



LITIGATION, ADR & CONTRACTS Group

Stockholm 11th May 2018

INTERNATIONAL CONTRACTS AND ANTI-BRIBERY by Thierry CLERC

1. Legislation

In recent years, European countries, including France, have substantially amended their legislation on the fight against bribery and the search for transparency in public and economic matters.

In addition, to overcome the delay of some States, unify and strengthen the fight against bribery, the European Union has published Directive 2014/95/EU of 22 October 2014 on the publication of non-financial information and information relating to diversity in business, implemented in all member Countries.

Some States were more advanced than others in the fight against bribery before the directive came into force.

Indeed, **in the United Kingdom, since 2010**, the « Bribery-Act (UKBA)» introduced 4 criminal offences in respect of bribery:

- Bribing another person;
- Being bribed;
- Bribery of a foreign public official;
- Failing to prevent corruption in the corporation.

The offence will be committed by the corporation if a person associated with the organisation bribes another person intending to obtain or retain business for the organisation or an advantage in the conduct of business for the organisation. The person "associated" with the company is defined as the one providing services for or on behalf of the organisation. This includes employees, agents, contractors, subcontractors, subsidiaries.

The company can be guilty even if it was not aware of the bribery.

There is no limitation on fines for legal and natural persons. The latter also incur a prison sentence of up to 10 years.

The law also provides guidance on anti-bribery provisions to be implemented between trading partners before the contract is signed.

This law has influenced other states like Germany.

In Germany, the sanction is a prison sentence of up to 5 years.

In Spain, specific anti-bribery legislation is expected to come into force in 2018, in accordance with the aforementioned European directive.

New sanctions would be introduced, different according to the severity of the offence with 3 maximum levels: € 5,000, € 30,000 and up to € 400,000 for the most severe.

In Monaco, a bribery offence (active or passive) in the private sector is punishable by a fine of € 18,000 to € 90,000 and a prison sentence of 5 years. These sanctions can be doubled or tripled according to the capacity of the corrupted person (magistrate, juror, civil servant etc ...). The penalties can be up to 20 years' imprisonment and the fines multiplied by 10 in case of organised crime.

In the United States, the Foreign Corrupt Practices Act (FCPA) came into force in 1978. Companies, in the event of bribery, incur a civil fine of \$ 10,000 per violation and a criminal fine of up to 2 million dollars. For natural persons, the civil fine is the same. However, at the criminal level, the person can be sentenced to 5 years' imprisonment and \$ 100,000 per offence.

In France, a few months before the legislation transposing the directive came into force, another more comprehensive and binding law entered into force. This is the Sapin 2 act on transparency, the fight against bribery and the modernisation of economic life, which came into force on 1 June 2017, which ultimately replaces the transposition legislation.

The main points of the Sapin 2 act are as follows:

- Create more transparency in the process of public decision-making and in economic life, in particular the legal obligation to identify representatives of interests (lobbies)
- A legal framework to protect whistleblowers
- The creation of an obligation of vigilance by the companies
- The annual publication of a report containing information on tax on profits (distributed or not)
- The implementation procedures for the prevention of corruption situations.

The Sapin 2 act has introduced 8 measures applicable to companies having at least one establishment in France, employing at least 500 employees and having a turnover of more than 100 million euros:

- The implementation of a code of conduct illustrating the different types of behaviour to be proscribed and integrated in the company's rules of procedure;
- An alert system for the collection of alerts from employees

- A regularly updated risk mapping designed to identify and prioritise the risks of exposure of the company to external solicitations, depending on the sectors and geographic areas of activity;
- Procedures for evaluating the situation of clients, senior and intermediate providers = due diligence;
- Internal or external accounting control procedures to ensure that social accounts do not obscure facts of corruption or influence peddling;
- Training for executives and personnel most at risk of corruption and influence peddling;
- A mechanism for monitoring and evaluating the measures implemented;
- Disciplinary penalties for employees of the company in case of violation of the code of conduct.

In addition, act n° 2017-399 of 27 March 2017 relating to the duty of vigilance of parent companies and companies giving order, orders large companies of more than 5,000 employees with an establishment in France, to organise a plan of vigilance. This duty of care applies in particular to subsidiaries and suppliers.

The new legislation in France and in other countries therefore indirectly involves all international trading partners.

	Main legislation	Controlling entity	Sanctions
Germany	Criminal code	Police	5 years' imprisonment + fines
Spain	Criminal code	Independent authority	3 levels of fines according to the severity of the offence: - < € 5,000 for minor offences, - < € 30,000 for serious offences - < € 400,000 for the most serious
UK	The Bribery Act		no limitation in terms of fines. + prison sentences of up to 10 years for natural persons
Monaco	Criminal code Act 1.362 of 03/08/2009	SICCFIN (<i>Service d'information et de contrôle sur les circuits financiers</i>).	Fine of € 18,000 up to € 90,000 + prison sentence of up to 5 years for the bribery of private agents. These sentences can be increased according to the quality of the people bribed (magistrates for example) or if the bribery emanates from an organised gang or facilitates transnational organised crime
USA	The Foreign Corrupt Practices Act (FCPA)	The United States Department of Justice and the Securities and Exchange Commission	For companies: criminal sentence < \$2 million + fine <\$10,000/offence For natural persons: criminal sentence <\$100,000/offence + <5 years' imprisonment + civil fine \$10,000/offence

France	Sapin 2 Act	AFA	Fine of up to 1 million euros for legal persons and up to € 200,000 for natural persons
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2. To what extent can a company be impacted by foreign laws? The example of a French Company

And conversely, how can a foreign business partner, established in the United States or the United Kingdom, force its French suppliers to abide by its own law?

Some laws do not apply to companies established abroad. For example, in the US, the anti-bribery law only applies to US companies.

If nothing is provided for in the contract, a company is therefore not legally obliged to apply the rules emanating from foreign legislation.

However, if the application of this law is expressly provided for in the contract, its non-compliance will be considered as a contractual breach with all the resulting penalties (indemnities, breach of contract). We leave the legislative framework, to enter the field of contractual responsibility. The question that arises then is who will judge the contractual fault. Can the French judge seized interpret the US law? According to Article 3 of the French Civil Code and Article 12 of the French Code of Civil Proceedings, it is incumbent on the French judge who recognises that a foreign law is applicable, to seek, either on his own initiative or at the request of a party invoking it, the content, with the assistance of the parties and personally, as the case may be, and to give the disputed question a solution in accordance with foreign positive law. The French judge could therefore interpret and apply the US anti-corruption law in a dispute.

In conclusion, it is possible and even recommended to include in contracts with suppliers clauses preventing bribery. This clause can be established according to the model of the International Chamber of Commerce. It can also impose the respect of a French or foreign law, and / or the code of conduct of the company.

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