Hughes Hubbard & Reed

2008 – 2017 : Feedback from a global compliance experience in Paris

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Following adoption of the Sapin II Act in France, 2017 will stand out as a milestone in the development of compliance in the country. For over eight years, our firm's Paris office has been assisting major French companies with setting up their compliance programs. Several of these clients had either been placed under monitorship by the U.S. authorities or under investigation by the U.S., UK or Brazilian authorities in matters of primary importance with global reach. The experience acquired in Paris in these cases has enabled us to develop both a unique team and unparalleled expertise in France. During what is an exceptional year for compliance in France, we organized a conference on February 28, 2017 that brought together over 100 legal and compliance managers to share our experience with them. This was followed by a cocktail reception where we presented some of the members of our Anti-Corruption and Internal Investigations Team.

This conference took the form of a practical case study in which our lawyers responded by providing multi-disciplinary solutions. You will find a summary of the exchanges and discussions that took place at the conference below.

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Background

FoodCo specializes in ready-made meals, employs 15,000 people around the world and has annual sales revenues of 3.8 billion Euros, divided equally between France, the EU and the rest of the world. Its clients include both public and private entities and the company provides a home-delivery service. As it focuses its business activity on a sustainable development approach, FoodCo does its utmost to protect its image. It recycles packaging, and the ingredients used in its meals are sourced from local organic producers. Its meal-preparation and packing plants are located around the world but the packaging itself is manufactured in the plant in Narbonne and sent around the world to local packing plants via the port of Port-la-Nouvelle. Transportation is outsourced.

After 20 years as in-house counsel at FoodCo, I have just been appointed to the new role of Chief Compliance Officer (hereafter "CCO").

Phase 1: Starting out

I've just started my new job. During 2016, I read various articles about the Sapin II Act which now seems relevant to FoodCo. The first step that will be necessary is the adoption of a code of conduct. FoodCo is running ahead of the Sapin II Act in this regard as we adopted a code of conduct eight years ago, which clearly states that corruption is prohibited. Do I need to take any additional steps?

Before beginning, it is important to check whether FoodCo is subject to the Sapin II Act. As the law applies to companies with over 500 employees and sales revenue of over 100 million Euros, FoodCo is subject to the statutory provisions under the Act. FoodCo is therefore required to set up an anti-corruption compliance program before June 1, 2017. This should include a risk-mapping exercise, an internal whistleblowing system, third-party due diligence review processes, employee training, a system of disciplinary sanctions for breaches of compliance rules, and an internal monitoring and assessment system. A code of conduct dating back eight years probably needs revising. This should be done after the risk-mapping exercise to take into account the company's actual business activities and identified risks, as well as the most recent international standards for corporate conduct.

Does my code of conduct need to be included in the internal regulations? In addition to updating the code, do I need to do anything as regards the staff representatives? How should I include the code of conduct in the internal regulations?

You need to check whether rules prohibiting corrupt or fraudulent activities are already included in the internal regulations. FoodCo's code of conduct is probably no longer in line with the provisions of the Sapin II Act and needs revising to incorporate examples of conduct that may constitute corrupt activities and disciplinary measures applicable to employees. It is important to respect the process for setting up new internal regulations, and in particular, to consult staff representatives with a view to incorporating the code of conduct into existing internal regulations and respecting the formal communication and publication requirements.

Does this apply only in France or also internationally?

Phase 1 : Starting Out

continued

As regards the Sapin II Act, FoodCo is under an obligation to extend including the code of conduct in the internal regulations of its subsidiaries, whether they are located on French territory or not. FoodCo cannot adopt universally-applicable internal regulations because the requirement to establish internal regulations containing a code of conduct is assessed at establishment level. However, it would be possible to adopt a code of conduct with identical content, provided the procedure for adopting the internal regulations is respected.

I read that the Sapin II Act also requires us to set up an internal whistleblowing system to escalate violations of the code of conduct. At FoodCo, three years ago, we set up a 24/7 hotline available in every language, which is referenced on intranet and in the code of conduct. However, we receive fewer than five alerts per year and which generally relate to employee disputes. Do I need to take additional measures?

The CCO will need to address several preliminary issues beforehand in order to understand FoodCo's needs. Has use of the whistleblowing system changed? How was creation of the internal whistleblowing system communicated to employees? Is information about the ethical guidelines easily available on the intranet? Under the "tone at the top" principle, executives should demonstrate their support for employee use of the hotline, and reassure employees that they will not be sanctioned for using the hotline in good faith. Training should be organized and tailored to the profile of specific employee groups. This makes it possible to develop trust between the CCO and the employees, and encourage employees to escalate alerts.

I also wonder about personal data processed during internal investigations carried out as a result of these alerts, especially as a new European Regulation clarifies the requirements in this area. What are the latest requirements for managing internal alerts?

Whistleblowing is subject to the single authorization system covering whistleblowing (AU 04) issued by the *Commission Nationale de l'Informatique et des Libertés* (CNIL, the French Data Protection Agency). FoodCo's scheme will therefore have to comply with the rules set out in AU 04, which aims in particular to protect the individuals concerned and limit access to the data. AU 04 provides a list of the data that may be collected within the framework of a corporate whistleblowing system. In particular, the system must be subsidiary to the normal procedure of escalating warnings to management. At European level, the General Data Protection Regulation affects whistleblowing by reducing red tape and creating a "Data Protection Officer."

What is the scope of the protection for whistleblowers under the Sapin II Act? What happens if a whistleblower in Asia decides to talk to journalists?

Provided the whistleblower complies with the conditions of the Sapin II Act and the whistleblowing procedure itself, he or she benefits from legal protection under both labor and criminal law. A whistleblower must be a disinterested and *bona fide* individual who has personal knowledge of the facts he or she denounces. The alert must relate to crimes, offenses or violations set out in the Sapin II Act. A specific procedure must be followed, requiring the whistleblower to contact the

employer first before he or she can contact the appropriate authorities. It is only in the event of the authorities' failure to act within a period of three months that the whistleblower may go public with his or her information. A whistleblower is not criminally liable for breach of professional secrecy, under certain conditions. In addition, a whistleblower cannot be sanctioned, dismissed or discriminated against. In the event of retaliatory measures, an employee benefits from a reversal of the burden of proof, as an employer would have to prove that the measure taken against him was decided on the basis of objective elements separate to the alert raised.
The Sapin II Act does not expressly provide for international scope to the legal protection afforded to whistleblowers. However, a whistleblower with a French employment agreement will benefit from the legal protection regardless of the place where he or she reveals the facts in question.

I've read that the Sapin II Act requires me to map compliance risks. How do I go about doing this?

This is effectively a preliminary step when defining and rolling out a compliance program.
In order to map the risks, you need to identify the geographical areas and business activities at highest risk. The combination of these two factors then enables you to better target the compliance actions required. Accordingly, in the case of FoodCo, you will need to determine the countries in which the company is located and study the sales revenues realized with its main clients, both public and private. As FoodCo has outsourced product shipment, you will need to know the amounts paid to the main shipping and forwarding agents and to ensure that due diligence reviews are conducted for each of them to check that they comply with international compliance standards. An important aspect of risk mapping involves having better knowledge of the details of the activities of business partners working on behalf of the company and attempting to categorize them by type of risk.

I know that the Sapin II Act requires us to set up processes for assessing client, leading supplier and intermediaries' situations, that is to say, due diligence reviews. The General Counsel of FoodCo ordered several due diligence reports from economic intelligence specialists on business agents in Africa. Is that enough? I've got tens of thousands of suppliers and millions of clients around the world. I'm not in a position to order a report on each of them. What should I do?

The due diligence process needs to be based on an analysis of the risks. FoodCo could find itself criminally liable for things being done by third parties on its behalf. It is paramount that you identify any red flags and act accordingly, because if FoodCo does not take action although a relationship with a business partner is showing up red flags, it will find itself subject to accusations in these respects.
It is important to identify the highest-risk business partners in order to better allocate resources. As the risk is not the same, depending on the third party in question, there is no point in applying the same level of due diligence to all third parties.

Large quantities of personal data are collected in due diligence files. And I think that the American FCPA requires me to maintain records of due diligence files for several years. What considerations need to be taken into account in terms of data protection?

Phase 1 : Starting Out

continued

Due diligence reviews of third parties are likely to contain not only sensitive data but also information relating to violations of criminal law. Collection and processing of this data is regulated by the CNIL. Once collected and processed, the data may only be kept for the period of time necessary for the purposes for which it was collected and processed. In practice, this is a question of the length of the time bar for offences.

The compliance program seems to be rather restrictive, which is likely to meet with significant resistance internally. What would I risk, in criminal terms, if my superiors don't give me the resources to act effectively? Will my managers and the company incur dissuasive sanctions?

The requirement to set up an effective compliance program imposed by the Sapin II Act is sanctioned administratively, and not criminally, by the French Anticorruption Agency. It covers company presidents and corporate officers but not the CCO directly. However, sanctions are no less dissuasive. They range between warnings and injunctions, to fines of up to 200,000 Euros for individuals and 1 million Euros for legal entities. These sanctionss may be published. The process is adversarial and the reasoning behind the decision is given.

How can I convince my management that a compliance program can be a competitive advantage?

Apart from the fact that a compliance program is now a legal obligation, it should be emphasized that very often, clients themselves require that their suppliers have a compliance program in place and make it a condition of being able to participate in certain tender processes. Clients are also increasingly carrying out compliance reviews themselves. In addition, compliance is positive for the business in that it enables companies to secure better visibility of the risks associated with certain transactions and to stand out from its competitors by protecting its core values as much as possible. This will be particularly relevant in the case of FoodCo, whose activity is based on an image of sustainable development.

Law n° 2016-1691 of December 9th 2016 on transparency, the fight against corruption and on the modernization of economic life.

Phase 2: Risk Mapping Underway

FoodCo began its risk mapping exercise three months ago, starting with the countries that present the most risk. We suspect our commercial representative in Japan of having bribed the Minister of Justice so that FoodCo would be hired to provide meals to local prisons. We need to investigate this thoroughly to determine whether or not our suspicions are correct and if this same set-up has been replicated in other Japanese contracts (especially in schools).

This commercial representative is not a FoodCo employee, how can I investigate? In addition, I know FoodCo's Commercial Director well, and I would not be surprised if he were implicated and receiving kickbacks. In the past, I have heard rumors that he was in on scams with lawyers and local tax specialists to make money. To my knowledge, nobody has dared to look into this more closely. Management has never had much of an appetite for bothering Commercial Directors.

When there are suspicions, it is useful to prepare a targeted work plan and, if possible, obtain the support of top management before carrying out an internal investigation. It is also important to consider legal privilege and the necessity of using external counsel, in order to distance the investigation and preserve internal relationships. The work plan can provide, among other things, for document collection, an economic intelligence report, and some interviews. This would allow for better identification of the business partner's scope, the potential implication of other persons, and the risk of repetition of the illicit conduct. We can also identify the Commercial Director's involvement.

I will need to interview some of our employees and do a forensic review of their computers and work phones. Some employees are French, including the Commercial Director. Do I need to take specific precautions?

FoodCo can set up controls of the tools made available to employees, after informing them via internal regulations or in an IT charter. In this case, any correspondence not specifically noted as being personal is assumed to be professional and can be reviewed by the employer. When correspondence is personal, FoodCo can only consult it either in the presence of the employee or after calling and advising the employee. FoodCo therefore has access to the correspondence, but needs to be prudent and take every precaution. Regarding interviews, ideally, specific provisions should be included in the code of conduct. Failing that, an employee could be informed that he or she must participate in investigations as part of his/her professional duties. It would also be preferable to give employees information about the legal protection they are entitled to have access to.

Phase 2: Risk Mapping Underway

continued

Do the European Union and the CNIL have a say regarding my investigation in Japan when it comes to protection of personal data?

The French Data Protection Act is only applicable if the person in charge of processing the data is located in France, or, if outside France, the person has access to processes located in France. The Japanese subsidiary of FoodCo does not therefore necessarily have to comply with the Data Protection Act. In practice, the CNIL can ensure rules are being followed through the control provisions it can use with respect to the processes set up by FoodCo in France. The European Regulation has introduced a new rule on extraterritorial applicability of European law so that it cannot be circumvented.

Do I need to prepare myself for an investigation by American, Japanese, or even French authorities? Do these authorities have the capability to detect acts of corruption even if there are no press articles regarding them? If the Japanese prosecutor's office launch an investigation, will the Americans and the French get involved?

You need to be prepared for the possibility of an investigation. FoodCo will be in a better position to answer questions from the authorities if most of the work has already been done. It is important that the company undertake corrective measures such as ending relations with the commercial partner or disciplinary sanctions. Various authorities across the globe are increasingly active and collaborate closely with the American authorities, and other authorities as well. It is no longer rare to see investigations conducted by several national authorities at the same time.

What are the risks FoodCo is exposed to if there is an investigation in France?

FoodCo runs the risk of being involved in a criminal investigation. The risks FoodCo may face depend on the results of such investigation, bearing in mind that actively corrupting public officials is punishable by a 5 million Euro fine for legal entities or a fine equal to ten times the profit that such corruption generated. FoodCo also risks being excluded from public procurement contracts. The Sapin II Act is innovative in this regard in that it provides for an additional penalty of "a compliance program". Convicted companies will be required to set up a compliance program under the monitorship of the AFA (French Anti-corruption Agency).

As the events took place between 2013 and 2015, can I conclude a CJIP (convention judiciaire d'intérêt public – French equivalent of a deferred prosecution agreement) with the French authorities if they investigate or if I go to them voluntarily?

The CJIP, a new feature under Sapin II, can be concluded before any prosecution is started, at the public prosecutor's initiative. Only legal entities may benefit from this scheme. A CJIP suspends the prosecution. The investigations may, however, resume if the CJIP was not validated by the President of the District Court, if the legal entity exercises its right of retraction, or if the CJIP was

Phase 2: Risk Mapping Underway

continued

not correctly performed. It would appear that a CJIP can be applied immediately to acts committed before Sapin II came into effect, as stipulated in Article 112-2 of the Criminal Code on laws determining conditions for prosecution and forms of proceedings. In addition, there is a question mark as to the utility of voluntarily approaching the French authorities, given that Sapin II does not provide for any form of clemency.

Can I conclude an agreement that would put an end to all investigations in France, Japan, and the United States?

In theory, concluding a CJIP would be likely to reduce the risk of investigations of the same facts or conduct by foreign authorities, in particular under application of the *non bis in idem* rule. In practice, however, the situation is more complex and uncertain. Experience shows, for example, that concluding a deferred prosecution agreement in the United States did not prevent the company from being convicted in France concerning the same facts.

Our Compliance Experience in Paris

Our team has unrivalled experience in assisting French corporate groups in dealing with the complex compliance issues that their business activity creates. We assist them in particular with developing, evaluating and testing their internal control mechanisms, internal policies and, more generally, their compliance programs. Here are some examples of French matters we are currently handling:

- We currently represent and are assisting **a CAC 40 company in the oil and gas services industry in connection with a global risk assessment and compliance review of its business activities** aimed in particular at ensuring the company's compliance with commitments given under settlement agreements with the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC"). During this engagement, we have assisted this company in: (i) designing, and revising its compliance policies and procedures, (ii) conducting compliance reviews of global operations, including **in Africa, Russia, South America and the Far East**, (iii) complying with the terms of the undertakings given in its Deferred Prosecution Agreement ("DPA"), (iv) managing its monitorship, and (v) conducting several hundred due-diligence reviews worldwide, covering the third parties with whom our client works (business partners and agents, partners in joint ventures or consortiums, or subcontractors).

- We currently represent another CAC 40 company in the oil industry and are also assisting it in connection with a worldwide review and evaluation of its activities, in particular to enable it to respect its **compliance obligations arising out of a settlement with the U.S. DOJ and SEC**. During this engagement, we have assisted our client with (i) conducting reviews of the company's business operations in Africa, the Middle East, Asia Pacific, Europe and South America, (ii) while developing various protocols to ensure that its compliance program meets international anti-corruption standards, (iii) developing and implementing policies and procedures aimed at laying down specific terms of engagement for third-party business partners, and (iv) **conducting due diligence reviews of various third parties in over 35 countries**.

- **In connection with a World Bank monitorship**, we successfully represented a **CAC 40 company involved in the transport sector**. Our representation included assisting our client with (i) reviewing and modifying the company's compliance policies and procedures, (ii) in-person training of personnel at 23 locations around the world, (iii) assisting more generally with the implementation of its compliance program, and (iv) regular interaction with the company's World Bank-imposed independent compliance monitor. In February 2015, the World Bank determined that our client had satisfied its commitments in this respect.

- We currently represent **a CAC 40 company in the defense and aerospace industry as part of a global review of its compliance program**. During this engagement, we have assisted our client with (i) conducting due diligence reviews of third parties with whom it does business, (ii) conducting a global review of its operations, and (iii) reviewing and revising its policies and procedures.

- **Kevin T. Abikoff** and **John F. Wood**, partners at the firm, have been appointed independent monitors by the United Nations for a French multinational in the inspection services industry following its exclusion from the United Nations procurement process.