

COMPLYING WITH SAPIN II – LIKE A PRO

HOW TO IDENTIFY AND ASSESS YOUR CORRUPTION EXPOSURE

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This publication is a product of Aperio Knowledge Centre®, our in-house think tank.

At Aperio Intelligence, we strive to help our clients come up with innovative solutions to the most pressing issues that they face in their daily operations by bringing to the table the whole depth of our collective expertise in the field of anti-financial crime. As a recognised financial crime specialist, we have developed unique methodologies for tackling many of the present-day challenges of complying with anti-corruption, anti-money laundering and other national and international legislation.

We are strong believers in the power of analysis and have witnessed first-hand the importance of basing decisions on solid facts and rigorous assessments.

Foreword

Bill n° 2016-1691 relating to transparency, the fight against corruption and the modernisation of economic life (hereafter Sapin II), which was signed into law by French President François Hollande on 9 December 2016, has revolutionised France's legislative and regulatory landscape. The key anti-corruption provisions, in force since 1 June 2017, aim to align France with the most advanced members of the OECD, in particular the US and the UK. The Foreign Corrupt Practices Act (FCPA) has become, since it took effect in late 1977, a tool of war of sorts at the hands of the US Department of Justice, notably through the principle of extraterritoriality which recognises neither borders nor nationalities. The 2010 UK Bribery Act (UKBA) has replaced old British laws dating from 1889, 1906 and 1916, with a view to modernising the fight against corruption by equally extending its scope to the whole world.

With Sapin II, France has now effectively joined the Anglo-Saxon club of countries insofar as it applies extraterritoriality and imposes upon eligible companies a number of obligations compliance with which can be verified at any time. While any company that has adopted best practices in line with the FCPA and the UKBA can reasonably deem itself largely compliant with Sapin II, the French law still has its national specificities. Nevertheless, despite the usual legalese and various norms and rules to follow, it is possible to discern the legislator's intention to carry out a radical change in the way both French and foreign companies with operations in France do business internationally. To resist that change makes no sense; instead, it had better be seen as a marvellous opportunity to improve corporate governance, better assess the risks, put in a place a dialogue between the management and employees and better protect the corporate image.

As a well-established financial crime specialist, Aperio Intelligence keeps receiving a great quantity of requests for clarification of the key provisions of Sapin II from a variety of French companies. We have written this guide as a means to answer some of these queries. It is not intended to be exhaustive nor has it the ambition to substitute itself for official guidance issued by the French government. Its only objective is to provide increased clarity on two key aspects of the legislation contained in article 17, which we think are among the least well-understood today. They are respectively about risk mapping and third-party risk assessments – two areas on which we have developed a considerable expertise at Aperio. We have also tried at the end of this guide to provide direct answers to a series of the most frequent questions. We do hope that this document will be helpful to you and will enable you to cope with your new responsibilities in confidence.

We hope you enjoy the read.



Adrian Ford,
Chief Executive Officer

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Risk mapping

The companies falling under Sapin II ought to put in place 'a risk map in the form of regularly updated documentation whose purpose is to identify, analyse and prioritise risks of exposure to external corruption, based on the sectors of activity and geographic areas in which such companies do business'.

Point 3 of II of article 17, Law n° 2016-1691 relating to transparency, the fight against corruption and the modernisation of economic life

A risk map is one of the key provisions of Sapin II. It is an instrument of evaluation and monitoring that enables proportionate, well-thought responses to international corruption risks. Some organisations, such as banks, are accustomed to mapping their different risks, including credit and model ones. Despite this, the legal obligation to develop and maintain a risk map is a novelty for France. In order for you to get off to a good start, we recommend referring to the UKBA's best practices, the guidance of the UK Government and advice provided by Transparency International UK which has long researched this issue. Still, every company subject to Sapin II must have its own risk map based on its unique characteristics and accurately reflecting the everyday reality of its business operations.

Risk factors

The elaboration of a risk map begins with identifying the appropriate risk factors. Sapin II provides substantial liberty to each firm to decide on their composition, except for the mandatory inclusion of sectoral and country risks. The ultimate goal is to ensure that the risks identified correspond to the entirety of a given company's business activities. Shortly before the UKBA went into effect in July 2011, the UK Government had released official guidance with recommendations on how to implement the six key principles in the field of anticorruption. We believe that the recommendations related to the risk factors under the UKBA are perfectly reusable in the French legal context, given the originally similar intentions of the two legislators.

We suggest dividing the main risk factors, which will ultimately result in risk mapping (see below), into two broad categories: 'macro risks' and 'micro risks'. A description thereof follows below.

This risk factor relates to the geographic areas where a Sapin II company carries out business. Working in certain countries can be riskier than in others, for the following reasons:

- Inexistent or deficient rule of law;
- Nondemocratic regime;
- Lack of independent media;
- Endemic corruption in daily life;
- Bad governance (excessive red tape, etc.);
- Inexistent or inefficient anticorruption legislation;
- Subservience of the judiciary to the executive branch;
- Culture and mores favouring corruption and nepotism.

Commentary: The first thing many companies would do is to consult the annual Corruption Perceptions Index (CPI) by Transparency International (TI). It is currently the best-known anticorruption ranking in the world. However, as TI itself admits, the CPI should only be used for preliminary analysis better to understand corruption risks in various countries. More specifically, the CPI 1) does not take into account regional corruption whereas significant differences may exist within the same country; 2) looks only at public sector corruption; 3) measures perceptions, rather than the reality, of corruption. As far as risk mapping is concerned, TI recommends conducting a more thorough analysis of country risk.

Aperio Intelligence has a unique methodology for assessing country risk based on many corruption-related criteria as well as on broader financial crime categories such as money laundering, the financing of terrorism, etc. Our analyses take into account the reality of corruption, which manifests itself through past instances of bribery, inefficient or unapplied legislation and regulations, façade political reforms and the like. For more information, contact us today.

This risk factor relates to the sectors in which a Sapin II company carries out business. Working in certain sectors can be riskier than in others, for the following reasons:

- High level of governmental oversight;
- Direct involvement of the government and/or local authorities;
- Informal influence and decision-making networks;

- Predominance of long-term, high-value as well as structurally complex projects;
- High number of stakeholders (apart from the government) in key projects.

Commentary: Some public and private sector bodies publish research on sectoral risk. This research does not extend to all sectors and, when accessible, is not always updated on a regular basis. Aperio Intelligence offers sectoral risk analyses to comply with Sapin II and to identify risks inherent in a given sector of activity, for instance when a company needs to conduct a pre-transaction due diligence.

Micro risk

TRANSACTIONAL RISK

This risk factor relates to the nature of business operations by a Sapin II company. Working under certain contractual arrangements can be riskier than under others, for the following reasons:

- Contracting with government clients;
- Need to obtain permits, licences and specific authorisations;
- Cross-border trade;
- Employment of individuals with ties to foreign officials;
- Use of lobbying services;
- Patronage;
- Gifts to or payment of travel and other work expenses in behalf of foreign officials;
- Donations and contributions to electoral campaigns or charities at the request of the host government;
- Temporary use of one's assets by third parties outside of the project scope.

Commentary: This risk factor should be evaluated by companies themselves, with the direct involvement of operations personnel.

Micro risk

BUSINESS OPPORTUNITY RISK

This risk factor relates to high-value and/or particularly complex projects (for instance, those with a significant number of stakeholders). Participation in certain projects can be riskier than in others, for the following reasons:

- Supply of goods or services whose value for the project is uncertain ;

- Involvement of intermediaries or third parties without clearly defined responsibilities;
- In case the cost of goods or services exceeds reasonable expectations or contradicts common sense.

Commentary: This risk factor should be evaluated by companies themselves, with the direct involvement of operations personnel.

Micro risk

PARTNERSHIP RISK

This risk factor relates to the interaction between a Sapin II company and various stakeholders, for example within joint ventures or consortia, as well as with intermediaries. Some projects can become risky if intermediaries are involved, such as:

- Commercial agents;
- Distributors;
- Subcontractors;
- Lobbyists;
- External consultants;
- Customs agents;
- Visa agents, etc.

Commentary: This risk factor should be evaluated by companies themselves, with the direct involvement of operations personnel.

Elaboration of a risk map

Once the risk factors have been identified, it is then necessary to elaborate a risk map. It has several objectives, first and foremost to risk-assess third parties and projects and to take appropriate verification measures based on built-in protocols. This process is described in greater detail in the next section of the guide, 'Third-party risk assessments'.

Similarly, the risk map helps to evaluate risks inherent in business lines or business units within a Sapin II company in order to understand its corruption exposure and take appropriate remediation steps. If this method can theoretically be applied to higher organisation echelons, up to the Group level, such an approach may not be very useful because in a medium-risk company some business lines can be particularly exposed. Thus, one may end up not anticipating properly the inherent risks by looking only at the Group level.

Methodological note

Some organisations, such as TI, recommend building a risk map off two variables – impact and probability of occurrence. We consider this method to be insufficiently efficient and sometimes even lacking in coherence.

First off, it is practically challenging to measure impact. For instance, a relatively small bribe paid by a remote subsidiary of a large international group of companies can result in heavy litigation and considerable penalties. If the bribe, however small, has served to bypass free and fair competition rules and to obtain a hard-to-quantify competitive advantage, it nonetheless can have negative consequences from the financial and reputational standpoints. As for the probability of occurrence, it normally increases with the level of risk but this relationship is not always linear.

Our approach consists in assessing risk directly from the macro and micro risk factors, respectively situated along the x-axis and y-axis on a bi-dimensional graph.

Simplified example: a project in Kazakhstan

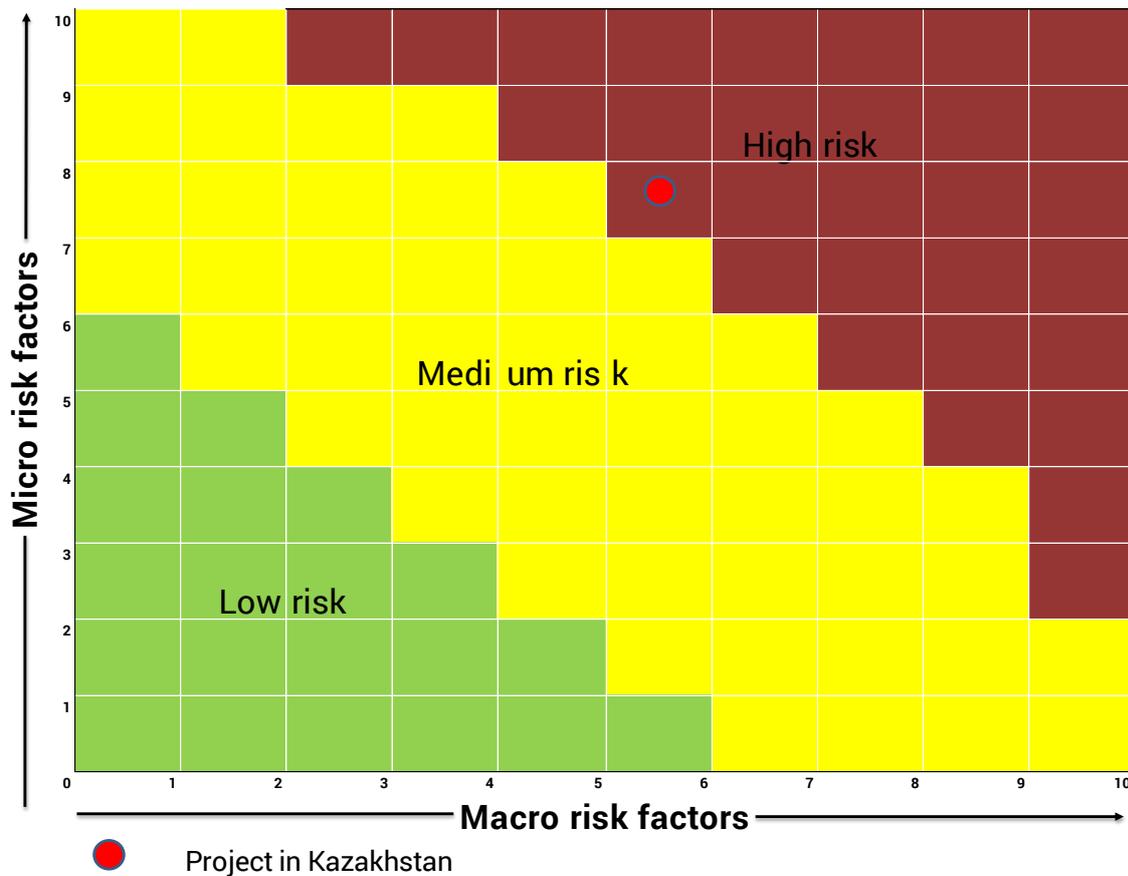
- You are a mid-sized French company specialising in the manufacture of medical equipment.
- You have won a tender for the supply of new equipment to a public children's hospital in Astana, Kazakhstan. You consider this contract as high-value, more so because further supplies are envisageable to other hospitals in future.
- Your contract is part of a technical assistance project between the European Union and the government of Kazakhstan, which provides total funding.
- Your client is the Kazakh Ministry of Healthcare.
- You do not need a licence or special authorisation to import the equipment.
- The Kazakh government has asked you under the contract to cover travel expenses for a group of doctors who will be visiting the capital from the regions to learn how to use the new equipment. The EU's diplomatic mission to Astana has obtained Kazakhstan's agreement to control the use of funds.
- Two months before the scheduled signing date, a representative of the Healthcare Ministry gets in contact with you to say that you will be called by Mr X who will provide new instructions regarding the contract.
- Two days later, Mr X calls you on behalf of Y Limited which, according to him, acts as an official intermediary between the ministry and suppliers of medical equipment from the EU.
- During your phone conversation, Mr X asks you to replace the equipment initially proposed with an older and cheaper model. He tells you that it is possible to modify the documentation after delivery and even promises to do it himself.
- The following day, your country manager in Kazakhstan, who works on his own, suggests using a 'person of confidence' to solve any problems at the customs (even if you know that you need no licence to import the equipment, see above). Also, he suggests using the same person to speed up the issuance of visas to a group of technicians planning to visit Kazakhstan for more than 30 days in three months' time (no visa required of OECD nationals for shorter stays since January 2017).

1. You evaluate the project's inherent risk (the ranking below is given for illustrative purposes and does not constitute an opinion by Aperio Intelligence on this sample project or other similar projects).

Risk factor	Rank (1)	Risk level	Observations	Rank (2)
Country risk	8	High	<ul style="list-style-type: none"> Kazakhstan is a high-risk country. 	$8 \times 0.5 + 3 \times 0.5 = 5.50$
Sectoral risk	3	Low	<ul style="list-style-type: none"> The sector of medical equipment is low-risk. 	
Transactional risk	6	Medium	<ul style="list-style-type: none"> The client is a foreign government; Some expenses are paid at the request of the client, but a reliable third party (EU) ensures accounting control. 	$6 \times 0.35 + 9 \times 0.3 + 8 \times 0.35 = 7.60$
Business opportunity risk	9	High	<ul style="list-style-type: none"> Intermediary without a clearly defined role; Request to replace the equipment with a cheaper version, without proper documentation. 	
Partnership risk	8	High	<ul style="list-style-type: none"> Use of intermediaries for customs and visa issues; Wide authority left to the Kazakhstan-based country manager. 	

NB. Level of risk: less than 3 – low, between 3 and 7 inclusive – medium, between 8 and 10 inclusive – high. The weighting used in the above table is given for illustrative purposes only

- You locate the project on a bi-dimensional graph (see the *Methodological note*, above) in order to determine its overall level of risk.



- You come to a conclusion that the project in Kazakhstan is high-risk and calls for increased vigilance. If you follow the protocols outlined in the next section of this guide, 'Third-party risk assessments', you should conduct an enhanced due diligence into the project and third parties involved. You would benefit from specialist assistance offered by a corporate intelligence provider.

Regarding other potential mitigation steps, you can insist on a bigger role for the EU's diplomatic mission, which is in charge of technical assistance; request additional assistance from the French embassy on visa and customs issues; appoint a representative of the head office to head up the Kazakhstan branch; ask to deal directly with the Ministry of Healthcare for the importation and installation of the equipment, etc.

Anticorruption programme

As previously indicated, risk assessments under the risk map can be extended to entire business lines, business units or subsidiaries within a single group of companies in order to uncover gaps

and weaknesses in their anticorruption programmes and eliminate them accordingly. Unlike the evaluation of third parties, which we presented earlier using an imaginary project in Kazakhstan, this exercise should by definition go deeper and involve more detail because its final goal is to contribute to a long-term good-quality anticorruption programme. Moreover, a sound understanding of risks inherent in the business of a big international group's foreign subsidiaries can help the latter to propagate best practices among employees, to prevent corruption from being committed and to fight against internal fraud.

Let us examine the case of a subsidiary of a French industrial services group specialising in the oil and gas sector. The subsidiary operates on the markets of Southeast Asia. For the sake of brevity, we are limiting our analysis to transactional risk.

TRANSACTIONAL RISK					
Risk vector	Rank (1)	Observations	Existing or planned short-term responses	Rank (2)	Rank (3)
Government clients	9	<ul style="list-style-type: none"> 95% of clients have historically been state-owned enterprises. 	<ul style="list-style-type: none"> The share of privately-owned clients should rise to 15% by 2018 (contracts currently being finalised). 	-2	7
Need to obtain permits, licences or specific authorisations	8	<ul style="list-style-type: none"> The subsidiary has to renegotiate licences every year; Some imported equipment subject to authorisations. 	<ul style="list-style-type: none"> Ongoing finalisation, due October 2017, of a framework agreement on the largest market (Indonesia, 70% of annual turnover), with a view to securing multi-year licences (min. 5 years). 	-3	5
Employment of persons linked to foreign officials	8	<ul style="list-style-type: none"> 6 relatives of foreign officials (Indonesia, China) hired in 2014-2016, 2 of them to managerial positions. 	<ul style="list-style-type: none"> None 	0	8
Use of lobbying	0	<ul style="list-style-type: none"> No use of lobbying. 	<ul style="list-style-type: none"> N/A 	0	0

Contributions to electoral campaigns or donations to charities at the request of the host government	10	<ul style="list-style-type: none"> ■ Regular donations to various NGOs as stipulated in service contracts; ■ No financing of electoral campaigns. 	<ul style="list-style-type: none"> ■ Agreement reached in March 2017 with the World Bank to control the use of funds; ■ Signing of first two contracts (August 2017) without the obligation to make charity donations. 	-4	6
XXX	XXX	■ XXX	■ XXX	XXX	XXX

NB. i) Level of risk: less than 3 – low, between 3 and 7 inclusive – medium, between 8 and 10 inclusive – high; ii) Rank (1): level of risk by risk vector; iii) Rank (2): subtraction from the level of risk by risk vector; iv) Rank (3): residual risk=Rank(1)-Rank(2).

Third-party risk assessments

The companies falling under Sapin II ought to put in place 'procedures for evaluation of clients, first-tier suppliers and intermediaries based on the risk map'.

Point 4 of II of article 17, Law n° 2016-1691 relating to transparency, the fight against corruption and the modernisation of economic life

The risk map only makes sense if it helps to minimise vulnerability to international corruption risks. This is why third-party risk assessments are an inalienable and indispensable element of risk mapping, which makes possible the so-much-needed transition from theory to practice. Beyond the quantification of risk based on different criteria, such assessments should lead to a clear categorisation of third parties. The next stage in the process is to evaluate these third parties using operational protocols, which should be easy enough to understand by those at the company who have to deal with anticorruption assessments.



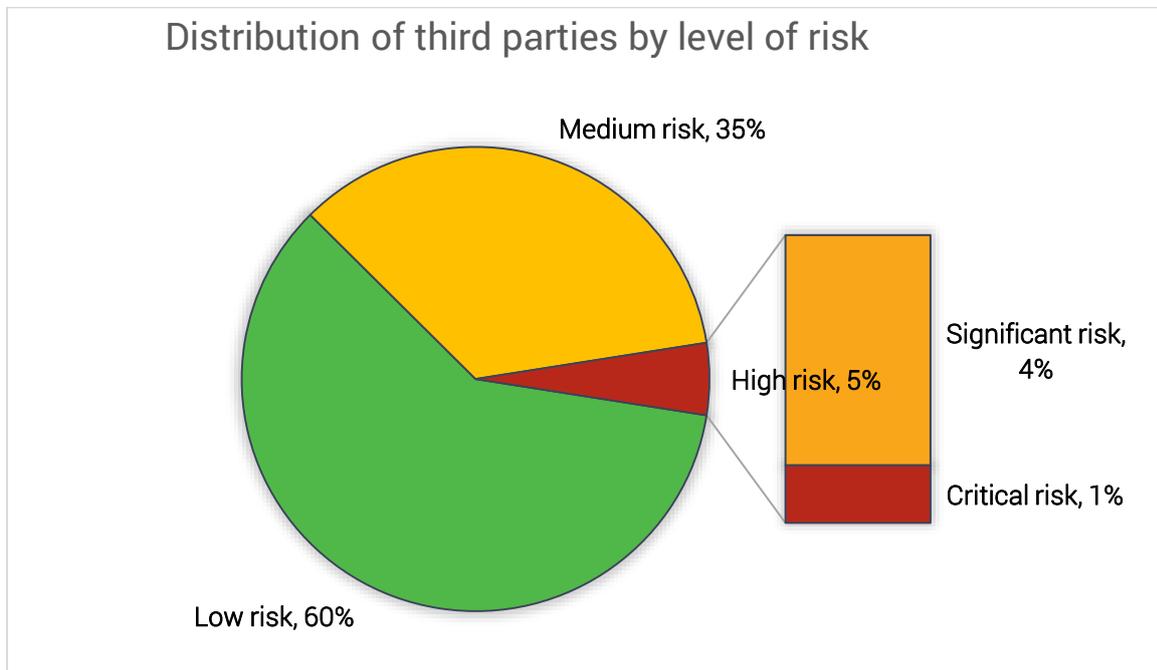
Distribution of risk

The main contribution of the risk map, as established under Sapin II requirements, is through developing a comprehensive understanding of third parties depending on their degrees of overall risk. This preliminary evaluation should enable the categorisation of third parties into three large groups: 'low risk', 'medium risk' and 'high risk' each of which calls for a specific plan of action.

The distribution of risk is unique to every company as it is determined by a number of factors, which can be shared by many firms but are rarely found everywhere at the same time. Two companies working in the same sector and present in the same markets can therefore have varying degrees of corruption exposure.

For example, Company A may prefer to work on particularly complex projects involving many subcontractors and intermediaries, including those imposed by a host government. Instead, Company B is usually involved in smaller projects without state participation and has the

advantage of knowing all the stakeholders. The same applies to clients: when a client is a state entity with ties to the government or when work is being done for a big enterprise owned by a local power broker, the risk is higher than if a client is a small privately-held company.



Commentary: The above diagram presents the average distribution of risk among the third parties of a large organisation. Some 60% of all third parties are low-risk, compared with 35% of medium risk and 5% of high risk. High-risk third parties can further be classed into 'significant risk' and 'critical risk'.

Risk distribution varies greatly from company to company and depends on the size (mid-sized vs. international), international presence (France – France and Europe – France/Europe and other regions), the core clientele and main areas of activity. A private bank that works predominantly with wealthy individuals from Africa and the Middle East may have 0% of low risk, 85% of medium risk and 15% of high risk, of which from 5% to 7% of clients are in the critical risk category. Conversely, a big retailer whose operations are based in France and Benelux may have 80% of low risk, 18% of medium risk and only 2% of high risk, including 0% of the critical risk typology.

Risk profiles

You will find below examples of third parties that we have classed into various risk categories based on their risk profiles (as evidenced during the risk mapping phase).

Low risk

You are a mid-sized manufacturer of plumbing fixtures. Your new client is a Dutch company with an excellent reputation on the market. It is wholly-owned by members of one family. You know well its senior management, which have provided to you key information about this family business. Your client mainly operates in the Netherlands and, to a lesser extent, in neighbouring countries. Given its situation, you consider your counterparty to be low-risk.

Medium risk

You are a large agri-business and you are currently equipping a new plant in Turkey. You have decided to buy some equipment from a local supplier. You possess some basic information about the company and have requested additional disclosures whose provision is being delayed by the supplier. You know that its CEO was active in politics before he became a businessman. Also, your Turkish counterparty has been working for a decade in what you consider to be especially challenging markets, such as Russia, Brazil and China. You categorise the supplier into the medium risk tranche.

High risk*

You are a construction company that is ranked in the top-5 in France. You have recently won a contract with the government of Saudi Arabia to implement a large-scale project under the national infrastructure development programme. Your end client is the Ministry of Transport, but you are mostly interacting with an intermediary designated by the authorities. This company has been recently incorporated, has no specific known activity and is headed by a low-key individual supposedly linked to the Saudi government. You have no information about its ownership structure at this stage. You consider the intermediary in question as being high-risk.

** While high risk can be further separated into the 'significant risk' and 'critical risk' components, we recommend a common approach emphasising the highest level of vigilance possible. This otherwise slight distinction does not seem to be very pertinent as far as due diligence procedures are concerned.*

Protocols and due diligence

A specific procedure in the form of a built-in protocol applies to each and every level of risk. This is what makes the risk map truly operational given that every employee whose attributions include risk assessments knows what to do and how to respond in any given scenario.

The actions spelled out in the protocols should be proportionate to risk, in accordance with the risk-based approach which is one of the guiding principles under both the FCPA and the UKBA. In practice, it means that most effort will go where risk is highest, thus permitting a rational use of time and resources, financial and human alike. In a way, a traditional debate about the costs of compliance writ large should not be taking place at all because costs must be in direct proportion to the required level of vigilance.

Low risk

Refer to the example listed above. You have key official information on a third party.

- Look for negative information on the internet ;
- Ask the third party to fill out an integrity questionnaire;
- Consult the database of your choice to obtain commercial information and any references to past and present legal proceedings, as well as access to paywall articles in the media.

Medium risk

Refer to the example listed above. You have some information on a third party but it is not sufficient.

- Conduct an enhanced due diligence in-house, provided the right competences and resources are available to you;
- Otherwise, ask for assistance from a specialist firm, which will conduct an EDD on your behalf WITHOUT the use of local sources in the third party's country of origin or operation. This EDD will include the following information (whenever available):
 - ✓ *Commercial data;*
 - ✓ *Ownership structure and organisational chart;*
 - ✓ *Management and shareholders;*
 - ✓ *Activities and projects;*
 - ✓ *Potential links to the political authorities;*
 - ✓ *Sanctions and legal cases;*

- ✓ *Corruption, money laundering and terrorist financing allegations;*
- ✓ *Media coverage of scandals.*

High risk

Refer to the example listed above. You have the bare minimum of information on a third party, for instance its date of incorporation and postal address.

- Ask for assistance from a specialist firm, which will conduct an EDD on your behalf WITH the use of local sources in the third party's country of origin or operation. This EDD will include the following information (whenever available):
 - ✓ *Commercial data;*
 - ✓ *Ownership structure and organisational chart;*
 - ✓ *Management and shareholders;*
 - ✓ *Activities and projects;*
 - ✓ *Potential links to the political authorities;*
 - ✓ *Sanctions and legal cases;*
 - ✓ *Corruption, money laundering and terrorist financing allegations;*
 - ✓ *Media coverage of scandals;*
 - ✓ *First-hand insights from local sources.*

Questions & Answers

Compliance with Sapin II is no doubt important but it is also expensive! True or false?

False. First of all, non-compliance can be far more expensive, either in the United States (under the FCPA), or in the UK (under the UKBA), or now in France. Sapin II establishes a maximum fine of 30% of the average sales revenue over the last three years. For a company with a stable revenue of EUR 1 billion, that means around EUR 300 million worth of penalties – a hard test for both employees and shareholders. A parallel with the healthcare system is welcome here: prevention costs much less than medical treatment and is rarely as painful! Besides the financial damage coupled with individual disciplinary punishment, one should not discount the negative impact of a corruption trial on the reputation of a company, which may end up losing existing clients, not finding new ones and being barred from lucrative deals. Unfortunately, this still goes much too often forgotten.

Second, every level of risk has its own profitability. Risky projects in vulnerable jurisdictions are usually more profitable than the ones in so-called safe countries. High costs characteristic of developed economies of the West limit the upside while in risky countries profits can be huge amid limited expenses. It is therefore almost natural that a high-risk project is worth conducting a preliminary due diligence, which is nothing but a fair price one pays with a view to making a better deal in complete confidence.

Finally, nobody puts into question the hefty fees paid to law firms, which normally charge on an hourly basis, given the widely recognised role that they play in international business transactions. External consultants who specialise in compliance play a no less important role and deserve all possible respect for their hard work, too, although they cost much less their clients than legal advice, especially when it is provided in the context of litigation.

Can we still save money?

Of course. You should choose carefully your corporate intelligence providers and make them compete with one another for your attention. It is not rare that a client ends up overpaying for something that others could have done more quickly and more cheaply by blindly following someone else's recommendation. Large consulting firms usually have very high tariffs that the majority of mid-sized companies can barely afford and many international groups struggle to justify. You should know that at least 30% of such fees represent nothing other than an attempt to recoup prior investments into advertising, annual conferences and forums, spacious offices at prestigious addresses, etc. The golden rule is to find a balance between the least and most expensive providers by always keeping in mind what is more important in due diligence, that is the quality of services rendered.

Many believe that Sapin II is just a formality. True or false?

False. The French government has made clear its intention to close the gap with the most advanced fellow members of the OECD in terms of anticorruption fight. It also wants to reduce French companies' exposure to prosecution abroad, namely in the United States where several big firms have been heavily sanctioned since 2010. Sapin II should be seen not as an obstacle to doing business but as an opportunity to improve risk management and corporate governance.

The new obligations stemming from Sapin II do not limit themselves to the identification of risks and the implementation of appropriate due diligence procedures. There is also an obligation to monitor compliance and set up well-functioning internal controls. Let us refer to a real-life example under the FCPA. In 2012, the *Financial Times* ran a series of articles about presumed corruption committed by US-based Cobalt International Energy in Angola. The energy company was accused, among other things, of having turned a blind eye to the conclusions of several investigations, which it had commissioned from an independent consultant and which uncovered the use of shell companies belonging to Angolan politicians in joint projects. This instance of corporate negligence led to a formal probe in 2014, followed in June 2017 by a class action by hundreds of Cobalt International Energy shareholders.

Can law firms conduct risk assessments in the field of anticorruption?

Usually no, except if they have heavily invested into this particular activity and possess sufficient human, technological and intellectual resources. From our experience, the majority of law firms have no required skills to conduct in-depth investigations under the FCPA, the UKBA and Sapin II. This activity is not really part of their traditional skillset. It is better to leave to the lawyers what they can do best.

My law firm (which offers due diligence, see above) says it can guarantee a higher degree of confidentiality thanks to legal privilege. True or false?

False. The concept of legal privilege does not exist in French law. Its local equivalent is professional secrecy, which has nonetheless a much narrower scope. In common-law countries, legal privilege can be of two types: legal advice privilege, which governs the client-counsel relationship, and litigation privilege, which guarantees the confidentiality of communication in the context of litigation. Third-party risk assessments do not meet any of the above definitions.

Furthermore, Sapin II requires of companies to keep track of third-party risk assessments to be able to share them, if need be, with the French Anticorruption Agency (in French: AFA) in the course of an inspection. That said, the ultimate goal of a due diligence is being capable of demonstrating to the regulator actions taken to prevent bribery, and not to hide information obtained for that specific purpose. Regarding the issue of non-disclosure, it goes without saying that an external consultant entrusted with conducting an investigation is obliged to ensure complete discretion and confidentiality in relation to any information that it may have received from its client.

Should we wait for the publication of detailed implementation decrees on risk mapping and third-party risk assessments before launching any internal procedures?

It would be a serious mistake. In fact, no decree published since late 2016, when Sapin II became law, deals with either of these key aspects of the new legislation. To understand the causes, it is worth drawing a parallel with the UKBA, which has inspired much of Sapin II's thinking. The intention of both the UK and French governments has been to lay out guiding principles and standards instead of providing a detailed description of rules and procedures. Moreover, it is impossible to do so for some 1,600 French companies that fall under the new anticorruption law. We recommend using the so-called common sense approach, which is by the way a term officially employed in the UKBA. It says that every company should adopt a set of procedures adapted to its business and the level of associated risk, being mostly free to define more specific parameters.

The wait-and-see tactics is not the right approach. The eight principal provisions of article 17 of Sapin II have been in force since 1 June 2017 and are mandatory for all eligible companies. While it is generally recognised that the AFA will be unable to start first audits before 2018, any violation of Sapin II between 1 June 2017 and then is retroactively punishable. It is important to ensure compliance with the law as early as possible by drawing from the guiding principles contained in the law, however seemingly vague.

My company has subscribed to a database, which seems to address all our needs. True or false?

False. From our experience, the idea that it is enough to subscribe to one of the many databases in order to be able to risk-assess third parties effectively is not only inaccurate but also outright dangerous. No database can fulfil this mission alone (the use of several databases at the same time is hardly a good strategy because they often use the same primary sources of information). The problem becomes more apparent whenever a need arises to obtain insights into a country where official information (corporate registers, annual financial reports, stock exchange filings, etc.) is unavailable or fragmentary. The same applies to places where there is no free speech and the media are tightly controlled by the government.

Despite their considerable efforts to promote the exclusive use of databases, compliance software providers are increasingly viewed with a sceptical eye. A 2 July 2017 article in the Swiss daily *Le Temps*, accessible at the following link: <https://www.letemps.ch/economie/2017/07/02/base-donnees-preferee-banques-feu-critiques>, sheds some useful light on the growing sentiment of dissatisfaction within Switzerland's banking community with one of the databases most widely used by finance professionals. Similar criticisms have been repeatedly levelled at other software providers. This has sometimes resulted in the cancellation of entire projects after the emergence of new facts that were not initially available through databases. Nothing can actually replace an enhanced due diligence conducted by well-trained financial crime specialists as far as high-risk third parties are concerned.

Should the due diligence function be centralised at the head office?

General supervision and strategic management of the broader compliance function will clearly benefit from centralisation at the level of the Chief Compliance Officer, Head of Legal or Secretary General. As regards due diligence, for this part of the function to operate smoothly, it is first necessary to have a well-thought, clear and comprehensive risk map. Once this condition is met, third-party risk assessments can be decentralised at the subsidiary level for both low and medium risk, provided that those in charge are well aware of what to do and which corporate intelligence provider(s) to contact in case of need. For high risk, it is better to centralise investigations at the head office given the increased stakes. The Chief Compliance Officer or an equivalent senior executive should supervise the due diligence process from start to finish and make an appropriate decision based on its outcomes.

More specifically, what does the risk-based approach mean?

The risk-based approach is a fundamental concept in the field of anticorruption and is one of the key good practices to implement. Its main idea is that both risk assessments and remediation should be proportionate to the level of risk identified. For example, when risk is low, it is not necessary to activate burdensome verification procedures, which in all likelihood will not let you know more than you do already. In a similar vein, whenever your third party is high-risk, it makes little sense to limit yourselves to integrity questionnaires because such a third party is unlikely to answer honestly. An enhanced due diligence, with or without the use of local sources (to be eventually discussed with your corporate intelligence provider), becomes the only viable option in the above high-risk scenario.

How to choose a good corporate intelligence provider?

You should have as much information as possible in order to make the right choice. The field of corporate intelligence is quite different to other sectors in that consulting firms have access to confidential data and cannot openly discuss the work they have performed for clients, nor can they reveal the nature of their investigations. It makes sense to enquire about the companies whose services are being used by your peers at other firms, with a particular emphasis on how they found them and structured contracts with such providers. It is equally important to stay open to pitches coming from the very consultants as such an approach allows you to spend less time on searching for the right individuals and to put those you have identified in direct competition with one another.

In the end, the choice will be made on the basis of quality, pricing and turnaround times. Quality is obviously the key driver of your decision-making, hence the need to ascertain the credentials of all consultants and their teams. Besides a detailed knowledge of relevant legislation (FCPA, UKBA, Sapin II, OECD Antibribery Convention, EU directives, etc.), your preferred provider ought to have appropriate language and analytical skills, understand the countries and regions in which it operates, have access to a wide network of dependable local sources, act legally and ethically at all times, and so on. Do not hesitate to request sanitised sample reports from those seeking to win business. It will enable you to evaluate the quality of the work, including internal coherence, comprehensiveness, factual accuracy, formatting and other factors. You may then choose the one that offers the best quality at the lowest price and with the shortest delivery times.

Our services

Founded in 2014 by a former director of forensics at KPMG, Aperio Intelligence is a reputable financial crime specialist. We help our clients, mostly multinationals, to stay compliant with anticorruption laws such as the FCPA, the UKBA, Sapin II, etc. We have conducted to date numerous investigations in more than 130 countries and have access to an exclusive network of over 500 sources across the globe.

Our services include:

- Elaboration of risk maps;
- Country and sectoral risk evaluations, based on a unique methodology which remains unrivalled in the marketplace;
- Enhanced due diligence on individuals and companies, including source-based investigations;
- Transactions-based due diligence (M&A, joint ventures, strategic alliances, etc.).

To stay abreast of the latest developments in the world of financial crime, please subscribe to our monthly newsletter 'Financial Crime Digest' at the link below:

<https://www.aperio-intelligence.com/financial-crime-digest/>.

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