

CLIENT ALERT

First Inspections by the French Anticorruption Authority: Rights and Duties of Inspected Companies

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In October 2017, the French Anticorruption Authority (the “AFA” or the Authority) issued its first [Letters of Assignment](#) naming [six companies](#) whose policies for preventing and detecting corruption and influence peddling were to be inspected.¹

At the same time, the AFA also published its [Charter of Rights and Duties of Parties Involved in the Inspection](#), which only briefly touches upon the scope of such inspections. The Authority then published a number of guidelines (in [French](#) and in [English](#)), as well as a [Practical Note](#) on the scope of inspections carried out under Article 17 of Law n°2016-1691 of December 9, 2016 on Transparency, Anti-Corruption and Economic Modernization (the so-called “[Sapin 2 Law](#)”), which again remain silent on several issues that are likely to arise very quickly in practice (assuming they have not already arisen).

In any case, such guidelines have no binding force² and the AFA’s conclusions can legitimately be questioned, in particular when it comes to interpreting the wording of the Sapin 2 Law.³

Further inspection procedures have since been initiated by the AFA and, in February 2018, the Authority published, for informational purposes,⁴ a [Standard Preliminary Questionnaire](#) listing information and documents that companies are asked to provide at the beginning of an inspection.

These first AFA inspections indicate that the Authority’s agents have adopted an extensive approach with respect to documents relevant to the prevention and detection of corruption.

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Yet, while an inspected company is naturally obliged to cooperate – and has every interest to do so; the AFA's inspection powers have their limits. The purpose of this note is thus to outline the AFA's powers and the rights of companies under inspection.

1. The Inspected Company's Duty to Cooperate

The company under inspection is obliged to cooperate with AFA agents by making all “necessary arrangements” to allow them to exercise their inspection powers and by organizing itself “in a way to facilitate the inspection.”⁵

The company must therefore provide “business-related documents . . . or useful information” requested by AFA agents (*i.e.*, off-site document inspection).⁶ Furthermore, the company must provide electronic copies of the documents, and more generally, allow an on-site inspection of the accuracy of information so provided.⁷ An on-site inspection may take place only on the company's premises and, at the company's discretion, with its attorney present.⁸

In addition, the company must allow AFA agents to interview any person “whose assistance is deemed necessary,” in conditions ensuring the confidentiality of their discussions.⁹

Interference with the mission of AFA agents, defined as any measure intended to prevent the agents from duly performing their functions, is an offense punishable by a €300,000 fine.¹⁰ In practice, the following may be deemed to be interference: refusal to produce documents, refusal to be interviewed by agents, employment of delay tactics to hamper the inspection, etc.

Therefore, whereas the company has the right to initiate formal discussions with AFA agents in order to assert its rights, it must, however, ensure that it does not impede their mission.

2. Rights of the Inspected Company

- **Companies that may be inspected**

The scope of companies subject to the AFA inspections is strictly defined in the law.

In fact, Article 17 of the Sapin 2 Law limits inspections to legal entities of a certain size, corporate form and capital position. In certain instances, therefore, the company or group that was notified of an inspection must ensure that it falls within the criteria set out by Article 17 of the Sapin 2 Law, *i.e.*, that an inspection can actually be carried out on that company or group.

In the future, one cannot exclude situations where companies, groups or other legal entities that have in good faith deemed themselves outside the scope of Article 17 would be notified of an inspection. In the same vein, unconsolidated subsidiaries or “French sub-groups”¹¹ that the group holding company did not consider to be subject to corruption prevention obligations under French law may well be subject to inspection.

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- **Temporal scope of the inspection**

The wording of Article 17-VI of the Sapin 2 Law does not allow determination of the temporal scope of AFA inspection with certainty.¹²

In practice, the AFA should limit its inspection of the company's compliance program to such program as it exists on the day of the inspection (as opposed to its previous form or state).

However, during the course of this inspection, the AFA can logically request documents drafted prior to the inspection whenever they are useful for the Authority's mission.¹³ Yet, *prima facie* and except where special circumstances exist (for example, in the case of concealment or delaying tactics, or if it is absolutely imperative for the inspection), it appears unjustified that such requests be for documents dating back more than "three elapsed years."¹⁴

- **Material scope of the inspection**

The Sapin 2 Law provides that the purpose of the AFA inspection is to verify the existence of measures and procedures for preventing and detecting corruption or influence peddling being committed in France or abroad. In other terms, the object of the AFA inspection is limited solely to verifying the compliance program of the company concerned.

Therefore, whereas the AFA logically may inform the Public Prosecutor of offenses it discovered during the performance of its mission,¹⁵ as the legal texts currently stand, its primary mission is not to *search* for offenses. This is the main difference between the inspection mission of the AFA, which is a "national government service," and the missions of the French Financial Markets Authority ("AMF") and Competition Authority ("ADLC"), which are "independent administrative authorities" acting as specialized regulators empowered, for this purpose, to prosecute and impose sanctions for actions that may prove to be criminal in nature.¹⁶

In other words, *inspect* does not mean *investigate*.

Therefore, it appears necessary to determine the documents that would fall within the scope of AFA inspection, which in principle is limited solely to verifying the company's compliance program.

First and foremost, documents sufficiently related to the eight measures of prevention and detection of corruption provided for by Article 17¹⁷ logically fall within the scope of documents subject to inspection. Yet, the same is not necessarily true *vis-à-vis* documents only indirectly related to the prevention of corruption or influence peddling, and/or documents the collection cost of which appears disproportionate to the interest of such documents for the AFA's inspection mission.

For example, where the client portfolio of a company counts thousands or millions of clients, is it legitimate and proportionate to the intended purpose to request, to produce or grant access to all of its "client contracts"? To assert that it

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is indeed the case, the AFA would probably refer to the necessity of specifically evaluating the extent to which the company under inspection extends the obligation of preventing corruption to its clients through the relevant contracts. From a different viewpoint, the company under inspection could legitimately assert that a mere sample of standard contractual clauses is sufficient for the inspection's purposes.

Therefore, without interfering with the mission of AFA agents, it seems justified for the company to discuss the proportionality and necessity of the agents' requests¹⁸ and, if necessary, formally object. Naturally, however, if agents insist, the company will have no other choice but to disclose the documents requested,¹⁹ and reserve its rights.

- **Ad hoc documents and translations**

Another unsettled question is the extent of the AFA's power to request that new or *ad hoc* documents be created (e.g., an organizational chart in a specific format or a timeline) for the needs of an inspection, or for foreign-language documents to be translated.

In this respect, the AMF has acknowledged that its agents may ask not only for preexisting documents, but also for information or written answers to questions asked by them.²⁰ However, this position has not been confirmed by the French courts.

As to the AFA, the legal texts do not provide any answer to this question. Such requests must therefore be evaluated on a case-by-case basis. As the difference between, on the one hand, providing a written answer to agents' questions and, on the other hand, creating *ad hoc* documents is not always clear, the company under inspection shall take reasonable efforts in view of its size and financial and human resources to best answer the agents' requests in good faith.

- **Lawyers' professional secrecy (i.e., attorney-client privilege)**

Contrary to what is expressly foreseen, for example, in AMF investigations,²¹ the Sapin 2 Law does not provide any exception for lawyers' professional secrecy.

In fact, the AFA in its commentaries simply states that "the entities under inspection cannot rely on professional secrecy to refuse carrying out one of their obligations"²² and therefore does not seem to foresee an exception for legal professional secrecy.

Nonetheless, as has been found in ADLC investigations,²³ the company under inspection can in principle object to any inspection likely to breach professional secrecy. Here again, in case of a serious disagreement with AFA agents, the company must formally acknowledge this situation in order to duly preserve its rights.²⁴

The same applies for national defense (e.g., military) secrecy.

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- **Recourse**

Article 17-VII of the Sapin 2 Law provides that the decisions of the AFA Sanctions Commission are subject to a “full jurisdiction” appeal before the administrative judge. Such appeal can be launched within two months from the notification of the disputed decision.

However, the legal texts are silent with respect to whether an appeal against a request by the AFA at the inspection phase is possible.²⁵ For example, it is unclear whether a request sent by registered mail to the director(s) of the company under inspection informing them that the company will be subject to an off-site document inspection and/or onsite inspection can be disputed or appealed.²⁶

Yet, even when the legal texts are silent on this, the company under inspection may attempt to appeal on grounds of *ultra vires* (annulment appeal) before the administrative courts. This appeal is available against any administrative decisions, including the decisions or administrative acts of the AFA – which is a national government service under the Minister for Justice and the Minister for Budgets²⁷ – in situations where such decisions affect the company.²⁸

With respect to the admissibility of such an appeal, it must be filed against an administrative act, defined as a manifestation of the unilateral will of an administrative authority that modifies an existing legal situation, which affects the appellant.²⁹ However, case law restrictively interprets the admissibility of appeals against acts related to administrative proceedings. For example, the State Council deemed inadmissible the annulment appeal of (i) a letter by which the tax authorities invited a taxpayer to disclose declarations, since this act was an integral part of the taxation procedure,³⁰ (ii) similarly, a tax verification notice,³¹ or again (iii) an investigation notice from the Regional Accounting Chamber.³² Similarly, the French Supreme Court recently confirmed that a “free-standing” annulment appeal before the Paris Court of Appeal with respect to written information and communication of document requests issued by the ADLC is inadmissible.³³

Given the state of administrative case law, the admissibility of an annulment appeal against the AFA’s requests seems uncertain. That being said, administrative judges rule on a case-by-case basis on the admissibility of appeals, and it therefore cannot be excluded that certain decisions by the AFA taken at the time of the inspection could be considered as modifying the legal situation of the inspected companies. In these circumstances, the latter would therefore potentially be in a position to appeal before the administrative judge on the grounds, namely, of misuse of powers or procedure,³⁴ or the violation of a rule of law (for example, professional secrecy).

Finally, in a case of emergency, this annulment appeal could be reinforced by parallel interim proceedings to suspend the enforcement of the disputed request.³⁵ However, the admissibility conditions for this procedure and, in particular, the condition related to the urgency of the situation are restrictively interpreted by administrative case law.

Evidently, given the consequences on the relations between the company under inspection and the AFA, the question of a possible appeal should be envisaged only where there is a serious disagreement with the Authority.

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Conclusion

When the AFA carries out an inspection, the company under inspection should be completely transparent and cooperative. That being said, this inspection is not a *carte blanche* and, if necessary, requests that do not fall within the AFA's power and/or are unduly burdensome, could give rise to discussions with and recorded statements to the AFA agents, if not an appeal.

In the meantime, companies that fall under the obligation to implement a compliance program are advised to keep an updated file with all the documentation relating to the implementation of such program and its follow-up.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

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¹ This note focuses only on the inspections carried out under Articles 3-4° and 17 of the Sapin 2 Law; these must be differentiated from the inspections carried out under Article 3-3° of the same law, relating to State administrations, local authorities, their public institutions and semi-public companies, and registered public associations and foundations. The AFA Director stated: "At full steam, the AFA expects to control 50 public and private companies, and 50 public bodies (local authorities and public administrations) per year." (emphasis added).

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- ² Paragraph 3 of the [Opinion Relating to the French Anticorruption Authority's Guidelines to Help Private and Public Sector Entities Prevent and Detect Corruption, Influence Peddling, Extortion by Public Officials, Unlawful Taking of Interest, Misappropriation of Public Funds and Favoritism \(JORF n° 0298 dated December 22, 2017\)](#): “If, pursuant to the law of December 9, 2016, the AFA’s guidelines are published for information in the Official Journal, they are not legally binding and do not create any legal obligation.”
- ³ Therefore, for example, where Article 17 of the Sapin 2 Law refers only to “companies,” the AFA considers that all “entities with an economic activity . . . regardless of their legal form (EIG, association, professional union, foundation, professional governing body...)” fall within the scope of the law (AFA’s Practical Note on the scope of inspections, p. 2).
- ⁴ The “questionnaires and lists of documents to be provided” annexed to inspection notifications actually received by companies may differ from those reproduced in the AFA’s February 2018 Standard Preliminary Questionnaire. In any case, companies subject to the obligation to implement a compliance program are advised to use this standard questionnaire as a guideline for setting up documentation management systems for the implementation of such program and follow-up, in anticipation of a possible inspection.
- ⁵ Articles IV-2 and V of the Charter of Rights and Duties of Parties Involved in the Inspection. The inspection powers of AFA agents are provided by the following texts: Article 4 of the Sapin 2 Law; [Decree n° 2017-329 dated March 14, 2017 relating to the French Anticorruption Authority](#); and [Order dated March 14, 2017 relating to the Organization of the French Anticorruption Authority](#).
- ⁶ Article 4 of the Sapin 2 Law.
- ⁷ Articles II-1-1 (off-site document inspection) and II-1-2 (on-site inspection) of the Charter of Rights and Duties of Parties Involved in the Inspection. Article 4 of the Sapin 2 Law merely provides that agents “can carry out on-site verifications of the accuracy of information provided.” Article II-1-2 of the Charter of Rights and Duties of Parties Involved in the Inspection specifies that “[t]he on-site inspection is in principle preceded by an off-site document inspection, but this rule can be waived if particular circumstances justify [doing] so.” With no legal definition of “particular circumstances,” the company that is subject to an immediate on-site inspection may have to discuss with the AFA agents the reasons for such choice.
- ⁸ Article 7 of Decree n° 2017-329: “Authorized agents shall be in possession of their authorization card when they carry out on-site inspections, which can only be carried out on company premises, excluding private individuals’ homes, and only during working hours, after having informed the inspected entity’s representative that they can be assisted by the person of their choice.”
- ⁹ Article 4 of the Sapin 2 Law.
- ¹⁰ *Id.* By way of comparison, in AMF investigations ([Article L. 642-2 of the Monetary and Financial Code](#)) or ADLC investigations ([Article L. 450-8 of the Commercial Code](#)), the punishment is one year of imprisonment and a €300,000 fine.
- ¹¹ On these issues, see, e.g., diagram n°11 (p.18) of the AFA’s Practical Note on the scope of inspections, suggesting an interpretation of Article 17-I of the Sapin 2 Law that, in practice, could lead to discussions on the scope and criteria of the Article (for example, on the legal concept of “consolidation”).
- ¹² Article 17-VI of the Sapin 2 Law: “The action of the French Anticorruption Authority is time barred after three years have elapsed from the day the infringement was found if, in this timeframe, there has been no action to sanction this infringement”, to be compared with [Article L. 462-7 of the Commercial Code](#): “The [Competition] Authority cannot review facts from more than five years ago, if no action has been taken to **reveal them, establish them** or sanction them” (emphasis added) and [Article L. 621-15 of the Monetary and Financial Code](#): “The [AMF] sanctions commission cannot review facts going back more than three years if during this timeframe there has been no action to **reveal them, establish them** or sanction them.” (emphasis added).
- ¹³ Including the documents established even before the Sapin 2 Law entered into force, since there is nothing in law that opposes this.

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¹⁴ See above, footnote 12.

¹⁵ Article 3-6° of the Sapin 2 Law. The AFA Director commented: “And if, during an inspection, we find corruption acts, there will be no leniency. . . I have an obligation to refer them to the Prosecutor.” Furthermore, a Circular from the Directorate of Criminal Matters and Pardons (Ministry of Justice) dated January 31, 2018, states that “an instruction note will specify the terms of exchanges between the Prosecutors and the AFA.” (p.7).

¹⁶ See in this context the Advisory Opinion by the State Council on the Draft Law dated March 24, 2016: “The State Council has not adopted the wording that the service is in charge of ‘detecting’ corruption, such wording being likely to create confusion with the jurisdiction of judicial authorities to establish offenses.”

¹⁷ Which are: (1) code of conduct, (2) internal alert system, (3) risk mapping, (4) procedures for assessing the situation of clients, first-tier suppliers and intermediaries, (5) accounting control procedures, (6) training for management and personnel most exposed to these risks, (7) disciplinary regime, and (8) internal control and evaluation for implemented measures.

¹⁸ By analogy, in criminal investigations, searching for evidence during dawn raids, confiscations and searches of premises is subject to the principles of necessity and proportionality: Article 76, para. 4 of the Criminal Procedure Code: “The object of these operations cannot, subject to annulment, be anything other than seeking and establishing the infringements referred to in the liberty and custody judge’s decision” (it being noted, however, that “the fact that these operations reveal infringements other than those referred to in the decision does not constitute an annulment cause for incidental proceedings”) and Preliminary Article III of the Criminal Procedure Code (which applies to coercive measures): “Coercive measures which the suspected or prosecuted person can be subject to are made by decision or under the effective control of the judicial authority. They must be strictly limited to the needs of the proceedings, proportionate to the seriousness of the alleged infringement and not violate the person’s dignity.”

¹⁹ In ADLC investigations, the French Supreme Court has had the opportunity to rule that “the refusal to disclose contractual documents in their entirety, which prevented the investigators from verifying the application of the regulation in doorstep selling, constitutes the offense [of interfering with the investigation].” (emphasis added) (Cass. com., February 24, 2009, n° 08-84.410, Bull.).

²⁰ AMF, September 16, 2010 – SAN-2010-20, point II-A-1, para. 3.

²¹ Article L. 621-9-3 of the Financial and Monetary Code: “As part of inspections and investigations . . . , professional secrecy cannot be opposed to the Financial Markets Authority . . . , except by legal professionals.” (emphasis added).

²² Articles IV-2 and V of the Charter of Rights and Duties of the Parties Involved in the Inspection.

²³ See namely: La saisie de documents en vue de prouver des pratiques anticoncurrentielles ne peut porter sur des correspondances, entre avocat et client, relevant des droits de la défense, LexisNexis, May 27, 2013 (“By five annulment decisions based on the same legal ground principle, the criminal chamber imposed the annulment of the confiscation, by the agents of the Competition Authority seeking proof of anticompetitive practices, of correspondence between a lawyer and their client falling under defense rights . . . The French Supreme Court makes the lawyers’ professional secrecy protection prevail over the needs of seeking anticompetitive practices, a solution which merits total approval.”) More generally, in French Prudential Control Authority (“ACPR”) inspections, the State Council states that they must be carried out in “conditions guaranteeing that the defense rights of the person to which the grounds are then notified are not irreparably damaged.” (CE, 9th and 10th Chambers (together), October 5, 2016, n° 389377).

²⁴ By analogy, in AMF investigations, the French Supreme Court dismissed the criticism by the prosecuted party according to which “the AMF investigators, whilst having the right to obtain documents whatever their nature, can only obtain documents protected by professional secrecy after having informed their owner of their right to be assisted by counsel, implying their right to oppose their communication” because “firstly, . . . the electronic correspondence that the company’s legal representative had accepted to provide a copy of to the investigators were not annexed to the investigation report, and . . . it was not disputed that prior to these remittals, the investigators had been provided with elements that could establish

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that the messages contained correspondence covered by the secrecy of exchanges between a lawyer and their client.” (emphasis added) ([Cass. com., January 29, 2013, n° 11-27.333, Bull.](#)).

- ²⁵ Furthermore, the question of the admissibility of the annulment appeal against the AFA’s acts or “soft law,” such as the Charter of Rights and Duties of the Parties Involved in the Inspection or various AFA guidelines mentioned beforehand, could also arise in view of the State Council’s recent case law granting the admissibility of an appeal against such acts ([CE, Ass., March 21, 2016, n° 368082, Lebon](#)). If it is true that this decision refers only to acts made by regulatory authorities, such as independent administrative authorities and independent public authorities (which the AFA is not), certain authors consider, however, that the solution here could be extended to other administrations under hierarchal power (e.g., the AFA) (see namely [Le droit « souple », les autorités administratives indépendantes et le jugement administratif. De la doctrine au prétoire](#), RFDA 2017, p. 1087).
- ²⁶ See above, footnote 7.
- ²⁷ Article 1 of the Sapin 2 Law.
- ²⁸ [CE, Ass., February 17, 1950, n° 86949, Lebon](#).
- ²⁹ [Recours pour excès de pouvoir \(Conditions de recevabilité\), Répertoire de contentieux administratif, Dalloz, April 2016, ¶¶44 and 51](#).
- ³⁰ [CE, 9/8 SSR, July 24, 1981, n° 28959](#).
- ³¹ CE (CAPC), July 5, 1995, n° 153942, cited in [JCI Procédures fiscales, Fasc. 337: Garanties préalables à la vérification de comptabilité, mars 2014](#), ¶37, ruling on: CAA Lyon, September 22, 1993, n° 93161 (see: [Recours pour excès de pouvoir – Condition de recevabilité – Acte détachable de la procédure d’imposition – Recours contre un avis de vérification – Recevabilité \(non\)](#), Droit fiscal n° 46, November 17, 1993, comm. 2228). However, a third party (i.e., the person other than the taxpayer) with which the tax administration made the decision to use its communication right may contest this decision via the annulment appeal ([CE, 8th and 3rd Sub-sections \(together\), November 7, 2008, n° 305609, Lebon](#)).
- ³² [CE, Opinion, May 20, 1998, n° 192689, Lebon](#).
- ³³ [Cass. com., April 26, 2017, n° 15-25.699](#): “The right of access to a judge should be evaluated, namely, in view of the nature of the act and the possibility of ulterior appeals; after having found that an ‘annulment appeal’ had been brought before the court of appeal against a written request for information and documents addressed to the company Brenntag by the ADLC inspector pursuant to Article L. 450-3 of the Commercial Code, and that Article L. 464-8 of this code provides no autonomous appeal to contest such investigation acts which are not decisions of the ADLC, the court decision finds that these requests cannot be likened to such intrusive acts as an inspection of a company’s premises and that time had been given to the company Brenntag for it to assemble and analyze the scope of the elements it had to disclose, or did not want to disclose if it considered that they violated its rights, and to explain this to protect itself against any claim for obstructing the investigation; that furthermore the validity of this type of request . . . can be contested . . . as part of the appeal on the merits possibly filed against the ADLC’s sanction decision . . .; that in the state of the findings and evaluations, which reveal that the disputed act did not constitute a compelling act, likely to violate the respect of their corporate residence and their correspondence, and that other appeals could be filed ensuring sufficient judicial protection . . .; the ground is unfounded”; “[i]f the provisions of Article L. 450-3 of the Commercial Code impose to provide authorized agents with documents they have requested, it does not give them enforcement powers to obtain these documents, nor a general questioning power or warrantless searching powers, so that only documents voluntarily disclosed can be taken; that the circumstance that the refusal to communicate information or documents request can result in, secondly, an injunction with financial penalties, an administrative fine ordered by decision of the ADLC, or a criminal sanction, does not give a different scope to the powers of agents authorized by these provisions; the ground, which analyzes the disputed request for information as an act by which ADLC obliges a company, subject to sanctions, to provide information, is lacking in the actual fact which serves as its basis; the ground is unfounded.” (emphasis added).

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³⁴ “To use the classic definition of Maurice HAURIOU . . . , ‘the misappropriation of power is the fact that an administrative authority that, whilst carrying out an act within its competence, whilst complying with the required formalities, whilst not committing any formal violation of the law, uses its power for reasons other than those for which it has been given this power, *i.e.*, other than preserving public interest and the good of the service’ . . . one differentiates classically two types of misappropriation of power: those where the administrative authority has pursued a private interest purpose and those where a public interest purpose different than the one justifying the power it has implemented is pursued.” (emphasis added) (*Recours pour excès de pouvoir (Moyens d’annulation)*, *Répertoire de contentieux administratif*, Dalloz, October 2014, ¶ 38).

³⁵ [Article L. 521-1 of the Administrative Justice Code](#).