

Frédéric Lalanc, **Partner**, Orrick Rambaud Martel**« The American settlement system may soon apply in France in case of corruption »**

The Sapin 2 bill, which should be presented to the French Council of Ministers of 23 March 2016, provides for the setting up of an anti-corruption arsenal against companies. What are the motives for such a bill?

Announced by the French Government last July, the bill is aimed at equipping France with effective anti-corruption preventive and enforcement tools (in particular international corruption) and, thus, to give credibility to the action of France in this field. Although our country has had a structured anti-corruption arsenal for 20 years, it is true that such a law enforcement framework has not been or has been barely implemented. Noting what was perceived as a certain laxity on the part of France, other States thus undertook to enforce their own anti-corruption legislation to French corporate groups.

When it succeeded in finding links (transactions in dollars, subsidiaries located across the Atlantic etc.) with its own anti-corruption legislation, the US legal system imposed sanctions, for instance, on Total, Technip or Alstom for offences committed outside its borders. In fact, those three companies are among the top 10 FCPA enforcement actions (in terms of amounts) across the Atlantic, France being the most represented in this ranking.

What innovations are introduced by this bill?

First, it provides for the creation of an *Agence Nationale de Prévention et de Détection de Corruption* (National Agency for Corruption Prevention and Detection). In particular, such agency will be in charge of defining the good practices in terms of prevention and combating of this type of offences. As opposed to the *Service central de prévention de la corruption* (central service for corruption prevention) which it should replace, it would have a capacity of investigation, of injunction and above all a power to impose administrative penalties (up to one million Euros for legal entities and €200 000 for individuals).

In addition, this agency will be in charge of setting up a system aimed at protecting and assisting whistleblowers. Second, all the companies with over 500 employees and with over 100 million in turnover will have the obligation to set up an internal prevention plan against corruption risks.



“The companies with over 500 employees and with over 100 million in turnover will have the obligation to implement an internal prevention plan against corruption risks”.

The said plan should include a code of conduct, a detailed risk mapping and the setting up of disciplinary action procedures. If a large number of groups already have these plans, the mandatory nature of such plans would be a real innovation. The National Agency for Corruption Prevention and Detection's power to impose sanctions will fall within the framework of the checking that such prevention plans are being implemented.

In addition, similar to what already exists, in particular in the US [Deferred Prosecution Agreement], the draft bill introduces a settlement mechanism.

During the preliminary investigation stage, a company suspected of acts of corruption would have the possibility to enter into an agreement with the public prosecutor (*convention de compensation d'intérêt public* - a kind of Deferred Prosecution Agreement “à la française”). In consideration for (i) the payment of an amount proportionate to the benefits derived from the infringement and capped at 30% of the average turnover over the last three years, (ii) the agreement being made public and (iii) the implementation of a compliance program, the public prosecutor would

not bring proceedings against the company that signed the agreement. Finally, the bill provides that criminal courts could condemn a legal corporate entity convicted of acts of corruption to fulfill compliance obligations, which would trigger a compliance program over a period of three years. In the event of failure to comply with the said compliance program, the company and/or the individuals would be subject to new criminal penalties.

How do the companies react?

It seems that they welcome this bill. To take just one example, the criminal settlement procedure or its equivalents exists in various countries, such as the United States, the Netherlands, Switzerland, Germany, and works perfectly well. If the Bill is enacted, it will provide a real added value, especially as it tends to secure the companies, by giving them more visibility (penalties are capped, schedules are shortened).

More generally, France's credibility in combating corruption would be looked upon in a positive way by other countries. Knowing that most of them recognize the “*non bis in idem*” principle, according to which an operator cannot be condemned twice for the same offence –their legitimacy to impose sanctions on a French company would be significantly reduced. France would thus regain its “jurisdictional sovereignty”.

Interviewed by Arnaud Lefebvre