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The International Comparative Legal Guide to:

Business Crime 2019

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1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

Business crimes are usually prosecuted by a public prosecutor. Upon completion of his/her investigation, a matter considered to have sufficient evidential support will be referred to trial, generally before the criminal court of first instance (*Tribunal correctionnel*) for a trial without a jury. In unusually complex or large business crime cases, the public prosecutor may refer the matter to an investigating judge (*juge d'instruction*), who will then conduct an investigation (*instruction*) and decide whether or not to refer the matter to trial.

These enforcement authorities usually operate at a regional level, working with local police units. Certain criminal violations – such as complex criminal environmental cases – are usually handled by the public prosecutors or investigating judges of specialised offices (*pôles*).

Since 2013, France has had a national prosecutorial office dedicated to financial matters (*Parquet National Financier*, "**PNF**"). The PNF is composed of 18 public prosecutors. It has nationwide jurisdiction to prosecute complex financial crimes. Occasionally, when a financial case is complex and/or requires specific investigating measures, the PNF may refer the case to the investigating judges of the Paris court (*pôle financier du TGI de Paris*).

Certain business crimes are prosecuted by administrative agencies. For instance, cartels are prosecuted by the Competition Authority (*Autorité de la Concurrence*) while other anticompetitive behaviours can be prosecuted as ordinary crimes; market abuses (i.e., insider trading, market manipulation and dissemination of false information) are prosecuted either by the PNF or the Financial Markets Authority (*Autorité des Marchés Financiers*, "**AMF**").

Under certain conditions, victims of business crimes may also initiate prosecution, either by bringing cases directly before trial courts, or by requesting the appointment of an investigating judge.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

For most of financial crimes – including corruption, influence peddling, tax fraud, money laundering, etc. – the PNF has concurrent jurisdiction with regional public prosecutors. In practice, however, complex financial cases are handled by the PNF.

For market abuse crimes, the PNF has exclusive jurisdiction (i.e., regional public prosecutors cannot prosecute), provided that the case is not prosecuted by the AMF. Since March 2015, market abuses have only been subject to one type of prosecution, either criminal (PNF) or administrative (AMF). Once a first-level investigation has been carried out (usually by the AMF investigators), the AMF and the public prosecutor will decide whether the prosecution will be criminal or administrative.

In any case, the PNF or the public prosecutors may decide to refer a case to an investigating judge.

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

Several administrative agencies are responsible for administrative enforcement of certain business crimes:

- The Competition Authority is the enforcement authority for cartels involving corporations (enforcement against individuals participating in a cartel led by regular criminal authorities).
- The AMF is the enforcement authority for market abuses, provided it is not enforced criminally by the PNF (see question 1.2).
- The Prudential Control and Resolution Authority (*Autorité de Contrôle Prudentiel et de Résolution*, "**ACPR**") is the enforcement authority for non-compliance with anti-money laundering and anti-terrorist obligations of banks and insurance companies.
- The French Anti-Corruption Agency (*Agence Française Anti-corruption*, "**AFA**") is the enforcement authority for non-compliance with the obligation to implement corporate compliance programmes.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

In a landmark decision on March 14, 2018, the French Court of Cassation found Total and Vitol guilty of the active corruption of foreign public officials in relation to the U.N. Oil For Food programme in Iraq. This case is one of the rare instances of companies convicted of corruption before French courts. The €750,000 criminal fine imposed on Total amounts to the maximum applicable fine under French law at the time of the offences.

In December 2016, a French-style deferred prosecution agreement known as the *convention judiciaire d'intérêt public* ("**CJIP**") was introduced into French law. Under this new procedure, corporations

– but not individuals – accused of corruption, influence peddling and laundering proceeds of tax fraud may negotiate an outcome without a judgment of conviction. In November 2017, the PNF announced the first CJIP whereby HSBC Private Bank Swiss agreed to pay €300 million as settlement for criminal charges related to the laundering of proceeds from tax fraud. In June 2018, for the first time, Société Générale SA entered into both a DPA with U.S. authorities and a CJIP with French authorities to settle charges of corruption of foreign officials. The bank agreed to pay a total of $585 million, divided equally between the U.S. and French authorities.

2 Organisation of the Courts

2.1 How are the criminal courts in your jurisdiction structured? Are there specialised criminal courts for particular crimes?

Criminal violations are divided into three categories, which determine the applicable procedures and the participants in the process. High crimes (*crimes*) are criminal matters punishable by imprisonment of more than 10 years. They are always prosecuted by an investigating judge and are tried before a mixed jury in a special court (*cour d'assises*). Ordinary crimes (*délits*) are violations punishable by imprisonment from two months up to 10 years and by financial penalties. They are generally prosecuted by a public prosecutor, with an investigating judge appointed in cases of complex violations. Ordinary crimes are tried before a criminal court of first instance without a jury (*tribunal correctionnel*). Misdemeanours (*contraventions*) are violations punishable by financial penalties, and they are tried by a police court (*tribunal de police*).

Most business crimes are ordinary crimes. However, some business crimes are not treated as ordinary crimes, but rather as "administrative offences". As such, they are not tried before regular criminal courts. For instance, cartels are tried before the Competition Authority, and market abuses are tried before the AMF Enforcement Committee (unless they are subject to regular criminal prosecution by the PNF).

2.2 Is there a right to a jury in business crime trials?

Since most business crimes fall within the category of ordinary crimes, they are usually tried before a criminal court of first instance (*tribunal correctionnel*) before professional judges and without a jury.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in your jurisdiction to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

o Securities fraud

Most of the regulations governing securities violations originate from the 2014 EU market abuse regulation n°596/2014 and the April 16, 2014 directive n°2014/57/EU. The regulation and directive have been codified in the French Monetary and Financial Code (*Code Monétaire et Financier*, "**CMF**").

The main offences related to financial markets are insider trading (*délit d'initié*) and market manipulation (*manipulation de marché*) (see below).

If prosecuted by the PNF, an individual found guilty of market abuse may be sentenced by a criminal court to five years' imprisonment and a €100 million fine, or 10 times the amount of the profit realised. A corporation may be penalised with a €500 million fine, 10 times the amount of the profit realised, or 15% of its annual consolidated turnover. If prosecuted by the AMF, an individual does not face a prison sentence but may be sentenced to a €100 million fine or 10 times the amount of the profit realised. A corporation may be penalised with a €100 million fine, 10 times the amount of the profit realised, or 15% of its annual consolidated turnover.

Awareness of committing a violation is required to establish a criminal offence, but it is usually not required to establish an administrative offence. Attempted market abuse is punishable before both the criminal courts and the AMF Enforcement Committee.

o Accounting fraud

Pursuant to Article L.242-6 of the French Commercial Code, directors may be criminally liable for falsifying financial statements. This offence is punishable by up to five years' imprisonment and a €375,000 fine.

Fraudulent management leading to bankruptcy is punishable by up to five years' imprisonment and a €75,000 fine (Article L.645-2 *et seq.* of the Commercial Code). Fraudulently organising one's insolvency in order to evade a criminal conviction or a civil sanction is punishable by up to three years' imprisonment and a €45,000 fine (Article 314-7 of the Criminal Code).

o Insider trading

The insider trading crime (*délit d'initié*), which can only be prosecuted by the PNF, is defined by Article L.465-1 of the CMF. The related administrative offence, to be prosecuted by the AMF, is defined by Article 8 of the EU market abuse regulation.

Insider trading is committed when a party deals – or recommends that another person deal – in securities on the basis of insider information, that is, information that is not publicly known and which would affect the price of the securities, if it were made public.

The regulation against insider trading applies to any person who possesses inside information as a result of their: (a) position as a member of the administrative, managerial or supervisory bodies of the issuer; (b) position in the capital of the issuer; (c) access to the information through the exercise of his or her employment, profession or duties; or (d) involvement in criminal activities. The prohibition also applies to any other person who possesses insider information under circumstances in which that person knows or ought to know that it is inside information.

For applicable sanctions, see above: "Securities fraud".

o Embezzlement

The misuse of corporate assets (*abus de biens sociaux*) is an offence that concerns corporate managers who directly or indirectly use corporate property for purposes which are inconsistent with the interests of the company they manage (Articles L.241-3 and L.242-6 of the Commercial Code). It is punishable by five years' imprisonment and a fine of €375,000. If the offence was facilitated by foreign accounts, the offence is punishable by seven years' imprisonment and a fine of €500,000.

Breach of trust is an offence that consists of the misappropriation of funds or property, which were received based on an understanding that they would be handled in a certain way (Article 314-1 of the Criminal Code). This offence is punishable by three years' imprisonment and a fine of €375,000.

o Bribery of government officials

Both passive corruption and active corruption are unlawful under French law. Passive corruption occurs when a domestic or foreign

public official unlawfully solicits or accepts a bribe, either directly or indirectly. Active corruption occurs when another person, either directly or indirectly, unlawfully induces, or attempts to induce, a domestic or foreign public official or private actor to accept a bribe (Articles 433-1 and 433-2 of the Criminal Code).

For individuals, bribery is punishable by up to 10 years' imprisonment and a fine of up to €1 million, or up to twice the amount gained in the commission of the offence. For companies, the fine is up to €5 million or up to 10 times the amount gained.

Influence peddling is also punishable under French law. This offence consists of the abuse of one's real or apparent influence with intent to obtain advantages, employment, contracts or any other favourable decision from a public authority or the government. It is punishable by five years' imprisonment and a fine of €500,000.

o Criminal anti-competition

Under French law, cartels are not criminal wrongdoings but are administrative offences (see below, "Cartels and other competition offences"). However, it is an ordinary crime (*délit*) for any individual – but not a corporate entity – to fraudulently participate personally and significantly in the conception, organisation, or implementation of a cartel (Article L.420-6 of the Commercial Code). The criminal sanction amounts to four years' imprisonment and a €75,000 fine.

Other anti-competitive practices may be criminally prosecuted: selling a product at a loss (*revente à perte*) is punishable by a €75,000 fine (Article 442-2 of the Commercial Code), and artificially modifying the price of goods and services (*action illicite sur les prix*) is punishable by two years' imprisonment and a €30,000 fine (Article 443-2 of the Commercial Code).

o Cartels and other competition offences

Cartels are prohibited by Article L.420-1 of the Commercial Code. This statute prohibits concerted practices, agreements, express or tacit cartels, or combinations when they aim to limit market access, serve as barriers to price determination by the free market, limit or control production, market investment or technical development, or share markets or sources of supply.

Under Article L.420-2 of the Commercial Code, a corporation or a group of corporations is also prohibited from abusing a dominant position in an internal market or in a substantial part of an internal market. The following actions could constitute abuse of a dominant position: a refusal of sale; tied sales; discriminatory sales terms; or the breaking of an established commercial relationship, for the sole reason of a refusal by a commercial partner to submit to unjustified commercial terms. The exploitation by a corporation or a group of corporations of a client or a supplier's state of economic dependence is also prohibited by the same article.

Offering sale prices or determining consumer prices that are abusively low compared to the cost of production, transformation and commercialisation, where these offers or practices have as a goal or could have the effect of eliminating from a market or preventing access to a market with respect to an enterprise or one of its products, are also prohibited by Article L.420-5 of the Commercial Code.

These competition offences are prosecuted and sanctioned as administrative violations by the Competition Authority. According to Article L.464-2 of the Commercial Code, the Competition Authority may take any of the following actions:

- Order the end of the anti-competitive activity within a fixed period or impose specific conditions.
- Accept commitments proposed by companies or organisations that are likely to rectify their competition issues that may amount to competition violations.
- Apply an immediate pecuniary sanction or apply a pecuniary sanction in the event of a failure to respect the terms of an injunction, or of a failure to respect commitments that have been accepted.

The maximum sanction for an individual is €3 million, and the maximum sanction for an entity is 10% of its global profits before the application of any adjustment for tax. Final decisions of the Competition Authority may be appealed before the Paris Court of Appeal.

o Tax crimes

Tax fraud is an ordinary crime (*délit*) prohibited by Article 1741 of the General Tax Code (*Code Général des Impôts*): "Anyone who fraudulently evades assessment or payment in whole or in part of the taxes with which this Code is concerned or attempts to do so, whether by wilfully omitting to make his return within the prescribed time, by wilfully concealing part of the sums liable to tax, by arranging his insolvency, by obstructing the collection of tax by other subterfuges, or by acting in any other fraudulent manner, shall be liable."

Tax fraud is punishable by five years' imprisonment and a €500,000 fine. If committed by an organised group, and in some limited circumstances (including foreign domiciliation), tax fraud is punishable by seven years' imprisonment and a €3 million fine. Because they face a maximum fine of five times that which is applicable to natural persons, legal entities responsible for tax fraud may pay a fine of up to €15 million.

o Government-contracting fraud

Government-contracting fraud mainly refers to favouritism (*favoritisme*). For a public official, favouritism means conferring an unjustified competitive advantage to a person that would lead to different treatment among candidates. This offence is punishable by up to two years' imprisonment and a €30,000 fine (Article 432-14 of the Criminal Code).

o Environmental crimes

Criminal environmental offences are outlined in both the Criminal Code and the Environmental Code.

The Criminal Code contains only one specific crime relating to the environment: "ecologic terrorism", which is defined as "the introduction into the atmosphere, on the ground, in the soil, in foodstuff or its ingredients, or in waters, including territorial waters, of any substance liable to imperil human or animal health or the natural environment" (Article 421-2 of the Criminal Code).

Although not directly related to the protection of the environment, several other provisions are also used as legal bases for prosecution when damage to the environment occurs: endangering the lives of others (Article 223-1 of the Criminal Code), unintentional injury (Articles 222-19 and 222-20 of the Criminal Code), and manslaughter (Article 221-6 of the Criminal Code).

The Environmental Code contains numerous specific criminal offences relating to the environment, including, for instance, offences related to water pollution, air pollution, nuclear materials, protected species, ozone-depleting substances, and ship-source pollution.

o Campaign-finance/election law

Pursuant to Article L.52-8 of the Electoral Code, it is unlawful for businesses to finance electoral campaigns. Individuals' contributions may not exceed €4,600 per person. Candidates or funders who violate this provision face sanctions of up to three years' imprisonment and a fine of up to €45,000, pursuant to Article L.113-1 of the Electoral Code.

o Market manipulation in connection with the sale of derivatives

The market manipulation crime (*manipulation de marché*), which can only be prosecuted by the PNF, is defined by Article L.465-3-of the CMF. The related administrative offence, to be prosecuted

by the AMF, is prohibited by Article 12 of the EU market abuse regulation. Both offences apply in connection to the sale of financial instruments, including derivatives.

Market manipulation applies to any person who: (i) enters into a transaction that gives false or misleading signals to the market or secures the price of a financial instrument at an abnormal or artificial level; (ii) enters into a transaction that affects the price of a financial instrument by means of employing a fictitious device or any other form of deception or contrivance; or (iii) disseminates information that gives false or misleading signals to the market or is likely to secure the price of a financial instrument at an abnormal or artificial level, if the person who disseminated the information knew, or ought to have known, that the information was false or misleading.

For applicable sanctions, see above: "Securities fraud".

o Money laundering or wire fraud

Money laundering consists of fraudulently hiding the origin or the nature of funds or property (Article 324-1 of the Criminal Code). Individuals may be punished by up to five years' imprisonment and a €375,000 fine. These sanctions are doubled if committed by an organised group. Entities committing money laundering may be subject to a fine of €1,875,000 (€3,750,000 if committed by an organised group). These fines may be raised to up to half of the value of the property or funds with which the money laundering operations were carried out (Article 324-3 of the Criminal Code).

"Mail fraud" and "wire fraud" provisions of the U.S. Criminal Code (18 U.S.C. §§1341 and 1343) do not have a French equivalent. Rather, fraudulent conduct can be an element of various criminal provisions arising under the Criminal Code.

o Cybersecurity and data protection law

Principal cyber activities criminalised under French law are intrusions into information systems, removal or alteration of data, breach of data (such as passwords, email addresses and home addresses), the infection of a company's network by a Trojan horse, telephone tapping or call recordings, theft of computer files and documents, theft of digital identity and phishing attacks. Pursuant to Articles 323-1, 323-2 and 323-5 of the Criminal Code, sanctions range from two to five years' imprisonment, fines of up to €300,000, and ancillary sanctions such as forfeiture, debarment and deprivation of civil rights.

o Trade sanctions and export control violations

Trade sanctions and export control violations are prohibited by Article 459, para. 1, of the Customs Code, which imposes five years' imprisonment, confiscation of the object of the infraction, confiscation of the means of transport used for the fraud, confiscation of the goods or assets that are the direct or indirect product of the offence and a fine equal to, at a minimum, the amount at issue, and at maximum, double the proceeds of the offence or attempted offence.

Any person who induces the commission of one of the offences under Article 459, para. 1, of the Customs Code by means of writing, propaganda, or publicity may be subject to five years' imprisonment and a fine ranging from €450 to €225,000 (Article 459, para. 3, of the Customs Code).

o Any other crime of particular interest in your jurisdiction

Swindling (*escroquerie*): depriving a physical person or a company of money, a thing of value or services, or inducing the discharge of a debt by trickery, including by use of a false name, identity or pretences (Article 313-1 of the Criminal Code).

Breach of trust (*abus de confiance*): misappropriation of funds or property received based on an understanding that they would be handled in a certain way (Article 314-1 of the Criminal Code).

Taking advantage (*abus de faiblesse*): causing a victim to act or abstain from acting in a way that causes the victim injury, by taking advantage of a state of ignorance, weakness or vulnerability, including through use of psychological pressure (Article 223-15-2 of the Criminal Code).

Extortion (*extorsion*): obtaining anything of value (information, funds, signatures, etc.) through violence or threat of violence (Article 312-1 of the Criminal Code).

Falsification (*faux*): fraudulent alteration of the veracity of a document or other medium that creates a right or obligation (Article 441-1 of the Criminal Code).

Consumer fraud (*tromperie*): deceiving a purchaser regarding the nature, quality, quantity or appropriateness of merchandise (Article L.213-1 of the Consumer Code).

3.2 Is there liability for inchoate crimes in your jurisdiction? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

Yes, there is liability for inchoate crimes in France. Pursuant to Article 121-5 of the Criminal Code, the attempt to commit a crime is punishable when, in the process of its execution, the wrongdoing was stopped or prevented from achieving its effect due to circumstances beyond the control of the actor. Attempts to commit a serious crime (*crimes*) are always punishable. Attempts to commit an ordinary crime (*délit*) are punishable only if provided for by the law (Article 121-4 of the Criminal Code). One who attempts to commit a crime faces the same maximum sanctions as one who commits the crime.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

Corporations – or other legal entities other than the French state – may be held criminally responsible under Article 121-2 of the Criminal Code. Such entities may be found guilty for acts committed on their behalf (or for their benefit) by responsible individuals, referenced in the Code as "organs" or "representatives" of the entities.

An "organ" is generally an individual or group of individuals exercising powers inherent in their position in the entities or derived from an entity's constituent documents or internal governance. A "representative" is generally someone to whom certain responsibilities have been delegated by the entity. Court decisions are still in the process of clarifying who may be characterised as an "organ" or "representative".

The principal sanction incurred by corporate entities is a fine. The maximum amount of this fine is five times the fine that would be applicable to natural persons for the same crime. In the case of high crimes (*crimes*), when the law makes no provision for a fine to be paid by a natural person, the fine incurred by a corporate entity is €1 million. Corporate entities may also be punished with one or more additional penalties including: placement under judicial supervision; debarment; prohibition from offering securities to the public or listing securities on regulated markets, either permanently or for a maximum of five years; and/or forfeiture of property that was used or intended for the commission of the offence or property resulting from the crime.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime? Under what circumstances?

The establishment of corporate criminal responsibility does not exclude the possibility of individual responsibility for the same facts. Aside from any corporate criminal responsibility, a managing director (*chef d'entreprise*) may be criminally responsible for acts committed within a corporation subject to his supervision, unless these acts fall within the scope of a specific delegation of authority to another officer or employee in relation to a specific activity (e.g., employee's health and safety).

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

In a non-binding memorandum (*circulaire*) to public prosecutors, dated February 13, 2016, the French Ministry of Justice recommends the pursuit of both the legal entity and the individual (organ or representative) if the offence is considered to have been intentionally committed. Otherwise, the prosecution should only target the corporation.

4.4. In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

The French Court of Cassation has dismissed criminal proceedings against an acquiring company for acts previously committed by the target company. In a March 2015 decision, the European Court of Justice held otherwise, ruling that an acquisition results in the transfer to the acquiring company of the obligation to pay the fine imposed by a final decision, issued after the acquisition, for infringements of employment law committed by the target company prior to that acquisition. However, in a decision dated October 25, 2016 (No 16-80366), the French Court of Cassation maintained its traditional position.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

In February 2017, a new law extended the statute of limitations applicable for criminal prosecution. The limitations period has been extended to 10 to 20 years for high crimes (*crimes*) and three to six years for ordinary crimes (*délits*). For concealed infringement, the limitations period for prosecution begins running from the day on which the infringement is established. However, this period must not exceed 30 years for high crimes and 12 years for ordinary crimes from the day on which the crime was committed.

These new statutes of limitations apply to all crimes since March 1, 2017, including crimes committed prior to this date, if the previously applicable statute of limitations has not expired prior to such date.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

The limitations period starts running once the offence is entirely completed. For continuous offences – offences that are not completed instantly but over a period of time – the limitations period begins running only once the offence has reached completion. A continuous offence may therefore be prosecuted during its commission and during the provided limitations period after its completion. For concealed infringement, the limitations period for prosecution starts from the day on which the infringement is established (see above: question 5.1).

5.3 Can the limitations period be tolled? If so, how?

Limitations periods may be either "interrupted", at which point the limitations period starts anew following the interruption, or "suspended", at which point the remaining period keeps running after the suspension. The statutes of limitations reform from February 2017 codified situations giving rise to interruptions and suspensions of limitations periods, referring to previous case law:

- Interruption is caused by: any acts by the public prosecutor or any civil party to initiate proceedings; any investigative acts by the public prosecutor, the police, any authorised agent or the investigating judge to search and prosecute the actor; or any judicial decision (Article 9-2 of the Code of Criminal Proceeding).
- Suspension is caused by: any legal obstacle or acts of *force majeure* that make the opening of criminal proceedings impossible (Article 9-3 of the Code of Criminal Proceeding).

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

French criminal law applies to offences for which one component has taken place on French soil, the perpetrator is a French national or corporation, or the victim is French (Articles 113-6 to 113-12 of the Criminal Code).

Specifically for acts of corruption and influence peddling, French law applies to acts committed abroad, so long as the perpetrator is a French national, a French resident or someone engaged in, in whole or in part, business in France (regardless of the nationality of the victim).

Criminal procedures applicable to prosecutions of acts committed outside of France may be different from procedures that are applicable to domestic crimes.

6.2 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

For most business crimes, investigations are initiated and led by a public prosecutor (such as the PNF). Sometimes the public prosecutor may refer the case to an investigating judge, who then leads the investigation and has the discretion to either drop some or all of the charges or to turn the case over for trial. Both the public prosecutor and the investigating judge work in close connection with the police.

Investigations are usually opened on the basis of victim complaints, reports from another public authority, or press reports. If the public prosecutor does not prosecute, victims may request that an investigating judge commence a criminal investigation and may participate in the investigation (and in the trial) as "civil parties" (*parties civiles*).

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

In May 2017, the European Investigation Order (*Décision d'Enquête Européenne*) entered into force (Articles 694-15 to 694-49 of the Code of Criminal Procedure). This new tool created by EU Directive 2014/41/EU of April 3, 2014 aims to simplify and speed up cross-border criminal investigations in the EU. It enables judicial authorities in one EU Member State to request that evidence be gathered and transferred from another EU Member State. This new instrument replaces the existing fragmented legal framework for obtaining evidence within the EU.

France is also a signatory to a number of international agreements providing for cooperation in criminal matters. These include: bilateral extradition agreements with France's trading partners; European conventions relating to extradition from France to other European countries; more specialised agreements, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997, which requires cooperation among its signatories; numerous bilateral mutual legal assistance treaties ("**MLATs**"); and memoranda of understanding ("**MOUs**") with most of France's trading partners.

France has designated a special office of the Ministry of Justice to handle requests made under such treaties. The Ministry of Justice, the AMF and other organisations also have practical relationships with their foreign counterparts (such as the U.S. Securities and Exchange Commission). The U.S. currently stations a federal prosecutor and several agents of the Federal Bureau of Investigation at its embassy in Paris. Their work includes coordinating cross-border cooperation with their French counterparts, with whom they generally have a good relationship.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

Both the public prosecutor and the investigating judge, who work in conjunction with the police, have a full range of investigative powers (e.g. dawn raids, seizure of documents, wire taping and interviews). The scope of these prosecution powers will generally vary depending on the type of investigation. Investigations may take three different forms:

- A "flagrant offence investigation", led by the public prosecutor (*enquête de flagrance*), occurs when a crime punishable by imprisonment is in the process of being committed or has just been committed or if the suspect is found in the possession of something which would implicate his or her participation in the offence. This investigation allows for a wide variety of temporary detention, interrogation, search and seizure powers.
- A "preliminary investigation", led by the public prosecutor (*enquête préliminaire*), may be used in any case, regardless of the nature of the crime. Suspects must normally give their consent to searches or seizures. In general, no coercive measures are allowed.
- A "judicial investigation", led by an investigating judge (*information judiciaire* or *instruction*), occurs when the investigating judge is appointed by a public prosecutor. The investigating judge enjoys very broad powers of arrest, interrogation of witnesses and suspects, search and seizure.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

Both the public prosecutor and the investigating judge may demand that a company under investigation produce documents and/or raid a company. The circumstances will depend on the type of investigation (see above: question 7.1). Administrative authorities with authority to investigate and sanction administrative offences (such as the AMF or the ACPR) may also conduct investigations and demand that documents be produced; however, for these authorities, judicial authorisation is usually required for any raid involving seizure of documents.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

During a raid, all employee documents may be seized irrespective of whether they are personal or work-related. The banking secrecy rule (*secret bancaire*) may not be invoked.

The only available protection is "professional secrecy" (*secret professionnel*), the French near equivalent of "attorney-client privilege", which protects all communications between external counsel members of the bar (*avocat*) and their clients from disclosure. Professional secrecy therefore provides significant protection to individuals under investigation. In-house counsel are, however, not considered members of a bar, and professional secrecy does not protect their communications with the officers or employees of the company.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

No labour law impacts the collection, processing, or transfer of employees' personal data in the context of criminal investigations. All documents, files, emails, etc. located on an employee's device provided by the employer may be seized during police raids, irrespective of whether they are personal or work-related.

With regards to data protection, Law No. 2018-496 of June 20, 2018, which implements EU Directive 2016/680 of April 27, 2016, lays down the rules related to the protection of natural persons

with respect to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the enforcement of criminal penalties. The subjects of the data – including employees – have certain rights outlined in Articles 70-18 to 70-20 of the Law (e.g. right of access, rectification or erasure of personal data). However, under certain conditions, these rights may be restricted in order to, for instance, avoid obstructing official or legal inquiries, investigations or procedures or avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the enforcement of criminal penalties. If the personal data are contained in a judicial decision, record or case file processed in the course of criminal investigations and proceedings, right of access, rectification or erasure of personal data are governed by provisions of the Code of Criminal Procedure.

Cross-border disclosure may be impeded by the French blocking statute (Law No. 68-678 of July 26, 1968, as amended in 1980), which makes it a criminal offence for any person to provide information of scientific or commercial value to a foreign investigator or court for use in a non-French judicial or administrative proceeding, other than through the exercise of an international agreement.

7.5 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

See above: questions 7.1 and 7.2.

7.6 Under what circumstances can the government demand that a third person or entity produce documents to the government, or raid the home or office of a third person or entity and seize documents?

Authorities may order any third party to produce documents relevant to an investigation. Third parties may not invoke professional secrecy, unless they have "legitimate grounds". In a memorandum (*circulaire*) of May 14, 2004, the French Ministry of Justice interpreted "legitimate grounds" restrictively. Unless they are suspects, third parties may not be raided.

Questioning of Individuals:

7.7 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

Employees, officers, or directors of a company under investigation may be questioned in custody (*garde à vue*) if there are one or more plausible reasons to suspect that they have committed, or attempted to commit, a crime punishable by a prison sentence (Article 62-2 of the Code of Criminal Proceeding). The questioning may last for a period of 24 hours (subject to several renewal periods, depending on the crime). They may be assisted by an attorney.

They may alternatively be questioned under a non-custodial regime (*audition libre*). They must give their consent and must be notified of the date and nature of the crime, as well as of their right to attorney representation and right to terminate the interview and leave at their discretion (Article 61-1 of the Code of Criminal Proceeding).

If there is no plausible reason to suspect that they have committed or have attempted to commit a crime, they may only be interviewed as witnesses for up to four hours, with no right to assistance by counsel (Article 62 of the Code of Criminal Proceeding).

7.8 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

If there is no plausible reason to suspect they have committed or attempted to commit a crime, third parties may be questioned as witnesses (see above: question 7.6).

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Suspects questioned under the *garde à vue* or *audition libre* regimes have a right to be assisted by an attorney (see above: question 7.6). They also have a right to remain silent. In theory, no inferences may be drawn from silence, but in practice, the court will usually question the defendant's "refusal" to answer questions asked by authorities.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal cases are initiated by public prosecutors, or under certain conditions by the victims of crimes (see questions 1.1 and 6.2).

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

For most crimes, the decision to charge a defendant belongs to a prosecutor, in the prosecutor's discretion; subject, however, to policy guidelines that may be established by the Ministry of Justice. Where no investigating judge is appointed, the public prosecutor also has the authority to refer the defendant to trial before the criminal court of first instance for trial (*citation directe*).

In complex cases, the public prosecutor may request that the presiding judge of the local court appoint an investigating judge to investigate the facts that the prosecutor lays out. Under certain conditions, victims may also request that an investigating judge investigate the facts they set out in a complaint. If the investigating judge decides that there are important and consistent indications of culpability of a person or entity, this defendant will be put under formal investigation (*mise en examen* status), which provides the defendant with certain rights and protection. The investigating judge may either drop some or all of the charges against a defendant, or decide to refer the defendant to trial.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution agreements are available to dispose of criminal investigations.

A pre-trial guilty plea procedure exists for most ordinary crimes,

including business crimes (*comparution sur reconnaissance préalable de culpabilité*, "**CRPC**"). This procedure may be initiated by the public prosecutor of his own initiative, at the request of the defendant or, under certain conditions, by an investigating judge. The defendant agrees to plead guilty to a particular charge in return for a more lenient sentence. The public prosecutor may propose a prison sentence not exceeding one year and a fine not exceeding the maximum amount faced before the criminal court. If the defendant accepts the agreement, the agreement can only become effective with the approval of the court. If the defendant refuses the proposed agreement, the case will be tried in the usual way.

Specifically for corruption, influence peddling and laundering of proceeds of tax fraud, the Sapin II Law of December 2016 introduced a new procedure called a *convention judiciaire d'intérêt public* ("**CJIP**"), which is roughly similar to a Deferred Prosecution Agreement in the U.S. and the UK. The CJIP permits a public prosecutor to propose an agreement by which a corporation, without admission of guilt, would agree to pay a fine as high as 30% of its annual turnover and may agree to certain other obligations, such as the implementation of an enhanced compliance programme and supervision by a monitor. If an investigating judge leads the investigation, and the corporation is under formal investigation (*mise en examen*), the defendant corporation may only benefit from a CJIP upon formal acknowledgment of the facts and its legal characterisation – still without an admission of guilt – and once the investigating judge has concluded that there exist sufficient facts to constitute the commission of a criminal offence. If victims are identified, the CJIP must also provide for their compensation for losses resulting from the wrongdoing, which must be paid within one year. A CJIP may only be finalised following approval by a judge at a public hearing, at which the judge reviews the validity and regularity of the procedure, as well as the conformity of the amount of the fine to the statutory limit and the proportionality of the agreed-upon measures. The decision may not be appealed, and the agreement does not have the effect of a conviction. If the corporation observes the terms of the agreement for a period of three years, the charges will be dismissed, giving the corporation protection against prosecution in France for the facts giving rise to the CJIP.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

See question 8.3. A CJIP may only be finalised following approval by a judge at a public hearing, at which the judge reviews whether the procedure has been correctly implemented, that the agreed upon sanction is within statutory limitations, and that the overall sanction is in proportion to the facts giving rise to the CJIP. Courts conduct similar reviews in respect of CRPCs.

8.5 In addition to, or instead of, any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies may apply.

Any victim who has personally and directly suffered harm due to a criminal offence may participate in the criminal procedure as a civil party and seek damages before the criminal court (Article 2 of the Code of Criminal Procedure).

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

There is a presumption of innocence in France – a person is presumed innocent until proven guilty. It is for the public prosecutor to build the case and to produce sufficient evidence at trial in order to convince the court of the defendant's guilt. Any remaining doubt should weigh in favour of the defendant.

With respect to affirmative defences, the burden of proof shifts to the party raising them.

9.2 What is the standard of proof that the party with the burden must satisfy?

There is no statutory standard of proof to be met by the prosecution. Trial judges rule on the basis of their "innermost convictions" (*intime conviction*).

Because a public prosecutor has the burden of proving the defendant's guilt, he must convince the court that all factual and legal elements of the offence have been met and that the defendant had the requisite intent to commit the offence.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

Trial judges decide on the facts and assess whether the prosecutor and the defendant have both satisfied its burden of proof.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a business crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

Yes, French law recognises the principle of "aiding and abetting" (*complicité*). An accomplice is a person who knowingly provided assistance and facilitated the preparation of a criminal offence. A person is also an accomplice if he or she has precipitated an offence through gifts, promises, threats, orders, abuse of authority or power or has given instruction to commit it. The accomplice may be punished in the same manner as the principal perpetrator of the offence, and may incur the same maximum penalty (Articles 121-6 and 121-7 of the Criminal Code).

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Under French criminal law, crimes may be either intentional or unintentional. Where intent is required, it falls on the public prosecutor to prove that the defendant intended to commit the crime for which he is being prosecuted.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law, i.e., that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

Ignorance of the law is generally not a defence. However, there exists one statutory defence based on an erroneous understanding of the law: if a defendant, based on a mistake in the law that he or she was not in a position to avoid, can prove that he believed that the action could be legitimately performed, then the defendant is not criminally liable (Article 122-3 of the Criminal Code).

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts, i.e., that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

Ignorance of the facts does not constitute a defence. Where a defendant ignores that he has engaged in conduct that he knows is unlawful, this may open the possibility of a lack of intent defence, depending on the nature of the crime at issue.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

Any person who has knowledge of a high crime, the consequences of which it is still possible to prevent or limit, must report it to the authorities. Failure to report may be punished by three years' imprisonment and a fine of €45,000 (Article 434-1 of the Criminal Code).

Auditors must report business-related offences that they are aware of to a public prosecutor. Failure to report is punishable by five years' imprisonment and a €75,000 fine (Article 820-7 of the Commercial Code).

Civil servants who, in the performance of their duties, become aware of a crime must report it without delay to the public prosecutor and must provide all relevant information, minutes and documents relating to the report (Article 40 of the Code of Criminal Procedure). However, failure to report is not punishable.

Whistle-blowers may reveal possible criminal activity to French authorities. A person who legally qualifies as a whistle-blower and complies with the procedure for reporting provided by this law may not be held criminally liable for disclosing confidential information, as long as this action was necessary and proportionate to the safeguards of the interests involved. The whistle-blower may not be discriminated against nor have his or her employment terminated on the grounds of this disclosure. There is no provision under French law for the payment of a "bounty" to a whistle-blower.

13 Cooperation Provisions / Leniency

13.1 If a person or entity voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person or entity, can the person or entity request leniency or "credit" from the government? If so, what rules or guidelines govern the government's ability to offer leniency or "credit" in exchange for voluntary disclosures or cooperation?

France has no strong traditions or criminal procedures that encourage "self-reporting". Since 2013, however, perpetrators or accomplices to an offence of bribery or influence peddling of public officials or judicial staff will have their sanctions reduced by half if, by having informed administrative or judicial authorities, they enabled them to put a stop to the offence or to identify other perpetrators or accomplices. In a non-binding memorandum (*circulaire*) to public prosecutors dated January 31, 2018, the French Ministry of Justice also recommended that public prosecutors take into account self-reporting when deciding whether to offer a CJIP (the French-style DPA) to a corporation and when negotiating the amount of the fine. With regards to cartels, the first company to alert the authorities may avoid prosecution.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in your jurisdiction, and describe the favourable treatment generally received.

Apart from leniency programmes available before the French Competition Authority in the context of competition related offences, no guidelines have been issued.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed-upon sentence?

See question 8.3.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

See question 8.4.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of a sentence on the defendant? Please describe the sentencing process.

Sentencing guidelines are alien to the French system. French courts have the discretion to impose penalties of up to the maximum amount provided for by statutes. The sanction must, however, be proportionate to the seriousness of the offence and to the offender's

personality. For each offence, the statutes provide for the maximum jailtime and fine amount faced by natural persons. Legal entities face fines of up to five times the amount applicable to natural persons.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

In addition to respecting sentencing rules codified in the Criminal Code and the Code of Criminal Procedure, courts must respect formal requirements related to discussions and decisions (debates among judges sitting on the court are in chamber with no-one from the public, decisions must be in writing and set out the reasons for the decisions, decisions must be first given during an oral hearing, etc.).

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

Yes, guilty or non-guilty verdicts are appealable by the defendant and by the public prosecutor. A civil party (*partie civile*) may only appeal the part of a non-guilty verdict that relates to damages.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

Yes, a criminal sentence may be appealed by both the defendant and the public prosecutor. A civil party (*partie civile*) may only appeal a criminal sentence following a guilty verdict with respect to the amount of damages granted by the criminal court.

16.3 What is the appellate court's standard of review?

The standard of review utilised by the criminal court of appeals is identical to the standard used in the court of first instance. An appeal is essentially a *de novo* review: an appeal takes the form of a retrial by the appellate court based on elements of law and fact. By contrast, court of appeals decisions may be subject to review by the French Court of Cassation only on issues of law.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

Under French criminal law, an appeal has suspensive effect. Courts of appeals have the authority to acquit the accused (of all charges or of some counts) or to modify the sentence.

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