

THE INTERNATIONAL
INVESTIGATIONS
REVIEW

EIGHTH EDITION

Editor
Nicolas Bourtin

THE LAWREVIEWS

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REVIEW

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PREFACE

In the United States, it is a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Healthcare, consumer and environmental fraud. Tax evasion. Price fixing. Manipulation of benchmark interest rates and foreign exchange trading. Export controls and other trade sanctions. US and non-US corporations alike have faced increasing scrutiny by US authorities for several years, 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 the past many corporate criminal investigations were resolved through deferred or non-prosecution agreements, the US Department of Justice has increasingly sought and obtained guilty pleas from corporate defendants. While the new presidential administration in 2017 brought uncertainty about certain enforcement priorities, there have been few signs – even a year and a half into the new administration – of any significant departure from the trend towards more enforcement and harsher penalties.

This trend has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in several 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 who have contributed to 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 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 eighth edition, this publication covers 23 jurisdictions.

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

Nicolas Bourtin

Sullivan & Cromwell LLP

New York

July 2018

FRANCE

*Antoine Kirry, Frederick T Davis and Alexandre Bisch*¹

I INTRODUCTION

Criminal and administrative 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 whereas in the United States (and other common law countries) it is ‘accusatory’. The distinction is neither scientific nor complete, and as a practical matter the differences can be exaggerated. It is nonetheless true that many fundamentals differ from the US equivalents. These include:

- a* the relative roles of prosecutors, judges and private attorneys;
- b* the importance of state actors in establishing the facts of a case;
- c* the relative absence of attributes of an ‘adversarial’ process such as cross-examination;
- d* the limited (but evolving) ability to negotiate with the investigating authority;
- e* the nature and use of testimonial and other kinds of evidence; and
- f* the absence of ‘rules of evidence’ comparable to those applicable in US courts.

As a result, anyone involved in an investigation of any sort in France must consult closely with local counsel.

i Criminal investigations

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

1 Antoine Kirry is a partner, Frederick T Davis is of counsel and Alexandre Bisch is a senior associate at Debevoise & Plimpton LLP.

2 Both these codes are available in English at www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations.

significant city throughout France. There is no jury trial. Misdemeanours (contraventions) 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 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 Court of Cassation, the ‘supreme court’ for judicial matters, which can review the judgment only for issues of law and will either affirm the judgment or reverse it and remand to a new court of appeals.

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

Investigating magistrates are found throughout France. In some instances they are teamed together in a group called a *pôle*; for example, the *pôle financier* in Paris includes the principal investigating magistrates who look into financial and other major business crimes, including corruption, tax fraud and insider trading. The appointment of an investigating magistrate is mandatory for high crimes. With regard to regular crimes, he or she 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 ‘civil 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 is the rough equivalent of being informed that one is a ‘target’ under US Department of Justice (DOJ) guidelines. Depending on the alleged offence, a person put under formal investigation can be placed under judicial supervision, including pretrial custody. A person against whom weaker evidence has been assembled, but who is still of interest to the investigating magistrate, may be designated a material witness, roughly the equivalent of being a ‘subject’ in the United States. Both a person put under formal investigation 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. These tools include wiretaps, dawn raids on premises and custodial interrogations, in which a person may be held for questioning for 24 hours (subject

to several renewal periods of 24 hours, depending on the violations, and up to a maximum of 144 hours for persons suspected of terrorism), usually in the presence of counsel.³ 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, who will then submit written opinion, copied to the parties to the investigation, as to which parties (if any) should be bound over to trial and on what charges. However, the position of the public prosecutor is not 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 public prosecutor's views nonetheless have significant weight,⁴ the parties have an opportunity to file their own observations before a final decision is made by the investigating magistrate.

The investigating magistrate must issue a formal decision to close an investigation. There are two principal outcomes: either the person and the charges are dismissed, or 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 and a civil party 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 under formal investigation or a material witness – the parties may be procedurally active through their counsel 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 magistrate's investigation, participants are bound by a secrecy obligation, making it a crime to disclose proceedings before the magistrate; this obligation, however, does not apply to the defendants, the victims and the press.

Two differences from US investigative practices must be emphasised. First, before a person or a company is given the formal status of being under investigation or a 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 for interviews, 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

3 F Davis and A Kirry, 'France to Reform Controversial Interrogation Practices', *The National Law Journal*, 7 February 2011.

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

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 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 basis 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.

High crimes are tried before a jury consisting of three judges and six lay jurors chosen at random, all of whom deliberate together on both the culpability and the potential sentence. A verdict in a jury trial does not have to be unanimous. Guilt must be based upon at least six votes and sentence upon at least five votes (six if the maximum sentence is sought). The trial of a regular crime will be before three judges. 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. Questions relating to the admissibility of evidence are rare and under the principle of 'freedom of proof', judges may consider any evidence that they find useful. There is no hearsay rule as such and formal written statements of witnesses are often in the record. The judges can convict only if they are convinced of guilt. The basis for a conviction or acquittal will be set out in a written judgment. There is no tradition of dissenting opinions.

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 12 consisting of three judges and nine lay jurors, with a majority of eight being necessary to convict (nine if the maximum sentence is sought). Appeals from a regular criminal court are to an appellate criminal court composed of three judges.

Victims claiming injury from a criminal act can, and usually do, pursue any damages claims in the same criminal proceeding, provided that they have applied for and been given the formal status of 'civil parties'. In the event of a conviction, the criminal 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 also claim damages in a separate lawsuit before civil courts, but often choose to join a criminal matter 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. If a witness insists on a right to silence, there is no procedure to give that witness immunity as a predicate to forcing him or her to testify.

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 public prosecutor works with the police – of which there are many national and local agencies, including specialised units – to investigate a matter and to build an evidentiary record. When the public 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 are empowered to conduct enquiries 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 Court of Cassation or the Council of State, the latter functioning (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).

Where market abuses are suspected, an investigation is carried out by the AMF, which can summon and take statements from witnesses, gain access to business premises and require any records of any sort. The AMF often works closely with the US Securities and Exchange Commission (SEC) and the DOJ, and frequently requests these authorities and other fellow regulators to gather evidence that may be of interest for its investigation. At the end of its investigation, if the AMF concludes that the evidence shows a market conduct violation, it must inform the criminal authorities so that a choice can be made between criminal or administrative prosecution. For many years, market abuses were prosecuted and sanctioned by both the AMF and the criminal justice, but in a landmark decision of 18 March 2015, the French Constitutional Court⁵ reversed that long-standing position. A law passed on 21 June 2016 now ensures that suspects of market abuses are subject to one type of

5 The French Constitutional Court (Conseil Constitutionnel) 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 Conseil Constitutionnel 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 Conseil Constitutionnel. If the law has already been reviewed by the Conseil Constitutionnel, there must have been a change in circumstance such that the law should be reviewed again. A constitutional question can be transmitted to the Conseil Constitutionnel via the Court of Cassation (supreme court for judicial matters) or the Council of State (supreme court for administrative matters).

prosecution only, either administrative by the AMF or criminal by the public prosecutor or an investigating magistrate. Under both proceedings, a person found guilty of market abuse face a maximum financial sanctions of up to €100 million or 10 times any earned profit, or for legal entities, 15 per cent of annual consolidated turnover. Under criminal proceedings, a natural person also faces a maximum 5 year prison sentence. If the authorities take the view that the alleged misconduct deserves a prison sentence, the tendency is to prosecute the case criminally. To date, however, most alleged market abuses are prosecuted by the AMF before its enforcement committee. Appeals are heard by the Paris Court of Appeals or the Council of State, depending on the status of the defendant. Prior to referring a defendant to its enforcement committee, the AMF may offer to enter into a settlement. Such a settlement does not amount to a conviction and the defendant is not required to admit the alleged facts but must undertake to pay the Public Treasury a sum that cannot exceed the maximum pecuniary sanction applicable before the AMF enforcement committee.

Cartels are usually prosecuted and sanctioned as an administrative violation by the AC. The AC works very closely with competition authorities within the European Union and with antitrust authorities in the United States. The AC will generally align its rulings with those of European antitrust authorities. The maximum sanctions are €3 million for an individual and 10 per cent of global profits, before taxes, for a legal entity enterprise. The calculation of an enterprise's profit for the purpose of applying the sanction is based on the highest profit that was realised in any fiscal year following the fiscal year that preceded the one during which the practices were put into place. Final decisions by the AC may be subject to appeal before the Paris Court of Appeals.

II CONDUCT

i Self-reporting

The principles and practice of self-reporting are the subject of much debate in France and are evolving. The subject must be approached with great care.

In the area of competition law, self-reporting is encouraged. 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 offers fine reduction for companies that elect not to challenge the objections filed by the AC. Under a commitment programme, AC investigations may also be stopped against companies that put in place or improve a competition law compliance programme.

In the area of criminal justice, a fundamental obstacle to self-reporting is the general lack of statutory incentive to do so.⁶ Since December 2013, in the specific context of corruption and influence peddling, perpetrators or accomplices can have their prison sentence reduced by half if, by having informed the administrative or judicial authorities, they enabled them to put a stop to the offence or to identify other perpetrators or accomplices. This incentive, however, does not apply to corporations. Recent efforts to expand the possibility of corporate guilty pleas have led to little change. In December 2016, the legislature adopted the Sapin II

6 A further disincentive is the fact that, as noted below in Section III.i, under French law a corporation may have a much greater ability than would be the case in the United States to claim that it is not responsible for the acts of employees or others apparently acting for it. This possibility makes it less attractive to engage in negotiations that implicitly give up the chance of a total acquittal under such a defence.

Law,⁷ which established a procedure called a judicial agreement in the public interest (CJIP). A CJIP is quite similar to a US deferred prosecution agreement (DPA), which permits the disposal of claims of corruption, influence peddling and laundering of the proceeds of tax fraud without a criminal conviction. This procedure is available only to legal entities. In none of the three CJIPs approved to date does it appear that the company in question self-reported by bringing a matter to the attention of the authorities before an investigation started. The absence of self-reports in those cases may be because they occurred in matters where investigations had already commenced before the Sapin II Law was adopted.⁸ However, because of the lack of statutory incentive to self-report, it remains to be seen if, in the future, companies will elect to do so before a formal investigation with an investigating magistrate is commenced.

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 difficult; second, their actual function and ultimate use remain unclear and are evolving.⁹

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 by a thoughtful opinion of the Paris Bar issued in March 2016¹⁰ and subsequent guidelines,¹¹ which provide that (1) lawyers can participate in internal investigations, (2) that they may do so even with respect to their usual clients and (3) the investigation would be covered by professional secrecy, the rough equivalent of (but in some respects markedly different from) the US attorney–client privilege. Particularly as the professional standards for conducting such an investigation develop, they should be handled carefully. The Paris Bar guidelines emphasise that an attorney conducting an investigation must be sensitive to the needs and vulnerabilities of the person being interviewed. This would certainly include the need to convey the equivalent of *Upjohn* warnings as practised in the United States – that is, to inform the person being interviewed that the interviewer is an attorney for the company, but that no professional privilege exists to the benefit of the person being interviewed – but would

7 Law No. 2016-1691 of 9 December 2016.

8 For more details about the first CJIPs, see Debevoise & Plimpton, Client Update, 12 March 2018, ‘First French DPAs for Corruption Offences’, available at https://www.debevoise.com/-/media/files/insights/publications/2018/03/20180309_first_french_dpas_for_corruption_offences_concluded_.pdf; Debevoise & Plimpton, Client Update, 8 December 2017, ‘France Announces First-Ever Deferred Prosecution Agreement’, www.debevoise.com/-/media/files/insights/publications/2017/12/20171208%20france_announces_firsterver_deferred_prosecution_agreement.pdf.

9 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.

10 Paris Bar, ‘Report on lawyers instructed to conduct an internal investigation’, 8 March 2016, available at www.avocatparis.org/mon-metier-davocat/publications-du-conseil/rapport-sur-lavocat-charge-dune-enquete-interne.

11 Paris Bar, ‘Vademecum on lawyers instructed to conduct an internal investigation’, 13 September 2016, available at www.avocatparis.org/mon-metier-davocat/publications-du-conseil/nouvelle-annexe-xxiv-vademecum-de-lavocat-charge-dune.

also imply a need to be especially careful about a witness who may give self-incriminating information and often to inform the witness of a right to consult with an independent attorney. Further, many aspects of EU and 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 the European Union or France.

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 that is solely used internally by the company and its lawyers to evaluate risk, devise strategy or adopt changes would raise no problem because it fits within the professional privilege. Much more problematic, however, is sharing the fruits of an investigation with a third party, particularly an adversary such as a prosecutor or investigative agency. Professional secrecy in France 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, it 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 or adversary.

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 Blocking Statute¹² 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 leading 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.¹³ 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, that company may be in violation of the Blocking Statute pursuant to the French principles of extraterritoriality (see Section IV.i).

If a company determines that data or other information that is 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 1970 Hague Evidence Convention. While a formal procedure under that Convention may take months, practical workarounds may be possible in certain areas. For example, the AMF and its foreign counterparts have increased their practical coordination through the Multilateral Memorandum of Understanding of the International Organisation of Securities Commissions. In the application of this Memorandum, the SEC is able to ask

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

13 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 US. The Department of Justice (DOJ) appears to recognise the risk posed to companies, and their lawyers, who collect information in France for transmittal to the DOJ. In several recent deferred prosecution agreements 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).

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. One obvious consequence 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

The Sapin II Law adopted in December 2016 significantly increased the protection afforded to whistle-blowers. A whistle-blower is now defined by the statute as:

a natural person who discloses or reports, in a selfless and bona fide manner, a crime or offence, a serious and clear violation of an international convention duly ratified or approved by France, a unilateral decision of an international organisation made on the basis of such a convention, of law or regulation, or a serious threat or harm to the public interest of which he has been personally aware.

Entities that fall within the scope of the Sapin II Law must put in place an internal whistle-blowing programme for employees to report behaviours or situations contrary to the company's code of conduct relating to corruption or influence peddling. In applying the law of March 2017 on the corporate duty of care,¹⁴ entities may also have to put in place an internal whistle-blowing system to report serious human rights violations, serious bodily injury and environmental damage.

Whistle-blowers are protected against retaliation by an employer for providing accurate information of corporate wrongdoing to a competent authority. There is no provision in any French law for whistle-blowers to receive a reward or other payment from authorities.

III ENFORCEMENT

i Corporate liability

Article 121-2 of the French Criminal Code (CP) provides that a corporate entity can be held criminally responsible for the acts of its 'organ or representative' carried out for the benefit of the corporation. The statute specifies that this 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 surprisingly uncertain. The courts are still exploring, for example, the relative seniority or importance of an officer or employee necessary to qualify him or her as a representative of the company sufficient to trigger 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.

¹⁴ Law No. 2017-399 of 27 March 2017. For more details about this law, see Debevoise & Plimpton, Client Update, 29 March 2017, 'French Corporate Human Rights and Environmental Due Diligence Legislation', available at www.debevoise.com/-/media/files/insights/publications/2017/03/20170328b_french_law_on_duty_of_due_diligence.pdf.

In November 2012, a court of appeals 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.¹⁵ In January 2015, another court of appeals entered into 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 to obtain a large contract in Africa.¹⁶ Notably, 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.¹⁷ In March 2018, in another case of overseas corruption, the Court of Cassation affirmed the conviction of the oil giant company Total SA on the ground that the offence had been committed on its behalf by its executive committee, which was composed of some other individual defendants.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 statutes 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 recidivism or 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 example, the only two corporations convicted in France, by a final decision, for corruption of foreign officials were sentenced to fines of €300,000 and €750,000.¹⁹ The latter, however, amounted to the maximum fine faced by a corporation at the time of the offence. In December 2013, the maximum penalties applicable to criminal convictions for corruption were increased, and are now, for individuals, five years in prison and a fine of up to €1 million or double the profits gained from the offence, and for legal entities, a fine of up to €5 million or 10 times the profits gained from the offence.

15 Versailles Court of Appeals, 29 November 2012, No. 11/00332.

16 Paris Court of Appeals, 7 January 2015, No. 12/08695.

17 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/.

18 Court of Cassation, 14 March 2018, No. 16-82.117.

19 Id.

Individuals convicted in France of corporate crimes from which they did not personally benefit (but rather accrued benefits for their employer) are not generally given a prison sentence. Corporate fines are also moderated by the absence 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. These may include confiscation of the proceeds of the corruption and, for corporations, revocation of licences to commit certain activities, publication in national or other press of its conviction, and disbarment from eligibility to respond to public bids. In addition, European rules may prohibit convicted companies from participating in public bids in other EU Member States.

Corporate entities entering into a CJIP (see Section II.i) have to pay a fine proportionate to the benefit secured through the illicit activity, up to 30 per cent of the company’s average annual turnover for the previous three years.

iii Compliance programmes

The Sapin II Law adopted in December 2016 fundamentally changed French law with respect to compliance programmes. The law established the French Anti-corruption Agency (the AFA), which among other things is tasked with supervising the new requirement, added by the same law, that all French companies, other than very small ones, adopt a compliance programme meeting certain specifications. The enforcement committee of the AFA is empowered to impose an administrative fine of up to €200,000 against individuals and up to €1 million against legal entities that do not comply with this law. The AFA appears to be vigilant about insisting on enforcement of this mandate.²⁰

French criminal law does not, at this point, include a ‘compliance defence’ that would permit a corporation to defend corruption or another charge by insisting that the individuals in question violated company rules or practices. But a company that can show that employees committed acts in violation of company rules would certainly be better able to negotiate a CJIP or other outcome, and may even be able to claim an absence of criminal responsibility under Article 121-2 of the CP, as noted in Section III.i.

iv Prosecution of individuals

Individual officers and employees can be, and often are, prosecuted with the companies they serve. In such a circumstance, the attorneys for the corporations and the individuals may decide to cooperate during an investigative phase and in preparation for trial, and the content of meetings held pursuant to these joint efforts would be completely protected from subsequent discovery or divulgation by professional secret. In most circumstances, and in the absence of consensual arrangements such as a CJIP or pressure from foreign 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

²⁰ For a review of AFA compliance guidelines issued in December 2017, see Debevoise & Plimpton, FCPA Update, January 2018, Vol. 9, No. 6, available at <https://www.debevoise.com/insights/publications/2018/01/fcpa-update-jan-2018-vol-9-no-6>.

in joining a prosecution. In one highly publicised case, for example, a rogue trader at one of the largest banks in France was accused of engaging in unauthorised market 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 criminal conviction of the trader included an obligation by the defendant to repay his former employer for the losses he caused. On review, the Court of Cassation ruled that since the bank had been partially responsible for the losses, it could not collect reimbursement of all those losses from the employee.²¹

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 that responsibility to others in the company.

IV INTERNATIONAL

i Extraterritorial jurisdiction

French principles concerning the extraterritorial application of 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.

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 French criminal law is applicable to any high crime committed by a French person outside 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. In the specific context of acts of overseas corruption, French law now also applies to acts committed abroad by someone exercising business, in whole or in part, in France (regardless of the nationality of that person and of the victim).

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, and international treaties concerning cooperation in the investigation of crimes, such as the Hague Evidence Convention of 1970 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. French authorities coordinate closely with European cooperation agencies such as Europol and Eurojust, and with Interpol. 'Red notices' communicated by Interpol are diligently pursued in France.

21 Court of Cassation, 19 March 2014, No. 12-87.416.

France has signed a number of classic bilateral extradition treaties; its execution of these 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, and France cooperates closely with other European authorities in execution of European Arrest Warrants. An office with responsibility for international criminal mutual aid is maintained within the French 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) and memoranda of understanding between investigative agencies, such as between the AMF, the SEC and other financial market watchdogs. Importantly, the practical level of communication and cooperation among these agencies has visibly increased. As an example, US 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, and approximately four agents of the Federal Bureau of Investigation, who work closely with their French counterparts in facilitating mutual aid; in addition, the French Ministry of Justice maintains a liaison magistrate in Washington, DC, to perform a similar coordination role with the US authorities.

Until early in 2018, a series of decisions by the Paris courts offered some hope that a person or company that was convicted, pleaded guilty, or even entered into a non-criminal outcome such as a DPA in the United States, could avoid prosecution in France under the theory of *ne bis in idem*, which is the rough equivalent of the protection against double jeopardy in the United States. In particular, several courts noted that both the United States and France signed the International Covenant on Political and Civil Rights (ICCPR), which contains a *ne bis in idem* provision. On 14 March 2018, however, the Court of Cassation annulled these decisions and held that the ICCPR only protects against multiple prosecutions by the same sovereign.²² There remain some situations, however, where an outcome outside France will bar subsequent prosecution. France's statutory provisions relating to territoriality (see Section IV.i) provide that if a French prosecution is based only on 'extraterritorial' principles, such as the nationality of the defendant or the victim, then a definitive criminal outcome abroad bars prosecution in France. However, if the French prosecution is 'territorial' – meaning that any constituent act of the offence took place on French soil – then a French prosecutor is free to proceed, irrespective of any outcome elsewhere. Separately, a number of European treaties – in particular the Convention for the Implementation of the Schengen Agreement,²³ the EU Charter of Fundamental Rights, and Protocol No. 7 to the European Convention on Human Rights – include a *ne bis in idem* provision that generally means, with some exceptions, that a prosecution in one country in Europe bars new prosecution in another.

22 Court of Cassation, 14 March 2018, No. 16-82.117. For an analysis, see Debevoise & Plimpton, FCPA Update, April 2018, Vol. 9, No 9, 'French Supreme Court Limits Protection Against Double Jeopardy After Prior U.S. Resolutions', available at https://www.debevoise.com/-/media/files/insights/publications/2018/04/fcpa_update_april_2018.pdf.

23 The CISA provision has been liberally interpreted by the European Court of Justice to protect against multiple prosecutions.

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) 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 commitment to the needs of other countries to investigate their crimes. EU and local laws relative to privacy and data collection further emphasise the sometimes unique problems of gathering evidence in France.²⁴

V YEAR IN REVIEW

It has been commonly acknowledged for years that France lagged behind other industrialised nations in its pursuit of overseas corruption, and perhaps other areas of corporate criminality as well. In the area of overseas bribery, four iconic French companies paid over US\$2 billion in fines and other payments to the DOJ and other US authorities for crimes that almost certainly could have been pursued in France. The appointment in 2014 of a National Financial Prosecutor with enhanced responsibility and visibility in the area of business crimes, and the adoption of Sapin II Law in December 2016, were clearly intended to redress this imbalance. The promulgation of the first CJIPs agreements have yet to define a clear path for French authorities to re-establish leadership in this field, but clearly reflect a commitment by French authorities to be much more active in pursuing crimes that touch French interests. In any event, it seems clear that the requirement that all but small companies adopt robust compliance programmes, an obligation that is being monitored by the AFA, is certainly a part of the French legal landscape.

VI CONCLUSIONS AND OUTLOOK

Until recently, an international company potentially subject to French prosecution often considered that threat to be relatively insignificant compared to the risk of prosecution in the United States. The new laws and visible commitment in France may change that analysis.

24 See generally, 'Les Difficultés in Conducting FCPA Due Diligence in France', Debevoise & Plimpton, FCPA Update, April 2012, Vol. 3, No. 9, available at https://www.debevoise.com/-/media/files/insights/publications/2012/04/fcpa%20update/files/view%20the%20update/fileattachment/fcpa_update_april_2012.pdf.

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