. If the acquisition was widely reported in the media, it may attract the attention of the AFA, which may launch an investigation into the target or acquirer.

Post-acquisition, the acquirer should investigate any concerns that arose during the due diligence and follow-up with compliance reviews to entrench the pre-closing due diligence.

Non-French acquirers should be mindful that in-house counsels and compliance officers in France, and in many civil law countries, do not benefit from legal privilege before French courts and public administrations. In terms of AFA investigation, if the due diligence report on compliance was prepared in-house, the AFA is likely to request a copy of it.

For economic sanctions and export control risks, and based on the conclusions of the preliminary audit report, the acquirer must, at the very least:

- Stop all of the target's activities that may contravene economic sanctions and export control regulations.
- Ensure that adequate policies and procedures are implemented with the target to prevent any future violations.
- Reinforce the target's contractual framework to ensure that its clients, suppliers, distributors, intermediaries and agents are complying with applicable economic sanctions and export control regulations.

Self-reporting

© 2021 Thomson Reuters. All rights reserved.

French law does not require companies to self-report any misconduct that they uncover.

Both individuals and companies benefit from a right not to self-incriminate (*Cour européenne des droits de l'Homme - CEDH, Funke vs. France, February 25th, 1993, case n°10828/84*). If the acquirer identifies any acts of corruption within the target during the due diligence process and decides to pursue the acquisition (or identifies any shortly after completion), it is not obliged to report them to the French authorities.

The French Ministry of Justice, the AFA and the National Prosecutor's Office (PNF) encourage companies to self-report any misconduct (*joint guidelines, AFA and PNF; Circular of June 2, 2020 on penal policy in respect of international anti-corruption, Ministry of Justice*). However, the applicable regime and potential advantages remain uncertain, by comparison, to how companies are treated in the US or the UK in similar circumstances.

Despite benefiting from a right not to self-incriminate, the acquirer may still decide to self-report and negotiate a disgorgement of profits to not be criminally liable for having benefitted from the proceeds of the corrupt actions of the newly acquired company. The acquirer may also want to avoid that any misconduct is associated in the media with them, rather than the seller.

How might misconduct come to light?

To measure the criminal risk involved, a distinction must be made between the risk of prosecution and the risk of conviction.

Risk of prosecution

Before the Sapin II Law came into force, corrupt foreign officials and private corruption were rarely prosecuted.

Under the Sapin II Law:

- The French Ministry of Justice's penal policy favours investigating corruption by corporations. This is because it is now possible for corporations to settle with the PNF (see *Liability under French law*).
- The AFA audits companies and can bring misconduct to light. If it brings misconduct to light in a company, it has to inform the PNF of such activities. All public officials in France have an obligation to inform the PNF of facts of a criminal nature of which they are aware (*Article 40, Criminal Procedure Code*).
- There is a whistleblower's status, which protects (and therefore encourages) any person who "discloses or reports, in a disinterested manner and in good faith, an offence or misdemeanour" (*Article 6, Sapin II Law*).
- There is public interest associations such as Transparency International, Anticor and Sherpa. They are now entitled to bring a legal action in anti-corruption cases (that is, "*se porter partie civile*").
- There is more pressure on external auditors to fulfil their legal obligations to disclose to the PNF the offences and misdemeanours they uncover in the books and records of the companies they audit (*articles L.823-12 and L.820-7, Commercial Code*). Such pressure, and the criminal liability they face if they fail to report the misconduct, was reiterated by the French Ministry of Justice in its circular (*Circular of June 2, 2020 on penal policy in respect of international anti-corruption, Ministry of Justice*).

As of 1 January 2019, the PNF reported 547 ongoing investigations, including 47% relating to corruption and related offences. 37% of these proceedings were opened following a reporting by a public authority, 15% following

© 2021 Thomson Reuters. All rights reserved.

a complaint filed by an individual, a corporation or an association, and 12% from whistleblowers, press articles and other sources (See *Le Tribunal de Paris: Procédures en cours*).

For economic sanctions and export control violations, the competent national authorities of EU member states are responsible for conducting investigations into potential non-compliance cases. *Article 453* of the French Customs Code provides that the following officers have the power to conduct investigations and establish breach of economic sanctions and export control regulations:

- Customs officers.
- Other officers within the Financial Administration having at least the rank of controller.
- Judicial police officers.

The reports drawn up by the officers are provided to the French Minister for the Economy and Finance, which can decide whether or not to prosecute. If there is a decision to prosecute, the Minister will refer the matter to the PNF.

Liability under French law

Liability for corruption

If the acquirer self-reports to the French authorities, or if a government investigation is opened independently, the target company that committed the offence, the individuals involved, and the seller if it aided or participated in the misconduct, may face criminal liability for corruption.

Active and passive corruption

French law prohibits both active and passive corruption in both the public and private sectors, as well as other related offences:

- Active and passive corruption of French public officials and influence peddling (*articles 433-1, 433-2 and 432-11, Criminal Code*).
- Private active and passive corruption (*articles 445-1 and 445-2, Criminal Code)*
- Active and passive corruption of foreign public officials and public officials from international organizations and influence peddling (*articles 435-1, Criminal Code*).

In accordance with the general rules of French criminal law, any individual participating in, as either perpetrator or accomplice, actions qualified as active (that is, corrupting or bribing) or passive (being corrupted or bribed) corruption may be prosecuted.

A company is a legal entity distinct from its parent company and the other subsidiaries within a group. Therefore, the company's own criminal liability does not entail the criminal liability of the other companies within the group unless it can be proven there was complicity or participation. For example, on the part of the parent company, such as giving instructions or participating in the contracts in question.

Corruption committed outside the French territory

© 2021 Thomson Reuters. All rights reserved.

French law may apply to acts of corruption committed outside the French territory in the following circumstances:

- Offences committed abroad that are also partially committed in France (*article 113-2, Criminal Code*).
- Offences committed abroad by French nationals or by persons who usually do business in France, when the offence is also punishable under the law of the country in which it was committed (*article 113-6, Criminal Code*).
- Offences punishable by imprisonment committed outside France where the victim is a French national (*articles 113-7 and 113-8, Criminal Code*).

Active public or private bribery
For a conviction for active public or private bribery, the maximum penalty is respectively:

- Ten year's imprisonment and a fine of EUR1 million.
- Five years' imprisonment and a fine of EUR500,000 (amount can be increased to double the proceeds of the offence).

The legal entity can incur a fine five times higher than the amount provided for individuals (*article 131-38, Criminal Code*). Both the individuals and the legal entity incur additional sanctions where the facts are particularly serious (such additional sanctions are rarely pronounced, but they could be used as an argument by the PNF during the negotiation of a settlement).

For legal entities, the additional sanctions include:

- Prohibition, either permanently or for a maximum period of five years, from directly or indirectly conducting one or more professional or social activities (the professional activity during which the corruption took place).
- Placement, for a maximum period of five years, under judicial supervision.
- The permanent closure, or for a period of not more than five years, of the establishments or of one or more of the establishments of the company that was used to commit the incriminated acts.
- Exclusion from public contracts permanently, or for a period of not more than five years.
- Prohibition, either permanently or for a period of not more than five years, from making a public offering of financial securities or from having their financial securities admitted to trading on a regulated market.
- The prohibition, for a period of not more than five years, to issue cheques other than those which allow the withdrawal of funds by the drawer from the drawee (or certified cheques), or to use payment cards (*articles 131-39 and 445-4, Criminal Code*).

Public interest judicial conventions

© 2021 Thomson Reuters. All rights reserved.

To avoid heavy sanctions, as well as long criminal proceedings, companies in France are entitled to seek a settlement agreement with the Prosecutor's Office; a Public Interest Judicial "Convention" (*Convention Judiciaire d'Intérêt Public* (CJIP)) (*articles 41-1-2, 180-2 and R. 15-33-60-1 et seq., Code of Criminal Procedure*).

In France, prosecutors have discretion to negotiate a CJIP. Under the *joint guidelines issued by the AFA and the PNF in June 2019*, the Prosecutor's Office makes a case-by-case assessment of whether it is appropriate to make use of this measure. The proposal for a CJIP may be made as long as prosecution proceedings have not been initiated.

As is specified by the *Ministry of Justice's Circular of 31 January 2018*, a CJIP is an alternative to prosecution. Entering into a CJIP may be proposed by the Prosecutor's Office at any time in the course of the criminal investigation (*enquête préliminaire*) or, in any event, before the case is brought before the criminal court.

A proposal for a CJIP may also be made during an investigation carried out by an investigative judge (*information judiciaire*) (*article 180, Code of Criminal Procedure*). This is reserved for situations in which it appears in line with public interest not to initiate a criminal prosecution, taking into account certain factors (such as the criminal record of the person, self-reporting of the offence by the company, the degree of co-operation with the judicial authorities). The PNF is particularly sensitive to whether the company did or did not self-report the misconduct, as well as the level of co-operation of the company through the launch of an internal investigation.

When agreed to by the company, the CJIP remains subject to validation by the President of the Court. The President grants (or refuses to grant) a validation order following a public hearing.

The CJIP essentially entails the:

- Payment of a public interest fine to the state.
- Potential implementation, under the supervision of the AFA, of a programme to ensure compliance with its procedures for preventing and fighting corruption, for a maximum period of three years (monitorship).

The CJIP does not involve an admission of guilt and has neither the nature nor the effect of a conviction. It is therefore not entered on the bulletin no. 1 of the criminal record of the legal person (bulletin no. 1 is the criminal record issued to judicial authorities).

The fine will be set at an amount in proportion to the benefits derived through the misconduct. It can amount to up to 30% of the average annual turnover of the company over the previous three financial years of the entity reaching settlement. The joint guidelines issued by the AFA and the PNF provide little detail on how to calculate such financial benefits in the frame of corruption to project the level of the fine.

Liability for breaching economic sanctions

EU

EU member states are responsible for implementing in national law any criminal or administrative sanctions required in the event of a violation of EU economic sanctions regulations. All EU economic sanctions regulations contain a clause worded as follows:

"Member states shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive."

© 2021 Thomson Reuters. All rights reserved.

France
In France, the Customs Code and the Criminal Code provide for criminal sanctions for violations of EU and national asset freeze measures. These penalties are provided for in *article 459 (1 bis and 1 ter)* of the Customs Code.

Under these provisions, any person who contravenes or attempts to contravene any asset freeze measures in economic sanctions regulations, is liable to:

- A term of five years' imprisonment.
- The confiscation of the *corpus delicti* (material element of the offence).
- The confiscation of the means of transport used for fraud.
- The confiscation of property and assets that are the direct or indirect proceeds of the offence.
- A fine of at least the amount and at most, twice the amount, of the offence or attempted offence.

Additional penalties
Legal entities, including shareholders, may also be held criminally liable if violation of the measure has been committed for their benefit, by their body or representatives. In this case, they may be subject to additional penalties (*article 131-39, Criminal Code*). Individuals, including managers and shareholders who are individuals, may also be held criminally liable on the same basis.

These additional penalties may take the following forms:

- Excluding public procurement contracts on a permanent basis or for a maximum period of five years.
- A prohibition, either on a definitive basis or for a maximum period of five years, on offering financial securities to the public or having their financial securities admitted for trading on a regulated market.
- Dissolution, where the legal entity has been created or diverted from its purpose to commit the acts at issue.
- A prohibition, either on a definitive basis or for a period of no more than five years, of the direct or indirect exercise of one or more professional or corporate activities.
- A placement, for a maximum period of five years, under judicial supervision.
- A permanent closure, or closure for a maximum period of five years, of one or more of the premises of the company used to commit the offences.
- A display of the decision issued or its publication either in the written press or by any electronic means of communication to the public.

Obligation of enhanced effort
Compliance with EU economic sanctions regulations does not imply an obligation to achieve a result but an obligation of enhanced effort.

© 2021 Thomson Reuters. All rights reserved.

The obligation of enhanced effort is a "duty of care and diligence" by which the debtor owing the obligation undertakes to apply its care and ability to achieve a result but does not undertake to achieve this result. The debtor's liability may be engaged if the creditor of the obligation can prove a violation of the owing party's duty of care and diligence.

The obligation of result is a "determined obligation": the debtor must achieve a specific result and may be liable to the creditor if this result is not achieved.

EU regulations on economic sanctions specify that:

"[a]ctions by natural or legal persons, entities or bodies shall not give rise to any liability of any kind on their part if they did not know, and had no reasonable cause to suspect, that their actions would infringe the measures set out in this Regulation [...]."
In all situations where a company should have refrained from conducting a transaction and invokes, in good faith, the impossibility of knowing or suspecting the existence of a restrictive measure, it cannot be held liable. The aim of this is to limit the liability of persons acting in good faith.

In addition, the French Treasury Directorate General has specified that:

"it goes without saying that no one may invoke his ignorance if he is not in good faith, which implies that a minimum number of questions have been asked before starting or continuing an operation, in particular to or from a country subject to sanctions" and that "the person cultivating ignorance may not invoke good faith and the person who has been misled, despite taking precautions, may not be held liable."

END OF DOCUMENT

© 2021 Thomson Reuters. All rights reserved.