The International Investigations Review

Third Edition

Editor
Nicolas Bourtin

Law Business Research

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For further information please email
Adam.Sargent@lbresearch.com

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EDITOR'S 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. LIBOR. Foreign corruption. Financial fraud. Tax evasion. Price fixing. Environmental crimes. 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, has been punished severely by record-breaking fines and the prosecution of corporate employees. Already complex interlocking legal and regulatory regimes have become even more labyrinthine with the passage of new laws in the wake of the economic crisis, and the compliance burdens imposed on corporations have grown ever more onerous.

This trend has by no means been limited to the US; 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 substitute for 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 third edition, this volume covers 24 countries.

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 2013

Chapter 9

FRANCE

Antoine Kirry and Frederick T Davis[1]

I INTRODUCTION

Investigations in France – whether purely domestic, or part of transborder activity involving other countries – follow procedures and principles that are fundamentally different from those in the United States. On a very general level, 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 fundamentals such as the relative role of prosecutors, judges and private attorneys; the importance of state actors in establishing the facts of a case; the relative absence in France of attributes of an 'adversarial' process such as cross-examination; the very limited ability to negotiate with the investigating authority; and the nature and use of testimonial and other kinds of evidence differ greatly between the two countries. 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.

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 typically found in the French Code of Criminal Procedure ('CPP').[2] Criminal violations are divided into three categories, the distinctions among which determine sanctions,

1 Antoine Kirry is a partner and Frederick T Davis is of counsel at Debevoise & Plimpton LLP.

2 The French government website Legifrance publishes the texts of the CP and the CPP, in the original French as well as an official (but sometimes over-literal) translation into English. See www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719.

actors and the courts involved. 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 (*délits*) are violations punishable by more than two months and up to 10 years and by financial penalties; the crime of corruption falls within this category. They are tried before the local district court, of which there will be one court 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 the 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. Upon entry of a judgment in the court of appeals, any party may seek review from the Supreme Court (Cour de Cassation), 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.

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 investigative magistrates who look into financial and other major business crimes. An investigating magistrate can be authorised to commence an investigation on 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 file (and, ultimately, are parties to the trial and any appeal). An investigating magistrate is only authorised to proceed *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, '*mis en examen*', is the rough equivalent of being informed that one is a 'target' under US Department of Justice 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 (*témoin assisté*), roughly the equivalent of being a 'subject' in the United States. Both a person *mis en examen* and a material witness have a right to formally appear in the investigative proceeding through counsel and receive access to the entire file assembled by the investigating magistrate. In addition to non-custodial interviews, 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 with assistance of a counsel. Interviews are generally reduced to a written statement, which the declarant is asked to sign.

When the investigating magistrate has finished an investigation, he or she will formally announce its closure and 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, in which he or she provides an opinion as to which parties 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,[3] 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 the designated person is bound over to trial on the specified charges. In unusual circumstances an investigating magistrate can declare that he is without jurisdiction to proceed at all. The Public Prosecutor may appeal a dismissal; however, parties bound over to trial cannot normally appeal that decision. Throughout the period when they are formal parties to the investigation – whether *mis 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.

Two differences from American investigative practices, however, must be emphasised. First, before a person or a company is given formal status of *mis en examen* or material witness, there is little if anything that can be done with respect to an investigation, 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 by a target or potential target (or counsel) with a percipient witness will almost inevitably be viewed as an attempt to influence that person's testimony, with potentially dire results.

3 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 generally 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.

The investigating magistrate is required to search for both inculpatory and exculpatory evidence, and it is formally expected that the magistrate will establish 'the truth' of what happened. All of the fruits of the investigation – including not only documents that are seized, but also witness statements – 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, 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 forth in their written statements. 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 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 that presumption can be met by the contents of the file as noted above. The judges can convict only if they are convinced of guilt.

Throughout an investigation, 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 through an investigation by an investigating magistrate, overall more than 90 per cent of all criminal cases proceed 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.

Administrative investigations

There are scores of administrative agencies in France that are empowered to conduct inquiries or investigations of one sort or another. Such matters are very generally governed by specific laws, practice 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 roughly equivalent to the US Securities and Exchange Commission and 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 any records of any sort. 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 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.[4] The AC works very closely with competition authorities within the European Commission, as well as with antitrust authorities in the United States.

II CONDUCT

i Self-reporting

Self-reporting with respect to significant criminal matters is difficult in France. The issue is currently the subject of public debate and may evolve.

The fundamental obstacle to self-reporting is the absence of any formal or effective means of negotiation of a plea or other disposition. In the United States and in 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, critically, make an evaluation whether it is in the best interests of the company to self-report or not. 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

4 On 1 November 2010 French doctor Yves M Benhamou was arrested in Boston, where he was attending a medical conference. He was prosecuted in federal court in New York under federal insider trading laws on an allegation that he passed on confidential information about a drug test he supervised to third parties who used the information in securities transactions. As part of its investigation, the DoJ sought help from the AMF, which took testimony from Dr Benhamou in France and queried him about his activities. No further action was taken in France, from which Dr Benhamou may well have concluded that he would not be prosecuted; but the fruits of the AMF interrogation were passed on to the DoJ, which then filed a sealed indictment charging Dr Benhamou with federal violations. He later pleaded guilty, cooperated with the US authorities and was sentenced to the time he had served in prison before released on bail. See http://dealbook.nytimes.com/2010/11/02/french-doctor-arrested-on-insider-trading-charges/; www.nytimes.com/2011/12/22/business/in-crackdown-on-insider-trading-two-more-are-sentenced.html?_r=0&adxnnl=1&adxnnlx=1370517118-7i0bWlcQHozPPz6XGYf8uQ; and www.sec.gov/news/testimony/2012/ts032212ebw.htm#P111_39709.

may agree to a non-penal alternative such as a deferred prosecution agreement ('DPA') or even full clemency. Virtually no such procedures exist in France. 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. While the CRPC procedure was recently enlarged to apply to some higher level crimes (*délits*), two circulars issued by the French Ministry of Justice indicate that the procedures are not to be used for large-scale financial matters, such as investigations dealing with international corruption. In any event, the CRPC procedure differs fundamentally from its American and British counterparts because there is essentially no negotiation but rather a simple proposal made by the Public Prosecutor, which is open to acceptance by the defendant on the condition that he or she acknowledges guilt.

More fundamentally, the investigation by an investigating magistrate, which is the principal French investigative process relating to complex international crimes, is inimical to any form of negotiation, and thus provides virtually no basis for self-reporting because there is essentially no one to negotiate with. As noted above, the Public Prosecutor may well have an important role in the development of a case and its presentation to the court, but the Prosecutor does not have ultimate control over whether a case is to be prosecuted or not and must defer to the investigating magistrate. The investigating magistrates, in turn, are obligated to seek 'the truth' and thereby to establish all of the relevant facts of the matter, whether inculpatory or exculpatory; they have neither the formal ability nor the background or traditions to enter into negotiations.

Self-reporting by means of an internal investigation is also hampered by the fact, as noted below, that such investigations are done relatively rarely in France, face practical as well as legal impediments and are not widely accepted. An investigative report conducted by attorneys paid by the company under investigation is likely to be viewed at best as a highly suspect piece of advocacy.

In the areas of competition and securities, self-reporting to administrative agencies is 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 reduction 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).

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, or even impossible; second, there are limits to their actual function and ultimate use.

Any company that has a concern about an aspect of its operations may need to inform itself of the relevant facts, and therefore conduct a 'private' investigation – that is, one not connected in any way with a governmental inquiry. There is, conceptually, no reason why such a private internal review cannot be conducted in France. There are, however, a number of procedural, practical and sometimes cultural restraints.

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 of 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 agency Commission Nationale de l'Informatique et des Libertés ('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. (The issue becomes complicated because digitised data are often not 'found' in one particular place but may be stored in a 'cloud' or elsewhere and retrieved through everyday means via terminals outside of the place where the data are entered). There are specialised procedures and practices for dealing with the CNIL. Separately, 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.

Whether in the context of a private review or one conducted in coordination with an investigating agency, careful attention must be paid to the confidentiality of the inquiry and its fruits. French lawyers have relatively little experience of doing organised internal investigations, and some concern has been expressed by local bars about their fulfilling this role, in part because of a concern that a lawyer thereby may become a 'witness' to what he or she learns. Information received by a lawyer, as well as his or her reflections and advice to a client, are covered by the French '*secret professionnel*', which approximates, but is not exactly the same as, the common law attorney–client privilege. Notably, the *secret professionnel* cannot normally be waived even by the client (although the client itself may be in a position to share with others information it receives from its lawyer); this inhibition may be problematic if an attorney who has conducted or participated in an investigation is later asked to report on it to authorities.

Investigations that are carried out in contemplation of disclosure to public authorities, and certainly those carried out in coordination with them, encounter even more formidable obstacles. The French 'Blocking Statute'[5] prohibits transmittal of much documentary 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 a direct response (that is, without going through international conventions on a state-to-state basis) to a foreign judicial or administrative discovery request, subpoena

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

or the like. Although no court to date has so held, the better view is that information gathered in France by a company or its attorneys with a view to sharing that information with investigative authorities in other countries may well violate the law.[6] 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*).

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 rather quickly to 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 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.

Relatively recently, however, legislation has been adopted that gives whistle-blowers some degree of protection in the case of retaliation. As a practical matter, the law is likely to lead to compensation for retaliation against a whistle-blower.

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. Further, there is no provision for a bounty to be paid to whistle-blowers.

6 The United States Department of Justice appears to recognise this. In at least two 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 *US v. Alcatel-Lucent, S.A.*, 1:10-cr-20907-PAS (S.D. Fla. 2011); *US v. Total, S.A.*, 1:13 cr 239 (E.D. Va. Filed May 29, 2013).

III ENFORCEMENT

i Corporate liability

Article 121-2 of the CP now 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 of the relative recentness of this provision, prosecutorial policies and practices, as well as details of the application of the law, 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, her or it as an organ or a representative of the company sufficient to trigger the application of the statute. Separately, the courts are 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.

ii Penalties

Both corporate and individual 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 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. Generally speaking, courts do not multiply sanctions by treating separate victims of a crime – for example, serial victims of a single or continuing fraud – as separate crimes, as is often the case in the United States.

Corporate penalties are very low by American standards. As an illustrative example, only one corporation has been convicted in France for foreign corruption in the 13 years since France adopted anti-corruption legislation pursuant to its obligations under the OECD Anti-Bribery Convention, and that corporation was sentenced at trial (the corporation has lodged an appeal) to a fine of €500,000 for having paid a bribe to obtain a contract worth more than €170 million.[7] Individuals convicted of corporate crimes for which they did not personally benefit (but rather accrued benefits for their employer) are not generally sentenced to prison in France.

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, many European rules may prohibit convicted companies from participating in public bids in other European Member States.

7 Paris Criminal Court, September 5, 2012, No. 060992023.

iii Compliance programmes

While compliance programmes are often viewed as a US or British import (the word 'compliance' is generally 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.[8] 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.[9]

That said, the existence of a strong compliance programme will have less weight in defence of a criminal investigation by French authorities than would be the case in the United States. Statutes criminalising corruption or other conduct do not recognise the existence of a compliance programme as either a defence or a mitigation, although one can envision that a company with a strong policy could argue that an act taken in defiance of it was not in the interest of the corporation and thus should not lead to corporate criminal 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 completely protected from subsequent discovery or divulgation by the *secret professionnel*. In most circumstances, and in the absence of consensual arrangements such as a DPA, it would be highly unusual for a company to 'cooperate' with investigating authorities by agreeing to turn over information that may be inculpatory of its officers or employees. In other circumstances, however, the corporation may conclude that it is a victim of its employees' actions and thus has an interest in joining a prosecution. In one highly publicised case, for example, a rogue trader of one of the largest banks in France was accused of engaging in unauthorised foreign exchange transactions that cost the bank billions of dollars in losses; the bank participated in the criminal prosecution of the trader by appearing as a civil party as the result of which the criminal conviction included an obligation by the defendant to repay his former employer.

French law recognises a form of vicarious or derived responsibility for company heads where 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.

8 See, for example, Le Cercle de la Compliance, www.cercledelacompliance.com.

9 See, for example, Ethic Intelligence, http://ethic-intelligence.com.

IV INTERNATIONAL

i Extraterritorial jurisdiction

French principles concerning the extraterritorial application of their criminal laws are generally based upon principles of nationality and territoriality: by and large, its 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 point of departure is Article 113-2 of the CP, which provides that French criminal law applies 'to infractions committed on French territory', and notably when at least 'one of the elements of the offence has been committed there'. Subsequent provisions address situations where a person acting in France is viewed as having aided and abetted a principal violation committed overseas, as well as the applicability to acts committed on the high seas and other specific situations. Article 113-6 of the CP provides that the French criminal law is applicable to any high crime committed by a French person outside of France, and to any normal crime committed outside France if it would be criminally punishable in the country where the acts took place. French criminal law may also be applicable to certain crimes committed outside France if the victim is of French nationality.

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, as well as international treaties concerning cooperation in the investigation of crimes, such the Hague Evidence Convention and several others. It is also 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 government, with their separate appeals processes.

Most significantly, 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).

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, even indirectly, in France; its origins lie in concern 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 overbroad, it nonetheless reveals

a measured commitment to the needs of other countries to investigate their crimes. Local laws relative to privacy and data collection (see Section II.ii, *supra*) further emphasise the sometimes unique problems of gathering evidence in France.[10]

V YEAR IN REVIEW

In October 2012 the OECD issued its third biannual review of France's success in pursuing international corruption pursuant to its OECD treaty obligations, and concluded that France was lagging well behind other industrial nations.[11] It attributed this failure to a variety of procedural issues, including the virtual non-existence of negotiated pleas or alternative resolutions, as well as lack of focus and effort by prosecuting authorities. The report has elicited significant public debate and France's participation in international investigative efforts may continue to evolve. Anecdotally, the number of international business investigations involving France appears to be growing, although their outcomes are far from clear.

In May 2013 the US DoJ announced that French oil giant Total had agreed to pay substantial fines relating to bribes paid in Iran under the terms of a DPA, which was described by the DoJ as the 'first' result of Franco-American joint efforts in this field. Under the agreement, France remains free to pursue Total and its chief executive, and press reports indicate that they remain under formal investigation (*mis en examen*), thus indicating that Total was unable to secure a DPA-type agreement effective in France.

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 in France. Thus, a non-French company whose activities in France are being investigated must proceed very carefully.

The first conviction of a corporation for overseas bribery occurred in September 2012 and its sentence in the first instance was €500,000, which suggests that at least for the moment companies face relatively low risks with respect to French prosecution but may be more concerned by US and UK prosecutions if their activities, even in France, are subject to the laws of those countries.

10 See generally, Davis et al., Conducting FCPA Due Diligence in France, www.globallegalpost.com/global-view/conducting-third-party-fcpa-diligence-in-france-87881254/#.UbCwd9n0SUk.

11 OECD (2012), Phase 3 Report on Implementing the OECD Anti-Bribery Convention in France, October 2012, OECD Publishing.

Appendix 1

ABOUT THE AUTHORS

ANTOINE KIRRY

Debevoise & Plimpton LLP

Antoine Kirry is a partner in the Paris office of Debevoise & Plimpton LLP, and heads the litigation practice of that office. He is a member of the New York Bar and the Paris Bar, and has extensive experience in criminal and administrative investigations, as well as complex litigation, in France.

FREDERICK T DAVIS

Debevoise & Plimpton LLP

Frederick T Davis is of counsel in the Paris office of Debevoise & Plimpton LLP. He served as an Assistant United States Attorney in the Southern District of New York and in private practice in New York before moving to Paris, where he is a member of the Paris Bar and appears in French courts. He is an elected Fellow of the American College of Trial Lawyers, and the French government named him a *Chevalier* of the National Order of Merit of France.

DEBEVOISE & PLIMPTON LLP

4 place de l'Opéra
75002 Paris
Tel: +33 1 40 73 12 12
Fax: +33 1 47 20 50 82
www.debevoise.com