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Anti-Corruption

France: Law & Practice
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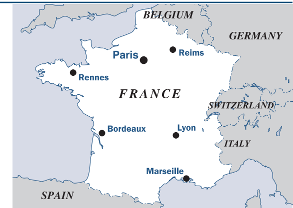

Law and Practice

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1. Legal Framework for Offences

1.1 International Conventions

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

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

1.2 National Legislation

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

Law No 2016-1691, called the Sapin II Law, signed on 9 December 2016 and entered into force on 11 December 2016 with regard to most of its provisions, strove to make further progress in the fight against corruption by providing:

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

1.3 Guidelines for the Interpretation and Enforcement of National Legislation

On 26 June 2019, the FAA and the National Financial Prosecutor's Office released for the first time joint guidelines on the application of the public-interest judicial convention in order to encourage legal entities to adopt such a co-operative approach with the French authorities.

In its first decision rendered on 4 July 2019, the Enforcement Committee confirmed that FAA recommendations are not legally binding even if public institutions and companies are encouraged to follow them. In a second decision handed down on 7 February 2020, it specified that the failure to comply with the FAA's recommendations, which would add obligations not provided for by the law in force, cannot lead to the imposition of a sanction.

In January 2020, the FAA published a practical guide relating to anti-corruption audits in the context of mergers and acquisitions. The FAA recommends carrying out anti-bribery audits before entering into such transactions, aiming to:

- determine whether the target company has been involved in a case of bribery or influence-peddling or, if it has been sanctioned for such acts, to know the sanctions taken against it;
- ensure the existence and, if possible, assess the quality, of its anti-bribery system.

On 2 June 2020, the Ministry for Justice issued a new circular on criminal policy in the fight against international bribery to the attention of Public Prosecutors and courts. It recalled the leading role to be played by the National Financial Prosecutor's Office in this area and sets out the principles that should guide judicial action at the stage of detection and investigation as well as the choice of prosecution and sanction methods for these types of facts while protecting France's judicial sovereignty.

1.4 Recent Key Amendments to National Legislation

The French government transposed Directive No 2017/1371/UE dated 5 July 2017 by Ordinance No 2019-963 dated 19 September 2019 on the fight against fraud affecting the financial interests of the European Union through criminal law. In accordance with the new paragraph created in Articles 432-11, 433-1, 435-1 and 435-3 of the French Penal Code, the fine incurred by an individual shall be increased to EUR2 million or to double the proceeds generated by the offence when (i) the offences provided for in these Articles (bribery of domestic/foreign or international public officials) affect the revenue collected or the expenditure incurred by any institution or body of the European Union and (ii) are committed in an organised gang. The prosecution of such offences should be carried out by the new European Public Prosecutor's Office.

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

2. Classification and Constituent Elements

2.1 Bribery

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

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

The scope of the bribe is extensive under French law, covering all kinds of advantages without consideration of their magnitude. In a decision handed down in 2018 (Paris Court of Appeal, 10 April 2018, No 16/11182), the Paris Court of Appeal enshrined the bundle of indicators method (*méthode du faisceau d'indices*) to determine the existence of a corruption pact. Thus, the following indicators were likely to be regarded as relevant in a case where three litigious consultancy contracts were involved: the absence or inadequacy of precise and conclusive documents, the inadequacy of the consultant's material and human resources with regard to the importance of the work claimed, the percentage-based remuneration or the unjustified obtaining of the contract by the consultant's client.

Recently, the same Court of Appeal specified that the bundle of indicators identified in this decision is not exhaustive so that the court may look for other elements to determine the existence of a corruption pact (Paris Court of Appeal, 15 September 2020, No 19/09058).

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

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

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

Bribery is also punishable when it only involves private parties.

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

2.2 Influence-Peddling

Influence-peddling (*trafic d'influence*) is an offence that occurs when any person (whether a private person or official) who has real or apparent influence on the decision-making of an author-

ity exchanges this influence for an undue advantage (offer, promise, donation, gift or reward). The French legislator has criminalised active and passive influence-peddling where the decision-maker is a domestic authority or public administration (Article 433-2 of the Penal Code) or a domestic judicial official (Article 434-9-1 of the Penal Code) or a public official from a public international organisation (Articles 435-4 and 435-2 of the Penal Code) or a judicial official from an international court (Articles 435-8 and 435-10 of the Penal Code) or, following the Sapin II Law, a public official from a foreign state (Articles 435-4 and 435-2 of the Penal Code). Furthermore, the Penal Code provides for specific offences where the influence-peddler is a public official and the decision-maker is a domestic authority or public administration (Articles 433-1 and 432-11-2° of the Penal Code).

2.3 Financial Record-Keeping

In practice, corruption may lead to accounting stratagems seeking to conceal in financial statements the benefits obtained or paid by using false invoices. Therefore, it is also an offence for the chairman, directors, members of the executive or supervisory board, de jure or de facto managers to publish or provide the shareholders with annual accounts that do not accurately reflect the company's results. Individuals may incur a prison term of up to five years and a fine of up to EUR375,000 and additional penalties (Article L.241-3-3° and Article L.242-6-2° of the Commercial Code); legal entities may incur a fine of up to EUR1,875,000.

2.4 Public Officials

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

2.5 Intermediaries

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

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

3. Scope

3.1 Limitation Period

As of 1 March 2017, the limitation period of corruption acts was increased from three years to six years following the day of commission (Article 8 of the Code of Criminal Procedure).

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

3.2 Geographical Reach of Applicable Legislation

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

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

With regard to bribery and influence-peddling, the third of these conditions was considerably softened by the Sapin II Law. The dual-criminality requirement (Article 113-6 of the Penal Code) was abolished. Since the entry into force of the Sapin II Law, any French person having committed bribery, whether as a bribe-taker and/or a bribe-giver, or influence-peddling outside French territory, can now be prosecuted in France in all circumstances. Moreover, French courts still have jurisdiction over an indicted foreigner who did not commit any unlawful act in French territory, as long as his or her acts had inextricable links with acts committed by other indicted persons in France (Court of Cassation, Crim. Ch., 20 September 2016, No 16-84.026).

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

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

In the case of territorial jurisdiction, the French Court of cassation rejects its application to foreign decisions and agreements. Whenever one of the constituent elements of the corruption offence has been committed in France, French courts have jurisdiction (Court of Cassation, Crim. Ch., 17 January 2018, No 16-86.491; Court of Cassation, Crim. Ch., 14 March 2018, No 16-82.117; Paris Court of Appeal, 15 May 2020, No 18/03310).

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

3.3 Corporate Liability

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

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

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

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

Even in the event of the conclusion of a public interest judicial convention (see **4.5 Safe Harbour or Amnesty Programme**), legal entities may be required to pay compensation.

In the event of a merger by absorption, the French Court of cassation ruled for the first time, in a decision rendered on 25 November 2020 (Court of cassation, Crim. Ch., 25 November 2020, No 18-86.955), that the acquiring company can be criminally liable for an offence committed by the organs or representatives of the absorbed company on behalf of the latter prior to the merger. This new interpretation, in line with the case law of the European Court of Justice, will only be applicable to mergers concluded as from 25 November 2020.

4. Defences and Exceptions

4.1 Defences

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

Nevertheless, the perpetrator may be exempted from penalties, provided that his or her social rehabilitation has been established, the damage caused by the offence has been remedied and the disturbance arisen from the offence has ceased (Article 132-59 of the Penal Code). The judge has full discretion in granting any such exemption.

4.2 Exceptions

As explained in **4.1 Defences**, the French anti-corruption law does not provide for any specific defence.

4.3 De Minimis Exceptions

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

4.4 Exempt Sectors/Industries

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

4.5 Safe Harbour or Amnesty Programme

Co-operation with Investigators

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

Self-Reporting

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

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Leniency

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

Admission of Guilt

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

Settlement

According to the circular issued by the French Department of Justice on 2 June 2020, the opportunity of entering into a public interest judicial convention (CJIP) depends on the following factors:

- the absence of judicial record of the legal entity;
- the voluntary disclosure of the facts by the latter;
- the degree of co-operation with the judicial authority demonstrated by the managers of the legal person (in particular to enable the identification of the persons involved in the corruptive pact in question).

For legal entities, the main benefit of the public interest judicial convention is the absence of any acknowledgement of guilt, contrary to the CRPC procedure, which also implies the absence of any mention in the criminal record. Another interest is to protect them from the risk of exclusion from public procurement procedures to which they are exposed in the event of conviction by a court on the grounds of bribery of domestic or foreign public officials (Article 131-39 of the Penal Code and Article L.2141-1 of the Code of Public Procurement).

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

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

During a subsequent validation hearing, the judge decides whether to validate the proposed agreement. Once validated, the legal entity has ten days to withdraw from the agreement. Then, the validation judgment as well as the convention itself are published on the FAA website.

5. Penalties

5.1 Penalties on Conviction

Bribery of Domestic Officials

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

Ancillary penalties may also be imposed, such as the prohibition (i) from holding public office, (ii) 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 (iii) from directing, administering, managing or controlling a company in any capacity, permanently or for a period of up to 15 years. Lastly, publication of the judgment may be ordered and the item that was used or was intended to be used to commit the offence, or any item that is a proceed of the offence, may be confiscated (Articles 433-22, 433-23, 432-17, 434-44 of the Penal Code).

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

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

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

Bribery of Foreign Officials

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

Bribery of Private Individuals

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

Influence-Peddling

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

Repeated Offences

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

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

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

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

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

5.2 Guidelines Applicable to the Assessment of Penalties

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

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

6. Compliance and Disclosure

6.1 National Legislation and Duties to Prevent Corruption

Article 17 of the Sapin II Law requires the implementation of a corruption-prevention plan for (i) chairmen, general managers and company managers as well as (ii) members of the management boards of public limited companies and (iii) chairmen and general managers of public industrial and commercial establishments employing at least 500 employees, or belonging to a group whose headquarters has its registered office in France and whose turnover or consolidated turnover exceeds EUR100 million.

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

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

The legislator has empowered the FAA to assess the quality and effectiveness of the preventive measures and to impose, in the event of non-compliance, graduated sanctions (ranging from warnings to fines of up to EUR200,000 for individuals and EUR1 million for legal entities and injunction procedures to bring internal procedures into line) through its Enforcement Committee, regardless of the communication of any finding of a criminal offence for acts of corruption or influence-peddling to the Prosecutor.

In its second public decision handed down on 7 February 2020, the FAA Enforcement Committee provided procedural and substantive clarifications. Firstly, it recalled that grievances brought before the Enforcement Committee must be set out "in a sufficiently clear and precise manner so as to leave no doubt as to their content and scope". Failing this, it would be up to the Enforcement Committee to declare the proceedings null and void.

On the merits, the FAA director alleged that a company and its representative had failed to comply with Article 17 of the Sapin II Law by (i) not having a risks-mapping in accordance with the requirements of this article, (ii) not having a code of conduct complying with the requirements of this article and (iii) not integrating the specific control points required by this article into the company's accounting control procedures. He requested the Enforcement Committee to order the company and its general director to adapt their internal procedures by 30 June 2020. In the event of non-compliance with these obligations, he proposed that a penalty of EUR 1 million be imposed on the company and EUR100,000 on the general director. As regards to the risks-mapping grievance, the FAA Enforcement Committee specified that the failure to comply with the FAA's recommendations, which would add obligations not provided for by the law in force, cannot lead to the imposition of a sanction. In the case at hand, it considered that the elements on which the FAA director relied were not sufficient to establish, at the date on which it sat down, that there had been such a breach. In contrast, the Enforcement Committee ruled that the company had committed two breaches (relating to the code of conduct and the accounting control procedures). In view of the importance of the improvements already made, the Enforcement Committee found that these breaches did not justify, at this stage of the proceedings, the imposition of a financial penalty. Thus, it ordered the company to comply with its obligations by respectively 1 September 2020 and 31 March 2021. On a date to be set, the FAA Enforcement Committee will rule on the persistence of the breaches observed in the light of the measures taken by the company.

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

In the public sector, Article 40 of the Code of Criminal Procedure requires all public officials and civil servants who, in the performance of their duties, become aware of a felony or misdemeanour to inform the Public Prosecutor's Office and provide it with all information in relation thereto. For instance, in 2019, the FAA notified seven cases to the National Financial Prosecutor's Office and to Paris, Marseille, Nanterre and Bordeaux Public Prosecutors' Offices concerning acts of bribery, embezzlement of public funds, favouritism or unlawful taking of interest. Four notifications concerned public entities which had been controlled by the FAA.

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

6.3 Protection Afforded to Whistle-Blowers

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

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

The Social Chamber of the French Court of Cassation (Court of Cassation, Soc. Ch., 8 July 2020, No 18-13.593) recently granted the benefit of the whistle-blower protection to an employee who had been dismissed for serious misconduct after having filed a complaint against the manager of an agency of the company employing him. The Court of Cassation recalled that an employee who has acted without bad faith cannot be dismissed, and specified that bad faith only results from the employee's knowledge of the falsity of the facts reported.

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

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

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

6.4 Incentives for Whistle-Blowers

These protective measures, as described in **6.3 Protection Afforded to Whistle-Blowers**, against dismissal, obstruction, identity disclosure and criminal prosecution for breach of secrecy can be viewed as sufficient incentives to report misdemeanours. Other incentives, such as financial rewards, do not apply.

6.5 Location of Relevant Provisions Regarding Whistle-Blowing

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

7. Enforcement

7.1 Enforcement of Anti-bribery and Anti-corruption Laws

See **1. Legal Framework for Offences**.

7.2 Enforcement Body

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

The Public Prosecutor's Office is empowered to decide whether it is appropriate to institute proceedings, although civil claimants may also initiate prosecution.

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

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

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

The various prosecutorial bodies are assisted by a specialised investigative service, the Central Office for the Fight Against Corruption and Financial and Tax Offences (*Office Central de Lutte contre la Corruption et les Infractions Financières et Fiscales*, OCLCIFF), created in 2013.

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

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

The FAA (see **6.1 National Legislation and Duties to Prevent Corruption**) is entitled to inform the Public Prosecutor about any act of corruption of which it might become aware (Article 3, 6° of the Sapin II Law). In addition, it monitors the proper implementation of the new ancillary penalty that can be imposed by judges on legal entities under Article 131-39-2 of the Penal Code, consisting of setting up a compliance programme.

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

In 2019, the FAA carried out 36 new controls, 50 training sessions and 70 awareness-raising interventions with public and private entities.

Starting from the observation of an unmet need for co-operation with anti-corruption authorities at the operational level, the FAA, the Italian National Anti-corruption Authority and the Serbian Anti-corruption Agency launched an international network of corruption-prevention authorities, the NCPA Network. Their initiative aims to provide an international operational platform for the exchange of technical information and the sharing of good practices.

In May 2020, the FAA, in partnership with the Council of Europe's Group of States against Corruption (GRECO), the OECD and the NCPA released a joint analysis report entitled "Global Mapping of Anti-Corruption Authorities" based on data provided by 171 national authorities from 114 countries, in order to help anti-corruption practitioners to understand better national anti-corruption agencies' characteristics and needs, as well as to identify common trends and challenges.

7.3 Process of Application for Documentation

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

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

7.4 Discretion for Mitigation

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

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

7.5 Jurisdictional Reach of the Body/Bodies

See **7.4 Discretion for Mitigation**.

7.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption

In a decision handed down on 15 May 2020 by the Paris Court of Appeal No 18/03310, a telecommunications equipment manufacturer was convicted of bribery of foreign public officials for having paid bribes of more than 20 million dollars to Costa Rican officials and political figures between 2001 and 2004, under the cover of consultancy contracts, to obtain telephone contracts. In 2010, the company committed to pay a fine of EUR137,000,000 to end its prosecution in the United States for bribery. In 2017, in the French part of this case, the Paris High Court acquitted the legal entity on the grounds that it had been unable to identify the body or representative who had acted fraudulently on behalf of the company. The Public Prosecutor's Office appealed against this judgment. The Court of Appeal considered for its part that the recourse to the intermediaries, whose remuneration was excessive, whose mission was particularly vague and whose evidence of the work provided was almost non-existent, was not justified; furthermore, certain consultancy contracts were signed after the award of telephone contracts.

The company was consequently fined EUR150,000. However, the Court confirmed the acquittal of a former executive of the company and a former manager of a subsidiary also prosecuted for bribery of foreign public officials. The reasoning behind this acquittal was that the illicit payments in question had been the result of a complex group policy, allowing the liability of individuals to be scattered.

As regards non-trial resolutions, a public-interest judicial convention was concluded on 29 January 2020 between a major European aircraft manufacturer and the National Financial Prosecutor's Office. The company committed to pay a public-interest fine of EUR2,083,137,455 (the largest public-interest fine since the introduction of this procedural framework) and to be monitored by the FAA regarding the effectiveness of its compliance programme for three years. In this case, investigations have focused on facts of bribery of foreign public officials and private bribery committed between 2004 and 2016 in connection with contracts concluded for the sale of civil aircrafts and satellites. They were performed as part of a joint investigation team set up between the National Financial Prosecutor's Office and the Serious Fraud Office (SFO) and in parallel with the investigation launched by the Department of Justice (DOJ) of the United States and the Federal Prosecutor for the District of Columbia (Washington DC). The National Financial Prosecutor's Office, the SFO and the US judicial authorities have co-ordinated their actions to achieve the simultaneous signing of a public-interest judicial convention and two Deferred Prosecution Agreements with the company. Under these agreements, the latter committed to pay a fine of EUR983,974,311 to the UK authorities and a fine of EUR525,655,000 to the United States Treasury. The National Financial Prosecutor's Office emphasised the exceptional co-operation implemented in this case, that enabled joint investigation and a global resolution in international corruption matters involving multiple jurisdictions. Furthermore, the transmission by the company to the authorities of all relevant information resulting from the internal investigations resulted in a 50% reduction of the penalty in the CJIP. This is the first time that a CJIP has quantified in detail the influence of the mitigating and aggravating factors.

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

7.7 Level of Sanctions Imposed

See **5. Penalties**.

8. Review and Trends

8.1 Assessment of the Applicable Enforced Legislation

The year 2020 has obviously been marked by the health crisis. In France, a state of health emergency was decreed by Law No 2020-290 of 23 March 2020. The processing of corruption cases has been slowed down, since most of the hearings were reported during the lockdown in France, which lasted from 17 March 2020 to 11 May 2020. The procedural deadlines were also adjusted during this period: Article 3 of Order No 2020-303 of 25 March 2020 adapting the rules of criminal procedure on the basis of Law No 2020-290 of 23 March 2020 provided that the limitation period was suspended from 12 March 2020 until the expiry of a period of one month from the end of the state of health emergency (eg, until 11 August 2020).

While it is too early to assess the real impact of the health crisis on the fight against corruption in France, key figures for the year 2019 have been published. In 2019, Transparency International ranked France 23rd next to the United States, losing two places since 2018, in its corruption perceptions index in the public sector. France was attributed a score of 69 on a scale of 0 to 100, where 0 is highly corrupt.

According to the 2019 FAA annual report, prosecutors handled 823 proceedings relating to probity offences in 2018. Finally, 286 of the prosecuted probity offences resulted in a definitive conviction, it being specified that bribery offences amounted to 451.8% of these convictions.

The release of the joint analysis report in May 2020 by the FAA, the OECD and the NCPA demonstrates the FAA's willingness to play a leading role in strengthening anti-corruption systems and in the co-operation with its counterparts at the international level.

At the national stage, the FAA published, in September 2020, the results of its national diagnosis on anti-corruption measures in companies, a study that started in February concerning all types of companies, whether or not they are subject to the compliance obligations of Article 17 of the Sapin II Law. According to the FAA's President, Charles Duchaine, compliance programmes are still too incomplete in terms of risks-mapping and third-party evaluation. Small companies, which are not subject to the obligations of Article 17, seem to be falling behind in the deployment of prevention programmes. As part of its fifth evaluation cycle, the GRECO published its evaluation report on France in January 2020, which assesses the effectiveness of the existing framework to prevent corruption among members of the executive power and law enforcement agencies. In its report, the GRECO takes note of the positive legislative developments aimed at enhancing the transparency of French public life and particularly the establishment of the High Authority for the Transparency of Public Life (HATVP), the FAA and the National Financial Prosecutor's Office. Nevertheless, the report highlights the need for further efforts. It recommends the implementation of codes of conduct applying to all cabinet members in the French government, which should be accompanied by effective monitoring and proportionate disciplinary sanctions. With regard to the protection of whistle-blowers, practice has shown that the system of graduated levels of reporting to different authorities is complex. The GRECO calls, therefore, for an improvement of this system.

8.2 Likely Future Changes to the Applicable Legislation of the Enforcement Body

On 9 January 2020, the first multi-year plan on the fight against corruption (*plan pluriannuel de lutte contre la corruption*) was launched in France. Developed by the FAA and covering the 2020-2022 period, it is built around four priorities:

- a better knowledge and detection of corruption;
- training and raising awareness of all public officials on the challenges of the fight against integrity violations;
- strengthening prevention mechanisms within all administrations and improving the effectiveness of criminal sanctions;
- improving international co-operation in the fight against corruption.

It also takes into account the prevention of corruption in the organisation of two international sport events that will take place in France: the Rugby World Cup in 2023 and the Paris Olympic Games in 2024. This initiative will be supplemented by the launch of a public consultation at the end of 2021 in order to involve civil society and all stakeholders in the evaluation of the first results of the plan's actions. In its evaluation report, the GRECO recommends that this plan should also be applied to members of the French President's Office.

Given the evolution of the French set of regulations in the fight against corruption since 2016, the OECD assessment, scheduled for 2021, is particularly awaited.

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Bougartchev Moyne Associés AARPI was formed in January 2017, when Kiril Bougartchev and Emmanuel Moyne joined forces to create a law firm combining all the disciplines of business litigation, and specialising in criminal law. They are supported by a team of around ten lawyers. As litigators recognised throughout their profession, the founders and their team assist public and private enterprises such as banks, financial institutions, insurance companies and their executives as well as prominent figures in all disputes to which they are a party, whether involving white-collar crime, civil and commercial law or regulatory matters. With wide experience of emergency, complex, cross-border and multi-jurisdictional proceedings, Bougartchev Moyne Associés' lawyers assist their clients both in France and internationally, and with the benefit of privileged relations with counterpart law firms on all continents. Primary practice areas are white-collar crime, compliance, investigations, regulatory disputes, civil and commercial litigation, as well as crisis and reputational injury management.

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Kiril Bougartchev began his career in 1988 as an auditor at Arthur Andersen and, after admission to the French Bar, he joined Gide, where he became a partner in 1999, then moved to Linklaters LLP in 2007, where he would become co-head of the dispute resolution practice of the Paris office and lead the Linklaters LLP global white-collar crime group. Kiril has been and is still involved in many notorious white-collar crime cases, including sensitive political and financial matters, both in France and internationally. He is also involved in regulatory disputes (including before the French Financial Markets Authority, the French Anti-corruption Agency and the French Prudential Supervisory Authority) as well as in complex civil and commercial litigation. Kiril was a Secrétaire de la Conférence des Avocats of the Paris Bar.

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