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Anti-Corruption

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Introduction
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. The establishment of this firm is the fruit of more than 20 years of professional experience gained by the two founding partners, at Gide and Linklaters LLP. They are supported by a team of around ten lawyers. As litigators have 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. Bougartchev Moyne Associés advises clients in very sensitive matters, whether involving French, foreign or international public officials, private bribery or influence-peddling. The firm's lawyers also assist large companies in implementing the new compliance measures required by the Sapin II Law, in performing compliance and anti-corruption M&A due diligence as well as in their internal investigations.

Authors

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1. Offences

1.1 Legal Framework for Offences

1.1.1 International Conventions

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

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

1.1.2 National Legislation

The main national legal provisions relating to anti-bribery and anti-corruption are enshrined in the Penal Code and the Code of Criminal Procedure. Law No 2016-1691, called the Sapin II Law, signed on 9 December 2016 and entered into force on 11 December 2016 with regard to most of its provisions, strove to make further progress in the fight against corruption, in order to reach the highest European and international standards, by providing:

- the introduction of a new duty to prevent bribery or influence-peddling in France or abroad for chairmen, chief executives and managers of large private and public companies consisting of setting up a comprehensive compliance programme;
- the creation of the French Anti-corruption Agency (FAA), an authority in charge of monitoring the quality and efficiency of compliance measures implemented within the companies and public entities concerned;
- the introduction of the offence of influence-peddling of foreign public officials and a new ancillary penalty consisting of a compliance programme (*programme de mise en conformité*);
- the extension of the French judges' jurisdiction over acts of bribery and influence-peddling committed abroad;
- the introduction of a new ADR mechanism called a public interest judicial convention (*convention judiciaire d'intérêt public*), which is, relative to the fight against fraud, available for legal entities suspected of acts of bribery or influence-peddling, laundering of tax fraud proceeds (extended to tax fraud in 2018); and
- the strengthening of the protection to whistle-blowers.

1.1.3 Guidelines for the Interpretation and Enforcement of National Legislation

Since the entry into force of the Sapin II Law, the FAA has published two annual reports as well as a dozen recommendations aiming to help public institutions and companies to comply with their obligations under Article 17 of this law and thus to prevent and detect acts of corruption.

For instance, after having identified a number of major risks, including gifts, accommodations or entertainment, customer travel, donations, sponsorships and facilitation payments, the FAA published, on 18 July 2018, a draft guide for public consultation based on good practices already applied by some entities regarding gifts and invitations policy in companies, public institutions, associations and foundations.

On 26 June 2019, the FAA and the National Financial Prosecutor's Office published, for the first time, joint guidelines on the application of the public interest judicial convention in order to encourage legal entities to adopt such a co-operative approach with the French authorities. They indicated that they expect companies to participate themselves in the determination of the truth through an internal investigation or a thorough audit giving rise to a report submitted by the entity concerned. In its first decision rendered on 4 July 2019, the Enforcement Committee confirmed that FAA recommendations are not legally binding even if public institutions and companies are encouraged to follow them. Therefore, in order to prove compliance with the requirements of the Sapin II Law, it is sufficient for an audited entity to establish that its programme, even if inconsistent with the FAA's recommendations, is nevertheless relevant and effective.

1.1.4 Recent Key Amendments to National Legislation

Under Directive No 2017/1371/UE dated 5 July 2017, the Council of Europe and the European Parliament obliged all Member States to create in their legislation offences of active and passive bribery of public officials affecting specifically the financial interests of the European Union, for example in obtaining subsidies from the EU budget through a bribery pact. The French Government transposed this directive by Ordinance No 2019-963 dated 19 September 2019 on the fight against fraud affecting the financial interests of the European Union through criminal law. In accordance with the new paragraph created in Articles 432-11, 433-1, 435-1 and 435-3 of the French Penal Code, the fine incurred by an individual shall be increased to EUR2 million or to double the proceeds generated by the offence when (i) the offences provided for in these Articles (bribery of domestic/foreign or international public officials) affect the revenue collected or the expenditure incurred by any institution or body of the European Union and (ii) are committed in an organised gang. The prosecution of such offences should be carried out by the new European Public Prosecutor's Office from November 2020.

On 6 November 2018, a member of the French Parliament submitted a draft law "*on the allocation of assets resulting from transnational bribery*" aiming to set up a dedicated fund within the State budget to collect revenues from the confiscation of movable or immovable property held directly or indirectly by foreign politically exposed persons convicted in France of offences involving the concealment or laundering of the proceeds generated by an offence committed in the exercise of their functions to the prejudice of a foreign State. The objective is to (i) ensure that illicit assets recovered in France contribute to the development of countries that have been deprived of them and (ii) strengthen France's efforts to combat transnational bribery. The draft law was adopted by the French Senate on 2 May 2019 and is currently under review by the French National Assembly.

Besides, Law No 2019-222 dated 23 March 2019 on programming for 2018-2022 and reform for justice provided several substantial changes in the French criminal procedure, from investigation to trial and enforcement of sentences, specifying that, from 25 March 2020, non-suspended imprisonment sentences of more than one year ordered by French judges will no longer be subject to adjustments in full.

1.2 Classification and Constituent Elements

In France, corruption offences are often grouped together under "offences to probity" (*manquements à la probité*).

Bribery

Under French criminal law, the prosecution of bribery (*corruption* in French) revolves around the status of the person bribed so that a specific offence exists for each type of person. The French legislator has criminalised bribery of domestic public officials (Articles 433-1 and 432-11 of the Penal Code), bribery of domestic judicial staff (Article 434-9 of the Penal Code), bribery of domestic private individuals (Articles 445-1 and 445-2 of the Penal Code), bribery of foreign or international public officials (Articles 435-1 and 435-3 of the Penal Code) and bribery of foreign or international judicial staff (Articles 435-7 and 435-9 of the Penal Code).

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.

The scope of the bribe is extensive under French law, covering all kinds of advantages without consideration of their magnitude. Pursuant to the FAA's recommendations, the risk of bribery is posed by accommodation, entertainment, customer travel, donations, sponsorships and facilitation payments. According to the case law, bribes may consist of

a non-cash benefit (eg, a car) or a service (eg, a fine wines' tasting session or a safari).

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

Active bribery is the act of (i) unlawfully offering, at any time, directly or indirectly, advantages (as listed above) to a person (public official, judicial official or private individual) for the benefit of that person or of a third party, to induce that person to perform or refrain from performing, or because such person has performed or refrained from performing, any act pertaining to his or her position, duties, mandate or activities, or facilitated thereby; or (ii) accepting the proposal of such 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 also punishable when it only involves private parties. On 26 July 2019, the EU Commission published its third report assessing the extent to which the Member States have taken the necessary measures in order to comply with Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector. Although the Commission welcomed the level of transposition of the Framework Decision's provisions which has clearly improved since the 2011 report, it highlighted several gaps in the way they have been implemented by some Member States. For instance, in some countries, the offence of bribery can only be committed by a decision-maker in a specific position or endowed with certain powers.

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

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

Influence-peddling

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

Other behaviours involving public officials in the area of corruption may constitute criminal offences under French law: misappropriation of public funds (*concussion* Article 432-10 of the Penal Code), unlawful taking of interest (*prise illégale d'intérêts* Article 432-12 of the Penal Code), embezzlement of public funds (*détournement de fonds publics* Article 432-15 of the Penal Code) and favouritism (*favoritisme* Article 432-14 of the Penal Code).

Financial Record-keeping

In practice, corruption may lead to accounting stratagems seeking to conceal in financial statements the benefits obtained or paid by using false invoices. Therefore, it is also an offence for the chairman, directors, members of the executive or supervisory board, 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 (Article L.241-3-3° and Article L.242-6-2° of the Commercial Code); legal entities may incur a fine of up to EUR1,875,000.

Public Officials

Criminal law associates with the notion of public official people:

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

the performance of a function or acts intended to satisfy a general interest); or
- invested with a public elective mandate.

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

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

1.3 Scope

1.3.1 Limitation Period

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

In principle, as regards bribery, the limitation period will thus expire six years after the date of the request or acceptance (in cases of passive bribery) and six years after the proposal or agreement (in cases of active bribery). However, the Criminal Chamber of the Court of Cassation has ruled that if any different act is performed after this date pursuant to the corruption pact, the period is tolled and begins to run anew from the date of that act (Court of Cassation, Crim. Ch., 27 October 1997, No 96-83698).

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

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

1.3.2 Geographical Reach of Applicable Legislation

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

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

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

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

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

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

In the case of territorial jurisdiction, the French Court of Cassation rejects its application to foreign decisions and agreements. Whenever one of the constituent elements

of the corruption offence has been committed in France, French courts have jurisdiction (Court of Cassation, Crim. Ch., 17 January 2018, No 16-86.491; Court of Cassation, Crim. Ch., 14 March 2018, No 16-82.117).

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

1.3.3 Corporate Liability

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

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

There is also a risk of civil liability under Article 1240 and/or Article 1242 paragraph 5 of the Civil Code in the event of a sentence for corruption.

A compensation action may be carried out by any person who has suffered damage resulting from corruption, such as a competitor of the company or by approved anti-corruption associations (Transparency International France, Anticor and Sherpa so far), which are entitled to act as a civil party in any criminal proceedings relating to corruption (Article 2-23 of the Code of Criminal Procedure).

Even in the event of the conclusion of a public-interest judicial convention (see **2.5 Safe Harbour or Amnesty Programme**), legal entities may be required to pay compensation.

In the event of a merger by absorption, whereas the acquiring company is civilly liable for offences committed previously by the dissolved company (Court of Cassation, Crim. Ch., 15 November 2016, No 15-84.692), the French Court of Cassation constantly rules that it cannot be criminally liable for offences committed by the organs or representatives of the absorbed company on behalf of the latter (Court of Cassation, Crim. Ch., 20 June 2000, No 99-86.742; Court of Cassation, Crim. Ch., 25 October 2016, No 16-80.366).

2. Defences and Exceptions

2.1 Defences

French anti-corruption law does not provide for any specific defence.

Nevertheless, the perpetrator 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 arisen from the offence has ceased (Article 132-59 of the Penal Code). The judge has full discretion in granting any such exemption.

2.2 Exceptions

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

2.3 De Minimis Exceptions

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

2.4 Exempt Sectors/Industries

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

2.5 Safe Harbour or Amnesty Programme

Co-operation with Investigators

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

Self-reporting

The Sapin II Law introduced the possibility for the perpetrators of, or the accomplices to, an offence of bribery of public officials or judicial staff only (private bribery being excluded) to have their penalties reduced by half if, by having informed the administrative or judicial authorities, they made it possible to put a stop to the offence or to identify other perpetrators or accomplices, if any (Articles 432-11-1, 433-2-1, 434-9-2, 435-6-1 and 435-11-1 of the Penal Code).

Leniency

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

Admission of Guilt
French law does not yet have an equivalent to the US process of plea bargaining. However, Law No 2011-1862 of 13 December 2011 extended the scope of the "appearance pursuant to a prior admission of guilt" procedure (*comparution sur reconnaissance préalable de culpabilité*, CRPC) to corruption offences. Under this procedure, the Public Prosecutor's Office is entitled to offer directly and without a trial, on its own initiative or at the request of the accused or his or her lawyer, one or more penalties to a natural or legal person who acknowledges the acts of which he or she is accused (Code of Criminal Procedure, Article 495-7). If the accused accepts the penalty(ies) proposed, those penalty(ies) still have to be approved by the presiding judge of the High Court. The court judgment is deemed a conviction.

Settlement
The main benefit of the public-interest judicial convention (provided for legal entities in Article 41-1-2 of the Code of Criminal Procedure) is the absence of any acknowledgement of guilt, contrary to the CRPC procedure.

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

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

During a subsequent validation hearing, the judge decides whether to validate the proposed agreement. Once validated, the legal entity has ten days to retract (this option has not been used so far). Then, the validation judgment as well as the convention itself is published on the FAA website.

In the joint guidelines with the FAA, the National Financial Prosecutor's Office encouraged companies to co-operate with the French authorities by self-reporting acts of corruption within a reasonable timeframe and participating themselves in the determination of the truth through an internal investigation, and specified that such proactive approaches may reduce the amount of the public-interest fine in the event of the conclusion of a public-interest judicial convention.

3. Penalties

3.1 Penalties on Conviction

Bribery of Domestic Officials
Individuals who commit the offences of active bribery and passive bribery of domestic public officials and judicial staff may be imprisoned for a term of up to ten years, as well as be ordered to pay a fine of up to EUR1 million. The fine may be increased to double the proceeds generated by the offence (Articles 433-1-1°, 432-11-1°, 434-9 of the Penal Code). From 20 September 2019, individuals who commit any such offences which affect the revenue collected or the expenditure incurred by any institution or office of the European Union and who are in an organised gang may be ordered to pay a fine of up to EUR2 million.

Ancillary penalties may also be imposed, such as the prohibition

- from holding public office;
- from engaging in the professional or social activity in the performance of which, or in connection with the performance of which, the offence was committed, for a period of up to five years; or
- from directing, administering, managing or controlling a company in any capacity, permanently or for a period of up to 15 years.

Lastly, publication of the judgment may be ordered and the item that was used or was intended to be used to commit the offence, or any item that is a proceed of the offence, may be confiscated (Articles 433-22, 433-23, 432-17, 434-44 of the Penal Code).

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

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

In practice, an increasing number of French officials have been sanctioned. For example, on 3 April 2019, the French Court of Cassation confirmed the conviction of a sub-Prefect to three years' imprisonment, a fine of EUR20,000 and the definitive prohibition from performing any public function. The Court noted that the defendant had intervened with a municipality and the Prefecture to have a case investigated more quickly in favour of a real estate promotor. The corruption pact was based on the obtaining of the Prefecture's favourable opinion and the payment into her husband's account of EUR200,000 (Court of Cassation, Crim. Ch., 3 April 2019, No 17-87.209).

On 18 October 2019, a French politician accused of passive bribery in connection with his mandate as mayor of a Parisian suburban city and a promotor who had carried out a real estate project in this city, accused of active bribery, have been acquitted. The Paris High Court considered that there was insufficient evidence of the existence of a corruption pact nor the obtaining of undue advantages by the mayor. However, the Court has sentenced the latter to five years' imprisonment as well as ten years of ineligibility for aggravated laundering of tax fraud. On 13 September 2019, he had been sentenced by the same Court to four years' imprisonment as well as ten years of ineligibility for tax fraud. In both cases, the Court ordered the immediate imprisonment of the mayor, which shows the increasing severity of French judges in cases involving breaches of the duty of probity, with more recourse to non-suspended prison sentences for economic and financial offences.

Bribery of Foreign Officials

Active or passive bribery of foreign public officials or international judicial staff is punishable by penalties which are similar to the ones provided for bribery of domestic officials (Articles 435-3,435-1, 435-14 and 435-15, 435-9, 435-7 and 435-15 of the Penal Code).

By a judgment handed down on 21 December 2018 (Paris High Court, 21 December 2018, No 060170092027), the Paris High Court refused to apply the principle of non bis in idem to a Deferred Prosecution Agreement ratified by an American Court as the acts concerned had partly been committed in France. The Court ruled that the accused legal entity, a French oil and gas major company, was guilty of having bribed an Iranian public official in order to obtain a significant gas contract and sentenced the company to a fine of EUR500,000. The Court applied the principle of proportionality of penalties in the event of a prior conviction abroad and did not follow the public prosecutor's requisitions, who had requested the conviction of the accused entity to an ancillary penalty of confiscation of EUR250 million. This decision is also interesting in that it is a reminder that it is not necessary, under French law, in the offence of bribery for it to be established that the public official has himself or herself a decision-making power within the entity which attributed the contract at stake. The French company did not appeal this decision.

Bribery of Private Individuals

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

Influence-peddling

Penalties similar to bribery are provided for influence-peddling (Articles 433-2, 434-9-1, 434-9-1, 435-4, 435-2, 435-8 and 435-10 of the Penal Code).

Legal entities are also liable for a fine of EUR 2.5million, which may be increased to double the proceeds generated by the offence, and various ancillary penalties (Articles 433-25 and 435-15 of the Penal Code).

In two recent cases, the French Court of cassation censured the conviction decision rendered by the judges on the merits. The Court of Cassation recalled that abusive acts of mediation with a public authority or an administration in order to obtain favours (Court of Cassation, 5 December 2018, No 17-86.800) as well as the positive intervention from the person supposed to be influenced (Court of Cassation, 3 April 2019, n°17-87.209) must be characterised for the offence of influence-peddling to be established.

Repeated Offences

In the event of a repeated offence, the maximum penalties incurred are doubled. As regards individuals, this is the case when:

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

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

Public-interest Fine in the Event of a Public-interest Judicial Convention

Under Article 41-1-2 of the Code of Criminal Procedure, the amount of the fine is fixed in proportion to the benefits

derived from the breaches found, within the limit of 30% of the company's average annual turnover calculated on the basis of the last three annual turnover figures known at the time the breaches were found.

According to the aforementioned joint recommendations of the FAA and the National Financial Prosecutor's Office, the amount of the public-interest fine may be increased in the event of bribery of public officials, when the company has already been convicted of bribery, if it has used its resources to conceal acts of corruption or in the event of repeated and systematic acts of bribery. However, the amount of the public-interest fine may be reduced if the company has spontaneously disclosed acts of corruption before the opening of an investigation and within a reasonable time, if there is an excellent co-operation with the Prosecutor and when the company carried out internal investigations, or when it implemented corrective measures.

3.2 Guidelines Applicable to the Assessment of Penalties

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

However, the judge must in all cases explain the grounds for his or her decision if he or she imposes a prison sentence that is not suspended and provides for no adjustments to the penalty.

4. Compliance and Disclosure

4.1 National Legislation and Duties to Prevent Corruption

Article 17 of the Sapin II Law requires the implementation of a corruption-prevention plan for chairmen, general managers and company managers, as well as members of the management boards of public limited companies, and chairmen and general managers of public industrial and commercial establishments 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.

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

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

The legislator has empowered the FAA to assess the quality and effectiveness of the preventive measures and to impose, in the event of non-compliance, graduated sanctions (ranging from warnings to fines up to EUR200,000 for individuals and EUR1 million for legal entities 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 Prosecutor.

On 4 July 2019, the FAA Enforcement Committee rendered its first public decision. In that case, the FAA director had alleged that the company in question had not set up a sufficiently preventive arsenal in accordance with Article 17 of the Sapin II Law. He requested the Enforcement Committee to order the company to adapt its internal procedures to the laws in force before the end of 2019 and, failing that, to impose financial penalties on the company (EUR1 million) and on its CEO (EUR200,000). However, the Enforcement Committee held that the breaches of Article 17 of the Sapin II Law were no longer continuing at the time of the hearing. It therefore refused to issue any order or to impose any financial penalty. Charles Duchaine, the FAA director, welcomed the fact that the control carried out by his services, the recommendations addressed to the company and the prospects of a sanction had prompted the company concerned to improve its anti-corruption measures.

4.2 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

In the public sector, Article 40 of the Code of Criminal Procedure requires all public officials and civil servants who, in the performance of their duties, become aware of a felony or misdemeanour to inform the Public Prosecutor's Office and provide it with all information in relation thereto. For instance, in 2018, the FAA notified five cases to the National Financial Prosecutor's Office and to Paris, Marseille, Nanterre and Lille Public Prosecutors' Offices concerning acts of bribery, embezzlement of public funds, favouritism or unlawful taking of interest.

In the private sector, statutory auditors are required, under criminal penalties (Article L.820-7 of the Commercial Code), to report to the Public Prosecutor criminal acts of which they become aware. They are also required to report to Tracfin, the agency charged with dealing with illegal financial circuits, transactions involving sums that they know, suspect or have good reason for suspecting, originate from an offence punishable by a prison sentence of more than one year or that contribute to financing terrorism (Article L.561-2 12° of the Monetary and Financial Code).

4.3 Protection Afforded to Whistle-blowers

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

To be eligible for immunity, the person reporting an unlawful act needs firstly to match the definition of the whistle-blower as provided for in the Sapin II Law (Article 6); ie, "*an individual who selflessly and in good faith reveals or signals a felony or a misdemeanour, a serious and manifest breach of an international commitment properly ratified or approved by France, or a unilateral act issued by an international organisation on this basis, or a law or a regulation, or a serious threat or harm to the public interest, that he had personal knowledge of.*" Secondly, the person needs to comply with the required reporting procedure – the alert is reported in priority to the supervisor, the employer or any designated adviser. In the absence of response from the latter within a reasonable time, this alert can be sent to the judicial authority, the administrative authority or professional bodies. A further lack of response from authorities and professional bodies within three months allows the whistle-blower to make the alert publicly available, unless in the case of serious and imminent danger or risk of irreversible damage (Article 8 of the Sapin II Law). 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.

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

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

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

4.4 Incentives for Whistle-blowers

These protective measures (see **4.3 Protection Afforded to Whistle-blowers**) against dismissal, obstruction, identity disclosure and criminal prosecution for breach of secrecy can be viewed as sufficient incentives to report misdemeanours. Other incentives, such as financial rewards, do not apply.

4.5 Location of Relevant Provisions Regarding Whistle-blowing

The main national legal provisions relating to whistle-blowing are enshrined in the Penal Code (Article 122-9) and the Employment Code (Article L.1132-3-3 §2).

5. Enforcement

5.1 Enforcement of Anti-bribery and Anti-corruption Laws

See **1. Offences.**

5.2 Enforcement Body

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

The Public Prosecutor's Office is empowered to decide whether it is appropriate to institute proceedings, although civil claimants may also initiate prosecution. The investigating magistrate and the Criminal Chamber of the High Court, when the Public Prosecutor brings cases before them, have jurisdiction to handle corruption cases.

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

On 1 February 2014, a National Financial Prosecutor specialised in economic and financial matters, and more specifically in corruption and tax-fraud matters, was created.

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

Aside from those specific powers, prosecutors at eight inter-regional specialised courts are also granted expanded territorial jurisdiction over a certain number of economic and

financial offences, including some corruption offences, in highly complex matters. After carrying out a pre-trial investigation, the prosecutor may bring the case to an investigating magistrate of the same inter-regional specialised court for deeper investigation and/or directly to a specialised criminal chamber of this court for trial.

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

In addition, a number of administrative bodies have been created, dealing with tasks that may relate to corruption issues. An Agency for the Management and Recovery of Seized and Confiscated Assets in criminal matters (*Agence de Gestion et de Recouvrement des Avoirs Saisis et Confisqués en matière pénale*, AGRASC) was created by the aforementioned law of 9 July 2010. AGRASC's duties include recovering assets seized in criminal proceedings and conducting pre-judgment sales of confiscated assets when they are no longer needed as evidence or if they may lose value (2,215 goods sold in 2017, representing EUR6.9 million). Tracfin is the sole centre for collecting suspicions reported by the regulated professions subject to the anti-money laundering measures. It receives all reports of suspicions that may concern acts of corruption.

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

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

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

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

In its first decision rendered on 4 July 2019, the Enforcement Committee ruled that the FAA does not infringe the principle of non-retroactivity by requesting that it be provided with documents that predate the entry into force of the Sapin II Law. If it does not receive them, the FAA will be presumed to have proved the breach pursued.

5.3 Process of Application for Documentation

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

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

5.4 Discretion for Mitigation

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

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

The appointment and functioning rules of the FAA tend to provide its agents with autonomy in the exercise of their

tasks. The FAA is led by a magistrate (the first director being Charles Duchaine) who is not allowed to receive or solicit any instruction from any administrative or governmental authority. The Enforcement Committee has a separate staff and activity (Article 2 of the Sapin II Law). Its first decision, rendered on 4 July 2019, by which it dismissed a case of alleged breaches of Article 17 of the Sapin II Law although the FAA director had requested financial penalties on the company and its CEO, has confirmed the independence of this Committee.

5.5 Jurisdictional Reach of the Body/Bodies

See **5.4 Discretion for Mitigation**.

5.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption

By an aforementioned judgment handed down on 21 December 2018 (Paris High Court, 21 December 2018, No 060170092027), the Paris High Court refused to apply the principle of non bis in idem to a Deferred Prosecution Agreement ratified by an American Court, as the acts concerned had partly been committed in France, in line with the traditional solution adopted by the French Court of Cassation. The Court ruled that the accused legal entity, a French oil and gas major company, was guilty of having bribed an Iranian public official in order to obtain, in 1997, a significant gas contract and sentenced the company to a fine of EUR500,000. Indeed, the Court applied the principle of proportionality of penalties in the event of a prior conviction abroad and did not follow the Public prosecutor's requisitions, who had requested the conviction of the accused entity to an ancillary penalty of confiscation of EUR250 million. This decision is also interesting in that it is a reminder that it is not necessary, under French criminal law, for the offence of bribery for it to be established that the public official has himself or herself a decision-making power within the decision-making entity which attributed the contract at stake. The French company did not appeal this decision.

As regards non-trial resolutions, a public interest judicial convention was concluded on 24 May 2018 with a French bank concerning acts of bribery of Libyan public officials in co-operation with the US Department of Justice. The two prosecuting authorities co-ordinated their action in order to reach simultaneously the conclusion of a CJIP and a DPA (with respect to Libyan and IBOR matters). Regarding the acts of bribery, the French bank agreed to pay a fine of EUR250,150,755 to resolve the disputes in the United States. In France, it committed to pay an identical amount and to submit its compliance programme to the control of the FAA for two years. No public-interest judicial convention regarding corruption acts has been concluded so far in 2019.

The first decision rendered by the FAA Enforcement Committee on 4 July 2019 reflects the significant role of this new authority in encouraging compliance and reassures companies that are audited as to the leeway they will have, in the event of an audit, to comply with the new legal requirements before any penalties are imposed. The assessment of the breaches on the date on which the Committee takes its decision increases the FAA's role as an incentive for compliance but considerably weakens the usefulness of its Enforcement Committee. This approach differs from the one of the French Financial Markets Authority and the Prudential Supervision and Resolution Authority which determine whether breaches exist as the date of the audit.

5.7 Level of Sanctions Imposed

See **3. Penalties.**

6. Review and trends

6.1 Assessment of the Applicable Enforced Legislation

In the fight against corruption, France's legal arsenal relies on both trial and non-trial resolutions.

In 2018, Transparency International ranked France 21st, gaining two places since 2017, in its corruption perceptions index in the public sector. France was awarded a score of 72 on a scale of 0 to 100, where 0 is highly corrupt.

According to the 2018 FAA annual report, prosecutors handled 816 proceedings relating to probity offences in 2017, an increase of 6.7% from 2016. The most frequently prosecuted offences were bribery (141 prosecutions), embezzling of public funds (78 prosecutions) and influence-peddling (72 prosecutions). Finally, 297 of the prosecuted probity offences resulted in a definitive conviction, specifically stating that bribery offences amounted to 41.8% of these convictions.

On 20 March 2019, the OECD published the results of its study entitled "*Resolving Foreign Bribery Cases with Non-Trial Resolutions*" in which it noted that, ever since the entry into force of the OCDE Anti-Bribery Convention, bribery offences, including bribery of foreign public officials, have increasingly been resolved through non-trial resolutions. Thus, out of the 890 cases concluded under the Bribery Convention until the date of the study, close to 80% have been solved through non-trial resolutions. However, the OECD noticed that among the countries that have relied on both trial and non-trial resolutions, the vast majority of their resolutions were, on average, concluded through non-trial resolutions. In particular, France is the jurisdiction least likely to conclude a foreign bribery matter without trial, concluding only two of 18 resolutions (11%) through some type of non-trial resolution. According to the OECD, the reason is that the public-interest judicial convention is a recent instrument. The results of the OECD's working group in 2020, as part of its fourth round of evaluation, will be enlightening to assess the effectiveness of this tool in France.

6.2 Likely Future Changes to the Applicable Legislation or the Enforcement Body

In its report dated 20 March 2019, the OECD welcomed the conclusion, on 24 May 2018, by a French bank, of a public-interest judicial convention concerning acts of bribery of a foreign public official, highlighting the facts that:

- the monetary penalties imposed on the French company dramatically exceeded what had been imposed in previous foreign bribery cases upon conviction at trial;
- it appeared to have facilitated the first co-ordinated resolution between French authorities and the US DOJ; and
- it marked the first time that French authorities had required a company to undergo a monitorship as part of the resolution of a foreign bribery case.

Although the public-interest judicial convention seems to be an attractive mechanism for resolving complex economic crimes, it undoubtedly remains an imperfect tool. Firstly, legal entities should bear in mind that if they are innocent, it is not the natural route to take.

Secondly, there is still an asymmetry of information between the Public Prosecutor's Office and the company concerned, which has very little visibility over what it incurs. In this respect, it would be appropriate to draw inspiration from the American Sentencing Guidelines, which are based on a system of "points" leading to a "score" likely to be multiplied by a coefficient of between 0.05 and 2 depending on the situation at stake. Thus, the definition of the scale to be applied and the minimum and maximum coefficients to be applied per score range allows the persons concerned to have a certain visibility on what they incur, while leaving the Prosecutor the latitude to adjust the amount of the fine according to what he or she considers appropriate.

Thirdly, its limited scope to legal entities could turn out to be detrimental to managers who can only be judged through a trial. Finally, another risk is that, in the event of failure of negotiations with the Public Prosecutor's Office, the judges then in charge of the case at trial could take into consideration an admission of guilt of the legal entity, since there is no guarantee of confidentiality of the elements communicated by the company prior to the formalisation of the public-interest judicial convention.

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