

10 Things U.S. Criminal Defense
Lawyers Should Know About
Defending a Case in France



10 Things U.S. Criminal Defense Lawyers Should Know About Defending a Case in France

© 2019 Debevoise & Plimpton LLP.

This book has been prepared by and is the copyright of the law firm Debevoise & Plimpton LLP. All rights are reserved. It may not be reproduced in whole or in part without their permission. This book provides summary information only and is not intended as legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed herein.

Contents

Introduction.....	1
In a Nutshell.....	4
1. The Background: the Courts, the Law, the Players.....	7
2. From the Reporting of Facts to the Decision to Prosecute	19
3. Judges May Lead Investigations	31
4. Defendant Custody Practice	47
5. Beware of the Victim.....	55
6. Long-Arm Considerations.....	65
7. Investigation Confidentiality and Attorney-Client Privilege	75
8. A No-Deal Environment (Almost).....	85
9. Trial Surprises	93
10. Sentencing.....	107
11. And Two More Things.....	115

Introduction

Fortunately, most U.S. companies that have operations in France manage to stay away from the French criminal justice system. For those that do not, the experience is almost always a memorable one because almost every aspect of a French criminal defense case differs from what is familiar to U.S. defense lawyers.

When we introduced our 2017 “*10 Things U.S. Litigators Should Know About Court Litigation in France*,” we noted that, in the corporate area, there has been a degree of convergence between U.S. and European rules and practices, notably so in mergers and acquisitions transactions. In contrast, U.S. and European court litigation rules and practices remain substantially different. This observation is even more accurate when comparing the respective criminal justice systems and how they impact the work of criminal defense lawyers.

In any country, putting together a defense strategy is always a complex exercise that involves many aspects, including: the process of fact-finding and development; the procedural rules; what is customarily done and not done in the relevant courts; how the prosecutor is likely to approach the case; and, of course, the substantive law and how it has been interpreted locally. Undoubtedly, being a seasoned criminal defense lawyer in the United States may help identify what may or may not work in a case in the courts of another country. However, relying on this experience alone to participate in the development of a defense strategy in a non-U.S. case would most certainly be a recipe for disappointment.

Against this background, Debevoise's White Collar & Regulatory Defense Practice Group thought that it would be helpful to summarize in one place the key features of the French criminal justice system, using as a guide the lessons we have identified over the years from working with a number of U.S. clients and colleagues on criminal cases in France.

Our objective is to take a look at the French criminal justice system from the perspective of those who are used to working in the U.S. system and leverage our experience to identify and explain features of the French system that others may find perplexing. We recommend that U.S. lawyers gain some understanding of these elements whenever their clients may become involved in criminal cases in French courts.

We aim to provide practical, real-world views, based on the authors' experiences, and focus mainly on rules and practices as they relate to business crimes. Consistent with this approach, this guide includes limitations and subjective observations, which will be clearly indicated.

After a brief overview of the French criminal justice system, we will discuss each step of a criminal investigation through trial and sentencing and conclude with some recent developments in French criminal procedure.

This guide would not exist but for the invaluable contributions of our New York colleagues Bruce E. Yannett, Deputy Presiding Partner of our firm and Chair of the White Collar & Regulatory Defense Practice Group (beyannett@debevoise.com), Andrew M. Levine (amlevine@debevoise.com) and Anna Domyancic (adomyancic@debevoise.com), all experts in U.S. criminal

procedures. We thank them wholeheartedly for their support and patience in helping us decipher the French criminal justice system for the benefit of U.S. readers.

ANTOINE F. KIRRY (akirry@debevoise.com)

FREDERICK T. DAVIS (ftdavis@debevoise.com)

ALEXANDRE BISCH (abisch@debevoise.com)

ROBIN LÖÖF (rloof@debevoise.com)

ALICE STOSSKOPF (astosskopf@debevoise.com)

FANNY GAUTHIER (fgauthier@debevoise.com)

LINE CHATAUD (lchataud@debevoise.com)

ARIANE FLEURIOT (afleuriot@debevoise.com)

In a Nutshell

The rules and practices of French criminal justice are very different from their U.S. counterparts. Differences exist in virtually every aspect of handling a criminal case. They concern both fundamental underlying principles about criminal justice and numerous practical aspects such as the manner in which defense counsel are expected to participate in an investigation and how a defendant is expected to behave in court.

The following points capture the most salient differences:

- In the most complex cases, investigations are led by judges who have vast authority to order investigative measures, including coercive ones and pretrial detainment of suspects;
- A victim can initiate a criminal investigation even when the relevant prosecutor has declined to do so;
- There is no plea bargaining in the U.S. sense; there are only limited possibilities of a negotiated outcome; there are only rare opportunities to interact with prosecutors about a case prior to trial;
- Most business crime cases are likely to end up in a public trial with no jury;
- The high point in defending a criminal case is the trial; before then, the role of the defense is traditionally limited; however, this is gradually changing;
- There is no set of sophisticated or detailed rules of evidence: basically, anything goes when it comes to proving facts;

- The record at trial is mostly organized in advance; last-minute surprises are rare;
- Professional privileges work very differently from in the U.S. criminal defense practice; internal communications of in-house lawyers are not protected;
- Trial judges play an active role at trial: they lead the questioning of all parties and witnesses; there is little direct or cross-examination of witnesses by counsel;
- There is almost unlimited right to appeal, and appeal is essentially a new trial; a prosecutor can appeal on acquittal.

1. The Background: the Courts, the Law, the Players

Any U.S. attorney reflecting on a criminal case in France may want to begin by understanding the type of court before which the case is likely to be heard. To a U.S. practitioner, the French court system may appear somewhat odd and complex, but it has its own logic.

JUDICIAL V. ADMINISTRATIVE COURTS

France has two separate court systems, the judicial and administrative court systems, with different types of judges in each system.

Administrative courts adjudicate almost all disputes involving State entities (the State and its agencies, and local public authorities). This may include, for instance, matters related to taxes, public procurement contracts and building permits. Judicial courts handle all other disputes (civil, commercial or IP-related matters, for instance), including criminal matters.

This two-court system has its roots in the French Revolution, when it was thought that judges should not interfere with governmental actions. This idea gradually led to the emergence of a separate court system to resolve disputes arising from governmental actions and actions taken by State entities more generally.

JUDICIAL COURT SYSTEM: THREE LEVELS OF CRIMINAL COURTS

The French judicial system has three levels of courts: courts of first instance; courts of appeal for the review of first instance decisions; and a supreme court called *Cour de Cassation* for the

1. The Background: the Courts, the Law, the Players

review of court of appeals' decisions. Each of these three levels has at least one type of court that specializes in criminal cases. At the level of the courts of first instance, there are three different types of criminal courts, to which cases are allocated depending on the seriousness of the offenses. At the appellate level, there are two types of criminal courts (again, case allocation is based on the seriousness of offenses). At the supreme court level, one single chamber of the *Cour de Cassation* deals with criminal cases coming from all courts of appeal in France.

At the first instance level, the three types of criminal courts are as follows:

- The *Tribunal de Police* (akin to city or municipal courts in the United States) is a special criminal chamber of the court of general jurisdiction (*Tribunal de Grande Instance* or TGI). Each *département* of metropolitan France (a *département* is an administrative and political subdivision of the State, on average about the size of a large U.S. county) has at least one TGI, sometimes two or three, for a total of 164 TGIs in metropolitan France. The *Tribunal de Police* only deals with minor offenses called *contraventions*, which are heard by a single professional judge. Offenses are considered minor when they are punished only with financial penalties. These may include, for example, DUI/DWI, driving while uninsured, driving with suspended license, other traffic violations, minor assault, disturbing the peace, excessive noise at night, hunting without license, etc.
- The *Tribunal Correctionnel* is also a special criminal chamber of each TGI. This court deals with offenses of intermediate seriousness, which represent the vast majority of criminal

cases. These intermediate offenses are called *délits*. They are punishable by a sentence of imprisonment of up to 10 years and by financial penalties. For instance, acts of corruption, theft, fraud and misappropriation fall into this category. There are 164 of these criminal courts in Metropolitan France.

Tribunal Correctionnel cases are heard by either one or three professional judges, depending on the nature of the offense and certain other factors (such as whether the proceedings are on a fast track or whether the defendant is in pre-trial custody, for example). Most white collar and business crime cases go before a *Tribunal Correctionnel*.

- Finally, there is one *Cour d'Assises* in each French *département*. This court deals with the most serious offenses, called *crimes*, which are defined as those punishable by more than 10 years of imprisonment (such as murder and rape, for example – overall, these represent less than 1% of criminal cases). (This terminology necessitates a word of caution for U.S. lawyers: the term *crime* as used in French legal vocabulary only designates these most serious offenses as defined above. *Crime* in this context should not be mistaken for the term “crime” as used in English, which has a broader and more generic meaning and would be better translated in French as *infraction*.) Before *Cours d'Assises*, cases are heard by three professional judges and six lay jurors, who deliberate together. When sitting for certain crimes such as acts of terrorism, the *Cour d'Assises* is comprised of professional judges alone. One should note that the *Cours d'Assises* are the only courts in France for which there is a jury. A defendant in another criminal court has no option to be tried by a jury, and a defendant in a *Cour d'Assises* has no option to be tried without

1. *The Background: the Courts, the Law, the Players*

a jury. The *Cours d'Assises* follow specific procedural rules, which makes it inadvisable for most French criminal lawyers to take on cases before these courts without seeking assistance from colleagues with solid *Cour d'Assises* experience.

On appeal (*i.e.*, the second layer of the judicial court system), almost all cases initially handled by the *Tribunal de Police* and the *Tribunal Correctionnel* go before the same court, the criminal chamber of the local court of appeal. One important note is that appeal is as of right (a party needs not request permission or leave from the court of appeals to consider the appeal) and involves a *de novo* review of the entire case, including factual issues. Put another way, an appeal is essentially a new trial, which results in its own judgment of conviction or acquittal, as the case may be. A prosecutor may appeal an acquittal; a defendant acquitted at a first trial may be convicted on appeal.

Crime cases that have been heard by a *Cour d'Assises* go on appeal before a different *Cour d'Assises* (usually that of another *département*). The principal difference is that, for appeal purposes, the court includes nine lay jurors instead of six, who sit and deliberate along with three professional judges.

Beyond the appellate stage, any party to the appellate proceedings who is dissatisfied with the appeal decision (including the prosecution and the defendant, as the case may be) has the right to bring the case to a third and final level of court. At this level, there is one single court for all of France, called the *Cour de Cassation*. This court is the functional equivalent of the U.S. Supreme Court, with two notable differences. *First*, this court only reviews decisions coming from judicial courts (not the administrative ones, which are reviewed by the *Conseil d'Etat*).

Second, this court cannot rule on issues related to the constitutionality of statutes, which are reserved for a special constitutional court called the *Conseil Constitutionnel*. The *Cour de Cassation* has a special chamber for criminal matters called the *Chambre Criminelle*.

In contrast to the U.S. Supreme Court, there is no requirement to secure permission from the *Cour de Cassation* to bring a case before it. Nor is there any requirement regarding the seriousness of the offense: even cases for minor offenses can be brought to this third level of court. But this relatively easy access to the *Cour de Cassation* comes with a notable limitation to what this court will do. In short, the *Cour de Cassation* must take the lower courts' determinations of facts as they are. The *Cour de Cassation* only reviews whether the appellate court has correctly applied the law. The *Cour de Cassation* can either uphold the appellate decision, or reverse the decision if it concludes that the appellate court has misapplied the law. If the court so concludes, it usually remands the case to a different appellate court. In summary, the primary role of the criminal chamber of the *Cour de Cassation* is to ensure that the various appellate courts are consistent in interpreting and enforcing criminal laws and procedures throughout the French territory.

This guide focuses on “*délits*” only, since this is the type of offense that is most frequently met in the business environment. Consequently, the comments below about procedural aspects will be confined to the *Tribunal Correctionnel*. This guide will not discuss certain regulatory procedures that may be applied for violations of the law in certain specific areas. These include (i) violations of preventive anti-corruption and compliance rules,

which can be prosecuted by the French anti-corruption authority (*Agence Française Anti-corruption*), (ii) market abuses, which can be prosecuted by the stock market regulator (*Autorité des Marchés Financiers* or AMF) and (iii) violations of competition rules, which can be prosecuted by the competition authority (*Autorité de la Concurrence*). How these non-court procedures interact with criminal prosecution to avoid double jeopardy has been the subject of recent major changes in French law, in which our firm played a leading role. However, this subject is beyond the scope of this guide and will not be discussed further below.

ONE SINGLE BODY OF CRIMINAL LAW

Because France is not a federal republic, the notion of state or local law is alien to the French legal system, subject to limited exceptions not relevant here. For the purpose of this guide, there is one single set of criminal law rules, which apply nationwide.

One of the basic principles of French criminal law is that there cannot be a crime unless there is a statutory or regulatory instrument that provides for it. This is expressed by the widely known Latin idiom *nullum crimen nulla poena sine lege*. A related general principle is that statutory and regulatory provisions that define crimes must be sufficiently specific, and they must be construed narrowly. Courts take these principles very seriously: they routinely dismiss cases brought on the basis of overly extensive interpretations of statutory or regulatory criminal provisions.

Most crimes and their applicable penalties are defined in the Criminal Code, of which an official (but not always accurate) English version is available online. However, a host of crimes are defined elsewhere: for instance, tax fraud is defined in the Tax

Code, and most corporate crimes are defined in the Commercial Code sections on corporations. Almost all rules of criminal procedure are found in the Code of Criminal Procedure. This code includes all the rules that govern how investigations should be conducted, the organization of criminal courts, how criminal trials should be run and the rights and obligations of all of the players in a criminal process (the police, prosecutor, defendant, victim, fact witnesses, experts and courts). These procedural rules apply throughout France.

In addition to the codified rules, the Ministry of Justice (the functional equivalent of the U.S. Department of Justice) sometimes issues implementation guidelines. These are mostly intended to give prosecutors the ministry's perspective on subjects ranging from clarifications on certain procedural rules to policy matters. For example, these guidelines may reflect the government's desire to focus prosecutorial activities on certain types of crimes. These guidelines are not binding. As a result, defendants cannot rely on them even if prosecutors fail to follow them. They may help defense attorneys understand how a prosecutor is likely to approach a specific case; however, they should only be taken as one indication among many others.

THE JUDICIARY

Criminal judges are all professional, government-appointed judges. Unlike in most common-law countries, these judges are not called to the bench following a distinguished career at the bar. Only a small portion of judges have had a previous career in private practice, government service or elsewhere outside of the judiciary. To become judges or prosecutors, law school graduates must first take a competitive exam and be admitted to a special,

government-run training school for the judiciary (*École Nationale de la Magistrature* or ENM). If all goes well, at about age 27, the majority of them become judges or prosecutors, usually starting at courts of first instance before moving up to more senior positions.

Our U.S. colleagues (and, frankly, most French attorneys) often find it perplexing that the same school trains both judges and prosecutors; that both of them are equally regarded as members of the judiciary; and that one can switch from the bench to prosecution and vice versa all along one's career. This commonality of legal regime is illustrated in the legal vocabulary since there is one single word (*magistrats* in French) to designate either one or both of two categories of professionals: prosecutors (otherwise collectively called *le Parquet* or *le ministère public*) and judges (otherwise called *juges du siège* or *juges*).

The central point is that prosecutors and judges are all members of the same profession, and this profession is distinct from that of a lawyer or attorney (*avocat*). Judges are not elected in any way. All of them are appointed to office by a government decision, which must be taken after a special body called High Council of the Judiciary (*Conseil supérieur de la magistrature* or CSM) has expressed its views; however, these views are only binding on the government for a limited number of senior judges. For more junior judges and all prosecutors, the government may freely disregard the CSM's views. This leaves the appointment and career paths of prosecutors in the hands of the executive branch, a feature that has been the source of some embarrassment when the European Court of Human Rights held that French prosecutors could not be regarded as judicial

authorities because they lack independence (ECHR *Medvedev* and *Moulin* decisions).

Beyond the legal questions relating to the judiciary's independence from the executive branch, a more vexing issue for the day-to-day practice of most criminal defense lawyers is that of the familiarity between prosecution and bench. In reality, the commonality of training, the school memories, the intertwining of career paths, the shared sentiment of belonging to a single and distinctive profession – all this combines to blur the distinction between prosecution and bench and makes the prosecutor in a courtroom a party that somehow has more weight than the defense. More on this below; see Chapter 9, *Trial Surprises*.

Two notes on the relationship between the judiciary and the bar. First, unlike in the United States, transfers from the bar to the judiciary are rare, and most former attorneys we know who have moved to the judiciary will express in some manner the feeling that their past as private practitioners does not help them much in their new careers, if it does not hinder them; and transfers the other way around are even rarer. Second, on average, one should not overestimate the degree of trust and consideration that judges and attorneys have towards one another. There are of course notable exceptions, mostly at senior levels on both sides; however, by and large, and much to our regret, it is fair to say that there is not much love lost between the judiciary and the bar. This factor contributes to the absence of a sense of a legal profession as a whole, as it exists in the United States.

THE POLICE

What a U.S. defense lawyer would typically label the “police” in the context of criminal investigations corresponds in France to

1. *The Background: the Courts, the Law, the Players*

two very different institutions (disregarding for our purpose specialized units, such as the French Customs and others, which also have authority to investigate certain crimes).

First, somewhat counterintuitively, the “real” police (*Police Nationale*) are not the primary players in support of criminal investigations. The French police include many units, the principal of which is the one dedicated to public security: this is the department that runs the local “911” telephone number (which in France is “17,” also known as *Police Secours* or “112,” which is a general emergency number). This police department provides most of the visible presence of the police on the streets in the large cities of France. There is also a police unit known as the Air and Border Police, another one called CRS that is essentially a nationwide Disorder Control Unit and another one called the “judicial police” (*police judiciaire*), whose role is primarily to support investigations ordered by prosecutors or investigating judges. This police unit, however, only focuses on the largest cities in France.

Second, about 95% of the French territory, and about one half of the population of France, are under the jurisdiction of another law enforcement unit called the *Gendarmerie*. This unit is a military unit under the supervision of the Ministry of Interior (which also runs the police). The *Gendarmerie* has about 10 times more officers than the judicial police and in effect is the primary player in criminal investigations in geographic areas other than the major cities.

Not surprisingly, there is often a dose of rivalry between the two organizations, which in certain cases has been known to make the necessary cooperation between them somewhat inconsistent.

Both the judicial police and the *Gendarmerie* have dual-reporting lines: one to the Ministry of Interior (the functional equivalent of the U.S. Department of Homeland Security) and one to the local prosecutors or the investigating judges, depending on the type of investigation. In brief, for most investigation activities, both of them take their instructions from prosecutors or investigating judges while management (including budget, human resources and procurement) of both the judicial police and the *Gendarmerie* is under the supervision of the Ministry of Interior.

In the discussion below, we use the word police to designate collectively the judicial police and the *Gendarmerie*.

2. From the Reporting of Facts to the Decision to Prosecute

This is a summary of how the process works from the initial discovery or reporting of facts that could constitute a crime to the moment when a prosecutor will decide whether prosecution should be initiated in respect of one or more individuals or entities or an as-yet-unknown defendant. In procedural terms, a decision to prosecute has much greater and more formal significance in France than in the United States: it is known in France as commencing an *action publique*, which in essence means exercising the State's right to bring an action to enforce criminal laws. Commencing an *action publique* in a criminal matter has significant legal consequences, not the least of which is that the prosecutor cannot drop the case without some form of judicial action, as will be further discussed below.

The starting point is not substantially different from what it is in the United States: facts occur; someone believes that these facts may constitute a criminal offense and brings them to the attention of public authorities. As in the United States, these authorities are either the police or the local prosecutor (*Procureur de la République*) directly. It is worth noting here that certain individuals have a statutory obligation to report to these authorities a suspected crime of which they may become aware in connection with their professional activities: these include all government officers and external corporate auditors, but lawyers in private practice are never under such an obligation.

THE LEADING ROLE OF THE LOCAL PROSECUTOR

There is at least one prosecutor assigned to each TGI, often several of them for the TGIs of large cities. Their responsibilities extend to the geographic area in which their TGI has jurisdiction: ordinarily, a prosecutor has authority to prosecute the crimes committed in this geographic area or in which a suspect lives. This allocation of authority based on the location of certain facts does not always apply: for instance, for insider trading, a special prosecutorial unit based in Paris (the *Parquet National Financier* or PNF, *i.e.*, the National Financial Prosecutorial Office) has authority over all of France.

When facts are reported to the police, they may decide to investigate without a request from the prosecutor and even without reporting to the prosecutor's office; but this happens very rarely. In practice, the police tend to take instructions from prosecutors for pretty much any reported facts that may constitute a crime of some significance. Young prosecutors often make no secret that being the one on duty to handle calls from police units asking for instructions is hardly their favorite task because this usually means long shifts with phones that keep ringing for reasons that are sometimes less than compelling.

On the relatively rare occasions where the police investigate on their own initiative without initially reporting the facts to the prosecutor, they must report to the prosecutor on the status of the investigation no later than six months into the investigation. Where facts are first reported to the prosecutor, the prosecutor may decide whether these facts are worth investigating and direct the police accordingly. If the prosecutor decides to investigate, the responsibility for taking investigative actions lies

with the police; however, the prosecutor has the leading role for all significant decisions in relation to the investigation, based on periodic reports from the police. Thus, for the vast majority of cases, the strategic thinking in the conduct of the investigation lies with the prosecutor.

THE ORDINARY ROUTE: THE SO-CALLED “PRELIMINARY INVESTIGATION”

In ordinary circumstances, where there is no reason for particularly swift action (see *The Fast-Track Investigation* below), an investigation is conducted under a regime called “preliminary investigation.” The key feature of this regime and the fast-track one, in contrast to the judicial investigation discussed in Chapter 3, is that suspects have very little right to participate and defend themselves at this stage. Very often they are not even aware that they are the subjects of investigations. Here are the principal aspects of what the police can do in a preliminary investigation.

Stop and search

In a nutshell: the police may stop and search anyone who they believe behaves in a manner that can justify suspicion; however, the police tend to construe this requirement with some degree of flexibility, as a result of which, stop and search and ID control tend to be conducted on a rather discretionary basis. This is usually irrelevant in the context of business crimes.

Custody

Taking suspects into custody is increasingly common in the context of business crimes. This may be somewhat traumatic for business persons, most of whom have limited experience dealing with visits to police stations. Since the custody regimes and how

to manage them have become an important component of the business crime practice, we will discuss this in more detail in a separate chapter (see Chapter 4, *Defendant Custody Practice*).

Search and seizure

In a preliminary investigation, the police cannot enter and search premises without first securing the written consent of the individual who lives on those premises. It is only for crimes that may involve a jail sentence of over three years, and upon showing of a need, that a prosecutor may be authorized to search without the individual's consent. Only a special judge can give this authorization, which resembles a U.S. search warrant. Seizures follow a similar regime. Search and seizure on the premises of law firms follow specific rules, generally intended to protect the confidentiality of attorney-client communications.

Wiretapping, eavesdropping

The short of it is: not in a preliminary investigation. The rules do not even permit the prosecutor or the police to apply to a judge for permission to wiretap in a preliminary investigation. There are limited exceptions: where there is conspiracy to commit certain serious crimes (not ordinarily seen in a business context) or where the purpose of the proposed wiretap is to catch an individual on the run, a special judge may authorize a wiretap upon application by the prosecutor.

Witnesses

Do not look for subpoenas in the French criminal practice: this type of instrument just does not exist. There is no need for it because, by statute, third parties have a duty to appear before the police whenever they are called to do so, and they are required to testify. During a preliminary investigation, a witness whom the

police calls to testify (i) may be taken to the police headquarters (usually, but not always, where the witness has first declined to appear in response to an initial call); (ii) may be forced to stay on police premises to testify (but not for more than four hours); and (iii) may not be assisted by an attorney during the interrogation. Finally, there is no verbatim transcript of the interrogation; rather, the police officer conducting the interrogation usually rephrases the witness's statements in a police-typed record, known as a *procès-verbal*, which the witness will be asked to sign before leaving the police station, and of which the witness will not be allowed to retain a copy.

There is simply no way defense attorneys can compel witnesses to provide evidence at this stage of the investigation. *First*, as noted above, in most instances of preliminary investigations, suspects only become aware that they are being investigated when the investigations are drawing to a close or when investigative measures (e.g., custody) are performed against them. *Second*, even if informed of the reasons for which they are being investigated, there is no procedural tool to give them the right to take testimonies of third parties or otherwise compel third parties to help dig into the facts of the case. Such an aspect of building a defense only becomes somewhat possible if and when there is a judicial investigation (see Chapter 3, *Judges May Lead Investigations*); and at trial (see Chapter 9, *Trial Surprises*).

One final note about timing: there is no rule that would require a prosecutor to conduct a preliminary investigation within any prescribed time period. An investigation may be completed in a couple of days or years depending on the circumstances. Neither the suspect nor anyone else has the right to cause the

investigation to terminate where the prosecutor believes that it should continue. Once an investigation is in motion, each investigative action tolls the applicable statute of limitation. As a result, it is quite rare that a defendant can successfully argue that the statute has expired during an investigation.

“LE DOSSIER:” A KEY FEATURE OF THE PROCESS

For the police, a preliminary investigation must follow rather tight rules, failing which, defense counsel may ultimately ask the court to strike portions of the record or invalidate the investigation altogether. A key requirement is that the police must record each investigative action (such as witness interviews, search of premises and review of documents) in a specific report called *procès-verbal*. In terms of probative value, while in theory most police reports should only be treated as “simple information,” in practice (and in the absence of a general principle excluding hearsay), it is advisable to assume that in the eyes of most judges, they carry significant probative value and are likely to be treated as conclusive evidence unless the defendant can bring reliable counterevidence.

As the investigation moves forward, these reports, together with all information on the case gathered by the investigators, are compiled in a physical or electronic file. Ultimately, this file will constitute the record of the case, otherwise known as *le dossier*. It is on the basis of information in this record that the prosecutor eventually decides whether the facts under investigation warrant prosecution.

If the prosecutor eventually decides to refer the matter to trial, all of this record will be made available to defense counsel and to the court. The prosecutor cannot withhold incriminating

information and pull it out at trial in an effort to surprise the defense. Nor can the prosecutor add new incriminating evidence after defense counsel has been given access to the record without defense counsel being given access to this new evidence and time to consider and discuss it.

Once before the court, this record constitutes the universe of information on the basis of which the court will evaluate the prosecutor's case (subject to any additional information provided by the defense at trial). More on this in the trial section of this guide (see Chapter 9, *Trial Surprises*).

THE FAST-TRACK INVESTIGATION: THE EXIGENT CIRCUMSTANCES THEORY (OR FLAGRANCY)

Similar to the U.S. exigent circumstances practice, French criminal procedure includes a set of more permissive investigation rules for circumstances called flagrancy situations. In brief, flagrancy exists where there is a situation requiring swift action because a serious crime has just been, is being or is about to be committed. This includes where the police are in hot pursuit of a suspect who is possibly involved in criminal activities and is fleeing. In these circumstances, the police may take investigative actions without most of the protections awarded to suspects under the standard preliminary investigation regime. Prosecutors frequently use flagrancy in the context of business crimes, for example to investigate facts following anonymous reports by whistleblowers.

What should make the prospect of a flagrancy investigation a source of concern to defense attorneys is that this investigation may continue for up to eight days (renewable once for the more

serious crimes), and it carries with it substantially enhanced investigative authority for the police.

In a flagrancy investigation, police officers may take DNA samples, seize documents or computer records, search the premises where suspects live, put a suspect in custody for 24 hours and compel witnesses to testify (but in most cases they cannot set up wire taps), all on their own initiative and without any action by a judge.

There are only limited protections against potential police abuses in a flagrancy investigation: the police must notify the prosecutor as soon as the investigation begins, and the investigation is conducted under the prosecutor's control. However, one should not overestimate the effectiveness of these protections, essentially because a prosecutor is usually unlikely to take a suspect's interest to heart at the expense of the progress of an investigation.

The flip side of this broader authority is that if, ultimately, a court decides that the use of the flagrancy regime was not justified under the circumstances, the investigative actions taken by the police under this regime will be declared null and void and cannot be used in further prosecution.

THE PROSECUTOR'S DECISION WHETHER TO PROSECUTE

When the record of a police investigation arrives on the prosecutor's desk, the prosecutor usually is already familiar with the key findings of the investigation. In virtually all cases, the prosecutor has received periodic status reports from the police during the course of the investigation. It may happen, however, that the prosecutor may request further investigation on one or

more aspects of the case, at which point the investigation regime continues for the remaining investigative actions under the same procedures. Absent such a request, the delivery of the record to the prosecutor opens the phase in which the prosecutor will consider what the next step of the case should be.

Although the internal operation of each prosecutor's office may vary, for any given case of significance, the decision to be taken by the prosecutor is a collective one. Usually, a junior prosecutor (called *substitut*) does the groundwork and submits a recommendation to a more senior prosecutor, sometimes up to the chief prosecutor of the court. But in contrast to the United States, there is no grand jury or anything similar that could arguably limit in any way the authority of prosecutors to charge someone: this is essentially left to their judgment.

Here comes into play an aspect of the organization of the French prosecutorial function that most U.S. lawyers find odd, if not distasteful. In sum, a French prosecutor is under the hierarchical supervision of the government, specifically the minister of justice, who essentially has the power to hire, fire, transfer and discipline prosecutors without much accountability to anyone. This situation has generated much soul searching in French judicial circles for years, fueled by suspicion of governmental intervention in certain high-profile cases (not only political ones) and a number of decisions of international courts finding that French prosecutors are not sufficiently independent.

In an effort to alleviate these concerns, a 2013 law provides that the minister of justice cannot give prosecutors any instructions relating to specific cases. Officially, the reason for keeping a hierarchical link between the government and prosecutors is that

2. From the Reporting of Facts to the Decision to Prosecute

the ministry of justice should retain the right to give policy directions to the prosecutors. Many observers, however, question whether the government retaining authority to hire and fire prosecutors is absolutely necessary for it to give them policy directions. In reality, most observers and definitely most French defense attorneys do not have intense faith in the absence of informal instructions given to prosecutors for certain cases to encourage or discourage prosecution or otherwise influence the proceedings. As a result, for any case of significance where defense attorneys believe that there are policy or other important subjects to be discussed with the prosecution, it is sometimes worth pausing and thinking hard whether the local prosecutor is the right discussion partner.

With or without input from more senior prosecutors or from other sources, the prosecutor in charge of the matter will ultimately come to one of the following decisions:

First, the prosecutor may decide that the investigation has not brought to light enough evidence to establish the commission of a crime. In this case, if the investigation was prompted by a complaint from a private party (including a putative victim) or certain public authorities, the prosecutor must inform this private party or these authorities and explain the basis for this decision. As will be further discussed below, in such a situation, the putative victim may force prosecution by filing a special complaint (*plainte avec constitution de partie civile*) before an investigating judge, thus triggering a formal criminal investigation (*action publique*).

Second, the prosecutor may decide that, while believing that a crime has been committed, this crime is not serious enough to

warrant prosecution. In this situation, the prosecutor may opt for one of several alternative actions. The purpose of these actions is to settle the dispute caused by an offender's conduct, and compensate the victim where there is one. These alternative actions range from simply summoning and lecturing the offender on citizens' obligations under the law (which is almost invariably accompanied by a promise of more stringent action if the offender were ever to appear again for the same misbehavior); a request to fix an unlawful situation; a request to provide compensation to the victim of the crime; or a mediation.

Third, the prosecutor may decide that the facts at issue are sufficient to refer the case directly to trial. This is usually the preferred route for most prosecutors for relatively simple cases. They use it also increasingly for more complex ones, including the most serious and complex white collar and business offenses. Where the prosecutor takes this route, the prosecutor's office simply forwards the record of the case to the clerk of the court for docketing and delivers a summons to the suspect and any witnesses that the prosecutor intends to produce in court. From that moment, defense lawyers have access to the record of the case, as submitted to the court.

Fourth, the prosecutor may request the appointment of an investigating judge to take over the investigation and ultimately decide whether there is sufficient cause to refer someone to trial. This request usually comes where the prosecutor concludes that, based on the findings of the initial investigation, the facts of the case are complex and justify further investigation or require investigative measures not available to the prosecutor in a preliminary or flagrancy investigation. Requesting the

2. *From the Reporting of Facts to the Decision to Prosecute*

appointment of an investigating judge is essentially giving a judge full authority over the investigation: this situation will be discussed in the following chapter (see Chapter 3, *Judges May Lead Investigations*).

One could have expected this list to include a fifth possibility that would cover settlement-like outcomes, in which the prosecutor and the suspect would bargain out of the situation. This has long been regarded as profoundly alien to the French criminal justice system, something reserved for legal systems such as the U.S. one, as often reflected in imported TV series. Things are changing, though, and lawmakers are gradually opening the door to negotiated resolutions in criminal cases. The existing options for negotiated resolutions will be discussed in Chapter 8 below, *A No-Deal Environment (Almost)*.

3. Judges May Lead Investigations

While U.S. prosecutors may investigate the facts of a case themselves with the help of the police, their French counterparts have the option of effectively delegating this work to independent judges. These judges' role essentially consists of gathering facts relating to cases referred to them. In a judge-led investigation, the judge is the one who develops the record of the case, which ultimately will comprise all the information on the basis of which this judge will decide whether the case warrants referring the defendant for trial. This judge is known as an investigating judge (*juge d'instruction*), a judicial position that exists in a number of European countries, including Belgium, Luxembourg and Spain.

For crimes in the *délits* category, prosecutors are at liberty to develop the facts themselves, with the help of the police, and decide whether they have sufficient evidence to send suspects to trial or to request the appointment of an investigating judge. There is no such option for *crimes*, where having an investigating judge is mandatory.

In practice, prosecutors only request the appointment of investigating judges where they believe that they cannot run the investigation themselves. This happens usually where cases appear so complex that developing the facts on their own would be expected to take too much time and absorb significant resources or involve actions that prosecutors cannot take without judicial authorization, such as placing suspects in pretrial temporary detention (see Chapter 4, *Defendant Custody Practice*). As a result, the vast majority of cases in the French

3. Judges May Lead Investigations

criminal courts are brought by prosecutors directly, without the intervention of investigating judges.

The reasons why French lawmakers thought it necessary to have an investigating judge in the criminal process are akin to those that initially justified the existence of a grand jury in American judicial history. Charging and sending someone to trial was thought to be serious enough that the process should not be left to a prosecutor's discretion. As a protection of civil liberties, it was decided that a judge should take a first look at the facts of the case and decide independently whether there would be enough to support the prosecution. Historically, investigating judges looked systematically into cases relating to intermediate and serious offenses. Over time, going through an investigating judge was only thought indispensable for *crimes*, and it became optional for *délits*.

When looking at what investigating judges are and do, the key elements to consider are: (1) their roles as judges; (2) with broad investigation powers; (3) who are expected to take a balanced and neutral view of the cases they investigate; and (4) all with the limited participation of defendants.

A JUDGE

In any court of general jurisdiction in France (a TGI, see Chapter 1, *The Background: the Courts, the Law, the Players*), there are one or more judges that hold the position of investigating judges. Although this position is often held by junior judges right out of judiciary school, this is not a rule: sometimes, investigating judges are very experienced judges who have made career choices to remain in this position. There is a limitation, however: judges generally cannot hold the same position in the

same court for more than 10 years. Therefore, after 10 years, they are reassigned to another position, either as an investigating judge with another court or in another judicial position. In short, one cannot be an investigating judge in the same court throughout one's career.

An investigating judge is, legally speaking, a one-person court. Most of this judge's decisions are judicial decisions, and most of them can be appealed: each court of appeals in France has a special chamber (called *Chambre de l'Instruction*) to hear appeals from some decisions made by local investigating judges.

But not all investigating judges' decisions are subject to appeal. One example of a decision that is almost never subject to appeal is the judge's final order to refer a defendant to trial.

BROAD INVESTIGATING POWERS

Investigating judges cannot start investigating facts on their own initiative: they can only investigate cases that are brought to them by either the prosecutor or an alleged victim of a crime who brings a special type of claim to request that the alleged crime be investigated by an investigating judge (*plainte avec constitution de partie civile*, see Chapter 5, *Beware of the Victim*).

The starting point of the investigating judge's work is therefore a request by either the prosecutor or the alleged victim. This request describes the facts at issue and asks that the investigating judge investigate whether these facts involve the commission of one or more criminal offenses, and, if so, who should be sent to trial. In order to arrive at a conclusion, the investigating judge must dig into the facts and consider their legal implications.

3. Judges May Lead Investigations

For each case, there is one or two, and rarely three, investigating judges appointed to run the investigation. Investigating judges are sometimes grouped in pools (such as the *pôle financier*, which groups the Paris investigating judges who deal with financial crimes); however, they have no teams of investigators working directly for them.

Accordingly, a large part of an investigating judge's work consists of issuing orders to others. Most commonly, these orders are for the police, whom the investigating judges routinely order to conduct searches and seizures, take testimony of individuals, obtain bank or telephone records, set up wiretaps, conduct surveillance of suspects and the like. Orders may also be given to technical experts to issue opinions or perform other tasks on subjects of interest to the judge such as forensic accounting work, voice or handwriting identification or retrieval of computer data.

Investigating judges can also take direct actions with respect to persons or entities. The most common of these actions is taking testimonies of suspects and witnesses: the judges can conduct as many interrogations as they see fit, and failure to appear for questioning is itself a criminal offense. An important point to note here is that interrogation of suspects can only be taken with defense counsel present. A witness other than a suspect, however, has no right to be assisted by a lawyer during questioning by either an investigating judge or the police.

Other measures that investigating judges routinely take include ordering the payment of bonds, taking measures that limit the freedom of defendants (such as temporary prohibition to interact with certain persons or to appear in certain places) and ordering asset freezes (bank accounts are often frozen in business crime

cases). But investigating judges no longer have the authority to put suspects in pretrial temporary detainment. In an effort to curb the tendency of certain investigating judges to use detainment as a way to pressure suspects into confessing, lawmakers have given the authority to put defendants in such detainment to other judges unassociated with ongoing investigations. See Chapter 4, *Defendant Custody Practice*.

The principal limit to an investigative judge's scope of work is the set of facts that this judge has been asked to investigate. If investigating these facts reveals other facts that could potentially constitute a different crime, the judge cannot investigate them incidentally to the initial investigation. The judge must first inform the prosecutor and request that the prosecutor deliver a supplemental investigation request covering the facts not initially in the judge's scope of work. Failure to do so would expose the portion of the investigation outside of the original scope to be declared invalid upon appeal by any party to the *Chambre de l'Instruction*.

Note that the judge's investigation is supposed to be confidential to all parties other than the prosecutor, the victim and the defendants. For this aspect of the investigation, see Chapter 7, *Investigation Confidentiality and Attorney-Client Privilege*.

A BALANCED VIEW OF THE CASE?

The ultimate role of the investigating judge is limited to opining on whether there are sufficient factual and legal reasons to refer someone to trial (and if so, who and on what charges) in light of the investigation of the facts that were initially brought before this judge. This judge is not expected to opine on the defendant's guilt nor on any recommended penalty.

3. Judges May Lead Investigations

In investigating the facts that lead to this ultimate decision, the investigating judge is expected to look for both incriminating and exculpatory evidence, weigh both the prosecutor's and the suspect's arguments and come to a fair conclusion on the question of whether there is enough reason to send the suspect to trial. The Code of Criminal Procedure provides that the investigating judge is to use all means available "to establish the truth," that is, to develop a neutral evaluation of what happened. Reality often falls somewhat short of these expectations. In our experience, two points are worth bearing in mind here.

First, most investigating judges tend to have a degree of *prima facie* deference to the prosecutor's views on the case. That is, they often work with the initial assumption that their prosecutor colleague's views are reliable. The term "prosecutor colleague" resonates with the fact that investigating judges and prosecutors are all members of the judiciary, having attended the same professional training school, and they often switch from bench to prosecution and vice versa during their careers (see Chapter 1, *The Background: the Courts, the Law, the Players*). This is by no means a suggestion that investigating judges tend to take biased views of cases; this is simply an observation that there is a natural and somewhat understandable commonality of mindset between prosecutors and investigating judges, which defense lawyers ought to factor in when considering how they intend to approach their cases.

Second, conducting a truly neutral investigation, taking both the prosecutor's and the defendant's perspective on the facts, is a very challenging task. Practical experience suggests that, in most cases, there is a point in time when investigating judges form an

opinion on whether a given suspect should be sent to trial. From that point on, whether consciously or not, they tend to look for information that supports their views and ignore or downplay the rest. This may be the understandable thought process of a normal human being. However, where these views are formed early in the investigation, based on relatively limited information and merely on initial impressions, this may defeat the entire purpose of having an investigating judge. Because of the risk that investigating judges might be unconsciously biased towards prosecution positions and then stick to them no matter what defense counsel may say, many defense lawyers are wary of submitting their key arguments too early during the investigating judge process. Most of them have a natural tendency to keep their powder dry for the court hearings, which may or may not be an advisable strategy.

As a result, when considering the strategic aspects of a case that is being investigated by an investigating judge, it may be helpful to be familiar with the judge's mindset and try to understand the judge's early views on the case. Undoubtedly, prior experience with the judge who is investigating a case is of great value to this process, hence our recommendation to enlist local counsel for cases outside of one's area. How defense attorneys usually get access to investigating judges to sound them out regarding ongoing cases is another question: some judges are fairly open to conversations with defense counsel, while others make no secret that they do not like to talk to them. In the latter case, the opportunities for a defense attorney to meet with the judge and get a sense of the judge's thinking on the case are limited to instances when the judge takes the testimony of the suspect, because the suspect's counsel must be present. Since there may

3. Judges May Lead Investigations

only be a handful of these instances throughout an investigation, it is critical for defense counsel not only to prepare their clients for their interviews but also to prepare the key points they want to discuss with the judges in side conversations that may occur around clients' testimonies, to evaluate how balanced the judges' views actually are, all without erring too far on the side of having a substantive conversation without the other parties present.

LIMITED DEFENDANT PARTICIPATION

For each person who has some association with the facts under investigation, the investigating judge has the authority to assign a status that will determine which rights the person has relative to the investigation. Three types of status are worth being familiar with.

Named as target (mis en examen)

If the investigating judge believes that the present record includes serious or consistent indications that an individual or a legal entity has participated in the facts for which the investigation is being conducted, and these facts may constitute a crime, the judge must put this person in the *mis en examen* status. Roughly speaking, in terms of procedural progression, this corresponds to being named as a target of investigation in U.S. proceedings.

This *mis en examen* status was initially meant to be a protection for the suspect, since this status provides certain rights. Most importantly, this status gives a suspect the immediate right to access the record being assembled by the investigating judge and thus to find out the factual basis on which the judge is considering bringing charges. Nowadays, this positive aspect of the *mis en examen* status is mostly lost, for, in most cases, the

media covering criminal cases tend to treat a judge's decision to put a suspect *en examen* as an indication that there is sufficient cause for this suspect's guilt. This notwithstanding, defense counsel in publicized cases routinely appear on news programs to explain that their clients are happy and relieved to be *mis en examen* because this will give them opportunities to demonstrate that all charges are groundless.

A note on timing: before such a suspect is put in the *mis en examen* status, it is generally imperative not to attempt to reach out to investigating judges or the police conducting an investigation, even if the client becomes aware that an investigation is underway (which may be the case if employees or others have been interviewed). Such an attempted intervention would invariably be viewed negatively by the authorities. Even attempts to identify and reach out to potential witnesses risk being considered as an improper attempt to influence their testimony.

A witness but... (témoin assisté)

Short of being *mis en examen*, an individual or a legal entity may be put in the *témoin assisté* (assisted witness) status, which is a sort of intermediary status between a simple witness against whom no charge exists and a *mis en examen*. In this perspective, *témoin assisté* is somewhat similar to being named a "subject" of a U.S. investigation.

This status was initially intended to protect witnesses against whom charges may be brought during the course of an investigation. In fairness to these witnesses, the investigating judge must give them the *témoin assisté* status so that they may be assisted by counsel (which an ordinary witness cannot) and

3. Judges May Lead Investigations

have access to the record. In practice, the *témoin assisté* status is regarded as much more desirable than the *mis en examen* one because, in the eyes of the public, the former carries less of an implication that the person concerned may have committed wrongdoing.

A simple witness

Individuals for whom the investigating judge does not see any reason to believe that they could somehow become defendants and yet have knowledge of facts relevant to the investigation are simple witnesses. In the context of a judge-led investigation, this status carries essentially the same rights and obligations as that of a witness in a preliminary investigation: no right to decline to testify, criminal sanction if one does, no right to be assisted by a lawyer during an interrogation, no access to the record, no stenographer and no verbatim transcript.

Because the investigating judge is expected to look for and ultimately present both incriminating and exculpatory facts, suspects are not typically expected to actively help develop factual evidence in support of their defense, even when *mis en examen*. The prevailing view among defense counsel is that the defense is mostly a spectator of the investigating judge's work. Nonetheless, defense counsel may request that the judge take one or more specific investigative actions that the defense believes may be helpful to the defendant's case. Overall, however, most traditional defense lawyers do not show great interest in fact development, and investigating judges tend to look warily on defense counsel's activism to develop facts outside the scope of the judge's investigation.

This explains why there is only a modest market in France for investigation firms that could help defense counsel and provide them with information that they could turn over to investigating judges, although this landscape may be gradually changing. Perhaps under the influence of their U.S. counterparts and courting from international investigation firms, the younger generation of French defense lawyers tends to try and take a more active role in the investigation phase with the help of specialized service providers. At present, such an approach should still be taken with a degree of caution because certain investigating judges may react negatively to what they might perceive as a form of encroachment on their prerogatives. Importantly, where a suspect turns over exculpatory information to the investigating judge, the judge must include this information in the record; this information thus becomes available to all suspects.

DOES DEFENDANT HAVE A “RIGHT TO LIE”?

In a somewhat provocative way, certain U.S. observers of French criminal procedure have sometimes suggested that the rules would in effect give suspects a sort of “right to lie.” The expression sounds almost like an oxymoron, and, as such, it could easily stick in memories; however, it may as easily lead to disappointment if understood literally.

To put this question in context, it is important to understand two key bases upon which French procedures differ from those in the United States. The first is that the “right to silence” is much less zealously guarded in France than in the United States. It is true that before interviewing a suspect taken in custody, the police are now required to inform the suspect that there is a right to

3. *Judges May Lead Investigations*

silence. Similarly, in a judge-led investigation, a suspect whom the investigating judge calls for an interrogation must be informed of a suspect's right to silence. In reality, however, while it may happen that a suspect would decline to speak to the police, very few interviewees actually decline to speak to an investigating judge for the well-founded reason that this judge will draw an immediate and strong presumption that they have something to hide. As we will see at trial, the presiding trial judge may at any time turn to a physical defendant (or the representative of a corporate one) and ask for their response to a particular piece of evidence of testimony and will similarly draw a stark and negative inference from a refusal to respond. In short, the "right to silence" in France does not have the stature or importance the Fifth Amendment right against compelled self-incrimination has in the United States.

Perhaps for this reason, while witnesses are put under oath to tell the truth when they testify, suspects and defendants are not. Commentators have noted that there would be some unfairness to put a suspect under oath because a suspect who has actually committed a crime would face the difficult choice of either incriminating oneself or committing another crime by not telling the truth. From this, a number of observers have concluded that suspects would have a "right" to lie in French criminal procedure. This line of thought is sometimes fed also by commentaries from investigating judges who are not shy to suggest that they take anything a suspect says with more than one grain of salt.

The troubling aspect of this theory is that it seems to suggest that not being under oath would give an implicit permission to lie, something that should cast doubt on the reliability of

anyone's statement made without an oath. Beyond this probable logical flaw, we believe this debate is a rather theoretical one that may not capture the reality of how an investigation works. For a suspect, lying in an investigation is not only morally questionable, it is also usually a weak strategic option because of the risk this carries to the reliability of statements the suspect has made and will make in the investigation in a context where building credibility is often a key aspect of a defense. In addition, experience suggests that it is quite rare that there is no better option than just lying about something of interest to a police officer.

France is no exception to these practical considerations, which leads us to the conclusion that debating whether a suspect has the "right" to lie in the French criminal procedure does not have much of a real life impact (note that victims who join in criminal cases as civil parties are not put under oath either; see Chapter 5, *Beware of the Victim*). As is the case elsewhere, where defense counsel has to deal with adverse facts, the better option usually is to confront these facts and present them in a context that minimizes the adverse effect for the defendant, rather than taking a bet that a deliberate factual inaccuracy in a suspect's statement will go unnoticed. But perhaps the most important point is that while suspects (and defendants) in the United States may base a defensive strategy on saying nothing and invoking the cloak of the Fifth Amendment, in France, there is significant pressure for suspects/defendants to provide their versions of the events in question.

3. Judges May Lead Investigations

THE END GAME

Once the investigating judge has received all the information requested from the police, experts and other third parties solicited during the investigation, and once the judge has completed interrogations of the individuals who were of interest to the investigation, the judge typically prepares the final order on the case.

Before issuing this order, notice must be given to all parties and their counsel that the judge believes the investigation is over and is considering issuing a final order. Both prosecutor and defense counsel (and lawyers for victims if they have qualified as parties to the investigation) then have an opportunity to request that the investigating judge take specific actions to further investigate the facts of the case before closing the investigation. Refusals to investigate further can be appealed before the *Chambre de l'Instruction*, the special chamber of the court of appeals that considers challenges to investigating judges' decisions.

Both prosecutor and defense counsel (and victims who are parties) also have an opportunity to submit written comments on the merits of the case. Neither the prosecutor's nor defense counsel's comments have any binding effect on the investigating judge, who may elect to ignore them. There have even been cases in which investigating judges have decided to refer defendants to trial over the objections of the prosecutors who had recommended that charges be dropped. This indicates that the process of providing comments to the investigating judge ahead of the final order may not be as efficient as defense counsel would like it to be. Common wisdom suggests that comments by

defense counsel rarely ever change the judge's view of what the outcome of the investigation should be.

While defense counsel should be wary about the value of active engagement with an investigating judge and especially about providing information other than at the judge's specific request, strategic thought can be given to establishing building blocks for an ultimate defense. For example, in a case where there might be a basis to believe that some other person was responsible for the offense being investigated, or that another causation link exists in a case requiring a showing of causation, during the judge's investigation, defense counsel might consider formally requesting that the investigating judge pursue further leads or engage an expert to look into a matter. The strategic thinking may be that such a request will be denied, in which case, at a subsequent trial, the defense may urge that the prosecution is ill-founded because further promising leads that could have led to exculpatory evidence were not pursued.

At the end of an investigation, the investigating judge must account for it in one of three ways. In rare cases, the judge may conclude that he lacked jurisdiction to investigate the offense referred to him. In the vast majority of cases, the judge will either dismiss the investigation on the basis that there is no basis to hold any person or company responsible (this is called a *non lieu*) or bind over for trial those against whom sufficient evidence of guilt has been established. The document in which an investigating judge binds parties over to trial is not an "indictment" in the U.S. sense, theoretically because it is not an "accusation." Rather, these documents often consist of extensive recitations by the investigating judge (or judges) summarizing

3. Judges May Lead Investigations

what they found to have been established during the investigation and may include, for example, observations concerning the credibility or strength of evidence that had been reviewed including the results of interrogations or review of evidence submitted by the suspect.

An order binding a defendant over to trial cannot be appealed by the defendant, with very limited exceptions. An order dropping charges may be appealed by a victim who has appeared as a party.

4. Defendant Custody Practice

Custody practice is perhaps one of the areas of the French criminal procedure where the letter of the law and the manner in which things work in practice have diverged to the greatest extent. The system tends to see a defendant's confession as the epitome of prosecutorial evidence, and many police officers, prosecutors and investigating judges believe more or less openly that there is no better thing than a stint in custody to elicit confessions. As a result, putting a defendant in custody has frequently been overused, including for business crimes.

Here is a summary of how things should work, and how they really work, from the less to the more coercive measures. In this discussion, we are covering the custody practice in all types of investigation (prosecutor-driven investigations -- preliminary investigation or flagrancy investigation -- and investigation by a judge), with notes where the various regimes differ.

A (NOT SO) FRIENDLY CHAT (AUDITION LIBRE)

In all types of investigation, a suspect may first be invited to come to the police station under a set of procedures whose denomination (literally, "free hearing") could suggest that the invitee would be free to appear or stay home. This is not quite the case. Anyone receiving this type of invitation must report to the police station and answer the questions posed by the police. This may last as long as the police see fit: there is no rule that prescribes a maximum duration. The "free" aspect of this regime simply resides in the rule that anyone called to a police station for a free hearing has the right to stand up and leave at any time.

4. Defendant Custody Practice

The letter of the law says that this free hearing regime should be reserved for individuals for whom there are plausible reasons to believe that they have committed or attempted to commit a crime. In reality, this standard is observed in a somewhat relaxed manner. It does not really have teeth when it comes to trying to argue that the standard was *not* met.

While the law requires that the invitation (which can be extended by a telephone call or by mail) specify the nature of the crime that is being investigated, it is standard for an invitation to give very little information on the reasons for the invitation. Very often, the police only indicate the legal designation, date and location of the facts of the potential crime; for instance: “we want to hear you in the context of an investigation for alleged corruption of foreign public officials, between 2010 and 2018, in France and abroad.”

The invitee may only be assisted by counsel if the crime that is being investigated is punished by jail time. At the outset of the conversation, the police must give the invitee notice of an invitee’s rights, which include the right not to talk (as to the extent of this right, see above). As is standard in the French criminal procedure, there is neither a steno typist nor a verbatim transcript nor a right of the invitee to retain a copy of the interview notes.

The free hearing regime for taking testimonies of suspects and witnesses has met with great success with the police because it is relatively light in terms of its procedural burden. In addition, using this regime does not preclude using the more coercive regime of formal custody discussed below called *garde à vue*. This is why in a number of instances, police officers suggest to their

invitees that it would make sense for them to be cooperative in an *audition libre* invitation and not exercise their right to leave, failing which the police may be tempted to switch to the *garde à vue* regime. This is also why anyone called for an *audition libre* interrogation should be prudent and plan for a possible extended stay on police premises under the *garde à vue* regime.

CUSTODY, STEP ONE: GARDE À VUE OR GAV

If *audition libre* could (with a bit of imagination) be described as a relatively friendly process, a *garde à vue* clearly is not. *Garde à vue* (which means, literally, “keep in sight”), or GAV as the acronym goes, is a regime where someone is detained on police premises for up to 24 hours, in most cases, only renewable once, but this detainment can last up to six days for certain crimes.

Under the rules, not every suspect can be placed in GAV: this regime is reserved for situations where this is the only possible way to (1) make sure the person concerned will not run away; (2) protect evidence and/or witnesses; (3) avoid contact between the suspect and possible accomplices; and (4) put an end to the commission of the offense. There are a lot of cases revolving around the issue of whether these conditions were met; however, very few challenges result in the GAV and suspects’ interrogations being cancelled by the courts.

There is no need for any sort of warrant to put someone in GAV. The police may do so on their own initiative, on the sole condition of reporting immediately to the local prosecutor. Alternatively, they may put someone in GAV at the prosecutor’s request, in either case, without a need for any authorization from a judge. When acting in a judicial investigation, the police may

4. Defendant Custody Practice

also put someone in GAV at the request of the investigating judge.

When suspects are placed in GAV, the police must notify them of their rights, similar to the *Miranda* rights in the United States. This includes the right to have a relative or the employer informed of the GAV custody; the right to be examined by a doctor; the right to be assisted by a lawyer; and the right to answer questions or to remain silent. In addition, the police must inform the person in custody of the expected duration of the GAV, including possible extension thereof, and of the alleged nature, date and place of the offense of which this person is suspected.

In GAV, as in *audition libre*, there is neither a steno typist nor a verbatim transcript nor a right of the suspect to retain a copy of the interview notes. Defense prerogatives are limited: the suspect and defense counsel only have limited access to the record; and they can meet privately for only 30 minutes at the outset of each 24-hour custody session. Defense counsel can be present during the periods when the suspect is being questioned by the police; however, the rules only provide that counsel may ask questions and make oral statements at the end of the police questioning, leaving uncertainty as to what counsel may do during the interaction between the police and the suspect. In practice, with some diplomacy and sobriety of tone, most defense counsel manage effectively to participate in these sessions.

When the GAV is over, the suspect is either released or brought before the prosecutor (or the investigating judge, in a judge-lead investigation). Where the suspect is brought before the prosecutor or the judge, there may be an additional waiting

period in custody for up to 20 hours pending appearance before the prosecutor or judge; however, during this period, the suspect cannot be interrogated further.

While the book version of the GAV may appear relatively familiar to U.S. defense counsel and also relatively innocuous, reality makes a GAV a tough period for most business persons who have to go through this, perhaps more than the U.S. equivalent would. A GAV takes place at a date and time of choice by the police, generally with little or no notice. The police may not always be as courteous as one would hope. The GAV premises rarely match the comfort of even a modest hotel, and the company is rarely as elegant as one would usually look for. One rarely sleeps well in a cell with a bare light bulb on all night, with the noise and smell of other cells and with a simple blanket that may not have seen a laundry for weeks, not to mention the usually poor quality of the food. One is usually not at one's best when interrogations resume, sometimes in the middle of the night.

Some have characterized a GAV as a mix of a marathon and a chess game. There is some truth to that, in that for a suspect, managing a GAV requires adequate mental preparation and a sense of do's and don'ts. These go beyond the scope of this guide; however, it is worth bearing in mind that GAV preparation is a subject on which a client will usually need specific guidance.

As noted previously, while an interviewee has a theoretical right to remain silent during a GAV, in fact few do because there is a strong and well-founded sense that such silence will be viewed as an admission. At the end of an interview, the police will often type up their notes of the interview in the form of a *procès-verbal*

4. Defendant Custody Practice

and ask the interviewee to review and sign it; again, there is significant pressure to do so.

CUSTODY, STEP TWO: DÉTENTION PROVISOIRE

Pretrial temporary detainment (*détention provisoire*) is the most stringent custody measure that can be imposed on a suspect in the investigation phase. Simply put, this consists of sending the suspect to jail for potentially as long as 28 months prior to any trial.

Détention provisoire is reserved for (i) investigations led by an investigating judge and (ii) suspects who are *mis en examen* for crimes punishable by jail time in excess of three years. The formal standard for *détention provisoire* is similar to that for GAV (*i.e.*, make sure the person will not run away, protect evidence, etc.).

Putting someone in *détention provisoire* requires the investigating judge to apply to a special judge known as “judge of liberties and detainment” (*juge des libertés et de la détention* or JLD), before whom both the prosecutor and counsel for the suspect can present their cases. The JLD ultimately authorizes or declines the use of *détention provisoire* for the suspect or orders an alternative measure such as electronic monitoring. The JLD’s decision can be appealed by either the suspect or the prosecutor, and a suspect in *détention provisoire* may at any time apply to the investigating judge for a release order. When that judge denies the application, the case is referred to the JLD.

To note: *détention provisoire* may also be used, but for a maximum of three days, in a prosecutor-lead investigation, where the prosecutor decides to refer a suspect to trial at the end

of a GAV, and the court cannot hear the case on the same day. *Détention provisoire* is also available in the context of a settlement-like procedure called CRPC, where the defendant requests time to consider the resolution proposed by the prosecutor (see Chapter 8, *A No-Deal Environment (Almost)*). In both cases, *détention provisoire* is subject to JLD authorization.

Where the nature of the crime being investigated makes *détention provisoire* available, defense counsel should consider this as a significant risk to the suspect and build a defense strategy to try hard to avoid this being ordered. Two background notes are in order here. First, the French criminal justice system has a recurrent issue of overuse of *détention provisoire* in criminal investigations, which seems to be abating only modestly over time: in 1984, individuals in *détention provisoire* represented 52% of the French prison population, a percentage reduced to 28% in 2017. This overuse has been publicly criticized by human rights organizations and even by the legislature, with only mixed success. Second, in whichever context it is ordered, *détention provisoire* means that the suspect is sent to jail. Jail means jail: the suspect is likely to share a cell with convicted criminals serving post-trial sentences, in facilities whose conditions are rarely exemplary. The French official prisons watchdog wrote in 2016 that the conditions of certain facilities amounted to inhuman or degrading treatment of inmates.

5. Beware of the Victim

U.S. criminal defense lawyers often underestimate the role the victim plays in a French criminal case. The general idea is that the victim may effectively act like a second prosecutor who pursues not only criminal punishment but also compensation for the damage caused by the criminal offense.

The underlying idea is that there is a significant benefit to having both the criminal and civil sides of a case adjudicated in one process. In most cases, the key issues of facts are similar, with only causation and quantum of damages being specific to the civil side of the cases. It may therefore make good economic sense to spare the parties and the court system the duplication of processes. However, there is more to understand about this configuration than a mere cost-saving mechanism. Here are the key features of the victim's role.

THE VICTIM CAN TAKE OVER THE PROSECUTOR'S ROLE IN TRIGGERING A FORMAL INVESTIGATION

Perhaps the most salient oddity in the French system is the ability of the victim of a crime to set in motion a formal criminal investigation, even when the prosecutor has decided to take no action. Here is how this works.

Assume that there is a factual circumstance that causes damage to a party (the victim), and the victim thinks these facts constitute a criminal offense. The victim may not care about the criminal aspects and only seek damage in a civil action (more on this below). But a victim could alternatively seek to have the perpetrator criminally punished, in addition to paying damages, in which case, victim compensation could be established as part

5. Beware of the Victim

of a criminal matter. The victim therefore takes the usual steps for reporting a crime by either reporting the facts to the police or writing directly to the local prosecutor. However, the victim may also take the case directly to a criminal court.

The standard way: going through the prosecutor

Whether the victim reports facts to the police or writes directly to the prosecutor, the prosecutor will eventually decide whether the facts as reported warrant criminal prosecution. Assuming the prosecutor takes the view that they do not, this decision should be reported to the victim. The law provides that a three-month silence is tantamount to a denial of prosecution.

Once denial has occurred, the victim may essentially step into the prosecutor's position and set prosecution in motion. To do so, the principal requirement is that the victim file a complaint with the local investigating judge. This complaint must include a descriptive summary of the facts and the damages suffered and a request that the investigating judge investigate the reported facts and decide whether they warrant referring anyone to trial. This complaint is called a *plainte avec constitution de partie civile*, a denomination that reflects the dual nature of this procedural tool: it is both a complaint to report potentially criminal facts and a claim for compensation.

On receipt of this complaint, the investigating judge must process it. The judge must first seek the prosecutor's opinion and also independently investigate the accuracy of the facts presented in the complaint. There are only a few situations where the judge can decline to investigate: for instance, where it appears that the reported facts cannot constitute any sort of criminal offense or where the formal criminal investigation can only be initiated by

the prosecutor, which is the case in a limited number of situations specified in the Criminal Code. Absent a declination to process the complaint, this complaint opens the way to a normal investigation by the investigating judge (see Chapter 3, *Judges May Lead Investigations*). In effect, this boils down to the victim leveraging the investigating powers of a judge to develop the facts of the case and ultimately refer the suspect to court for both a criminal sanction and damages. It is important to note that an investigating judge can decide to proceed with an investigation -- and ultimately bind one or more defendants to trial -- even though the prosecutor opposes prosecution.

Following procedures that differ dramatically from American ones, under certain circumstances a Non-Governmental Organization (NGO) that pre-existed the events in question may have standing to qualify as victim/party and to participate in an investigation and trial. In other circumstances, an entity representing a group of victims may appear as victim/party, in essence having some of the force and effect of a class action in the United States. In particularly large criminal events where a significant number of victims have been identified -- such as in terrorist acts of mass killing or industrial accidents -- the State may establish a victims' compensation fund designed to get prompt compensation to victims, even in advance of any criminal adjudication of responsibility. That fund then becomes subrogated to the rights of the compensated victims and may appear during the criminal investigation and trial to seek repayment from the individuals or companies found criminally responsible.

The fast track: taking the case directly to court

A victim may also step into the shoes of the prosecutor and refer a suspect directly to a criminal court (*tribunal correctionnel*) through a process called *citation directe*. This process is available for virtually all crimes that fall in the *délits* category. It is frequently used in practice.

Where a victim believes that there is a record of facts sufficient to bring the case to court, without the investigative help of a judge, the victim may simply serve a complaint on the suspect and apply for a hearing date with the prosecutor. On the hearing date, the suspect must appear before the criminal court, irrespective of whether the prosecutor believes that there is ground for prosecution.

Prior to the court hearing, the plaintiff-victim and the defendant-suspect may exchange written submissions and supporting materials. At the hearing, both of them may present their cases; all with very limited participation by the prosecutor. Ultimately, the court decides whether the facts before it warrant a finding of guilt against the defendant-suspect and whether the plaintiff-victim is entitled to damages and the amount of any damages. While the court must consider the observations of the prosecutor at the hearing, these are not binding on the court. In many cases, the whole process may last less than six months.

A MODEST COST PROPOSITION FOR THE VICTIM

For the victim, the interest of using the *plainte avec constitution de partie civile* or the *citation directe* is that both are very modest cost and risk propositions.

Aside from attorneys' fees, the principal cost item is the posting of bond that comes with the filing of a *plainte avec constitution de partie civile* or a *citation directe*. The amount of the bond is usually quite small, with a maximum of 15,000 euros. This bond is intended to guarantee the seriousness of the *plainte avec constitution de partie civile* or the *citation directe*. This bond will be refunded to the victim at the end of the trial in most cases (see *Virtually No Risk if the Victim Gets It Wrong* below). There is neither a court fee nor anything else to be paid by the victim to bring the action.

VIRTUALLY NO RISK IF THE VICTIM GETS IT WRONG

Although, under the rules, the victim may face criminal and civil sanctions if this action is found unjustified, in practice, this risk is rather low.

Where a victim has filed a *plainte avec constitution de partie civile* or a *citation directe*, and the investigating judge or the court finds that the victim's action was frivolous (deliberately alleging inaccurate facts, for instance), the victim may be ordered to pay a civil fine in an amount no greater than 15,000 euros. Because this type of fine requires a finding of the frivolous nature of the action, it is rarely imposed in practice.

Also, where an investigating judge ultimately decides that there is no ground for referring anyone to trial, or where the court dismisses a *citation directe*, the individuals named as suspects in the complaint may sue the plaintiff. The action may be either in a civil court for compensation or in a criminal court (using a similar *plainte avec constitution de partie civile*) on a charge of bringing a malicious accusation.

5. Beware of the Victim

However, where a putative victim brings a *plainte avec constitution de partie civile*, it is relatively easy to insulate oneself from the risk of being charged for bringing a malicious accusation by filing a complaint “against an unknown person,” *i.e.*, without mentioning the identity of the alleged wrongdoer. But if the wording of the complaint makes it easy to identify the individuals against whom the complaint is directed, the plaintiff may still be charged for bringing a malicious accusation. In any case, this risk can hardly be regarded as a strong deterrent to would-be plaintiffs, since penalties for bringing malicious accusations usually consist of fines in the 1,000-2,000 euros range, with no jail time.

FLEXIBLE TIMING REQUIREMENTS FOR THE VICTIM

The victim may file a complaint with the local investigating judge to set the prosecution in motion, but this complaint may equally be filed when prosecution is already in motion at the prosecutor’s initiative. The victim may even wait until the case is referred to trial and file a claim during trial until the beginning of the defense’s closing argument. In any case of some complexity, however, it is usually advisable for the victim to file a complaint earlier, to become a party to the investigation and exercise the rights discussed in the next paragraph. For a *citation directe*, the victim has complete liberty regarding the timing of the complaint, subject only to the applicable statute of limitation.

RIGHTS OF THE VICTIM-CIVIL PARTY IN THE INVESTIGATION AND AT TRIAL

U.S. colleagues are often surprised by the apparent propensity of French lawyers advising plaintiffs in civil or commercial cases to look into the possibility of giving these cases a criminal aspect. There is a simple reason for this, which lies in the rather broad

rights given to a victim that has opted for a *plainte avec constitution de partie civile* procedure. These rights may in effect put a victim in a much better position than would be the case in a civil action.

First, once a victim has joined the criminal case as a civil party, this victim becomes a party to the criminal case with equal rights with the suspect. This includes the right to have access to the record being built by the investigation judge, to be heard by the judge and to participate in the interrogation of others. Importantly, the victim may request the judge to take certain investigative actions intended to find additional support for the victim's case, which would not be available to the victim in a civil context (e.g., the victim may request the investigating judge to order the suspect or third parties to produce information relevant to the case). The victim may also challenge the arguments submitted by defense counsel.

In a judicial system where there is no effective discovery available to civil and commercial plaintiffs (see our *10 Things U.S. Litigators Should Know About Court Litigation in France*), being a civil party in effect gives a victim an opportunity to leverage the investigative power of an investigation judge for the purpose of a civil damage claim. Investigation judges are generally aware that using this route may be tempting to certain civil or commercial claimants. They usually have a good sense of which *plaintes avec constitution de partie civile* hide cases whose nature is mostly civil or commercial and tend to treat them as not the highest-priority cases on their rosters.

Second, at trial, a victim who has joined the case as a civil party has a role that is substantially greater than a victim who has not.

5. Beware of the Victim

Counsel to the civil party may submit briefs, participate in the examination of witnesses in court and present a closing argument, all things a non-civil party victim cannot do. If unsatisfied with the court's decision, a civil party may appeal but only with respect to the damage issue as adjudicated by the court. A civil party may not appeal the decision on a criminal prosecution, including a non-guilty decision, only the prosecutor can.

CIVIL USE OF CRIMINAL RECORD BY THE VICTIM

An additional interest in considering the criminal route for a civil or commercial case is that, even if, ultimately, the criminal court renders a not-guilty decision, this has no preclusive effect on the civil action. The victim may subsequently commence a civil or commercial court action to seek compensation. In this new action, the victim may produce documents taken from the criminal record, *e.g.*, transcripts of opponents' testimonies in which there are statements of facts that may help the victim's position. Where the victim was not a civil party in the criminal proceedings, having access to the criminal record for use in subsequent civil proceedings is a lot trickier. This involves, among other things, applying to the prosecutor for the delivery of the criminal record to the civil or commercial court, which may or may not be granted and, at a minimum, takes quite some time.

NO SETTLEMENT

Finally, an important point to bear in mind is that, while the victim and the defendant may settle with regard to the civil aspects of a case, this settlement will usually have no impact on the formal criminal prosecution itself once the *action publique*

has been set in motion by the victim. More on this below, see Chapter 8, *A No-Deal Environment (Almost)*.

6. Long-Arm Considerations

THE EXTRA-TERRITORIAL REACH OF FRENCH CRIMINAL COURTS

In terms of exercising jurisdiction over wrongdoings committed outside one's territory, one should recognize that France remains a couple of strides behind the United States. The French criminal courts' extraterritorial jurisdiction (and its interpretation by prosecutors) has traditionally been limited, but it is expanding. In contrast to the United States, where territoriality is largely a subject of prosecutorial interpretation and judge-made law, the principles of the territorial reach of French criminal laws are set forth in the Criminal Code, although often with sufficient generality to require interpretation.

The starting point for any territoriality analysis is that French law is deemed to apply to, and French authorities are competent to investigate, any crimes that occur, even "in part," on French soil. The "in part" aspect has been interpreted by French courts to permit a French prosecution even when the bulk, or "center of gravity," of a criminal matter took place outside of France if any significant part occurred domestically.

For facts committed outside the French territory, the jurisdiction of the French criminal courts is generally based on the nationality of the suspect or victim (this is the "personal" or *in-personam* jurisdiction notion used by French lawyers). French courts have jurisdiction over crimes committed by or against a French citizen outside the French territory. However, traditionally, personal jurisdiction had a "dual criminality" requirement: that is, the facts at issue must have constituted a crime under the laws of both France and the country in which the facts occurred. In addition, for the prosecutor's office to

6. Long-Arm Considerations

prosecute, either the victim or the relevant foreign authority must have also filed a complaint.

Another hurdle for French prosecutors is the *non bis in idem* (or double jeopardy) principle, under which an individual who has already been tried for facts committed in another country and has served a sentence upon conviction in that country cannot be prosecuted on the same facts in France. Understandably, French prosecutors look with a degree of envy at their colleagues in other jurisdictions that do not have these impediments to the prosecution of facts occurring outside their countries, including their U.S. colleagues. However, the *non bis in idem* principle in the Criminal Code only precludes re-prosecution of a person or a company pursued in another country if the French basis for prosecution is “non-territorial,” that is, based on the personality of the victim or perpetrator. A non-French outcome will not bar re-prosecution in France if the prosecution is “territorial,” that is, based on acts that took place on French soil. In addition, France is signatory to a number of treaties within Europe that generally apply the principle of *non bis in idem* to prosecutions that have taken place elsewhere in the European Union.

In addition to the nationality-based jurisdiction, French courts have jurisdiction over facts committed outside the French territory, when these facts threaten France’s specific superior interests. This expression is intended to cover crimes such as espionage, treason, conspiracy, terrorism or threats to diplomatic and consular agents, and the counterfeiting of the French legal currency (*i.e.*, the euro).

Finally, French courts have universal jurisdiction over individuals arrested in the French territory, without regard to their

nationality, where there is a jurisdictional basis in an international convention (e.g., the 1984 U.N. convention against torture, the 1977 European convention against terrorism, the 1980 Vienna convention on the physical protection of nuclear material, and the 1988 Rome convention for the suppression of unlawful acts against the safety of maritime navigation).

This relatively restrictive landscape is gradually changing to facilitate prosecution, but only in certain selected areas. In 2016, France passed a “Law Regarding Transparency, the Fight Against Corruption and the Modernization of Economic Life,” known as the *Loi Sapin II*, which removed a number of impediments to the prosecution of extraterritorial facts of corruption and influence peddling. The *Loi Sapin II* first relaxed the personal jurisdiction rules: French courts now have jurisdiction over acts of corruption and influence peddling committed outside of France by French nationals, by individuals whose habitual residence is in France or by any individual or legal entity “carrying out all or part of his/her/its economic activity in the French territory.” In addition, for facts of corruption and influence peddling committed outside of the French territory, the *Loi Sapin II* eliminated the “dual criminality” requirement, and prosecutors are now entitled to prosecute suspects even in the absence of a complaint filed by either the victim or the relevant foreign authority.

The *Loi Sapin II* thus expands considerably the extraterritorial reach of French courts over acts of corruption of public officers. In this area, the French jurisdictional rules are getting closer to other legal systems. However, in our view, the principles giving jurisdiction to the French courts remain less far-reaching than

they may be under U.S. or U.K. prosecutors' interpretation of the jurisdictional provisions of the U.S. Foreign Corrupt Practices Act or the U.K. Bribery Act, for instance.

GETTING HELP: THE FRANCE/U.S. SITUATION

In criminal matters, France and the United States cooperate on the basis of a 1998 mutual legal assistance treaty and a 2003 mutual legal assistance treaty between the United States and the European Union. These treaties have structures that are similar to other MLATs the United States has signed, including in providing that assistance is available only with respect to crimes for which the requesting state has jurisdiction. There is also the right for either country to deny assistance where the execution of a request would prejudice its sovereignty and security, which has been at times relatively broadly understood by both parties.

For France-based cases, the issue is how efficient this MLAT is in helping a French prosecutor. In practice, there are scores of issues that may get in the way of the execution of a French prosecutor's request directed to the United States. These may include probable cause, specificity in warrants, privilege against self-incrimination and attorney-client privilege as understood in the United States; however, the United States seems to err on the side of honoring most requests for assistance coming from France. The process is rather slow: on average, a request from France takes about 10 months for the delivery of the requested information.

In addition to (and sometimes in lieu of) cooperation based on formal agreement, there seems to be a growing tendency of authorities on both sides to share information informally. In law enforcement jargon, this is referred to as "police-to-police

cooperation.” This may include, for example, direct texting between prosecutors for purposes such as sharing information of common interest in concurrent investigations or coordinating actions of police units. This informal cooperation usually relies on networks of personal contacts among prosecutors. These are facilitated by the presence of a senior U.S. prosecutor acting as justice attaché with the United States embassy in France, while a French prosecutor is based at the French embassy in Washington, D.C. Prosecutors also participate in regular meetings of law enforcement officers of various countries, which facilitate interactions among them. Those include the OECD’s Paris-based meetings and Egmont group activities, in which both the U.S. FinCEN and France’s TRACFIN participate. In sum, defense attorneys in France-based cases would be well advised to consider that French prosecutors can have relatively easy access to information located in the United States through formal or informal contacts with their U.S. counterparts.

France has signed extradition treaties with the United States and most of its regular trading partners. The procedures for extradition from France are a mixture of both judicial and administrative processes following generally well-known rules.

GETTING HELP IN THE EUROPEAN UNION

For investigations in the European Union, there is no Europe-wide investigative authority that would resemble the U.S. Federal Bureau of Investigation. Investigations spanning across more than one E.U. country therefore rely on intra-European cooperation mechanisms, and the Eurojust, Europol and European Judicial Network agencies.

The trend, however, is clearly towards closer cooperation among the law enforcement organizations of E.U. member States. The following four systems have become (or, for the EPPO, will shortly become) central to intra-E.U. law enforcement:

The European Arrest Warrant

Since 2002, the European Arrest Warrant (EAW) is available as a substitute for the traditional extradition system. The transfer of a suspect from one country to another within Europe now follows much quicker and simpler procedures, roughly akin to procedures in the United States when a perpetrator sought by one State is arrested in another. The EAW system includes quite innovative rules, including (i) limited grounds for refusal of execution, (ii) decision-making has shifted from political to judicial authorities, (iii) there is a possibility to surrender nationals of the executing state, (iv) the dual criminality requirement has been eliminated for 32 categories of offenses, and (v) there are clear time limits for the execution of each EAW.

The Joint Investigation Teams

Also since 2002, the police of E.U. member States may form joint investigation teams to investigate cases for which relevant facts are located in more than one E.U. country. Creating a Joint Investigation Team (JIT) is relatively easy. Once a JIT is set up with members from two or more countries, its members can engage in direct gathering and exchange of information and evidence without the need to use traditional channels of mutual legal assistance. Even more remarkable, where a JIT conducts operations in one country, team members from other countries can participate in investigative measures essentially as if they

were police officers of the country in which operations are conducted.

The European Investigation Order

Since 2017, E.U. prosecutors can use European Investigation Orders (EIO) to obtain investigative measures in other E.U. countries (except Ireland and Denmark) without much administrative burden. In substance, investigating authorities in each member State must recognize and execute requests from investigating authorities of other member States as if these requests originated from their own national authorities. EIOs cover a broad scope of investigation measures such as the taking of testimony, the conduct of search and seizure and the obtaining of telephone or bank records; however, they cannot be used to obtain the arrest of a suspect in another jurisdiction.

The European Public Prosecutor's Office

The European Public Prosecutor's Office (EPPO) is expected to start operating in 2020. The EPPO will be the European Union's first independent and decentralized prosecution office. It will have the power to investigate, prosecute and bring to judgment crimes against the E.U. budget, such as fraud, corruption or serious cross-border VAT fraud.

In addition to formal cooperation mechanisms, observers should note the pervasive role of personal relationships among law enforcement officers of the various E.U. member States. With the advent of younger generations of officers, who often have been educated in more than one country and speak several European languages, police officers of many large European cities tend to know each other rather well. They also tend to find it more and more expedient to pick up the phone and have direct

6. Long-Arm Considerations

conversations with their counterparts in other E.U. countries on matters of common interest, in addition to, or in lieu of, using formal cooperation procedures. In fact, one of the functions of groups such as Interpol, Europol and Eurojust is to foster efficient and effective communications among their members.

A HURDLE TO TAKING EVIDENCE IN FRANCE: THE FRENCH BLOCKING STATUTE

There is no such thing as 28 USC Section 1782 in France. In fact, taking evidence in France for use in foreign proceedings has been made somewhat tricky by the French legislature. Explicitly in reaction to the practices of U.S. lawyers coming to France to conduct pre-trial discovery for use in U.S. proceedings, France enacted in 1968 a statute known as a “blocking” statute. This statute prohibits any French citizen and any resident of France from disclosing commercial information for use in foreign judicial or administrative proceedings, unless this is accomplished under an existing treaty such as the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

Violation of this statute is a crime that may be punished with a fine and a jail sentence of up to six months. The core principle of the blocking statute is not controversial: it posits that if a foreign State wants to obtain evidence found in France, it should not do so by dealing directly with a French person or company on French soil, but rather should proceed through a French authority to conduct such an inquiry pursuant to the terms of a bi-lateral or multi-lateral agreement.

For many years, this statute was scarcely applied. This may explain why it has been viewed with some suspicion by U.S.

authorities, some of whom view it as providing an excuse for French individuals or corporations to refuse to participate in civil discovery or a criminal investigation. This situation may be changing, since French prosecutors have shown increasing interest for prosecuting individuals under the blocking statute.

The resulting situation is hardly satisfactory, with potentially two inconsistent positions. On the French side, the statute does exist and there is no basis to believe that enforcement is likely to abate any time soon; in fact, there are indications of the opposite. However, it remains unclear whether foreign authorities regard this statute as an effective impediment for a French citizen or a resident of France to comply with information requests issued by foreign courts or in the context of foreign proceedings. For this reason, potential blocking statute issues involved in defending a case should be considered carefully.

7. Investigation Confidentiality and Attorney-Client Privilege

Confidentiality, secrecy, who is under what obligation, to whom do the obligations run, for what information and for what purpose, are questions for which it is easy to start on the wrong footing, on the belief that the same words in use in U.S. practice may mean similar things in the context of French criminal proceedings. In reality, there are fundamental differences.

In a French criminal case, the first thing to consider is the distinction between the confidential nature of the investigation and the confidential nature of certain information in the context of the attorney-client relationship.

THE CONFIDENTIALITY (OR SECRECY) OF INVESTIGATIONS

One of the original features of the French Code of Criminal Procedure is the principle of secrecy of investigations.

The starting point is a Code provision under which a criminal investigation (be this a prosecutor-led preliminary investigation or one conducted by an investigating judge) is by nature secret. That is, information regarding the conduct of the investigation should not be disclosed outside the circle of people who have legitimate access to it. This covers, for instance, who has said what in testimony before the police or in communications monitored by investigators, what information of interest has been found in searching suspects' homes, offices or computers, what experts have said on any particular technical issue, what the investigation strategy is and what the next steps are, etc.

7. Investigation Confidentiality and Attorney-Client Privilege

Whoever participates in the conduct of an investigation must keep this information confidential, under criminal penalties. For this purpose, the relevant individuals are the police, prosecutors, clerks, experts, translators and whoever else may have access to the record of a criminal investigation for the purpose of one's professional activity. In an investigation led by an investigating judge, with attorneys for the suspects and victims having access to the record, this duty of secrecy extends to the judge and these attorneys (although for attorneys, the statutory basis is different, see below). However, this duty does not apply to suspects, victims and witnesses, because they are not regarded as individuals who actively participate in an investigation.

The traditional justification for the secrecy of investigations is twofold. First, secrecy is said to be necessary to protect an investigation against leaks that could jeopardize its success. The classic illustration of this idea consists of observing that if an investigation requires a dawn raid at a suspect's home, secrecy is necessary so that the suspect does not receive advance notice of this. Second, secrecy is said to be necessary to protect the suspects' privacy, reputation and presumed innocence, as long as there has not been a determination that they should be referred to trial.

As some commentators have put it, this secrecy rule has almost dissolved in its numerous statutory or court-shaped exceptions and intricacies. For example, while attorneys are not regarded as individuals who participate in the conduct of investigations (therefore not falling in the category of persons bound to observe the secrecy of investigations), they nonetheless are under a distinct confidentiality obligation in respect of investigations,

one that arises from attorneys' general duty of professional confidentiality. However, this confidentiality obligation is "without prejudice to the rights of defense," an exception whose meaning has been difficult to delineate.

Realistically, the secrecy of investigation rule has become a sort of maze, with few safe areas. One of them is that, in a judge-led investigation, defense counsel and counsel to the victim (if the victim has joined the case as a civil party) may have access to the record, review it and obtain copies of it, and they may disclose information from the record to their clients. They may even share copies of the record documents with them; however, the clients must not share these copies with a third party (clients must sign a statement to the effect that they are aware of the related penalties).

There is a growing reflection on whether this secrecy of investigation still makes sense nowadays. While the justifications outlined above still seem reasonable in principle, reality has developed in directions that make them less and less compelling. Of course, everyone agrees that giving a suspect advance notice of a dawn raid is generally not conducive to the success of an investigation; therefore, there is not much debate about the confidentiality of future investigative action. There is much debate, however, when it comes to providing reports on where the investigation stands and what it has uncovered. In recent years, it has been extremely hard to protect the secrecy of investigations, to the point that it has become frequent that minutes of witnesses' or suspects' testimonies find their ways to the media almost instantly, at least for cases that attract public attention. Similarly, journalists are not shy about calling

attorneys involved in high-profile cases to seek comments on ongoing investigations, and some attorneys occasionally succumb to the charm of being quoted as figures in these cases in return for sharing information they should keep to themselves, at the risk of breaching their secrecy duties. Against this background, public figures, including senior investigating judges, have publicly taken the view that this secrecy rule no longer makes much sense.

THE ATTORNEY-CLIENT RELATIONSHIP

In the context of a criminal investigation, the attorney-client relationship generates three distinct types of confidentiality protection for the benefit of attorneys' clients.

Communications between attorney and client

The first one resembles the U.S. attorney-client privilege, in the sense that the confidentiality of certain information makes it immune from seizure by investigators acting either for a prosecutor or an investigating judge. In France, this immunity only comes into play in the context of criminal defense, because this is the only context where a party can be compelled to disclose information this party holds (aside from exceptions not relevant here). Therefore, only in a criminal defense context can there be a question of what information should be immune from compelled disclosure. The question is irrelevant in civil or commercial litigation because U.S.-style discovery is not available; therefore, there is no reason to wonder what may or should be exempt from disclosure.

The scope of what communication from an attorney to this attorney's client (or vice versa) is immune from seizure has been the subject of considerable jurisprudential wavering over the

recent decades. As we write this guide, however, it is firmly established that communications (including meeting notes, correspondence and any other medium) between a client and defense counsel that relate to the defense itself cannot be seized, irrespective of any marking of documents as “attorney-client communication” or “attorney work-product.” This immunity from seizure would cover, for instance, any interaction between client and counsel regarding the facts of a case, and any interaction regarding the defense strategy.

But there is no protection in respect of in-house lawyers, who are systematically not considered “attorneys” capable of generating an attorney–client relationship in their discussions within their corporation. Therefore, internal communications of corporate clients concerning matters that are or may become of interest to prosecutors must always be treated with great caution. There is only a narrow protection for communications in which an in-house lawyer is reporting internally on advice received from outside counsel.

Even where this attorney-client protection applies, most criminal defense attorneys regard it with a dose of skepticism. This is mostly based on the mundane consideration that once something has come to the knowledge of police officers during a search, there is no way one can erase this from their memories. This is the source of the conventional wisdom that really sensitive matters are best kept for one-on-one conversations with clients, rather than written communications.

Clients’ confidential information delivered to attorneys

The second aspect of the confidentiality that arises from an attorney-client relationship consists of the confidentiality duty

7. Investigation Confidentiality and Attorney-Client Privilege

that an attorney owes to the client in respect of non-public information that the client may deliver to the attorney.

As the statutory wording goes, this confidentiality duty is absolute and infinite. This is intended to mean that no one can release an attorney from the confidentiality duty owed in respect of client confidential information, and this confidentiality duty continues without time limitation. There are exceptions, however: for example, in the context of the European Union's efforts against money laundering and terrorism financing, attorneys must report to the head of the bar when they suspect that funds might have come from terrorist activities, tax fraud or crimes punishable by at least one year of imprisonment.

One aspect of this set of rules that seems rare in countries other than France is the inability of a client to release the attorney from the attorney's obligation to keep client information secret. This rule is real, however, and it is regularly enforced. As a result, for instance, attorneys receiving usual letters from auditors asking them to express views on pending or threatened litigations of their clients cannot respond directly to the auditors; rather they must respond to their clients, who may then decide whether they want to forward the response to the auditors. The rule that a client cannot waive the confidentiality duty also affects an attorney's ability to disclose information to an adversary, including a prosecutor, even with the client's express permission.

Communications from attorney to attorney

Finally, there is a third aspect of an attorney's duty of confidentiality that is intended to protect clients' interests, although its existence is not directly related to an attorney-client

relationship. This duty relates to attorney-to-attorney communications. These communications are said to be *per se* confidential.

This confidentiality of attorney-to-attorney communications has nothing to do with any sort of joint defense privilege. The rule has its roots in the idea that attorneys representing clients in litigation should be able to exchange freely about a case without being concerned that what they say or write to opposing counsel could be used as evidence in favor of opposing counsel's client. This particular trait of an attorney's duty of confidentiality is provided by statute, which makes no distinction among civil, commercial or criminal matters.

In the context of a criminal investigation, this rule means that investigators cannot seize communications from one French attorney to another French attorney, irrespective of whether the respective clients' interests are aligned or adverse. One should note that there is still a degree of uncertainty about the question whether this immunity from seizure only applies to communications that relate to attorneys' defense work, as opposed to general legal advice.

WHAT TO DO WITH THE MEDIA?

Handling communications with the press and other media has become an integral part of working on a criminal defense case that is likely to attract public attention. The subject is tricky, because it involves conflicting considerations: on the one hand, the relatively stringent rules regarding secrecy of investigations, and on the other hand, the fact that in any high-profile case, attorneys are likely to be heavily solicited by journalists. In addition, other attorneys may engage in media actions to further

7. Investigation Confidentiality and Attorney-Client Privilege

their clients' interests, not to mention possible media communications by prosecutors. All of this may put some pressure on attorneys to have an active communication strategy, if only not to let other attorneys occupy too much of the media scene.

Calibrating a communication strategy in the context of a criminal case is a complex task, which can only be approached on a case-by-case basis. The key drivers to bear in mind are the following.

First, victims and suspects are always free to make public comments and feed information to the media regarding cases in which they are parties, as long as they do not disseminate copies of materials taken from the record of an ongoing investigation. The distinction may sound somewhat artificial; however, it does reflect the manner in which courts currently approach the issue of whether victims or suspects have breached their obligations to protect the secrecy of investigation.

Second, attorneys' confidentiality obligation is broader than that of their clients: this obligation covers any information taken from the record, not only the dissemination of copies of record documents. In addition, it seems clear that the "rights of defense" exception referred to above does not cover the fact of waging a media war on behalf of one's client, but is limited to bringing concurrent civil proceedings, for example. Attorneys must also focus on not breaching the confidentiality that attaches to the attorney-client relationship. As a result, attorneys must walk a very fine line in terms of public statements regarding cases in which they represent a suspect or a victim, because they are regularly penalized by courts and professional

bodies for disclosing confidential information from criminal investigation records.

Third, media are free to report information they obtain about ongoing investigation. The rule is clear where the information is sourced from individuals not subject to a secrecy obligation in respect of the information at issue. It is somewhat less clear where the information is sourced from someone who is breaching a secrecy obligation: while knowingly reporting information in this context should constitute a crime, this crime is often difficult to prove because the law gives journalists a right not to disclose the source of the information they report.

On balance, these rules give attorneys and their clients significant leeway in devising communication strategies regarding ongoing criminal cases. Whether aggressive public communication strategies ultimately help before courts is a different question. This touches on the nature of the case, the personalities of the defendants, attorneys and judges, the tone and style of the communication, the media used to communicate, etc. In general, judicial circles tend to look to communication activism with a degree of distaste, which may explain why parties' communication strategies are usually somewhat more sober than they would be for similar cases in the United States, at a minimum in business crime cases.

WHEN DOES SECRECY END?

The investigation secrecy starts with the opening of the investigation and ends with its conclusion (*i.e.*, a prosecutor's decision to refer a suspect to trial, or an investigating judge's decision to drop charges or to refer a suspect to trial). Once an investigation is over, prosecutors, investigating judges and

7. Investigation Confidentiality and Attorney-Client Privilege

attorneys can use information and documents gathered during this investigation to establish facts in other civil or criminal proceedings.

Unlike investigation secrecy, the French version of the attorney-client privilege is of indefinite duration. Similar to the U.S. attorney-client privilege, it does not end with the conclusion of a case or with the client's death.

8. A No-Deal Environment (Almost)

When considering the defense strategy in a case brought by a French prosecutor, it is important to bear in mind that the French environment provides very little room to shape the proceedings or avoid a public trial through deals with the prosecutor, the victim or a co-defendant.

Several reasons may explain the long standing reluctance in France to resolving criminal cases through negotiated deals.

One aspect is a widely held belief that making arrangements out of the scope of public scrutiny may lead to questionable practices. There is also the notion that in order to treat defendants in a fair and equal manner, it is best not to allow wealthier defendants to buy their way out of public trials, which would increase the risk that prosecutors would be more lenient with the more powerful. Most of the French population believes that criminal matters should be resolved by courts at public trials. Publicity is perceived as a necessary feature, either to amplify a no-guilt finding or as a “name and shame” addition to the court-imposed penalty in the event of a guilty finding.

Another contextual aspect is that there is not much of a deal-making culture in the circles that deal with criminal cases. Prosecutors and private practitioners usually come from different backgrounds: as we have outlined already, unlike in the United States, French prosecutors are very rarely former private practitioners, and they very rarely switch from public prosecution to private practice. While officially the relationship between the bar and public prosecution is one of cooperation and mutual respect, in reality, the relationship is somewhat more

complex. At the risk of oversimplifying, it can be said that many prosecutors tend to regard defense lawyers as unhelpful players whose principal objective is to derail proceedings rather than to contribute to justice, and many defense lawyers see prosecutors as unreasonably harsh. This often contributes to an uncooperative environment, one in which it is not typical for a lawyer to interact informally with a prosecutor about a case.

There may be many other reasons that explain this traditional reluctance of the French criminal justice system towards negotiated solutions, including the fact that trials, when they occur, tend to be much shorter and considerably less resource-demanding than is the case in the United States. For the purpose of guiding U.S. criminal defense lawyers that may deal with cases in France, it would be prudent to plan under the assumption that there is no possibility to strike deals with any of the participants of the cases, except with the limited exceptions summarized below.

NO DEAL WITH THE VICTIM

The first point to bear in mind is that there is no possible deal with the victim that will put an end to criminal proceedings. Once a prosecutor has initiated the prosecution of a crime on account of certain actions taken by an individual or a legal entity, there is no point in offering compensation to the victims in the hope that this would put an end to the criminal case. Even where the prosecution has been triggered by a *plainte avec constitution de partie civile*, offering compensation to the victim in return for the withdrawal of the complaint will not put an end to the case. This is because, while the victim has the right to set the

prosecution in motion, the victim does not “own” the prosecution and therefore has no authority to stop it.

There are two caveats, however. The first is that, for a limited number of crimes, the victim may be at liberty to stop the prosecution at any point once it has been initiated. This only applies for the rare crimes that may only be prosecuted if the victim has filed a complaint, such as in some tax fraud cases (where the filing of a complaint by the tax administration is a prerequisite), in invasion of privacy cases, and for most crimes committed out of the French territory, for example. The second caveat is that spontaneous compensation offered to the victim is often noted by courts as a mitigating factor when it comes to sentencing. This may be worth keeping in mind when the facts of a case make it implausible to dispute that the suspect has committed the crime that is being prosecuted.

NO DEAL WITH THE PROSECUTOR (ALMOST)

There is almost no possible deal with the prosecutor that can stop the prosecution of a crime or alter the charges once prosecution has been initiated. As a result, there is almost no room for any defense strategy that would consist of conceding certain facts in return for more lenient charges or anything close to the sort of plea bargains made between the prosecution and the defense that may be seen in U.S. criminal proceedings.

A prosecutor who becomes aware of facts that could possibly give rise to prosecution has wide discretion over the decision to initiate proceedings, as we have seen above in Chapter 2, *From the Reporting of Facts to the Decision to Prosecute*. The prosecutor may decide not to prosecute for almost any reason, subject to the rights of the victim to initiate prosecution by filing a *plainte avec*

8. A No-Deal Environment (Almost)

constitution de partie civile, as explained above. A key feature of the French system is that while the prosecutor has a degree of discretion in deciding to prosecute, as the expression goes, the prosecutor “does not own” the prosecution (*action publique*). This is intended to mean that while a prosecutor has authority to trigger an *action publique* by initiating prosecution, this authority does not extend to stopping prosecution: once the formal prosecution is underway, there must be a judicial decision to stop it (absent an intervening factor such as the death of the defendant or amnesty).

Against this background, French lawmakers have tried to contain the flow of cases going to trial by gradually adopting provisions that sometimes make it possible to resolve certain designated criminal cases without formal prosecution, or at least without a trial. These provisions are scattered throughout the Code of Criminal Procedure and other codes, and not all of them work the same way. These provisions share a common feature, however, which is that none of them may be used at the defendants’ initiative: only prosecutors or the administrative officers that have authority to prosecute may decide to offer defendants one of these alternative resolutions, in their sole discretion.

The principal settlement-like procedure that is available is the *transaction pénale*, which is available for most minor crimes (excluding most business crimes). For a number of more serious crimes, two other procedures are available: *composition pénale* and *comparution sur reconnaissance préalable de culpabilité* (or CRPC). The principal difference between these two procedures is that the former can only be used before there is prosecution, as a

substitute to prosecution, while the latter can be used at any time, including after the prosecutor has initiated the formal investigation. In other words, CRPC only can be used in lieu of a trial. Both procedures, however, are predicated on the defendant agreeing to plead guilty to the charges brought by the prosecutor.

Another settlement-like procedure was enacted in 2016 under the name *convention judiciaire d'intérêt public* (or CJIP). This procedure is reserved for legal entities. It permits resolution of criminal cases without trial and without an admission of guilt by corporate defendants. It is only available for certain specific crimes (corruption, influence peddling, tax fraud and laundering of the proceeds of tax fraud).

The French legislature adopted this new procedure explicitly to address the risk of debarment that corporate defendants may face when they admit guilt for certain crimes such as corruption. The objective was also to give French prosecutors a tool comparable to U.S. DPAs. At this time, however, there have only been a handful of these arrangements, which we believe is far too few to advise on how much one may rely upon this new procedure when considering a defense strategy. In addition, French prosecutors have not yet issued any guidelines that would indicate with some specificity the benefits that corporations could expect from self-reporting and cooperating in investigations. This situation may evolve rather quickly in part because it seems increasingly clear that the National Financial Prosecutorial Office (PNF) intends to use this procedure to obtain prompt outcomes with corporations.

8. A No-Deal Environment (Almost)

Overall, one should not assume that these procedures may become backdoor ways of introducing U.S.-style plea bargaining, for two reasons.

First, in all the settlement-like procedures that exist in France, there is almost no room for negotiation. Conversations with prosecutors on this subject consistently suggest that when a prosecutor offers an alternative resolution in lieu of prosecution or trial, the perspective on the prosecutor's side is that, for the defendant, this is essentially a "take it or leave it" proposition. We believe that this mindset may change in the future; however, for now, in the eyes of a prosecutor, offering such a resolution is akin to doing the defendant a favor. If the defendant does not want it, the prosecutor is unlikely to be concerned if the case goes to trial, in part because a prosecutor essentially loses nothing if the court ultimately finds in favor of the defendant.

Second, in addition to the "no-deal culture" mentioned above, courts would probably show some reluctance to importing all aspects of a U.S.-style plea bargain. Courts play an important role in these procedures because any arrangement a prosecutor may offer in any of the available procedures can only become effective once approved by a court in an open hearing. The court is at liberty to reject the arrangement if it finds it too harsh or too lenient or if the charges on which the arrangement is based are at odds with the facts. In this context, we believe that a court would be unlikely to approve an arrangement involving fact bargaining in which a defendant would agree to plead guilty in return for the prosecution's stipulation that the facts were less serious than they actually were. Similarly, we believe that a court may take the view that an arrangement that involves offering the

defendant a lighter sentence in return for future testimony against a co-defendant is not fair practice.

In addition to the settlement-like procedures outlined above, there is a host of crime-specific provisions under which a defendant may shortcut prosecution by opting for the payment of a fine (for certain minor tax, custom and air-traffic offenses, for instance). Outside the scope of criminal prosecution, there are also settlement-like procedures available in the context of regulatory enforcement proceedings brought by the stock market regulator (AMF) or the competition authority (*Autorité de la Concurrence*).

While in the United States, a vast majority of federal criminal cases never go to trial and are resolved through plea bargains, in France, the statistics and common expectation both point in the opposite direction. U.S. colleagues participating in defense cases in France should therefore start from the premise that any criminal case, other than for a minor, routine offense, is likely to end up in a public trial.

NO DEAL WITH CO-DEFENDANTS

There is not much more of a deal culture when it comes to the relationship among co-defendants. Two points are worth noting in this regard.

First, multi-defendant cases very often turn into strategic minefields. To put it bluntly, one should not count on much cooperation among co-defendants in the interest of avoiding ugly finger-pointing when the case goes to trial or even simply avoiding rehashing the same arguments at trial. This is not the way most French defense lawyers see their most effective

8. A No-Deal Environment (Almost)

strategies. Rather, most of them see the appearance of collusion among co-defendants as a greater risk than having inconsistent arguments or a disorganized trial.

As a result, most defense lawyers walk into the courtroom with only limited information about the arguments of co-defendants' counsel. Last-minute trial surprises are not uncommon, except for the rare occurrences where co-defendants' respective counsel know and trust each other enough to discuss defense strategies ahead of time.

Second, joint defense agreements are unlikely to be effective tools to protect privileged communications among co-defendants, or between a defendant and counsel to a co-defendant. These agreements are alien to the French criminal defense practice. We believe that prosecutors would likely take the views that, these agreements not falling in the scope of the privileges provided by statute, the information they are intended to protect is not legally protected from disclosure or seizure.

There is a relatively easy workaround to this. Communications among co-defendants' respective counsel are *per se* privileged under the statutory privilege that attaches to communications among attorneys (see Chapter 7, *Investigation Confidentiality and Attorney-Client Privilege*). Communications related to joint defense efforts should therefore be channeled through co-defendants' respective counsel, which would make them immune from disclosure or seizure, without a need for a specific agreement among co-defendants or their respective counsel.

9. Trial Surprises

Simply walking into the courtroom for a criminal case in France is unlikely to give U.S. criminal defense attorneys much of a shock. They easily recognize where the court will sit and where the defendants have their bench, next to the defense lawyers. They presumably understand by then that there will not be a jury; therefore there is no jury box. They may frown at the idea that the prosecutor routinely walks into the courtroom together with the judges, from behind the judges' desk, and sits on a podium on equal level with the court, while defense lawyers sit one level below. A popular saying attributes the difference to a "carpenter's error," but, in reality, it is a reflection of the fact that prosecutors are not lawyers on equal footing with the defense attorneys. Prosecutors are members of the judiciary (see Chapter 1, *The Background: the Courts, the Law, the Players*) whose position on the podium is supposed to underscore their public interest role, although most defense lawyers vocally disagree with this view.

The features of a standard French criminal trial that most differ from a typical U.S. criminal trial include the following:

WHAT THE COURT KNOWS AT THE BEGINNING OF TRIAL

In most criminal matters, the case only comes before the court at the final stage of the proceedings. Until then, there is very limited interaction between the parties and the court regarding the substance of the case. However, this does not mean that the court knows nothing about the case on the first day of trial.

In a U.S. jury trial, the trier of fact -- typically the jury -- learns the facts during the trial. In contrast, in France, the court (or at

least one of the judges on the panel) usually already has a good understanding of the facts of the case when the trial opens. As noted above, during the investigation, all of the factual elements (including witness statements and police reports) will have been assembled in a file (*dossier*); in the case of a long-running investigation led by an investigating judge such as in complex financial matters, this file will be extensive and detailed. The trial judges will have complete access to this file, and at least one of them will have read it before trial begins.

From this, several differences flow that radically change the nature of a French trial from an American counterpart. First, the judges will feel that they already know a fair amount about the case and will start off with their own ideas how the trial should most expeditiously proceed. Second, as discussed further below, there is virtually no concept of elements of proof being “admitted into evidence” such as in a U.S. trial. The existing investigative file (including many elements that a U.S. lawyer would consider hearsay; and often elements that a lawyer might find prejudicial such as the defendant’s prior criminal record) simply becomes the baseline record of the trial. A French trial is thus less of a gladiator’s battle, often focusing on arguments over admissibility of evidence and on the credibility of witnesses who are being heard for the first time, and more of a debate over whether the evidence already assembled during the investigation suffices to prove guilt.

From the defense perspective, the court’s initial familiarity with the record is often a source of concern because the record is usually not quite a balanced presentation of the facts. As we have seen above (see Chapter 2, *From the Reporting of Facts to the*

Decision to Prosecute and Chapter 3, *Judges May Lead Investigations*), when a case reaches the trial stage pursuant to a prosecutor's or an investigating judge's action, this is because the prosecutor or the investigating judge who has assembled the record has concluded that there is enough evidence there to send the defendants to trial. To put it otherwise, in the vast majority of cases, the judges deciding the guilt or non-guilt of the defendant will know that one or more of their professional colleagues -- either a prosecutor or an investigating judge -- has already concluded that the evidence is sufficient to support guilt. This is particularly the case with respect to investigations led by a judge who, as noted above, may already have written a detailed summary of the evidence reviewed during the investigations and reached conclusions (including observations on the credibility of witnesses) why the case should be bound over for trial.

More often than not, the record on which the court has relied to prepare for the trial includes very few submissions by defense lawyers. As already noted, it is common wisdom for defense attorneys that one should be very cautious about making arguments to an investigating judge or a prosecutor in an attempt to convince them to drop a case. Most counsel believe that this may backfire, with the judge or prosecutor dismissing the argument and pressing ahead, at which point, the argument may be "used goods" when trial begins.

As a result, the trial is almost always the most important phase of defense work, during which, defense counsel will work towards challenging the findings of the prosecutor and the investigating judge. In the majority of cases, this only involves oral communications with the court, without written submissions.

In complex cases, however, written submissions on procedural issues and on the merits are frequent. They must be submitted to the court and the other parties prior to or on the first day of trial.

THE WEIGHT OF PROCEDURAL DEBATES

Our U.S. colleagues often observe that during the first few days of trial, defense attorneys tend to put great emphasis on trying to delay or shortcut the proceedings on procedural grounds rather than diving into the facts of the case. This observation is generally accurate. It is rare that a criminal trial opens without one or more defendants moving to stay the proceedings, merging the proceedings with related concurrent proceedings, ordering additional fact-finding, striking portions of the record and challenging the victim's right to participate in the proceedings, to name only a few. There are several reasons for this proclivity for procedural debates.

First, cases often arrive at trial with factual records that are not quite favorable to the defendants for reasons already discussed. In this context, testing every possible procedural argument that could end the case or delay the discussion of substantive issues may be of significant interest.

Second, the rules of procedure mandate that procedural issues must be raised first, prior to any discussion of the substance of the case. This also creates an incentive to try every available procedural argument, since any procedural argument not raised at the time cannot be raised later on during the trial.

Spending time in French criminal courts teaches that there is virtually no limit to the creativity of defense attorneys in identifying procedural issues. Defense lawyers' agility in raising

procedural issues might sometimes appear beyond the scope of reasonableness or without regard to its impact on their credibility in the eyes of the court. In addition to procedural issues, it has become relatively frequent in complex matters that defense counsel claim that the statutory basis for the prosecution may be unconstitutional. This claim must also be raised at the outset of trial, and the court must review it first. If the court holds that there is *prima facie* merit to the claim, it must refer the matter to the *Cour de Cassation* and ultimately to the *Conseil Constitutionnel*. The whole process may delay a trial by many months.

Very often, in order to avoid having a trial bogged down by procedural arguments, the court may issue an interim decision stating that procedural arguments will be considered together with the substance of the case. In this case, the benefit of raising procedural arguments in order to delay or avoid a substantive discussion of the case may be reduced to almost nothing.

THE COURT LEADS THE SHOW

There is nothing more alien to the French system than the idea of the court as a passive, neutral party, whose role consists primarily of adjudicating issues on the admissibility of evidence and otherwise ensuring that the trial runs smoothly.

As a matter of general philosophy, the ultimate objective of the French criminal procedure is to find the truth of what really happened in a case, as opposed to pondering whether the prosecution has met its burden of proof. This is apparent in the Code of Criminal Procedure where the word “truth” appears many times, including to provide that an investigation led by a prosecutor or an investigating judge should focus on discovering

the “truth” of a case. Likewise, many decisions have held that even after an investigation is over, the trial court should order any additional investigative measure that it believes is necessary to discover the truth, rather than relying only on the record that has been delivered to it.

To simplify, the court is like the judge and the jury in one single body, one whose role is to actively investigate the facts and the law of the case with a view to developing its own understanding of the case. This results in the court asking a lot of questions during the trial.

Questioning by the court usually starts with the court asking many questions to the defendant (this is not the equivalent of taking witness testimony of the defendant, as will be discussed below). Questions to the defendant usually revolve around the defendant’s background, including education, income and family status. Any existing criminal record is also likely to be discussed. The court then summarizes the facts on the record; then it engages in a dialogue with the defendant intended to probe the defendant’s version of the facts and its consistency with the record, and to discuss any inconsistency in greater detail. This is a very important phase of the trial because this is when the court forms its initial impression of the credibility of the defendant’s defense. If the defendant and defense counsel have prepared properly, this phase usually requires minimal participation by counsel. Conventional wisdom is that “less is more” in this case, since the court is generally eager to evaluate the defendant without counsel’s interruption, which in most cases may be perceived as counsel trying to correct things said by the defendant. Following the dialogue between the court and the

defendant, the court normally invites both the prosecutor and defense counsel to ask additional questions to the defendant. Custom requires the defendant to respond by addressing the court, not the one who asked the question.

The trial proceeds with the questioning of the victims and witnesses, then with the final oral arguments of the prosecutor, the victim's attorney and defense counsel. Note that the pace of the trial, the time devoted to testimony and the bulk of the questioning on the facts of the case all are in the court's discretion at all times, rather than that of the prosecutor or the defendant. Indeed, the judges will often indicate before the trial begins how many trial days they are allocating to it, and will generally stick to that schedule.

NOT MUCH EVIDENTIARY DEBATE

U.S. colleagues participating in a defense team in France should not count on much debate on the evidence produced at trial, for two reasons.

First, if the case has gone through an investigating judge phase, challenges to items of evidence used by the investigating judge to build the record should have been brought before this judge and on appeal before the *Chambre de l'Instruction*, the special chamber of the court of appeals that considers challenges to investigating judges' decisions. Once the record comes before the trial court, it is usually too late to take issue with decisions made by the investigating judge regarding evidence that is in the record.

Second, the French rules of criminal procedure do not include detailed provisions on the admissibility of evidence. The fundamental rule is that, absent explicit statutory requirements,

criminal offenses may be proved by any and all means, and the court will ultimately decide on a case based on its “innermost conviction.” The question of how this standard compares to the “beyond reasonable doubt” standard in the U.S. court system is beyond the scope of this work, and probably of little practical impact. Suffice to say that to the extent “beyond reasonable doubt” would mean that no reasonable person would ever question the defendant’s guilt or that the court must have moral certainty, this does not seem significantly different from the standard in use in French criminal courts.

There is a limit to the “any and all means” by which to prove a criminal offense in France. A court must not base its decision on evidence that has been obtained through illicit methods or by unfair means in which the prosecution or the investigators are involved. There is sometimes a fine line here, but by and large, where investigators induce or provoke someone to committing an offense, the resulting evidence is likely to be inadmissible in court, while where they simply observe the commission of a crime (*e.g.*, as undercover agents buying drugs from suspected or known drug dealers), the resulting evidence should not pose much problem in court. Instances of rejection of evidence on this basis are rare.

In contrast, where an investigation has found questionable evidence such as unauthorized recording of conversations or documents obtained through illicit means, insofar as neither the prosecution nor its investigators have participated in generating this evidence, they are free to use it in criminal court, subject only to the court’s discretion in weighing the strength of the evidence.

WITNESS PRACTICE ODDITIES

To U.S. criminal defense attorneys, one of the most startling aspects of a French criminal trial is the manner in which witnesses are used. Here are three things to consider:

First, the defendant is never treated as a witness in the defendant's own case. Of course, as we have seen, the court does question the defendant on the facts and on any matters the court may find helpful to its understanding of the case. Procedurally speaking, however, this communication of information by the defendant to the court does not constitute witness testimony. The defendant has the right to stay silent (although this is rarely an advisable way of handling the opening phase of a trial). If the defendant answers the court's questions, this is never under oath. From this observation, certain U.S. lawyers have engaged in discussions about a so-called "right to lie" in French criminal proceedings, which we believe are of little practical impact (see Chapter 3, *Judges May Lead Investigations*).

Second, there is hardly any preparation of witnesses in French criminal proceedings. To most defense attorneys, there is a firmly engrained belief that a lawyer should not meet with a witness before producing the witness in court. Many of them believe that doing so might affect the witness's credibility and potentially expose the lawyer to accusations of witness tampering. Of course, as anywhere else, it is highly advisable for defense counsel to understand what a witness may have to say on the case before deciding to produce this witness in court. To most lawyers, however, probing witnesses is best left to the defendant, not defense counsel.

There is no statutory or other support for this belief. This is merely a cautionary custom intended to insulate lawyers from the suspicion that they might have done something questionable with a witness. With the younger generation of the defense bar, however, this mindset is gradually changing towards a more flexible approach, in the interest of avoiding unpleasant surprises in court and not wasting the court's time with unhelpful witness testimony.

Third, in contrast to U.S. practice, there is very limited opportunity for cross-examination. One reason is that the prosecution rarely calls witnesses to the trial. In the vast majority of cases, most of what a prosecutor's witnesses have to say is already in the record in the form of testimonial minutes taken by the police or before the investigating judge. Since there is no rule prohibiting the use of hearsay, there is no formal need to have these witnesses examined again before the court. For this reason, the question of cross-examination of witnesses arises principally only in multi-defendant cases, where defendants engage in finger-pointing and try to undermine each other's exculpatory witnesses. Note that in the French version of cross-examination, there is no "grilling" of witnesses in the way U.S. legal television shows sometimes suggest. Courts keep a tight control over the questioning of witnesses by defense counsel. For instance, courts would not hesitate to cut off lines of questioning based on facts unrelated to the case that are primarily intended to attack a witness's credibility. In practice, this limited cross-examination should always focus on lines of questioning that stay close to the facts of the case or whose rationale can easily be followed by the court. Not surprisingly,

cross examination, if any, tends to be much shorter than in the United States.

In the United States, witness testimony is the core of a criminal trial: the prosecutor builds his “narrative” by selecting the order in which to call witnesses, and even key documents are generally introduced by witness testimony to provide a basis for their admissibility and to explain them. In France, whether a potential witness testifies at all is entirely left to the discretion of the judges. The judges may conclude, on the basis of the investigative record, that there is no purpose in even calling certain witnesses to trial at all. A defense counsel who feels that there is a strategic advantage to having a specific witness be heard in open court may ask that the court hear that witness, but will have to convince the court that it is in the interest of justice to do so. In most cases, witnesses are called to testify pursuant to summonses served on them by the parties who intend to produce them at trial. For defense attorneys, it is regarded as good practice to inform the prosecutor and the court of the names of the witnesses that one expects to produce, although this is simply a courtesy rule. Witnesses properly summoned must appear at trial: failure to do so may expose them to (very rarely imposed) fines.

A word on experts: traditionally in France, an “expert” participating in a criminal case – to provide insight on issues such as forensics, DNA or causation – could only be a theoretically neutral expert appointed by a judicial authority, generally during an investigation. What happens, then, if the defense believes that the expert’s conclusions (of which they will have received a copy) is simply wrong? The answer is that a defense team can

hire its own expert in the first instance to learn how best to argue against the weight of the court-appointed expert at trial (and to some degree to be able to cross-examine that expert at trial). The practice is evolving in that an expert hired by the defense may often now be allowed to testify at trial, although because that expert is not regarded as a “neutral” (since the expert was hired and compensated by the defense), this party-appointed expert is not formally referred to as an “expert” at all, but only as a “witness.” In general, French courts try to avoid having to deal with a “battle of the experts,” such as often exists in the United States.

CLOSING STATEMENTS

The trial ends with closing statements by the prosecutor, counsel for the victim and counsel for the defendant, in this order. When there are multiple defendants, it is customary that counsel for the one most at risk speak last, and that counsel for individual defendants speak after counsel for corporate defendants.

A prosecutor’s closing statement usually consists of a summary of the key points of the prosecution’s case, sometimes leveraging the additional information about the case gathered during the trial. It may happen that a prosecutor takes into account this information as a basis for dropping certain charges in respect of one or more of the defendants. A prosecutor’s closing statement ends with the prosecutor’s sentencing request, which must be within the limits prescribed by statute for the offenses under consideration.

The role of counsel to the victim usually consists of expressing support for the points made by the prosecutor in a relatively brief presentation. In most cases, damages are addressed at separate

court hearings. At stake for the victim at this stage is therefore securing a guilty verdict, which should open the way to a request for compensation for the damages suffered as a result of the facts for which the defendant may be found guilty.

Defense counsel's closing statement is the high point of defense practice. This is the moment when defense counsel is expected to work through the information in the record and the information added to the record at trial, and use it to debunk the prosecution's case. In most cases, defense counsel's task focuses on highlighting the factual uncertainties or inaccuracies of the prosecution's case, and any legal obstacles to prosecution (although sophisticated legal discussions are relatively rare in the day-to-day practice of criminal courts). The substance, tone and duration of this closing statement varies vastly, depending on numerous factors, including the nature of the case, defense counsel's familiarity with the court and counsel's perception of what may work with the judges. A key factor is also defense counsel's perception of how much the earlier phases of the trial may have already shifted the court's understanding of the case to the defendant's benefit. Where defense counsel believes that this has happened to a significant extent, it is usually advisable that the closing statement be limited to a summary of the key points of defendant's position in a relatively short, well-organized and sober presentation, with appropriate record references, rather than rehashing the whole case at great length.

On rare occasions, with the court's permission, the prosecutor may make additional comments after defense counsel has spoken. In this case, defense counsel has the right to comment on the prosecutor's additional comments. Defense counsel

9. Trial Surprises

should always have the final word before the court closes the trial.

Overall, closing statements are quite lengthy by U. S. standards; they may easily take a full day or even more for a multiday trial. Judges rarely ask questions during closing statements, nor is it considered good form for counsel of one party to object during the argument of another.

In most cases, the court takes the case under consideration before issuing a decision.

10. Sentencing

By the time a case arrives at the sentencing stage, our U.S. colleagues should have a good grasp of the substantial differences between the U.S. and French criminal justice systems. The sentencing stage is one more, and not the least.

To put it bluntly, there is no sentencing phase in a French criminal case; at least not in the manner a U.S. defense counsel sees it. In almost all cases, the decision the court will prepare and render will cover both guilt and sentence, all in one go. Said otherwise, there is no subsequent sentencing hearing at which the prosecutor and defense counsel will argue what the sentence should be. Here is a summary of how the court will set the sentence.

NO PRESENTENCE INTERVIEW OR REPORT

There is nothing like a presentence interview where a probation officer would question the defendant, family members or others about the defendant's criminal and family history, employment and financial circumstances, or other matters potentially related to sentencing. Not that a French court would ignore these subjects in considering sentencing; however, by the time a trial ends, the court should have all it needs in the record.

This is because as an investigation typically develops, the investigators would normally have gathered in the record the information about a suspect that may ultimately be relevant to sentencing. Should the court believe that it may need additional information to consider a sentence if a defendant is found guilty, obtaining this information from the defendant should be among the points to be discussed first in the dialogue between the court

and the defendant that usually opens the trial. Very frequently, the court's initial questions to the defendant revolve around the defendant's criminal, family, education and employment history, income and wealth, in an effort to double check and update the information the record already includes on these subjects, and clarify any remaining questions.

In a sense, this underscores that under French procedures, issues explored at trial relating to guilt are not viewed as entirely separate from personal issues relating to the character and history of the defendant that in the United States would normally be explored separately and in relation to sentencing. French judges often say that in evaluating guilt or nonguilt, they want to know as much as they can about the defendant.

NO SENTENCING GUIDELINES

France has not felt the need to address the question of sentencing disparities across the country to the point of adopting sentencing guidelines similar to those developed in the United States. By and large, the rule remains that courts may impose sentences with virtually unlimited discretion within the statutory ranges of punishment.

This is not to say that there has been no attempt to curb the courts' discretion in sentencing decisions. The government, acting through the Ministry of Justice, occasionally issues guidelines covering specific subjects of criminal policy, often with recommendations to prosecutors on how certain specific crimes should be prosecuted. However, these recommendations are not authoritative for prosecutors, and definitely not for the courts. Also, in recent years, the legislature has tried to impose statutory minimum sentences for certain crimes in certain

circumstances such as recidivism, but this was not well received by the judiciary, and these statutory minimum sentences were eliminated in 2014.

In sum, it is fair to say that at present, French courts enjoy significantly greater discretion in sentencing decisions than their U.S. counterparts. The flip side of this, of course, is a much lesser ability of French defense counsel to predict what the outcome of a case is likely to be.

NO CUMULATIVE SENTENCES

French defense attorneys often express amazement at U.S. sentences that give defendants prison terms that they are unlikely to live long enough to serve in full. Where these death-defying sentences are the result of adding up penalties for multiple offenses in one go, this is even more surprising to French defense attorneys, because France simply does not have a system that permits this sort of addition of penalties.

The U.S. system is even more distinct from procedures in France because prosecutors can often break up a unified series of acts into separate “counts,” with the possibility of cumulating the sentences on each count. This process is not known in France. Rather, where a defendant is brought to trial on a series of counts arising from related or unrelated facts, with each count being punished by imprisonment, and the defendant is found guilty on all counts, the sentence should be based on the count that is most severely punished; that is, the maximum sentence the court can give corresponds to the maximum statutory penalty for this one count. This is not to say that cumulative sentences are unheard of: they may exist where penalties for the various crimes under

consideration are of different natures; for instance, a jail sentence for one crime can be given in addition to a fine for another crime.

NO MANDATORY FORFEITURE OF PROFITS

Until a few years ago, a criminal court could only order the forfeiture of profit derived from a crime if a specific statutory provision made it possible for the crime under consideration. Following a 2007 change to the French Criminal Code, forfeiture of profit is available for any crime that is punished by imprisonment of one year or more.

The salient difference with the U.S. system is that there are very few provisions in the French Criminal Code that make forfeiture mandatory for a court, and very few of these provisions relate to business crimes (most of them relate to vehicular crimes and forfeiture of vehicles). For virtually all crimes, forfeiture is optional for the courts, and statistics suggest that this option is rarely used: for example, in 2017, out of 235,223 ancillary measures ordered by criminal courts in addition to jail terms or fines, only 392 consisted of forfeiture. It is also striking that for crimes that by their nature would provide financial benefits to their authors, forfeiture is notably absent in the statistics: for example, out of 32 guilty verdicts for unauthorized practice of a regulated profession, none ordered forfeiture of the proceeds of the crime.

LIMITED HOOK FOR CORPORATE LIABILITY

Since 1994, legal entities may be found guilty for acts committed on their behalf or for their benefit by their “organs” or “representatives,” and since 2004, this concerns any type of criminal offense. The interpretation of the words “organs” and “representatives” by French courts has resulted in the scope of

corporate criminal liability being much narrower in France than it is in the United States. While in the United States, a corporation may be held criminally liable for acts of pretty much any of its employees (even acts taken in violation of corporate policies), in France, a corporation can only be held criminally liable for acts of employees who have the power to represent or bind the company. Simply put, in France, the wrongdoings of a mailroom clerk cannot trigger criminal liability of the employer company. Rather, to bind a corporation, it must be shown that an individual “representative” was not only acting for the benefit of the corporation, but was acting within the scope of his authority (and not, for example, in violation of the company’s rules).

Corporate criminal liability does not exclude the possibility of individual responsibility for the same act.

Legal entities are usually more concerned about additional sanctions a criminal court may impose than just the risk of having to pay fines. These additional sanctions include forced closure, disqualification from public tenders or prohibition from offering securities to the public either permanently or for a certain period. Even more drastically, French public procurement law mandates that a corporate entity convicted of certain offenses (such as corruption, influence peddling or terrorist financing) by a final judgment is automatically excluded from public procurement for five years from the date of the conviction.

CRIMINAL JUDGMENT

At the end of the trial, the court will generally indicate a specific date at which the judgment will be made public. Where there is a

panel of three judges, they are expected to deliberate over their decision behind closed doors, and once their decision is made, it is regarded as their collective decision: there is never an opportunity for a judge to issue a dissenting opinion, nor would it be customary for a judge to comment on a decision in which this judge has participated, at any point in time.

In most cases, the judgment is made public by reading it in open court. This reading of the decision is usually limited to the court's conclusions and rarely provides the court's reasoning in full. The full written version of the decision is almost never available on that date. In complex cases, it is sometimes sent to parties several weeks after the public reading.

The judgment will state the sentence imposed on each convicted defendant, and will state the civil awards due to victim parties, if any. In complex cases, the judgment may be a substantial document that will recite the charges, the procedural history of the case, a summary of the facts, the contrasting arguments of the parties and the court's legal evaluation why it either convicts or acquits the defendants on each offense for which they were tried.

Each written decision should indicate the names of the judges on the panel, which has become quite helpful to criminal lawyers in "profiling" judges ahead of a trial. Written judgments are not systematically reported, nor universally available through an Internet search. Judgments in important cases are often reported in the media, which may reproduce them.

When the court finds a defendant guilty, it may impose a penalty up to the statutory maximum provided for the crime the

defendant has committed. The court is not obligated to follow the sentencing request made in the prosecutor's closing statement.

In the context of offenses of intermediate seriousness (*délits*), individuals face a maximum prison sentence of up to 10 years. For the most serious offenses (*crimes*), the death penalty has been abolished in France since 1981, and lifetime imprisonment is unheard of: the maximum prison sentence is 30 years. Since 2014, France no longer applies mandatory minimum sentences (see *No Sentencing Guidelines* above).

Defendants may also face fines. For each offense, a statutory provision sets the maximum fine amount for an individual defendant. This amount may be fixed and/or variable. Legal entities face fines of up to five times the amounts faced by individuals. Under certain circumstances (such as recidivism), enhanced sanctions may be applicable. Offenders who have had no conviction in the previous five years may be sentenced to a suspended sentence, which may be applied to custodial sentences, fines and ancillary sanctions. If a second offense occurs in the following five years, the suspended sentence must be served.

Finally, a defendant found guilty must pay a modest procedural fee to the court.

DAMAGES

In addition to the penalties summarized above, criminal courts may award compensation to the victims (the "civil party" mentioned above, see Chapter 5, *Beware of the Victim*). Issues of civil liability and damages are determined according to general rules of civil law. It is worth mentioning here that although

punitive damages do not currently exist under French law, the question of introducing this mechanism is under discussion in the context of a proposed revamping of the Civil Code rules on civil liability.

If the defendant is found not guilty, the criminal court may not grant damages to the civil party, except where the facts causing the harm were “unintentional.” The alleged victim may still have the possibility of bringing a claim against the defendant before a civil court. The criminal court’s not guilty decision may also grant the defendant damages, on the basis that the civil party abused its right to initiate a criminal action (the *constitution de partie civile* discussed above, see Chapter 5, *Beware of the Victim*).

11. And Two More Things...

In March 2019, France passed a new law that includes a number of changes to the criminal procedure. However, prior the enactment of that law, several of its provisions that were intended to increase the investigating powers of public prosecutors have been declared unconstitutional. While the changes brought by the new law as enacted are reflected in this guide, this deserves two final notes.

First, the landscape of the French criminal procedure is hardly a stable one. Over the past 20 years, there have been at least 20 bills that have made significant changes to certain key provisions of the French Code of Criminal Procedure. A number of these bills have just undone what previous bills had accomplished, as a reflection of the ebbs and flows of political majorities in parliament. Others were in response to public outrage following highly publicized crimes, which prompted the government to propose procedural changes intended to address alleged shortcomings in the procedural system.

New reshuffling of certain provisions of the French Code of Criminal Procedure would therefore not be a terribly significant event. As with previous instances of criminal procedure reform, prosecutors, the police and defense attorneys will adapt to new rules and develop practices based on them. The point is that observing the French criminal procedure requires closely following legislative developments to stay current.

Second, in terms of the trend the recent legislative evolution highlights, the key point seems to be a desire of the legislature gradually to increase the investigative authority of prosecutors,

11. And Two More Things...

correlatively making it less and less necessary for prosecutors to refer investigations to investigating judges. Against this background, it would not be surprising if the rate of judicial investigations in the population of cases brought before the courts would drop again in the years to come. Since this rate is about 3% of all criminal investigations at present, the legislative trend would appear ultimately to lead to a near elimination of judicial investigations.

Debevoise & Plimpton

New York

919 Third Avenue
New York, NY 10022
+1 212 909 6000

Washington, D.C.

801 Pennsylvania Avenue N.W.
Washington, D.C. 20004
+1 202 383 8000

London

65 Gresham Street
London
EC2V 7NQ
+44 20 7786 9000

Paris

4 place de l'Opéra
75002 Paris
+33 1 40 73 12 12

Frankfurt

Taunustor 1 (TaunusTurm)
60310 Frankfurt am Main
+49 69 2097 5000

Moscow

Business Center Mokhovaya
Ulitsa Vozdvizhenka, 4/7
Stroyeniye 2
Moscow, 125009
+7 495 956 3858

Hong Kong

21/F AIA Central
1 Connaught Road Central
Hong Kong
+852 2160 9800

Shanghai

13/F, Tower 1
Jing'an Kerry Centre
1515 Nanjing Road West
Shanghai 200040
+86 21 5047 1800

Tokyo

Shin Marunouchi Bldg. 11F
1-5-1 Marunouchi, Chiyoda-ku
Tokyo 100-6511
+81 3 4570 6680

www.debevoise.com