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Adoption of the “Sapin II Law”: Strengthened anti-corruption enforcement arsenal and changes to the rules governing business relationships

Adopted by the Parliament on November 8, 2016, the “Sapin II Law” is primarily designed to strengthen the French anti-corruption arsenal and introduces new measures to prevent and penalize corruption.

This Law also brings a number of changes to the legislation governing business relationships between economic operators, including with respect to practices that restrict competition, so-called “single commercial agreements” and payment terms.

The so-called “Sapin ll Law”, definitively adopted by the French National Assembly on November 8, 2016[1], aims at “*increasing transparency, better combatting corruption and modernizing economic life*”.

One of the key features of the “Sapin II Law” concerns the strengthening of the French anti-corruption arsenal (1). It also introduces significant changes to the legislation governing business relationships between companies (2).

1. Strengthened anti-corruption arsenal

In order to strengthen the legislation to combat corruption, the “Sapin II Law” introduces measures to better prevent and detect corruption, including:

- The creation of a National Anti-corruption Agency

The new entity, called *Agence française anticorruption* (French Anti-corruption Agency), will be placed under the authority of the Minister of Justice and the Minister of Finance.

This Agency will be responsible for drafting recommendations concerning the prevention and detection of corruption. This Agency will also have the power to control internal corruption prevention programs implemented within French administrative agencies as well as the measures and procedures that must be put in place by "large companies" to prevent corruption and influence peddling.

- "Large companies" have the obligation to prevent corruption risks

Under the "Sapin II Law", companies with at least 500 employees and companies belonging to a corporate group, the parent company of which is based in France, that employs at least 500 employees and that generates a turnover or a consolidated turnover in excess of 100 million euros are required to take measures to prevent and detect the commission of acts of corruptions and influence peddling in France and abroad.

These measures include, but are not limited to, the adoption of a code of conduct, the implementation of an internal whistleblowing procedure, the creation of a corruption risk mapping and the provision of training programs for employees exposed to risks of corruption and influence peddling.

If companies fail to comply with these obligations, the French Anti-corruption Agency is empowered to enjoin them to do so, and to impose a fine of up to 200,000 euros for natural persons and 1,000,000 million euros for legal entities.

- The creation of a "mandatory compliance" penalty

The "Sapin II Law" creates an additional "mandatory compliance" penalty for companies convicted of acts of corruption or influence peddling. This penalty consists in the obligation for the convicted companies to implement a compliance program for its internal measures and procedures to prevent and detect corruption and influence peddling, under the supervision of the French Anti-corruption Agency, within a certain period of time that may not exceed five years.

The "Sapin II Law" also introduces measures that are designed to better sanction corruption. These measures include:

- The creation of a French Deferred Prosecution Agreement

The "Sapin II Law" provides for the creation of a so-called "*convention judiciaire d'intérêt public*" (Deferred Prosecution Agreement) that can be proposed by the Public Prosecutor to a company that is suspected of a corruption offense, prior to prosecution.

Under this Deferred Prosecution Agreement, the relevant company will have to pay a public fine to the State Treasury (the amount of the fine shall be based on the proceeds derived from the offense, up to a maximum of 30% of the company's average annual turnover) and implement a compliance program for its internal measures and procedures to prevent and detect corruption and influence peddling, under the supervision of the French Anti-corruption Agency and for a maximum period of three years.

- The adoption of measures to facilitate the prosecution of bribery of foreign public agents

The “Sapin II Law” creates a new offense of corruptly influencing foreign public agents. The scope of application of French criminal law will also be extended outside France for offenses of corruption and influence peddling committed abroad by a French national or by a person who habitually resides in France or carries out all or part of his/her business activities on the French territory.

2. Changes to the legislation governing business relationships

The “Sapin II Law” also includes provisions that apply to business relationships between professionals, among which:

- The definition of new practices that restrict competition

The “Sapin II Law” criminalizes new practices that restrict competition, such as:

- With respect in particular to so-called “conventions uniques” (see below), the fact of “*imposing a revision of price (…) by reference to one or more public index(es) which have no direct connection with the products or services supplied under the relevant agreement*”;
- The fact of “*imposing or attempting to impose penalties for late delivery to a commercial partner whenever said late delivery is due to a force majeure event*”.
- The extension of the duration of so-called “conventions uniques”:

Distributors and suppliers can henceforth enter into a “convention unique” (i.e. a single commercial agreement that incorporates the terms of the commercial negotiations between them) for a period of two or three years, and not only for one year.

Wherever this single commercial agreement is entered into for a period of two or three years, it must set forth the conditions in which the agreed price shall be revised. Such conditions may include reference to one or several public index(es) that reflect the evolution of the production factor prices.

The above also apply to single commercial agreements to be entered into between suppliers and whole-sellers.

These provisions shall apply to single commercial agreements concluded on or after January 1, 2017.

- New payment terms :

The “Sapin II Law” introduces a specific payment term for “*purchases of goods made on a tax-free basis, under Article 275 of the [French] Tax Code, designed to be delivered “as is” outside the European Union*”. This payment term may not exceed 90 days as from the date of issuance of the invoice.

The payment term agreed upon between the parties must be expressly set forth in the contract and must not be grossly unfair to the creditor.

It should be noted that under the “Sapin II Law” these provisions do not apply to “*purchases made by large companies*”.

- Increased penalties

The maximum amount of the fine provided for in Article L.442-6 of the French Commercial Code in relation to practices that restrict competition is increased to 5 million euros (as opposed to 2 million previously).

In addition, the maximum amount of the administrative fine that applies in case of non-compliance with the provisions governing payment terms is increased from 375,000 euros to 2 million euros.

[1]The Law must, in principle, enter into force on the day following its publication. It should be noted, however, that an appeal was lodged before the Constitutional Council on November 15, 2016. The Constitutional Council should issue its decision by December 15, 2016.