

Bonifassi and Chatelin: France has DPAs, but needs more guidance

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The French government enacted the law commonly known as Loi Sapin II, paving the way for out-of-court settlements, on December 9, 2016. And the French Ministry of Justice issued regulatory guidelines on the subject on January 31 this year.

To date, only four corporate criminal settlements have been signed in France. The most recent, concluded in June with [Société Générale S.A.](#) in coordination with the U.S. DOJ, was about international bribes paid to foreign officials.

Although the guidance from the Ministry of Justice (the Memo) has provided some ground rules, it is far less instructive than the U.S. Attorneys' Manual on current [FCPA enforcement policy](#). The Memo is especially weak in telling prosecutors under what circumstances they should offer companies settlements and how negotiations should proceed.

While the USAM describes very precisely the factors a prosecutor should take into account when deciding whether to offer a deal (Section 9-28.300), neither the Loi Sapin II nor the French guidance gives prosecutors directions to the settlement route. The sole directive is that the prosecutor can offer a deal at two different stages: when conducting an investigation, or once the investigating judge gets involved.

Prosecutors have sole discretion as to what they want to do. Companies are left in an uncertain position: Should they, or should they not, reveal the facts? Will a self-denunciation automatically trigger a settlement?

Only experience will tell. But at the moment, it seems that unless the facts are revealed elsewhere -- in the United States, perhaps -- and there's a high level of risk in France, attorneys will most likely warn companies to refrain from saying anything.

In contrast, USAM Section 9-28.300 and the record have given companies a roadmap to how things are done in U.S. enforcement actions. The general principle is that "prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals."

The manual adds ten additional factors that should be taken into account, ranging from the nature and seriousness of the offense, to the corporation's willingness to cooperate with the investigation.

The French Ministry of Justice Memo's corollary, limited to when the prosecutor can offer a settlement, could charitably be called less detailed.

Once a settlement is reached, the legal entity has some obligations to respect: pay a fine, institute a compliance program, pay the fees incurred by anti-bribery surveillance, and, finally, compensate the victim.

As for how the fine should be calculated, the French guidance added elements to the Loi Sapin II's limited offerings. Still, the ground rules are extremely vague compared with the USAM.

The Loi Sapin II states that the fine imposed by the enforcement authority is calculated proportionally to the "profits made from the fraud," with a ceiling of 30 percent of the company's average turnover over the previous three years.

The law and the Memo list very limited criteria to define "profits made from the fraud." For example, in a bribery case, the prosecutor should take into account all direct and indirect profits the company made from the market it fraudulently shaped. The Loi Sapin II stopped there. Thus, the prosecutor would have broad discretion to set the amount of the fine.

Thankfully, the French guidance brought some precision, similar to the USAM. It lists aggravating factors that should lead to applying a multiplier of two to the fine:

- the seriousness of the facts
- the duration of the wrongdoing
- the company's criminal record

Increasing the fine in such circumstances is mandatory. However, the prosecutor is free to decide whether a fine should be reduced, based on:

- when the facts occurred
- when the facts were disclosed
- the level of the company's cooperation with enforcement authorities

Also taken into consideration are the company's general behaviour and remedial measures. This mitigation played out in a bribery case settlement, where the company's remedial actions led to a reduction of the fine.

The broad prosecutorial discretion granted in the French guidance is even more striking when compared to the USAM. In the United States, the level of cooperation seems extremely important when calculating the fine. The criteria given to prosecutors are very precise for fixing the amount, and even for determining whether a fine should be levied.

While the USAM requires companies to name the wrongdoer, neither the Loi Sapin II nor the French guidance requires this in order to benefit from a reduced fine.

It's hard to imagine the French accepting anything like the rigid sentencing guidelines that characterize the U.S. criminal justice system. Opposition to such a thing would be intense.

That said, the memo from the Ministry of Justice is a welcome step in the right direction, one that would benefit from more precision and less prosecutorial and judicial discretion. Another memo drafted by prosecutors should be published in the near future. Over time, practitioners will learn what to expect from the settlement procedure.

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