POHLMANN & COMPANY

International Compliance Update

3/2016

Our "International Compliance Update" portrays current developments and trends in international compliance legislation, jurisdiction and practice with a focus on their relevance for Germany.

France

The new French anti-corruption legislation

Eric Mayer / Christian Schmitt

- It is highly probable that Germany's second most important trading partner will introduce a completely revised anti-corruption law – the so called "*Loi Sapin II.*" – within the current calendar year.
- For the first time, this new law will impose a legal obligation on companies to prevent bribery and introduce new settlement mechanisms resembling the Deferred Prosecution Agreements (DPAs) in the United States, including the concept of compliance monitorships.
- Many international companies that employ at least 500 employees in France and generate annual revenues exceeding EUR 100 million will also fall under the extraterritorial scope of the new law.

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From "Sapin I." to "Sapin II."

As early as 1993, Michel Sapin, who at the time was the economics minister and currently serves as the finance minister of France, introduced an anti-corruption law which was henceforth known as "Loi Sapin".[1] Nevertheless, this could not prevent large-scale international bribery scandals: In 2010, the engineering and construction group Technip S.A. had to pay a fine amounting to $ 338 million to the *U.S. Department of Justice* ("**DoJ**") and the *Securities and Exchange Commission* ("**SEC**"). In 2013, the mineral oil company Total S.A. entered into a settlement with the DoJ and the SEC which included a payment of $ 398 million. In 2014, the rail technology corporation Alstom S.A. followed with a DoJ-settlement amounting to $ 772 million, making it the second highest FCPA-settlement ever. This places three major French companies in the world-wide Top Ten FCPA cases of all times[2]. No other country appears more than twice in this statistic.

As a result, enormous pressure began to build up against our neighboring country, which according to recently published figures of the Federal Statistics Office (Statistisches Bundesamt) is Germany's second most important trading partner worldwide, directly after the U.S.[3] Especially international organizations, such as the Organization for Economic Cooperation and Development (OECD) in the year 2014, expressed serious concerns about the legal situation existing for the time being and France's limited enforcement approach. In the current Corruption Perceptions Index (CPI) compiled by Transparency International, France is ranking only 23rd with a point value of 70 behind non-European countries like Uruguay or Qatar.[4] At the beginning of the year 2016, the French government finally reacted and announced the introduction of a new law regarding transparency, the fight against corruption and the modernization of economic life.[5]

This so called "Loi Sapin II." was discussed on an accelerated process before the Senate on July 8 and before the Joint Committee on September 14 as an amending law for the French codifications of – amongst others – the criminal code, criminal procedure code, labor code and commercial code. The French National Assembly has been dealing with the draft bill since September 21 and will discuss final adjustment in public debate from September 28 until 30.

A new Anti-Corruption Agency and new provisions on Whistleblowers

The draft bill from July 8, 2016 introduces a new public anti-corruption agency under the responsibility of the Ministries of Justice and Finance.[6] This new "*Agence de prévention de la corruption*" will be provided with wide-ranging investigative and sanctioning powers and is tasked with issuing guidelines regarding the new obligation to implement compliance programs. Furthermore, this agency shall protect Whistleblowers ("*lanceurs d'alerte*") which have also been regulated for the first time.[7] The agency shall be led by an independent judicial officer or a former judge ("*magistrate*") who will be appointed by the

[1] Law No. 93/122 of 29 January 1993 on Prevention of Corruption and Transparency of Economic Life and Public Procedures ("*Loi du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques*", https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000711604&dateTexte=&categorieLien=id)

[2] Cf. https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml; http://www.iflr1000.com/NewsAndAnalysis/An-overview-of-the-US-Foreign-Corrupt-Practices-Act-FCPA/Index/5228

[3] In 2015, the turnover with France (Exports + Imports) amounted to EUR 169 billion, with the U.S. EUR 173 billion. Cf. Außenhandel – Rangfolge der Handelspartner im Außenhandel der Bundesrepublik Deutschland 2015, published 18.08.2016.

[4] Transparancy International Corruption Perception Index 2015 (TI CPI), http://www.transparency.org/cpi2015#results-table

[5] "*Projet de Loi relatif à la transparence, à la lutte ciontre la corruption et à la modernisation de la vie économique*", http://www.assemblee-nationale.fr/14/projets/pl3623.asp

[6] Pursuant to Art. 1 of the bill from 08.07.2016 the "*Agence de prévention de la corruption*" will replace the "*Service central de la prévention de la corruption*" (SCPC).

[7] Chapter II. handles the protection of Whistleblowern under the titel "*De la protection des lanceurs d'alerte*".

French President via decree with a non-renewable six-year mandate.

New corporate obligation "Compliance"

Probably the most important legal innovation applicable for all (even international) companies that employ at least 500 employees in France or that generate annual revenues exceeding EUR 100 million – which according to current estimates are more than 1,500 companies – is the introduction of an obligation to implement measures for the prevention of corruption or influence-trafficking offenses in France or expressis verbis abroad.[8]

1. Code of conduct ("*Code de conduite*")
2. Internal whistleblowing process ("*Dispositif d'alerte*")
3. Compliance risk analysis ("*Cartographie des risques*")
4. Internal audit and control procedures ("*Procédures de contrôle comptable*")
5. Compliance trainings ("*Dispositif de formation*")
6. Compliance review procedures ("*Dispositif de contrôle et d'évaluation*")

Compliance with this new obligation to prevent corruption will be regularly controlled by the new governmental anti-corruption agency. The implementation of an effective CMS within a five years maximum time limit can be enforced as criminal penalty against legal entities that have been convicted by a French criminal court on the grounds of corruption.[9]

New settlement mechanisms

The second fundamental innovation represented by "Loi Sapin II." is the introduction of Deferred Prosecution Agreements ("**DPAs**") "*à la française*". For the first time French law enforcement authorities will be provided with alternatives to regular criminal proceedings, comparable to the Anglo-Saxon model. The bill would enable prosecutors to propose a settlement to a company involved in acts of corruption, including foreign corruption offences. Pursuant to such a "*transaction judiciare*"[10], law enforcement authorities can refrain from criminal proceedings and criminal judgements relating to a company accused of wrongdoing in exchange for the company paying an amount proportionate to the offence, but limited to a maximum of 30% of the company's average annual revenues over the last three years, and implementing a CMS within a period of three years. In contrast to "Independent Compliance Monitors" who are deployed in comparable U.S. DPA cases, the current bill proposes direct supervision and control by the new anti-corruption agency. According to the current bill those settlement mechanisms would only be available for legal entities and not for individuals. Unlike the U.S. Non-Prosecution Agreement ("**NPA**") procedure, the current draft also requires detailed judicial approval as well as a public hearing. Interestingly, the provision on settlement mechanisms had disappeared during the legislative process in the meantime but reappeared within the "Loi Sapin II." after the reading in the Senate on the July 8, 2016.

Outlook

Even if there might be changes in the details of the regulation of the DPA-alike settlement mechanisms on the proverbial "last mile" of the French legislative procedure and even if it remains unchanged that the successful implementation of CMS shall be supervised by the new public anti-corruption agency and not by an independent Compliance Monitor, the "Loi Sapin II." would constitute a quantum leap in material law and procedural legislation for one of the most important European countries.

Typically, the implementation of DPA- or NPA-alike settlement mechanisms is an unmistakable sign of a serious approach and an advanced

[8] Cf. Chapter XI: "*De la prévention des faits de corruptions et de trafic d'influence*", Art. 8 et seq.

[9] Cf. Art. 9 Nr. 2: "*Lorsque la loi le prévoit à l'encontre d'une personne morale, un délit peut °etre sacnctionné par l'obligation de se soumettre à un programme de mise en conformité, pour une durée de cinq ans au plus* (…)".

[10] Cf. Art. 12bis; in other sources, this alternative dispute-settlement arrangement is referred to as "*convention judiciare d'interêt public*" (CCIP).

stage of maturity in the effective fight against international corruption. This is not only apparent from the decades long DPA and NPA-practices in the U.S. – the first NPA dates back to 1992[11] and the first DPA to 1993[12] and since then overall 437 DPAs and NPAs have been concluded – but also from the very first DPA in the United Kingdom last year. Following the introduction of the UK Bribery Act in the year 2011 the course was set for the implementation of DPAs in 2014. One year later, the Serious Fraud Office (SFO) settled a DPA with the ICBC Standard Bank on November 30, 2015 because of the failure to prevent foreign corruption.[13] It seems that "*La Grande Nation*" finally does not want to linger anymore and intends to simultaneously improve both material and procedural law.

With the new corporate obligation to implement preventive Compliance Management Systems, France follows the international models of the U.S. Foreign Corrupt Practices Acts (FCPA) of 1977, the U.S. Sentencing Guidelines since 1991, the UK Bribery Act 2010 or the Brazilian Clean Company Act (CCA) of 2013 thus confirming the global trend towards convergence in anti-corruption-legislation. Accordingly, well-proven international best practices regarding the development and implementation of CMS will play a much greater role in France in the future than so far.

Exactly this has explicitly been highlighted in the motives of "Loi Sapin II.", not the least in order to restore public confidence in the governmental institutions of our biggest European neighboring country. This goes hand in hand with the need to examine whether the already implemented CMS are sustainable and consistent with the imminent legislative changes. Companies that fall within the scope of "Loi Sapin II." and have not introduced any CMS so far would be well advised to now at least implement the new French compulsory compliance catalogue without delay. "*C'est pas la mer à boire*"[14] – the right sense of proportion and closest possible business proximity can turn this into a definitely doable undertaking.

[11] http://lib.law.virginia.edu/Garrett/prosecution_agreements/ (Salomon Brothers)
[12] http://lib.law.virginia.edu/Garrett/prosecution_agreements/ (Armour of America)
[13] https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/

[14] French proverb: "It's not the sea to drink"; "It's not that difficult".

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Europe

BREXIT and then? A brief overview of the potential impact on Compliance and Governance in the EU

Dr. Max Erhard / Clemens Blettgen

- The impact of the BREXIT on each part of a Compliance Management System ("**CMS**") depends largely on the particular scenario that the BREXIT will ultimately bring about.
- There are a number of potential changes with high Compliance and M&A transaction relevance of which one should be aware.

Introduction

"*What does the BREXIT mean for our Compliance Management System?*" is a question that is now being frequently asked by our clients. The answer does not only depend on the specific Compliance issue but also largely on the actual BREXIT scenario. There are many options, ranging from the United Kingdom ("**UK**") having bilateral agreements with several European Union ("**EU**") states, over a UK-EU customs union up to a complete independence of the UK from the EU.

Hereinafter we would like to give a brief overview of potential key legal topics that might be of future relevance from a Compliance perspective.

Anti-corruption

One of the most common questions concerns the issue of applicability of the Bribery Act of 2010 ("**UKBA**"). However, none of the BREXIT scenarios will have an effect on this issue as there is no interdependence between the EU membership of the UK and the exterritorial reach and thus the applicability of the UKBA to cases of bribery or other corrupt acts connected to companies in the EU. Consequently it does not matter for a company whether it is located in the UK or in any other country in order to fall under the governance of the UKBA.

Still, within anti-corruption risk assessment of relationships with business partners (business partner compliance due dilligence) the potential aftermath of an actual BREXIT scenario might need consideration in the future. Of special concern would be changes in the tax legislation turning the UK into a tax haven as an attempt to increase the attractiveness of the UK for international corporations. With the status of a tax haven, payments to UK banks could consequently be considered as "red flags" in terms of Compliance. This would make further Compliance assessment of the individual relationship with the business partner necessary.

Similarly a higher risk of curruptive business conduct may arise in the not unlikely case that the UK will introduce new state aid laws offering special subsidies to attract innovation-intensive companies to move to the UK. The legal admissibility of subsidies and tax advantages gained under these regulations – regularly through the use of business partners such as lobbyists and tax consultants – will need thorough assessment.

Antitrust law

In terms of antitrust, the BREXIT may lead to additional workload and costs in M&A processes, as in numerous cases, in addition to the EU merger control proceedings, the filing of a merger notification will be compulsory in the UK.

Furthermore, the UK might disharmonize its antitrust laws to such an extent that the assessment of certain competitive conduct might highly differ with EU law. Consequently companies conducting business in the UK will need to increase their efforts to comply with antitrust regulations.

Export controls and customs

The topics of potential export controls and customs depend very much on the scenario that will be ultimately established between the UK and the EU. In case the EU and the UK will not come to an agreement on a customs union, customs law is likely to become a significant issue for trade with companies located in the UK. Especially exports of dual-use goods to the UK, for which up until now no export license from the responsible authorities was needed, might not be possible without one under the EU *Dual-Use Regulation*. Additionally, the UK is likely to introduce its own dual-use regulations. All of which will need to be considered in a company's internal export control process.

Procurement/Tender processes

The BREXIT might also have a significant impact on public procurement law, leading to different tender processes in the EU and the UK. Consequently, it might become significantly harder for EU companies to secure public contracts in the UK, which again might increase the risk of gaining such contracts through corruptive contact. Additionally, with different public procurement laws in place, a company's internal procurement processes will need to differentiate between the EU and the UK.

Labor law

The BREXIT may also lead to further fragmentation of the regulation governing work permits and therefore hinder secondment options of international companies. In the event that legal barriers for secondments of German citizens to subsidiaries in the UK will rise for instance, this again will increase the risk of illicit conduct through the use of business partners striving for special rewards for providing "accelerated" work permits.

Apart from that, similar to the applicability of the UKBA the BREXIT will not have an impact on the exterritorial applicability of the UK Modern Slavery Act 2015 with its transparency requirements for companies conducting business in the UK. The adherence to "supply chain compliance" for foreign companies in national public procurement processes under the Act might even by monitored more precisely by a UK that will just have left the EU.

Data protection

Although no indications about changes in UK data protection law following the BREXIT have been made public, a disharmonization might have severe consequences for companies active in the EU and the UK. If the UK lowers its data protection standard, the UK might be considered an unsafe third country. Consequently, the transfer of personal data to another company (even a subsidiary) in the UK might be subject to very strict legal requirements or might not be possible at all without authorization by the individual person affected.

Outlook

"*BREXIT means BREXIT*" was proclaimed by the UK's new Prime Minister Theresa May which clearly shows that even to leading politicions the legal consequences of leaving the EU are yet unknown. Nevertheless, companies with business in the UK should not use these uncertainties as an excuse to refrain themselves from keeping a close eye on these developments. They should rather regularly assess any business decision linked to the UK from a compliance point of view already today – "if you fail to prepare, you prepare to fail."

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World

"Collective Action" – Joint Fight against Corruption

Julia Kahlenberg / Stefan Hoffmann-Kuhnt

- In almost every description of state-of-the-art Compliance programs, "Collective Action" is listed as one of the elements in the area of "Prevention".
- What exactly does Collective Action mean? Is there any clear guidance or list of prerequisites? How can one measure its effectiveness?

What is Collective Action?

The fundamental idea of Collective Action is to look for increased impact by joining forces in the fight against corruption. The more market participants position themselves against corruption and together develop, interconnect and implement common strategies for prevention, the more effective can activities with corrupt background actually be prevented. Finally, the aim is the well-known "Level Playing Field", to establish fair market access for all participants who position themselves based on the quality and price of their offered services.

Naturally all companies operate under different market conditions, compete with different competitors, contract with other customers, suppliers and business partners in different geographical markets and work with different points of contact from authorities – all parameters which should not only be considered for a sound Compliance Risk Analysis by the Compliance Officer but also have to be addressed in a strategy for Collective Action.

Aside from **country-specific** Collective Action, there is also **industry- and sector-specific** Collective Action. Cases where all participants of a public tender are requested to sign project specific integrity pacts as part of the RFP submission documents are commonly referred to as **project specific** Collective Action.

"**Early Education**" at academic institutions (universities, high schools and other institutions) is a further key element of Collective Action. The idea is to develop a sound understanding of Compliance among future managers during their education and to familiarize them with topics such as risk analysis and prevention of corruption, so they can participate in the development of future standards regarding "ethical business".

Guidance and Expectations

Although there is not a lot of literature about Collective Action in general, quite specific expectations can be found in various guidance documents of relevant anti-corruption laws and Compliance regulations:

The Integrity Compliance Guidelines published by the **World Bank Group** contain a very clear expectation that companies with effective compliance programs will approach other organizations, industry groups, professional associations, and civil society organizations in order to encourage and support other entities in the development of their anti-corruption efforts.

The **U.S. Department of Justice ("DoJ")** is not referring explicitly to Collective Action, however, it points out the importance of risk analysis with regards to corruption risks as well as the necessity to adequately address the identified risks. As a significant portion of Compliance related risks can be classified as external risks, companies should also communicate and act externally to mitigate those risks. Thus, it can be argued that Collective Action should be included in measures to address overall corruption risks effectively, also

with a view to satisfy the U.S. DoJ requirements of effective Compliance Programs.

Finally, Principle 2 "Top Level Commitment" of the guidance to the UK Bribery Act 2010 published by the **U.K Ministry of Justice** refers in two points specifically to Collective Action as key element of an effective Compliance Management System.

Conclusion and Reference

Publicly visible and consistent commitment against corruption can not only positively impact the reputation of a company, it also can be taken into account as a mitigating factor in litigation processes or investigations of corruption cases, provided that an effective Compliance Program has since been implemented. Especially companies, which have hit the headlines due to corruption offences, can use Collective Action to give additional emphasis to their efforts for internal culture change and implementation of a compliance program, thus also helping to rebuild public trust that may have been lost.

We would like to inform our readers and clients, that a more detailed discussion of the individual forms of Collective Action by the authors with concrete references to additional materials has been published in the latest edition of the Compliance Berater (9/2016).[1]

1 Hoffmann-Kuhnt, Stefan; Kahlenberg, Julia: "Collective Action" – der gemeinsame Kampf gegen Korruption, CB 2016, 347 (Heft 09); see also http://online.ruw.de/suche/cb/2016/09.

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We'd like to know your areas of interest.
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