THE INTERNATIONAL INVESTIGATIONS REVIEW

Twelfth Edition

Editor
Nicolas Bourtin

THE LAWREVIEWS

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TWELFTH EDITION

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PREFACE

In its second year, the Biden administration has made clear its prioritisation of white-collar prosecutions. This includes changes in policy and guidance, such as a renewed focus on individual accountability, an increased concern with corporate recidivism, and greater scrutiny of the use, and repeated use, of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). The administration has announced plans not only to redistribute existing resources to prosecutions of corporate crime but to increase resources, particularly through the hiring of more white-collar prosecutors and investigative agents. Although recovery from the covid-19 pandemic and more recently the consequences of the Russia–Ukraine war have slowed the administration's implementation of these corporate enforcement priorities, US and non-US corporations alike will continue to face increasing scrutiny by US authorities.

The trend towards more enforcement and harsher penalties 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 or, conversely, have their own rivalries and block the export of 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. Of course, nothing can replace the considered advice of an expert local practitioner, but a comprehensive review of corporate investigative 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 12th edition, this publication features two overviews and covers 15 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gifts 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 2022

Chapter 8

FRANCE

Alexandre Bisch[1]

I INTRODUCTION

Criminal and administrative investigations in France – whether purely domestic or cross-border – follow procedures and principles that are fundamentally different from those in the United States. These differences 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.

i Criminal investigations

Criminal investigations involve potential violations of the criminal laws. Criminal violations are divided into three 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. Ordinary crimes are violations punishable by imprisonment of up to 10 years and by financial penalties; most business crimes fall within this category. They are tried before the local district courts, without a jury. Misdemeanours are violations punishable by financial penalties and may be tried in lower courts.

Criminal investigations in France generally fall into two categories: regular and simple matters, which are handled by the public prosecutor; and complex and important matters, which are sometimes referred to an investigating magistrate.[2]

Public prosecutor-led investigations represent more than 97 per cent of all criminal cases. In those cases, the public prosecutor works with the police to investigate a matter and build an evidentiary record. In contrast to the judicial investigation discussed below, suspects have very little right to participate and defend themselves at this stage. When the public

1 Alexandre Bisch is an international counsel at Debevoise & Plimpton LLP.

2 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 to be magistrates and receive their professional training following law school graduation at the National School for the Judiciary. Prosecutors and judges thus tend to have somewhat closer professional relations with each other than either group has with members of the Bar. Prosecutors nonetheless serve within the Ministry of Justice and are not considered to be independent of the government.

prosecutor is satisfied with the record, the matter is referred to the relevant court. At that time, the accused and their counsel will have access to the file, which will serve as the basis to prepare for trial.

The appointment of an investigating magistrate is mandatory for high crimes. With regard to ordinary crimes, an investigating magistrate can be authorised to commence an investigation by an order from the public prosecutor. Public prosecutors would usually only request the appointment of investigating magistrates for cases that appear so complex that developing the facts on their own would be expected to take too much time and absorb significant resources, or involve actions that prosecutors cannot take on their own, such as requesting the placement of suspects in pretrial temporary detainment. In practice, most criminal investigations involving international matters are likely to be addressed by an investigating magistrate, although this landscape may be gradually evolving towards a greater role for public prosecutors.

In some instances, third parties with an interest in the matter – often victims but occasionally non-governmental organisations – 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).

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, usually in the presence of counsel. Interviews are generally reduced to a written statement, which the declarant is asked to sign.

When the investigating magistrate has finished an investigation, they will formally announce its closure and transfer the investigation file to the public prosecutor, who will then submit a 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. 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 for trial on specified charges. The public prosecutor and a civil party may appeal a dismissal; however, parties bound over for trial cannot normally appeal a decision of this kind. Throughout the period when they are formal parties to the investigation, 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.

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 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. Because 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.

The trial of ordinary crimes will be before either one or three judges. At trial, live witnesses may be heard. 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) 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. Questions relating to the admissibility of evidence are rare and under the principle of 'freedom of proof', and 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 appeal by a party dissatisfied with the outcome, and 'cross appeals' are often filed. The court of appeal will then review the facts as well as the law *de novo* and reach its own conclusion as to both. Upon entry of a judgment in a court of appeal, an unsuccessful party may seek review from the Court of Cassation, the supreme court for judicial matters, which can review the judgment for issues of law only and will either affirm the judgment or reverse and remand it to a new court of appeal.

Victims claiming injury from a criminal act can, and usually do, pursue any damages claims in the same criminal proceedings, 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.

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 who declines to explain their circumstances is acting out of an awareness of guilt.

ii Administrative investigations

Scores of administrative agencies are empowered to conduct regulatory investigations. These matters are generally governed by specific laws, practices and procedures applicable to these agencies, including appellate review in some circumstances. In the international context, the agency most likely to be involved is the Financial Markets Authority (AMF).

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), the Commodity Futures Trading Commission and the US Department of Justice (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. Under both proceedings, a person found guilty of market abuse faces a maximum financial sanction 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 five-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. Appeals are heard either by the Paris Court of Appeals and the Court of Cassation 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 Treasury a sum that cannot exceed the maximum pecuniary sanction applicable before the AMF enforcement committee.

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 criminal justice, a fundamental obstacle to self-reporting has been the general lack of a statutory incentive to do so.[3] 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 the authorities 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, although there are indications that things may be slowly changing. In December 2016, the legislature adopted the Sapin II Law,[4] 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, tax fraud, laundering of the proceeds of tax fraud, and environmental crimes, without a criminal conviction. This procedure is available only to corporate entities. In June 2019, the French Financial National Prosecutor (PNF), together with the French Anti-corruption Agency (AFA), published its first guidelines on the use of the CJIP, providing that self-reporting within a reasonable timeframe will be taken into account by the prosecution when considering whether to enter into a CJIP. The guidelines also state that self-reporting will be considered as a mitigating factor for the calculation of the fine. So far, it appears that in none of the 16 CJIPs approved to date did the company in question self-report by bringing a matter to the attention of the French authorities before an investigation started.

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

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

ii Internal investigations

Internal investigations in the US 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.

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 their independence or risk becoming a witness. These concerns are now addressed by Paris Bar guidelines,[5] which provide that lawyers can participate in internal investigations; they may do so even with respect to their usual clients; and the investigation would be covered by professional secrecy, the rough equivalent of (but in some respects markedly different from) the US attorney–client privilege. Such investigations should be handled carefully, particularly as the professional standards for conducting them continue to develop. 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 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 used solely internally by the company and its lawyers to evaluate risk, devise strategy or adopt changes would raise no problem because it fits within the scope of professional privilege. Much more problematic, however, is sharing the fruits of an investigation with a third party, 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 French Blocking Statute[6] prohibits – and provides criminal sanctions for – transmittal of much documentary and testimonial evidence in France to officials in other countries, without going through international conventions on a state-to-state basis.[7]

5 Paris Bar, 'Vademecum on lawyers instructed to conduct an internal investigation', 10 December 2019, available at www.avocatparis.org/conseil-de-l-ordre/annexe-xxiv-vademecum-de-lavocat-charge-dune-enquete-interne.

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

7 In 2007, a Franco-American attorney was convicted under the French Blocking Statute and fined €10,000 for interviewing in France a potential witness in litigation pending in the United States. The US Department of Justice (DOJ) appears to recognise the risk posed to companies, and their lawyers, who

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 US–France Mutual Legal Assistance Treaty (MLAT). Since April 2022, companies receiving foreign requests for documents or information potentially covered by the Blocking Statute have to report 'without delay' to French authorities.[8]

iii Whistle-blowers

The French whistle-blower protection adopted in December 2016, updated in March 2022,[9] significantly increased the protection afforded to whistle-blowers. A whistle-blower is now defined by the statute as:

> *a natural person who reports or discloses, without direct financial compensation and in good faith, information concerning a crime, an offence, a threat or harm to the general interest, a violation or an attempt to conceal a violation of an international commitment duly ratified or approved by France, of a unilateral act of an international organization taken on the basis of such a commitment, or of the laws and regulations of the European Union. When the information was not obtained in the context of professional activities [. . .], the whistleblower must have had personal knowledge of it.*

Entities above certain thresholds must put in place an internal reporting 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,[10] 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.

Since 2017, the French tax administration may reward 'informants' who report misconducts relating to specific French provisions governing international taxation. The amount of the reward is calculated by reference to the evaded amounts. Informants are not considered as whistle-blowers and do not, as such, benefit from a specific protection, although their identity and the reward are kept confidential.

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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 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).

8 Debevoise Update, 21 March 2022, 'French Blocking Statute: Small Changes, Big Expectations', available at www.debevoise.com/insights/publications/2022/03/french-blocking-statute.

9 Debevoise Update, 23 March 2022, 'France Beefs Up Whistleblower Protections', available at: www.debevoise.com/insights/publications/2022/03/france-beefs-up-whistleblower-protections.

10 Law No. 2017-399 of 27 March 2017. For more details about this law, see Debevoise 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.

III ENFORCEMENT

i Corporate liability

Article 121-2 of the Criminal Code 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, details of the application of the law by the courts, remain relatively uncertain. French 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.

In a landmark decision of March 2018, the Court of Cassation affirmed the conviction of a French company for corruption of foreign officials on the grounds that the offence had been committed on its behalf by its executive committee, which was composed of some other individual defendants.[11] In a another important decision of June 2021, the Court of Cassation ruled that a parent company could be held criminally liable for acts of corruption committed on its behalf by employees of its subsidiary.[12]

ii Penalties

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

The rare corporations convicted in France, by a final decision, for corruption of foreign officials were sentenced to fines of no more than €750,000. 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.

Legal entities convicted of 'laundering' now face a fine of up to 2.5 times the value of the goods or funds subject to the laundering operations. On that basis, in February 2019, the Paris Criminal Court fined a Swiss bank €3.7 billion for illegal solicitation of financial services and aggravated laundering of the proceeds of tax fraud.[13] In December 2021, the Paris Court of Appeal upheld that conviction but reduced the total amount to €1.8 billion.[14]

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.

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

12 Court of Cassation, 16 June 2021, No. 20-83.098.

13 Paris Criminal Court, 20 February 2019, No. 11055092033. For an analysis, see Debevoise Update, 21 February 2019, 'French Criminal Court Imposes Blockbuster Fine for Tax Fraud Related Offences', available at www.debevoise.com/~/media/files/insights/publications/2019/02/20190221_french_criminal_court_imposes_blockbuster_fine_for_tax_fraud_related_offences.pdf.

14 Paris Court of Appeal, 13 December 2021, No. 19/05566.

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. In January 2020, Airbus agreed to pay €2.1 billion to settle criminal charges with the PNF, which represents the highest fine imposed since the creation of the CJIP.[15]

iii Compliance programmes

The Sapin II Law adopted in December 2016 fundamentally changed French law with respect to compliance programmes. The law established the AFA, which among other things is tasked with supervising the new requirement 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.

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. However, 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 Criminal Code, 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 these circumstances, 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 in the course of these joint efforts would be completely protected by professional secrecy from subsequent discovery or divulgation. 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 in joining a prosecution.

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

15 For more details about the Airbus settlement, see Debevoise & Plimpton, FCPA Update, February 2020, Vol. 11, 'Airbus Record-Breaking Global Settlement', available at www.debevoise.com/insights/publications/2020/02/fcpa-update-february-2020.

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.

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. French criminal law is also applicable to any high crime committed by a French person outside France and to any ordinary 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). In guidelines dated June 2020, the Ministry of Justice took the view that 'someone conducting, in whole or in part, business in France' should be read as covering at least foreign companies having a subsidiary, branches, commercial offices or other establishments in France, even if those entities in France have no distinct legal personality.[16]

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. It is 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. France is also a participating state in the European Public Prosecutor's Office, which commenced its operational activities on 1 June 2021.

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 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 MLATs and memoranda of understanding between investigative agencies, such as those between the AMF, the SEC and other financial market watchdogs. Importantly, the practical level of communication and

16 Circular No. JUSD2007407 on criminal justice policy in the fight against international corruption (2 June 2020), available at: https://www.legifrance.gouv.fr/circulaire/id/44989.

cooperation between 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 a US assistant 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.

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.

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. The appointment in 2014 of a PNF with enhanced responsibility and visibility in the area of business crimes, and the adoption of the Sapin II Law in December 2016, were clearly intended to redress this imbalance.

In December 2021, France passed a new law addressing various criminal law issues, including about criminal investigations, attorneys' professional secrecy, and pretrial guilty pleas.[17] In March 2022, France also passed a new law increasing the protection of whistle-blowers. In 2021 and early 2022, French prosecutors have concluded a total five cases through CJIPs. Since the creation of this French-style DPA in 2016, a total of 16 cases have now been concluded through CJIPs.

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 recent settlements in France may change that analysis.

17 Law No. 2021-1729 of 22 December 2021.

Appendix 1

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