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France

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LAW AND PRACTICE: p.3

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Law and Practice

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Bougartchev Moyne Associés AARPI was formed in January 2017, when Kiril Bougartchev and Emmanuel Moyne joined forces to create a law firm combining all the disciplines of business litigation, predominantly in criminal law. The establishment of this firm is the fruit of more than 20 years of professional experience gained by the two founding partners at Gide and Linklaters LLP. They are supported by a team of around ten lawyers. As litigation lawyers recognised by their profession, the founders and their team assist public and private enterprises such as banks and financial institutions, insurance companies and their executives in all disputes to which they are a party, whether involving white-collar crime, civil and commercial law or regulatory matters. With wide experience of emergency, complex, cross-border and multi-jurisdictional proceedings, Bougartchev Moyne Associés' lawyers assist their clients both in France and internationally with the benefit of privileged relations with counterpart law firms on all continents. Primary practice areas are: white-collar crime (bribery and related offences), crisis and reputational injury management, civil and commercial litigation, regulatory disputes, compliance, and investigations. Bougartchev Moyne Associés advises clients in very sensitive matters, whether involving French, foreign or international public officials, private bribery or influence-peddling. The firm's lawyers also assist large companies in implementing the new compliance measures required by the Sapin II Law. Bougartchev Moyne Associés has been involved in matters concerning bribery or related offences for numerous leading firms and high-profile individuals, within France and internationally.

Authors

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1. Offences

1.1 Legal Framework for Offences

1.1.1 International Conventions

France has ratified a number of international treaties relating to bribery and corruption, the key ones being:

- the European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States (signed by France on 26 May 1997, approved by Law No 99-423 of 27 May 1999 and ratified on 4 August 2000);
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (signed by France on 17 December 1997, approved by Law No 99-424 of 27 May 1999 and ratified on 31 July 2000);
- the Council of Europe criminal law convention on corruption of 27 January 1999 (signed by France on 9 September 1999, approved by Law No 2005-104 of 11 February 2005 and ratified on 25 April 2008);
- the Council of Europe civil law convention on corruption of 4 November 1999 (signed by France on 26 November 1999, approved by Law No 2005-103 of 11 February 2005 and ratified on 25 April 2008);
- the additional protocol to the Council of Europe criminal law convention on international corruption (signed by France on 15 May 2003, approved by Law No 2007-1154 of 1 August 2007 and ratified on 25 April 2008); and
- the United Nations Convention against Corruption of 31 October 2003 (signed by France on 9 December 2003, approved by Law No 2005-743 of 4 July 2005 and ratified on 11 July 2005).

1.1.2 National Legislation

The main national legal provisions relating to anti-bribery and anti-corruption are enshrined in the Penal Code and the Code of Criminal Procedure.

Since the introduction of the offence of bribery of foreign public officials in Law No 2000-595 of 30 June 2000, France has adopted numerous reforms to reinforce its anti-corruption legislation, both substantively and procedurally.

In particular, Law No 2007-1598 of 13 November 2007 aimed to expand the scope of criminal prosecution and was followed by Law No 2010-768 of 9 July 2010 that facilitated asset seizure and confiscation in criminal matters.

Law No 2013-1117 of 6 December 2013 brought about a substantial rise in the amount of possible fines and created the National Financial Prosecutor, a specialised public prosecutor responsible for investigating very complex matters or ones that could have a major national or international impact.

In December 2014, although welcoming the above series of reforms, the Organisation for Economic Co-operation and Development (OECD) still expressed concerns about the French anti-corruption arsenal in its follow-up to the 'Phase 3 Report on Implementing the OECD Anti-Bribery Convention', criticising "France's limited efforts" to combat bribery in international transactions and the relatively limited number of French prosecutions and convictions on the grounds of corruption.

Law No 2016-1691, called the Sapin II Law, signed on 9 December 2016 and entered into force on 11 December 2016 with regard to most of its provisions, took such criticism into account and strove to make further progress so as to reach the highest European and international standards. This law intensified the fight against corruption by providing:

- the introduction of a new duty to prevent bribery or influence-peddling in France or abroad for chairmen, chief executives and managers of large private and public companies consisting of setting up a comprehensive compliance programme;
- the creation of the French Anti-corruption Agency (FAA), an authority in charge of monitoring the quality and efficiency of compliance measures implemented within the companies and public entities concerned;
- the introduction of the offence of influence-peddling of foreign public officials and a new ancillary penalty called a 'compliance programme' (*programme de mise en conformité*);
- the extension of the French judges' jurisdiction over acts of bribery and influence-peddling committed abroad;
- the introduction of a new ADR mechanism called a public interest judicial convention (*convention judiciaire d'intérêt*

public), which is, relative to the fight against fraud, available for legal entities suspected of acts of bribery or influence-peddling, laundering of tax fraud proceeds and, since the entry into force of Law No 2018-898, tax fraud; and
- the strengthening of the protection to whistle-blowers, who under certain conditions can benefit from immunity against retaliatory measures by their employer and against criminal prosecution for secrecy violations.

The latest development is the reform of the limitation of public action by Law No 2017-242 of 27 February 2017, which doubled the limitation period for all the offences and crimes and which is consequently relevant to corruption offences.

1.1.3 Guidelines for the Interpretation and Enforcement of National Legislation

Since the entry into force of the Sapin II Law, the FAA has published a dozen recommendations aiming to help public institutions and companies to comply with their obligations under Article 17 of this law and thus to prevent and detect acts of corruption. In this regard, a number of major risks were identified, including gifts, accommodations or entertainment, customer travel, donations, sponsorships and facilitation payments. These recommendations are, however, not legally binding.

As regards procedural aspects, the circular of 31 January 2014 provides additional detail on the objective and scope of the jurisdiction of the National Financial Prosecutor, including its interplay with public prosecutors.

Furthermore, the implementation rules for certain provisions of the Sapin II Law have been specified by various decrees and circulars, in particular by:

- Decree No 2017-329 of 14 March 2017 relating to the FAA and notably its operating conditions, the procedures for appointing its members, its missions and the operating conditions of the Sanctions Committee;
- Decree No 2017-564 of 19 April 2017 relating to the procedures for collecting alerts issued by whistle-blowers within legal persons governed by public or private law or State administrations;
- Decree No 2017-660 of 27 April 2017 on the implementation of the public interest judicial convention; and
- a Circular dated 31 January 2018 on the presentation and implementation of the criminal provisions provided for by the Sapin II Law.

1.2 Classification and Constituent Elements

1.2.1 Bribery

Under French criminal law, an offence is comprised of:

- a physical element, which concerns the prohibited act itself;
- a mental element, which generally consists of a general intent (*dol général*), requiring that the perpetrator of the offence be aware that he is acting in violation of the law and possesses the will to commit that act, and a special intent (*dol special*), which requires an intent to pursue a specific goal; and, in certain cases,
- a prior condition (ie, prerequisite to commit the offence).

Corruption offences are detailed below. In France, they are often grouped together under 'offences to probity' (*manquements à la probité*).

Under French criminal law, the prosecution of bribery (*corruption* in French) revolves around the status of the person bribed so that a specific offence exists for each type of person. The French legislator has thus criminalised bribery of domestic public officials (Articles 433-1 and 432-11 of the Penal Code), bribery of domestic judicial staff (Article 434-9 of the Penal Code), bribery of domestic private individuals (Articles 445-1 and 445-2 of the Penal Code), bribery of foreign or international public officials (Articles 435-1 and 435-3 of the Penal Code) and bribery of foreign or international judicial staff (Article 453-9 of the Penal Code).

Regardless of the offence concerned, the bribe can be defined as any offer, promise, donation, gift or reward unlawfully offered or requested that will induce or reward the performance or the non-performance by a person of an act pertaining to his position.

The scope of the bribe is extensive under French law, covering all kinds of advantages without consideration of their magnitude. Pursuant to the FAA's recommendations, risk of bribery is posed by accommodation, entertainment, customer travel, donations, sponsorships and facilitation payments. According to the case law, bribes may consist of a non-cash benefit (eg, a car) or a service (eg, a fine wines tasting session or a safari).

In each situation, a distinction is made under French law between active bribery and passive bribery, which allows for the separate prosecution of the bribe giver and the bribe taker.

Active bribery is the act of (i) unlawfully offering, at any time, directly or indirectly, advantages (as listed above) to a person (public official, judicial official or private individual) for the benefit of that person or of a third party, to induce that person to perform or refrain from performing, or because such person has performed or refrained from performing, any act pertaining to his position, duties, mandate or activities, or facilitated thereby; or (ii) accepting the proposal of such person who unlawfully requests, at any time, directly or indirectly, such advantages in exchange for such acts.

In contrast, passive bribery is the act whereby a person (public official, judicial official or private individual) unlawfully requests or accepts advantages (as listed above), at any time, directly or indirectly, on his own behalf or on behalf of a third party, to perform or refrain from performing, or because such person has performed or refrained from performing, any act pertaining to his position, duties, mandate or activities, or facilitated thereby. The mere receipt of a bribe thus constitutes an offence in itself.

Bribery is also punishable when it only involves private parties.

The scope of French anti-bribery law encompasses all managers or employees as well as volunteers and learned professionals, regardless of the entity to which those persons are attached (individual, legal entity, grouping without legal personality).

In short, based on the criteria set out above, bribery is established when the following events occur.

- A physical element is found. Concerning active bribery specifically, the physical element may consist in the unilateral offering of a corruption pact by the bribe giver (regardless of any subsequent acceptance) or in his acceptance of the bribe taker's solicitation, thereby sealing the corruption pact. Concerning passive bribery, the physical element may consist in the bribe taker's request for advantages, regardless of any subsequent acceptance (ie, unilateral offering to enter into a corruption pact), or in his consent to the bribe giver's offer, thereby sealing the corruption pact.
- A mental element is established. In bribery matters, it can be deduced from the unlawful nature of the advantage granted or received and the existence of necessarily intentional acts such as requests, proposals, agreements or acceptance (general intent), as well as from the objective to be achieved through the unlawful behaviour; ie, obtaining a monetary or non-cash advantage for the bribe taker and obtaining the benefit of performance or non-performance of an act for the bribe giver (special intent).
- As a prerequisite, the status of the persons involved in the perpetration of the offence falls within the scope of the provision at issue. In particular, bribery offences are conditional upon the position of the person bribed (public official, judicial official, private individual, foreign or international public official, foreign or international judicial official).

If proposing or accepting an unlawful advantage may qualify as an offence without any requirement that the results expected by the perpetrators actually occur, the Sapin II Law has gone even further. In entities of a certain size, the mere fact that directors or managers did not take the required measures to prevent acts of corruption will now constitute a punishable behaviour.

1.2.2 Influence-Peddling

Influence-peddling (*trafic d'influence*) is an offence that occurs when any person (whether private person or official) who has real or apparent influence on the decision-making of an authority exchanges this influence for an undue advantage (offer, promise, donation, gift or reward). The French legislator has criminalised active and passive influence-peddling where the decision-maker is a domestic authority or public administration (Article 433-2 of the Penal Code) or a domestic judicial official (Article 434-9-1 of the Penal Code) or a public official from a public international organisation (Articles 435-4 and 435-2 of the Penal Code) or a judicial official from an international court (Articles 435-8 and 435-10 of the Penal Code) or, following the Sapin II Law, a public official from a foreign state (Articles 435-4 and 435-2 of the Penal Code). Furthermore, the Penal Code provides for specific offences where the influence peddler is a public official and the decision-maker is a domestic authority or public administration (Articles 433-1 and 432-11-2° of the Penal Code).

1.2.3 Financial Record-Keeping

In practice, corruption may lead to accounting stratagems seeking to conceal in financial statements the benefits obtained or paid by using false invoices. Therefore, it is also an offence for the chairman, directors, members of the executive or supervisory board, or de jure or de facto managers, to publish or provide the shareholders with annual accounts that do not accurately reflect the company's results. Individuals may incur a prison term of up to five years and a fine of up to EUR375,000 and additional penalties (Articles L.241-3-3° and L.242-6-2° of the Commercial Code); legal entities may incur a fine of up to EUR1,875,000. Furthermore, since the Court of Cassation's Carpaye ruling of 1992 and Carignon ruling of 1997, French courts regularly hold that the use by a company chairman, director, member of the board, or de jure or de facto manager, of corporate funds only aimed at the commission of an offence such as bribery is necessarily contrary to the corporate interest and constitutes a punishable misuse of corporate assets under Articles L.241-3-4° and L.242-6-3° of the Commercial Code (Court of Cassation, Crim. Ch., 22 September 2004, No 03-81.282).

1.2.4 Public Officials

Criminal law associates with the notion of 'public official' people:

- holding a public authority (which applies to all persons who hold decision-making power based on the parcel of public authority entrusted to them because of the functions they perform, whether administrative, judicial or military – the so-called judicial corruption being the subject of specific criminalisation under Article 434-9 of the Penal Code);

- entrusted with a public service mission (meaning a person, whether permanently or temporarily, entrusted with the performance of a function or acts intended to satisfy a general interest); or
- invested with a public elective mandate.

Besides bribery and influence-peddling, other behaviours involving public officials in the area of corruption may constitute criminal offences under French law:

- misappropriation of public funds (*concussion*), which occurs when a public official receives, requests or orders to pay as public duties, contributions, taxes or impositions any sum known not to be due, or known to exceed what is due, or when he grants any exoneration or exemption in breach of statutory or regulatory rules (Article 432-10 of the Penal Code);
- unlawful taking of interest (*prise illégale d'intérêts*), which occurs when a public official takes, receives or keeps any interest in an operation or in a transaction, either directly or indirectly, while having the duty of ensuring its supervision, administration, liquidation or payment (Article 432-12 of the Penal Code);
- embezzlement of public funds (*détournement de fonds publics*), which occurs when a public official/accountant destroys, fraudulently divests or acquires a document or security, public or private sums, or any other object entrusted to him by reason of his position or his duties (Article 432-15 of the Penal Code); and
- favouritism (*favoritisme*), which occurs when a public official grants an unjustified advantage to a third person, acting thereby in breach of the rules ensuring free access and equality of bidders for procurement contracts and concession contracts (Article 432-14 of the Penal Code).

1.2.5 Intermediaries

Prosecution may concern other parties than the bribe giver and the bribe taker who have variable involvement in the commission of the offence. In particular, under French criminal law, an individual or legal entity who knowingly, by providing aid or assistance, facilitates the preparation or commission of an offence, or induces through any advantage or gives instructions to commit an offence, is considered to be an accomplice to such offence and is subject to the same penalties as the principal perpetrator of the offence (Articles 121-6 and 121-7 of the Penal Code).

Furthermore, individuals and legal entities that engage in the concealment (Articles 321-1 and 321-12 of the Penal Code) or the laundering (Articles 324-1 and 324-9 of the Penal Code) of corruption offences may also be prosecuted.

1.3 Scope

1.3.1 Geographical Reach of Applicable Legislation

As a general rule, the perpetrator of an offence can be subject to criminal prosecution in France when:

- the offence or any of its constituent elements is committed in French territory;
- the victim is French;
- the perpetrator is French and a similar offence exists in the country in which it is committed; or
- jurisdiction is granted to French courts by an international convention to which France is a party.

With regard to bribery and influence-peddling specifically, the third condition was considerably softened by the Sapin II Law. The dual criminality requirement (Article 113-6 of the Penal Code) was abolished. Furthermore, the Sapin II Law abandoned the requirement of Article 113-8 of the Penal Code according to which the prosecution of acts committed abroad could only result from the Public Prosecutor following a complaint lodged by the victim (or any rightful claimant) or an official denunciation from the country concerned. As a consequence, any French person having committed bribery, whether as a bribe taker and/or a bribe giver, or influence-peddling outside French territory can now be prosecuted in France in all circumstances.

Moreover, based on principles relating to the connection between cases or their indivisibility (Articles 203 and 382 of the Code of Criminal Procedure), foreign individuals or legal entities having committed unlawful acts outside France can still fall within the jurisdiction of French courts when they are co-perpetrators, accomplices or launderers of an offence that French courts may hear, or when they engaged in its concealment. French courts still have jurisdiction over an indicted foreigner who did not commit any unlawful act in French territory, as long as his acts had inextricable links with acts committed by other indicted persons in France (Court of Cassation, 20 September 2016, No 16-84026).

Besides, application by French courts of the principle of non bis in idem regarding countries that do not belong to the EU differs according to the basis of their jurisdiction.

In the case of extra-territorial jurisdiction, the principle of non bis in idem applies to foreign decisions and agreements that have become final (Article 113-9 of the Code of Criminal Procedure).

In the case of territorial jurisdiction, French courts reject the application of the non bis in idem principle to foreign decisions and agreements.

The decision rendered by the Court of Cassation on 14 March 2018 (Court of Cassation, Crim. Ch., 14 March 2018, No 16-82.17) concerning the enforceability in France of a plea agreement signed by a French company in the USA, so as to escape prosecution from French authorities on the

grounds of non bis in idem, confirms the principle above stated. Taking as an example the practice of US courts interpreting the FCPA extensively to declare themselves competent, the Court of Cassation stated that since the offence of bribery of a foreign public official had been decided and organised in France, where bribes also flowed through, French courts had jurisdiction. Thus, according to French courts, the principle of non bis in idem cannot be applied whenever one of the constituent elements of the corruption offence has been committed in France. This reasoning can be seen as a response to the inapplicability of the non bis in idem principle in the USA.

In intra-EU relations, the principle of non bis in idem may be invoked regardless of the territorial or extra-territorial basis of French jurisdiction.

1.3.2 Corporate Liability

Legal entities may be criminally liable in the same way as individuals for all criminal offences, including corruption ones, provided that the offences are committed on their behalf by their corporate bodies or representatives (Article 121-2 of the Penal Code). Therefore, in order to hold the legal entity liable for corruption offences, prosecutors first have to establish the material existence of the offence committed by an individual and then to demonstrate that the perpetrator was a body or representative of the legal entity.

However, the liability of legal entities does not preclude individuals from also being liable if they are perpetrators of or accomplices to an offence. Prosecution against any individual occurs independently of the prosecution that may be initiated against the legal entity, so that the annulment of one prosecution would not affect the other one.

In addition to criminal liability, there is also a risk of civil liability in the event of a sentence for corruption.

Indeed, legal entities may be ordered by the judge to pay compensation for loss or damage arising due to acts of corruption pursuant to Article 1240 (formerly Article 1382) and/or Article 1242 paragraph 5 of the Civil Code (formerly Article 1384). This action may be carried out by any person who has suffered damage resulting from corruption such as a competitor of the company. In particular, entities may face claims of approved anti-corruption associations (Transparency International France, Anticor and Sherpa so far), which are entitled to act as a civil party in any criminal proceedings relating to corruption (Article 2-23 of the Code of Criminal Procedure).

Even in the event of the conclusion of a public interest judicial convention (see **2.5 Safe Harbour or Amnesty Programme**), legal entities may be required to pay compensation. For example, a French company agreed to pay EUR30,000 for compensation of the damages undergone by the national electric utility company. In this case, the former company's director was found to have corrupted one of the latter company's employees, by offering the latter trips and payment of expenses to conclude and maintain commercial contracts with that company. It can also be noted that the Swiss branch of a British banking group agreed to pay EUR142,024,578 to the French State to compensate the State's loss caused by its unlawful financial and banking solicitation of French prospects and money laundering of tax evasion.

In the event of a merger by absorption, whereas the acquiring company is civilly liable for offences committed previously by the dissolved company, since it has absorbed its assets and therefore all its claims and debts (Court of Cassation, Crim. Ch., 15 November 2016, No 15-84.692), it cannot be criminally liable for offences committed by the organs or representatives of the absorbed company on behalf of the latter (Court of Cassation, Crim. Ch., 20 June 2000, No 99-86.742). The Criminal Chamber explains this solution by considering that the absorption causes the absorbed company to lose its legal existence (Court of Cassation, Crim. Ch., 14 October 2003, No 02-86.376) and that it can then be deduced from Article 6 of the Code of Criminal Procedure that the public prosecution is terminated in this respect (Court of Cassation, Crim. Ch., 18 February 2014, No 12-85.807). Such a position may appear to contradict that of the Court of Justice of the European Union, which held that "Article 19(1) of Third Council Directive 78/855/EEC of 9 October 1978... must be interpreted as meaning that a 'merger by acquisition' as defined by Article 3(1) of the directive results in the transfer to the acquiring company of the obligation to pay a fine imposed by final decision adopted after the merger by acquisition for infringements of employment law committed by the acquired company prior to that merger" (ECJ, 5 March 2015, case C-343/13). Nevertheless, the Criminal Chamber maintained its solution by stating that "Article 121-1 of the Penal Code can only be interpreted as prohibiting criminal proceedings against the acquiring company for acts committed by the absorbed company before the latter loses its legal existence" (Court of Cassation, Crim. Ch., 25 October 2016, No 16-80.366).

1.4 Limitation Periods

Law No 2017-242 of 27 February 2017 brought about the doubling of the limitation period. As of 1 March 2017, the limitation period of corruption acts was consequently increased from three years to six years following the day of commission (Article 8 of the Code of Criminal Procedure).

In principle, as regards bribery, the limitation period will thus expire six years after the date of the request or acceptance (in cases of passive bribery) and six years after the proposal or agreement (in cases of active bribery). However, the Criminal Chamber of the Court of Cassation has ruled that if

any different act is performed after this date pursuant to the corruption pact, the period is tolled and begins to run anew from the date of that act (Court of Cassation, Crim. Ch., 27 October 1997, No 96-83698).

In addition, the starting point of the limitation period is also delayed for secret (*occultes*) and concealed (*dissimulées*) offences to the date on which they could be discovered under circumstances enabling prosecution (Article 9-1 of the Code of Criminal Procedure). Having enshrined the principle contra non valentem agere non currit praescriptio, the French legislator, fearing the risk of imprescriptibility of offences, specified that prosecution against offences such as bribery would in any event be time-barred 12 full years following the day on which the offence was committed.

This law also provided a list of procedural acts interrupting the limitation period: prosecution acts initiated by the Public Prosecutor or the plaintiff; investigation acts performed by the Public Prosecutor, the judicial police or the investigating magistrate/chamber; or any valid judgment (Article 9-2 of the Code of Criminal Procedure).

2. Defences and Exceptions

2.1 Defences

In general, French criminal law provides for a number of grounds for the exclusion or mitigation of criminal liability, such as mental disorder (Article 122-1 of the Penal Code), physical or moral coercion (Article 122-2 of the Penal Code), legal or factual error (Article 122-3 of the Penal Code), the order of the law or the command of a legitimate authority (Article 122-4 of the Penal Code), state of necessity (Article 122-7 of the Penal Code) and minority (Article 122-8 of the Penal Code), provided that most of these grounds are rather exceptionally applied.

The Sapin II Law created a new defence concerning whistleblowers discouraging any prosecution for breach of secrecy against them (Article 122-9 of the Penal Code).

Apart from that, the French anti-corruption law does not provide for any specific defence. For example, setting up a very comprehensive compliance programme internally that would go beyond legal requirements does not prevent the company from any prosecution or conviction for bribery.

Nevertheless, even when the perpetrator cannot escape prosecution and conviction, he may be exempted from penalties provided that his social rehabilitation has been established, the damage caused by the offence has been remedied and the disturbance arisen from the offence has ceased (Article 132-59 of the Penal Code). The judge has full discretion in granting such exemption or not.

2.2 Exceptions

As explained in **2.1 Defences**, the French anti-corruption law does not provide for any specific defence.

2.3 De Minimis Exceptions

Conviction for corruption is possible even if the amounts at stake are small. However, should these amounts be small, they may be considered to be a mitigating factor by a court when it determines the quantum of the penalty to be imposed.

2.4 Exempt Sectors/Industries

In France, no sector is ruled out from the scope of corruption.

2.5 Safe Harbour or Amnesty Programme

A few mitigating measures and programmes may be applied to persons who engaged in corruption and show to the French judicial authorities their willingness to acknowledge or amend their behaviour.

Co-operation with Investigators

Under French law, there is no special treatment of perpetrators of offences who co-operate with investigators and prosecutors. However, the co-operation of the accused during the investigation stage and throughout the proceedings, and, in the case of legal entities, the adoption of measures intended to reinforce internal anti-corruption systems may be considered to be mitigating factors by a court when it determines the quantum of the penalty to be imposed.

Self-reporting

The Sapin II Law introduced the possibility for the perpetrators of, or the accomplices to, an offence of bribery of public officials or judicial staff only (private bribery being excluded) to have their penalties reduced by half if, by having informed the administrative or judicial authorities, they made it possible to put a stop to the offence or to identify other perpetrators or accomplices, if any (Articles 432-11-1, 433-2-1, 434-9-2, 435-6-1 and 435-11-1 of the Penal Code). At this time, customs officials have a much greater incentive to act as informants because the law exempts them from the penalties, fines and confiscations prescribed by the Penal Code if they report the acts of corruption that they have committed (Customs Code, Article 59).

Leniency

The French anti-corruption law does not provide for any leniency measure, apart from the aforementioned self-reporting regime. However, the court is free to adjust the penalty by reference to various factors.

Admission of Guilt

French law does not yet have an equivalent to the US process of plea bargaining. However, Law No 2011-1862 of 13 December 2011 extended the scope of the 'appearance pur-

suant to a prior admission of guilt' procedure (*comparution sur reconnaissance préalable de culpabilité*, CRPC) to corruption offences. Under this procedure, the Public Prosecutor's Office is entitled to offer directly and without a trial, on its own initiative or at the request of the accused or his lawyer, one or more penalties to a natural or legal person who acknowledges the acts of which he is accused (Code of Criminal Procedure, Article 495-7). If the accused accepts the penalty(ies) proposed, such penalty(ies) still have to be approved by the presiding judge of the High Court. The court judgment approving the penalty(ies) is deemed a conviction.

Settlement
The Sapin II Law introduced the 'public interest judicial convention' (*convention judiciaire d'intérêt public*), a new settlement procedure available solely for legal entities (Article 41-1-2 of the Code of Criminal Procedure). The main benefit of this procedure is the absence of any acknowledgement of guilt, contrary to the CRPC procedure.

Under this new procedure, the Public Prosecutor and the investigating magistrate (Article 180-2 of the Code of Criminal Procedure) are entitled to initiate a settlement, respectively before the initiation of prosecution or before the end of the investigation (in the latter case, at the request of, or in agreement with, the Public Prosecutor).

The accused legal entity is then offered to enter into an agreement with (i) the obligation to pay a public interest fine in proportion to the advantages gained from the offences within the limit of 30% of the annual average turnover calculated on the basis of the last three turnovers available, with the possibility of spreading the penalty over a maximum of one year, and/or (ii) the obligation to set up a compliance programme for up to three years under the FAA's supervision.

During a subsequent validation hearing, the judge decides whether to validate the proposed agreement, by carrying out a substantial review. Once validated, the legal entity has ten days to retract (this option has not been used so far). Then, the validation as well as the public interest fine amount and the agreement itself will be published on the FAA's website.

Several public interest judicial conventions have been concluded since the entry into force of the Sapin II Law, notably by the Swiss branch of a British banking group, which committed to pay a public interest fine of EUR157,975,422, and a French banking group, which committed to pay a public interest fine of EUR250,150,755.

3. Penalties

3.1 Penalties on Conviction

Bribery of Domestic Officials
In theory, bribery is severely punished under French law. Individuals who commit the offences of active bribery and passive bribery of domestic public officials and judicial staff may be imprisoned for a term of up to ten years, as well as be ordered to pay a fine of up to EUR1 million. The fine may be increased to double the proceeds generated by the offence (Articles 433-1-1°, 432-11-1°, 434-9 of the Penal Code).

Ancillary penalties may also be imposed on such persons. For instance, they may be prohibited from holding public office or from engaging in the professional or social activity in the performance of which, or in connection with the performance of which, the offence was committed, for a period of up to five years, or they may be barred from France if the offence was committed by a foreigner. This offence is also punishable by a prohibition against exercising a commercial or industrial profession, or directing, administering, managing or controlling a company in any capacity, permanently or for a period of up to 15 years. Lastly, publication of the judgment may be ordered and the item that was used or was intended to be used to commit the offence, or any item that is a proceed of the offence, may be confiscated (Articles 433-22, 433-23, 432-17, 434-44 of the Penal Code).

Legal entities are liable for a fine of EUR5 million, which may be increased to double the proceeds generated by the offence, and ancillary penalties, such as temporary exclusion from public procurement, the temporary closure of one or several establishments concerned by the offence and the confiscation of items used for the commission of the offence (Articles 433-25 and 434-47 of the Penal Code).

Bribery of domestic judicial staff for the benefit or to the detriment of a person who is the subject of criminal prosecution is punishable by a 15-year term of imprisonment (Article 434-9 of the Penal Code).

In practice, an increasing number of elected officials have been sanctioned. For example, in October 2013, the former mayor of a town was sentenced to a four-year term of imprisonment, two years of which were suspended, and a fine of EUR30,000 for passive bribery and breach of trust. He died before the Court of Appeal was able to hear his case (see www.transparency-france.org). Similarly, the Versailles Court of Appeal sentenced a former mayor and senator to a one-year term of imprisonment, a EUR20,000 fine and five years of ineligibility for passive corruption having been found guilty of accepting cash from one of his deputies for a promise to allocate social housing (Versailles Court of Appeal, 30 June 2017, appeal pending before the Court of Cassation, see www.transparency-france.org).

Bribery of Foreign Officials
Active or passive bribery of foreign public officials is punishable by an imprisonment of up to ten years and a fine of up to EUR1 million, which may be increased to double the proceeds generated by the offence (Articles 435-3 and 435-1

of the Penal Code). Active bribery of foreign public officials committed by a legal entity is subject to a fine of EUR5 million, which may be increased to double the proceeds generated by the offence (Article 435-15 of the Penal Code). Ancillary penalties are also provided (Articles 435-14 and 435-15 of the Penal Code).

The penalties provided for active bribery of foreign or international judicial staff are the same as for bribery of foreign public officials (Articles 435-9, 435-7 and 435-15 of the Penal Code).

In the past, few of the convictions handed down in corruption cases were on the grounds of bribery of foreign public officials. For example, in an important case involving bribery of foreign public officials in which the High Court had held a legal entity liable to pay a fine of EUR500,000, the Court of Appeal acquitted the legal entity on the grounds that no evidence showed that the company had risked losing the contract and that, therefore, there was insufficient proof that the payments were intended as a bribe (Paris Court of Appeal, 7 January 2015, No 12/08695, which has become final).

More recently, courts seem to judge more severely cases on the grounds of corruption of foreign public officials.

For instance, on 14 March 2018, the Court of Cassation rejected the appeal lodged against the conviction of a French company to pay a fine of EUR750,000 and of a Swiss company to pay a fine of EUR300,000 for bribery of foreign public officials (Court of Cassation, Crim. Ch., 14 March 2018, No 16-82.117).

Besides, on 24 May 2018, a major French bank concluded a public interest judicial convention on the grounds of bribery of Libyan public officials. It agreed to pay a public interest fine of EUR250,150,755 and to submit its compliance programme to the control of the FAA for two years.

Notwithstanding the above considerations, Transparency International ranked France in the category 'Limited Enforcement' in the report 'Exporting Corruption 2018' published on 12 September 2018, which aims to assess the enforcement of the OECD Anti-Bribery Convention.

Bribery of Private Individuals

Active and passive bribery of private individuals by individuals is punishable by a five-year term of imprisonment and a fine of EUR500,000, which may be increased to double the proceeds generated by the offence (Articles 445-1 and 445-2 of the Penal Code), as well as ancillary penalties (Article 445-3 of the Penal Code), whereas legal entities are liable for a fine of EUR2.5 million, which may be increased to double the proceeds generated by the offence, as well as ancillary penalties (Article 445-4 of the Penal Code).

Influence-peddling

Penalties similar to bribery are provided for influence-peddling.

In the case of influence-peddling involving as decision-maker a domestic authority or public administration (Article 433-2 of the Penal Code) or a domestic judicial official (Article 434-9-1 of the Penal Code) or a foreign/international official (Articles 435-4, 435-2, 435-8 and 435-10 of the Penal Code), individuals are liable for a term of imprisonment of up to five years and a fine of EUR500,000, which may be increased to double the proceeds generated by the offence, as well as various ancillary penalties. Legal entities are liable for a fine of EUR2.5 million, which may be increased to double the proceeds generated by the offence, and various ancillary penalties (Articles 433-25 and 435-15 of the Penal Code).

For example, a former judge in Béthune was convicted by the Paris Court of Appeal, on 13 April 2018, for rendering complacent judgments in 2010. The Court of Appeal stated in its judgment that "the facts alleged are serious and involve a magistrate, who was losing control and has already been disciplined." Seven other defendants who had sought interventions in their favour or the judge's clemency were also sentenced (Paris Court of Appeal, 13 April 2018, No 17/00067, which has become final).

Other Corruption Offences

Individuals engaging in:

- embezzlement of public funds (Article 432-15 of the Penal Code) are liable for a term of imprisonment of up to ten years and a fine of EUR1 million, which may be increased to double the proceeds generated by the offence;
- misappropriation of public funds (Article 432-10 of the Penal Code) or unlawful taking of interest (Article 432-12 of the Penal Code) are liable for a term of imprisonment of up to five years and a fine of EUR500,000, which may be increased to double the proceeds generated by the offence; and
- favouritism (Article 432-14 of the Penal Code) are liable for a term of imprisonment of up to two years and a fine of EUR200,000, which may be increased to double the proceeds generated by the offence.

Ancillary penalties are provided for under Article 432-17 of the Penal Code.

Legal entities engaging in one of the above offences are liable for five times the amount laid down in the Penal Code for individuals (Article 131-38 of the Penal Code), which may be increased to double the proceeds generated by the offence, and various ancillary penalties.

Repeated Offences
In the event of a repeated offence, the maximum penalties (imprisonment and fine) incurred are doubled. As regards individuals, this is the case when:

- the perpetrator of acts of corruption punishable by an imprisonment of ten years had been convicted in the past for felony or any misdemeanour punishable by an imprisonment of ten years and a period of less than ten years has elapsed between the expiration or prescription date of the first penalty and the date of commission of the new offence (Article 132-9 §1 of the Penal Code);
- the perpetrator of acts of corruption punishable by an imprisonment of more than one year and less than ten years had been convicted in the past for felony or any misdemeanour punishable by an imprisonment of ten years and a period of less than five years has elapsed between the expiration or prescription date of the first penalty and the date of commission of the new offence (Article 132-9 §2 of the Penal Code); and
- the perpetrator of acts of corruption had been convicted in the past for the same corruption offence and a period of less than five years has elapsed between the expiration or prescription date of the first penalty and the date of commission of the repeated offence (Article 132-10 of the Penal Code).

Similar provisions apply to legal entities that have been convicted for a felony or misdemeanour before the commission of acts of bribery (Articles 132-13 and 132-14 of the Penal Code).

Public Interest Fine in the Event of a Public Interest Judicial Convention
Under Article 41-1-2 of the Code of Criminal Procedure, the amount of the fine is fixed in proportion to the benefits derived from the breaches found, within the limit of 30% of the company's average annual turnover calculated on the basis of the last three annual turnover figures known at the time the breaches were found.

Under the public interest judicial convention concluded between the National Financial Prosecutor's Office and the Swiss branch of a British banking group on 4 November 2017, the amount of this public interest fine was based on two elements: the restitution of the profits derived from the breaches and an additional penalty based on the exceptional gravity of the facts. It should be noted that the additional penalty was not provided for by the Sapin II Law or the Decree of 27 April 2017. To justify this complementary penalty, the National Financial Prosecutor stated that the bank "did not disclose the facts to the French judicial authorities or acknowledge its criminal responsibility during the judicial investigation" and that it "provided minimal co-operation in investigations."

3.2 Guidelines Applicable to the Assessment of Penalties
The discretion of judges to determine penalties is one of the fundamental principles of French criminal law. The judge has thus full discretion to choose, from amongst the penalties applicable to the offence, those he deems appropriate and to determine the quantum of the penalty, with the only restriction being the maximum prescribed by law (no minimum sentences).

However, the judge must in all cases explain the grounds for his decision if he imposes a prison sentence that is not suspended and provides for no adjustments to the penalty, which partly explains the still relatively low number of non-suspended prison sentences handed down to date in corruption cases.

Furthermore, a basic principle of French law is that sentences are not consecutive, which means that if several penalties of the same type are possible because more than one offence has been committed, only one penalty of such type may be imposed, up to the highest statutory maximum penalty.

4. Compliance and Disclosure

4.1 National Legislation and Duties to Prevent Corruption
Article 17 of the Sapin II Law requires the implementation of a corruption prevention plan for chairmen, general managers and company managers as well as members of the management boards of public limited companies employing at least 500 employees, or belonging to a group whose headquarters has its registered office in France and whose turnover or consolidated turnover exceeds EUR100,000,000. This represents around 1,800 companies in France. The chairmen and general managers of public industrial and commercial establishments employing at least 500 employees, or belonging to a public group employing at least 500 people, and whose consolidated turnover or turnover exceeds EUR100,000,000, will also be subject to this obligation.

Persons subject to this obligation must therefore take measures, under the FAA's supervision, to prevent and detect the commission, in France or abroad, of acts of corruption or influence-peddling by:

- adopting a code of conduct, integrated into the internal regulations, and describing the behaviour to be prohibited;
- implementing an internal alert system (detailed below);
- establishing a risk map detailing the possible external solicitations according to the sector and geographical areas;
- implementing a procedure for evaluating customers, first-tier suppliers and intermediaries;
- carrying out internal or external accounting controls;
- providing training to the most exposed managers and staff;

- introducing disciplinary sanctions; and
- establishing a system for internal monitoring and evaluation of the measures taken.

The legislator has empowered the FAA to assess the quality and effectiveness of the preventative measures and to impose, in the event of non-compliance, graduated sanctions (ranging from warnings to fines and injunction procedures to bring internal procedures into line) through its Sanctions Commission, regardless of the communication of any finding of a criminal offence for acts of corruption or influence-peddling to the prosecutor.

The FAA Sanctions Committee may impose a financial penalty in proportion to the seriousness of the breaches found and the financial situation of the individual or the legal entity sanctioned (its maximum amount is set at EUR200,000 for individuals and EUR1,000,000 for legal entities).

4.2 Protection Afforded to Whistle-blowers

In the public sector, Article 40 of the Code of Criminal Procedure requires all public officials and civil servants who, in the performance of their duties, become aware of a felony or misdemeanour to inform the Public Prosecutor's Office and provide it with all information in relation thereto.

In the private sector, statutory auditors are required, under criminal penalties if they do not (Article L.820-7 of the Commercial Code), to report to the Public Prosecutor criminal acts of which they become aware, and incur no criminal liability for doing so, including on the grounds of making malicious accusations (Article L.823-12 of the Commercial Code). They are also required to report to Tracfin, the agency charged with dealing with and taking action against illegal financial circuits, transactions involving sums that they know, suspect or have good reason for suspecting originate from an offence punishable by a prison sentence of more than one year or that contribute to financing terrorism (Article L.561-2 12° of the Monetary and Financial Code). Since the aforementioned law of 6 December 2013, reporting felonies and misdemeanours committed in the civil service is not only a duty, but also a right. The protective system created provided that no measure concerning, inter alia, recruitment, tenure, training, evaluation, discipline, promotion, assignment or transfers may be taken against any civil servant because he has in good faith reported or testified about acts that are the constituent elements of a felony or misdemeanour.

The Sapin II Law of 2016 went a step further in granting protection to whistle-blowers. Under this new system, they benefit under certain conditions from immunity against retaliatory measures by their employer (Article L.1132-3-3 §2 of the Employment Code) and against criminal prosecution for breach of secrecy (Article 122-9 of the Penal Code).

To be eligible for immunity, the person reporting an unlawful act needs firstly to match the definition of the whistle-blower as provided for in the Sapin II Law (Article 6); ie, "an individual who selflessly and in good faith reveals or signals a felony or a misdemeanour, a serious and manifest breach of an international commitment properly ratified or approved by France, or a unilateral act issued by an international organisation on this basis, or a law or a regulation, or a serious threat or harm to the public interest, that he had personal knowledge of." Secondly, the person needs to comply with the required reporting procedure – the alert is reported in priority to the supervisor, the employer or any designated adviser. In the absence of response from the latter within a reasonable time, this alert can be sent to the judicial authority, the administrative authority or professional bodies. A further lack of response from authorities and professional bodies within three months allows the whistle-blower to make the alert publicly available, unless in the case of serious and imminent danger or risk of irreversible damage (Article 8 of the Sapin II Law). This might cover the situation where the company is likely to take all measures to eliminate the evidence thereof before it becomes public. When in doubt, the whistle-blower can seek advice from the national ombudsman (*Défenseur des droits*), who will direct him towards the relevant contact point (Article 8 IV).

Moreover, obstruction to whistle-blowers' action constitutes an offence punishable by one year of imprisonment and a EUR15,000 fine. Defamation complaints against whistle-blowers are also discouraged: the maximum fine that may be imposed on plaintiffs for abusive or dilatory complaints are increased from EUR15,000 to EUR30,000 (Article 13 of the Sapin II Law).

Compliance measures are also imposed on large entities: companies of more than 50 employees, state administrations and municipalities are under an obligation to set up appropriate alert management procedures to escalate reports from members of the personnel or external staff (Article 8 of the Sapin II Law).

Finally, a specific provision seeks to guarantee the strict anonymity of the whistle-blower and the information provided throughout the reporting process. The unlawful disclosure of such information is punishable by two years of imprisonment and a EUR30,000 fine (Article 9 of the Sapin II Law).

These protective measures against dismissal, obstruction, identity disclosure and criminal prosecution for breach of secrecy can be viewed as sufficient incentives to report misdemeanours. Other types of incentives, such as financial rewards, do not apply.

5. Enforcement

5.1 Enforcement Body

In French criminal law, the powers to prosecute and convict perpetrators of acts of corruption belong to judicial authorities and are not granted to administrative bodies.

The Public Prosecutor's Office is the key to prosecution as it is empowered to decide whether it is appropriate to institute proceedings, although civil claimants may also initiate prosecution. The local public prosecutors at every ordinary High Court (*Tribunal de grande instance*), as well as the investigating magistrate and the Criminal Chamber of the High Court when the Public Prosecutor brings cases before them, have jurisdiction to handle corruption cases.

However, this general jurisdiction is shared with specific administrative authorities, prosecutorial agencies and specialised courts.

On 1 February 2014, a National Financial Prosecutor specialised in economic and financial matters, and more specifically in corruption and tax fraud matters, was added to the judicial system.

Cases investigated and prosecuted by the National Financial Prosecutor are brought to an investigating magistrate in Paris for deeper investigation and/or directly to a dedicated Criminal Chamber of the Paris High Court (32nd Chamber) for trial.

Aside from the specific powers attributed to the National Financial Prosecutor, prosecutors at eight inter-regional specialised courts are also granted expanded territorial jurisdiction over a certain number of economic and financial offences, including some corruption offences, in highly complex matters. After carrying out a pre-trial investigation, the prosecutor may bring the case to an investigating magistrate of the same inter-regional specialised court for deeper investigation and/or directly to a specialised criminal chamber of this court for trial.

The various prosecutorial bodies are assisted by a specialised investigative service, the Central Office for the Fight Against Corruption and Financial and Tax Offences (*Office Central de Lutte contre la Corruption et les Infractions Financières et Fiscales*, OCLCIFF), created in 2013. OCLCIFF has significant resources and specialised officers to act in matters involving offences to probity, tax fraud and, more broadly, financial offences, either on its own initiative or pursuant to a request for judicial assistance (*commission rogatoire*). In addition, this unit may assist the National Police or National Gendarmerie in their investigations. It is also tasked with leading and co-ordinating, at the national and operational levels, police investigations in criminal matters and enquiries within its remit. Lastly, it is in a position to continue its investigations abroad and its relations with foreign authorities are facilitated by the fact that it is "the central point of contact in international exchanges."

In addition, a number of administrative bodies have been created, dealing with tasks that may relate to corruption issues. An Agency for the Management and Recovery of Seized and Confiscated Assets in criminal matters (*Agence de Gestion et de Recouvrement des Avoirs Saisis et Confisqués en matière pénale*, AGRASC) was created by the aforementioned law of 9 July 2010. AGRASC's duties include recovering assets seized in criminal proceedings and conducting pre-judgment sales of confiscated assets when they are no longer needed as evidence or if they may lose value (2,215 goods sold in 2017, representing EUR6.9 million). For example, in the 'ill-gotten gains' case, AGRASC auctioned nine luxury cars owned by the son of the President of Equatorial Guinea, which had been seized during the proceedings.

Tracfin is the sole centre for collecting suspicions reported by the regulated professions subject to the anti-money laundering measures. In that capacity, it receives all reports of suspicions that may concern acts of corruption.

These agencies, as well as the High Authority for Transparency in Public Life, which was created by the laws of 11 October 2013 on transparency in public life, and the Public Finance General Directorate, play a fundamental role in detecting offences, in particular corruption offences. They deal with the Public Prosecutor's Office, which gives instructions to the enquiry services and ensures they co-operate fully.

Until the creation of the FAA (see **4.1 National Legislation and Duties to Prevent Corruption**), corruption offences were prosecuted before the criminal courts only.

Some soft law is available to explain the functioning of prosecution bodies and administrative agencies. For example, as regards the National Financial Prosecutor, the circular of 31 January 2014 gives a clearer picture of the objective to be achieved; ie, to grant a specialised prosecutorial body jurisdiction over the matters that are the most complex or "likely to generate significant national or international impact."

The National Financial Prosecutor – and consequently the investigating magistrates of the financial division of the Paris High Court – were granted, inter alia:

- exclusive jurisdiction to investigate and prosecute stock market offences;
- concurrent jurisdiction with the ordinary High Courts over the offence of bribery of foreign public officials, as well as the offence of bribery of private individuals if the matter is highly complex due to the large number of perpetrators, accomplices or victims of the offence or due to the offence's geographical scope; and

- concurrent jurisdiction with the inter-regional specialised courts in economic and financial matters, and the ordinary high courts over cases involving bribery in the public sector, influence-peddling, unlawful taking of interests and favouritism, if such matters are particularly complex, and related money laundering activities.

The FAA is entitled to inform the Public Prosecutor about any act of corruption of which it might become aware (Article 3 6° of the Sapin II Law). In addition, the FAA monitors the proper implementation of the new ancillary penalty that can be imposed by judges on legal entities under Article 131-39-2 of the Penal Code, consisting of setting up a compliance programme. This monitoring involves periodic (at least annual) reports to the Public Prosecutor (Article 764-44 of the Code of Criminal Procedure). The FAA also has its own power to prosecute and punish (through its Sanctions Commission) representatives and companies or public establishments of at least 500 employees.

The Public Prosecutor, or any police officer authorised by him, is entitled to require by any means that documentation and information relevant to the investigation be provided to them. If the request is not responded to, a fine of EUR3,750 may be imposed (Articles 60-1 and 77-1-1 of the Code of Criminal Procedure).

Under specific conditions and, as appropriate, supervision of the Public Prosecutor or the investigating magistrate, police officers may carry out investigations at the suspected person's home (Articles 56, 76 and 95 of the Code of Criminal Procedure) or in any other relevant places, such as vehicles (Article 78-2-3 of the Code of Criminal Procedure), hotel rooms and bank vaults (Article 96 of the Code of Criminal Procedure) to search and seize objects and documents that could be useful for establishing the truth.

The Sapin II Law extended the scope of extraordinary procedural measures available for bribery, influence-peddling, embezzlement of public funds and related laundering activities, with investigators and prosecutorial agencies permitted to take advantage of measures such as surveillance, infiltration, wire tapping, recording conversations and filming certain premises or vehicles (Article 706-1-1 of the Penal Code).

For the execution of their tasks, the FAA's agents are entitled to require communication of any professional document (of any format) or any information held by the entity controlled. They can verify on the spot the accuracy of the provided information and interview any person who might be helpful. Any obstruction may be punished by a fine of EUR30,000 (Article 4 of the Sapin II Law).

5.2 Process of Application for Documentation

The requests for information from the Public Prosecutor or the police officer can be sent to the holder of relevant information "by any means" (Articles 60-1 and 77-1-1 of the Code of Criminal Procedure).

Pursuant to Decree No 2017-329 of 14 March 2017, FAA's empowered agents are provided with an authorisation card when they carry out on-the-spot checks, which can only take place in business premises (excluding the private person's home) and during working hours. The representative of the entity must be informed that he can be assisted by the person of his choice.

5.3 Discretion for Mitigation

The Public Prosecutor, regardless of its representative who takes action, is free to initiate prosecution against a person suspected of an offence, pursuant to the principle of discretionary prosecution (Article 40 of the Code of Criminal Procedure) and in light of the criminal policy defined by the Minister for Justice and the General Prosecutor (Article 39-1 of the Code of Criminal Procedure). In a given matter, the Public Prosecutor can discretionarily decide whether:

- to initiate prosecution, by summoning the accused person directly before a criminal court or by asking an investigating magistrate to carry out deeper investigations;
- to implement alternatives to prosecution (such as CRPC or public interest judicial convention); or
- to drop the case (Article 40-1 of the Code of Criminal Procedure).

The appointment and functioning rules of the FAA tend to provide its agents with autonomy in the exercise of their tasks. The FAA is led by a magistrate (the first director being Charles Duchaine) who is not allowed to receive or solicit any instruction from any administrative or governmental authority regarding its monitoring and prosecution activities. The Sanctions Commission has a separate staff and activity (Article 2 of the Sapin II Law). The FAA seems to enjoy wide leeway in deciding whether a company should be prosecuted before the Sanction Commission so that injunctions or sanctions be imposed.

5.4 Jurisdictional Reach of the Body/Bodies

See **5.3 Discretion for Mitigation**.

5.5 Recent Landmark Investigations or Decisions Involving Bribery or Corruption

Among the significant judgments recently handed down in the field of corruption, the judgment rendered by the Court of Cassation on 14 March 2018 should be mentioned. It rejected the appeal against the Court of Appeal of Paris's decision of sentencing a French company to a maximum fine of EUR750,000 for bribery of foreign public officials. In its ruling, the Court of Cassation stated that (i) since the offence of bribery of a foreign public official had been decided and organised in France, where bribes also flowed through, French courts had jurisdiction on the case and (ii)

the principle of non bis in idem cannot be applied whenever one of the constituent elements of the corruption offence has been committed in France (Court of Cassation, Crim Ch., 14 March 2018, No 16-82.117).

Another example is the judgment of the Paris Criminal Court of 27 October 2017 sentencing the Vice-President of Equatorial Guinea to a suspended imprisonment of three years, a suspended fine of EUR30,000,000 and the confiscation of all his seized property for fraudulently building a considerable estate in France (High Court of Paris, 27 October 2017, appeal pending, see www.transparency-france.org).

Furthermore, as said above, one of the major innovations of the Sapin II Law was the introduction of the public interest judicial convention.

Although multiple conventions have been concluded since its entry into force, three of them have been concluded in matters of corruption with French companies. The first two companies agreed to pay a public interest fine of EUR2,700,000 and EUR800,000 respectively as well as to implement a compliance programme within an 18-month and two-year period under the FAA's supervision. Both conventions were validated by the High Court of Nanterre on 23 February 2018.

More recently, on 4 June 2018, a public interest judicial convention was concluded with a major French bank concerning a corruption case in Libya. This is the first convention negotiated in co-operation with the US Department of Justice. Indeed, the two prosecuting authorities co-ordinated their action to reach simultaneously the conclusion of a public interest judicial convention and a deferred prosecution agreement. In total, therefore, the bank has agreed to pay USD1.34 billion to resolve the two disputes in the USA and France, the sanctions in France being a public interest fine of EUR250,150,755 and a two-year supervision of its compliance programme by the FAA. According to the National Financial Prosecutor's Office in a communiqué dated 4 June 2018, "the first co-ordinated resolution agreement constitutes significant progress in the fight against international corruption."

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Generally speaking, the judgments issued in 2016, 2017 and 2018 in cases involving breaches of the duty of probity suggest that French courts are increasingly severe, with more and more recourse to non-suspended prison sentences for economic and financial crimes.

6. Review and Trends

6.1 Assessment of the Applicable Enforced Legislation

In conclusion, in line with the stiff penalties introduced over the last years by the French Parliament for acts of corruption, the courts show increasing severity in this field.

Likewise, investigating judges increasingly seek to ensure effective recovery of fines at an early stage of the proceedings, by carrying out prominent seizures and by only accepting to release indicted people on bail, once colossal sums have been secured (eg, several million euros imposed on individuals).

According to the 2017 FAA report, prosecutors handled 758 proceedings relating to probity offences in 2016. The most frequently prosecuted offences were bribery (134 prosecutions), misappropriation of public property (91 prosecutions), illegal taking of interest (64 prosecutions) and influence-peddling (23 prosecutions). Finally, 297 of the prosecuted probity offences resulted in a conviction.

In 2017, Transparency International ranked France 23rd in its corruption perceptions index in the public sector. France was attributed a score of 70, being noted that it used a scale of 0 to 100, where 0 is highly corrupt.

The first cases implementing the Sapin II Law confirm that it has given a modern twist to French anti-bribery legislation. Most observers agree that it constitutes progress in the prevention, detection and repression of breaches of probity, including corruption. In particular, the public interest judicial convention constitutes a 'strategic' justice tool dedicated to an imperative of efficiency and dominated by an economic logic based on speed and predictability for both the company concerned and the State. Nevertheless, its limited scope to legal entities could restrict its effectiveness.

Although innovative, the Sapin II Law undoubtedly remains an imperfect tool and will give rise to various calls for improvement, starting with the OECD's working group, which will examine this Law in 2020 as part of its fourth round of evaluation.