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AFA ENFORCEMENT COMMITTEE FIRST DECISION

Newsletter – 2 August 2019

First decision of the AFA Enforcement Committee: what lessons can be learned?

On 26 June 2019, the French Anti-Corruption Agency (Agence française anticorruption – "AFA") published joint guidelines with the National Financial Prosecutor's Office (Parquet National Financier – "PNF") on the implementation of a judicial agreement in the public interest. Two weeks later, it was its Enforcement Committee that was in the spotlight by making its first decision public.

In that case, the AFA Director alleged that the company in question had not set up a sufficient preventive arsenal in accordance with Article 17 of the Sapin II Act of 9 December 2016. In particular, the following deficiencies were noted:

- irregularities in the mapping of corruption and influence peddling risks due to the fact that the method used was based on generic risks and, therefore, the company was unable to identify all risks to which it was exposed;
- the code of conduct did not comply with the requirements of the statute because "the illustrations selected are generic and unrelated to the specific risks that only a mapping carried out using a relevant methodology would have disclosed";
- a breach of its third-party evaluation procedure due to the fact that it had not been fully deployed;
- the non-compliance of its accounting audit procedures, which did not include specific controls in relation to corruption; and
- the lack of internal control and evaluation mechanisms for the measures implemented, in particular due to the lack of effective second-level controls.

In view of the number and significance of these breaches, Mr Charles Duchaine, the AFA Director, requested the Enforcement Committee to order the company to adapt its internal procedures to the laws in force before the end of 2019 and, failing that, to impose financial penalties on the company (€1 million) and on its chairman (€200,000).

The audited company requested that the referral to the Enforcement Committee be invalidated, as well as the audit procedure. On the merits, it contended that it had complied with the requirements of the aforementioned Article 17 and that, therefore, the alleged breaches had not been established.

The procedural arguments presented by the company that the referral to the Enforcement Committee and the audit performed out by the AFA were improper were denied by the Enforcement Committee. The company's argument that its defence rights had been infringed because of a discrepancy between the deficiencies noted in the audit report, the letter notifying the grievances and the opinion of the Agency's Director was also dismissed by the Committee on the grounds that only the grievances described in the letter of referral were before it, which it held were sufficiently clear in that case. The Committee also held that the audit performed by the AFA was not vitiated by any irregularity.

However, on the merits, the Enforcement Committee held that the breaches of Article 17 of the Act of 9 December 2016 alleged against the company were either not proved or were no longer continuing at the time of the hearing. It therefore refused to issue any order or to impose any financial penalty.

The assessment of the breaches as at the date on which the Committee rules increases the Agency's role as an incentive for compliance, but considerably weakens the usefulness of its Enforcement Committee. As a result, an entity that is audited by the AFA will have a certain amount of flexibility to comply with the provisions of the Sapin II Act since it will have a significant period of time between the audit phase and the date of the Committee's hearing to bring its system into compliance, if necessary. This choice as to the date at which breaches are assessed is particularly noteworthy because it differs from the approach of the French Financial Markets Authority (Autorité des Marchés Financiers) and the Prudential Supervision and Resolution Authority (Autorité de Contrôle Prudentiel et de Résolution), both of which determine whether breaches exist as at the date of the audit.

In addition, this decision confirms that entities subject to the Sapin II Act are not required to comply with the Agency's recommendations. Firstly, these recommendations are not binding (which was already clear from both the statute and the AFA recommendations). Secondly, it is sufficient for an audited entity to establish that its programme, even if inconsistent with the AFA's recommendations, is nevertheless pertinent and effective to prove that it is in compliance with the requirements of the law.

Lastly, the Committee provides a clarification on an evidentiary point. According to the Committee, the Agency's task simply consists in requesting information enabling it to determine whether the audited entity's system complies with the requirements of the law. On this issue, the Committee held that the AFA does not infringe the principle of non-retroactivity by requesting that it be provided with documents that predate the entry into force of the Act of 9 December 2016. If it does not receive them, or if the information provided does not enable it to assess the pertinence, quality and effectiveness of the system set up, the AFA will be presumed to have proved the breach and it will then be up to the audited company to furnish evidence to rebut the presumption.

This first decision is highly instructive, reflects the significant role of this new authority in encouraging compliance and reassures companies that are audited as to the room for manoeuvre they will have, in the event of an audit, to comply with the new legal requirements before any penalties are imposed. The only regrettable fact is that the AFA Enforcement Committee was not more pedagogical in its analysis of the grievances in question. In fact, its decision does not make it possible to understand, in detail, the factors taken into account to assess the conformity of the measures implemented.