# Anti-Corruption Regulation 2020

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Anti-Corruption Regulation*, which is available in print and online at www.lexology.com/gtdt.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, James G Tillen of Miller & Chevalier Chartered, for his assistance with this volume.

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## RELEVANT INTERNATIONAL AND DOMESTIC LAW

### International anti-corruption conventions

1 To which international anti-corruption conventions is your country a signatory?

The French anti-corruption legal framework is the result of the ratification and transposition by France of several conventions relating to bribery.

- The European Union Convention on the fight against corruption involving officials of the European Communities or officials of member states, signed on 26 May 1997 before its ratification was authorised by Law No. 99–423 of 27 May 1999 (the EU Convention).
- The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed by France on 17 December 1997 before its ratification was authorised by Law No. 99–424 of 27 May 1999 (the OECD Convention).
- The Council of Europe criminal and civil law conventions on corruption of 27 January 1999 and 4 November 1999, respectively, the ratification of which was authorised by France by the Law of 25 April 2008.
- The additional protocol to the Council of Europe criminal law convention on international corruption, signed on 15 May 2003 before its ratification was authorised by Law No. 2007–1154 of 1 August 2007.
- The United Nations Convention against Corruption, signed by France on 31 October 2003, before its ratification was authorised by Law No. 2005–743 of 4 July 2005.

### Foreign and domestic bribery laws

2 Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Incorporating the OECD Convention and the EU Convention, Law No. 2000–595 of 30 June 2000, which has amended the Penal Code and the Code of Criminal Procedure with regard to the fight against corruption, introduced the offence of bribery of foreign public officials. Since then, numerous reforms have been adopted so as to effectively fight corruption. Thus, Law No. 2007–1598 of 13 November 2007 relating to the fight against corruption expanded the scope of criminal prosecution to tend towards a greater assimilation between foreign bribery laws and domestic bribery laws. Then Law No. 2010–768 of 9 July 2010 focused on facilitating the seizure and confiscation of assets in criminal matters, especially in bribery cases. French law was thereafter enhanced by Law No. 2013–1117 of 6 December 2013 on combating major economic and financial crimes, which increased possible penalties and created the National Financial Prosecutor.

Under French criminal law, the prosecution of bribery is based on the status of the person bribed, so that a specific offence has been created for each type of person. Thus, the French Penal Code criminalises 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 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).

In each situation, criminal law distinguishes between active bribery and passive bribery, it being specified that such a distinction allows the possibility to prosecute the bribe-giver independently from the bribe-taker and vice versa.

Regardless of the offence concerned, active bribery is defined as the acts of:

- unlawfully proposing, at any time, directly or indirectly, any offer, promise, donation gift or advantage to a person (public official, judicial official or private individual), for the benefit of such person or of a third party, to induce or reward the performance or the non-performance by such person of an act pertaining to his or her position, duties, mandate or activities, or facilitated thereby; or
- accepting the proposal of a person (public official, judicial official or private individual) who unlawfully requests, at any time, directly or indirectly, such advantages in exchange for such acts.

In contrast, passive bribery can be defined as the act of a person (public official, judicial official or private individual) unlawfully requesting or accepting advantages as defined above, at any time, directly or indirectly, on his or her behalf or on behalf of a third party, inducing or rewarding the performance or the non-performance of an act pertaining to his or her position, duties, mandate or activities, or facilitated thereby.

### Successor liability

3 Can a successor entity be held liable for violations of foreign and domestic bribery laws by the target entity that occurred prior to the merger or acquisition?

Pursuant to the principle of individual criminal liability, only the perpetrator of an offence and the accomplice to the same offence can be prosecuted and sentenced for it (article 121–1 of the Penal Code). Consequently, 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 violations of bribery laws committed by the organs or representatives of the other entity on behalf of the latter 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, the financial sanction will be transferred to the successor only if a final sentence is pronounced before the date of the transaction.

With respect to civil liability, the successor entity is civilly liable for offences committed previously by the dissolved company (Court of Cassation, Crim Ch, 15 November 2016, No. 15-84.692).

**Civil and criminal enforcement**

4 Is there civil and criminal enforcement of your country's foreign and domestic bribery laws?

In France, the powers to prosecute and convict perpetrators of acts of corruption belong to judicial authorities.

The Public Prosecutor's Office is empowered to decide whether it is appropriate to institute proceedings, it being specified that 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 bribery cases.

However, this general jurisdiction is shared with specific administrative authorities (see questions on Agency Enforcement), prosecutorial agencies and specialised courts.

In 2014, a National Financial Prosecutor specialised in economic and financial offences, and more specifically in corruption and tax-fraud matters, was established. Cases investigated and prosecuted by the National Financial Prosecutor are brought to an investigating magistrate in Paris for deeper investigation or directly to dedicated Criminal Chambers of the Paris High Court (11th and 32nd Chambers) for trial.

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. They may carry out a pretrial investigation before bringing the case to an investigating magistrate of the same inter-regional specialised court for deeper investigation or directly to a specialised criminal chamber of this court for trial.

These various prosecutorial bodies are assisted by a specialised investigative service: the Central Office for the Fight Against Corruption and Financial and Tax Offences (OCLCIFF). OCLCIFF is granted with 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.

With respect to civil enforcement, civil action may be brought before civil courts or, together with the public action, before criminal courts.

The victim of an offence has the right to choose between civil and criminal proceedings. This choice is irrevocable (article 5 of the Code of Criminal Procedure), it being specified that irrevocability applies only when the victim brought the civil action before the civil courts in the first place (article 426 of the Code of Criminal Procedure) and that it 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. Conversely, 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 civil action may be suspended (article 4 of the Code of Criminal Procedure).

**Dispute resolution and leniency**

5 Can enforcement matters involving foreign or domestic bribery be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial? Is there a mechanism for companies to disclose violations of domestic and foreign bribery laws in exchange for lesser penalties?

French law does not provide for a mechanism strictly 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 to corruption offences. Under this procedure, the Public Prosecutor's Office, or the investigating magistrate, is entitled to offer directly and without 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 (article 495-7 of the Code of Criminal Procedure). 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.

Moreover, Law No. 2016-1691 of 9 December 2016 (the Sapin II Law) created a new transactional mechanism inspired by the US DPA: the public-interest judicial convention (CJIP), which 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 (article 41-1-2 of the Code of Criminal Procedure). Under this procedure, there is no acknowledgement of guilt. 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 (1) the obligation to pay a public-interest fine in proportion to the advantages gained from the offences within the limit of 30 per cent 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, (2) the obligation to set up a compliance programme for a maximum of three years under the supervision of the French Anticorruption Agency (AFA), or (3) the obligation to compensate any identified victims in an amount and following modalities determined in the convention.

A subsequent validation hearing will take place, during which the judge decides whether to validate the proposed agreement. Once validated, the legal entity has 10 days to retract. Then, the validation judgment as well as the convention itself are published on the AFA website.

In the joint guidelines they published on 26 June 2019, the AFA and the National Financial Prosecutor's Office encouraged companies to cooperate with the French authorities by self-reporting acts of corruption within a reasonable time frame 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. As the fate of the individuals involved is not settled by the agreement, prosecution authorities will decide whether a prosecution should be brought against them.

With regard to cooperation, there is no other special treatment of perpetrators of offences who cooperate with investigators and prosecutors. However, the cooperation 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 taken into consideration as mitigating factors by a court when it determines the quantum of the penalty to be imposed.

That said, 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 to have their imprisonment 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).

Furthermore, the law exempts customs agents from penalties if they report acts of corruption they have committed (article 59 of the Customs Code).

Subject to these mechanisms, French law does not provide any leniency measure, it being specified that the judge has full discretion to choose, from among the penalties applicable, those he or she deems appropriate in light of the nature of the acts and the personality of the defendant as well as the quantum of the penalty.

## FOREIGN BRIBERY

### Legal framework

6 Describe the elements of the law prohibiting bribery of a foreign public official.

The French Penal Code has criminalised active bribery of foreign public officials since the aforementioned Law No. 2000–595 of 30 June 2000 (article 435–3 of the Penal Code) and, following Law No. 2007–1598 of 13 November 2007, passive bribery by such officials (article 435–1 of the Penal Code). French law also criminalises active and passive bribery of international public officials (articles 435–1 and 435–3 of the Penal Code) as well as active and passive bribery of foreign or international judicial staff (articles 435–7 and 435–9 of the Penal Code).

As a prerequisite, the status of the person bribed falls within the scope of the provision at stake. The physical element consists of the bribe-taker's request for advantages or in his or her consent to the bribe-giver's offer (passive bribery) or in the acceptance of the bribe-taker's solicitation as well as in the bribe-giver offering for an advantage (active bribery). Lastly, the mental element is composed of:

- a general intent, deduced from the unlawful nature of the advantage received or granted and from the fact that the request, proposal, agreement or acceptance are necessarily intentional acts; and
- a special intent, which consists of the objective sought (ie, for the bribe-giver, conferring an advantage to obtain the benefit of the performance or non-performance of an act and, for the bribe-taker, to perform or refrain from performing such an act to obtain an advantage).

Neither the performance of the act nor receipt of the advantage are required for the offence to be characterised. The mere offering or agreeing to an advantage suffices for the commission of the offence of active bribery. In the same way, the mere fact of requesting or accepting an advantage is construed as an act of passive bribery. It explains why French law does not expressly criminalise attempted bribery.

Under French law, the conclusion of a corruption pact does not need to precede the performance or non-performance of the act expected. Such principle had been established by case law and confirmed by the aforementioned Law No. 2000–595 of 30 June 2000 and Law No. 2011–525 of 17 May 2011 to simplify and improve the quality of law.

The aforementioned provisions are supplemented by the criminalisation of active and passive influence peddling involving international officials and international judicial staff as well as, following the Sapin II Law, active and passive influence peddling involving foreign public officials (articles 435–2, 435–4, 435–8 and 435–10 of the Penal Code).

### Definition of a foreign public official

7 How does your law define a foreign public official, and does that definition include employees of state-owned or state-controlled companies?

French law defines foreign public officials as persons who:

- hold public authority (eg, state representatives and civil servants such as police officers, teachers and tax administrators);
- have a public service mission; or
- hold public elected office; and
- perform their duties:
  - in a foreign state; or
  - within a public international organisation.

If the employee of a state-owned or state-controlled company has a public service mission (eg, has a general interest function designed to meet the collective needs of the public), he or she can therefore be included in the definition of a foreign public official.

French law also criminalises active and passive bribery of any:

- person who holds a judicial position in a foreign state or with an international court;
- civil servant with the registry of a foreign court or international court;
- expert appointed by any such court or by the parties to the proceedings;
- person appointed to act as a conciliator or mediator by any such court; and
- arbitrator who performs his or her duties under the arbitration law of a foreign state.

### Gifts, travel and entertainment

8 To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

Regardless of the offence concerned, the scope of the French Penal Code is very broad, as a bribe can be defined as any offer, promise, donation, gift or reward unlawfully offered or requested, without any restriction as to the value of such an advantage. What matters is the intention that lies beneath the granting of, or the request for, an advantage.

This list covers many possibilities, it being specified that French law does not include any specific provision that could help companies in identifying practices that may be prohibited. However, the AFA, created by the Sapin II Law, has identified, in its non-legally binding recommendations on how to prevent and detect acts of corruption, a number of major risks including gifts, accommodations, entertainment, customer travel, donations, sponsorships and facilitation payments.

According to the case law, bribes may consist of a sum of money as well as of a non-cash benefit (eg, an apartment or a car) or a service (eg, a trip or a safari).

### Facilitating payments

9 Do the laws and regulations permit facilitating or 'grease' payments to foreign officials?

Facilitation payments are not allowed under French law and the offence of bribery can be characterised even if the amount at stake is small. As seen above, facilitation payments have been specifically identified as major risks by the AFA. That being said, should the amount be small, it may be considered as a mitigating factor by a court while determining the quantum of the penalty to be ordered.

### Payments through intermediaries or third parties

10 In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Unlawful payments are prohibited whether they are made directly or indirectly. Therefore, criminal liability is incurred even if the payments are carried out through intermediaries or third parties, should the perpetrator have knowledge that the said intermediary or third party used the same payments to pay bribes. Such an intermediary or third party may also be prosecuted, as the principal perpetrator of the offence or as an accomplice. For example, an intermediary who had deposited

cheques into his own bank account on behalf of a mayor who had received bribes was convicted of aiding and abetting bribery (Court of Cassation, Criminal Chamber, 20 May 2009, No. 08–87.354).

**Individual and corporate liability**

11 | Can both individuals and companies be held liable for bribery of a foreign official?

Prior to the enactment of Law No. 2004–204 of 9 March 2004, adapting the justice system to changes in criminal behaviour, a specific provision was required to extend criminal liability to legal entities for a given offence, which was the case for bribery of public foreign officials. Since then, legal entities may be held liable in the same way as individuals for all criminal offences, including corruption ones, even if not expressly provided by law.

That being said, legal entities are criminally liable only for offences committed 'on their behalf' by their 'corporate bodies or representatives' (article 121–2 of the Penal Code). Legal entities' prosecution does not preclude individuals from also being prosecuted as perpetrators or accomplices where appropriate, at the discretion of the Public Prosecutor.

**Private commercial bribery**

12 | To what extent do your foreign anti-bribery laws also prohibit private commercial bribery?

Active and passive bribery of private individuals by other individuals is punishable by a five-year term of imprisonment and a fine of €500,000, 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 €2.5 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).

**Defences**

13 | What defences and exemptions are available to those accused of foreign bribery violations?

French law does not provide for any specific defence. In this respect, the fact for a company of having set up a very strong compliance programme, that goes beyond legal requirements, would not prevent the said company from being prosecuted or convicted for foreign bribery.

**Agency enforcement**

14 | What government agencies enforce the foreign bribery laws and regulations?

The Sapin II Law led to the creation of the AFA, the main duty of which is to monitor that certain legal entities (French companies that employ at least 500 employees and have an annual turnover or consolidated turnover of at least €100 million, as well as companies that belong to a group that employs at least 500 employees, and whose parent company is headquartered in France and have an annual turnover or consolidated annual turnover of at least €100 million) implement programmes to prevent and detect acts of corruption and influence peddling. This authority has been empowered to refer cases to its Enforcement Committee so as to prosecute and punish non-compliant legal entities. Legal entities that do not fulfil this obligation may be punished by a financial penalty up to €1 million, whereas individuals may face a financial penalty up to €200,000 (article 17 of the Sapin II Law).

To that purpose, the AFA agents may order the production of any document, as well as any helpful information, and to keep a copy thereof (article 4 of the Sapin II Law). They may also verify such information on the spot.

Thus, the AFA has jurisdiction only regarding French companies and their domestic and foreign subsidiaries, which explains why its president, Charles Duchaine, a former investigating magistrate, is promoting the expansion of the AFA's jurisdiction over foreign legal entities.

Since October 2017, the AFA has undertaken dozens of controls, notably within companies acting in the energy, aerospace and banking sectors.

The AFA is also in charge of issuing recommendations on how to prevent and detect acts of bribery and influence peddling (article 3 of the Sapin II Law). Since the entry into force of the Sapin II Law, it has, therefore, published a dozen recommendations aiming to help public institutions and private companies to comply with their obligations under the law.

In addition, other 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 (AGRASC) was created by Law No. 2010-768 of 9 July 2010. AGRASC is notably in charge of the recovery of assets seized in the course of criminal proceedings and of the conduct of pre-judgment sales of confiscated assets when they are no longer needed as evidence or if they may lose value. Tracfin, an agency charged with dealing with and taking action against illegal financial circuits, is the sole centre for collecting suspicion reports made by the regulated professions subject to the anti-money laundering measures. It notably receives all suspicion reports that may concern acts of corruption.

These agencies, as well as the High Authority for Transparency in Public Life and the Public Finance General Directorate, play a key role in detecting offences, in particular bribery offences. They deal with the Public Prosecutor's Office, which gives instructions to the enquiry services and ensures they cooperate fully.

**Patterns in enforcement**

15 | Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

The OECD was particularly critical towards France in its 2012 Phase 3 Report on Implementing the OECD Convention in France. Although the OECD softened its tone in its follow-up to the Phase 3 report (France: Follow-up to the Phase 3 Report and Recommendations, December 2014), it pointed out that 'France [was] insufficiently in compliance with the Anti-Bribery Convention'.

However, the French legal framework has been considerably enhanced, especially with the adoption of the Sapin II Law. Most observers agree that it constitutes progress in the prevention, detection and repression of breaches of probity, including bribery of foreign officials.

The aforementioned law of 6 December 2013 extended the scope of extraordinary measures (such as surveillance, infiltration, wiretapping, recording conversations and filming certain vehicles or premises) to corruption offences (article 706–1–1 of the Code of Criminal Procedure). The creation of a specialised National Financial Prosecutor also helps to effectively combat bribery.

Furthermore, the judgments issued in 2017, 2018 and 2019 in cases involving breaches of the duty of probity – notably corruption of foreign public officials – suggest that French courts are increasingly severe as regards sanctions imposed with higher fines and more recourse to non-suspended prison sentences.

The 2018 AFA report, published on 21 June 2019, has shown that prosecutors handled 816 proceedings relating to probity offences in 2017 (among which 141 prosecutions for bribery and 72 for influence-peddling), an increase of 6.7 per cent from 2016. Moreover, it is important to highlight that 47 audits were conducted in 2018 (versus six in 2017): 43 at the initiative of the AFA; and 4 as part of the enforcement

of public-interest judicial conventions. The AFA has received 303 alerts about suspicions of corruption, influence peddling or non-compliance with obligations set by article 17 of the Sapin II Law: one of these alerts has been addressed to the Prosecutor and five have triggered audits from the AFA (only one involving a corporate entity). In total, the AFA has reported five suspicions of corruption and similar offences to the Prosecutor, in application of article 40 of the Code of Criminal Procedure. More particularly, these reports have been made to the French Financial Prosecutor and to the Prosecutors of Paris, Marseille, Nanterre and Lille. Furthermore, the AFA has indicated that it is particularly focused on companies that are considered as leaders. In other words, by targeting such companies in Europe and also internationally, it expects the dissemination of best compliance practices all over the world.

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 zero to 100.

On 20 March 2019, the OECD published the results of its study entitled 'Resolving Foreign Bribery Cases with Non-Trial Resolutions' in which it highlighted that, bribery offences, including foreign public officials, have increasingly been resolved through non-trial resolutions. However, France appears to be the jurisdiction least likely to conclude a foreign bribery matter without trial, since it concluded only two of 18 resolutions through some type of non-trial resolution. According to the OECD, it results from the fact that the public-interest judicial convention is a recent mechanism. However, eight public-interest judicial conventions have been concluded to date.

**Prosecution of foreign companies**

16 | In what circumstances can foreign companies be prosecuted for foreign bribery?

As a general rule, criminal procedure may be initiated in France against the perpetrator of an offence if French law is applicable, which is the case if:

- the offence is committed in France (article 113–2 of the Penal Code);
- any of the constituent elements of the offence are committed in France (article 113–2 of the Penal Code);
- the perpetrator of the offence is French and a similar offence exists in the country in which such an offence is committed (article 113–6 of the Penal Code);
- the victim is French (article 113–7 of the Penal Code); or
- an international convention designates the French courts as having jurisdiction (articles 689, 689–1 and 689–8 of the Code of Criminal Procedure).

Thus, foreign companies may be prosecuted if the offence, or one of its constituent elements, is committed in France or if the victim is French.

With respect to acts of corruption and influence peddling of foreign public officials committed abroad, the Sapin II Law extended jurisdiction of French judges by removing, for such offences, the application of the dual criminality requirement of article 113–6 of the Penal Code and of article 113–8 of the Penal Code, which only authorises the prosecutor to initiate prosecution for offences committed abroad by French citizens if the victim has filed a claim or if the authorities of the country in question have issued an official complaint.

**Sanctions**

17 | What are the sanctions for individuals and companies violating the foreign bribery rules?

First, French civil law considers corruption acts to be void because their consideration or purpose is immoral and illegal (Court of Cassation, Commercial Chamber, 7 March 1961, Civil Bulletin III).

Second, individuals who commit the offence of active (article 435–3 of the Penal Code) or passive (article 435–1 of the Penal Code) bribery in the international as well as in the domestic arenas may be imprisoned for a term of up to 10 years, and sentenced to pay a fine up to €1 million, which are the maximum penalties for misdemeanours, it being specified that the amount of the fine may be increased to an amount equal to double the proceeds generated by the offence.

Other penalties may be imposed on individuals. Indeed, they may notably be prohibited from holding public office or from engaging 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 (article 435–14 of the Penal Code). Any item that is a proceed of the infraction may also be confiscated.

As far as legal entities are concerned, they are subject to a fine of €5 million, which may be increased to an amount equal to double the proceeds generated by the offence (article 435–15 of the Penal Code). Among other things, legal entities may also face a prohibition against performing for a period of up to five years one or more professional or social activities, a placement under judicial supervision for an equal period or the closure of one or more establishments of the company used to commit the offence, as well as the exclusion from public contracts for a period of up to five years.

The Sapin II Law introduced a new penalty that can be ordered on legal entities convicted for bribery or influence peddling. This penalty consists of the implementation, by the legal entity, for a period of up to five years, of a compliance programme, under the supervision of the AFA.

The penalties provided for active bribery of foreign or international judicial officials are the same as for bribery of foreign public officials. In cases of influence peddling involving foreign public officials (articles 435–4 and 435–2 of the Penal Code), officials of a public international organisation (articles 435–2 and 435–4 of the Penal Code) or international judicial staff (articles 435–8 and 435–10 of the Penal Code), individuals are liable for a term of imprisonment of up to five years and a fine of €500,000 – which may be increased to an amount equal to double the proceeds generated by the offence – as well as various supplemental penalties (articles 435–14 of the Penal Code). Legal entities are liable for a fine of €2.5 million – which may be increased to an amount equal to double the proceeds generated by the offence – as well as various supplemental penalties (article 435–15 of the Penal Code).

**Recent decisions and investigations**

18 | Identify and summarise recent landmark decisions or investigations involving foreign bribery.

In the past, few of the convictions handed down in corruption cases were on the grounds of bribery of foreign public officials. For example, in 2015, the Paris Court of Appeal had overturned the High Court's decision – which had held a French company liable to pay a fine of €500,000 – by acquitting the said company of active bribery of a foreign public official, in view of alleged bribes paid to public officials in Nigeria between 2002 and 2003 to obtain a contract. The court stated that there was insufficient proof that the payments were intended as bribes (Paris Court of Appeal, 7 January 2015, No. 12/08695, which has become final).

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

In the famous 'ill-gotten gains' case, the 32nd Criminal Chamber of the Paris High Court sentenced the vice president of an African country to three years' imprisonment and a fine of €30 million, notably for laundering the proceeds of corruption, it being specified that both penalties were suspended (High Court of Paris, 32nd Criminal Chamber, 27 October 2017). The court also ordered the seizure of many assets in France, for an amount of several millions, except for an apartment bought for €25 million, the seizure of which will have to await

the outcome of a proceeding pending before the International Court of Justice. These sentences have not become final yet, as this judgment is currently on appeal.

In another case, the Paris Court of Appeal convicted a Swiss company, a French company and three individuals for corruption of foreign public officials as well as two individuals for aiding and abetting corruption of foreign public officials. The legal entities were ordered to pay fines of, respectively, €300,000 and €750,000, the latter being the maximum penalty at the time of the events, and individuals were sentenced to pay fines ranging from €15,000 and €75,000 (Paris Court of Appeal, 26 February 2016, No. 13/09208). On 14 March 2018, the Court of Cassation rejected the appeals lodged against the Court of Appeal of Paris' decision by the above-mentioned companies and individuals (Court of Cassation, Criminal Chamber, 14 March 2018, No. 16-82.117).

On 21 December 2018 (Paris High Court, 21 December 2018, No. 060170092027), the Paris High Court decided not to apply the principle of non bis in idem to a deferred prosecution agreement ratified by an American court as the prosecuted acts had partly been committed in France. More precisely, the Paris 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 consequently sentenced the company to a fine of €500,000. 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 €250 million. It also results from this judgment that it is not necessary, under French law, for the offence of bribery to be established, that the public official has himself or herself a decision-making power within the entity which attributed the contract at stake, which is highly questionable.

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

On 30 October 2017, the Swiss branch of a UK bank concluded the first public-interest judicial convention – validated by the High Court of Paris on 4 November 2017 – with the National Financial Prosecutor's office and agreed to pay €300 million (a €158 million fine and €142 million to the French state as damages) to settle a long-running investigation into tax evasion by French citizens in Switzerland. The amount of the public-interest fine was based on two elements: the restitution of the profits derived from the breaches and an additional penalty based on the exceptional gravity of the facts. It should be noted that the additional penalty was not provided for by either the Sapin II Law or the Decree of 27 April 2017 on the implementation of the public-interest judicial convention. To justify this complementary penalty, the National Financial Prosecutor indicated that the bank 'did not disclose the facts to the French judicial authorities or acknowledge its criminal responsibility during the judicial investigation' and that it also 'provided minimal cooperation in investigations'.

Multiple conventions have been concluded since then, among which three in matters of corruption with French companies.

Two public-interest judicial conventions concluded and validated in February 2018 were relating to domestic bribery. More recently, on 24 May 2018, a public-interest judicial convention was concluded with a French bank concerning bribery of Libyan public officials. The convention was validated by the High Court of Paris on 4 June 2018. This is the first convention negotiated in cooperation with the US Department of Justice. Indeed, the two prosecuting authorities coordinated their action to reach a simultaneous conclusion of a public-interest judicial convention and a deferred prosecution agreement (with respect to the Libyan and Interbank Offered Rate matters). In total, therefore, the French bank has agreed to pay US$1.34 billion to resolve the disputes in the United States and France, the sanctions in France being a public-interest fine of €250,150,755 and a two-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 coordinated resolution agreement constitutes significant progress in the fight against international corruption'.

## FINANCIAL RECORD-KEEPING AND REPORTING

### Laws and regulations

**19 What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?**

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 an offence for the chairs, directors or executive officers of a limited company as well as for the managers of a limited liability company to publish or present to shareholders annual financial statements that do not provide, for each financial year, an accurate view of the results of the company's operations during the financial year or of its financial position and assets at the end of such period (articles L241–3 and L242–6 of the Commercial Code).

Listed companies may also be prosecuted before the French Financial Markets Authority (AMF) if they disclose financial information that is false, inaccurate or deceptive (article 223–1 of the AMF General Regulation).

### Disclosure of violations or irregularities

**20 To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?**

Pursuant to article 40 of the Code of Criminal Procedure, all public officials and civil servants, including the AFA, who, in the performance of their duties, become aware of a felony or misdemeanour have to inform the public prosecutor's office and provide it with all information related thereto. Moreover, statutory auditors are required to report to the public prosecutor criminal acts of which they become aware (article L823–12 of the Commercial Code).

Subject to the aforementioned, there is no general duty for legal entities to disclose violation of anti-bribery laws, neither is there any incentive to do so, whereas such incentives exist for individuals and customs agents. According to us, the new settlement procedure introduced by the Sapin II Law is not a sufficient incentive for legal entities to disclose potential wrongdoings as the prosecutor, regardless of the disclosure of the violation of anti-bribery laws and the cooperation of the legal entity, has entire discretion as regards the proposal of the conclusion of a public-interest judicial convention and the amount of the public interest fine.

That being said, the Sapin II Law enhanced protection for whistle-blowers by creating:

- a general status for whistle-blowers, protecting them, when fulfilling certain conditions, from a broad range of retaliatory measures;
- an obligation for public and private companies that employ at least 50 employees to adopt an internal whistle-blowing system; and
- a new specific protection for whistle-blowers in the financial sector (articles 6 to 16 of the Sapin II Law).

**Prosecution under financial record-keeping legislation**

21 | Are such laws used to prosecute domestic or foreign bribery?

Corruption offences generally lead legal entities to use accounting stratagems, notably using fake invoices, to conceal benefits unlawfully obtained or sums unlawfully paid in their financial statements. As a consequence, the financial statements do not accurately reflect the company's results. In theory, they can be prosecuted on these grounds.

However, in practice, officers charged for corruption acts will essentially also be prosecuted on the grounds of misuse of corporate assets (article L242–6 of the Commercial Code) as use of company funds and assets for illicit purposes is necessarily inconsistent with the corporate interest (Court of Cassation, Criminal Chamber, 19 September 2007, No. 07–80.533).

**Sanctions for accounting violations**

22 | What are the sanctions for violations of the accounting rules associated with the payment of bribes?

For the offences provided by articles L241–3 and L242–6 of the Commercial Code, individuals may be punishable by up to five years' imprisonment and a fine of up to €375,000, as well as supplemental penalties (articles L242–6, L243–30 and L249–1 of the Commercial Code), whereas legal entities risk a fine of up to €1.875 million (article 131–38 of the Penal Code).

Before the AMF, legal entities as well as their executives held liable for dissemination of false information may face a financial penalty of up to €100 million or to an amount equal to up to 10 times the gains generated (article 621–15 of the Financial and Monetary Code).

**Tax-deductibility of domestic or foreign bribes**

23 | Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

It goes without saying that bribes are not deductible from taxable income under French law. The General Tax Code expressly provides that sums paid or benefits granted, directly or indirectly, to a public official or a third party to induce or reward such official to act or refrain from acting in the performance of his or her official duties so as to obtain or retain a contract or other improper advantage in international commercial transactions, are not deductible.

In a recent case in which a French company had paid US$140 million to the US authorities, the state council stated that if the offence of bribery is committed by an employee of a legal entity, the culpable intent of the legal entity is not needed for adding back into its taxable income the amounts paid (state council, 4 February 2015, No. 364,708).

## DOMESTIC BRIBERY

**Legal framework**

24 | Describe the individual elements of the law prohibiting bribery of a domestic public official.

The required elements of the law prohibiting bribery of a domestic public official are the same as those for bribery of a foreign public official (see Legal framework).

**Scope of prohibitions**

25 | Does the law prohibit both the paying and receiving of a bribe?

Both the paying and the receiving of a bribe are prohibited under French law, the former being considered active bribery whereas the latter is considered passive bribery.

Moreover, the mere fact of making a proposal or accepting a request for an advantage suffices for the commission of the offence of active bribery and the mere fact of requesting or accepting a proposed advantage suffices for the commission of the offence of passive bribery.

**Definition of a domestic public official**

26 | How does your law define a domestic public official, and does that definition include employees of state-owned or state-controlled companies?

Similarly to bribery of foreign public officials, French law is very broad and applies to all persons who:

- hold public authority;
- have a public service mission; or
- hold a public elected office.

French criminal law also prohibits bribery of judicial staff, which includes judges, court clerks, experts, mediators and arbitrators.

**Gifts, travel and entertainment**

27 | Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and the receiving of such benefits?

Both the paying and the receiving of a bribe are prohibited under French law, the former being considered as active bribery whereas the latter is considered as passive bribery. Pursuant to the AFA's recommendations, gifts, accommodations, entertainment, customer travel, donations, sponsorships and facilitation payments are identified as major risks of bribery. According to the case law, bribes may consist of a non-cash benefit or a service.

**Facilitating payments**

28 | Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Facilitation payments (see Facilitating payments) are not a defence under French law and individuals and legal entities may be sentenced even if the amounts at stake are small.

**Public official participation in commercial activities**

29 | What are the restrictions on a domestic public official participating in commercial activities while in office?

A domestic public official who takes, receives or retains, directly or indirectly, any interest in an undertaking or in a transaction for which he or she is, at the time of the act, wholly or partly responsible for ensuring the supervision, administration, liquidation or payment is criminally responsible and may be punished by a imprisonment of up to five years and a fine of up to €500,000, which may be increased to double the proceeds generated by the offence (article 432-12 of the Penal Code).

**Payments through intermediaries or third parties**

30 | In what circumstances do the laws prohibit payments through intermediaries or third parties to domestic public officials?

The rules are the same as for foreign bribery (see Payments through intermediaries or third parties).

**Individual and corporate liability**

31 | Can both individuals and companies be held liable for violating the domestic bribery rules?

The rules are the same as for foreign bribery (see Individual and corporate liability).

**Private commercial bribery**

32 | To what extent does your country's domestic anti-bribery law also prohibit private commercial bribery?

The rules are the same as for foreign bribery (see Private commercial bribery).

**Defences**

33 | What defences and exemptions are available to those accused of domestic bribery violations?

The rules are the same as for foreign bribery (see Defences).

**Agency enforcement**

34 | What government agencies enforce the domestic bribery laws and regulations?

The government agencies are the same as for foreign bribery laws (see Agency Enforcement).

**Patterns in enforcement**

35 | Describe any recent shifts in the patterns of enforcement of the domestic bribery rules.

The patterns in enforcement are the same as for foreign bribery (see Patterns in enforcement).

**Prosecution of foreign companies**

36 | In what circumstances can foreign companies be prosecuted for domestic bribery?

The circumstances are the same as for foreign bribery (see Prosecution of foreign companies).

**Sanctions**

37 | What are the sanctions for individuals and companies that violate the domestic bribery rules?

Individuals who commit the offences of active and passive bribery of domestic public officials and judicial staff may be imprisoned for a term of up to 10 years, as well as be ordered to pay a fine of up to €1 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 that 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 €2 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 up to €5 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).

**Recent decisions and investigations**

38 | Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

Recent cases show the determination of judicial authorities to punish domestic bribery.

For example, on 12 June 2018, the Paris Court of Appeal sentenced the former director of Lyon's judicial police, on the grounds notably of passive bribery and influence peddling, to four years' imprisonment (among which 18 months suspended) and to a permanent ban on practising in police ranks (Paris Court of Appeal, 12 June 2018; this decision has, to our knowledge, become final).

In addition, two French companies have concluded with the National Prosecutor, respectively on 14 and 15 February 2018, public judicial interest conventions in relation to domestic bribery acts. They agreed to pay a public-interest fine of €2.7 million and €800,000, respectively, as well as implement a compliance programme within, respectively, an 18-month and two-year period under the AFA's supervision. Each of them also agreed to pay an amount of €30,000 for compensation of the damages undergone by a third company. In this case, the two French companies were found to have corrupted one employee of a third company, by offering the latter trips and payment of expenses to conclude and maintain commercial contracts with the said company. Both convictions were validated by the High Court of Nanterre on 23 February 2018.

In April 2019, the French Court of Cassation confirmed the conviction of a sub-prefect to three years' imprisonment, a fine of €20,000 and the definitive prohibition from performing any public function. The Court considered that the said individual 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 established by the obtaining of the Prefecture's favourable opinion and the payment made into her husband's account of €200,000 (Court of Cassation, 3 April 2019, No. 17-87.209).

Finally, 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 the same city, accused of active bribery, were both acquitted. The Paris High Court indeed judged 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 10 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 10 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.

## UPDATE AND TRENDS

### Key developments of the past year

39 Please highlight any recent significant events or trends related to your national anti-corruption laws.

On 4 July 2019, the AFA Enforcement Committee rendered its first public decision. In that case, the AFA director had alleged that the company subject to the control had not set up a sufficiently preventive arsenal in accordance with article 17 of the Sapin II Law. He, therefore, 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 (€1 million) and on its CEO (€200,000). 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 and, therefore, refused to issue any order or to impose any financial penalty.

This first decision rendered by the AFA Enforcement Committee illustrates the major role of this new authority in encouraging compliance. It also reveals that the audited company will have leeway to comply with Sapin II Law requirements before any penalties are imposed.

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

- the monetary penalties imposed on the French company significantly exceed those imposed upon conviction at trial in previous foreign bribery cases;
- it appeared to have facilitated the first coordinated resolution of a case between French authorities and the US Department of Justice; and
- it is the first time that, as part of the resolution of a foreign bribery case, French authorities have required a company to be subject to a monitorship.

It is true that, at first glance, the public-interest judicial convention seems to be an attractive mechanism for resolving complex economic crimes. However, it should be borne in mind that it is an imperfect tool.

First, a legal entity should not consider the public-interest judicial convention as an option if it is innocent. Second, a major issue is the asymmetry of information between the Public Prosecutor's Office and the concerned legal entity, the latter having very little visibility over what it actually incurs. Third, since this mechanism is limited to legal entities, the conclusion of a public-interest judicial convention could be detrimental to the individuals that would be judged before a court. Finally, another major issue arises in cases where negotiations with the Public Prosecutor's Office fail: since no one can guarantee that the elements communicated by the company in the course of the negotiations will remain confidential, the court may, in the context of a subsequent trial, take into consideration the admission of guilt of the legal entity.

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