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# White-Collar Crime

**France**
Bougartchev Moyne Associés AARPI

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# Law and Practice

*Contributed by Bougartchev Moyne Associés AARPI*

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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, and specialising in criminal law. They are supported by a team of around ten lawyers. As litigators recognised throughout their profession, the founders and their team assist public and private enterprises such as banks, financial institutions and insurance companies – as well as 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, and with the benefit of privileged relations with counterpart law firms on all continents. Primary practice areas are: white-collar crime, compliance, investigations, regulatory disputes, civil and commercial litigation as well as crisis and reputational injury management.

## Authors

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**Emmanuel Moyne** began his career in 1997 as in-house counsel within asset management company White Gestion SARL, a subsidiary of Goldman Sachs, and was admitted to the Paris bar in the same year. He then practised for ten years in Gide's litigation and white-collar crime department before joining the dispute resolution practice at Linklaters LLP in Paris in 2007 as a counsel. Emmanuel has acted in numerous white-collar crime cases, in regulatory, civil and commercial disputes as well as in industrial and environmental accident claims. He advises his clients on complex proceedings, often involving several foreign jurisdictions, as well as on compliance programmes, anticorruption due diligence and internal investigations. A former "Secrétaire de la Conférence des Avocats" of the Paris bar, Emmanuel is a member of the "Conseil National des Barreaux" working group on internal investigations and an Officer of the Criminal Law Committee of the International Bar Association. He has lectured at the University of Montpellier (mutual assistance and extradition proceedings) and the University of Sceaux (environmental criminal law) and authored various articles on the European arrest warrant, safeguarding business secrecy, managing criminal risk, corruption, Sapin II Law, tax fraud, French Blocking Statute, cybercriminality, and restitution of artworks. He recently defended the interests of a leading company, one of the first six firms audited by the French Anticorruption Agency, as well as a leading financial institution audited by the French Prudential Supervisory Authority, and obtained decisions not to refer the cases to the Sanctions Commission of the respective authorities.

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## 1. Legal Framework

### 1.1 Classification of Criminal Offences

Under French criminal law, there are three categories of offences: minor offences (punishable by financial penalties only), misdemeanours (punishable by imprisonment of between two months and ten years) and crimes (punishable by more than ten years imprisonment). The last two categories of offences are characterised by the following constituent elements being met:

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

Pursuant to Article 121-4 of the Penal Code (PC), the perpetrator is the person who commits, or attempts to commit, the offence. The liability and sanctions incurred are identical in both cases. French law considers that an attempt is committed where, being demonstrated by a beginning of execution, it was suspended – or failed to achieve the desired effect – solely through circumstances independent of the perpetrator's will (Article 121-5 of the PC). Moreover, as a general principle, the attempt to commit a given misdemeanour is punishable only if this is expressly provided by law.

### 1.2 Statute of Limitations

Law No 2017-242 of 27 February 2017 brought about the doubling of the limitation period for misdemeanours and crimes, now raised to six and twenty years respectively. With respect to minor offences, the limitation period remains one year. These ordinary rules have exceptions in several areas such as libel, drug trafficking and terrorism.

In accordance with Articles 7, 8 and 9 of the Code of Criminal Procedure (CCP), the starting point of the limitation period depends on the nature of the offence, whether it is instantaneous or continuous. Where the offence is committed through an act that is carried out in a single moment, the limitation period shall begin on the day on which the offence is committed. If the offence extends over time, the statute of limitations shall run from the day on which the criminal activity ceased.

However, some rules derogate from this dichotomy between instantaneous and continuous offences. The starting point of the time limit may be delayed in certain specific cases: when a minor is a victim of an offence, for example, or when the offence is secret (*occulte*) or concealed (*dissimulée*).

In the latter case, French courts have decided that the limitation period only runs from the day on which the offence could be discovered under circumstances enabling prosecution (Cass. crim., 10 December 1925, Bull. 1925 n° 339). This principle was then enshrined by the above-mentioned reform in Article 9-1 of the CCP. This deferral of the starting point of the statute of limitations is particularly relevant in white-collar crime cases as it regularly applies to, for instance, breach of trust, misuse of corporate assets, bribery, influence peddling or embezzlement of public funds.

The French legislator, fearing the risk of imprescriptibility of offences, however specified that prosecution of a misdemeanour would, in any event, be time-barred 12 full years after the day on which the offence was committed.

## 1.3 Extraterritorial Reach

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 facts are committed in French territory. However, French courts also have jurisdiction to rule on offences committed outside the territory in several other cases.

French law may also apply on the grounds of the nationality of the author or victim:

- when the perpetrator is French, French law applies to all crimes but also to misdemeanours committed in any foreign country, subject to the dual criminality requirement (Article 113-6 of the PC); and
- when the victim is French, French law applies to all crimes and misdemeanours punishable by imprisonment, regardless of whether the perpetrator is French (Article 113-7 of the PC).

According to Article 113-8 of the PC, in the cases provided for by Articles 113-6 and 113-7 of the same code, the Public Prosecutor can only begin a prosecution following a complaint lodged by the victim (or any rightful claimant) or an official denunciation from the country concerned.

It should be noted that, with regard to bribery and influence-peddling specifically, the dual criminality requirement was abolished by Law No 2016-1691 dated 9 December 2016 (the Sapin II Law). Furthermore, the Sapin II Law abandoned the requirement of Article 113-8 of the PC for these two offences. 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.

French law may also apply when jurisdiction is granted to French courts by an international convention to which France is a party.

Moreover, based on principles relating to the connection between offences or their indivisibility (Articles 203 and 382 of the CCP), 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 a foreigner who did not commit any unlawful act in French territory, as long as his or her acts had inextricable links with acts committed by other indicted persons in France (Court of Cassation, Crim. Ch., 20 September 2016, No 16-84026).

Besides, application by French courts of the ne bis in idem principle 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 ne bis in idem applies to foreign decisions and agreements that have become final (Article 113-9 of the CCP).

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

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

## 1.4 Corporate Liability and Personal Liability

Under Article 121-2 of the PC, legal entities may be criminally liable for all criminal offences, if the offences are committed on their behalf by their corporate bodies or representatives. Therefore, in order to hold the legal entity liable, 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.

The principle of discretionary prosecution enables proceedings against either the legal entity only, the individual(s) only or both, it being specified that the condemnation of the individual(s) is not a prerequisite to sanction the legal entity and vice versa.

In addition to criminal liability, there is also a risk of civil liability. Indeed, legal entities as well as individuals may be ordered by the judge to pay compensation for loss or damages arising from the offence they have committed (see **1.5 Damages and Compensation** below).

Pursuant to the principle of individual criminal liability, only the perpetrator of and the accomplice to an offence can be prosecuted and sentenced for it (Article 121–1 of the PC). Therefore, in the context of a transaction involving a loss of legal existence (eg, a merger, a total demerger or a dissolution), the successor entity cannot be held liable for the offences committed by the other entity before the transaction if a final sentence has not been ordered before the date of the transaction (Court of Cassation, Crim. Ch., 20 June 2000, No. 99–86.742; Court of Cassation, Crim. Ch., 23 April 2013, No. 12–83.244). Conversely, should a final sentence be pronounced before the date of the transaction, the sanction will be transferred to the successor.

## 1.5 Damages and Compensation

Civil action may be brought before civil courts or, together with the public action (see **2.1 Enforcement Authorities** below), before criminal courts.

However, in order to claim damages for the loss suffered because of the offence, the plaintiff must meet certain conditions: he or she must have legal capacity and interest to act. In addition, the alleged harm must be personal, certain and actual and must have been caused by the offence.

The victim of an offence has the right to choose between civil and criminal proceedings. This choice is irrevocable (Article 5 of the CCP), but irrevocability applies only when the victim brought the civil action before the civil courts in the first place (Article 426 of the CCP) and is subject to some softening rules.

The civil action brought before the civil judge is governed by the rules of civil procedure. If the civil judge decides before the public action is initiated, the results will be independent. On the other hand, if the public action is initiated before or during the civil proceedings, the criminal res judicata has authority over the civil: the judgment of the action brought under Article 2 is suspended (Article 4 of the CCP).

It should be noted that under French law, class actions are only possible for a very few consumer law cases. Class action is therefore defined by the Consumer Code (Article L. 623-1) as an action taken by a consumer advocacy association in order to obtain reparation for anticompetitive practices or individual damages caused by material damages suffered by other consumers in the same situation.

Finally, French law provides that accredited non-governmental organisations are authorised, in certain circumstances, to exercise the rights of a civil claimant for a certain number of offences, in particular for various corruption offences (Article 2-23 of the CCP).

## 1.6 Recent Case Law and Latest Developments

The judgments issued in recent years in cases involving breaches of the duty of probity suggest that French courts are becoming more severe and tending towards an alignment of French sentences with US ones, with increasing recourse to non-suspended prison sentences and huge financial penalties for economic and financial offences.

On 20 February 2019, the Paris Criminal Court sentenced a Swiss bank to a record fine of EUR3.7 billion – three of its former representatives having been sentenced to fines ranging from EUR200,000 to EUR300,000 and suspended imprisonment sentences ranging from twelve to 18 months – on the grounds of unlawful financial and banking solicitation of French prospects and aggravated money laundering of the proceeds of tax fraud. French penalties were often criticised for not being high enough, especially for major economic players. This decision, which is unprecedented, seems to announce a new penalty ceiling, it being specified that the bank and the three former representatives were condemned to pay EUR800 million for damages to the French state. It should be noted that the sentenced persons filed an appeal against the decision, which is questionable in many ways.

It should, however, also be noted that, further to a decision rendered by the Court of Cassation on 11 September 2019 (Court of Cassation, Crim. Ch., 11 September 2019, No 18-81040), the basis for the proportional fine – which may be increased to half the value of the assets or funds involved in the money laundering – in cases of laundering of tax-fraud proceeds is the amount of the unpaid taxes and not the taxable amounts that have been concealed.

On 13 September 2019, a preeminent politician, mayor of a town of 65,000 inhabitants, was sentenced to four years' imprisonment as well as ten years of ineligibility for tax fraud. This sentence was the one demanded by the Public Prosecutor's office. On 18 October 2019, the same politician was sentenced to five year's imprisonment as well as ten years of ineligibility for aggravated laundering of tax fraud. The individual declared he would file an appeal of the two decisions.

Since the introduction of the French equivalent of the US deferred prosecution agreement (DPA), the "public interest judicial convention" (convention judiciaire d'intérêt public; CJIP), which is discussed in greater detail in **2.7 Deferred Prosecution**, several have been concluded.

On 30 October 2017, the Swiss branch of a British bank concluded the first CJIP with the National Financial Prosecutor's office and agreed to pay EUR300 million (a EUR158 million fine and EUR142 million to the French state as damages) to settle a long-running investigation into tax evasion by French citizens via its private bank in Switzerland.

On May 24, 2018, a CJIP was concluded with a French bank concerning bribery of Lybian public officials. The convention was validated by the High Court of Paris on 4 June 2018. This is the first convention negotiated in co-operation with the US Department of Justice. Indeed, the two prosecuting authorities co-ordinated their action in order to reach simultaneously the conclusion of a CJIP and a DPA (with respect to the Lybian and London Inter-Bank Offered Rate matters). The French bank has agreed to pay USD1.34 billion to resolve the disputes in the United States and France, the sanctions in France being a public interest fine of approximately EUR250 million and a 2-year supervision of its compliance programme by the AFA. According to the National Financial Prosecutor's Office in a communiqué dated 4 June 2018, "the first co-ordinated resolution agreement consti-

tutes significant progress in the fight against international corruption".

A major American multinational technology company, which has been the target of a judicial investigation in France for aggravated tax fraud and money laundering since 2015, agreed on 12 September 2019 to pay nearly EUR1 billion to settle all its disputes with the French tax authorities and the National Financial Prosecutor's Office. As part of this agreement, the company agreed to pay a EUR500 million fine to stop the investigation by the National Financial Prosecutor's Office and to pay EUR465 million in catch-up tax to close the recovery proceedings brought against it. This convention is a direct application of Law No 2018-898 of 23 October 2018 (the Anti-Fraud Law), which extended the use of the CJIP to cases of tax fraud, whereas it was initially reserved for cases of corruption, influence peddling and the laundering of tax-fraud proceeds.

## 2. Enforcement

### 2.1 Enforcement Authorities

In French criminal law, the powers to prosecute and convict perpetrators of criminal offences 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 by way of a civil party complaint (*plainte avec constitution de partie civile*) (see **2.2 Initiating an Investigation** below) or direct summons to appear before a criminal court. 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 criminal cases.

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

Prosecutors at eight inter-regional specialised courts – as well as the Investigating Magistrate and the criminal chambers of these inter-regional courts – are granted expanded territorial jurisdiction over a certain number of economic and financial offences, in highly complex matters.

Moreover, 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 to deal with those matters that are most complex or " likely to generate significant national or international impact" (Circular of 31 January 2014, JUSD1402887C).

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 geographic 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.

With regard to economic and financial offences, the abovementioned 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). 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, 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 in 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. 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 (Cass. crim., 30 June 2010, no. 09-83.689).

Finally, under French law, the main administrative authorities empowered to prosecute specific administrative – but not criminal – offences are the following:

- the Financial Markets Authority (*Autorité des Marchés Financiers*; AMF), which is an independent public authority with a remit to:
  - (a) safeguard investments in financial products;
  - (b) ensure that investors receive material information; and
  - (c) maintain orderly financial markets, and which has been granted with:
    - (i) a normative power;
    - (ii) the right to conduct investigations and inspec-

tions; as well as
(iii) enforcement powers enabling it to pronounce financial and disciplinary sanctions in the field of securities law;

- the Competition Authority (*Autorité de la concurrence*; AdlC), which is specialised in the control of anti-competitive practices and the control of mergers and which has the power to investigate, issue injunctions, order financial penalties, accept settlements and grant leniency to companies that co-operate by helping to detect or establish the existence of cartels;
- the Prudential Control and Resolution Authority (*Autorité de contrôle prudentiel et de résolution*; ACPR) which is in charge of the banking sector's regulation and whose enforcement Committee is responsible for sanctioning various breaches of the legislative and regulatory provisions applicable to institutions subject to the control of the ACPR, especially in the field of money laundering and terrorism financing; and
- the Anti-Corruption Agency (*Agence Française Anticorruption*; AFA), whose main duty is to verify that certain legal entities (see **3.3 Anti-bribery Regulation** below) implement programmes to prevent and detect offences of corruption and influence-peddling. The AFA has been empowered to send warnings to non-compliant companies and to refer cases to its Sanctions Committee so as to prosecute and punish legal entities who breach the prevention and detection obligations prescribed by the law.

### 2.2 Initiating an Investigation

A criminal investigation may begin in different ways. In this regard, one must distinguish between the three different forms a criminal investigation can take.

An investigation of flagrance (*enquête de flagrance*) may be opened when either a crime punishable by imprisonment is in the process of being committed or has just been committed or when the suspect is found in possession of something which would implicate his or her participation in the offence (Article 53 of the CCP). Therefore, such investigations may be opened only by enforcement policy officers informed of a flagrance offence or having directly witnessed it. It will be led under the supervision of the Public Prosecutor who must be informed immediately of the commission of the offence (Article 54 of the CCP).

A preliminary investigation (*enquête préliminaire*) may be initiated for any suspected offence either by the Public Prosecutor, following the complaint of a victim, a denunciation, a press article, etc, or by law enforcement officers on their own initiative (Article 75 of the CCP), generally following a criminal complaint.

A judicial investigation (*information judiciaire*) is led by an Investigating Magistrate following an opening submission (*réquisitoire introductif*) made by the Public Prosecutor; or a civil party complaint (*plainte avec constitution de partie civile*), which can only be lodged after an ordinary complaint which the Public Prosecutor lets the victim know he or she will not prosecute; or if a three-month period has run from the filing of that ordinary complaint (Article 85 of the CCP).

### 2.3 Powers of Investigation

In general, law enforcement officers, acting under the supervision of the Public Prosecutor or an Investigating Magistrate, have broad powers to carry out all actions necessary to determine the truth. However, such powers vary depending on the type of investigation carried out and the type of offence.

Police officers may hear any witness who may provide information in one or more interviews, without any duress. If necessary, for the purposes of the investigation, the witness may be retained under duress, for a maximum of four hours (Articles 62 and 77 of the CCP).

Provided there are one or more plausible reasons to suspect that a person has committed or attempted to commit a crime or offence punishable by imprisonment, that person cannot be heard as a simple witness and shall be placed under police custody – with all the guarantees provided by the law for such a coercive measure (ie, the right to be examined by a doctor, the right to talk to a lawyer before being heard and to be assisted by him or her during interviews, the right to an interpreter, etc (Articles 63-1 and seq and 77 of the CCP)) – if such a measure is the only way to achieve at least one of the following objectives:

- allowing investigations involving the presence or participation of the person;
- preventing the person from altering the evidence or material clues;
- preventing the person from tampering with witnesses or victims and their families or loved ones;
- preventing the person from consulting other persons who may be co-authors or associates; or
- ensuring the implementation of measures to stop the crime or offence.

In principle, the person placed under custody may not be held more than 24 hours. However, the detention may be extended for a further period of up to 24 hours on authorisation of the Public Prosecutor (Articles 63 and 77 of the CCP). For certain specific offences, such as drug trafficking or terrorism, the police custody may exceptionally be subject to two supplementary extensions, each of 24 hours (Articles 706-88 and seq of the CCP).

A law enforcement officer may also order any person, establishment or organisation, whether public or private, or any public services likely to possess any documents relevant to the inquiry in progress, including those produced from a

registered computer or data processing system, to be provided with those documents (Article 60-1 of the CCP).

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 CCP) or in any other relevant place, such as vehicles (Article 78-2-3 of the CCP), hotel rooms and bank vaults (Article 96 of the CCP) to search and seize objects and documents that could be useful for establishing the truth.

Whereas in investigations of flagrance, police officers may carry out dawn raids on their own initiative without any prior authorisation of the searched party nor the authorisation of a judge (Article 56 of the CCP), such operations may not be conducted without the express consent of the suspected person or a reasoned order of the "liberty and custody judge" in the course of preliminary investigations. This reasoned order is easily granted to the Public Prosecutor.

Finally, for certain white-collar offences – including corruption and influence peddling offences, tax fraud offences when they are committed by an organised gang, and market abuses offences when they are committed by an organised gang – criminal authorities may take advantage of measures such as surveillance, infiltration, wiretapping, recording conversations and filming certain premises or vehicles (Article 706-1-1 of the CCP).

It is to be noted that when there are one or more plausible reasons to suspect that a person has committed or attempted to commit an offence, it is also possible to hear this person under the regime of "free hearing" (Article 61-1 of the CCP), which allows him or her to benefit from certain rights (the right to know the qualification, the alleged date and place of the offence, the right to leave the offices where the hearing takes place, the right to an interpreter, the right to make statements, answer questions or keep quiet, the right to be assisted by a lawyer if the offence is punished by imprisonment and the right to legal advice).

## 2.4 Internal Investigations

The practice of internal investigation is still under development in France. This approach to self-investigation disrupts the traditional balance of French criminal procedure, where investigations are traditionally conducted by police services under the authority of the Prosecutor or a judge. As a result, the internal investigation is not governed by any laws, except the ethical rules adopted by the Paris Bar Association to regulate internal investigations led by lawyers and case law.

Moreover, further to the Sapin II Law, a company may be encouraged to initiate an internal investigation in order to benefit from the possibility of concluding a CJIP (see **2.7 Deferred Prosecution** below). Indeed, according to the guidelines on the application of this criminal settlement published by the National Financial Prosecutor's Office and the French Anti-corruption Agency on 27 June 2019, among the conditions taken into account when assessing the possibility of concluding a CJIP, is the opening, by the legal entity, of an internal investigation related to the facts and dysfunctions of the compliance system in question, which should also contribute to the determination of individual responsibilities and identification of the main witnesses.

## 2.5 Mutual Legal Assistance Treaties and Cross-Border Co-operation

France is party to many multilateral and bilateral instruments ensuring co-operation in criminal matters.

As a member of the European Union, France is part of several mechanisms that aim at facilitating the exchange of information between European countries. Articles 695 to 695-10 of the CCP govern the specific rules related to judicial co-operation between members of the EU. They were created and reformed following the EU Directive 2014/41/EU dated 3 April 2014, which created the "European Investigation Order". Pursuant to this Directive and its national implementation, such an order – requesting the gathering and transfer of evidence – can be executed without additional formalities in any other EU member state.

There are also specific provisions governing the European Arrest Warrant. Under Articles 695-11 and seq of the CCP, such a warrant can be delivered to a foreign counterpart in order to require its assistance in the arrest and presentation to competent authorities of a person accused of a serious offence in France. Specific mechanisms concerning the execution of confiscation orders can also be found in French law (Articles 713 and seq of the CCP).

Members of the European Union can also rely on the Eurojust Unit, created in 2002 to fight against severe forms of criminality, which is an autonomous legal entity in charge of promoting and improving the co-operation between member states' authorities.

On the international stage, France is party to a number of bilateral agreements (MLATs) regulating the co-operation between countries. For example, concerning extradition proceedings, France is a signatory of more than sixty bilateral agreements such as the bilateral agreement between France and China dated 20 March 2007.

France is also signatory of memoranda of understanding (MOUs). For example, the 2002 IOSCO Multilateral Memorandum of Understanding concerning the consultation, co-operation and the exchange of information (MMoU) is used by the AMF in order to exchange crucial information with its foreign counterparts.

France has taken part in the conclusion of several multilateral agreements such as the OECD Convention on combating bribery of foreign officials in international business transactions dated 17 December 1997.

Several recent high-profile cases demonstrate that European and international co-operation works efficiently.

That being said, it has to be underlined that these mechanisms of co-operation are express derogations from the French "blocking statute".

Indeed, concerning the transmission of evidence in France to foreign authorities, the blocking statute (ie, the Law No 68-678 dated 26 July 1968) prohibits any person from disclosing documents or information of an economic, commercial, industrial, financial or technical nature intended to constitute evidence for foreign judicial proceedings, except where the disclosure occurs through the mechanisms provided by international treaties or agreements such as the Hague Convention. Such a prohibition is sanctioned as a criminal offence by a fine. Indeed, non-compliance with these provisions is punishable by a term of imprisonment of up to six months and a fine of up to EUR18,000 for individuals and EUR90,000 for legal entities.

However, both the effectiveness and the efficiency of this law have been criticised. As a matter of fact, in front of American judges, the blocking-statute defence to discovery has always failed. Foreign judges believe that this Law lacks "hardship" since it has only led to one conviction, in 2007.

Several propositions were made, notably in 2012 and 2019, to improve the French blocking statute.

### 2.6 Prosecution

Further to Article 1 of the CCP, the principle is that public action is initiated and exercised by the Public Prosecutor.

However, prosecution may also be initiated by the victim of the offence or by accredited non-governmental organisations.

The prosecutor then has the most important role insofar as he or she "receives complaints and denunciations and assesses the appropriate action to be taken" (Article 40 of the CCP, which also provides that every constituted authority and every public officer or civil servant who, in the performance of his or her duties, has gained knowledge of the existence of a crime or of a misdemeanour, is obliged to notify forthwith the Public Prosecutor of the offence and to provide him or her with any relevant information, official reports or documents). When informed of the commission of an offence, he or she has the option of not prosecuting (dismissal without further action), prosecuting or using an alternative to prosecution.

In the same way as for investigations, administrative authorities (AMF, Competition Authority, ACPR, etc) or the government authorities themselves (tax authorities, customs authorities, etc) have the power to initiate proceedings in order to impose administrative sanctions on natural or legal persons who fail to comply with their obligations in a particular field.

### 2.7 Deferred Prosecution

The Sapin II Law introduced a true settlement procedure, inspired by the US DPA, with no acknowledgment of guilt. Called the CJIP, this new alternative dispute resolution mechanism is only available for legal entities suspected of acts of bribery, influence peddling and the laundering of tax-fraud proceeds, it being specified that the Anti-Fraud Law of October 2018 extended the use of this mechanism to tax fraud offences.

This settlement procedure is an option made available for the Public Prosecutor before the opening of criminal proceedings as well as to the Investigating Magistrate before the closing of his or her investigation, at the request of or in agreement with the Public Prosecutor. Should this procedure be initiated, the accused legal entity may be required 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 to spread the fine over a maximum of one year; and/or
- set up, under the AFA's supervision, a compliance programme for three years in line with the measures described above; and, if necessary
- compensate the victims for their loss.

Public prosecution would only be precluded once all obligations have been performed, it being specified that the victim would retain the ability to claim compensation for his or her loss before the civil courts and that the legal entity's executives would remain criminally liable before the criminal jurisdictions.

Therefore, negotiating and concluding a CJIP does not close the whole criminal case by itself. In practice, attorneys tend to negotiate in parallel that the charges against the individuals be dismissed when a CJIP is concluded. Public Prosecutors and Investigating Magistrates are very cautious about this and most of the time are eager to prosecute or refer the individuals to the criminal court.

On 30 October 2017, the Swiss branch of a British bank concluded the first CJIP with the National Financial Prosecutor's office (see **1.6 Recent Case Law and Latest Developments** above). Since then, several CJIPs have been concluded.

### 2.8 Plea Agreements

"Pleading guilty" is recognised under French law through the mechanism of appearance on a preliminary admission of guilt (*comparution sur reconnaissance préalable de culpabilité*; CRPC). This procedure allows the Public Prosecutor's office, or the Investigating Magistrate, to offer directly and without a trial, on its own initiative or at the request of the accused or his or her lawyer, one or more penalties to a person, either legal or natural, who acknowledges the acts of which he, she or it is accused (Articles 495-7 to 495-16 of the CCP). If the accused accepts the penalty(ies) proposed, the presiding judge of the High Court must then approve such penalty(ies). Use of this procedure results in a criminal conviction because the aforementioned court judgment approving the penalty(ies) is deemed a conviction.

Since the CRPC is applicable to most misdemeanours (it is only excluded for a few ones, among them involuntary manslaughter), it should be considered as an option for both the legal person and the individual(s) concerned in cases where the conclusion of a CJIP is excluded.

It should be noted that these new settlement tools – CRPC and CJIP – have been recently introduced under French law and that numerous cases are still referred to criminal courts, where legal persons and individuals can, with the help of their lawyers, put forward their arguments and prove their innocence.

## 3. White-Collar Offences

### 3.1 Criminal Company Law and Corporate Fraud

In addition to concealment (see 3.11 Concealment below), the main general offences applicable to business are misuse of corporate assets, breach of trust, fraudulent obtaining and forgery. For all these offences, a criminal intent is required.

French criminal law proscribes the misuse of corporate power or assets, which is defined, with respect to joint-stock companies, as the use of company property or credit, or the misuse of powers or voting rights by a company chairman, director, member of the executive or supervisory board, or de jure or de facto manager, in bad faith and in a manner that he or she knows is contrary to the interests of the company, for personal purposes or to benefit another company or business in which they are directly or indirectly involved (Articles L.242-6 and L242-30 of the Commercial Code (Ccom)). Specific regulations apply to de jure and de facto managers of commercial enterprises with different structures (partnerships limited by shares, simplified joint-stock companies and limited liability companies).

Individuals may incur a penalty of up to five years' imprisonment, a fine of up to EUR375,000 and various additional penalties, while legal persons may incur a fine of up to EUR1.875 million and various additional penalties.

With respect to joint-stock companies and limited liability companies, the use of company property or credit as described above may be punished by a term of imprisonment of up to seven years and by a fine of up to EUR500,000 in cases where the offence was accomplished or facilitated by an agreement concluded with, or an account opened in, a foreign entity, or thanks to the interposition of a natural or legal person, or of any entity or trust or similar institution registered abroad.

This offence was almost not subject to any period of limitation since the said period began to run only when the facts were discovered and in circumstances allowing for a prosecution. It is now subject to a 12-year limitation period.

Under Article 314-1 of the PC, breach of trust is the act of "embezzling funds, securities or any assets that have been delivered in order to be returned, represented or for a specific use". Individuals may incur a prison term of up to three years, a fine of up to EUR375,000 and various additional penalties, while legal persons may incur a fine of up to EUR1.875 million and various additional penalties. These sanctions may be increased to up to seven years and EUR750,000, notably when the offence is committed by a person making a public appeal with a view to obtaining the transfer of funds or securities, either for his or her own account or as the manager or legally employed or de facto employee of an industrial or commercial company (Article 314-2 of the PC).

The delivery is the prior condition of the offence. The asset must then be embezzled: it is sufficient for the owner not to be able to exercise his or her rights over the asset to characterise the action as embezzlement (Court of Cassation, 2 December 1911 – Court of Cassation, 10 May 1989).

Since a decision of the Court of Cassation dated 16 December 2015 (Court of Cassation, Crim. Ch., 16 December 2015, No. 14-83140), this offence is applicable to all intangible assets capable of appropriation. It may therefore be used in the case of a violation of business secrecy.

Under Article 313-1 of the PC, fraudulent obtaining is the act of "misleading a person either by the use of a false name or quality, or by the abuse of a true quality or by the use of deceptive practices, and determining her to deliver funds, securities or services or to consent a deed, operating obligation or discharge". Individuals may incur a prison term of up to five years, a fine of up to EUR375,000 and various additional penalties, while legal persons may incur a fine of up to EUR1.875 million and various additional penalties. These sanctions may be increased to up to seven years and to EUR750,000 in cases of aggravating circumstances and may be doubled if the offence is committed by an organised gang.

The date of the delivery constitutes the starting point of the statute of limitations (Court of Cassation, 7 January 1944). Besides, the attempted fraudulent obtaining is punishable.

French criminal law punishes forgery (ie, any fraudulent alteration of the truth that is liable to cause harm), whether created by any means in a written document or any other medium of expression, the object of which is, or the effect of which may be, to provide evidence of a right or of a situation carrying legal consequences (Article 441-1 of the PC).

Individuals may incur a penalty of up to a three years' imprisonment, a fine of up to EUR45,000 and various additional penalties, while legal persons may incur a fine of up to EUR225,000 and various additional penalties.

### 3.2 Bribery, Influence Peddling and Related Offences

Under French criminal law, the prosecution of bribery revolves around the status of the person bribed so that a specific offence exists for each type of person bribed. The French legislator has thus criminalised bribery of:

- domestic public officials (Articles 433-1 and 432-11 of the PC);
- domestic judicial staff (Article 434-9 of the PC);
- private individuals (Articles 445-1 and 445-2 of the PC);
- foreign or international public officials (Articles 435-1 and 435-3 of the PC); and
- foreign or international judicial staff (Article 435-9 of the PC).

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 or her position.

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 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 or her position, duties, mandate or activities, or facilitated thereby; or accepting the proposal of a 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 or her 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 or her position, duties, mandate or activities, or facilitated thereby. The mere receipt of a bribe thus constitutes an offence in itself.

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 PC). Additional penalties may also be imposed on such persons.

Legal entities are liable for a fine of EUR5 million, which may be increased to double the proceeds generated by the offence, and additional penalties (Articles 433-25 and 434-47 of the PC).

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

Active or passive bribery of foreign public officials and of foreign or international judicial staff is punishable by a term of 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, 435-1, 435-9, 435-7 and 435-15 of the PC). 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 PC). Additional penalties are also provided (Articles 435-14 and 435-15 of the PC).

Active and passive bribery of private individuals by individuals is punishable by 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 (Articles 445-1 and 445-2 of the PC), as well as additional penalties (Article 445-3 of the PC), 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 additional penalties (Article 445-4 of the PC).

Influence-peddling (*trafic d'influence*) is an offence that occurs when any person (whether a private person or official) who has real or apparent influence on the decision-making of an authority abuses 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 PC) or a domestic judicial official (Article 434-9-1 of the PC) or a public official from a public international organisation (Articles 435-4 and 435-2 of the PC) or a judicial official from an international court (Articles 435-8 and 435-10 of the PC) or, following the Sapin II Law, a public official from a foreign state (Articles 435-4 and 435-2 of the PC). Furthermore, the PC 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 PC).

Penalties similar to bribery are provided for influence-peddling.

Other behaviours involving public officials which may constitute criminal offences under French law include:

- embezzlement of public funds (Articles 432-15 of the PC), which is punishable with a term of 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;
- misappropriation of public funds (Article 432-10 of the PC) or unlawful taking of interest (Article 432-12 of the PC), which is punishable with a term of imprisonment of up to five years and a fine of up to EUR500,000, which may be increased to double the proceeds generated by the offence; and
- favouritism (Article 432-14 of the PC), which is punishable with a term of imprisonment of up to two years and a fine of up to EUR200,000, which may be increased to double the proceeds generated by the offence.

### 3.3 Anti-bribery Regulation

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 million. 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 million will also be subject to this obligation.

Persons subject to this obligation must therefore take measures, under the AFA's supervision, to prevent and detect the commission, in France or abroad, of acts of corruption or influence peddling by establishing a compliance programme consisting in the following measures:

- adopting a code of conduct, integrated into the internal regulations, and describing the behaviour to be prohibited;
- implementing an internal alert system;
- establishing a risk map detailing 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 AFA to assess the quality and effectiveness of the preventative measures – through the conduct of inspections during which the Agency may have access to any documents and hear any individuals – 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 Enforcement Committee, regardless of the communication of any finding of a criminal offence for acts of corruption or influence-peddling to the Public Prosecutor.

The Enforcement Committee of the AFA 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 EUR1million for legal entities).

On 4 July 2019, the Enforcement Committee of the AFA rendered its first decision. While the AFA had referred a company and its CEO on the grounds of breaches of the above-mentioned measures, the Enforcement Committee dismissed the case.

### 3.4 Insider Dealing, Market Abuse and Criminal Banking Law

French law provides for a whole series of offences regulating market abuse and banking operations.

Market abuse can receive both a criminal and an administrative qualification. Thus, it can be investigated, prosecuted and sentenced either by the National Financial Prosecutor's Office (PNF) and the criminal division of the Paris High Court or by the AMF. Article L. 465-3-6 of the Monetary and Financial Code (MFC) introduced a case referral system in order to decide whether the criminal channel or the administrative channel is the most appropriate choice for the punishment of the alleged facts, while prohibiting each of the authorities in question (the AMF's Board and the PNF) from prosecuting market abuse without obtaining the other's approval to do so.

That being said, the market abuse administrative offences are those described in Regulation No 596/2014/EU of the European Parliament and Council of 16 April 2014 on market abuse (MAR) whereas market abuse criminal offences are defined and prohibited by Articles L.465-1 and seq of the MFC.

Although there are some minor differences between these two regulations, both prohibit insider dealing (Articles 8 of MAR and L. 465-1 and L. 465-2 of the MFC), unlawful disclosure of inside information (Articles 10 of MAR and L. 465-2 III and L. 465-3 of the MFC) and market manipulation (Articles 12 of MAR and L. 465-3-1 and seq of the MFC).

The offence of insider dealing is committed where a person:

- in possession of an inside information – that is, information of a precise nature that is not publicly known and which would affect the price of securities if it were made public – uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates, or cancels or modifies one or more orders placed on a financial instrument to which the inside information relates;
- in possession of inside information, recommends, on the basis of that information, that another person acquire or dispose of financial instruments to which that information relates, or that another person cancel or amend an order concerning the said financial instrument, or induces that person to make such an acquisition, disposal, cancellation or amendment; or
- uses a recommendation or an inducement as described above if he or she knows or ought to know that it is based upon inside information.

The prohibition of insider dealings applies to any person who possesses inside information as a result of a specific professional status as enumerated by the regulations and to any other person who possesses inside information where that person knows or ought to know that it is inside information.

Unlawful disclosure of inside information arises where a person:

- possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal course of a profession;
- discloses to any other person a recommendation or an inducement as described above where the person disclosing such a recommendation or such an inducement knows or ought to know that it was based on inside information.

The offence of market manipulation applies to any person who:

- enters into a transaction which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument;
- enters into a transaction which secures, or is likely to secure, the price of one or several financial instruments;
- enters into a transaction, places an order or exercise any other activity or behaviour which affects or is likely to affect the price of one or several financial instruments;
- disseminates information by any means which gives or is likely to give false or misleading signals to the market with regard to a financial instrument or which secures, or is likely to secure, the price of one or several financial instruments, including the dissemination of rumours, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.

It is to be noted that in market manipulation cases, the accused will have a defence which consists in demonstrating that the contested transaction is an "accepted market practice" in the meaning of Article 13 of MAR.

Pursuant to Articles L. 465-1 to Article L. 465-3-4 of the MFC, any individual committing a market abuse or attempting to commit such a criminal offence may face a fine of up to EUR100 million and a term of imprisonment of five to ten years. Legal entities are liable for a fine of up to EUR500 million (Article 131-38 of the French PC) and supplemental penalties provided by Article 131-39 of the French PC.

Before the AMF's Enforcement Committee, individuals and legal persons convicted for market abuse can be sentenced to pay a financial penalty of up to EUR100 million or ten times the amount of gains generated. For individuals acting under the authority or on behalf of a financial intermediary, the maximum financial sanction incurred is up to EUR15 million or ten times the amount of the profit earned. Even if not provided by law, in market abuses cases, the sanctions pronounced by the AMF's Enforcement Committee generally represent two or three times the profits earned.

Many offences also regulate banking activity (Articles L. 351-1 and seq of the MFC).

For instance, the MFC imposes a monopoly on credit institutions to carry out banking and credit operations on a regular basis. The fact of carrying out such operations without being authorised to do so constitutes an offence of illegal practice of the banking profession, it being specified that a similar offence exists for providing investment services without any legal agreement.

Under French law, unlawful financial and banking solicitation – that is, notably, the fact of any person engaged in a financial or banking solicitation without having obtained a professional licence to do so – is also prohibited and sanc-

tioned by a term of imprisonment of up to six months and a fine of up to EUR7,500.

In addition, breaching banking secrecy is also prohibited. Banking secrecy is the obligation for all members of the managerial and supervisory bodies of credit institutions, as well as their employees engaged in banking activities, to withhold confidential information they hold about their customers or third parties. Failure to comply with this obligation constitutes an offence punishable by a term of imprisonment of up to one year and a fine of up to EUR15,000.

Finally, as a last example, the Consumer Code prohibits usurious rates (when the interest rate of a credit exceeds the average effective rate applied during the previous trimester by credit institutions and finance companies for operations of the same nature). This offence is punishable by a term of imprisonment of up to two years and a fine of up to EUR45,000 (Article L. 313-5 of the Consumer Code).

### 3.5 Tax Fraud

The specificities of criminal tax law can be explained by the dual purpose of this discipline: to punish the tax evader, but above all to collect the tax due to the state. This leads to justifying certain derogations from the principles of general criminal law and criminal procedure.

The General Tax Code provides for a dual system of sanctions: tax sanctions on the one hand, criminal sanctions on the other, which can be combined depending on the circumstances.

There are many offences relating to tax fraud, often specific to the different types of existing taxes. The main offence remains above all the general offence of tax fraud (Article 1741 of the General Tax Code) which can result from several types of behaviour such as:

- failure to submit a tax return within the prescribed time limits;
- the concealment of taxable sums;
- the organisation of insolvency in order to obstruct tax collection; and
- other fraudulent methods.

In order to impose administrative or criminal penalties, the tax administration or judicial authority will therefore have to provide proof of a material element consisting of one of these behaviours as well as proof of the intentional nature of the behaviour.

In addition to recovering the evaded tax, tax fraud is punishable by a term of imprisonment of up to five years, a fine of up to EUR500,000 (and EUR2.5 million for legal entities) – an amount that may be increased to twice the value of the proceeds of the offence – and various additional penalties.

These sanctions may be increased to up to seven years and to EUR3 million – an amount that may be increased to twice the value of the proceeds of the offence – if the offence is committed by an organised gang or in case of aggravating circumstances.

### 3.6 Financial Record Keeping

Most companies must provide the court registry with annual accounts, an annual report and an auditors' report on their annual accounts. Furthermore, listed companies are required to publish several financial information reports punctually on a quarterly basis.

It is therefore 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°, L.242-6-2° and L.249-1 of the Ccom). Legal entities may incur a fine of up to EUR1.875 million.

Listed companies may also be prosecuted before the AMF if they disclose financial information that is false, inaccurate or deceptive (Articles 223-1 and 632-1 of the AMF's General Regulation). Legal entities as well as their executives held liable for dissemination of false information may face a financial penalty of up to EUR100 million or an amount equal to up to ten times the gains generated (Article 621-15 of the MFC).

### 3.7 Cartels and Criminal Competition Law

Unlike countries such as the United States, Japan or Canada, which mainly have formal criminal competition law, French law on anti-competitive practices has largely shifted to administrative law even if some behaviours may be criminally prosecuted.

Under Articles 101(1) of the Treaty on the Functioning of the European Union (TFEU) and L. 420-1 of the Ccom, prohibited agreements are defined by the willingness of companies to reach agreement through a formal agreement, concerted practices or coalitions, and an infringement of competition because of this agreement.

According to European and national case law, the agreement may only constitute an infringement of competition law if it affects the market in a significant way (ECJ, 9 July 1969, Case 5/69 – Court of Cassation, 4 May 1993). In addition, agreements are assessed in concreto. Therefore, while an agreement may contain clauses, which in abstracto are restrictive of competition, it may, once placed in its technical, economic and legal context, no longer have an anti-competitive character.

Under Articles 102 of the TFEU and L. 420-2 of the Ccom, the exploitation of a dominant position is abusive if it has as its object or may have the effect of preventing, restricting or distorting competition.

The existence of a dominant position is a prerequisite for the constitution of the infringement. In addition, the exploitation of this position can be abusive in different ways: by using certain practices, by foreclosing competitors or by monopolising relationships with customers or suppliers.

Finally, pursuant to Article L. 420-2 of the Ccom, the abusive exploitation of a state of economic dependence affecting the functioning or structure of competition is an offence. Economic dependence is a relationship in which one of the partners has no alternative solution if he or she wishes to refuse to enter into a contract under the conditions imposed by his or her customer or supplier (Court of Cassation, 7 January 2004, No. 01.12-477).

In the event of a breach of competition law, the Competition Authority may issue injunctions to companies, accept commitments from them (Article L. 464-2 of the Ccom) and/or impose financial penalties, which may amount to 10% of the worldwide consolidated turnover of the companies (Article L. 464-2 of the Ccom).

The company can justify the anti-competitive practice by referring to a legal text that would impose such a practice or by demonstrating the efficiency gains achieved through the practice (Article L. 420-4 of the Ccom).

Lastly, Article L. 420-6 of the Ccom criminalises the act of participating in anti-competitive practice and punishes it with a prison term of up to four years and a fine of up to EUR75,000.

While the criminalisation text expressly refers to individuals, the legal literature continues to debate its applicability to legal persons as all criminal offences can be committed by a legal entity under French law.

The existence of anti-competitive practices is a prerequisite for the offence. In addition, the offence is committed if the perpetrator has been personally and decisively involved in the conception, the organisation or implementation of the anti-competitive practices.

### 3.8 Consumer Criminal Law

As consumer law has developed since the Ordinance of 30 June 1945, criminal law has taken on an increasing importance. Adopted in response to the horse meat scandal in 2013, Law No 2014-344 of 17 March 2014 concerned criminal law in many aspects. On the one hand, the legislator decided, for a number of offences, to significantly increase penalties for deception, aggressive trade practices, etc. On the other hand, it has diversified the sanctions. Administrative sanctions have thus significantly entered into consumer law, in the form of administrative fines, sometimes substituted for criminal sanctions. The main offences under consumer criminal law are prohibited trade practices, deception and falsification.

Within the category of prohibited trade practices, there are unfair trade practices, which are subdivided into misleading practices and abusive practices. Practices of both subcategories are punishable by a term of imprisonment of up to two years and a fine of up to EUR300,000 (Articles L.132-2 and L.132-11 of the Consumer Code). Besides, prohibited trade practices also include the abuse of an individual's state of ignorance or weakness, which is punishable by a term of imprisonment of up to three years and a fine of up to EUR375,000 (Article L.132-14 of the Consumer Code).

Article L.441-1 of the Consumer Code prohibits deception. As a prerequisite, a trade contract needs to exist: the perpetrator must commit acts likely to mislead the contractor while intending to deceive him. Deception may take place through a third party and may concern either the nature, origin, substantial qualities, or composition of the product; or the quantity/identity of the products delivered; or the products' fitness for use, risks of use and controls. This offence is punishable by a term of imprisonment of up to two years and a fine of up to EUR300,000 (Article L.454-1 of the Consumer Code). Sanctions may reach seven years of imprisonment and a fine of up to EUR750,000 where the product concerned involves a danger to human and animal health or where the acts were committed by an organised group.

Lastly, Article L.413-1 of the Consumer Code prohibits falsifications. This offence consists in using unlawful manipulation or processing that does not comply with the regulations in force and is likely to alter the substance of the product. Falsification covers three types of products: products used for human or animal consumption, beverages and agricultural or natural products. This offence is punishable by a term of imprisonment of up to two years and a fine of up to EUR300,00 (Article L.451-1-1 of the Consumer Code).

As regards deception and falsification (Articles L.454-3 and L.451-2 of the Consumer Code respectively), sanctions may reach seven years of imprisonment and a fine of up to EUR750,000 where the product concerned involves a danger to human and animal health or where the acts were committed by an organised group.

The fines provided for all offences mentioned under this section can also be increased to 10% of the annual average turnover, in proportion to the benefits derived from the offence (Articles L.132-2, L.132-11, L.132-14, L.451-5 and L.454-4 of the Consumer Code). Fines sanctioning mislead-

ing practices can also reach 50% of the expenses incurred in carrying out the advertising or practice constituting the offence (Article L.132-2 of the Consumer Code).

Legal persons are also liable for the offences mentioned above. Fines imposed on legal persons can reach five times the maximum fine amount provided for individuals.

### 3.9 Cybercrimes, Computer Fraud and Protection of Company Secrets

Article 226-18 of the PC sanctions the collection of personal data by fraudulent, unfair or unlawful means. This offence is punishable by a term of imprisonment of up to five years and a fine of up to EUR300,000.

Article 226-22 of the PC sanctions the act of disclosing personal data whose disclosure would have the effect of violating the consideration of the person concerned or the privacy of his or her private life, to the knowledge of a third party who does not have the right to receive them. This offence is punishable by a term of imprisonment of up to five years and a fine of up to EUR300,000.

In addition, attacks on computer systems are punished by the PC, which distinguishes between attacks on the system, attacks on the functioning of the system and attacks on data.

Article 323-1 of the PC punishes the fact of accessing or remaining, fraudulently, in all or part of an automated data processing system. This offence is punishable by a term of imprisonment of up to two years and a fine of up to EUR60,000.

Article 323-2 of the PC sanctions the act of obstructing or distorting the functioning of an automated data processing system. This offence is punishable by a term of imprisonment of up to five years and a fine of up to EUR150,000.

Article 323-3 of the PC sanctions the fraudulent introduction of data into an automated processing system or the fraudulent deletion or modification of the data it contains. This offence is punishable by a term of imprisonment of up to five years and a fine of up to EUR150,000.

In France, the violation of trade secrets is not protected by a specific offence. When such a violation occurs, companies use peripheral offences such as breach of trust or theft, these offences being also used by French criminal courts to sanction the embezzlement or theft of industrial data.

Lastly, treason and espionage (Articles 411-1 and seq of the PC) as well as violations of national defence secrecy (Articles 413-9 and seq of the PC) are punishable.

### 3.10 Financial/Trade/Customs Sanctions

French customs law gathers together a set of offences that relate to the transport of goods and evasion of the vigilance of the administration. In addition, a second category of offences involves more malicious misconduct, which aims to distort the customs treatment of goods as provided for by the regulations. As a result, there are a very large number of offences regulating the conduct of international trade operators.

One of the most important offences concerns smuggling, which refers to the illegal transport of goods or persons, in particular across borders, in order to avoid paying taxes or bringing prohibited products into a country or, conversely, to remove them despite a ban. The Customs Code provides for a penalty consisting of the confiscation of the disputed goods, a prison sentence of up to ten years and a fine from EUR150 up to ten times the value of the disputed goods, depending on the nature of the said goods.

The Customs Code is full of disparate provisions designed to prosecute acts of all kinds, the common feature of these acts is the desire to override the multiple obligations imposed on international trade actors. These acts include:

- failure to comply with customs declaration obligations – for example, any omission or inaccuracy relating to the information to be provided in the declarations (Article 410), or any false declaration in the case of imported goods, their value or origin (Article 412);
- circumventing customs legislation through deception – for example, indicating the wrong number of packages declared, manifested or transported (Article 411); and
- violation of the restrictive measures on economic relations set out by EU Regulations or by international treaties and agreements approved and ratified by France, for example by trading embargoed goods or commodities (Article 459).

### 3.11 Concealment

Repressed as complicity for a long time, concealment is now an autonomous offence. Under Article 321-1 of the PC, concealment is to conceal, retain or transfer a thing or act as an intermediary in its transfer, knowing that it was obtained through a crime or misdemeanour, or to knowingly benefit in any manner from the proceeds of a crime or misdemeanour.

Concealment therefore implies the commission of a prior offence. It is not limited to the hiding, possession or transmission of something resulting from this offence, it also includes the act of profiting from it. In order to characterise concealment, the agent must know that the thing came from a crime or misdemeanour.

As a general rule, individuals can incur a term of imprisonment of up to five years and a fine of up to EUR375,000. However, when the original offence is punished by a prison sentence which is longer than that incurred for concealment, the receiver incurs the penalties pertaining to the offence that he or she knew about. If there are aggravating circumstances attached to the original offence, the receiver of the proceeds will only incur the penalties that exclusively relate to the circumstances he or she was aware of.

Moreover, fines may be raised beyond EUR375,000 to up to half the value of the proceeds. Individuals may also incur a number of additional penalties.

Legal persons may incur a fine of up to EUR1.875 million – an amount that may be increased to half the value of the proceeds of the offence – as well as various additional penalties.

The penalties incurred by individuals and legal persons may also be doubled when the concealment is committed

- on a regular basis or using the facilities offered by the exercise of a profession; or
- by an organised gang.

If the concealment is simple, the statute of limitations is six years, while it is twenty years in the presence of an aggravated concealment. It can even be increased to thirty years for the concealment of certain crimes. The prescription of concealment is independent of that original offence, to such an extent that it often lapses after the prescription of the predicate offence.

In France, the perpetrator of the predicate offence cannot be prosecuted for both the predicate offence and concealment. However, his or her accomplice can be prosecuted for concealment.

### 3.12 Aiding and Abetting

Under Article 121-7 of the PC, an accomplice is an individual or legal person who knowingly, by aiding and abetting, has facilitated the preparation or commission of a crime or misdemeanour, or any person who, by means of gift, promise, threat, order or by abusing his or her authority or powers, has provoked the commission of an offence or given instructions towards its commission.

Complicity implies a main punishable act and an act of complicity. Moreover, the accomplice must have been willing to commit his or her acts with full knowledge of the prior offence.

The accomplice is punished as a perpetrator and incurs the same main and complementary penalties as the main perpetrator, which does not mean that he or she will actually be punished with the same penalties. He or she will also have to endure the actual aggravating circumstances, related to the offence itself, but not the personal ones, related to the main perpetrator.

### 3.13 Money Laundering

Articles 324 and seq of the PC prohibit money laundering.

Two forms of behaviours are incriminated:

- facilitating by any means the false justification of the origin of the property or income of the perpetrator of a crime or misdemeanour that has provided him or her with a direct or indirect profit (Article 324-1, para. 1 of the PC); and
- assisting in the placement, concealment or conversion of the direct or indirect product of a crime or misdemeanour (Article 324-1, para. 2, of the PC).

Money laundering is committed regardless of whether the perpetrator derives any benefit from it. The offence requires the committing of an original offence punishable by law. The offence is also intentional, which implies that the perpetrator must have been aware of the fraudulent origin of the funds.

Individuals can incur a term of imprisonment of up to five years, a fine of up to EUR375,000 as well as additional penalties. These sanctions may be doubled in the case of aggravated money laundering, namely when the offence is committed:

- on a regular basis or using the facilities offered by the exercise of a profession; or
- by an organised gang.

The fine may be increased to half the value of the assets or funds involved in the money laundering.

Moreover, when the underlying offence is punished by a prison sentence which is longer than that incurred for money laundering, the money launderer incurs the penalties pertaining to the offence that he or she knew about. If there are aggravating circumstances attached to the original offence, the launderer will only incur the penalties that exclusively relate to the circumstances he or she was aware of.

Legal persons may incur a fine of up to EUR1.875 million – which may be doubled in the event of aggravated money laundering – and additional penalties. The fine may also be increased to half the value of the assets or funds involved in the money laundering.

The 6 December 2013 Law enabled the reversal of the burden of proof concerning money laundering (see **5.1 Burden of Proof** below).

On 9 May 1990, France created a co-ordination unit in charge of intelligence processing and action against illegal financial circuits (called TRACFIN).

TRACFIN is both an intelligence unit and an anti-money laundering expertise service. Its two main missions are:

- to collect, process and disseminate information relating to illegal financial circuits and money laundering; and
- to receive and complete suspicious transaction reports from financial institutions such as banks and credit institutions.

The prevention of money laundering indeed imposes a number of obligations on economic and financial actors:

- An obligation of vigilance – actors must pay particular attention to any activity which, by its nature, appears particularly likely to be related to money laundering or terrorist financing, and in particular complex or unusually large transactions, as well as to all unusual types of transactions which do not have an apparent economic purpose or a visible legal purpose. The detection of anomalies requires the implementation of appropriate risk assessment and management systems for money laundering and terrorist financing, of which all staff must be informed and in which they must be trained.
- A reporting obligation – actors must report any suspicious transaction to TRACFIN.

Failure to comply with these obligations may lead to various sanctions. Obstructing the missions of the supervisory authorities (in particular the ACPR) is punishable by a term of imprisonment of up to one year and a fine of up to EUR15,000. Breaching the confidentiality obligation of the declaration and the information communicated to Tracfin is punishable by a fine of up to EUR22,500.

## 4. Defences/Exceptions

### 4.1 Defences

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 PC), physical or moral constraint (Article 122-2 of the PC), legal or factual error (Article 122-3 of the PC), the order of the law or the command of a legitimate authority (Article 122-4 of the PC), state of necessity (Article 122-7 of the PC) and minority (Article 122-8 of the PC), provided that most of these grounds are rather exceptionally applied, especially in white-collar matters.

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

Apart from that, French 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 or she may be exempted from penalties provided that his or her social rehabilitation has been established, the damage caused by the offence has been remedied and the disturbance arising from the offence has ceased (Article 132-59 of the PC). The judge has full discretion in granting such an exemption. In practical terms, it is mostly granted when the offences are minor or when the perpetrator is a first-time offender.

### 4.2 Exceptions

As explained in **4.1 Defences**, French law does not provide for any specific defence and/or exception.

### 4.3 Co-operation, Self-Disclosure and Leniency

Under French law, there is no special treatment of perpetrators of offences who co-operate with investigators and prosecutors. However, it should be noted that the co-operation of the accused during the investigation stage and throughout the proceedings as well as, for instance, the adoption by legal entities of measures intended to reinforce the internal fight against white-collar crime, may be considered to be mitigating factors by a court when it determines the quantum of the penalty imposed.

Concerning self-disclosure, specific provisions regarding anti-corruption law recently entered into force. 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 prison sentence reduced by half if, by having informed the administrative or judicial authorities, they allowed them to put a stop to the offence or to identify other perpetrators or accomplices (Articles 432-11-1, 433-2-1, 434-9-2, 435-6-1 and 435-11-1 of the PC). The same possibility exists for the perpetrators of, or the accomplices to, the offence of tax fraud (Article 1741 of the General Tax Code).

French competition law provides for a leniency procedure carried out by the Competition Authority. As a result, the Authority may grant total or partial immunity from financial penalties incurred by a company participating in a cartel if that company contributes to the proving of that cartel's existence (Article L. 464-2 of the Ccom).

Apart from these specific provisions, French criminal law does not provide for any other rule regulating self-disclosure nor any other leniency measure.

However, it should be noted that co-operation and self-disclosure are part of the criteria taken into account by the Public Prosecutor while assessing the opportunity to enter into a CJIP and/or the amount of the fine to be pronounced.

### 4.4 Whistle-blowers' Protection

In the public sector, Article 40 of the CCP requires all public officials and civil servants who, in the performance of their duties, become aware of a crime or misdemeanour to inform the Public Prosecutor's office and provide it with all the relevant information.

In the private sector, statutory auditors are required, under criminal penalties if they do not (Article L.820-7 of the Ccom), 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 Ccom). 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 MFC). Since the aforementioned law of December 2013, reporting crimes and misdemeanours committed in the civil service is not only a duty, but also a right. The protective system created provides that no measure concerning, inter alia, recruitment, tenure, training, evaluation, discipline, promotion, assignment or transfers may be taken against any civil servant because he or she has, in good faith, reported or testified about acts that are the constituent elements of a crime or misdemeanour.

The Sapin II Law went a step further in granting protection to whistle-blowers. Under this new law, 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 PC).

To be eligible for immunity, the person reporting an unlawful act needs first to match the definition of the whistle-blower as provided for in the Sapin II Law (Article 6). Second, the person needs to comply with the required reporting procedure – the alert is reported to the supervisor, the employer or any designated adviser. In the absence of a 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 the authorities 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). The purpose is to cover the situation where the company is likely to take all measures to eliminate the evidence before it becomes public. When in doubt, the whistle-blower can seek advice from the national ombudsman (*Défenseur des droits*), who will direct him or her towards the relevant contact point (Article 8 IV).

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

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

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 up to two years' imprisonment and a fine of up to EUR30,000 (Article 9).

These protective measures against dismissal, obstruction, identify 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 exist under French law, except in the field of tax fraud. In April 2017, French tax authorities were authorised to reward people who communicated information leading to the discovery of a breach in the field of international tax fraud (Article 109 of Sapin II Law). These breaches concern especially rules of domiciliation in France, international tax evasion or the declaration of assets held abroad by French residents. This measure, which had originally been implemented for an experimental period of two years, has been maintained.

## 5. Burden of Proof and Assessment of Penalties

### 5.1 Burden of Proof

The presumption of innocence is one of the fundamental principles of French criminal procedure. Therefore, the burden of proof lies on the Public Prosecutor. This principle requires the judge to give the accused the benefit of any doubt as to the substance of the charge (Constitutional Council, 19 and 20 January 1981).

The prosecuting party must, in theory, provide full and complete proof of the existence of the elements constituting the offence.

However, the difficulties regarding the burden of proof have led the legislator and the judges to create some kinds of presumption of guilt. In white-collar matters, both money laundering and misuse of corporate assets are concerned. With regard to money laundering, Law n°2013-1117 of 6 December 2013 created a presumption of illegality of assets and incomes. In other words, the assets or the incomes are presumed to be the direct or indirect proceeds of a crime or misdemeanour when the material, legal or financial conditions of the investment or concealment or exchange can only be justified by the intent to hide the source of the funds or the actual receipt of such assets or incomes (Article 324-1-1 of the PC). With regard to misuse of corporate assets, consistent case law considers that, where it is not possible to prove that company funds, taken in secret by a manager, have been used solely in the interests of the company, they have necessarily been used in the latter's personal interest (Court of Cassation, 30 January 2019, n°17-85304).

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### 5.2 Assessment of Penalties

In France, the discretion of the judge to determine penalties is one of the fundamental principles of criminal law. The judge has thus full discretion to choose, from amongst the penalties applicable to the offence, those he or she deems appropriate and to determine the quantum of the penalty, with the only restriction being the maximum prescribed by law. The law does not provide minimum sentences.

However, the judge must in all cases explain the grounds for his or her decision if he or she imposes a prison sentence that is not suspended and provides for no adjustments (such as, among others, the placement under electronic surveillance) to the penalty.

Furthermore, a basic principle of French law is that sentences are not consecutive. In other words, 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.