

GIR KNOW-HOW SECURITIES & RELATED INVESTIGATIONS

France

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I N S I G H T

Regulatory environment

1 What are your country's primary securities or related law enforcement authorities?

The primary securities enforcement authority in France is the Autorité des Marchés Financiers (AMF). Created by Law No. 2003-706 dated 1 August 2003 on financial security, the AMF is an independent public body with a remit to (i) safeguard investments in financial products, (ii) ensure that investors receive material information and (iii) maintain orderly financial markets. It regulates financial markets and market infrastructures, listed companies, financial intermediaries authorised to provide investment services and financial products (article L. 621-1 of the Monetary and Financial Code).

To fulfil its remit, the AMF have been granted with (i) a normative power (article L. 621-6 of the Monetary and Financial Code), (ii) the right to conduct investigations and inspections as well as (iii) enforcement powers enabling it to pronounce financial and disciplinary sanctions.

With regard to market abuses, which can receive both an administrative and a criminal qualification (see question 3), the National Financial Prosecutor – created by Law No. 2013-1117 of 6 December 2013 on combating major economic and financial crimes – and consequently the investigating magistrates of the financial division of the Paris High Court have been granted an exclusive jurisdiction to investigate and prosecute market abuses criminal offences (article 705-1 of the Code of Criminal Procedure).

2 What are the principal violations or legal issues that the securities or related law enforcement authorities investigate?

The AMF may carry out inspections and investigations (article L. 621-9 to L.621-12 of the Monetary and Financial Code) and have been granted with investigatory powers to do so.

Inspections are focused on ensuring that professionals under the AMF's supervision (referred to in article L.621-9II of the Monetary and Financial Code) and individuals acting on their behalf comply with their professional obligations as set out in the Law or in the AMF General Regulation. Legal issues detected in the course of such inspections are very diversified.

Investigations on the other hand aim at detecting a breach of obligations that could undermine the orderly market activity, whether it is committed by a listed company, an individual, an institutional investor or a market professional. Investigations undertaken by the AMF mainly concern market abuses (ie, insider dealing, price manipulation and dissemination of false information, prohibited by articles 7, 12 and seq. of the European Regulation No. 596/2014 dated 16 April 2014, on market abuse) and listed companies that do not fulfil their informational duties. As underlined in the AMF's 2019 Annual Report, more than half of the investigations deal with cases of insider dealing.

As far as the National Financial Prosecutor is concerned, its investigations mainly concern market abuses criminal offences (ie, insider dealing, price manipulation and dissemination of false information), which are prohibited by articles L.465-1 and seq of the Monetary and Financial Code (see question 3).

3 If there is more than one authority involved in a securities or related investigation, how is jurisdiction allocated? What is the interplay between the securities regulator and the public prosecutor?

As mentioned above, market abuses can receive both an administrative and a criminal qualification. For nearly 30 years, French law have allowed that a person committing a market abuse could be sentenced both by the AMF's Enforcement Committee and by a criminal Court.

Following (i) the Grande Stevens case (ECHR, 4 March 2014, Grande Stevens v. Italy), where the ECHR stated, on the ground of the ne bis in idem principle, that the double repression of securities law violations was forbidden and (ii) a decision handed down by the French Constitutional Council, which deemed this double jeopardy system contrary to the French Constitution, the French law dated 21 June 2016 prohibited duplicate proceedings in instance of market abuses and created a process of case referral.

Article L. 465-3-6 of the Monetary and Financial Code now states that if the AMF or the French prosecutor intends to bring proceedings against a person for a market abuse, it must inform the other authority of such an intent and the latter shall have two months to contest. In the case of disagreement between the two authorities, the Paris Court of Appeal's Attorney General is empowered to decide which authority will handle the case. Even if not provided by the law, it appears that the National Financial Prosecutor will handle the most serious market abuses cases.

4 Do the securities or related law enforcement authorities have investigatory powers? Can they bring administrative, civil or criminal proceedings?

AMF's investigators have been granted with various investigatory powers enabling them to (i) request any documents, (ii) interview anyone who may be useful to the progress of the investigation, (iii) enter business premises and, in the course of investigations only, (iv) carry out house searches and seize documents based on a reasoned order from a judge with territorial jurisdiction (article L. 621-10 and L. 621-12 of the Monetary and Financial Code).

The AMF can take disciplinary sanctions against professionals acting under its supervision but also has the power to bring administrative proceedings against natural and legal persons.

When market abuses receive a criminal qualification, the PNF can carry out all necessary action to determine the truth such as searches, seizure of documents and witnesses interviews. Furthermore, where market abuses criminal offences are committed by an "organised gang", the PNF may take advantage of measures such as surveillance, infiltration, wiretapping, recording conversations and filming certain premises or vehicles (article 706-1-1 of the Code of Criminal Procedure).

5 Are regulatory or criminal securities and related investigations public? Under what circumstances?

The AMF and its members are bound to respect professional secrecy in accordance with article L.621-4 of the Monetary and Financial Code and are not allowed – subject to criminal penalties (article L. 641-1 of the Monetary and Financial Code) – to reveal any facts concerning an ongoing investigation or inspection or make public comments about one.

Even if the investigation itself is confidential, the hearing before the AMF Enforcement Committee as well as the decision handed down by the said Enforcement Committee are public. Even if it is possible to file a request aiming at obtaining a closed hearing or a non-publication order of the decision (article L. 621-15 of the Monetary and Financial Code), such requests are rarely granted in practice. When charges are dismissed however, the decision will be rendered anonymous in nearly all cases.

For criminal proceedings, the investigation must remain secret and the individuals taking part in the procedure are prohibited from disclosing any information on the ongoing case. However, the Public Prosecutor may, to avoid the dissemination of fragmented information or threat to public order, decide to release objective facts of the procedure that do not carry an appreciation of the defendant's guilt (article 11 of the Code of Criminal Procedure). In practice, breaches of the secrecy are common in France. It is to be noted that the civil party is not bound by the secret as such but cannot disclose elements of the criminal file to third parties.

6 Are regulatory or criminal securities and related investigations targeted at the company or the individuals involved, or both?

Pursuant to article L. 621-15 of the Monetary and Financial Code, the AMF can investigate and sanction (i) financial intermediaries and market infrastructures as well as the individuals under their authority or acting on their behalf for any breach of their professional obligations established by laws and regulations, (ii) listed companies as well as their representatives for any breach of the legal obligations they must comply with regarding the dissemination of regulated information and (iii) any natural or legal person who has engaged in or attempted to engage in market abuses.

Criminal authorities, on the other hand, can investigate and sanction whoever – both natural or legal person – has engaged in or attempted to engage in market abuses (article L. 465-1 to L. 465-3-5 of the Monetary and Financial Code).

That said, it is to be noted that, without an express order from a judge, AMF's investigators are entitled to have access to business premises only (article L. 621-10 of the Monetary and Financial Code), whereas law enforcement officers are allowed to conduct dawn raids in both business and private premises without any judicial order.

Investigation procedure

7 How do the securities and related law enforcement authorities typically begin an investigation?

Under French law, only the AMF's Secretary General or his or her delegate has power to decide to open an investigation.

He usually does so after an alert has been brought to the authority's attention. Such an alert often comes from the AMF's Market Surveillance Directorate, which monitors transactions on a daily basis. An investigation may also be open following a complaint or an alert sent by a third party, notably a whistleblower or a report of suspicious transaction from investment services providers.

The AMF can also open an investigation after a request has been made to do so by a foreign authority. According to AMF's 2019 Annual Report, among the 46 new investigations opened on 2019, 22 were opened at the request of a foreign authority.

The National Financial Prosecutor, on the other hand, does not monitor markets all days long so that it is quite less reactive than AMF can be, which partly explains why most of market abuses cases are handled by the AMF. It may open an investigation when it receives any alert, it being said that any public agent has the duty to inform the prosecutor of any criminal offence that was brought to his or her attention.

8 What level of suspicion of wrongdoing is required for the securities or related law enforcement authorities to begin an investigation?

There is no written standard concerning what level of suspicion of wrongdoing is required to open an investigation, nor is it possible to deduce one from the practice of the AMF. The decision of the Secretary General of the AMF to open an investigation is discretionary. However, it could reasonably be argued that he will take such a decision only if the alert is sufficiently serious.

9 May the securities or related law enforcement authorities conduct dawn raids? Does this depend on the nature and seriousness of the allegations?

Contrary to what prevails for law enforcement officers, who can carry out dawn raids and seize documents both in private and business premises in the conditions set forth by article 56 and seq and 76 and seq of the Code of Criminal Procedure without any judicial prior authorisation (subject to the authorisation of the searched party under article 76), AMF's investigators have power to enter business premises but are not allowed to conduct dawn raids on their own initiative nor are they entitled to seize documents. They will enter business premises in nearly all cases, irrespective of the seriousness of the allegations.

Pursuant to article L. 621-12 of the Monetary and Financial Code, however, when an investigation has been opened for a market abuse or acts that may constitute property crime and be sanctioned by the AMF's Enforcement Committee, the AMF Secretary General is entitled to file a request before the "liberty and custody judge" of the Regional Court in whose jurisdiction the premises to be searched are located to obtain an order authorising AMF's investigators to carry out dawn raids, in any place, and to seize documents. Said request must contain all the information in the AMF's possession which justifies such a search. During such an inquiry, a law enforcement officer will ensure that due process is followed and inform the judge of their progress.

10 Must the findings of a company's internal review be reported to the securities or related law enforcement authorities? When and under what circumstances?

Under French law, there is no general duty for natural or legal person to report illegal acts or behavior they would become aware of. Therefore, as a principle, when a company conducts an internal review, there is no need to report its finding to the enforcement authorities.

However, pursuant to article 16 of Regulation No 596/2014/EU of the European Parliament and Council of 16 April 2014 on market abuse and article L. 621-17-2 of the Monetary and Financial Code, professional acting under the supervision of the AMF (ie, market operators and investment services providers) must establish procedures aimed at preventing and detecting market abuses. If a suspicious order or transaction is detected, then the said professional has the duty to issue a "report on suspicious transactions" to the AMF.

11 Are whistleblowers a frequent source of information for securities and related investigations?

Since the Law No. 2016-1691 dated 9 December 2016 on transparency, the fight against corruption and the modernisation of the economy, also known as the Sapin II Law, a specific plan of action has been put in place to allow the AMF to receive and process alerts raised by whistleblowers.

The system aims to ensure the protection of the author of the alert and is governed by articles L. 634-1 to L. 634-4 of the Monetary and Financial Code.

Since this reform, whistleblowers are becoming a more important source of information for such investigations. Pursuant to the AMF's 2017 Annual Report, in 2017, the authority used more than 90 alerts received from whistleblowers.

12 Describe the typical phases of a securities or related investigation in your country.

When the Secretary General of the AMF decides to open an investigation, he has to nominate the investigators in charge and to define the scope of their mission.

Once an investigation opened, the investigators gather information using the aforementioned powers granted to them by the law (articles L. 621-10 and L.621-12 of the Monetary and Financial Code).

The investigators will then analyse the data gathered and, before closing the investigation and writing their final report, will send a “detailed letter” to the person(s) under investigations. This letter will set out their analysis of the factual and legal information gathered during the investigation. The respondent will have one month to respond.

Afterwards, the investigators will draft their final report, which indicates whether the facts constitute market offences or not (article R. 621-36 of the Monetary and Financial Code). Such report will be communicated directly to the AMF's Secretary General and the AMF's Board, together with the aforementioned response. The report is not made public nor is it communicated to the concerned parties.

Once it has reviewed the report, the AMF's Board decides what of the following action it has to take: (i) issue a statement of objection against the respondent and open a sanction proceedings, (ii) issue a statement of objection to the respondent and propose a settlement, (iii) refer the case to the public prosecutor, (iv) issue a letter of observation reminding to the persons under investigation their legal obligations or (v) close the case.

13 What are the mechanisms by which a securities or related law enforcement authority may cooperate and coordinate with authorities outside your jurisdiction?

As reminded by article L. 632-1 of the Monetary and Financial Code, during an investigation, the AMF can cooperate and exchange information with equivalent authorities of the other member states of the European Union or of the other states in the European Economic Area.

The French authority can also conclude international bilateral agreements directly with foreign authorities in order to cooperate (article L. 632-7 of the Monetary and Financial Code). The AMF is notably one of the signatories of the 2002 IOSCO Multilateral Memorandum of Understanding concerning consultation and cooperation and the exchange of information (MMoU).

According to the 2019 AMF Annual Report, the AMF sent 384 requests for assistance in 2019 to approximately 50 foreign regulators, more than 40 per cent of them having been addressed to the UK regulator. The AMF itself received 163 requests for assistance from foreign counterparts in 2019. In this regard, among the 46 new investigations opened in 2019, 22 have been opened on the request of a foreign authority.

14 Will a securities or related law enforcement authority take into account findings by a law enforcement authority outside your jurisdiction in the course of its investigation?

Findings by other law enforcement authority can usually be taken into account by the French authority.

In principle, unless otherwise specified by the concerned authorities, investigations are conducted in accordance with the requested authority's laws and regulations. Therefore, the regularity of its investigation is appreciated only pursuant to the said laws and regulations (Cass. com, 1 March 2017, No 14-26.225).

That being said, the procedure followed by the foreign authority must comply with some of France's fundamental principles, including the right to remain silent and to avoid self-incrimination, protected by the French Constitution and the European Convention of Human Rights.

In the *Ubisoft* case, for example, the Enforcement Committee set aside the audits realised by the Financial Market Authority of Quebec on the ground that the said authority infringed article 6 of the European Convention of Human Rights because of the interviewee had to take a binding oath to tell the truth (AMF, 7 December 2016, SAN-2016-15).

Document production

15 What can the securities and related law enforcement authorities require to be produced as part of an investigation? Do the powers of a regulator differ from those of the public prosecutor?

One of the powers AMF's investigators can exercise on their own initiative without needing judicial approval is the possibility to request all types of documents for the purpose of the investigation (article L. 621-10 of the Monetary and Financial Code).

However, contrarily to what prevails for law enforcement officers, the AMF's investigators have no coercive power and the documents must therefore be given voluntarily by the person concerned by the request.

If the investigators want to seize documents, they need an express authorisation of the liberty and custody judge (article L. 621-12 of the Monetary and Financial Code).

16 Will a litigation hold or will other instruction to preserve documentation need to be issued? When?

To ensure the production of certain documents during the investigation, article 144-2 of the AMF General Regulation states that the investigators may order the retention of information, regardless of the storage medium. This measure has to be confirmed in writing, with details of its duration and the conditions in which it may be renewed. Although there is no obligation in the law to send an internal order to conserve documents, it would be a criminal and an administrative offence to destroy documents.

17 Can the securities and related law enforcement authorities request the production of materials protected by attorney-client privilege or work-product doctrine? Can the securities and related law enforcement authorities use protected materials if it obtains them from third parties?

As a principle, professional secrecy does not affect the AMF's right to ask for the communication of documents, whether to the person under investigation or to third parties.

Nonetheless, article L. 621-9-3 of the Monetary and Financial Code provides that "officers of the law", including lawyers, bailiffs and court officers, can withhold documents from the AMF on the grounds of professional secrecy.

As provided for by the AMF Investigation Guide, AMF's investigators cannot join privileged documents to the investigating file. In practice, however, AMF's investigator usually asks for a copy of the whole mailbox, whether it contains privileged documents or not, and seal it. Second, AMF's investigators return the privileged documents. Such a practice is not satisfactory since AMF's investigators are in a position to review the privileged documents.

That being said, under article 66-5 of the Law No 71-1130 dated 31 December 1971, client-attorney privilege only protects the bilateral correspondence between the lawyer and his or her client. If a third party is added as recipient of the correspondence, the information is no longer privileged, which cannot be opposed to investigators by the said third party.

18 How is confidential information or commercially sensitive information treated by the securities and related law enforcement authorities?

Subject to what was said in question 17, the confidentiality of certain information or documents cannot be opposed to the AMF and there is no written rule concerning the specific treatment of sensitive information. However, it is possible to draw the Enforcement Committee's attention to the fact that there is sensitive information in this case, for the authority to avoid referring to it in its decision or to anonymise certain parts of it.

19 Can the target of a document request exercise a right not to produce?

As mentioned in question 15, investigators have no coercive power whatsoever. Therefore, it is up to the person concerned to accept or refuse to produce a document.

Nevertheless, article L. 642-2 of the Monetary and Financial Code states that anyone who obstructs an inspection or investigation of the AMF or who provides it with inaccurate information shall incur a penalty of two years' imprisonment and a fine of up to €300,000.

This provision led to very few sanctions, only in extreme cases such as in the Prologue Software case where two individuals erased crucial information with white-out fluid and were both sanctioned with a €10,000 fine (CA Paris, 15 January 2009).

Therefore, Law No. 2013-672 dated 26 July 2013 created a new administrative sanction for obstruction. Article L. 621-15, II of the Monetary and Financial Code prohibits and sanctions the fact of refusing to give access to a document, to communicate information, to comply with a convocation or to grant access to business premises. For example, the AMF Enforcement Committee recently imposed a €150,000 fine on an individual owing to the transfer to the investigators of a copy of his mailbox, "cleaned" of more than 38,000 emails (AMF, 7 May 2018, SAN-2018-06).

20 Do any data privacy, bank secrecy or other laws restrict the production of materials to a securities or related law enforcement authority in your jurisdiction? An authority outside your jurisdiction? May the company under investigation provide personal or bank customer data on a voluntary basis?

As stated above, information "may not be withheld on the grounds of professional secrecy" from the AMF (article L. 621-9-3 of the Monetary and Financial Code).

However, on the ground of the right to privacy, the Constitutional Council recently held that the ‘fadets’ procedure, which authorised the AMF’s investigators to obtain data relating to telephone calls made by a person from telecommunication operators, did not offer proper guarantees to ensure a balance between the right to privacy and the protection against breaches of public order (Cons. Council, 21 July 2017, No. 2017-646/647).

Since the Law No 2018-898 dated 23 October 2018 on the fight against fraud, article L. 621-10-2 of the Monetary and Financial Code provides that, in order to obtain data from telecommunication operators, investigators now must have been authorised to do so by the “connection data’s request controller”.

With regard to outside jurisdictions, the Law No 68-678 dated of 26 July 1968 on the disclosure of documents and information of an economic, commercial, industrial, financial or technical nature to foreign individuals or legal entities aims, inter alia, to protect French companies that may be required to produce such documents in connection with foreign administrative or judicial proceedings by punishing any person who attempts to obtain or who collects information and documents outside the channels provided for this purpose by the international treaties and conventions on mutual legal assistance.

That being said, article L. 632-1 and L. 632-2 of the Monetary and Financial Code provides that, as an exception to the provisions of the aforementioned Law of 26 July 1968, the AMF can cooperate with foreign authority. Therefore, if a foreign authority is seeking for documents located in France, it will have to comply with the relevant cooperation agreement provisions, which will generally consist in requesting AMF’s cooperation.

21 Are there any data privacy, bank secrecy or other laws that restrict where documents or other communications may be stored or reviewed for the investigation?

The only provision in that respect is the one according to which investigators are bound by professional secrecy, which imply taking care of the documents gathered (article L. 621-4 of the Monetary and Financial Code).

22 Are the securities and related law enforcement authorities able to obtain documents from outside the country?

As mentioned above, the AMF is part of several international mechanisms which allow it to cooperate with foreign authorities in order to obtain information and documents from outside the country.

Witness interviews

23 Will the securities and related law enforcement authorities conduct witness interviews? If so, will the interviews be on the record? Will the interviews be made public?

Investigators have the possibility to summon and take statements from any person likely to provide them with some information about an ongoing investigation and can also gather explanation on site (article L. 621-10 of the Monetary and Financial Code).

Article R.621-35 of the above-mentioned Code imposes that the witness be summoned at least eight days in advance for him or her to have enough time to prepare his or her interview. This obligation also needs to be complied with when investigators gather explanations on site, unless the interviewee has waived his or her rights (Cass. Com, 24 May 2011, No. 10-18267).

Minutes must be established by investigators, mentioning the nature, date and location of their observations and must be signed by the interviewee (article R. 621-35 of the Monetary and Financial Code). It is, however, to be noted that during inspections, investigators are not obliged to establish any minutes.

The interviews will not be made public since investigators are bound by professional secrecy. That said, decisions handed down by the AMF Enforcement Committee, which are public, may quote some parts of interviews.

24 Can witnesses exercise a right not to testify? Will any adverse inference be drawn if they do so?

Since the investigators have no coercive power, the witness has the right to refuse to testify.

Nonetheless, the AMF’s Enforcement Committee (AMF, 6 August 2012, SAN-2012-12) and the Council of State (CE, 12 June 2013, No. 359245) have made it clear that investigators do not have the obligation to remind the witness of such a right. This solution is induced by the non-coercive nature of the AMF’s investigations.

Moreover, it has already been judged that the AMF’s Enforcement Committee has the right to draw any useful consequences from one’s voluntary silence during an interview (AMF, 21 September 2009, SAN 2009-32).

25 Do witnesses receive separate counsel? Who provides counsel for witnesses?

When summoned for an interview by the AMF's investigators, anyone has the right to be assisted by the counsel of their choice (article L. 621-11 of the Monetary and Financial Code) and investigators must inform them about this right. It has to be noted that this counsel is not necessarily a lawyer.

Advocacy

26 Can the target of a securities or related investigation challenge the investigation in court while the investigation is ongoing?

As a general rule, it is not possible to challenge the investigation in court while it is ongoing and the respondent will have to wait the sanction proceedings phase before the AMF's Enforcement Committee to do so. Until then, acts of investigators are seen as only preparatory and not causing grievance to the person concerned in the investigation.

Nonetheless, article L. 621-12 of the Monetary and Financial Code allows the person involved in the investigation to challenge the regularity of the liberty and custody judge's order authorising a dawn-raid or the seizure of documents. Such order is appealable before the presiding judge of the Court of Appeal within 15 days of presentation of the minutes.

27 What opportunity will there be to respond to a securities or related law enforcement authority's theories or allegations prior to the authority bringing charges?

As mentioned above, before closing the investigation, the investigators will provide the person whose conduct is in question with a "detailed letter" setting out their analysis of the factual and legal information gathered during the investigation. Its recipient has one month to respond to it (article 144-2-1 of AMF's General Regulation).

This opportunity can be used to shed some lights on the investigators doubts and try to convince the AMF's Board that there is no basis to bring sanction proceedings or that a settlement procedure would be preferable. It can also be used to explain what corrective measures might have been taken since the investigation.

However, at this stage, the respondent has no access to the whole file but is solely provided with the key evidences discretionary selected by the investigators. It is then recommended to be very careful on the explanations provided in the response since they could be belied by evidence the respondent is not aware of.

28 What form does the advocacy with a securities or related law enforcement authority typically take?

With regard to inspections, the response to a detailed letter can be addressed by the respondent directly or by his or her counsel and there is no rule as to the form it must take (letter, email, etc).

As far as inspections are concerned, the respondent must insert his or her comments in a table provided to him or her by investigators and containing their own conclusions.

29 Are statements or advocacy positions taken by an investigated party during the investigation process deemed admissions and binding in future proceedings? Would such statements be made public?

Even if it is always possible to provide additional explanation and elements or to change his strategy once a sanction proceedings is opened, the fact is that every statement made during the investigation phase will remain in the file and any contradiction between these two phases could be detrimental for the credibility of the defendant.

Timing

30 What is the limitation period for charges for securities and related violations?

Law No. 2017-242 of 27 February 2017, regarding criminal offences and Law No. 2019-486 of 22 May 2019, for administrative offences, increased the limitation period from three years to six years following the day of commission, subject to what follows.

31 When does the limitation period begin to run?

The starting point of the limitation period varies according to the nature of the offence. For an instantaneous offence (such as an insider dealing), it begins when the violation is committed. For continuous offences (such as a breach of a professional obligation which would remain through the time), it is deferred to the date of the last illegal action taken by the individual (AMF, 16 March 2004, SAN-2004-01).

Since the aforementioned laws, the starting point of the limitation period is delayed for occult and concealed securities law violations to the date on which they could be discovered under circumstances enabling prosecution. However, in order to avoid the risk of imprescriptibility of offences, the French legislator specified that prosecution against criminal and administrative offences would in any event be time-barred 12 full years following the day on which the offence was committed (article 8 of the French Penal Code; article L. 621-15 of the Monetary and Financial Code).

With respect to criminal matters, this new rule enshrined in legislation the ruling of the Court of Cassation rendered on the principle to which the limitation periods shall not run against those who are not in a position to take action (*contra non valentem agere non currit praescriptio*) (Cass. crim., 10 December 1925, Bull. 1925 No. 339).

However, it seems to be a huge evolution regarding administrative offences. Indeed, in an important case where investors having invested in a hedge fund realised, many years after their initial investment, that they had not been provided with all legal information pertaining to it, the Enforcement Committee refused to report the limitation period's starting point accordingly on the ground that it was up to the AMF to detect securities law violations in due course (AMF, 19 April 2012, SAN-2012-03).

In light of the above, we can reasonably expect that the AMF's Enforcement Committee will have a strict appreciation of what can be deemed as an occult or concealed offence.

32 What can suspend the running of the limitation period? Can the securities and related law enforcement authorities request a tolling agreement?

French law distinguishes between the suspension of the limitation period and its interruption. For the latter, a new limitation period will start running when the cause of interruption ends.

With regard to the suspension of the limitation period, article L. 621-19 of the Monetary and Financial Code states that if a settlement procedure occurs, the running of the limitation period will be suspended and, in case where an approved agreement is not reached, the said limitation resumes running from the time the procedure failed.

With respect to causes of interruption, the law is silent on them. Therefore, the AMF's Enforcement Committee devised its own. For example, the Secretary General's decision to open an investigation will interrupt the statute of limitation (AMF, 19 April 2012, SAN-2012-03) as well as the act of summoning a witness to an interview (AMF, 7 October 2010, SAN-2010-26).

With regard to criminal offences, the limitation period is interrupted by any act performed by the prosecutor, a law enforcement officer or an investigating magistrate. It is also interrupted by any decision handed down by a court (article 9-2 of the French Penal Code).

33 How long does a securities or related investigation typically take?

There is no rule with regard to how long an investigation will typically take. Some might take a few months and some might take more than a year. However, pursuant to the AMF investigation and inspection guides, investigators take commitment to do their best efforts to close their investigations as soon as possible.

Resolution

34 What is the process for closing an investigation if the investigation does not reveal a violation of securities or related laws? Will the securities or related law enforcement authorities provide written confirmation that the investigation is closed without action?

If the investigation does not reveal any violation of securities laws, the AMF's Board may (i) issue a letter of observation reminding to the persons under investigation their legal obligations or (ii) close the case. In the latter instance, the person involved in the investigation will obtain confirmation that the investigation is closed, either after the AMF's Board's decision or, where other persons are charged, once the AMF's Enforcement Committee will have rendered its decision.

35 How will the resolution or settlement process be initiated?

If the Board deems that investigation revealed a violation of securities law, it will have the choice between (i) opening a sanction proceedings by notifying a “statement of objections” to the respondent, together with the AMF’s Enforcement Committee (article L. 621-15 of the Monetary and Financial Code), or (ii) issuing such a statement of objections and proposing a settlement (article L. 621-14-1 of the Monetary and Financial Code). In the first instance, the respondent has two months to submit observations to the Enforcement Committee in response to the statement of objections.

36 Who decides whether to proceed with charges and what charges to select?

The AMF’s Board is the prosecutorial body of the authority and is therefore entitled, in light of the investigation report, to instigate sanction proceedings and select charges. Afterwards, the case is sent to the AMF’s Enforcement Committee, which is the disciplinary body of the AMF.

37 What factors would a securities or related law enforcement authority consider in selecting charges and the severity of any penalty or fine?

The AMF’s Board will decide what charges must be selected on a discretionary basis, it being specified that he will do so whenever he deems that the evidences are sufficient to constitute a violation of securities laws.

With regard to the penalties, the AMF’s Enforcement Committee is exclusively empowered to assess, at its sole discretion, their severity. Nonetheless, the French legislator has set out a non-exhaustive list of factors that can be considered when assessing the severity of the penalty to be imposed (article L. 621-15 of the Monetary and Financial Code), knowingly:

- the seriousness and duration of the breach;
- the status and extent of involvement of the person concerned;
- the financial position and capacity of the person concerned, notably in light of his annual income (for a natural person), or its total turnover (for a legal person);
- the importance of the profits generated, or of any losses or costs avoided by the violation, insofar as they can be determined;
- any losses incurred by third parties as a result of the violation, insofar as they can be determined; and
- the cooperation of the respondent with the AMF.³⁸What remedies can the securities or related law enforcement authorities consider? How are penalties calculated?

When confronted with a securities law violation, the AMF has the power to issue a financial penalty or a disciplinary sanction, or both. The sanction varies depending on (i) the type of respondent and (ii) the violation’s nature.

Pursuant to article L. 621-15 of the Monetary and Financial Code, financial intermediaries acting under the AMF supervision can be sentenced to pay a financial penalty of up to €100 million or ten times the amount of gains generated. The same sanctions can be issued for any other person (issuer, executive, individual) who commits a market abuse. For individuals acting under the authority or on behalf of a financial intermediary, the maximum financial sanction incurred is up to €15 million or ten times the amount of the profit earned.

Even if not provided by law, in market abuse cases, the sanctions pronounced by the AMF’s Enforcement Committee generally represent two or three times the profits earned.

According to the AMF 2019 Annual Report, in 2019, the Enforcement Committee pronounced financial penalties for amounts ranging from €10,000 to €20 million for a total of €32.3 million (against €7.18 million in 2018, which was very few compared to the total amount of penalties pronounced during the past years. For example, in 2017, the AMF’s Enforcement Committee pronounced a €35 million financial penalty against a French bank in a single decision (AMF, 25 July 2017, SAN-2017-07)).

39 Do illegal profits have to be disgorged, and if so, how are they determined?

Before the AMF’s Enforcement Committee, there is no specific provision requiring illegal profits to be disgorged. Nonetheless, the unjust enrichment of the offender is taken into account by the Enforcement Committee when assessing the amount of the sentence to be pronounced (article L. 621-15, III, ter of the Monetary and Financial Code).

For insider dealing, the Enforcement Committee recently stated that the determination of the illegal profits must concretely reflect the consequences of the asymmetry of information between the user of the privileged information and the rest of the market. Therefore, a comparison will be made between transactions passed by the defendant and those that could have occurred if the information had been public (AMF, 18 December 2017, SAN-2017-13).

40 Can criminal charges be brought against companies in your jurisdiction for violations of securities and related laws?

As mentioned above, market abuses can receive both an administrative or a criminal qualification. The latter can be sanctioned by the financial division of the Paris High Court.

Pursuant to articles L. 465-1 to L. 465-3-4 of the Monetary and Financial Code, individuals convicted of a market abuse criminal offence are subject to a fine of up to €100 million and five to 10 years imprisonment. Legal entities are liable for a fine of up to €500 million (article 131-38 of the French Penal Code) and supplemental penalties provided by article 131-39 of the French Penal Code.

41 Will the securities and related law enforcement authorities provide a reduced penalty for cooperation? What standard will the authorities use when taking into account any cooperation?

Pursuant to article L. 621-15, III-ter of the Monetary and Financial Code “the extent to which the person concerned has cooperated with the financial markets authorities” can be taken into account by the AMF’s Enforcement Committee when assessing the amount of the penalty to be pronounced. Moreover, a settlement procedure is more easily considered if there is cooperation during the investigation.

The AMF’s Investigation Guide explains what behaviour is expected of persons asked to cooperate with an investigation. In accordance with this Guide, the person concerned should answer the investigator’s questions fairly, supply documents, files and explanations within a reasonable time frame and remain impartial, professional and courteous throughout the investigation.

42 Are deferred prosecution agreements or non-prosecution agreements permitted?

Pursuant to article L. 621-14-1 of the Monetary and Financial Code, when it decides to notify a statement of objections to a respondent, the AMF’s Board has the power to propose an administrative settlement procedure as an alternative to the sanction proceedings (composition administrative). Since Law No. 2016-819 dated 21 June 2016, market abuse cases can also be settled via this procedure.

The agreement must then be approved by the AMF’s Enforcement Committee.

However, on 20 March 2020, the Conseil d’Etat ruled that the Enforcement Committee may refuse to approve the agreement when the case raises a new and difficult question that it considers it must rule itself. The Enforcement Committee may then, by a decision rendered at the end of an adversarial proceeding, decide to specify the obligations of professionals subject to financial regulation in order to ensure their clarity and predictability (CE, 20 March 2020, n°422186, 422274).

Since 2010, approximately 70 settlements have been reached, it being specified that settlements increase each year. Since the 2016 reform, several have been concluded relating to market abuse cases. For example, a bank has recently reached a settlement for a breach of its obligation to provide information and took the commitment to pay a sum of €600,000 to the French Public Treasury (AMF, 17 December 2019, TRA-2020-03). It is to be noted concerning criminal offences, that the French convention judiciaire d’intérêt public, inspired by the US deferred prosecution agreement, is solely available for legal entities suspected of acts of (i) bribery, (ii) influence peddling, (iii) tax fraud and (iv) laundering of tax fraud proceeds (article 41-1-2 of the Code of Criminal Procedure). Such a settlement procedure is not available for market abuses criminal offences.

43 Will a court need to approve the settlement agreement with a securities or related law enforcement authority?

The AMF’s Board proposes the settlement and the person concerned agrees or disagrees to participate to settlement discussions with the authority. If discussions are initiated, an agreement must be reached within four months. Once the AMF’s Board has approved the settlement, it is submitted to the Enforcement Committee for approval. If approved, the settlement is published on the AMF’s website.

44 If a settlement occurs, will an admission to certain facts or wrongdoing be required?

One of the main advantages of the settlement procedure for the person subject of an investigation is that the agreement does not involve an admission of guilt. In this regard, it is often expressly stated in the settlement that its conclusion does not constitute a sanction nor an admission of wrongdoing. That being said, the facts which led the AMF’s Board to issue a statement of objection against the respondent are exposed in the agreement concluded.

45 Can the findings or decisions of the securities or related law enforcement authorities be administratively appealed? Appealed to a court?

Decisions handed down by the AMF's Enforcement Committee can be appealed either by the chairman of the AMF or by the person sanctioned within two months of their notification.

The Council of State has jurisdiction in cases concerning professionals under the AMF's supervision, whereas the Paris Court of Appeal is competent for cases involving non-professionals (article L.621-30 of the Monetary and Financial Code).

There is no real legal justification for such a system which creates a discrepancy between non-professionals who have the opportunity to have their cases reviewed by the Paris Court of Appeal and the Court of Cassation and professionals for which the Council of States hears the case in the first and last instance.

46 If a decision can be administratively or judicially appealed, what are the consequences of an adverse decision on appeal? What are the consequences of a positive decision on appeal?

The Council of State and the Paris Court of Appeal have full jurisdiction to uphold, review or repeal the decisions of the Enforcement Committee (article R. 621-45 of the Monetary and Financial Code).

Collateral consequences

47 What are some of the collateral consequences of a resolution or settlement with a securities or related law enforcement authority?

Pursuant to article L. 621-15, III of the Monetary and Financial Code, the AMF can take disciplinary sanctions against financial intermediaries acting under its supervision (as listed by article L. 621-9, II of the Monetary and Financial Code) and individuals acting on their behalf.

For legal persons under its supervision, it is possible to issue a warning, a reprimand or a temporary or permanent ban on providing some of the services previously provided and removal from the register referred to in article L. 546-1 of the Monetary and Financial Code.

For individuals acting on their behalf or under their authority, a warning, a reprimand, a temporary suspension or withdrawal of their professional licence, a temporary or permanent ban on exercising their previous activities can be issued.

48 What are some of the collateral consequences of a conviction or the imposition of liability by a court?

If a criminal court finds a defendant guilty of a criminal violation of securities law, article L 465-3-5 of the Monetary and Financial Code allows the court must issue additional sentences in accordance with article 131-39 of the French Penal Code, which states that the court can notably impose the dissolution of the legal person, the disqualification from the exercise of certain professions (for five years or definitively), the debarment from public markets or the prohibition from making an offer of securities to the public.

49 Can private securities or related legal claims proceed parallel to investigations by securities and related law enforcement authorities?

The victim of a securities law violation cannot claim for damages before the AMF.

However, the victim can issue a private claim before the civil or commercial jurisdictions.

In this regard, the Court of Cassation considers that any breach by a financial intermediary of its legal obligations can constitute a civil wrongdoing that could engage the professional's personal liability (Cass. Com, 26 February 2008, No. 07-10.761).

It goes without saying that it will be easier to prove that the professional has committed a fault after the Enforcement Committee has handed down a sanction decision but there is no specific provision prohibiting that a private claim be filled during an investigation led by the AMF.

50 What effect will findings by an authority in another jurisdiction have in private proceedings?

In principle, a decision handed down by a foreign jurisdiction cannot produce any effect in France without having been enforced by way of an exequatur. That being said, the probative value of findings by a foreign authority in private proceedings will be

governed by traditional civil and/or commercial rules of evidence. If such findings have been lawfully obtained, it will be taken into account by the French jurisdiction as evidence.

51 Can private plaintiffs obtain access to the files or documents the securities or related law enforcement authorities collected during the investigation?

Article L. 621-12-1 of the Monetary and Financial Code clearly states that the AMF can pass on to the court before which an action for damages has been brought and which so requests the minutes and investigation reports that it holds and may be useful to the resolution of the dispute. These documents being protected by the investigators' professional secrecy, a private plaintiff cannot have access to them unless it is necessary to the proper exercise of the rights of the defence (Court of Cassation, 19 January 2010, No. 08-19.761).



Kiril Bougartchev

**Bougartchev Moyne
Associés AARPI (Paris)**

Kiril Bougartchev studied at Panthéon Assas University Paris II. He holds postgraduate diplomas in business law (*Magistère*) and tax law (DESS). He joined Gide Loyrette Nouel where he became, in 1999, partner of the litigation and white-collar crime department. Kiril joined Linklaters LLP in June 2007, where he was made co-head of the dispute resolution practice in Paris and facilitator of the Linklaters LLP global white-collar crime group.

Kiril was formerly a *Secrétaire de la Conférence des Avocats* of the Paris Bar. Since 2011, he has been an external contributor at *Magistère Paris II* and is an examiner on the legal and tax management MSc degree at EDHEC Business School.

Kiril Bougartchev co-founded with Emmanuel Moyne the Bougartchev Moyne Associés AARPI law firm in January 2017, which was recognised by *Best Lawyers 2020* as the best criminal law firm in France for 2020.

Kiril Bougartchev has been and is still involved in many notorious white-collar crime cases, including sensitive political and financial matters. He is also involved in regulatory disputes (including regulatory matters before the French Financial Markets Authority, the French Anticorruption Agency and the French Prudential Supervisory Authority) as well as in complex civil and commercial litigation.

Kiril advises clients in the conception, the implementation and the strengthening of their anticorruption and compliance programmes and assists them in connection with the controls undertaken by the French Anticorruption Agency. He assists clients in performing compliance and anticorruption M&A due diligence. He also works with them in connection with their internal investigations and training programmes.

In 2018, 2019 and 2020, he has been ranked by *Chambers Europe* Band 1 in white-collar crime (Interviewees highlight the "global reach" that Kiril Bougartchev of Bougartchev Moyne Associés AARPI is able to provide. He has a great deal of experience in white-collar crime issues, particularly related to the financial sphere, and has advised on fraud, money laundering and criminal investigations") and Band 2 in internal compliance and investigations ("Kiril Bougartchev of Bougartchev Moyne Associés AARPI is

well known for his criminal law acumen. He acts before the French authorities on behalf of a diverse roster of clients from industries such as energy, banking and aerospace, handling matters ranging from fraud to regulatory compliance"). Kiril Bougartchev has also been ranked in 2018, 2019 and 2020 among the best lawyers in France (*Expert Guide*). For *The Legal 500*, Kiril Bougartchev was praised for his "strategic vision in complex cases". *Décideurs Magazine* ranked him in 2018 and 2019 among "Incontournable" lawyers in white-collar crime, among "Excellent" ones in commercial litigation and in 2019 among the "Highly recommended" lawyers in financial and post-acquisition litigation. It ranked him in 2018 among "Excellent" lawyers in international investigations, internal investigations and compliance programme. Kiril published many articles about misuses of corporate assets, corruption, criminal liability of auditors, business secrecy, the Sapin II law, the French blocking statutes, cryptocurrencies and ICO's as well as the French *convention judiciaire d'intérêt public*.



Emmanuel Moyne

**Bougartchev Moyne
Associés AARPI (Paris)**

Emmanuel Moyne began his career in 1997 as in-house counsel within asset management company White Gestion SARL, a subsidiary of Goldman Sachs and was admitted to the Paris Bar in the same year. He then practised for 10 years in Gide's litigation and white-collar crime department before joining the dispute resolution practice at Linklaters in Paris in 2007 as a Counsel. Emmanuel was elected *Secrétaire de la Conférence des Avocats* of the Paris Bar in 2000, during which year he defended about 70 individuals before the criminal or correctional courts as on-duty legal aid counsel (*commission d'office*). Emmanuel co-founded with Kiril Bougartchev the Bougartchev Moyne Associés AARPI law firm in January 2017, which was recognised by *Best Lawyers 2020* as the best criminal law firm in France for 2020.

He advises his clients in complex procedures that may involve several foreign jurisdictions and may concern, among other issues, misuse of company assets, breach of trust, swindle, laundering, misappropriation of data and secrets, counterfeiting, cybercrime, endangering life, manslaughter and unintentional injuries, concealed working, unlawful loan of labour and illegal

subcontracting of labour, non-compliance of products, pollution, abandoned waste or infringements relating to classified installations and nuclear facilities. He defended the interests of a leading firm being among the first six firms audited by the French anti-corruption agency and obtained a decision not to refer the case to the Sanction Commission of the agency. He is currently defending the interests of a French leading bank before the Autorité de Contrôle Prudentiel et de Résolution. He also recently obtained the referral of a preliminary question relating to the lack of independence of the French Prosecutor before the European Court of Justice and represented a foreign prominent figure before the Paris Criminal Court on the grounds of theft, complicity of violence with a weapon and complicity of sequestration.

Emmanuel has lectured at the University of Montpellier (mutual assistance and extradition proceedings) and the University of Sceaux (environmental criminal law). He provides training to private and public entities and advises clients on compliance programmes, anti-corruption due diligence and internal investigation.

Emmanuel is a member of the American Bar Association and of the International Bar Association. He has been appointed Conference Quality Officer of the Criminal Law Committee of the International Bar Association for 2019–2020. Emmanuel is also a member of the working group of the CNB, the national institution representing all practising lawyers in France, on internal investigation.

“As efficient in advising as in representing before courts“, Emmanuel, “whose strategy in matters is never found defeated“, is viewed as “a sharp mind, dedicated to his clients at any time, paying very close attention to every detail of the file, with such an analytical sharpness that he stands out as a reference counsel for strategic matters” (*The Legal 500*).

He is recognised by *Best Lawyers* 2019, 2020 and 2021 in “Criminal Defence” as well as by *Best Lawyers* 2021 in Litigation. Emmanuel is also among the seven lawyers recognised for their expertise in Corporate Governance & Compliance by *Best Lawyers* 2020 and has been named Lawyer of the Year in this field by *Best Lawyers* 2021. *Décideurs Magazine* ranked him in 2018, 2019 and 2020 among the “Incontournable” lawyers in white-collar crime, among “Excellent” ones in commercial litigation and in 2019 among the “Highly recommended” lawyers in financial and post-acquisition litigation. It also ranked him in 2018 and 2019 among “Excellent” lawyers in international investigations, internal investigations and compliance programme.

Nathan Morin

Bougartchev Moyne Associés AARPI (Paris)

Nathan’s area of practice covers litigation with financial predominance, particularly stock market law, criminal financial law, banking law and company law. He has extensive experience in regulatory litigation, having worked within the Enforcement Assistance Department of the French Financial Market Authority (AMF).

Nathan recently successfully represented (i) a leading company in connection with one of the first inquiries undertaken by the French Anticorruption Agency, (ii) the same company in the course of one of the first follow-up inquiries of the French Anticorruption Agency and obtained the full dismissal of the case, (iii) a leading financial institution in the context of a control conducted by the French Prudential Supervisory Authority (ACPR) regarding the compliance of its system for fight against money laundering and terrorist financing with the legal requirements and obtained the issuance of a formal notice letter instead of a referral before the Sanction Committee of the ACPR and (iv) an investment fund in connection with proceedings before the AMF’s Enforcement Committee on the grounds of various reclassifications of securities and obtained from the reporting judge the recommendation to the Enforcement Committee to discharge his client.

He also advises companies on how to set up anti-corruption measures in accordance with the provisions of the Sapin II Law and assists them in relation to controls carried out by the French Anticorruption Authority.

Nathan graduated from Université Paris II Panthéon-Assas and Université Paris I Panthéon-Sorbonne.

BOUGARTCHEV — MOYNE
ASSOCIÉS

After 30 and 20 years, respectively, of professional practice in major firms and hundreds of trials, Kiril Bougartchev and Emmanuel Moyne have chosen to create an ambitious firm for their clients, where the hallmarks are independence, liberty, versatility and flexibility.

Bougartchev Moyne Associés AARPI is composed of litigation lawyers who assist public or private companies, banks and financial institutions, insurance companies and their officers in all proceedings they are facing, whether involving white collar crime, civil law, commercial law or regulatory matters. The firm assists them on a daily basis, during crises or to aid them in meeting their legal and regulatory obligations. The firm also works with our clients in connection with their internal enquiries and training programmes.

Bougartchev Moyne Associés AARPI's lawyers have extensive experience in emergency, complex, multi-party, transnational and multi-jurisdictional proceedings, as well as in negotiating settlement agreements, in France and internationally, and are accustomed to working in teams. They assist their clients worldwide, alongside international firms and specialist firms.

In 2009, 2016 and 2019, Bougartchev Moyne Associés AARPI's team was named White-Collar Crime Team of the Year by *Décideurs* at the Trophées du Droit awards, where Bougartchev Moyne Associés was recognised as the best Entrepreneurial Firm Under Five Years in 2018. In 2019, Bougartchev Moyne Associés AARPI's team have been distinguished by Best Lawyers as the "Law Firm of the Year" in Criminal Defence.

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