Anti-bribery & corruption: the fight goes global

Commercial Fraud Commission

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National Report of France

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1. The Legal Framework

1.1 What criminal and/or civil/administrative law(s) exist in your jurisdiction which are specifically targeted at bribery & corruption? Please provide:

a. a brief summary of the offenses;

Corruption and trafficking in influence are incriminated under the French Penal Code.

An important distinction is made in French law between **active corruption** – acts committed by the "briber" - and **passive corruption** - acts committed by the "corrupt". They are separate offenses, respectively aiming one of the two parties involved. The same distinction exists concerning trafficking in influence.

For example, in the hypothesis of public corruption:

- **active corruption** corresponds to the acts of the person who unlawfully proffers an offer, promise, donation, gift or reward, in order to induce a person holding public authority, discharging a public service mission, or vested with a public electoral mandate (hereafter "*holding a public function*") to carry out or abstain from carrying out an act pertaining to his office, duty, or mandate, or facilitated by his office, duty or mandate;
- **passive corruption** corresponds to the acts of the person holding a public function who, directly or indirectly, requests or accepts without right offers, promises, donations, gifts or rewards to carry out or abstain from carrying out an act pertaining to his office, duty, or mandate, or facilitated by his office, duty or mandate.

The main provisions which criminalise corruption and trafficking in influence are the following:

1. Domestic corruption and trafficking in influence

- *Persons holding a public function*

1. Article 433-1[1] and 432-11[2] of the French Penal Code incriminates active and passive corruption and trafficking in influence committed by an individual towards a person holding public function

[1] Article 433-1: "*Unlawfully proffering, at any time, directly or indirectly, any offer, promise, donation, gift or reward, in order to induce a person holding public authority, discharging a public service mission, or vested with a public electoral mandate:*
1° to carry out or abstain from carrying out an act pertaining to his office, duty, or mandate, or facilitated by his office, duty or mandate;
2° or to abuse his real or alleged influence with a view to obtaining distinctions, employments, contracts or any other favourable decision from a public authority or the government;
is punishable by ten years' imprisonment and a fine of €150,000.

The same penalties apply to yielding before any person holding public authority, discharging a public service mission, or vested with a public electoral mandate who, unlawfully, at any time, directly or indirectly solicits offers, promises, donations, gifts or rewards to carry out or to abstain from carrying out any act specified under 1°, or to abuse his influence under the conditions specified under 2°."

2. Article 433-2 incriminates trafficking in influence between private persons aiming to obtain something from a public authority or administration.

- *Persons not holding a public function*

  Articles 445-1 and 445-2 incriminate passive and active corruption which involve persons who do not hold a public function.

- *Judiciary personnel*

  Articles 434-9 and 434-9-1 incriminate corruption and trafficking in influence involving judges or other persons holding a jurisdictional function.

2. International corruption and trafficking in influence

- Articles 435-1 et 435-3 incriminate passive and active corruption involving public officials and agents of foreign countries or international public organisations.

- Articles 435-2 and 435-4 incriminate trafficking in influence involving public officials and agents of international public organisations.

- Articles 435-7 and 435-9 incriminate active and passive corruption of persons holding a judicial function in a foreign country or in an international court.

- Articles 435-8 and 435-10 incriminate trafficking in influence of persons holding a judicial function in a foreign country or in an international court.

3. Offenses related to corruption

- Article 441-8 incriminates a variety of situations which involve corruption of persons who, in the exercise of their profession, establish certificates stating inaccurate facts.

- Article 432-10 incriminates misappropriation of public funds ("*concussion*").

- Article 433-3 incriminates the use of threats and acts of intimidation committed against persons holding public function or other functions (judge, lawyer, police man, etc.).

- Article 324-1 incriminates money laundering.

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[2] Article 432-11: "*The direct or indirect request or acceptance without right and at any time of offers, promises, donations, gifts or advantages, when done by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate, is punished by ten years' imprisonment and a fine of €150,000 fine where it is committed:*
1° to carry out or abstain from carrying out an act relating to his office, duty, or mandate, or facilitated by his office, duty or mandate;
2° or to abuse his real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision."

- Article 432-14 incriminates breaches of regulations on public procurement (called 'favouritism' or "*délit de fravoritisme*") ensuring the freedom of access and equality for candidates in respect of tenders for public service and delegated public services.

- Article 435-12 incriminates corruption involving the obtention of a false deposition, statement or certificate in legal proceedings in a foreign country or before an international court.

- Article 435-13 incriminates the use of threats and acts of intimidation committed against persons holding a judicial function or participating to the judicial system in a foreign country or in an international court.

b. any affirmative defences that are available;

No specific affirmative defences exist concerning corruption/bribery.

In French criminal law, the main grounds for absence or attenuation of liability are (articles 122-1 and following of the Penal Code):

- a person suffering from a psychological or neuropsychological disorder which destroys discernment or the ability to control actions (article 122-1);
- a person who acted under the influence of a force or constraint which he could not resist (article 122-2);
- a person who establishes that he believed he could legitimately perform the action because of a mistake of law that he was not in a position to avoid (article 122-3);
- a person who performs an action commanded by a lawful authority, unless the action is manifestly unlawful (article 122-4).

Regarding corruption, **article 433-2-1, 432-11-1, 434-9-2, 435-6-1 and article 435-11-1** provide that the perpetrator or accomplice of any of the offenses respectively enumerated therein incurs half the statutory custodial penalty if, having warned the administrative or judicial authority, he allowed to end the infringement or identify other perpetrators or accomplices.

c. the penalties that may be imposed upon offenders.

- Active corruption and trafficking in influence committed under article 433-1 are punishable by ten years of imprisonment and a fine up to 1 000 000 euros, which may be increased to twice the proceeds of the offense.

- Trafficking in influence committed under article 433-2 is punishable by five years of imprisonment and a fine up to 500 000 euros, which may be increased to twice the proceeds of the offense.

- Passive corruption and trafficking in influence committed under article 432-11 is punishable by ten years of imprisonment and a fine up to 150 000 euros.

- Corruption committed under article 434-9 is punishable by 10 years of imprisonment and a fine up to 1 000 000 euros, which may be increased to twice the proceeds of the offense.[3]

- Trafficking in influence committed under article 434-9-1 is punishable by 5 years of imprisonment and a fine up to 500 000 euros, which may be increased to twice the proceeds of the offense.

- Passive and active corruption committed under articles 435-1 and 435-3 are punishable by ten years of imprisonment and a fine up to 150 000 euros.

- Passive and active trafficking in influence committed under articles articles 435-2 and 435-4 is punishable by five years of imprisonment and a fine up to 75 000 euros.

- Passive and active corruption committed under articles 435-7 and 435-9 are punishable by ten years of imprisonment and a fine up to 150 000 euros.

- Trafficking in influence committed under articles 435-8 and 435-10 is punishable by five years of imprisonment and a fine up to 75 000 euros.

- Passive and active corruption committed under articles 445-1 and 445-2 is punishable by five years of imprisonment and a fine up to 500 000 euros, which may be increased to twice the proceeds of the offense.

Other offenses related to corruption:

- Corruption involving the establishment of false certificates under article 448-1 is punishable by two years of imprisonment and a fine up to 30 000 euros.[4]

- Misappropriation of public funds ("*concussion*") is punishable by five years of imprisonment and a fine up to 750 000 euros (article 432-10).

- Threats and acts of intimidation committed un article 433-3 is punishable by two years of imprisonment and a fine up to 30 000 euros.

- Money laundering is punishable by five years of imprisonment and a fine up to 375 000 euros (article 324-1).

- Offenses against equal access in respect of public tenders and public service delegations are punished by two years of imprisonment and a fine of 30 000 euros (article 432-14).

[3] However, if acts of corruption are perpetrated by a juge in favour or againts a person subject to criminal proceedings, the offense is punishable by fifteen years of imprisonment and a fine up to 250 000 euros.
[4] If the person involved practices medecine or profession related to health, the offense is punishable by five years of imprisonment and a fine up to 75 000 euros.

International offenses related to corruption:

- The penalties for acts incriminated by article 435-12 (obtention of a false deposition) are three years of imprisonment and a fine up to 45 000 euros.

- The penalties for acts incriminated by article 435-13 (threats and acts intimidation to person holding a judicial function) are ten years of imprisonment and a fine up to 150 000 euros.

Aside from the aforementioned penalties (called 'principal penalties'), offenders may incur **'additional penalties'** provided by articles 433-22, 433-23, 445-3 regarding natural persons and 433-25, 445-4 regarding legal persons.

1.2 Does your jurisdiction outlaw "private" bribery/corruption (i.e. transactions between two or more private entities or persons) as well as "public" bribery/corruption? If so, please explain how the distinction is drawn between private and public bribery/corruption.

Under French law, both private and public bribery/corruption are outlawed.

Before 2005, the French Penal Code did not contain provisions regarding private corruption (they only existed under the French Labour Code, mainly concerning the corruption of directors or employees of private companies). In 2005, the law n°2005-750 introduced new provisions in the Penal Code especially aiming to incriminate corruption of "*persons who do not hold a public function"* at articles 445-1 and following.

The difference between public and private corruption is that **public corruption** necessarily involves a person holding a public function, whereas **private corruption** concerns the corruption of a person "*who, not being a public official or charged with a public service mission, holds or occupies, within the scope of his professional or social activity, a management position or any occupation for any person, whether natural or legal, or any other body*" (article 445-1).

The distinction between private and public is also important in cases of **trafficking in influence**. Indeed, trafficking in influence strictly involving two private persons is not punished *per se* under the Penal Code. French criminal law only incriminates trafficking in influence directly targeting a person holding a public function (article 433-1) and trafficking in influence between private persons when the real or alleged influence aims (or is suppose to aim) a public authority or administration (i.e. a private person who accepts or seeks to use his own influence before a public authority or administration) (article 433-2). Therefore, the establishment of this offense necessarily entails an element of the "public" sphere.

1.3 Is your law extra-territorial? If so, in what circumstances can it be enforced if the relevant acts/omissions of bribery/corruption occur outside your jurisdiction?

French law may be applied for acts occurred outside French jurisdiction in the following cases:

- all crimes committed by a French individual out French national territory (article 113-6 of the Penal Code), and
- offenses committed by French individuals out French territory if the acts are punishable under the law of the country where they have been committed (i.e. the "dual criminality" requirement.)[5] (article 113-6 of the Penal Code).[6]

In addition (regarding jurisdiction):

- perpetrators or accomplices to offenses committed outside the French territory may be prosecuted and tried by French courts either when French law is applicable under the provisions of book I of the Penal Code or any other statute, or when an international Convention gives jurisdiction to French courts to deal with the offense (article 689 of the French Penal Procedure Code);

- in accordance with the international Conventions quoted in the following articles, a person guilty of committing any of the offenses listed by these provisions outside the French territory and who happens to be in France may be prosecuted and tried by French courts (article 689-1 of the French Penal Procedure Code);

    - Article 689-8 of the Penal Procedure Code specifically refers to two conventions regarding corruption.[7] According to this text, for the purposes these conventions, can be prosecuted and tried in accordance to article 689-1:

    "1. Any official working for a European Community institutions or body established under the Treaties establishing the European Communities and which has its headquarters in France, guilty of the offenses provided for in Articles 435-1 and 435-7 of the Penal Code or of an offense against the financial interests of the European Communities within the meaning of the Convention on the protection of the financial interests of the European Communities done at Brussels on July 26, 1995;

    2. Every French or any person belonging to the French public service guilty of the offenses under articles 435-1, 435-3, 435-7 and 435-9 of the Penal Code or an offense against the financial interests the European Communities within the meaning of the Convention on the protection of the financial interests of the European Communities done at Brussels on July 26, 1995;

[5] French criminal law is also applicable for any crime or any offense punishable by imprisonment committed outside France where the victim is French national at the time of the offense, the nationality of the perpetrator unimportant (article 113-7).
[6] See condition set at article 113-8 of the Penal Code.
[7] The Protocol to the Convention on the protection of the financial interests of the European Communities done in Dublin September 27, 1996 and the Convention on the fight against corruption involving European officials or officials of Member States of the European Union done at Brussels on May 26, 1997.

3. Any person guilty of the offense provided for in articles 435-3 and 435-9 of the Penal Code or any offense against the financial interests of the European Communities within the meaning of the Convention on the protection of the financial interests of the European Communities made Brussels on July 26, 1995, where the offense is committed against a french national."

Hence, regarding corruption cases, French courts have jurisdiction if the acts are:

- committed in France by a foreign individual or comapany;
- committed out of French territory, involving a french individual or company[8] if the acts are punishable under the law of the country where they have been committed; or
- committed out of French territory, involving a foreign individual who happens to be in France, in accordance to articles 689-1 and 689-8 of the French Penal Procedure Code.

1.4 Are there any "safe harbours" or exemptions in relation to transactions that might otherwise be regarded as bribes, such as "facilitation payments", which are expressly excluded from being illegal? If so, is this determined by statute/codified law, by case law or otherwise?

No express exemptions exist under the French law regarding transactions that might otherwise be regarded as bribes. Any bribery is illegal, irrespective of the amount.

Therefore, no express provisions regarding "faciliation payments" exist. However, the phrase "without right" included in several articles regarding corruption (such as article 432-11, 435-3 and 435-4 of the Penal Code), suggests that agents could potentially receive a sum of money allegedly in accordance with the law (for instance payments which aim to encourage foreign public officials to perform an act that depend on their function, i.e. faciliation payments). In some countries such payments are permitted but in France nothing allows to assert that such payments are tolerated. Besides, the conventions to which France is party do not mention these type of payments.

However, taking into account that the law may vary from one country to another regarding trafficking in influence, French Law does not incriminate influence peddling involving public officials or agents of foreign countries (unlike agents and officials of international organisations).

[8] A foreign subsidiary of a French company for an act of corruption committed abroad may also be caught under French criminal law if the French parent company is sentenced as the main offender and the foreign subsidiary as a accomplice.

1.5 Does the financial regulatory system (i.e. the law and regulations governing the operation and conduct of banks and other financial institutions) in your jurisdiction address the topic of bribery & corruption? If so, please provide a brief summary of the obligations (including systems/controls and reporting obligations) that are imposed on banks and other financial institutions in this regard.

The financial regulatory system does address the topic of corruption. This problem is mainly adressed through the fight against money laudering since they are closely linked.

The French Monetary and Financial Code provides a number of accounting and prudential rules which financial institutions are obliged to respect. Regarding the fight against money laundering, the law n° 90-614 of July 12, 1990 (supplemented by several utlrerior laws) introduced provisions submitting financial institutions to rigorous obligations regarding the fight against corruption and/or money laudering (articles L. 561-1 and following of the Monetary and Financial Code). These provisions mainly concern the identification of clients, the review and reporting of significant transactions, the notification of suspicious transactions, among others.

Permanent duty of care (articles L.561-5 and following)

The duty of care imposed to professionals depends on the risk of money laundering attached to the customer's profile, products and operations. The Monetary and Financial Code sets two main requirements to professionals: the first requirement intervenes (i) before entering into business relations with the client and the second requirement relates to the (ii) monitoring of clients and operations.

- Before entering into business relations with a client, professionals of financial institutions need to identify the client and the eventual beneficiary of the requested transaction. For this, they need to be provided with all necessary information proving the exactness of the elements of the identity and the nature of the alleged business relationship (article L.651-5).

- The duty of care required during the business relationship consists in a double obligation: an updated knowledge on the client and a rigorous review of the transactions carried out (article L. 561-6).

The obligations of identification and monitoring may be delegated by the financial institution to a third party (article L.561-7).

"Light" duty of care - The law defines several situations where professionals may reduce their duty of care as long as they do not nurture any suspicion of money laundering or terrorist financing (article L. 561-9). Some financial institutions are declared "safe" when stablished in France, in another Member State of the European Union or in another country which requires equivalent obligations regarding fight against money laundering and terrorist financing (a list is fixed by the Minister of Economy). In these cases, the fincial institution is exempt from rhe obligations imposed by articles L. 561-5 and L. 561-6.

"Increased" duty of care - The law defines cases where the professional must apply "additional due diligence" mesures (i.e. in addition to normal standards) (L. 561-10). Furthermore, article L. 561-10-2 of the Monetary and Financial Code provides that professionals should intensify their duty of care in cases where they perceive (in light of their own assessment) an important risk of money laundering attached to a customer, a product or a transaction.

If the information requested to the clients does not allow to establish the origin or destination of the funds, financial institutions must notify the activity.

Notification of suspicious transactions (articles L.561-1 and following)

Article L.561-1 and L.561-15 of the Monetary and Financial Code implement a notification system of "suspicious transactions".

On the one hand, "*individuals and legal entities other than those referred to in article L.651-2, and that in the normal course of their business, execute, supervise or recommend transaction giving rise to capital movements, shall be requied to declare to the Public Prosecutor any transactions they have knowledge of that involve sums wich they know to be the proceeds of an offense referred to in article L.561-15"* (article L.561-1). The offenses referred to in article L.561-15 include corruption.

On the other hand, "*persons referred to in article L.561-2*" (i.e. financial institutions and specialized professions in relation to financial investments) are required to report to services referred to in article L.561-23 (i.e. TRACFIN[9]) transactions involving sums that they know, or suspect to be, the proceeds of an offense punishable by one year of imprisonment or more or to be involved in the financing of terrorism (article L.561-15). The offenses referred to in this article include corruption.

This mechanism allows the conduct of investigations by TRACFIN (i.e. the service referred to in article L.561-23) and provides that the person who issued the notification is exempt from criminal liability (accordingly to article L.561-22).

Reporting obligations (article L.561-15-1)

Article L.561-15-1 requires legal entities to report, on a systematic basis, information on certain operations defined by objective criteria, regardless of their suspicious character.[10]

The data collected through this reporting system feeds into a database to which only TRACFIN has access. The information provided in this framework aims to strengthen ongoing investigations. However, these informations alone can't be the foundation for the opening of an investigation or pre-investigation (unlike the information collected under article L.561-15).

[9] "*Traitement du renseignement et action contre les circuits financiers clandestins*" (TRACFIN) is an administrative service, under the Ministry of the Economy, attached to the Secretariat of State budget. It was created by a decree of 9 May 1990.
[10] Decree n° 2013-385 of May 7, 2013 lies down the terms and conditions of the communication of information on transactions referred to in Article L. 561-15-1.

In addition to these mechanisms, the French Prudential Control Authority permanently monitors financial institutions (by periodically taking contact with the latter, analysing their internal reports, doing on-site inspections and/or random checks on client files and operations).

Furthermore, the law n°2013-1115 of December 6, 2013 led to the creation of a specialized Financial Prosecutor which has jurisdiction at a national level for stock market offenses (exclusive jurisdiction) and for other offenses, including corruption and trafficking in influence (concurrent jurisdiction with local prosecutors). The Financial Prosecutor mainly intervenes in complex cases and/or cases that have a significant national or international impact.

The rules governing the obligations concerning the fight against money laundering and terrorist financing are not *per se* part of criminal law. However, the acts of an officer or employee of a financial institution may fall under criminal law if he informs the author of a transaction or the owner of the money been transferred that such transaction has been notified to the TRACFIN or if he gives any information on the proceedings or investigations following the aforementioned notification. Such a disclosure is an offense punishable by a fine under article L. 574-1 of the Financial and Monetary Code.

2. Corporate Criminal Liability

2.1 In the context of bribery/corruption, does your law recognise the concept of corporate criminal liability? E.g. can a corporate entity be found guilty of bribery?

French law recognizes the concept of corporate criminal liability. Any legal person may be found guilty of corruption committed on its behalf by its organs or representatives.

Article 433-1 and following (public corruption**)** as well as article 445-1 and following of the Penal Code (private bribery) fully apply to legal persons.

2.2 If the answer to 2.1 above is "yes", please provide a brief explanation of the legal theory of corporate criminal liability (i.e. what circumstances must be established for corporate liability to arise and what form does that liability take) as well as the penalties that may be imposed upon a corporate offender.

a. Conditions to establish corporate liability

- Article 121-2 establishes the principle of criminal liability of legal persons:[11]

> *"Legal persons, with the exception of the State, are criminally liable for the offenses committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 and 121-7.*

[11] Articles 433-25 and 445-4 reconcerning penalties of legal persons liable for acts of corruption specifically make reference to article 121-2 of the Penal Code.

However, local public authorities and their associations incur criminal liability only for offenses committed in the course of their activities which may be exercised through public service delegation conventions.

The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of article 121-3."

The two main conditions for a legal person to be found liable are therefore set by article 121-2: the offense has to be "***committed on their account by their organs or representatives***".

The provisions of article 121-2 do not apply to the State (other local authorities are however liable under certain conditions).

- The implementation of corporate criminal liability requires the existence of legal personality ("*personnalité juridique*").

Numerous entities of private law are recognized as legal persons by law (some have a profit-making purpose and others do not). These include:

1. civil or commercial companies;
2. associations;
3. religious congregations;
4. recognized charitable foundations and corporate foundations;
5. groupings of economic interest;
6. trade unions;
7. political parties.

- Legal persons are liable for all offenses.

The liablility of legal persons is however **excluded for certain offenses**, mainly offenses under the law of the press a number of offenses under the Penal Code which are committed through the press or by broadcasting. Other offenses may also be inapplicable to legal persons as the provisions of the Penal Code incriminating them explicitly refer to a person holding a specific title or function and, consequently, can only to such individuals (for example : only the president, an administrator or the general director of a company can be liable for misuse of corporate assets under the phrasing of the Penal Code).

- Identification of the organ or representative who committed the offense.

For the establishment of corporate liability, the offense has to be committed by a representative or organ of the legal person. However, jurisprudence varies as to whether it is necessary that the **organ or representative must be identified**. In practice, this question mainly depends on the facts of the case but corporate liability has already been established even when no specific organ or representative was identifiable. Nonetheless, the current position of French Courts is to demand that the organ or representative be identified.

- Legal persons are liable only for offenses **committed on their behalf**.

A legal person may be held as the author of the offense or as the accomplice of the natural or legal person that committed the offense. It is however essential that the acts were committed on behalf of the corporation. Furthermore, although in practice corporate liability is closely linked to the directors' liability (*"responsabilité des dirigeants"*), in law, the Penal Code provides a certain autonomy to the establishment of corporate criminal liability, regardless of the establishment of its director's liability as individuals.

b. Legal persons' liability for private corruption

Concerning private corruption, a Framework Decision of the Council of the EU dated July 22, 2003 (2003/568/JHA) specifically concerns corruption in the private sector and provides details regarding legal persons's liability.

This Framework Decision defines a legal person as "*any entity having such status under the applicable national law, except for State or other public bodies acting in the exercise of State authority and for public international organisations*" (article 1).
Moreover, article 5 of the same Directive provides at paragraph 2:

"1. *Each Member State shall take the necessary measures to ensure that legal persons can be held liable for offenses referred to in Articles 2[active and passive corruption in the private sector] and 3 [instigation, aiding and abetting] committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:*

(a) a power of representation of the legal person;

(b) an authority to take decisions on behalf of the legal person; or

(c) an authority to exercise control within the legal person.

2. *Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of an offense of the type referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.*"

These provisions allow to complete the provisions of article 121-2 of the French Penal Code.

The law n°2005-750 of the 4th of July 2005 transposed the Council's Framework Decision of 2003 and created the provisons 445-1 and following of the French Penal Code.

However, paragraph 2 of the Framework Decision (corporate responsibility arrising from a decision maker's lack of "*supervision or control*") has not fully been implemented in French law as this would imply applying the french jurisprudence on corporate directors' liability to legal persons, which is not currently the case.

c. Penalties

Specific provisions usually provide penalties applicable to legal persons.[12]

- A legal person liable for active corruption or trafficking in influence, incriminated by article 433-1 and 433-2, incurs the penalties listed at article 433-25: respectively a fine up to 5 000 000 euros and 2 500 000 euros and additional penalties such as the penalties of article 131-39[13] (2° to 7°) for a period of up to five years, the display or publication of the sentence etc.

- A legal person liable for corruption of persons not holding a public function, incriminated by articles 445-1 and 445-2, incurs the penalties listed at article 445-4: a fine up to 375 000, sanctions listed at article 131-39 (3° to 7°) for period of five years or more, display and publication of the sentence, etc.

- A legal person liable for active corruption or trafficking in influence of public officials and agents of foreign countries or international public organisations and persons holding a judicial function in a foreign country or in an international court, incriminated by article 435-3, 435-4, 435-9 and 435-10, incur the penalties listed at article 435-15: a fine up to 5 000 000 euros for corruption and 2 500 000 for trafficking in influence, sanctions listed at article 131-39 (2° to 7°) for period of five years or more, display and publication of the sentence, etc.

2.3 Are there any pending or expected changes to the law of corporate criminal liability in your jurisdiction? If so, please explain the proposed changes and the expected timeframe for implementation.

No changes to the law of corporate criminal liability are expected in the near future.

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[12] The rule regarding fines is that the fines provided in the Penal Code for individuals are multiplied by 5 for legal persons and offenses which do not provide such a penalty for indivuals, legal persons may incur a fine up to 1 000 000 euros (article 131-18 of the Penal Code).

Article 131-39 provides:

"*Where a statute so provides against a legal person, a felony or misdemeanour may be punished by one or more of the following penalties:*

1° dissolution, where the legal person was created to commit a felony, or, where the felony or misdemeanour is one which carries a sentence of imprisonment of three years or more, where it was diverted from its objects in order to commit them;

2° prohibition to exercise, directly or indirectly one or more social or professional activity, either permanently or for a maximum period of five years;

3° placement under judicial supervision for a maximum period of five years;

4° permanent closure or closure for up to five years of the establishment, or one or more of the establishments, of the enterprise that was used to commit the offenses in question;

5° disqualification from public tenders, either permanently or for a maximum period of five years;

6° prohibition, either permanently or for a maximum period of five years, to make a public appeal for funds;

7° prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a maximum period of five years;

8° confiscation of the thing which was used or intended for the commission of the offense, or of the thing which is the product of it;

9° posting a public notice of the decision or disseminating the decision in the written press or using any form of communication to the public by electronic means.

The penalties under 1° and 3° above do not apply to those public bodies which may incur criminal liability. Nor do they apply to political parties or associations, or to unions. The penalty under 1° does not apply to institutions representing workers."

3. Mutual Legal Assistance / Co-operation

3.1 Is your jurisdiction a signatory to any bi-lateral or multi-lateral treaties or other instruments regarding mutual legal assistance / co-operation in the context of bribery & corruption? If so, which ones?

France is signatory to several treaties:

- The Convention on the protection of the financial interests of the European Communities, Dublin 27th of September 1996.

- The European Union Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, Council Act of May 26, 1997.

- The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted within the OECD on 17 December 1997.

  After the signature of these conventions, the legal provisions in the French Penal Code regarding corruption where modified in order to comply with France's international commitments:

  The law voted in June 30th, 2000 (n°2000-595) introduced legal provisions sanctioning passive corruption, observed in France, committed by EU officials or by agents and officials of other EU member states (provisions regarding active corruption of these agents and officials were also introduced in the Penal Code).

- The Criminal Law Convention on Corruption of the Council of Europe, signed in Strasbourg the 27th of January 1999 and its Additional Protocol of May 15th, 2003 (both published in France by two decrees in July 4th, 2008: Decree n° 2008-671 and Decree n° 2008-672).

  The Convention aims principally at developing common standards concerning certain corruption offenses. It deals with substantive and procedural law matters and seeks to improve international co-operation (mainly to facilitate direct and swift communication between the relevant national authorities).

- The Civil Law Convention on Corruption of the Council of the Council of Europe, signed in Strasbourg the 4th of November of 1999 (published in France by a decree dated July 4th, 2008, n° 2008-673)

  The Civil Law Convention aims at requiring each Party to provide in its internal law for effective remedies for persons who have suffered damage as a result of corruption, in order to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage.

- The United Nations Convention against Corruption (UNCAC) adopted in October 31, 2003 by the UN General Assembly, in New York.

After the signature of these conventions, the legal provisions in the French Penal Code regarding corruption where again modified:

The law voted in November 13th, 2007 (n°2007-1598) introduced legal provisions sanctioning passive corruption, observed in France, committed by agents and officials of foreign countries (thus covering non-EU states) and international organisations. Legal provisions incriminating trafficking in influence and corruption of judicial personnel were also added to the Penal Code.

3.2 Are the regulatory/prosecution authorities in your jurisdiction parties to any formal or informal co-operation arrangements with equivalent authorities in other jurisdictions (e.g. a memorandum of understanding, etc.)? If so, please provide a brief summary of the arrangements and the other authorities/jurisdictions.

The French Code of criminal procedure contains an entire Title concerning international legal assistance, which regulates France's cooperation with other jurisdictions and authorities:

- Chapter I of the aforementioned Title provides "General Rules" on the modalities of a transmissions and execution of requests for assitance.

- Chapter II provides the rules of mutual assistance between France and the other Member States of the EU (*see below*).

- Chapter III provides the rules of mutual assistance between France and the other States.

    1. This Chapter only contains one article (695-10) and provides that "*the provisions of Sections 1 and 2 of Chapter II apply to requests for assistance between France and the other parties to any agreement with similar terms to those of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union*".

    2. In the absence of an international conventions providing otherwise, requests for assistance issued from the French judicial authorities and directed to foreign judicial authorities are sent through the Department of Justice (article 694 of the French Penal Procedure Code).

- Chapter IV concerns the European Arrest Warrant, the surrender procedures between Member States of the EU resulting from the Framework Decision of the Council of the European Union on June 13, 2002 and the surrender procedures resulting from agreements concluded by the EU with other European states.

The procedure of the European arrest warrant was transposed into French law by the law n°2004-204 of March 9, 2004 and is regulated by articles 695-11 and following.

According to article 695-23, the execution of an European Arrest Warrant may be refused if the offense for which the warrant has been issued does not constitute an offense under French law. By way of exception to this rule, a European Arrest Warrant may be executed despite the "double criminality" requirement if:

(a) under the law of the issuing member state, the subject-matter of the accusation is punished by a custodial sentence of 3 years or more of imprisonment or a custodial safety measure of a similar duration, and

(b) the offense falls within one of the categories of offense listed in the aforementioned article.

Corruption qualifies as one these offenses. The same exception exists concerning orders freezing property regarding corruption offenses (article 695-9-17).

- Chapter V concerns extradition.

a. Mutual legal assistance at the European level (articles 695 and following):

In 1957, the Treaty of Rome first addressed the question of European cooperation in judicial and police matters. In 1959, the Council of Europe adopted a European Convention on Mutual Assistance in criminal matters (Strasbourgh, 1957). In 1996, Denis Robert brought together seven of the most notorious anti-corruption magistrates and launched the "Geneva Call" on the 1st of October, demanding for more European judicial cooperation. The Tampere European Council in 1999 laid important foundations for cooperation in criminal matters among EU member states (mainly leading to the creation of 'joint investigation teams'). In May 19, 2000 the Council adopted the Mutual assistance in criminal matters between Member States Act, aiming to encourage and facilitate mutual assistance between judicial, police and customs authorities on criminal matters. In particular, the latter supplemented the 1959 Council's Act on Mutual Assistance in Criminal Matters, and its 1978 Protocol. Very recently, on the 3rd of April 2014, the EU adopted a Diretive (2014/41/EU) regarding European Investigation Orders in criminal matters, aiming to render more efficient the cooperation between member states of EU (mainly by introducing an automatic mutual recognition of investigation decisions, restricting the grounds for refusal and establishing deadlines for the execution of measures of inquiry).[14]

In France, the law n°2004-204 of March 9, 2004 introduced a great number of new provisions to the Code of criminal procedure concerning international mutual legal assistance. Other several modification added and created other provisions in this field.

[14] To be into national law no later than May 22, 2017.

Aside from the provisions regarding European arrest warrants, all provisions applicable in matters related to legal mutual assistance between France and other EU member states are in Chapter II of Title X (Book IV) of the Code of Penal Procedure (article 695 and following).

- Section 1 concerns the **transmission and execution of requests for assistance within the EU** (articles 695-1).

- Section 2: concerns the rules regarding **joint investigation teams** (articles 695-2 and 695-3).

  These teams may be formed in two cases: either when appropriate to perform as part of a French procedure, complex investigations involving the mobilization of substantial resources and affecting other Member States or when several Member States are conducting investigations into offenses requiring coordinated and concerted action among the Member States concerned. Articles 695-2 and 695-3 of the Criminal Procedure Code respectively define the powers of the foreign staff seconded by another Member State and the powers of officers and agents of French police seconded to a joint investigation team. Such teams may also consist in customs matters;

- Section 3: **Eurojust** (articles 695-4 to 695-7).

  The Eurojust is a body of the European Union established by Council Decision No 2002/187/JHA of February 28, 2002, whose role is to promote and improve coordination and cooperation between competent authorities of the EU Member States. The 695-4 and following of the Code of Criminal Procedure define the prerogatives of Eurojust.

- Section 4 provides rules regarding the **National Member of Eurojust** (articles 695-8 to 695-9).

- Section 5 regulates **the issuance and execution of orders freezing property or evidence** in accordance with the Framework Decision of the Council of the European Union of July 22, 2003 (articles 695-9-1 to 695-9-30).

- Section 6 concerns the **exchange of information between services** under the Framework Decision of the EU Council of December 18, 2006 (articles 695-9-31 to 695-9-49).

- Section 7 regulates the cooperation between **Asset Recovery Offices of the Member States on tracking and identifying proceeds or other properties related to the crime**, in accordance with the Decision 2007/845/JHA of December 6, 2007.

Other European instruments of police and judicial cooperation in criminal matters exist at the EU level, these include:

1. the **European Police Office (Europol)**, established by the Brussels Convention of July 26, 1995, which aims to improve the efficiency of the competent services of the Member States and cooperation in specific areas

2. the **Schengen Agreement** of June 19, 1990, providing for increased police cooperation and mutual legal assistance.

b. Mutual legal assistance with non EU Member States:

- **Agreements between France and other states**

France has signed bilateral agreements on mutual legal assistance with the following countries (non exhaustive list): Algeria, Australia, Benin, Brazil, Burkina Faso, Cameroon, Canada, Central African Republic, Colombia, Congo, Korea, Ivory Coast, Djibouti, Ecuador, Egypt, Gabon, Laos, Madagascar, Mali, Morocco, Mauritania, Mexico, Monaco, Niger, Romania, San Marino, Senegal, Chad, Togo, Tunisia,Uruguay.

- **Agreements between the EU and other states**

A MLAT[15] was signed between the US and the EU in 2003. This treaty meant to replace the previous bilateral agreements between the US and EU. Then, the SWIFT agreement was signed (an international convention entered into force in August 2010), giving the US authorities access to European banking data stored on the network of '*Society for Worldwide Interbank Financial Telecommunication'*, in order to fight against terrorism.

Other International instruments of police and judicial cooperation in criminal matters exist at the international level, such as:

the **Stolen Asset Recovery Initiative** (**StAR)**, established in 2007, is a partnership between the World Bank and the UN Office on Drugs and Crime (UNODC) and aims to end safe havens for corrupt funds. StAR provides governments with advice, knowledge and technical assistance on how to effectively recover stolen assets (countries can request StAR assistance by sending a written request).

[15] A mutual legal assistance treaty (MLAT) is an agreement between two states to facilitate police and judicial cooperation, particularly in terms of exchange of information and personal data during ongoing investigations in the purpose of obtaining evidence.

4. Cases

4.1 Please describe in brief three (3) cases of bribery/corruption in (or involving) your jurisdiction which illustrate the trend towards cross-border/global investigation and enforcement of anti-bribery laws. For example, cases where:

a. your jurisdiction's law(s) were enforced on an extra-territorial basis;

b. there was a degree of cooperation/assistance provided by your jurisdiction to another jurisdiction, or vice versa; and/or

c. penalities were imposed by your jurisdiction as well as by other jurisdictions, in relation to the same set of facts.

These cases will be discussed in greater detail during the workshop in London.

- CASE n°1:

Pursuant to a contract named "Bravo" of August 31, 1991, the company China Shipbuilding Corporation (CSBC), the rights of which are held by the Republic of China (Taiwan) and the Republic of China Navy (ROCN), committed to purchase six frigates from the company Thomson CSF, the rights of which are held by Thales SA and Thales underwater Systems SAS (hereafter "Thales").

Since 1993, Taiwanese authorities started to suspect that the sale of these frigates involved fraud, money laundering and corruption.

In June 2001, Taiwan submitted a request for legal assistance from Switzerland in connection with the case (the fraudulent money involved several Swiss bank accounts).

In 2001, the French authorities launched an inquiry into alleged kickbacks involving politicians and military officers in Taiwan, China and France. More particularly, the inquiry sought to establish whether French politicians, military officials and other middlemen had illegally profited from the 1991 sale.

In June 2005, the Swiss Federal Commission approved the handover of bank files to foreign judicial authorities concerning the controversial sale of the French warships to Taiwan, rejecting an appeal by Andrew Wang (fugitive Taiwanese arms broker) to stop judicial cooperation with Taiwan and France, among others.

In July 2006, France's Consultative Commission on National Defense Secrets (CCSDN) decided not to release the documents requested by the investigating magistrates. After several similar rejections, in June 2008, French prosecutors in charge of the Taiwan frigate affair dismissed the case after 7 years of investigation, for "lack of evidence."

In April 2010, an arbitration tribunal ordered Thales to pay some 630 million euros to the ROCN on the grounds that it violated the terms of their contract as it was responsible for millions in kickbacks related to the sale of the frigates. The French government was responsible for 72.54% of the fine (457 million euros) as it acted as guarantor for 72.5% of the "Bravo" contract with Thomson-CSF.

June 9, 2011 Thales lost of an appeal before the Paris Court of Appeal against the international court of arbitration ruling (Paris Court of Appeal, June 9, 2011, n°10/11853).

Before and after the arbitration ruling 2010, the Taiwanese judicial system acted in parallel by sentencing navy officials involved in the case to pay important fines and return large sums of money.

Stolen Asset Recovery Initiative (StAR), in partnership with World Bank Group and the United Nations Office on Drugs and Crime (UNODC), assisted the different jurisdictions involved to return several millions of dollars which had been misused. France also offered assistance in tracking down and recovering bribe funds.

(*Sources*: http://www.defenseindustrydaily.com/full-steam-ahead-for-taiwan-frigate-corruption-investigation-01546/; http://star.worldbank.org/corruption-cases/node/19571 (StAR's documentation on the case)).

- CASE n°2:

In 1995 Total S.A., a French oil and gas company that trades on the New York Stock Exchange, attempted to obtain a contract with the National Iranian Oil Company (NIOC) to develop the Sirri A and E oil and gas fields. In May 1995, Total entered into negotiations with an Iranian official who served as the chairman of an Iranian state-owned and state-controlled engineering company. Total subsequently entered into a purported consulting agreement pursuant to which Total would corruptly make payments to an intermediary designated by the Iranian official to secure NIOC's signing. Over the next two years, Total paid approximately $16 million in bribes under the purported consulting agreement.

In 1997, Total sought to negotiate a contract with NIOC to develop a portion of the South Pars gas field. Total and a second intermediary entered into another purported agreement involving large payments to the latter. Over the next seven years, Total made unlawful payments of approximately $44 million pursuant to the second purported consulting agreement.

In sum, between 1995 and 2004, Total corruptly made approximately 60 million dollars in bribe payments under the agreements for the purpose of inducing Iranian officials to use their influence in connection with Total's efforts to obtain and retain lucrative oil rights in several oil and gas fields.

In May 2013, Total and the US *Derpartment of Justice* (DOJ) agreed to resolve the charges related to violations of the Foreign Corrupt Practices Act (FCPA)[16] in connection with illegal payments by entering into a *Deferred Prosecution Agreement* (DPA)[17] for a term of three years. In this context,

[16] Because of their ties with the US, non-US companies are likely to enter the territorial or personal scope of US criminal law. For example, provisions of the Foreign Corrupt Practices Act 1977 (FCPA), which punishes bribery of foreign public officials, apply to foreign companies that are listed on a US stock market or that act in the territory of the US. Once US criminal law applies to a foreign company, the company is often incentivised to consider some form of settlement with the prosecuting authorities (*JCP EG n°38, 16 sep. 2013, 954*) .

[17] In the last years, several French companies have entered into settlement agreements (deferred prosecution agreements, or DPA) with US federal prosecutors in matters related to bribery of foreign public officials. A DPA enables the prosecuting authorities (mainly the Department of Justice, or DOJ) to set in motion a prosecution procedure but then immediately defer any prosecution, provided there is compliance with certain commitments made by the company in agreeing the DPA. These commitments generally include that the company has to pay a substantial fine, a waiver to benefit from statutory limitations, cooperation with the DOJ, the admission of certain facts and the establishment of a corporate compliance program to prevent the renewal of the alleged offenses. Non-prosecution agreements (NPA) also exist and produce similar effects,

Total agreed to pay to the a 245.2 million dollars penalty to resolve charges, to cooperate with the DOJ authorities and to implement an enhanced compliance programs and internal controls designed to detect and prevent FCPA violations. The U.S. *Securities and Exchange Commission* (SEC)[18] also entered into a cease-and-desist order against Total in which the company agreed to pay an additional $153 million in disgorgement and prejudgment interest.

In parallel, in May 2013, Paris prosecutors requested that Total, Total's Chairman and Chief Executive Officer, and two additional individuals be referred to the Paris Criminal Court (French authorities had been investigating since 2006). In this regard, Total's late CEO, Christophe de Margerie, was under investigation in connection with the case when he died in Moscow in October 2014. Total was finally referred to the Paris Criminal Court in November 2014, on grounds of "corruption of foreign public officials".

The Assistant Attorney Mythili Raman, who's heading the DOJ's criminal division, said the enforcement action is *'the first coordinated action by French and U.S. law enforcement [agencies] in a major foreign bribery case*.'

'Our two countries are working more closely today than ever before to combat corporate corruption,' *'and Total, which bought business through bribes, now faces the criminal consequences across two continents*.'

In this case, some of the fraudulent funds that were traced, were also found to be in Switzerland.

(*Sources: http://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international (DOJ Press release); http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171575006#.VOMWoPmG8Z8 (SEC Press release) ; http://www.lesechos.fr/industrie-services/energie-environnement/0203964228492-contrats-gaziers-en-iran-total-en-correctionnelle-pour-corruption-1067919.php (article in "Les Echos"); http://www.lexology.com/library/detail.aspx?g=a03b3a11-210b-4895-9807-70e7f177c711 (France: the ne bis in idem principle and settlements with US authorities))*

- CASE n°3:

Safran (formerly Sagem) was sentenced September 5, 2012 by the Paris Criminal Court to 500 000 euros fine for bribery of Nigerian officials between 2000 and 2003 on the sidelines of a contract for the production of 70 million ID cards. This is the first conviction in France of a corporation on the grounds of corruption of foreign officials. However, the two main executives involved, Jean-Pierre Delarue, former Sagem sales engineer in Nigeria, and François Perrachon, then head of the department "identifications systems," were both discharged by the Paris Criminal Court.

Safran appealed this decision and was also discharged by the Court of Appeal on January 7, 2015 (according to the defense lawyers, the facts did not permit to establish corporate liability).

According to the indictment, millions of dollars had been paid to senior Nigerian officials, including late Minister Sunday Afolabi, through intermediary companies. The investigation indicated that payments in bribes reached up to 500 000 dollars (over 380 000 euros), plus

except that it consists of an agreement not to prosecute which is struck prior to any setting in motion of the prosecution procedure (*JCP EG n°38, 16 sep. 2013, 954*).

[18] For listed companies, the Securities and Exchange Commission (SEC) has similar civil enforcement powers, usually used in parallel to the criminal powers of the DOJ.

various gifts. The investigation was opened in France in January 2006, after accusations in Nigeria, Britain and the United States.

(*Source: http://www.lemonde.fr/economie/article/2012/09/05/corruption-safran-ecope-d-une-amende-au-nigeria_1755922_3234.html ; http://www.latribune.fr/entreprises-finance/industrie/aeronautique-defense/20150107trib82f9f0ab9/corruption-au-nigeria-safran-relaxe-en-appel.html*)