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The French Anti-Corruption Agency publishes guidance on “anti-corruption checks in M&A transactions”

The French Anti-Corruption Agency (*Agence Française Anticorruption*, hereinafter “AFA”), created by Law No. 2016-1691 of December 9, 2016 on transparency, fight against corruption and modernization of the economy, commonly referred to as the “Sapin II Law”, has recently supplemented its recommendations by issuing a best practice guide for M&A transactions.

Although this guide is not legally binding, as specified by the AFA, it is of significant interest to business operators as it encourages them to conduct checks that will determine not only the possible involvement of the target company in corruption or influence peddling but also the quality of the existing anti-corruption arsenal.

All of these checks should make it possible to identify elements likely to have an impact on the transaction price.

With the aim of raising awareness on the fight against corruption, the AFA emphasized the legal benefits of making these checks.

Regarding liability under French administrative law, the AFA considers that while the acquiring company or the merged entity may be accountable to the Sanctions Committee of the AFA for breaches committed prior to the transaction by the dissolved or acquired company, the principle that penalties must be applied only to the offender nevertheless prevents the imposition of a penalty other than a monetary penalty. The AFA therefore excludes measures concerning the publication of sanction decision or injunctions to improve compliance procedures.

With regard to civil liability, the AFA pointed out that companies may be held liable both in the event of absorption of the target and in the event of a merger, since in both instances, the universal transfer of assets/liabilities has the effect of incorporating debts which have, or may be, incurred in connection with acts of corruption committed by the target prior to the transaction. It should be specified that when a company

acquires – without any merger taking place – a company that has committed acts of corruption prior to the transaction, only the latter can be held civilly liable.

Finally, with regard to criminal liability, the AFA recalled that, by virtue of the principle of individualization of offences and penalties, "*you can only be liable for your own doings*" which means that the liability of a natural person or legal entity can only be sought if he/she/it has taken part in the wrongful actions in question.

As such, the acquirer or the acquiring company can only be held liable if it is itself guilty of acts of corruption or has aided and abetted the perpetration of such acts. However, it must be specified that for aiding and abetting to be established the existence of culpable intent and material actions must be demonstrated. The same difficulty will therefore arise for the offences of concealment, laundering of corruption proceeds and influence peddling, which require the active and intentional participation of the natural persons and/or legal entities.

That being said, the AFA failed to specify that although the new structure resulting from the transaction will escape conviction, the proceedings initiated against the management could continue after the consummation of the transaction. The AFA forgot to mention the reputational and media risk that these proceedings may represent, including for the newly created entity.

Indeed, it should be stressed that if corruption continues after the transaction and the management of the new entity is informed thereof, the new entity and its management could be held criminally liable for the offence of bribery, concealment or laundering of corruption proceeds.

To this end, the AFA recommends that an internal investigation be carried out to enable the management of the new entity to react immediately, and specifies that any suspicion must lead to the implementation of "*immediate corrective actions*".

While the internal investigation seems to be the preferred procedure, it should be noted that the AFA appears to encourage the use of the so-called Judicial Public Interest Agreement (*Convention Judiciaire d'Intérêt Public* or "CJIP") procedure – i.e. the pleading guilty "*à la française*" – by specifying that following the internal investigation the target company could "*report to the public prosecutor and thus anticipate a possible conviction*".

However, while according to the guidelines established by the AFA and the National Financial Prosecutor's Office, a company that has, from the outset, cooperated with the prosecution authorities may be granted credits for its cooperation during the implementation of a CJIP procedure, such a decision must be carefully analyzed, in particular in an international context.

Indeed, it should first of all be recalled that the CJIP does not provide for any exemption but only for a reduction of the fine based in particular on the company's participation in the discovery of the facts and the bringing to light of the wrongful actions through an internal investigation.

Furthermore, it should be recalled that the conclusion of a CJIP does not protect individuals who remain

excluded from this procedure. Consequently, such a procedure would necessarily be likely to accentuate the divergence of interests between the target company and its management.

While anti-corruption is undoubtedly expected to become an essential tool for companies, particularly in the context of a M&A transaction, this guide, which does not actually define the companies concerned, is primarily intended for entities of sufficient size that are already familiar with anti-corruption issues. This being said, smaller economic players can of course carry out similar checks that ought to be nevertheless proportionate to the issues at stake in the contemplated transaction.