



Spotlight on France – Dominique Mondoloni

[00:00:08] Welcome back to the podcast, Bribe, Swindle or Steal. I'm Alexandra Wrage, and today, we're in Paris. My guest today is Dominique Mondoloni. Dominique is with Willkie Farr in Paris. He handles commercial litigation, arbitration and, for our purposes, white collar criminal investigations. He regularly counsels clients on the OECD Convention on Combating Bribery and the U.S. Foreign Corrupt Practices Act. Today, we're going to talk about the anti-bribery enforcement record here in France and the newly enacted Sapin II. Dominique, thank you for joining me.

[00:00:39] You're very welcome, and thank you for having me.

[00:00:42] Let's start with the French anti-bribery law prior to Sapin II. Can you describe the scope and perhaps compare it to the FCPA or the U.K. Bribery Act, with which most people are more familiar?

[00:00:54] The French statute on anti-bribery dates back to 2000. That's the year in which we enacted the OECD Convention of 1997. The definition of the offense in 2000 resembled very closely the one in the FCPA. The fines, however, or the sanctions for misbehavior were not extremely high, and over the years, the legislature has reinforced our statute and our criminal sanction of foreign corrupt practices. But all in all, I'd say that as a legal matter, France has, since 2000, had an arsenal which would have been sufficient to enforce. The problem has never been really the law itself, but the criminal procedure and the willingness to enforce it. It's been a question of culture and a question of procedure — what kind of procedure. But as far as the statute itself is concerned, I think we've had the instruments in the arsenal in place. We've reinforced it because the OECD has been critical or has often criticized our criminal system. In its latest report, which is a follow-up of Phase 3 in 2014, if I remember correctly, the OECD continued to think that France's arsenal was not sufficient. In 2013, that said, we had just recently increased sanctions with a fine from 150,000 euro to 1 million euro, which means 5 million euros for corporations. That's not including disgorgements, which we call confiscation. But still, that wasn't sufficient because we did not have the procedural instruments that allowed us to be efficient or as efficient, say, as the United States Department of Justice. Criminal procedure in France requires a prosecutor to appoint an investigative magistrate. The investigating magistrate will investigate. He has enormous powers. But a lot of these facts take place abroad, which require letters [inaudible] sent over to foreign jurisdictions, oftentimes in countries that are not very cooperative — for example, Romania — and notwithstanding MLATs we have with them, oftentimes it's very difficult to get a response. At any rate, it takes off in more than six months or a year to get the return. We've had a system that's been blocking, and I'd say on top of that, willingness to enforce has been not really present.

[00:03:10] I think that's really what the OECD keyed in on when they indicated they weren't terribly impressed by France's performance to date. I'm curious if it's more awkward to be criticized by the OECD when they're headquartered right here in Paris.

[00:03:22] Well, the OECD has its forum, and people come to the OECD. When you say the OECD, you also mean the member states, among which, the United States, which has been very critical of the French enforcement practice.

[00:03:34] Yes, it's true. You used the word "culture" a couple of minutes ago, and that's always a word I resist because, of course, bribery is theft, and there isn't any culture that says that theft is a good idea. Can you elaborate a little bit — before we move on to the more technical aspects — what you mean by that?

[00:03:51] I think what I really had in mind was the whole system requires that people speak up, and speaking up means speaking up and ratting on others. That, culturally, has been an issue for France, just because of the weight of the war and the way that France and French persons in occupied territories or the occupied parts of France.

[00:04:10] Sure. Delation. We hear about that a lot in the context of whistleblower hotlines.

[00:04:14] Yes. Exactly. We've resisted quite strongly, and people that are 60 or 65 that are working in export divisions of companies still have that cultural thing that makes it hard for them to speak up and talk about what's going on in the company because it's just culture from that perspective. Obviously, paying bribes is not a cultural thing, but that said, it has been perceived by those people as something that you needed to do to do business. Now, I've said that, but it hasn't been that way since 1997. The law has punished that behavior since 2000, and the OECD recommendations in 1997 no longer allowed us to deduct those bribes, so the culture has changed, but we're still in that issue with the whistleblower and the delation.

[00:04:58] Before we turn to the new provisions that came into force last year, what are some of the cases that France can point to as successes under the older law?

[00:05:10] None.

[00:05:12] None at all?

[00:05:12] I'd say Safran, probably, essentially. But if you look at the Safran case in the first instance, that's one of the points that the OECD criticized in its last report. In the first instance, the company Safran was acquitted because, precisely, the prosecutor was not able to demonstrate that the legal representatives of the company had actually participated in a bribe. Oftentimes, the bribe will take place at a lower level, and evidence that the senior management was aware is not often there. That's why that company was acquitted in the first instance. The law in France being that a corporation can only be liable for the criminal facts of its legal representatives being the CEO and the people that have power and authority to represent the company vis-a-vis third parties. That was one of the heavy criticisms of the OECD, and the Sapin II does not really directly address that point. No one has wanted to change our system, so

unlike in the U.S. where a company will be liable for the criminal facts of its employees, in France that will not be the case unless you can show that that employee had a power of attorney issued by the CEO through XYZ. In the Court of Appeals, Safran was ultimately condemned, but the reasoning of the Court of Appeals was a little weak on the notion of the legal representatives involved, and more recent case law has always confirmed and affirmed that the company can only be liable for the facts of its legal reps. I'll give you a very recent example, which is actually interesting in the sense that the company had settled with the DOJ and SEC. It was a listed company back at the time of the facts. It's a French company. It was listed in the New York Stock Exchange at the time of the facts. The facts go back to 2004. That company settled with DOJ and the SEC, I think, in the realm of US\$92 million in fines plus US\$45 million in disgorgements was with the SEC. There was a procedure that was opened in France concomitantly, and that case came to court in first instance or trial court in 2016, so that's many, many years after the facts. This case was settled in 2011 with the United States, and the court acquitted the French company, although there was a statement in which the company had recognized a certain number of facts, but the company was acquitted in France because none of those facts actually demonstrated or showed that the legal representatives of the company were actually aware of the corruption. That's where our system is different.

[00:07:34] Do you see a shift coming on that? Even Germany - which has not, until very recently, had the concept of corporate criminal intent - has shifted towards that, I think, in order to address exactly this issue. Do you see that happening in France?

[00:07:48] There was a time when the Supreme Court in 2008 had tried to move away from that principle, but since it's been reaffirmed every year, maybe two times a year by the Supreme Court, I don't believe that there will be some underlying wave of change, I think, on the contrary. But Sapin II has tried to address the issue in a manner which is extremely different than what I would have suspected or what I would have done. Sapin II has actually, in a sense, made the legal representatives a little more responsible than they were in the past. I mean, that is an issue. To the extent you're a legal representative and you can get away with it if you're not caught, it doesn't really make you very implicated. Sapin II has changed that. It hasn't amended the law as such, but it has created mechanisms that will impose fines on the CEOs and the managing directors and other legal reps in these companies for not having implemented proper procedures to prevent corruption. It's taking the problem from the other side, but from that perspective, it's probably useful.

[00:08:45] Sapin II doesn't hold the executives responsible for the misconduct of more-junior employees, but they will be held responsible for failing to prevent, to use the language from the UK Bribery Act.

[00:08:58] Absolutely, unless they can be held criminally liable if it is shown that they actually participated. The only liability we'll have is for not having implemented the proper tools.

[00:09:06] Why don't you talk us through some of the provisions? Because after years of fairly negative reports from the OECD, this is a dramatic change, and I think there's been so much

going on with people distracted by GDPR and some of the new laws coming out of South American countries. I think the new French law and new Spanish provisions have received less attention. It's sweeping in its approach to, particularly, compliance.

[00:09:31] The Sapin II law, which is voted in 2016, it does change a lot of things. It basically does three things. It makes it mandatory for companies that employ more than 500 people and have turnover in excess of 100 million euro-

[00:09:47] They needn't be public companies. They can be private companies.

[00:09:49] Private companies or public companies. And those thresholds are thresholds that you need to look at from a consolidated perspective. If you have a French company that has subsidiaries abroad, say, in Africa or Asia, then you need to look at the number of employees and turnover on the basis of the French parent and its subs. Now, if that French company is itself a subsidiary, say, of an English company or an American company, you still look at the French structure, which is a substructure of the U.S., and you apply those thresholds to the French substructure. You could potentially have a French company that's a member of a U.S. group subject to the FCPA. If the U.S. company is listed, you'll have books and records issues in France, even in the subsidiaries of the French, but you'll also have Sapin II, which will apply any obligation to have in place procedures will also apply to the French subgroup.

[00:10:38] Just to the French portion of the company.

[00:10:40] Just the French portion. Now, that said, FCPA procedures that that company has put in place to prevent corruption as required by the FCPA are procedures that I believe are sufficient to comply with Sapin II, so if you have that on top, you don't really need it on the bottom. You need to show that you actually have had those procedures. 500 people, US\$100 million turnover, and the law applies. What applies? Well, the obligation to have in place proper controls. Now the law itself sets out nine points that you need to comply with. The first thing that you need to do is, obviously, what we call a mapping. The first thing companies need to do is to map out their risks of corruption. The whole system is a risk-based system, so it obliges companies - just like our anti-money laundering laws are risk-based - the idea is to force people to think about it and so to map the risks. That's the first obligation that you have. You need to have proper procedures for that business partner, depending on the risks that you've identified in your mapping. You need internal controls in the form of internal or external audits on a regular basis of those procedures, and you have to regularly update your mapping. You need to have disciplinary actions that are in place for people that violate your code of conduct. You need a code of conduct that describes in detail or precise details what kind of behavior is forbidden within the company. That obliges the company, after its mapping, to actually go into some sort of real detail of what could potentially happen in that company. You can't just say, "We forbid paying kickbacks." You have to say how and why and in which context. If you're a company that sells, I don't know, fire trucks in Africa, we need to explain your mechanism, how potentially one of your employees could be paying kickbacks to, say, the general commander of the fire department in this or that other African country and how that can be flowed through.

[00:12:32] Actually tying the controls back to the perceived risk that has been tailored for that company.

[00:12:37] Absolutely.

[00:12:38] That's a pretty meaningful process. It's not news to companies operating in the United States or some countries that have had high levels of prosecution, but that is quite new for France.

[00:12:46] It is quite new for France. What's interesting is that it's in a statute, when in most other countries, you won't find that in the statute. You'd find it recommendations or directives. Our legal system is what it is, so we have that obligation. That obligation is imposed on those companies that I described before - 500 employees and US\$100 million. It is also companies that do not have that procedure in place can be exposed to paying fines, which are administrative fines. They're not criminal fines. I believe the European Court of Human Rights would see that as criminal-like fines.

[00:13:19] Why are you making that distinction?

[00:13:21] Because France has always had a distinction between administrative fines and criminal - penalties is a better word. Because we have, for example, in stock market activity - the SEC, for example, will prosecute insider dealing directly. But in France, insider dealings can be prosecuted before the criminal courts or - it's not cumulative, this "either/or" - before the equivalent of the SEC. The SEC has powers to actually inflict sanctions, or rather penalties, in the form of fines. This is the case for these procedures in that if the company itself does not have the proper procedures in place, then the company is exposed to paying a fine of 1 million euro. To which organism? An organism that was created by the Sapin II law, which is called the Agence française anticorruption, and I'll talk about that in a second because that's one of the three innovations of the law. The managing directors of the company themselves, as natural persons, are exposed to paying fines as well to the Agence française anticorruption, up to a maximum of 200,000 euro, and those fines are personal fines. They cannot be insured or paid by the company, so they would come out of the managing director's pockets. That exposes them directly, and that obliges them to really think about putting in place these proper procedures. Companies have been doing that, although I note that companies seem to be a little less freaked out, to use that expression, about this than they are with GDPR. Everybody's gotten into putting in privacy policies just before the 25th of May. Everybody was excited about that. I haven't received as many phone calls for Sapin II, but again, a lot of companies - large ones are either part of foreign groups and have already had procedures, or if they have not already addressed those issues in the scope of FCPA, extraterritorial obligations.

[00:15:08] I think the difference between GDPR and this law, at least what I'm hearing, is that the GDPR just having certain data is a violation. You can have been in violation the morning of May 25th, whereas Sapin II still requires underlying misconduct. Once you have that misconduct, you've got to be able to show this robust compliance program, but companies

might have felt they had more breathing space because the misconduct - it has to occur, and then it has to be identified and uncovered.

[00:15:39] Well, that's true for corruption, per se, but Sapin II making it obligatory or mandatory for companies to have these procedures in place, they can be fined for not having them. The Agence française anticorruption has begun asking and controlling companies. One of the powers that agency has is to actually investigate within private companies whether or not those programs are in place. If you look at the list of questions that they ask companies, it's amazing. It's like a 25-page document.

[00:16:08] OK. Before we get into that, I think it's worth spending a minute on the AFA and their mandate and how much political support they have and their perceived appetite for proactively uncovering these issues as opposed to responding to scandals.

[00:16:25] Anticorruption has basically three functions. The first function is to issue recommendations and help companies to put in place these proper procedures, so it will issue recommendations as what it considers to be a proper program. They organize seminars and discussions with companies. Obviously, companies won't tell them much detail at this stage, but they try to be helpful. That's one of their first missions, which is to assist not only private companies, but also the administration itself because these rules also apply to publicly owned agencies and entities. The second function that it has is to control, to make sure that the law itself - Article 17, which is of the law Sapin, which is the one that lists what a program must contain - they have the obligation to control that companies comply with that. They send investigators in. They have a pretty large amount of people. I think last time I checked, there were about 45 controllers.

[00:17:23] That's a good-sized team.

[00:17:24] Yeah, and they come from different administrations. Some of them are tax controllers, tax inspector, so they have maybe a tax vision of things that may explain why their list of documents is so long. They have people from prosecutorial services and the rest. The head, Monsieur Duchesne - he's a magistrate judge - he's really keen on making sure that his mission is accomplished properly. The third function that it has is inflicting those administrative sanctions on those companies, and people - natural persons - that have not complied with Article 17. That is the obligation to put in place proper procedures. Now, the AFA does not have a prosecutorial capability. It will not and cannot prosecute, so that is not the person that you need to talk to if you want to self-disclose or if you've discovered something within your organization. It has no prosecutorial capacity. That remains the privilege of the prosecutor and, more particularly, what we call the national financial prosecutor, which was created in 2013 and has jurisdiction over the whole of France to prosecute corruption cases.

[00:18:28] How did those two organizations work together? It's just a straight referral to the prosecutors?

[00:18:34] In the case where the Agence would discover corruption in a company, on the occasion of its controls, it will refer the case to the PNF, the Parquet National Financier.

[00:18:44] But if they found no misconduct but inadequate controls - inadequate compliance program - they would proceed on their own.

[00:18:52] They would proceed on their own before their sanctions commission. Now they can inflict financial sanctions, but they could also inflict other sanctions, and they could also impose monitors and the rest. They have that capacity. If there is an offense that has been committed and they discovered it, they have the legal obligation to inform prosecutor because they are public servants, and public servants have the obligation to report wrongdoings of which they know or become knowledgeable.

[00:19:17] It has been a really interesting change to watch. Monsieur Duchesne, as you say, has made himself very available. They are doing a lot of positive outreach conferences and meetings, and we certainly saw some of that in the early days of the UK Bribery Act, less under Sir David Green, but more under Richard Alderman. It's an interesting shift, I think, within France. I'd like to spend our last few minutes, if we could, on DPAs, which seemed to be all the rage in the anti-bribery world these days, country by country. Can you describe the landscape here in France with respect to deferred prosecution agreements?

[00:19:53] That's the third innovation of the Sapin II. Sapin II has created what we call the convention judiciaire d'interet public - public interest judicial convention or agreement, which is the equivalent of a DPA. I would say that's very contrary or very foreign to our tradition. We have always been able to settle criminal cases, depending on the level of gravity of the case. Instruments have always been in place that have allowed people to actually get a deal without going to court, but all those instruments that existed always implied that the person that was charged admit its liability. It's always been a requirement of those procedures that there was a recognition of criminal liability, which has a number of consequences. You have a criminal record. If you are a company, then you can't respond to public procurements under the EU directive, et cetera. It has a number of collateral consequences. Companies, for example, would not use those mechanisms in corruption cases because it would just have dramatic effect on their possibility to respond to public procurement or tender offers by public entities in Europe. They would prefer to take their chance in court, and they did, and some of them - most of them, actually - got acquitted, so there was no real interest in going with what they should have done, and that's how the French DPA came about. It came about because we realized that no company was going to go through the other systems, and also because we saw how efficient it was in other countries. It's an instrument that allows France to settle cases at the same time as cases are settled in other countries where investigation is cross-border. Initially, the Council of State, which is the legal adviser of the government when it submits bills to the parliament, had rejected the concept of the DPA under French law, arguing that companies needed to be criminally sanctioned. People needed to receive a fine or a penalty for misbehavior. The government removed from its draft bill the concept of DPA, and then it when it was

reintroduced by one of the members of parliament. The Council of State has no control over that. It just has control it can give legal advice to the government but not to the members of parliament. So it was reintroduced that way, and I must say, it's been a very efficient tool. Since the law has been enacted, there have been one, two, three agreements that have been signed so far. Two concern bribery cases.

[00:22:02] Three agreements since late last year?

[00:22:05] Yes, three agreements. One is a tax fraud issue.

[00:22:08] Not related necessarily to anti-bribery.

[00:22:10] No. It's The HSBC money laundering tax fraud. That was assigned by the public prosecutor with HSBC. The two other cases were signed by the public prosecutor in Nanterre, so one of the suburban courts in the outskirts of Paris. Those concerned cases of private corruption. People in EDF's purchase department were getting bribes, were buying this and that. The companies that were paying those bribes signed these DPAs. The amounts at stake are not very high - a couple hundred thousand euros - but still, it's been used and I think will have a very nice future. In the press today, there was a comment about Societe Generale coming to close an agreement with the U.S. DOJ, the CFTC - because of banking violations - and also the French PNF. It seems as though the amounts that will be paid are substantial. I've read something about US\$275 million to the DOJ and the same amount to the French government. Again, this DPA is a great tool to allow the French government to settle the cases at the same time as those who settled abroad, just like in the Siemens case. The Germans settled at the same time as U.S. Well, now we get a chance to settle at the same time, too, and get our share of the cake if you want to look at it that way. People seem to think that because we have this French DPA, that will stop foreign prosecution, notably U.S. prosecution. I don't think that will happen. If there is improper conduct, and if there is the use of U.S. instrumentalities of interstate commerce. I think the U.S. will continue to prosecute those, but we will be allowed to settle them.

[00:23:43] I think the strong sense is that we'll continue to a certain extent, but the Department of Justice in the U.S. has been pretty vocal lately and released a policy against piling on internationally. We'll see if that makes a difference. It's difficult to know. The Department of Justice, for many years, has said, "When others step forward, we'll be able to step back," and now we'll see whether they actually do that. Are there other DPAs pending that you're aware of?

[00:24:09] Just the one that I mentioned concerning Societe Generale, which is the one we know of. There may be other ones in the loop because, again, the DPA only applies to corruption-type offenses and to money laundering of tax fraud. You can only use the DPA for those purposes, and it does not apply to natural persons. Natural persons can still be prosecuted while the company is settling a DPA, which makes it a bit awkward in certain circumstances because if you are the managing director of the company, and you were the

managing director of the company at the time of the facts, chances are you're not really going to go to the DPA, but you may not have a choice, and then the shareholders may have to remove you because if facts are found, they will remove you. We've seen that happen before in French companies that I mentioned just earlier in talking about the DOJ in 2011 and the acquittal by the French courts. That company's management was entirely changed, and that made it possible to actually make a deal with DOJ. You need people to actually move out before because it's hard to figure that, being the managing director, you would actually admit to certain facts because that will open you up to prosecution.

[00:25:13] Sure. You'd be exposing yourself while you're protecting the company. In light of all of this, Dominique, how has your advice changed for a multinational company entering the French market for the first time post-Sapin II?

[00:25:26] There are a lot of good news for companies. Obviously, putting in place the proper procedures but again, if it's a company that already has those procedures abroad, it should be an easy tweak. If it's a company, a French company, that does not, we would advise them on putting in place those agreements, bearing in mind that it's a cost center. It's often very difficult to explain or get them to focus on it. But we try to get the mapping done by companies which are less expensive than law firms. We try to help people focus on it. We meet with the board of directors, and we explain how important this is for them personally and for the company. Then all the rest is pretty much good news because although the French Sapin II does not include in the statute the notion of voluntary disclosure, the Ministry of Justice has issued a directive in which it explains that the prosecutors should consider a DPA when the company has self-disclosed, been co-operative. It also says the penalties should be evaluated in light of the cooperation and whether or not the company itself disclosed or not the information. We're coming to a situation that the foreign companies know better than French companies know.

[00:26:34] That's excellent. Thank you so much. Very interesting time here in France. Thank you, Dominique and our thanks, as always, to Willkie Farr & Gallagher. You're our partner firm here in France, and we're very grateful. Thank you.

[00:26:46] Thank you, Alexandra.