THE INTERNATIONAL INVESTIGATIONS REVIEW

Seventh Edition

Editor
Nicolas Bourtin

THE LAWREVIEWS

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CONTENTS

PREFACE

In the United States, it continues to be a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Healthcare, consumer and environmental fraud. Tax evasion. Price fixing. Manipulation of benchmark interest rates and foreign exchange trading. Export controls and other trade sanctions. US and non-US corporations alike, for the past several years, have faced increasing scrutiny from US authorities, and their conduct, when deemed to run afoul of the law, continues to be punished severely by ever-increasing, record-breaking fines and the prosecution of corporate employees. And while in past years many corporate criminal investigations were resolved through deferred or non-prosecution agreements, the US Department of Justice recently has increasingly sought and obtained guilty pleas from corporate defendants. With the new presidential administration in 2017 comes uncertainty about certain enforcement priorities, but little sign of an immediate change in the trend toward more enforcement and harsher penalties.

This trend has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in multiple countries increasingly compound the problems for companies, as conflicting statutes, regulations and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can replace the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world will find a wide and grateful readership.

The authors of this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage

the delicate interactions with the employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its seventh edition, this volume covers 23 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gift of time and thought. The subject matter is broad and the issues raised deep, and a concise synthesis of a country's legal framework and practice was in each case challenging.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
July 2017

Chapter 12

FRANCE

Antoine F Kirry and Frederick T Davis[1]

I INTRODUCTION

Investigations in France – whether purely domestic or part of trans-border activity involving other countries – follow procedures and principles that are fundamentally different from those in the United States. It is sometimes said that criminal justice in France is based on 'inquisitorial' principles while criminal justice in the United States (and other common law countries) is 'accusatory'. The distinction is neither scientific nor complete, and as a practical matter the differences can be exaggerated. It is, nonetheless, true that important fundamentals are distinctly different in France compared with the United States. These include:

a the relative role of prosecutors, judges and private attorneys;
b the importance of state actors in establishing the facts of a case;
c the relative absence in France of attributes of an 'adversarial' process such as cross-examination;
d the limited (but emerging) ability to negotiate with the prosecution authority;
e the insistence in France on judicial involvement in many aspects of a criminal investigation; and
f the absence of 'rules of evidence' comparable to those applicable in US courts.

Taken together, these and other significant differences may have important practical consequences on strategy. As a result, anyone involved in an investigation of any sort in France must consult closely with local counsel. Investigations can be either criminal or administrative, as described in more detail below.

i Criminal investigations

Criminal investigations involve potential violations of the criminal laws, which are generally found in the French Criminal Code (CP), and the procedures for which are found in the French Code of Criminal Procedure (CPP).[2] Criminal violations are divided into three categories, which determine maximum sanctions, the courts involved, applicable procedures, and participants in the process. High crimes are criminal matters punishable by more than 10 years in prison. A person accused of a high crime has a right to a jury trial in a special court called the assize court. Ordinary crimes are violations punishable by imprisonment

1 Antoine F Kirry is a partner and Frederick T Davis is of counsel in the Paris office of Debevoise & Plimpton LLP.

2 The CP and the CPP are both available in English at www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations.

of between two months and 10 years and by financial penalties; the crime of corruption and most business crimes fall within this category. They are tried before the local district court, of which there is one in each significant city throughout France. There is no jury trial. Misdemeanours are violations punishable by financial penalties and may be tried in lower courts, of which there are several sorts in different locations. Upon entry of the final judgment, an appeal may be taken to the relevant court of appeals; the public prosecutor may appeal an acquittal. The proceedings in a court of appeals amount virtually to a new trial, and the appellate judges – and, in the case of high crimes, the appellate jurors – can substitute their own finding of facts for those from the first trial, and enter their own judgment of guilt or acquittal. Upon entry of a judgment in a court of appeals, an unsuccessful party may seek review from the Supreme Court, which can review the judgment only for issues of law, and will either affirm the judgment or reverse it and remand to a court of appeals (generally a different one than the court whose judgment is reversed).

Criminal investigations in France fall generally into two categories: complex and important matters, which are referred to an investigating magistrate, and simpler matters handled by the public prosecutor and the police.

Investigating magistrates are found throughout France. In some instances they are teamed together in a group called a *pôle*; for example, the *pôle* financier in Paris includes the principal investigating magistrates who look into financial and other major business crimes, including corruption and insider trading. An investigating magistrate can be authorised to commence an investigation by an order from the public prosecutor after the latter has conducted a preliminary investigation. In some instances, however, third parties with an interest in the matter – often victims but occasionally non-governmental organisations given standing under the CPP – may file a complaint with an investigating magistrate and, if given the status of a party, become formal parties to the investigation with access to the investigation file (and, ultimately, are parties to the trial and any appeal). An investigating magistrate proceeds *in rem* (i.e., the scope of his or her investigation is limited to the facts and the persons listed in the public prosecutor's order). He or she is obligated to determine whether a violation has occurred and, if so, who may be responsible for it. If the investigating magistrate determines that there is 'significant and corroborated evidence' of the criminal responsibility of an individual or a company, that person is summoned to appear before the investigating magistrate and in the absence of a strong demonstration of non-responsibility (such as a misidentification) will be put under formal investigation. This status, '*mise en examen*,' is the rough equivalent of being informed that one is a 'target' under US Department of Justice (DOJ) guidelines. A person or company against whom weaker evidence has been assembled, but who is still of interest to the investigating magistrate, may be designated a material witness, roughly the equivalent of being a 'subject' in the United States. Both a person *mise en examen* and a material witness have a right to formally appear in the investigative proceeding through counsel and to receive access to the entire file assembled by the investigating magistrate. The investigating magistrate has a wide range of tools that may generally be exercised by the judge alone or with police. Such tools include wiretaps, 'dawn raids' on premises and custodial interrogations in which a person may be held for 24 hours (subject to several renewal periods

of 24 hours, depending on the violations, and up to a maximum of 120 hours for persons suspected of terrorism) for questioning, usually in the presence of counsel.[3] Interviews are generally reduced to a written statement, which the declarant is asked to sign.[4]

When the investigating magistrate has finished an investigation, he or she will formally transfer the investigation file to the public prosecutor. The prosecutor will then review the file and submit observations in a formal document, copied to the parties to the investigation, which provides an opinion as to which parties (if any) should be bound over to trial and on what charges. The position of the public prosecutor is not, however, binding on the investigating magistrate, who can, and sometimes does, decide to bind parties over to trial even in opposition to the position of the public prosecutor, or vice versa. Since the prosecutor's views nonetheless have significant weight,[5] the parties have an opportunity to file their own observations before a final decision of the investigating magistrate.

The investigating magistrate must issue a formal decision to close an investigation. The principal outcome is either a dismissal as to that person and those charges, or alternatively the target is bound over to trial on specified charges. In unusual circumstances an investigating magistrate can declare that he or she is without jurisdiction to proceed at all. The public prosecutor may appeal a dismissal; however, parties bound over to trial cannot normally appeal such a decision. Throughout the period when they are formal parties to the investigation – whether *mise en examen* or material witness – the parties through their counsel may be procedurally active, and can strategically intervene to influence the direction of the investigation. An example might be a formal request that the investigating magistrate search for certain evidence that might be exculpatory, or appoint an expert on a certain matter. Such requests are often discussed informally with the investigating magistrate. Throughout the investigating magistrate's investigation, all the parties to it are bound by a secrecy obligation, making it a crime to disclose proceedings before the magistrate, although leaks to the press are very common.

Two differences from US investigative practices must be emphasised. First, before a person or a company is given formal status of *mise en examen* or material witness, there is little if anything that can be done to influence an investigation or prepare a defence, even if the party and its counsel are acutely aware that an investigation is under way (which is often the case if witnesses are summoned, or if there are 'dawn raids' to obtain evidence). Before such a formal designation, any contact with an investigating magistrate would be viewed as irregular and improper, with negative consequences. Second, it is difficult for defence counsel to obtain information by interviewing witnesses or potential witnesses once any form of investigation has commenced, because any contact with a potential witness by a target or potential target (or counsel) with a percipient witness will almost inevitably be viewed as

3 Frederick T Davis & Antoine F Kirry, 'France to Reform Controversial Interrogation Practices', *The National Law Journal*, 7 February 2011, www.nationallawjournal.com/id=1202480394440/France-to-reform-controversial-interrogation-practices?slreturn=20170418094503.

4 See later in this section for a discussion of the right to silence at such an interrogation, and its invocation.

5 Neither prosecutors nor judges are considered lawyers in France, in the sense that they are not members of the local bar and they generally have not received professional training applicable to lawyers. Rather, both prosecutors and judges are considered 'magistrates', and receive their professional training following law school graduation at the French National School for the Judiciary in Bordeaux. Judges and prosecutors thus tend to have somewhat closer professional relations with each other than either has with members of the bar. Prosecutors nonetheless serve within the Ministry of Justice, and are not considered 'independent' of the government.

an attempt to influence that person's testimony, with potentially dire results. As a result, members of French bars tend to scrupulously avoid contacting witnesses in any disputed matter, including criminal investigations.

The investigating magistrate is required to conduct an impartial search for both incriminating and exculpatory evidence, thereby to establish 'the truth' of what happened. All of the fruits of the investigation – including not only documents that are seized, but also witness statements based on custodial or other interviews – will be meticulously recorded in a file. At the end of an investigation, if the matter is bound over to trial, this file will be turned over to the trial court as part of the record before the trial judges and essentially will be the evidentiary baseline for the trial. Since there are very few rules of evidence limiting proof that may be considered against the accused, including hearsay, in theory the evidence at a trial could consist of no more than the contents of the file assembled by the investigating magistrate, including the 'testimony' of witnesses only as set out in the formal record of their interrogations.

The trial of a regular crime will be before three judges. High crimes are tried before a jury consisting of three judges and nine lay jurors chosen at random, all of whom deliberate together. A guilty verdict in a jury trial need not be unanimous, but must be based upon at least eight votes (which mathematically ensures that at least a majority of the lay jurors voted for conviction). At trial, live witnesses may be heard (if the presiding judge concludes that there is a meaningful dispute about that witness's testimony) and the defence may offer additional testimonial proof. The defendant (including a formally designated representative of a company) is expected to be at trial; while not put under oath, the defendant (or corporate representative) may be – and often is – questioned by the judges. No literal transcript of trial proceedings is kept, although the court clerk will keep notes (sometimes handwritten) of proceedings, which become part of the record. There is a presumption of innocence, although the contents of the file as noted above may be sufficient to establish guilt. The judges can convict only if they are convinced of guilt. The basis for a conviction or acquittal will generally be set out in a written judgment. There is no tradition of dissenting opinions. As noted above, a final judgment (including an acquittal) can be appealed to the court of appeals by a party dissatisfied with the outcome, and 'cross appeals' are often filed. The court of appeals will then review the facts as well as the law *de novo*, and reach its own conclusion as to both. Appeals from an assize court decision of a high crime are to an appellate assize court, where the case will be heard by a jury of 15 consisting of three judges and 12 lay jurors, with a majority of 10 being necessary to convict.

Victims claiming injury from a criminal act can, and usually do, pursue any damage claims in the same proceeding as a criminal trial, provided that they have applied for and been given the formal status of 'civil parties'. In the event of a conviction, the court will separately assess damages. Civil liability is generally linked to criminal responsibility. There are only limited circumstances in which a court can acquit a defendant of criminal responsibility but assess civil damages. Victims can bring a separate lawsuit, but often choose to join a criminal matter in order to get the benefit of evidence assembled by the prosecution or the investigating magistrate. In some circumstances, the state may set up an administrative fund that compensates victims even in advance of a judicial proceeding, in which case the administrator of the fund may become subrogated to their rights to claim compensation from a defendant in a criminal trial.

Throughout an investigation and trial, including a custodial interrogation, a person under investigation has a right to remain silent. The right to silence is, however, invoked

much less frequently than in the United States, in large part because of a common but strong inference in France – which is legally permitted – that a person otherwise in a position to do so who declines to explain his or her circumstances is acting out of an awareness of guilt.

Although most criminal investigations involving international matters are likely to be addressed by an investigating magistrate, overall more than 90 per cent of all criminal cases proceed on a simplified basis without one. In those cases, the police – of which there are many national and local agencies, including specialised ones – work together with the public prosecutor to investigate a matter and to build an evidentiary record. When the prosecutor is satisfied with the record, the matter is referred to the relevant court (which will generally be local to the place of infraction and may depend upon the severity of the accusation). At that time, the accused and his or her counsel will have access to the file, which will serve as the basis to prepare for trial.

ii Administrative investigations

Scores of administrative agencies in France are empowered to conduct inquiries or investigations of one sort or another. Such matters are generally governed by specific laws, practices, and procedures applicable to these agencies, including appellate review in some circumstances. The ultimate authorities for appeals against decisions from these administrative agencies are either the Supreme Court or the Council of State, which functions (in addition to other responsibilities) as a 'supreme court' for administrative matters.

In the international context, the two agencies most likely to be involved are the Financial Markets Authority (AMF) and the Competition Authority (AC). The AMF is empowered to investigate insider trading and other infractions relating to public securities markets. The opening of an investigation is decided by the General Secretary of the AMF and usually follows observations made in the course of company monitoring and market surveillance. The investigators can then summon and take statements from witnesses, gain access to business premises and require the production of records. If they conclude that the evidence shows a market conduct violation, the case goes to the Enforcement Committee of the AMF. The sanctions imposed by the AMF can now go up to €100 million or 10 times any earned profit. Appeals are heard by the Paris Court of Appeals or the Council of State, depending on the market violation involved.

The AMF works increasingly closely with the US Securities and Exchange Commission (SEC) and the DOJ, and has, for example, used its procedures to gather evidence ultimately used by the DOJ to prosecute and convict a French national under US insider trading laws for activities that took place in France. The AC works very closely with competition authorities within the European Commission, as well as with antitrust authorities in the United States. The AC will generally align its rulings with those of European antitrust authorities.

An important decision in 2015 has had a significant impact on AMF investigations, and perhaps will also have an effect on other administrative proceedings. Prior to this decision of the French Constitutional Council, a defendant could be tried before the AMF for an insider trading violation and be definitely acquitted or sanctioned by that body and, subsequently, be prosecuted in a criminal court for insider trading based on the same facts. On 18 March 2015, the Constitutional Council[6] held that, among other articles, Article L

6 The Constitutional Council is the only body in France that reviews the constitutionality of French laws. In 2008, an amendment to the French Constitution introduced the possibility of an *a posteriori* review of the constitutionality of French laws. Prior to that time, the Constitutional Council reviewed the

465-1 of the French Monetary and Financial Code, relating to the criminal offence for insider trading, and the Sections of Article L 621-15 of the same code that define the analogous administrative violation are unconstitutional based on the principle of the necessity of crimes and sanctions as expressed through Article 8 of the French Declaration of the Rights of Man and of the Citizen.[7] The Constitutional Council abrogated, effective 1 September 2016, these unconstitutional articles of the Monetary and Financial Code. This decision gave the French legislature until 1 September 2016 to must amend the law on insider trading to bring it into conformity with the French Constitution. This was accomplished by a law of 21 June 2016, which includes a coordination procedure between the public prosecutor and the AMF, to avoid duplicative prosecution [8]

II CONDUCT

i Self-reporting

Self-reporting with respect to significant criminal matters faces procedural and traditional obstacles in France; it is not regularly done, and if attempted may, in at least certain circumstances, be counterproductive. The issue must be addressed with great care; it is currently the subject of public debate in France and may evolve.

Until very recently, the fundamental obstacle to self-reporting had been the absence of any formal or effective means of negotiation of a plea or other disposition for most criminal violations. In both the United States and the United Kingdom, to varying degrees and under different procedures, a company that may be criminally responsible for historical acts can investigate the matter internally (as discussed in the next section) and then make an evaluation as to whether it is in the best interests of the company to self-report. Notably, in each country there are guidelines, as well as well-known procedures and practices, for how to do this. In each instance, the relevant authorities typically make clear that a self-reporting company will receive significant benefits in the ultimate sanctions imposed (if any), and the authorities may agree to a non-penal alternative, such as, a deferred prosecution agreement (DPA) or even full clemency. There used to be virtually no means in France of a negotiated criminal outcome available to corporations or in significant business matters. The CPP contains a procedure known in France as the CRPC, which is an acronym standing roughly for 'appearance based upon prior acknowledgement of guilt', and which allows a party to agree to have a plea of guilty entered against it. Since 2011, the CRPC procedure has been available to corporations facing charges such as corruption and other financial infractions. During that time, however, only one corporation – a Swiss bank – has availed itself of the procedure. Nor is the procedure likely to be heavily used in the future: it essentially amounts

constitutionality of French laws exclusively prior to their promulgation. A constitutional question may now be raised in a trial court if the contested law is applicable to the pending litigation and if the question is new or serious, and has not already been reviewed by the Constitutional Council. If the law has already been reviewed by the Constitutional Council, there must have been a change in circumstance such that the law should be reviewed again. A constitutional question can be transmitted to the Constitutional Council via the French Supreme Court.

7 Constitutional Council, 18 March 2015, Decision No. 2014-453/454 & No. 2015-462, www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality-qpc-/sample-of-decisions-qpc/2015/decision-no-2014-453-454-qpc-and-2015-462-qpc-of-18-march-2015.143596.html.

8 Law No. 2016-819 of 21 June 2016, Article 2.

to a non-negotiated, or minimally negotiated, guilty plea, which typically is proposed after an investigating magistrate has established the facts and where the parties agree that the proof will lead to conviction. Further, it requires the consent of four different parties: the investigating magistrate, the public prosecutor, and any victims who have taken the status of 'civil parties', as well as the corporation itself. Especially since the procedure ends in a judgment of conviction, it would appear that it provides little incentive for corporations to use it.[9]

In December 2016, the legislature finally adopted the much-debated Sapin II Law, which provides a procedure for corporations (but not individuals) accused of corruption or certain money laundering offences to negotiate an outcome without a judgment of conviction. While the procedure is roughly similar to the US DPA – and was clearly adopted to give French prosecutors tools to compete with US prosecutors who had entered into DPA or guilty plea with French companies – it contains significant differences from the US model that may affect its attractiveness; as of the writing of this chapter, no French DPA has been announced,[10] and there is much to learn about how the procedure will be used by French prosecutors, and considered by judges. The law permits a prosecutor to propose an agreement (known in French as a JCPI, which stands roughly for a 'judicial convention in the public interest') whereby a corporation recognises its responsibility for facts constituting a crime, agrees to pay a fine that may be as high as 30 per cent of annual turnover, and may agree to certain other obligations such as an enhanced compliance programme and supervision by a monitor. If an investigating magistrate has conducted an investigation and put the corporation in *mise en examen* status, as described above, a JCPI can only be proposed once the magistrate has concluded that there exist facts sufficient to constitute the commission of a crime. The agreement must also be approved by any victims formally identified as civil parties and must provide for their compensation. The agreement is then presented to a judge who must evaluate whether the agreement is in the public interest; such a finding must be explained in a public document. If the corporation observes the terms of the agreement for a period of three years, the charges are dismissed, giving the corporation protection against prosecution in France.[11] The complexity of the procedure, the need for potentially searching judicial review, and the potentially high possible financial penalties may all be obstacles to frequent recourse to it. Further, in France it is significantly more difficult to convict corporations than in the United States; as noted below, the law regarding corporate criminal responsibility is much more demanding, and it is an open question whether many French corporations will in essence forego a defence based on those principles in order to obtain the benefits of a JCPI.[12]

9 See Frederick T Davis, 'First Corporate Guilty Plea in France – Will There Be More?', *Ethic Intelligence*, February 2016, www.ethic-intelligence.com/experts/11539-first-corporate-guilty-plea-france-will/?wb48617274=A16535F1.

10 The press has indicated that a prominent Swiss bank entered into negotiations seeking such an agreement but was unable to reach agreement. See Jennifer Thompson et al., 'UBS Faces Tax Evasion Trial in France After Settlement Talks Fail', *Financial Times*, 20 March 2017, www.ft.com/content/093e3cfc-0d6b-11e7-b030-768954394623.

11 For a fuller description of the Sapin II Law, see Frederick T Davis, Andrew M Levine & Charlotte Gunka, 'France's New Anti-Corruption Framework: Potential Impact for Businesses in a Multijurisdictional World', *Compliance & Enforcement*, 7 December 2016, https://wp.nyu.edu/compliance_enforcement/2016/12/07/frances-new-anti-corruption-framework-potential-impact-for-businesses-in-a-multijurisdictional-world/.

12 For a discussion of how France's rules regarding corporate criminal liability may inhibit its fight against overseas corruption, see Frederick T Davis, 'Guest Post: Limited Corporate Criminal Liability Impedes

In the areas of competition and securities, self-reporting to and negotiation with administrative agencies are possible. Since 2001, the AC has supervised a leniency programme that offers total immunity or a reduction of fines for companies involved in a cartel that self-report and cooperate by providing evidence. A settlement programme also offers fine reductions for companies that elect not to challenge the objections filed by the AC: the maximum amount of the fine normally applicable will be reduced by half and the company may benefit from a 10 per cent reduction of fines or more if it puts in place or improves a competition law compliance programme. Since 2011, the AMF has also supervised a settlement programme applicable to individuals or companies targeted by the regulator for violations of their professional duties as financial intermediaries (i.e., not for market abuses such as insider trading or market manipulation).

Other than in the areas of antitrust and securities, however, there is no tradition of self-reporting corporate crimes in France. The US DPAs and its UK equivalent are both based upon the strong presumption that a corporation will obtain its benefits by making a 'self-report;' absent such, the corporation will clearly be far less able to negotiate effectively. There is as yet no indication that French prosecutors will significantly 'reward' a corporate self-report, and there is no mention of such in the Sapin II Law. A strategic determination whether or not to self-report must be carefully considered under all the circumstances. In the event of a situation where prosecutors in other countries are or may get involved in investigating the same facts, the decision must be made in the strategic context of coordinating the potential discussions among the relevant jurisdictions.

ii Internal investigations

'Internal investigations' in the American sense must be approached very warily in France, for two reasons. First, there are a number of unusual local factors that may make the conduct of an internal investigation quite difficult; second, there are limits to their actual function and ultimate use.[13] The rules applicable to internal investigations in France are evolving rather rapidly, and much change can be expected in this area.

Until recently, it was an open question whether a French lawyer could even participate in an internal investigation; many expressed the concern that a lawyer doing so might lose his or her independence, or risk becoming a witness. These concerns were addressed, at least in part, by a thoughtful opinion of the Paris Bar issued in March 2016,[14] which opined that lawyers can participate in internal investigations; that they may do so even with respect to their usual clients; and that a lawyer conducting the investigation is subject to *le secret*

French Enforcement of Foreign Bribery Laws', *The Global Anticorruption Blog*, 1 September 2016, https://globalanticorruptionblog.com/2016/09/01/guest-post-unduly-limited-corporate-criminal-liability-impedes-french-enforcement-of-foreign-bribery-laws/.

13 For a general description of the challenges of doing internal investigation in a cross-border investigation involving France, see Frederick T Davis, Antoine F Kirry & Mark P Goodman, 'Multi-Jurisdictional Criminal Investigations Pose Challenges', *New York Law Journal*, 18 November 2013, www.newyorklawjournal.com/id=1202627815370/Multi-Jurisdictional-Criminal-Investigations-Pose-Challenges?slreturn=20140419170043.

14 'Rapport sur l'avocat chargé d'une enquête internet', *Ordre des avocats de Paris*, 25 February 2016, www.avocatparis.org/mon-metier-davocat/publications-du-conseil/rapport-sur-lavocat-charge-dune-enquete-interne.

professionnel, the rough equivalent of (but in some respects markedly different from) the US attorney–client privilege. This opinion was clarified in guidelines for the legal profession that were issued by the Paris Bar in September 2016.[15]

Crucial and sensitive points addressed in the issued opinions include whether, and the circumstances under which, an attorney should affirmatively advise the interviewee of a right to consult with independent counsel, and other aspects of what in the United States would be considered 'Upjohn warnings'.[16] Further, while the March 2016 Bar Opinion specifies that the fruits of an investigation, whether or not conducted at the request of a lawyer's 'usual' client, are protected by the French near-equivalent of the attorney–client privilege, many questions remain regarding how much the attorney conducting the investigation may be involved in discussions about it with third parties.

Many aspects of French law are protective of the rights of individual employees and other individuals, and are generally hostile to sharing certain kinds of information, particularly outside France or the European Union. The maintenance of databases containing any kind of personal information in France is strictly governed by rules supervised by the National Commission on Informatics and Liberty (CNIL). Companies operating in France generally must submit a plan to the CNIL for the maintenance of databases. Further, taking databases or the information in them outside France, and certainly outside the European Union, may violate specific CNIL rules relating to such conduct. There are specialised procedures and practices for dealing with the CNIL. France, in common with other countries in Europe, has developed specific privacy rules relating to information that individuals may deem to be personal, even when stored in a business context. Finally, workplace rules – and the significance given to workers' councils in collective bargaining and other employee relations – are sufficiently important that work representatives often must be consulted in the context of even a simple internal review.[17]

Separate from the question of whether and how an internal investigation can be conducted is the question of how to use its fruits. A report based on an investigation that is solely used by the company itself in order to evaluate risk, devise strategy, or adopt changes would raise no problem, and would presumably be protected from government seizure or compelled production. Much more problematic, however, is sharing the fruits of an investigation with a third party, particularly a prosecutor or investigative agency. The *secret professionnel* prohibits a lawyer who has conducted an investigation from sharing it with a third party, even with the consent of the client; in this respect, the secret is significantly different from the US attorney–client privilege. The client, however, is not under any professional restriction, and can share a lawyer's report with a third party.

Investigations that are carried out in contemplation of disclosure to non-French public authorities, and certainly those carried out in coordination with (or in response to a subpoena or a demand from) them, encounter more formidable obstacles. The French 'Blocking Statute'[18] prohibits – and provides criminal sanctions for – transmittal of much documentary

15 'Nouvelle annexe XXIV : Vademecum de l'avocat chargé d'une enquête internet', *Conseil de l'Ordre*, 13 September 2016, www.avocatparis.org/mon-metier-davocat/publications-du-conseil/nouvelle-annexe-xxiv-vademecum-de-lavocat-charge-dune?wb48617274=67E39915.

16 *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

17 For a practical discussion of these issues, see Frederick T Davis et al., 'Conducting third party FCPA diligence in France', *The Global Legal Post*, 24 October 2012, www.globallegalpost.com/global-view/conducting-third-party-fcpa-diligence-in-france-87881254/#.UbCwd9n0Suk.

18 Law No. 68-678 of 26 July 1968 as amended by Law No. 80-538 of 16 July 1980.

and testimonial evidence in France to officials in other countries. By its terms, the Blocking Statute would appear to apply primarily to a person or company making any direct response (that is, without going through international conventions on a state-to-state basis) to a foreign judicial or administrative discovery request, subpoena, or the like. Although no court has so held to date, the better view is that even private information gathering in France by a company or its attorneys with a view to sharing that information with investigative authorities in other countries may violate the law.[19] Further, if a company obtains data in France pursuant to a purely private investigation, removes that data from France, and subsequently makes a decision to turn that information over to a foreign investigative authority, such conduct may violate the Blocking Statute pursuant to the French principles of extraterritoriality (see Section IV.i, *infra*).[20]

If a company determines that data or other information situated in France should be shared with investigative authorities outside the country, the only formal means of doing so in strict compliance with the Blocking Statute is to proceed under the terms of an international convention, such as the Hague Evidence Convention. While a formal procedure under the Hague Evidence Convention may take months, practical workarounds may be possible. One is to take advantage of relatively informal mutual aid between comparable agencies in France and the United States. The AMF and the SEC, for example, have increased their practical coordination, and the SEC has been able to quickly ask its sister agency in France to issue a request for information in France that the company is perfectly willing to produce but is barred from producing by the Blocking Statute. The company thus produces the information in France to the AMF for immediate transfer to the SEC. An obvious problem with this arrangement is that the AMF thereby becomes aware of the underlying investigation (if it has not already been so) and may, depending on the facts and the importance for French interests, commence its own.

iii Whistle-blowers

Traditionally, France has had little or no protection for whistle-blowers, the value of whose function is appreciated less in France than in the United States. The above-mentioned Sapin II Law, however, has enhanced whistle-blower status and protections in an effort to match international standards; it introduces new measures to insure anonymity and non-liability of whistle-blowers, and obligates companies to implement procedures to encourage communication to direct or indirect supervisors (or, absent a satisfactory response from them, to judicial or administrative authorities under certain circumstances). It provides for criminal and administrative penalties for violations.

19 In 2007, a Franco-American attorney was convicted under the Blocking Statute, and fined €10,000 for interviewing in France a potential witness in a pending litigation in the United States. The DOJ appears to recognise the risk posed to companies, and their lawyers, who collect information in France for transmittal to the DOJ. In several recent DPAs that have been made public, the DOJ has recognised that the disclosure or reporting obligations of the company to whom the DPA applies, as well as any monitor acting under its authority, must comply with the French Blocking Statute. See, e.g., *United States v. Alcatel-Lucent, S.A.*, 1:10-cr-20907-PAS (S.D. Fla.) (Deferred Prosecution Agreement filed 22 February 2011); *United States v. Total, S.A.*, 1:13-cr-239 (E.D. Va.) (Deferred Prosecution Agreement filed 29 May 2013).

20 For a thorough discussion of the Blocking Statute and the reactions given to it by US courts, mostly in the context of civil litigation, see Pierre Grosdidier, 'The French Blocking Statute, the Hague Evidence Convention, and the Case Law: Lessons for French Parties Responding to American Discovery', *Texas International Law Journal Forum*, 2014, www.tilj.org/content/forum/forum_GROSDIDIER.pdf.

As a measure of the circumspection with which such matters are viewed, under rules promulgated by the CNIL, companies may open hotlines with toll-free numbers encouraging employees and others to provide information of wrongdoing of which they obtained personal knowledge, but only regarding five specific topics designated by the CNIL. There is no provision for rewards to be paid to whistle-blowers.

III ENFORCEMENT

i Corporate liability

Article 121-2 of the CP provides that a corporate entity can be held criminally responsible for the acts of its 'organ or representative' done for the benefit of the corporation. The statute specifies that such responsibility is not exclusive of individual responsibility for the persons involved.

Because this provision, which has existed in its current form only since 1994, is relatively new, prosecutorial policies and practices, as well as details of the application of the law by the courts, remain to be explored. The courts are still exploring, for example, the relative seniority or importance of an officer or employee necessary to qualify him or her as an organ or a representative of the company sufficient to trigger the application of the statute. The courts are also unclear whether a corporation can be held criminally liable without a specific finding as to which individual had committed acts deemed to be binding on the corporation.

In 2014, a French corporation was initially convicted of overseas bribery on the basis of bribes paid to officials in Nigeria by officers of the company. On appeal, the public prosecutor sought the corporation's acquittal on the ground that the individuals who had made the payments were not shown to have had sufficient authority to bind the corporation. The Court of Appeals did not reach that issue because it acquitted the corporation (and its officers) for lack of sufficient evidence. The case has garnered significant commentary because the conviction in the court of first instance – now vacated – had been the only instance of a corporate conviction under the French analogue of the Foreign Corrupt Practices Act, adopted in 2000 in compliance with the OECD Anti-Bribery Convention of 1997.[21]

ii Penalties

Both corporate and individual criminal penalties, whether financial or imprisonment, tend to be significantly lower than in the United States.

The maximum penalties for any offence will be found in the CP in articles generally adjacent to those specifying the elements of the offence. These provisions may provide for

21 See Frederick T Davis, 'The Fight Against Overseas Bribery – Does France Lag?', *Ethic Intelligence*, January 2015, www.ethic-intelligence.com/experts/7546-fight-overseas-bribery-france-lag/; Frederick T Davis, 'Corporate Criminal Responsibility in France – Is It Out of Step?', *Ethic Intelligence*, April 2015, www.ethic-intelligence.com/experts/8344-reflections-safran-appeal/. In February 2016, the Paris Court of Appeals did convict two corporations for violations of the so-called 'Oil for Food' programme administered by the United Nations to provide humanitarian relief to Iraqi citizens during the regime of Saddam Hussein. Those corporations did not engage in 'classic' bribery of a foreign official, but rather made payments that violated UN rules directly to the Iraqi regime. While the Court of Appeals held that this constituted a violation of France's corruption statute, even without the presence of a corrupted official, its reasoning seems limited to unusual facts, and is being reviewed by the Supreme Court of France.

enhancement under individual circumstances, such as those involving predation upon a minor or other vulnerable person. There are also general enhancement principles with respect to recidivists, to whom mandatory minima may apply.

Corporate penalties are also very low by US standards. As an illustrative example, the only corporation convicted in France for foreign corruption in the 14 years since France adopted anticorruption legislation pursuant to its obligations under the OECD Anti-Bribery Convention was sentenced at trial to a fine of €500,000 for having paid a bribe to obtain a contract worth more than €170 million.[22] The conviction was overturned on appeal, and a judgment of acquittal entered in January 2015. See Section III.i, *supra*. In December 2013, the maximum penalties applicable to criminal convictions for corruption were increased, and are now five years in prison and a fine of up to €500,000 (or, in the case of a corporate entity, up to €2.5 million) or double the profits gained from the offence, whichever is higher. Individuals convicted of corporate crimes for which they did not personally benefit (but that rather accrued benefits for their employer) are not generally sentenced to prison in France. Corporate fines are also moderated by the absence in France of the US penchant for cumulating 'counts' charging the defendant with separate violations when the overall conduct included repeated criminal acts (such as multiple payments in a bribery context).

With respect to both individuals and corporations, the sentencing provisions generally permit an array of complementary sanctions in addition to imprisonment (for individuals) and a fine. These may include (for corporations) revocation of licences to commit certain activities, publication in national or other press of its conviction, and disbarment from eligibility to respond to public bids. In addition, European rules may prohibit convicted companies from participating in public bids in other EU Member States.

iii Compliance programmes

While compliance programmes are often viewed as a US or UK import (the word 'compliance' is often used in the absence of a clear French alternative), they are increasingly encouraged in France, and are the subject of significant discussion and debate. Many French companies have created director of compliance posts, and a significant group has been formed to promote their activities.[23] In addition, there are unofficial but respected groups that will provide an independent review of company compliance measures, and certify those that meet international norms.[24]

The Sapin II Law now requires all large and medium-sized companies to implement a compliance programme meeting certain specifications. A company's programme may be reviewed by the Anti-Corruption Agency (called the AFA in French), which will have a Sanctions Commission empowered to impose monetary sanctions for companies that fail to adopt a compliance programme meeting the new standards.

Notwithstanding these changes, the existence of a strong compliance programme has much less weight in the defence of a criminal investigation by French authorities than would be the case in the United States or the UK. Statutes criminalising corruption or other conduct do not recognise the existence of compliance programmes as either a defence or a mitigation, although a company with a strong policy could possibly argue that an act taken in defiance of it was not in the interests of the corporation and thus should not lead to corporate criminal

22 Tribunal de Grande Instance de Paris, 5 September 2012, No. 060992023.

23 See, e.g., *Le Cercle de la Compliance*, www.cercledelacompliance.com.

24 See, e.g., *Ethic Intelligence*, http://ethic-intelligence.com.

responsibility. Further, and particularly in the absence of procedures leading to alternative dispositions such as a DPA, there is very little tradition of negotiating an improved sanction for historical conduct in exchange for promised changes to prophylactic provisions such as a compliance programme.

iv Prosecution of individuals

Individual officers and employees can be, and often are, prosecuted along with the companies they serve. In such a circumstance, the attorneys for the corporations and the individuals would normally cooperate during an investigative phase and in preparation for trial, and the content of meetings held pursuant to such joint efforts would be protected from subsequent discovery or divulgation by the *secret professionnel*. In most circumstances, and in the absence of consensual arrangements such as a DPA or pressure from US authorities, it would be highly unusual for a company to 'cooperate' with investigating authorities by agreeing to turn over information that may incriminate its officers or employees, at least where they were acting to benefit the corporation. In some circumstances, however, the corporation may conclude that it was a victim of its employees' actions and thus has an interest in joining a prosecution.

French law recognises a form of vicarious or derived responsibility for company heads for grossly negligent or criminal acts committed on their watch. The theory is to establish clear lines of responsibility for offences committed by corporations. Heads of companies may thus be found liable for offences caused by the company they direct in situations where they did not prevent the occurrence of an event through normal diligence or prudence; they can escape or limit such criminal responsibility by showing that they had formally delegated such responsibility to others in the company.

IV INTERNATIONAL

i Extraterritorial jurisdiction

The extraterritorial application of French criminal laws is generally based upon principles of nationality and territoriality: by and large, French criminal laws apply to French nationals and to conduct that takes place on French soil. French jurisprudence generally does not recognise the notion of the 'effects test' as developed in American courts. The Sapin II Law extended French competence to prosecute acts of public corruption committed outside of France by eliminating the 'dual criminality' requirement, and by making French corruption laws applicable to acts committed outside of France by companies that conduct 'all or part' of their economic activities in France.

ii International cooperation

France is a signatory to a variety of international treaties committing it to coordinate its substantive laws in areas of common concern, such as the OECD Anti-Bribery Convention of 1997, as well as international treaties concerning cooperation in the investigation of crimes, such the Hague Evidence Convention and several others. It is also a signatory to a number of European conventions that facilitate the execution of arrest warrants and other criminal procedures within Europe. France has signed a number of classic bilateral extradition treaties; its execution of such treaties in France is diligent, albeit somewhat complicated because it may involve both the judicial and the administrative branches of the court system, with their separate appeals processes. Extradition from France to countries within the European Union

is simplified, and quicker, based upon the application of European conventions. An 'office of international criminal mutual aid' is maintained within the Ministry of Justice to facilitate formal and informal exchanges of information with prosecutors and investigators in other countries and at international criminal tribunals.

In recent years France has signed a number of mutual legal assistance treaties (MLATs) as well as informal memoranda of understanding between investigative agencies, such as the AMF and the SEC. Importantly, the practical level of communication and cooperation among such agencies has visibly increased. As an example, American authorities now succeed in obtaining freeze orders concerning assets in France in a number of days (rather than weeks as was previously the case). The US Embassy in Paris maintains an Assistant United States Attorney on secondment from the DOJ, together with approximately four agents of the Federal Bureau of Investigation, who work closely with their French counterparts in facilitating mutual aid.

Two very recent decisions in France suggest circumstances under which a company that is the subject of a criminal prosecution in another country may be protected against prosecution in France under the principle of *ne bis in idem*, which is roughly comparable to the US principle of double jeopardy. The CPP prohibits France from prosecuting any party that has been convicted or acquitted abroad if the prosecution in France is based on 'extraterritorial' rather than 'territorial' powers; if the French prosecutor can show that any constitutive act occurred in French territory, the principle does not apply. However, the countries in the European Union have adopted several conventions on criminal investigative cooperation that include ne bis in idem provisions that, with exceptions, protect individuals and corporations against double prosecution in Europe. Two French decisions have explored whether France should be barred from prosecuting an individual or a corporation, even one that is subject to 'territorial' prosecution in France, and even with respect to prior prosecutions in a country such as the United States that is outside the European Union. In February 2016, in an unreported decision by the Paris Court of Appeals, the Court concluded that it was bound by the *ne bis in idem* principle found in the International Covenant on Civil and Political Rights (ICCPR), but refused to apply it to block a French prosecution where the corporate defendant had pleaded guilty in New York based on the same facts, but where the crime of which the corporation was accused was fundamentally different from the prosecution in France. In June 2015, a trial court in France had also relied on the ICCPR to bar prosecution of four French companies whose parents had entered into DPAs or non-prosecution agreements with US authorities.[25] The public prosecutor has appealed this ruling to the Court of Appeals and the 2016 ruling of the Court of Appeals is subject to review in France's Supreme Court, so the principles remain unclear, but the decisions nonetheless may affect strategy in managing multinational investigations.

iii Local law considerations

Local law considerations in France may affect international investigations more significantly than in many other countries.

The Blocking Statute (see Section II.ii, *supra*) was specifically designed to impede the ability of foreign governments (particularly the United States) to obtain information,

25 See Frederick T Davis & Antoine F Kirry, 'A Recent Decision in France Applies "International Double Jeopardy" Principles to U.S. DPAs', FCPA Professor, 15 October 2015, http://fcpaprofessor.com/a-recent-decision-in-france-applies-international-double-jeopardy-principles-to-u-s-dpas/.

even indirectly, in France; its origins lie in concerns about sovereignty and resistance to the extraterritorial reach of other countries' laws. While it is relatively rarely enforced, and is viewed by many French commentators as overly broad, it nonetheless reveals a measured commitment to the needs of other countries to investigate their crimes. The Sapin II Law authorises the new Anti-Corruption Agency to monitor application of the Blocking Statute in certain situations, which may be viewed as a legislative enhancement of the Statute's importance.

Local laws relative to privacy and data collection (see Section II.ii, *supra*) further emphasise the sometimes unique problems of gathering evidence in France.[26]

As noted (see Section II.ii, *supra*), French professional rules and traditions relating to the conduct of internal investigations on French soil, including of subsidiaries or divisions of a non-French company, are different from their US counterparts; lawyers considering an internal investigation in France, particularly in the context of developing information with prosecutors in the US or elsewhere, should proceed very carefully and in strict consultation with local counsel.

V YEAR IN REVIEW

By far the most important development of the last year was the adoption of the Sapin II Law. The law was clearly intended to respond to frequent criticisms of France that it has not done enough to combat overseas corruption and other international economic crimes. It is still too soon to know how effective its measure will be, and, in particular, whether French or non-French corporations will take advantage of its provisions permitting a negotiated non-criminal outcome.

The Paris Bar opinion of March 2016 and subsequent professional rules relating to internal investigation are clearly resulting in an increase in their number. A number of questions remain, however, about the nuances of their execution, as well as the use of reports based on them.

VI CONCLUSIONS AND OUTLOOK

French criminal procedures, and prosecutorial and investigative practices, differ very substantially from American ones, as do the laws and practices relating to evidence gathering. Thus, a non-French company whose activities in France are being investigated there must proceed very carefully.

The relatively low level of corporate criminal fines imposed in France, and the relatively strong defences available under French principles of corporate criminal responsibility, suggest that corporations may find the threat of a French criminal investigation poses lower ultimate risks than in other countries. The agreements of four French corporate giants to pay large fines in agreements negotiated primarily with the DOJ, in some cases based on acts that appear to have occurred predominantly in France and other countries outside of the United States, indicate that multinational companies may be more concerned by US and UK prosecutions if their activities, even in France, are subject to the laws of those countries.

26 See generally, 'Conducting third party FCPA diligence in France', footnote 17, *supra*.

Appendix 1

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