The International Investigations Review

Sixth Edition

Editor
Nicolas Bourtin

Law Business Research

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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. Foreign corruption. Financial 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.

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 sixth edition, this volume covers 21 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 2016

Chapter 9

FRANCE

Antoine 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. 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; the nature and use of testimonial and other kinds of evidence; as well as the absence of 'rules of evidence' comparable to those applicable in US courts, all reflect significant differences between the two countries with important practical consequences. 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

1 Antoine Kirry is a partner and Frederick T Davis is of counsel at 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.

categories, which determine maximum sanctions, the courts involved, 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 (*délits*) are violations punishable by imprisonment 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 investigative 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 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, '*mis 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 (*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 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 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, 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 *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. 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 *mis 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

3 F Davis and A Kirry, 'France to Reform Controversial Interrogation Practices', *The National Law Journal*, 7 February 2011, available at http://media.debevoise.com/publications/0050311 12DebevoiseP.pdf.

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.

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 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, 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 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 satisfy it. 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, 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 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 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.[6] 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.

6 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

An important decision in 2015 will have a significant impact on AMF investigations, and perhaps on other administrative proceedings. Prior to a recent 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 held that, among other articles, Article L 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. Between March 2015 and 1 September 2016, the French legislature must amend the law on insider trading to bring it into conformity with the French Constitution.

In the same decision, the Constitutional Council announced interim measures in order to address the situation of current defendants in insider trading proceedings. As of 18 March 2015, the date of the Constitutional Council's decision, a criminal prosecution for insider trading cannot be pursued when the AMF has definitively reached a decision based on the same facts against the same person. As of the same date, a person whose prosecution has already begun before the AMF based on Article L 621-15 of the Monetary and Financial Code cannot be prosecuted under Article L 465-1 of the same code before the judicial courts and, similarly, any person whose criminal prosecution has already begun for insider trading before the criminal courts also cannot be subject to prosecution by the AMF.[8]

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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.

7 Constitutional Council, 18 March 2015, Decision No. 2014-453/454 and No. 2015-462.

8 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 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

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.

The fundamental obstacle to self-reporting is the absence of any formal or effective means of negotiation of a plea or other disposition for most criminal violations. 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 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. 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. 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 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, any victims who have taken the status of 'civil parties', as well as the corporation itself. And especially since the procedure ends in a judgment of conviction, it would appear that it provides little incentive for corporations to use it.[9] As noted in Section V, *infra*, a much-discussed proposal to adopt legislation that would have opened the door to a negotiated outcome that did not include a criminal conviction, similar to a US or UK DPA, has stalled, although it may be revived in the future.

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 and must

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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.

9 See Davis, 'The First Corporate Guilty Plea in France – Will There Be More?', www.ethic-intelligence.com/experts/11539-first-corporate-guilty-plea-france-will/?wb48617274=A16535F1.

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 incriminating 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 carried out 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 and negotiation with 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.[10]

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,[11] which opined that lawyers can participate in internal investigations; that they may do so even with respect to their usual clients; and that the investigation would be covered by *le secret professionnel*, the rough equivalent of (but in some respects markedly different from) the US attorney-client privilege. Even armed with this opinion, however, lawyers contemplating doing an internal investigation in France should be wary of challenges both in conducting the investigation and in using its fruits.

10 For a general description of the challenges of doing internal investigation in a cross-border investigation involving France, see the article 'Multi-Jurisdictional Criminal Investigations Pose Many Challenges' published in the *New York Law Journal* on 18 November 2013 by the authors of this chapter; www.newyorklawjournal.com/id=1202627815370/Multi-Jurisdictional-Criminal-Investigations-Pose-Challenges?slreturn=20140419170043.

11 www.avocatparis.org/mon-metier-davocat/publications-du-conseil/rapport-sur-lavocat-charge-dune-enquete-interne.

To begin, the Paris Bar opinion notes that a number of important issues remain to be addressed, which it proposes to do in subsequent 'guidelines' after consulting with members of the Bar. The opinion raises, for example, the question of whether and under what circumstances an interviewer should inform an interviewee of a right to consult with an independent attorney. In general, the opinion suggests that the Paris Bar will be sensitive to complaints about the conduct of internal investigations and will insist that they be conducted consistently with professional principles.

Further, 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.[12] 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.[13]

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. Much more problematic, however, is sharing the fruits of an investigation with a third party, particularly a prosecutor or investigative agency. The French *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.

12 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. For example, a federal judge in New York has held that in aid of a domestic criminal investigation, a US court can compel an internet service provider located in the United States to produce e-mails belonging to a non-US resident and stored outside the United States. In re Warrant to Search a Certain E-Mail Account, 15 F. Supp. 3d 466 (2014). See Davis, 'A US Prosecutor's Access to Data Stored Abroad, Are There Limits?', 49 *The International Lawyer* 1-20 (2016). The decision is currently on appeal to the United States Court of Appeals for the Second Circuit, where an unusually large number of briefs as '*amici curiae*' have been filed with the court, reflecting great international interest in and concern about the issue.

13 For a practical discussion of these issues, see F Davis et al., Les Difficultés in Conducting FCPA Third Party Due Diligence in France, available at www.globallegalpost.com/global-view/conducting-third-party-fcpa-diligence-in-france-87881254/#.UbCwd9n0Suk.

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'[14] prohibits – and provides criminal sanctions for – 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 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 to date has so held, 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.[15] 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*).[16]

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.

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

15 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 United States Department of Justice 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., *US v. Alcatel-Lucent, SA*, 1:10-cr-20907-PAS (S.D. Fla. 2011); *US v. Total, SA*, 1:13 cr 239 (E.D. Va. filed 29 May 2013).

16 A thorough discussion of the Blocking Statute and the reactions given to it by US courts, mostly in the context of civil litigation, can be found at P Grosdidier, The French Blocking Statute, www.tilj.org/content/forum/forum_GROSDIDIER.pdf.

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; these protections were extended and reinforced in 2013. 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. 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 of the relative recentness of this provision, which has existed in its current form since 1994, 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. 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. A recent court of appeals decision acquitted Continental Airlines of criminal fault in the crash of a Concorde supersonic jet at Charles De Gaulle Airport, noting that the employee whose negligence may have caused debris to be left on the tarmac, and which contributed to the crash, did not have a sufficiently clear or established set of responsibilities upon which to justify corporate responsibility.[17] In January 2015, the Paris Court of Appeals entered a judgment of acquittal of a large French company that had been convicted of overseas corruption for participating in the payment of an apparent bribe in order to obtain a large contract in Africa. Notably, on the appeal the public prosecutor sought the corporation's acquittal on the ground that the individuals who had been shown to have made certain 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

17 Versailles Court of Appeals, 29 November 2012, RG 11/00332.

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.[18]

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 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 counts, as is often the case in the United States.

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 anti-corruption 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.[19] 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 offense, whichever is higher. 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. 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

18 See F Davis, 'The Fight Against Overseas Bribery, Does France Lag?', www.ethic-intelligence.com/experts/7546-fight-overseas-bribery-france-lag/; F Davis, 'Corporate Criminal Responsibility in France, Is It Out of Step?', 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 directly to the Iraqi regime that violated UN rules. 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. The case did thus not involve a 'classic' bribery situation, and its reasoning may be reviewed by the French Supreme Court.

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

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 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.[20] 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.[21]

That said, 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 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. As will be discussed in Section V, *infra*, French criminal reform legislation that is for the moment stalled, but may be renewed, includes provisions mandating compliance programmes.

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 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 other circumstances, however, the corporation may conclude that it was 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 seeking damages from its employee. The ultimate criminal conviction of the trader included an obligation by the defendant to repay his former

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

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

employer for the losses he caused; on review by the Supreme Court in March 2014, however, the Court ruled that since the bank had been partially responsible for the losses, it could not collect reimbursement of those losses from the employee.

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

French principles concerning the extraterritorial application of their criminal laws are generally based upon principles of nationality and territoriality: by and large, its 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 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 French.

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 government, 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.[22] 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) in obtaining information, 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

22 See Davis & Kirry, 'A Recent Decision in France Applies 'International Double Jeopardy' Principles to U.S. DPAs', http://fcpaprofessor.com/a-recentdecision-in-france-applies-international-double-jeopardy-principles-to-u-s-dpas/?wb-48617274=66D21DD9.

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.[23]

V YEAR IN REVIEW

It is increasingly clear that France lags behind other countries in combating some forms of international crime, notably overseas corruption. While there may be a number of reasons for this, some particularities of French procedures certainly play a role. In 2015 Michel Sapin, the Minister of Finance, advocated changes to French criminal procedures that were intended to address this gap in the area of overseas corruption. As finally proposed by the government, the draft legislation included two significant changes. First, it would create a new agency that would be tasked with developing guidelines for compliance programmes, and it would make companies that failed to adopt conforming compliance programmes subject to an administrative penalty (and would also allow a company to rely on the existence of a compliance programme as a mitigating factor in a criminal bribery prosecution). And second, it provided for a negotiated outcome that would include payment by corporations of potentially substantial fines and submission to supervised changes in their compliance programmes, but would avoid a criminal conviction – and thus would be roughly comparable to a US or UK DPA. However, at the last minute the Council of State, which advises on proposed legislation, came out against the DPA provision, largely on the basis that it did not take into account the interest of victims and that it should also apply to individuals, and this provision was dropped. The future of the legislation remains unclear, although it is likely that some changes will be made.[24]

Last year did see the adoption by the Paris Bar of an opinion that formally permits lawyers to participate in internal investigations, although many questions remain about how such investigations will be conducted, as well as about the uses to which reports based on such investigations can be put. And in January 2016 a 'corporate guilty plea' was entered for the first time. Absent further legislative activity, however, it appears likely that corporate criminal prosecutions in France may remain slow, and that the biggest risk corporations doing business in France relating to international and financial matters may face will for the time being come from prosecutors in the United States and the United Kingdom.

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.

23 See generally, 'Les Difficultés in Conducting FCPA Due Diligence in France', footnote 11, *supra*.

24 See Davis, Hecker & Gunka, 'France Takes Steps to Implement its Anti-corruption Laws – Or Does It?', www.debevoise.com/insights/publications/2016/05/fcpa-update-may-2016.

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, may 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.

Appendix 1

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