



# Implementing the OECD Anti-Bribery Convention



## Phase 4 Report: France



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This Phase 4 Report on France by the OECD Working Group on Bribery evaluates and makes recommendations on France's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2021 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the OECD Working Group on Bribery on 9 December 2021.

The report is part of the OECD Working Group on Bribery's fourth phase of monitoring, launched in 2016. Phase 4 looks at the evaluated country's particular challenges and positive achievements. It also explores issues such as detection, enforcement, corporate liability and international co-operation, as well as covering unresolved issues from prior reports.

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## EXECUTIVE SUMMARY

This Phase 4 report by the OECD Working Group on Bribery in International Business Transactions (the Working Group) evaluates and makes recommendations on France's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report details France's particular achievements and challenges in this regard, including in relation to the enforcement of its foreign bribery offence, as well as the progress France has made since its Phase 3 evaluation in October 2012.

Since Phase 3, France has made notable progress in enforcing its foreign bribery offence, marked by a significant increase in the number of investigations opened and the imposition of final sanctions in 14 cases, between October 2012 and July 2021. In those 14 cases, sanctions were imposed on 19 individuals and 23 legal persons for foreign bribery or complicity in foreign bribery as a result of trials, plea bargains (CRPC) or *Convention judiciaire d'intérêt public* (CJIP – a resolution similar to a Deferred Prosecution Agreement in other countries). The introduction of the CJIP into French law in 2016 and the priority given to resolving foreign bribery cases with this non-trial resolution mechanism have generated a paradigm shift in the approach to corporate liability, which has notably resulted in the resolution of five cases, including two major multi-jurisdictional cases jointly with other Parties to the Convention. However, the enforcement of corporate liability has not yet developed since Phase 3 to the extent expected by the Working Group. Weaknesses in the legislative framework for corporate liability remain a major obstacle to enforcement outside the CJIP. Moreover, the number of cases resolved remains relatively low in relation to France's economic situation and trade profile, as well as the number of foreign bribery allegations that have emerged in the media.

France has also undertaken major legislative and institutional reforms. In particular, the National Financial Prosecutor's Office (Parquet national financier – PNF) and a specialist criminal investigation department dedicated to combating economic and financial crime (the Central Office for Combating Corruption and Financial and Fiscal Offences – OCLCIFF) were established in 2013, and the Sapin 2 Act was passed in 2016. These reforms have given France a modern institutional framework and legal tools to combat foreign bribery more effectively. These legislative reforms have resulted in the removal of major obstacles to enforcing the foreign bribery offence, including the dual criminality requirement, a significant increase in the amount of criminal sanctions against individuals and legal persons, clarification and extension of the rules on national and territorial jurisdiction, extension of the statute of limitation and reinforcement of the investigative means and techniques available in the area of foreign bribery. They have also introduced the ability for accredited anti-corruption NGOs to bring civil actions as part of the criminal proceeding. Furthermore, the creation of the French Anti-Corruption Agency (AFA) and of an innovative regulatory framework have placed the development of compliance measures within companies at the heart of France's policy to combat foreign bribery. Finally, the renewal of French criminal policy on foreign bribery was significantly strengthened by the adoption of the Belloubet circular in June 2020, which is a testimony of France's willingness to give full effect to its updated legal arsenal.

However, these recent achievements are undermined by structural resource problems affecting all stages of the criminal justice process as well as by further reforms. In particular, the limitation of the duration of preliminary investigations to two or three years (adopted by Parliament on 18 November 2021), or the proposed overhaul of the AFA and its remit (a Bill was introduced on 21 October 2021), constitute a serious cause for concern about furthering recent progress and represent as many risks of calling these into question. The PNF and its operations have been equally called into question, and its role in investigating, prosecuting and resolving foreign bribery cases with non-trial mechanisms must imperatively be preserved. France must also continue its efforts to develop effective negotiated criminal justice for individuals in foreign bribery cases or risk undermining the attractiveness of the CJIP for legal persons. Now long-standing reform projects to strengthen guarantees of prosecutorial independence remain unimplemented. The blocking statute, the various professional secrecy rules that can hinder an investigation and the threat to public order and the fundamental interests of the Nation under article 694-4 of the Code of Criminal Procedure are also identified as obstacles to prompt and effective mutual legal assistance. Finally, while TRACFIN remains the main source of foreign bribery cases to date, other important sources, such as diplomatic and consular agents, the tax authorities and whistleblowers, must be mobilised more actively.

The report and its recommendations reflect the conclusions of experts from Canada and Switzerland and were adopted by the Working Group on 9 December 2021. The report is based on legislation, data and

other documents provided by France and research conducted by the evaluation team. It also draws on information obtained by the evaluation team during its virtual visit in May 2021, when the evaluation team met with representatives from the public and private sectors, the media and civil society, as well as parliamentarians and academics. The Working Group invites France to submit, within one year, an oral report on the measures taken to implement recommendations 7.a(i); b(i); and c(i) (on increasing the means and resources available to investigators, prosecutors and trial judges), 10.a (on preserving the role of the PNF in resolving foreign bribery cases); and 18.a (on preserving the role of the AFA in developing and monitoring compliance measures by companies). In two years' time (December 2023), France will submit a written report to the Working Group on the implementation of all recommendations and on its efforts to implement the Convention.

## INTRODUCTION

### 1. Previous evaluations of France

1. In December 2021, the OECD Working Group on Bribery in International Business Transactions (the Working Group) finalised the fourth evaluation of France's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention), the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2009 Recommendation),<sup>1</sup> and related instruments.

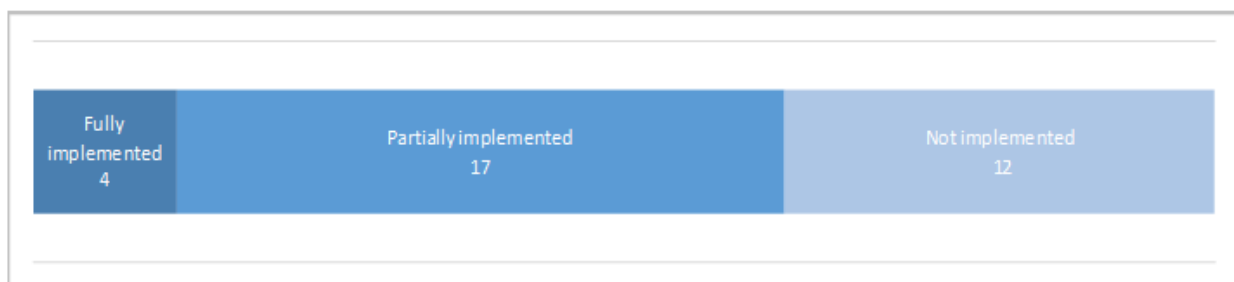
2. Monitoring of Working Group members' implementation and enforcement of the Convention and related instruments takes place in successive phases through a rigorous peer-review system. The monitoring process is subject to specific, agreed-upon principles. The process is compulsory for all Parties and provides for on-site visits (from Phase 2 onwards), including meetings with non-government actors.

3. The evaluated country has no right to veto the final report or recommendations. All of the OECD Working Group on Bribery evaluation reports and recommendations are systematically published on the OECD website. The last full evaluation of France – in Phase 3 – dates back to October 2012. The Working Group evaluated the implementation of its Phase 3 recommendations in 2014. During that evaluation, the Working Group concluded that 4 recommendations had been implemented, 17 were partially implemented and 12 were not implemented (Figure 1).

#### Previous evaluations of France by the Working Group

- 1999: [Phase 1 Report](#)
- 2004: [Phase 2 Report](#)
- 2006: [Follow-up on Phase 2 Report](#)
- 2012: [Phase 3 Report](#)
- 2014: [Follow-up on Phase 3 Report](#)

**Figure 1. France's implementation of Phase 3 recommendations (as of the 2014 written follow-up report)**



<sup>1</sup> On 26 November 2021, the OECD Council adopted the Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2021 Recommendation), in order to strengthen the implementation of the OECD Anti-Bribery Convention and further enhance the fight against foreign bribery. The 2021 Recommendation updates and expands upon the original 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions. The 2021 Recommendation was not in force at the time of the visit in the Phase 4 evaluation of France. As a result, the recommendations that the Working Group formulated in this report refer to the 2009 Recommendation.

## 2. Phase 4 process and virtual visit

4. Phase 4 evaluations focus on three key cross-cutting issues: enforcement, detection and corporate liability. They also address progress made in implementing outstanding recommendations from previous phases, as well as any issues raised by changes to domestic legislation or the institutional framework. Phase 4 takes a tailor-made approach, considering each country's unique situation and challenges, and reflecting positive achievements and good practices. For this reason, issues that were not deemed problematic in previous phases or that have not arisen in the course of this evaluation may not have been fully re-assessed at the virtual visit and may thus not be reflected in this report.

5. The evaluation team for France's Phase 4 evaluation was composed of examiners from Canada and Switzerland, as well as members of the OECD Anti-Corruption Division.<sup>2</sup> Pursuant to the Working Group's Phase 4 evaluation procedures, after receiving France's response to the Phase 4 questionnaire and supplementary questions, the evaluation team conducted a visit from 3 to 12 May 2021. This visit was exceptionally conducted virtually due to the limitations imposed by the COVID-19 pandemic. The evaluation team met with relevant law enforcement and government authorities, parliamentarians, and representatives from civil society and the private sector. The evaluation team notes that the French government representatives decided, as permitted under the Working Group's procedures, not to observe the panels organised with the non-government representatives. The evaluation team expresses its appreciation to the representatives of the PNF for their availability during the visit. Finally, the team is also grateful to the French authorities, in particular the General Secretariat for European Affairs (SGAE), a department of the Prime Minister's Office, the General Directorate of the Treasury within the Ministry of Economy, Finance and Recovery, the Directorate of Criminal Affairs and Pardons of the Ministry of Justice, the French Anti-Corruption Agency (AFA) and the Ministry for Europe and Foreign Affairs for their level of engagement, including at the highest political level, during the visit, and their co-operation throughout the evaluation, the organisation of the virtual visit and the provision of additional information following the visit.

## 3. France's foreign bribery risk in light of its economic situation and trade profile

### ***a. A major actor in the global economy<sup>3</sup> with a presence in jurisdictions known to be at high risk of corruption***

6. France is the world's sixth largest economy, accounting for 3.3% of global exports in 2020, and the second largest economy in Europe. In 2019, France ranked fifth among Working Group members in

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<sup>2</sup> Canada was represented by Ms Nathalie Hébert, Senior Counsel, Team Leader, Criminal Law Policy Section, Department of Justice; Mr Mark Scrivens, Senior Counsel, Policy Implementation Directorate, Department of Justice; and Mr Matthieu Boulanger, Supervisor and Senior Investigator, International and Sensitive Investigations, Royal Canadian Mounted Police. Switzerland was represented by Mr Olivier Bovet, Economist, State Secretariat for Economic Affairs (SECO), Federal Department of Economic Affairs, Education and Research; Ms Maria Schnebli, Federal Prosecutor for Economic Crime, Office of the Attorney General; and Mr Alexis Schmocker, Attorney at Law, Federal Office of Justice. The OECD was represented by Ms Sandrine Hannedouche-Leric, Co-ordinator of the Phase 4 evaluation of France and Senior Legal Analyst; Ms Lise Née and Ms Solène Philippe, both Legal Analysts, and Mr Noël Mérillet, Anti-Bribery Analyst, all of the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs. Mr. Brooks Hickman, a Legal Analyst also with the Anti-Corruption Division, helped the evaluation team harmonise the English and French versions of the report.

<sup>3</sup> The figures included in this section were generated from a number of different databases: OECD, ECO ADB database, IMF, [World Outlook Economic Database](#), United Nations Conference on Trade and Development (UNCTAD), [Gross Domestic Product constant](#) (2015) prices, OECD Data, [Trade in Goods and Services](#); UNCTAD, [Outward Foreign Direct Investment Stocks](#).



terms of gross domestic product (GDP estimated at USD 2.6 billion), fifth for exports of goods and services, and seventh for foreign direct investment (FDI) stocks. The French economy is supported internationally by large groups and multinational companies operating in highly strategic sectors. In 2020, 31 major French groups were included in the ranking of the world's 500 largest groups. These groups rely on a large network of subsidiaries and France is the European country with the most subsidiaries operating abroad.<sup>4</sup>

7. Although the vast majority of French exports are directed to European countries (52% of French exports in 2019), exports outside the European Union (EU) and particularly to Asia remain significant, with the latter accounting for 28% of French exports in 2019.<sup>5</sup> Moreover, France continues to maintain close economic ties with countries in Africa, even though it has lost market share in recent years. With a 5.2% share of the African market, France ranked first in Europe and second in the world among exporters to Africa in 2020.<sup>6</sup> In terms of outward FDI, although the United States, the Netherlands and Belgium are the main destinations for French FDI,<sup>7</sup> France is also active in Latin America, where it is among the ten largest foreign investors in Brazil and Mexico.<sup>8</sup> French companies are also investing massively in Africa, where French FDI stocks grew from EUR 6 billion in 2000 to EUR 52 billion in 2017, 45% of which is invested in the extractive industries.<sup>9</sup>

### **b. Large companies among world leaders in sectors at high risk of corruption**

8. French companies are active in international markets and are leaders in several sectors known to be particularly exposed to high risks of corruption. France plays an important role in the aerospace sector, in which it ranked second in the world and first in Europe in 2018. France was also the world's second largest producer of nuclear energy in 2019.<sup>10</sup> This sector is mainly driven by companies controlled by the French state. More than 50% of companies in the sector are active on international markets, particularly in the context of large-scale projects in the People's Republic of China, India, South Africa, the United Arab Emirates and the Russian Federation.<sup>11</sup> France is also active in the manufacturing and extractive industries, which accounted for 13.6% of French GDP in 2020.<sup>12</sup> Finally, civil engineering and construction is another important sector for France and represented 6% of its GDP in 2018.<sup>13</sup> Although civil engineering exports remain relatively low (EUR 3.1 billion in 2019), French companies operating in this sector include

<sup>4</sup> OECD (2017), [France – Trade and Investment Statistical Note](#), p. 3; BPI France (12 August 2020), [“52% des exportations françaises sont à destination de l’UE”](#); [Fortune Global 500 ranking for 2020](#).

<sup>5</sup> OECD Data, [Outward FDI by partner country](#); and Directorate General of the Treasury (2021), [Rapport du commerce extérieur de la France](#) [Report on France's Foreign Trade], p.107; INSEE (2020), [Principaux partenaires français à l'exportation](#) [Main French Export Partners].

<sup>6</sup> Directorate General of the Treasury (2021), [Rapport du commerce extérieur de la France](#) [Report on France's Foreign Trade], pp.49 and 109; Press Office of the French Prime Minister (2018), [Présentation de la stratégie du Gouvernement en matière de commerce extérieur](#) [Presentation of the Government's Foreign Trade Strategy].

<sup>7</sup> OECD, Data, [Outward FDI by partner country](#).

<sup>8</sup> Directorate General of the Treasury (2021), [Relations bilatérales avec le Brésil](#) [Bilateral relations with Brazil]; Directorate General of the Treasury (2021), [Baisse des investissements directs étrangers au Mexique en 2019 et au cours des premiers mois de 2020](#) [Decline in foreign direct investment in Mexico in 2019 and the first months of 2020].

<sup>9</sup> Report to the Minister of Europe and Foreign Affairs and the Minister of the Economy and Finance (2019), [Relancer la présence économique française en Afrique: l'urgence d'une ambition collective à long terme](#) [Relaunching French economic presence in Africa: the urgency of a long-term collective ambition], p.7.

<sup>10</sup> Nuclear Energy Agency (NEA) (2020), [Nuclear Energy Data](#), p.24.

<sup>11</sup> *Les Echos* (23 April 2021), [“Nucléaire: EDF fait un grand pas dans son gigantesque projet d'EPR en Inde”](#) [“Nuclear energy: EDF takes a big step forward in its gigantic EPR project in India”]; French Nuclear Energy Society (SFEN) (2019), [Une filière exportatrice \[An export industry\]](#); SFEN (n.d.), [Le nucléaire dans le monde](#) [Nuclear energy in the world].

<sup>12</sup> INSEE (2020), [The National Accounts in 2020](#).

<sup>13</sup> INSEE (2019), [Enterprises in France, added value](#), 2019 edition.

a number of large groups that are active on international markets.<sup>14</sup> Finally, France ranks among the largest exporting countries in the strategic arms sector (in third place for 2016–2020) according to the Stockholm International Peace Research Institute (SIPRI) Index.<sup>15</sup> France's main customers are India, Qatar, Saudi Arabia, Egypt and the United Arab Emirates.<sup>16</sup>

#### 4. A significant number of reforms since Phase 3

9. Since Phase 3, France has carried out a significant number of reforms in many areas relevant to the implementation of the Convention and its related instruments. The country's legal and institutional framework in this area has been substantially revised.

10. A major step in this process was the adoption of the Act of 9 December 2016 on transparency, combating corruption and the modernisation of economic life,<sup>17</sup> known as the Sapin 2 Act, which aimed to bring France up to the best European and international standards for combating bribery, and to implement a number of the Working Group's recommendations. The act strengthened the preventive aspect of France's anti-corruption system, in particular by establishing the AFA and creating an obligation for large companies to set up compliance programmes, with sanctions imposed for non-compliance. The AFA, with its wide-ranging remit, particularly in terms of advice and oversight, is now a central player in combating corruption in the public and private sectors. The act also establishes a general regime for whistleblowers, including greater levels of protection. The Sapin 2 Act has additionally made significant improvements for law enforcement, including the removal of certain procedural obstacles to enforcing the foreign bribery offence, the creation of an offence of trading in influence in relation to foreign public officials, the introduction of an additional penalty requiring companies convicted of bribery to implement a compliance programme, and the introduction of the CJIP, which has profoundly transformed the way in which prosecutors work, particularly in relation to foreign bribery cases.

11. The investigative and prosecutorial framework to combat corruption, including foreign bribery, has undergone significant reforms since Phase 3, to give more visibility to the fight against economic and financial crime, allowing for greater specialisation of the services concerned, and strengthening and securing their resources. In 2013, the Act on combating tax evasion and serious economic and financial crime<sup>18</sup> created the PNF, which relies on the Central Office for Combating Corruption and Financial and Fiscal Offences (*Office central de lutte contre la corruption et les infractions financières et fiscales* - OCLCFFF), also created in 2013, for its investigations.<sup>19</sup> By centralising the handling of foreign bribery cases within these two organisations, France has usefully clarified its institutional framework for law enforcement in this area. The question of their resources is now critical. The Act of 24 December 2020 on the European Public Prosecutor's Office, environmental justice and specialised criminal justice<sup>20</sup> also

<sup>14</sup> Directorate General of the Treasury (2021), [Rapport du commerce extérieur de la France](#) [Report on France's foreign trade], p.108; France Industrie, [Industrie du bâtiment et des travaux publics](#) [The building and civil engineering industry].

<sup>15</sup> [SIPRI \(March 2021\), Trends In International Arms Transfers, 2020](#).

<sup>16</sup> Ministry of the Armed Forces (2021), [Rapport au Parlement 2021 sur les exportations d'armement de la France](#) [Report to Parliament on Arms Exports from France], p.113.

<sup>17</sup> [Act No. 2016-1691](#) of 9 December 2016 on transparency, combating corruption and the modernisation of economic life, supplemented by the [Circular](#) of 31 January 2018 on the presentation and implementation of the criminal provisions provided for by the Act.

<sup>18</sup> [Act No. 2013-117](#) of 6 December 2013 on combating tax evasion and serious economic and financial crime.

<sup>19</sup> Decree No. 2013-960 of 25 October 2013 creating a central office for combating corruption and financial and tax offences.

<sup>20</sup> [Act No. 2020-1672](#) of 24 December 2020 on the European Public Prosecutor's Office, environmental justice and specialised criminal justice.

defined the procedural framework for France's participation in the European Public Prosecutor's Office, whose jurisdiction extends to bribery of foreign public officials when this affects the EU's financial interests.

12. A large number of laws have also introduced reforms in various areas, such as the prohibition of individual instructions from the Minister of Justice to public prosecutors,<sup>21</sup> the reorganisation of the criminal courts and the strengthening of the framework for the plea-bargaining system known as *Comparution sur reconnaissance préalable du culpabilité* (CRPC),<sup>22</sup> the strengthening of investigative resources and the extension of the adversarial process to the preliminary investigation stage,<sup>23</sup> the extension of the judicial authority's access to tax information,<sup>24</sup> the extension and clarification of the statute of limitation for public prosecution,<sup>25</sup> the protection of trade secrets<sup>26</sup> and personal data,<sup>27</sup> the disclosure and publication of court decisions,<sup>28</sup> the strengthening of the system for combating money laundering and terrorist financing,<sup>29</sup> and the modification of the scope of application of the obligation for companies to appoint an external auditor.<sup>30</sup> Other texts have also introduced the non-deductibility of bribes paid to foreign public officials in overseas territories<sup>31</sup> and reformed the rules on the protection of classified defence information.<sup>32</sup>

13. France also clarified and formalised the strategic framework of its criminal law policy on combating foreign bribery in the circular of 2 June 2020 on international corruption, known as the Belloubet circular.<sup>33</sup>

14. Although some of these measures have not yet produced their full effect, further reforms are under discussion, or have even been approved by the Parliament. Some of these are major and could upset the balance that has just been achieved and call into question the progress made since Phase 3. For example, the bill on confidence in the judiciary, which was approved by the Parliament on 18 November 2021, three weeks before the adoption of this report,<sup>34</sup> provides, among other things, for limiting the duration of preliminary investigations to two or three years. The impact that this reform, which is about to enter into force, would have on inherently complex and time-consuming cases such as those involving foreign bribery is discussed in Section B4.b.

<sup>21</sup> Act No. 2013-669 of 25 July 2013 relating to the powers of the Minister of Justice and the Public Prosecutor's Office with regard to criminal policy and the implementation of public prosecution, which enshrines the guidelines previously set out in two circulars from the Minister of Justice dated 31 July 2012 and 19 September 2012.

<sup>22</sup> [Act No. 2019-222](#) of 23 March 2019, 2018–2022 Framework and Reform Act for the Justice System.

<sup>23</sup> [Act No. 2016-731 of 3 June 2016](#) strengthening efforts to combat organised crime, terrorism and the financing of these activities, and improving the efficiency and guarantees of criminal procedure.

<sup>24</sup> [Act No. 2018-898](#) of 23 October 2018 on combating fraud.

<sup>25</sup> [Act No. 2017-242](#) of 27 February 2017 reforming the statute of limitation in criminal matters.

<sup>26</sup> [Act No. 2018-670](#) of 30 July 2018 on the protection of commercial confidentiality transposing Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

<sup>27</sup> [Act No. 2018-493](#) of 20 June 2018 on the protection of personal data and [Ordinance No. 2018-1125](#) of 12 December 2018 issued pursuant to article 32 of the Act on the protection of personal data.

<sup>28</sup> [Act No. 2016-1321](#) of 7 October 2016 for a Digital Republic, known as the Lemaire Act, and Act No. 2019-222 of 23 March 2019 mentioned above, supplemented by [Decree No. 2020-797](#) of 29 June 2020 on the availability to the public of the decisions by the ordinary and administrative courts.

<sup>29</sup> [Ordinance No. 2016-1635](#) of 1 December 2016 strengthening the French anti-money laundering and counter-terrorist financing system and [Ordinance No. 2020-115](#) of 12 February 2020 strengthening the national anti-money laundering and counter-terrorist financing system.

<sup>30</sup> [Act No. 2019-486](#) of 22 May 2019 on the growth and transformation of companies, known as the PACTE Act.

<sup>31</sup> [Act No. 2021-29](#) of 21 June 2021 on measures to strengthen the requirement for exemplary fiscal practices.

<sup>32</sup> [Decree No. 2019-1271](#) of 2 December 2019 on the arrangements for classifying and protecting national defence secrets and the [Order of](#) 13 November 2020 approving Inter-ministerial General Instruction (IGI) No. 1300 on the protection of national defence secrets.

<sup>33</sup> [Circular](#) of 2 June 2020 on criminal policy on combating international corruption.

<sup>34</sup> [Bill No. 4091](#) on confidence in the judiciary.

15. Moreover, France must transpose the European directive of 23 October 2019 on whistleblowers before 17 December 2021.<sup>35</sup> While the directive requires the introduction of certain useful adjustments to the French system, transposing it could also provide an opportunity for a more ambitious reform, strengthening the protections granted to whistleblowers and activating this source of detecting foreign bribery in France. Two bills have been introduced before the National Assembly on 15 and 21 July 2021 by the deputy Sylvain Waserman in consultation with the Government: a proposed bill for an organic law to strengthen the role of the Defender of Rights office regarding whistleblower reports and an ordinary bill to improve whistleblower protections.<sup>36</sup> At the time of finalising this report, the proposed bills were about to be examined by the National Assembly.<sup>37</sup> They contain several proposed reforms that are detailed under section A10.b. and c.

16. Finally, the constitutional reform bill for a renewal of democratic life,<sup>38</sup> tabled in the National Assembly on 29 August 2019, aims to strengthen the independence of the Public Prosecutor's Office by amending, among other things, the disciplinary and appointment procedures for prosecutors.

17. A parliamentary report published after the visit, concluding the work of a parliamentary fact-finding commission evaluating the impact of the Sapin 2 Act (the Gauvain and Marleix report)<sup>39</sup> opens up the possibility of a new set of reforms at a time when, according to its rapporteurs, "France's anti-corruption policy is looking for a second breath".<sup>40</sup> Based on hearings with more than 100 people, the report makes 50 proposals, notably to clarify the institutional organisation of anti-corruption policy in France and to promote the use of the CJIP.<sup>41</sup> Right before the finalisation of this report, a proposed bill was introduced by Deputy Raphaël Gauvain<sup>42</sup> based on the parliamentary report. The proposed bill has not yet been included by the Government in the agenda of the National Assembly for the current legislative term, which ends in February 2022. The provisions of this proposed bill relating to foreign bribery are referred in the relevant sections of this report.

## 5. Foreign bribery cases

### a. Notable progress in enforcing the foreign bribery offence since Phase 3

18. The PNF now deals centrally with almost all foreign bribery cases. However, because of the stage they had reached at the time of its creation, a small number of the cases reviewed in this Phase 4 evaluation are still being handled by the Paris, Nanterre and Versailles prosecutor's offices, under the residual jurisdiction left to them by the Act on combating tax evasion and serious economic and financial crime.<sup>43</sup>

19. In total, since France acceded to the OECD Convention in 2000 and up to July 2021, 17 cases have resulted in final sanctions being imposed on 23 individuals, including 1 in the context of plea

<sup>35</sup> [Directive \(EU\) 2019/1937](#) of 23 October 2019 on the protection of persons who report breaches of Union law.

<sup>36</sup> Proposed Bill n°4398 to strengthen whistleblower protections and a proposed Bill for an organic law to strengthen the role of the Defender of Rights office regarding whistleblower reports.

<sup>37</sup> Review by the Law Commission planned on 10 November and in public hearing on 15 November 2021.

<sup>38</sup> [Bill No. 2203](#) on constitutional reform for a renewal of democratic life.

<sup>39</sup> National Assembly, Law Commission, [Information Report No. 4325](#), 7 July 2021, concluding the work of an information mission evaluating the impact of the Sapin 2 Act, presented by Mr Raphaël Gauvain and Mr Olivier Marleix, Rapporteurs, Deputies.

<sup>40</sup> *Ibid.*, p. 9.

<sup>41</sup> Dumourier A. (2021), "[La mission d'évaluation de la loi Sapin 2 veut relancer la politique de lutte contre la corruption en France](#)" ["The mission to evaluate the Sapin 2 Act aims to relaunch France's anti-corruption policy"], *Le Monde du Droit*.

<sup>42</sup> Proposed Bill n°4586 to strengthen the fight against corruption, introduced on 21 October 2021 by the Deputy Raphaël Gauvain.

<sup>43</sup> [Act No. 2013-117](#) of 6 December 2013.

bargaining, and on 23 legal persons, including 5 in the context of a CJIP for foreign bribery or complicity in foreign bribery.

20. In Phase 3 (as of October 2012), only three cases had resulted in final convictions of four individuals in minor cases judged by direct summons. No legal person had been finally convicted. Since Phase 3, the number of cases resulting in final convictions for foreign bribery has increased significantly. Between October 2012 and March 2021, 9 additional cases resulted in the final conviction (i.e. not including a CJIP) of 19 individuals and 18 legal persons for foreign bribery or complicity in foreign bribery<sup>44</sup> and 5 legal persons were sanctioned using a CJIP in 5 cases,<sup>45</sup> i.e. a total of 19 individuals and 23 legal persons were sanctioned for foreign bribery in 14 cases. These figures include the convictions handed down and confirmed on final appeal in May 2020 and March 2021 in two parts of the *Oil-for-Food case: Oil aspect – Total and Vitol No. 102* and *Equipment aspect – 12 companies sanctioned No. 70* against 9 individuals and 14 legal persons for foreign bribery or complicity in foreign bribery. The nine cases that resulted in final convictions, although relatively old, involved more complex foreign bribery schemes than the minor cases concluded in Phase 3. These nine cases were the subject of a judicial inquiry – with the exception of one case that was subsequently resolved through a CPRC – and were for the most part initiated by the Paris Public Prosecutor's Office and investigated over a period of approximately six to eight years. No case initiated by the PNF has yet been tried in court. Of the five cases resolved using a CJIP, two were the subject of a judicial inquiry and three were resolved following a preliminary investigation.

21. Between France's Phase 3 evaluation and as of September 2021, a total of 108 foreign bribery cases were investigated.<sup>46</sup> Of these 108 cases, 52 cases are still under investigation against at least some of the persons involved, 41 cases have been closed without a prosecution for foreign bribery, 13 cases have been tried and 6 cases were resolved, at least for certain persons involved, through non-trial resolutions.<sup>47</sup> Of the 52 ongoing cases, 35 are under preliminary investigation by the PNF, 2 preliminary investigations are conducted by a different Public Prosecution Office, and 15 are under investigation by an investigative judge. In 7 of the 15 judicial inquiries under way, at least 17 individuals and 5 legal persons had been indicted, including for foreign bribery, at the time of writing this report. In addition, 14 cases resulted in sanctions being imposed on individuals and/or legal persons, including in the context of plea bargaining and a CJIP; 13 individuals and 1 legal person have been charged with foreign bribery and complicity in foreign bribery, in 3 cases awaiting trial. Final acquittals were handed down against 14 individuals and the 1 legal person that had been convicted in first instance (during Phase 3) in 6 cases.<sup>48</sup>

<sup>44</sup> The cases that resulted in a final conviction were (i) *Bank Investment (Cameroon) No. 120*; (ii) *Oil 1 (Republic of the Congo) No. 128*; (iii) *Hydrocarbon Exploitation (Algeria) No. 4*; (iv) *Total (Iran) No. 103*; (v) *TSKJ (Nigeria) No. 99*; (vi) *Public Services Lobbyist – Eurotrends and Kic System (EU) No. 62*; (vii) *Oil-for-Food, Oil aspect – Total and Vitol No. 102*; (viii) *Oil-for-Food – Equipment aspect – 12 companies No. 70*; and (ix) *Alcatel (Costa Rica) No. 7*.

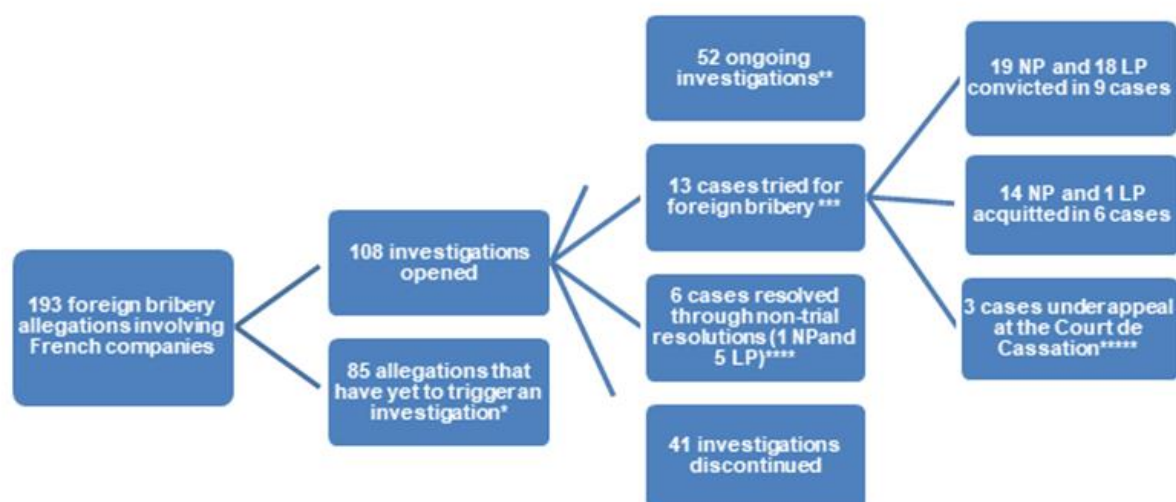
<sup>45</sup> The cases that resulted in a final sanction following a CJIP are (i) *Société Générale (Libya) No. 90*; (ii) *Egis Avia (Algeria) No. 78*; (iii) *Airbus (multiple jurisdictions) No. 5*; (iv) *Bolloré (Togo) No. 34* and (v) *Systra (Uzbekistan and Azerbaijan) No. 87*.

<sup>46</sup> French implementation data from Phase 3 to 10 September 2021, the date on which the French authorities sent their comments on the draft report, are detailed in Annex 2. More detailed figures and analysis appear in the relevant sections of this report.

<sup>47</sup> The detailed list does not add-up to a total of 108 cases because, for example, certain cases may have been resolved only regarding some of the natural or legal persons involved, while investigations or proceedings continue against others.

<sup>48</sup> The cases that resulted in a final acquittal are (i) *Arms 1 (Cameroon) No. 124*; (ii) *Safran (Nigeria) No. 79*; (iii) *Oil Exploration (Burundi, Malawi and Democratic Republic of Congo) No. 1*; (iv) *Arms materials (Cameroon and Mali) No. 101*; (v) *Alcatel (Costa Rica) No. 7*; and (vi) *Oil-for-Food, Oil aspect – Total and Vitol, No. 102*.

Figure 2. Foreign bribery cases since Phase 3 (September 2021)



## Notes:

\* Number of foreign bribery allegations involving French companies in the compilation maintained by the Working Group based on press articles.

\*\* 52 ongoing investigations, including 37 preliminary investigations and 15 judicial inquiries for foreign bribery. This figure does not include three cases awaiting trial, two of which were the subject of a preliminary investigation or a judicial inquiry initiated by the PNF.

\*\*\* Some cases are counted simultaneously as final convictions, acquittals and/or appeals to the Court of Cassation. Not included are (i) final convictions for misuse of corporate assets in one case where the offence of foreign bribery could not be prosecuted, and (ii) cases that resulted in the acquittal and non-final conviction of two individuals for the accounting offences of forgery and use of forgeries, where the offence of foreign bribery was dismissed.

\*\*\*\* One case was resolved with an individual through a CRPC approved by the Paris Criminal Court and five cases were resolved with five legal persons by means of CJIP with the PNF approved by the Tribunal of Paris (*Tribunal judiciaire de Paris*).

\*\*\*\*\* In three cases, appeals to the Court of Cassation were lodged by the defendants (four individuals) against their convictions.

### b. Enforcement of corporate liability remains weak but is strengthened by the CJIP

22. Since the Convention entered into force in France in 2000, 18 legal persons have been finally convicted for foreign bribery (i.e. excluding cases concluded through a CJIP), including 14 in the context of two *Oil-for-Food* cases. No legal person had received a final conviction at the time of Phase 3. Consequently, excluding the *Oil-for-Food* case, only four legal persons have been finally convicted of foreign bribery or complicity in foreign bribery, in three cases.<sup>49</sup>

23. The introduction of the CJIP into French law by the 2016 Sapin 2 Act marked a significant shift in France's enforcement of corporate liability in foreign bribery cases. In practice, the use of the CJIP allowed France to take part in the resolution of two large-scale, multi-jurisdictional cases involving French companies. These two cases gave rise to coordinated resolutions with the prosecuting authorities of other Parties to the Convention in the *Société Générale (Libya) No. 90* and *Airbus (multiple jurisdictions) No. 5* cases. Five legal persons have been sanctioned under a CJIP in five foreign bribery cases since 2016. In four of these cases, investigations are ongoing concerning the individuals involved, none of whom has been sanctioned to date.

<sup>49</sup> The convictions were in the cases of *Public Services Lobbyist (EU) – Eurotrends and Kic System No. 62*; *Total (Iran) No. 103*; and *Alcatel (Costa Rica) No. 7*.

**c. A significant increase in the number of investigations opened but a low number of cases resolved**

24. The number of investigations initiated for foreign bribery has increased by almost 3.5 times since Phase 3. Only 33 investigations had been initiated between 2000, when the Convention entered into force in France, and the end of 2012, when the Phase 3 evaluation was conducted. Between the end of 2012 and 10 September 2021 (the cut-off date for French data), 108 investigations were opened or were still in progress since Phase 3. However, these cases continue to result in a limited number of sanctions. The increase in the number of investigations opened has also led to a corresponding increase in the number of investigations closed without prosecution, whether these cases are closed without further action by the prosecutor's office or dismissed by an investigative judge. However, the number of cases resolved remains low in relation to France's economic weight and the exposure of its companies to bribery risks. Of the 108 investigations opened or still ongoing since Phase 3, only 14 of them (13%) have resulted in sanctions through final convictions or settlement by way of a CJIP. This proportion is more or less the same as it was in Phase 3, when 3 of the 33 cases resulted in final convictions. However, it is low compared with a European economy of comparable size to France evaluated by the Working Group in 2018, for which this proportion is 39% of cases opened since Phase 3.<sup>50</sup> One explanation for this low resolution rate could be the lack of resources at all stages of the criminal justice process, from the investigative stage to trial in foreign bribery cases (see Section B3.b.).

**d. Increasing number of cases not investigated**

25. A significant number of foreign bribery allegations involving French companies have not been investigated. As of March 2021, 85 cases involving French companies identified by the Working Group on Bribery had not led to the opening of a preliminary investigation in France, compared with 38 such cases in Phase 3. The vast majority of these allegations relate to undue advantages granted to public officials in Africa and are mainly in the defence, construction, telecommunications, and mining sectors. Some of these cases have been investigated, prosecuted or sanctioned abroad (at least on the recipient side), and others have been covered in the press. Some of them involve internationally renowned French companies in relation to large-scale projects abroad. In Phase 3, the lack of investigation, even preliminary investigation, in a significant number of foreign bribery allegations raised concerns among the Working Group, particularly regarding the lack of prosecutorial independence. (See Section B3.d.) During the visit, PNF representatives indicated that due to the volume of cases that they already have to handle and the limited resources available to the PNF and investigative services, they must constantly make choices. The PNF reports that it therefore focuses on the most recent violations, notably to preserve the evidence and on the most relevant cases under the criminal policy set out in the Belloubet circular.

**Commentary**

***The lead examiners welcome the significant legislative and institutional changes introduced by France since Phase 3 including, in particular, the 2013 creation of the PNF and the 2016 Sapin 2 Act that have enabled France to revise its approach to combating foreign bribery and become recognised by its peers as a partner in the enforcement of the foreign bribery offence. These reforms, supplemented by a relatively dense body of case law, are analysed throughout this report.***

***The lead examiners commend France for its notable progress in enforcing the foreign bribery offence since Phase 3. Between the end of 2012 and September 2021, 19 individuals and 23 legal persons were sanctioned for foreign bribery or complicity in foreign bribery in 14 cases. The lead examiners welcome the much more proactive way in which the French authorities are opening foreign bribery cases brought to their attention, resulting in a 3.5-fold increase in the number of investigations since Phase 3. In this regard, they further note that the concluded cases have also***

<sup>50</sup> [The Working Group's Phase 4 Report on Germany](#), (2018), paras. 18–19.

***involved larger corruption schemes than in Phase 3. Moreover, the introduction of the CJIP into French law in 2016 has led to a paradigm shift, which has resulted in the resolution of two major cases jointly with other Parties to the Convention.***

***However, the lead examiners note that the number of cases resolved and the number of legal persons convicted of foreign bribery to date remain low in regard of France's economic situation and its companies' exposure to risks of bribery. Investigations and prosecutions still result in a limited number of persons sanctioned, particularly with regard to legal persons. Moreover, these proceedings progress slowly and the proportion of investigations that do not progress to prosecution remains high. Finally, the lead examiners are disappointed to note that a significant number of allegations, some of which are long-standing and concern large French companies, have not been investigated to date. France must now solidify its recent achievements which, as indicated in this report, are undermined by structural resource issues that impact the entire criminal justice system, as well as by approved or pending reforms to, first, the duration of preliminary investigations and, second, the AFA. In the opinion of the lead examiners, all of these developments raise concerns calling into question the continuation of recent progress.***

***The lead examiners therefore recommend that France take all necessary measures to enable the various components of the criminal justice system, including the entities set up since Phase 3, to pursue the enforcement of the foreign bribery offence and, more particularly, to proactively and effectively detect, investigate, prosecute and sanction the individuals and legal persons who commit foreign bribery.***

## **A. DETECTION OF THE FOREIGN BRIBERY OFFENCE**

### **Introduction**

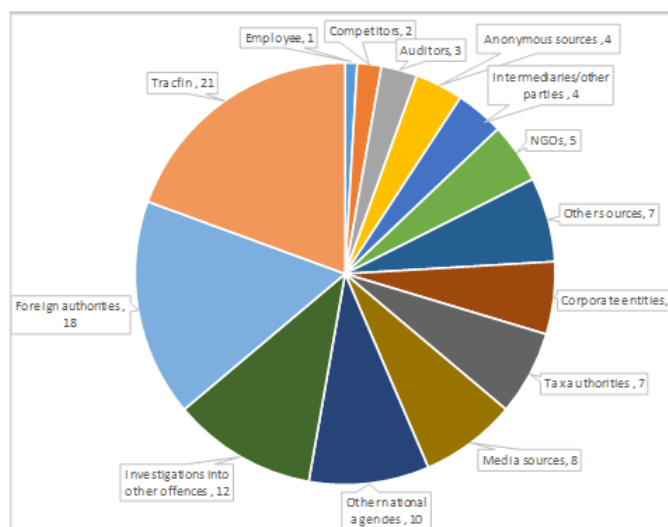
26. A wider range of sources has allowed for more foreign bribery investigations to be opened since Phase 3. The Belloubet circular has significantly contributed to defining the priorities for detection. The circular emphasises the need to "exploit all existing reporting channels for foreign bribery cases" and explains the role that each of these sources, foremost among which are government agencies, plays in detection. As in Phase 3, TRACFIN, the French Financial Intelligence (anti-money laundering) Unit remains the primary source of foreign bribery cases. The two other most important detection sources, in terms of both number and content, are information transmitted by foreign authorities and investigations into other offences. France also identifies civil society complaints as a significant source of foreign bribery investigations and highlights the increasing use made of press reports.

27. However, two important sources used by other Parties to the Convention, have not been activated in France. As a result, no foreign bribery case has been detected to date by diplomatic and consular posts or by whistleblowers, despite the strengthening of the whistleblower protection regime introduced by the Sapin 2 Act. Other sources could be further mobilised, in particular tax authorities, export credit authorities and authorities in charge of disbursing official development assistance (ODA). Furthermore, spontaneous reports from companies still represent only a tiny fraction of the investigations opened. France considers that the number of such cases is likely to increase, however, given the new framework for the prevention and detection of bribery introduced by the Sapin 2 Act, including the new compliance obligation.

28. Furthermore, the fact that the two most important foreign bribery cases resolved by France to date were not initially detected by its authorities but by foreign authorities is a warning about the effectiveness of some of the detection measures in place. The large number of cases identified by the Working Group that have not so far been investigated also raises questions. These questions seem to be shared by a number of actors involved in combating bribery in France, since the parliamentary report by Gauvain and Marleix, mentioned above, proposes to "encourage the detection of bribery abroad by mobilising all government departments" (Proposal no. 14). The figure below lists all of the primary detection sources that have triggered the opening of foreign bribery investigations since Phase 3.



**Figure 3. Sources leading to the detection of foreign bribery cases since Phase 3**



Note: This figure provides aggregate data on the detection sources that initiated foreign bribery investigations in the cases analysed in this evaluation. These data were compiled based on information provided by the French authorities in their replies to the Phase 4 questionnaires and cover the detection sources of cases that were already in progress at the time of Phase 3 and cases detected since Phase 3.

### A1. Capacity of national authorities (in general) to report foreign bribery offences

29. As a preliminary point, the obligation for public officials to report to the Public Prosecutor's Office a crime or misdemeanour of which they become aware in the course of their duties, under article 40 of the Code of Criminal Procedure (CCP), is relevant for the various administrations that play a role in detecting foreign bribery cases: notably the Ministry for Europe and Foreign Affairs, the tax authorities, the AFA, the agency responsible for granting development aid (AFD) and the Ministry of the Armed Forces. The employees of Bpifrance Assurance Export (BPIFrance), the new agency in charge of export credits, are employees under private law and are therefore not subject to the obligation under Article 40 CCP. As BPIFrance is subject to the Sapin 2 Act, it has put into place internal channels to encourage reporting. With regard to TRACFIN, although its officials are subject to article 40 CCP, they are also under another obligation to report to the Public Prosecutor's Office. The threshold that triggers this obligation is lower. (This is discussed in section B3.c below).

30. Under Article 40 CCP, government officials must report as part of their functions “knowledge of felonies and misdemeanours”. In practice, the public agencies apply a demanding threshold to decide which allegations should be reported to the public prosecution service. In Phase 3, this reporting obligation was only used to a limited extent, even though some administrations had become aware of suspected or proven cases of bribery in the course of their duties. The Working Group recommended that France take measures to encourage reporting under article 40 CCP and monitor the impact of these measures in practice (recommendation 11.b. and follow-up question 13.g.).<sup>51</sup>

31. Since Phase 3, the Belloubet circular has restated the reporting obligation to which all public officials are subject under article 40 CCP. In its replies to the questionnaires, France indicated that more specific measures have been taken by each administration to remind their staff of the obligation to report and to encourage such reporting, but only when it satisfies the demanding threshold discussed above. The Ministry for Europe and Foreign Affairs has reminded government officials posted abroad of the provisions

<sup>51</sup> [Phase 3 Report of the Working Group on France](#) (2012), paras. 167–171.

of article 40 CCP and their application in combating foreign bribery in a memo developed with the Central Corruption Prevention Department (SCPC) and with the AFA, and distributed to the entire French diplomatic network in 2013, 2015 and 2018. A second, more general memo on article 40 CCP was posted on the Ministry's intranet in December 2020. The revised AFA Recommendations devote a specific section about the relationship between the article 40 CCP obligation and the reporting procedures introduced by the Sapin 2 Act.<sup>52</sup> A circular dated 7 March 2019 from the Minister of the Budget and the Minister of Justice states that facts likely to fall under article 40 CCP must be systematically identified during tax audits. The tax authorities have also developed a methodological module to help detect and draft reports of foreign bribery for tax auditors with a focus on foreign bribery and examples of possible red flags. However, the number of reports of potential foreign bribery reaching the PNF remains low. France has indicated that only nine foreign bribery investigations have been opened following a report under article 40 CCP since Phase 3, including 2 reports by the AFA, 1 by the AFD and 1 by the French National Insurance Company for External Trade (Coface), which was responsible for export credits at the time.

32. Discussions during the visit, in particular with representatives of the AFD, the tax authorities and the Ministry for Europe and Foreign Affairs, highlighted that the main obstacle to reporting is the high threshold of article 40 CCP, as understood by the public agencies. Accordingly, the 2018 memo from the Ministry for Europe and Foreign Affairs and the AFA, for government officials posted abroad, indicates that "the report must be based on information known to the official and which establishes with sufficient probability and precision the existence of one or more facts likely to be qualified as criminal of any kind." The December 2020 note issued by the Ministry for Europe and Foreign Affairs specifies that "the criminal acts must appear to be sufficiently established, which goes beyond mere suspicion not supported by tangible evidence (testimonies, medical certificates, complaint by the victim, information disclosed by local authorities, etc.)." With regard to the tax authorities, the methodological module for tax auditors recommends that a case should be referred to the Public Prosecutor's Office when there is "a sufficient degree of probability" or when "[the facts] appear to be sufficiently established (credible suspicions)." During the visit, representatives from the Ministry for Europe and Foreign Affairs indicated that criminal acts must appear to be sufficiently established, as opposed to mere unsubstantiated suspicions. Representatives of the AFD also indicated that reporting mere suspicions is not sufficient and that in practice, its agents are not always able to refer cases to the Public Prosecutor's Office under article 40 CCP, because they cannot gather the necessary evidence.

33. In light of the above, the setting-up of internal reporting channels foreseen in article 8 and, to a lesser extent, article 3 of the Sapin 2 Act could enable public officials to report suspected acts of foreign bribery, which they become aware of in the course of their duties. These new reporting mechanisms, which are optional and not obligatory as in the case of article 40 CCP, could enable France to align itself with the approach of other Parties to the Convention, which emphasise the reporting of foreign bribery by whistleblowers, including in the public sector. Furthermore, the Prime Minister's circular of 11 October 2021 underlines that "adherence to the procedure provided by these new reporting mechanisms should allow reporting persons to benefit from all associated protections and guarantees, given that it provides a greater scope of protection than those provided under article 40 CPP.<sup>53</sup> However, France indicates that it considers that the same threshold is required for reporting under article 40 CCP and reports made by whistleblowers in the public sector on the grounds that "if the entity receiving the report does not have investigative powers, it will not be in a position to report it to the Public Prosecutor's Office." The extension to all types of reporting of the requirement of sufficiently established criminal acts, even before any internal verification or investigation, appears to limit the usefulness of the new internal reporting channels foreseen in article 8 of the Sapin2 Act as an effective source of detection of foreign bribery.

<sup>52</sup> AFA, (2021), [Les Recommandation de l'AFA](#) [The AFA Recommendations], paras. 545–546.

<sup>53</sup> [Circular](#) n° 6306-SG of 11 October 2021 on reinforcing transparency in relation to foreign activities aimed at influencing State public officials, p.4

34. In any case, there is a need to clarify the relationship between these internal channels and those applicable to reporting under article 40 CCP, which overlap and even conflate. The relationship between these procedures is addressed in the circular of 19 July 2018<sup>54</sup> and is the subject of a specific point in the AFA's revised Recommendations.<sup>55</sup> However, the lack of clarity in the current system, which was highlighted by the Defender of Rights during the visit, and the multiplication of reporting channels raise practical questions concerning both their implementation and the level of protection afforded to the person submitting the report. This level of protection varies depending on whether the report is made in the context of article 40 CCP or article 8 of the Sapin 2 Act. The Ministry for Europe and Foreign Affairs, for example, has set up a "direct communication channel" to facilitate discussions on the reporting obligation of Ministry staff under article 40 CCP, as well as a reporting mechanism for whistleblowers under article 8 of the Sapin 2 Act. However, there is a lack of clarity in the relationship between the schemes. While the Ministry for Europe and Foreign Affairs instruction of December 2020 indicates that the reporting channel established to implement article 40 CCP is distinct from the whistleblower procedure, the criteria justifying the use of either of these mechanisms are not clearly set.

### **Commentary**

***The lead examiners consider that the high threshold for referring cases to the Public Prosecutor's Office under article 40 CCP, as understood by the public agencies, is a serious impediment to the referral of foreign bribery cases to the PNF by officials posted to diplomatic missions abroad, tax authorities, the AFA, the AFD and the Ministry of the Armed Forces. They are disappointed to note that the requirement for "sufficiently established criminal acts" applied to reports under article 40 CCP is also required for reports by whistleblowers within public administrative authorities under the Sapin 2 Act, thus limiting the possibilities offered by this new mechanism to detect foreign bribery.***

***The lead examiners therefore recommend that France (i) clarify the relationship between the reporting obligation incumbent on public officials under article 40 CCP and the possibility of reporting open to them under articles 6 and 8 of the Sapin 2 Act, in particular with regard to reporting channels, the criteria applicable for using either of these mechanisms, and the related protections; and (ii) ensure that the thresholds for reporting a credible allegations of foreign bribery are not interpreted in an overly demanding manner and do not create obstacles to such reporting.***

## **A2. Ability of the AFA to detect and report foreign bribery**

35. The AFA was created by the Sapin 2 Act and replaced the Central Service of Corruption Prevention (SCPC), which existed at the time of Phase 3. Foreign bribery falls under the AFA's remit and is specifically mentioned in the AFA's 2021 revised Recommendations.<sup>56</sup> The AFA has a number of responsibilities in respect of both the public and private sectors. A significant part of the AFA's activity is therefore not directly covered by this evaluation, which focuses on the AFA's missions relating to the strengthening of internal anti-bribery compliance measures by exporting companies headquartered in France. (The AFA's duties, other than detecting and reporting foreign bribery violations, are detailed in Section C5.)

<sup>54</sup> [Circular](#) of 19 July 2018 on the procedure for flagging reports made by public officials under articles 6 to 15 of the Sapin 2 Act, p.2.

<sup>55</sup> *Ibid.*, The AFA Recommendations, paras. 545–546.

<sup>56</sup> The original version of the AFA Recommendations published in 2017 did not cover the offence of foreign bribery, and only referred to active domestic bribery under article 433-1 of the Criminal Code. The new AFA Recommendations cover, more broadly, in para. 2 "all of those criminal acts defined in Title III of Book IV of the Criminal Code" and therefore the offence of foreign bribery.

36. The Sapin 2 Act has invested the AFA with the duty to detect acts of bribery and trading in influence and to notify the National Financial Prosecutor of any acts of which it becomes aware in the course of its duties (articles 1 and 3.6 of the Sapin 2 Act). Additionally, as explained in Section A1 above, AFA officials, like those of other public agencies, are subject to the obligation to report under article 40 CCP. The AFA may detect incidents of foreign bribery in the context of an inspection instigated by the agency on the compliance measures taken by a company (referred as “*ad hoc* compliance audit”). The Belloubet circular stresses that “in the context of its duties to monitor the robustness of anti-bribery programmes within large companies, the AFA may uncover suspicious acts that could justify a report to the judicial authorities”. The AFA Director also emphasised the detection role legally entrusted to AFA when testifying before the parliamentary inquiry evaluating the impact of the Sapin 2 Act in April 2021.<sup>57</sup>

37. The AFA may also detect foreign bribery facts through external reports sent to the agency by any individual or legal person, including employees of companies subject to the compliance obligation under article 17 of the Sapin 2 Act, and the anti-corruption associations accredited pursuant to article 2-23 CCP. This type of report of an offence, which, like foreign bribery, falls within the jurisdiction of the AFA, does not necessarily have to be linked to a breach of compliance obligations. Such a report may trigger an *ad hoc* compliance audit on the AFA’s own initiative or, if necessary, be forwarded to the Public Prosecutor’s office.

38. In practice, between its creation and December 2020, the AFA forwarded two reports of foreign bribery to the PNF, involving exporting companies headquartered in France, which led to the opening of a preliminary investigation. The first report originated from an external referral and the second from an *ad hoc* compliance audit. France has indicated that this second report was based on several internal audits, following which the AFA made recommendations (which were not followed up for a long time) aimed at preventing the recurrence of, notably, foreign bribery. In the *Combat Aircraft case No. 25*, the AFA’s failure to report to the PNF a suspicious payment that the agency reportedly detected during an *ad hoc* compliance audit raised questions, which were relayed by the media and also expressed by civil society and the press during the virtual visit.<sup>58</sup> In this case, the AFA allegedly did not report to the PNF a suspicious payment of EUR 1 million made to an intermediary – who was at the time under investigation in India in another case of arms sales – that the agency had detected during its *ad hoc* compliance audit. After the visit, France indicated that the AFA had implemented the necessary verification procedures and concluded that the payment in question related to an actual service and therefore did not justify a report to the PNF. A civil complaint has since been filed and has led to the opening of a judicial inquiry.

39. During his hearing in front of the parliamentary fact finding commission evaluating the impact of the Sapin 2 Act, the AFA Director underlined the difficulties the agency faces in carrying out its detection mission. He stressed that “the AFA has not been given the tools required for detection; for example, it has no right of discovery and is bound by the rules on secrecy, in both theory and practice”.<sup>59</sup> During the visit, the AFA representatives confirmed that in practice they encountered several types of secrecy obligations that companies raised to object to disclosing information during their *ad hoc* audits, including lawyers’ and auditors’ professional confidentiality obligations and bank secrecy. These areas of secrecy may constitute an obstacle to identifying suspicious financial transactions and thus limit the AFA’s ability to detect foreign bribery in the context of the audits it carries out.

### **Commentary**

***The lead examiners are encouraged by the initial reports of foreign bribery made by AFA to the PNF. Nevertheless, they note that certain obstacles may hinder the detection of suspected criminal***

<sup>57</sup> [Evidence](#) given by the Director of the AFA, Evaluation of the Sapin 2 Act by the National Assembly, 1 April 2021.

<sup>58</sup> Médiapart, “[Les « Rafale papers »](#)” [“The ‘Rafale papers’”], an investigation in three parts, the last one dated 8 April 2021.

<sup>59</sup> *Ibid.*, Evidence given by the AFA Director.

**acts committed by exporting companies headquartered in France, particularly in the context of the ad hoc compliance audits that the AFA conducts at companies.**

**The lead examiners recommend that France ensure that the AFA has the necessary tools to continue to detect potential foreign bribery in the course of its duties by: (i) training its staff on the red flags for foreign bribery to ensure that offences are reported to the PNF, which can then assess the appropriateness of opening an investigation; and (ii) taking the necessary measures to ensure that companies' assertions of professional secrecy obligations will not impede the identification of suspicious financial transactions during AFA's audits.**

### **A3. Capacity of the Ministry for Europe and Foreign Affairs and embassies to detect and report foreign bribery offences**

40. No foreign bribery cases have ever been detected by diplomatic and consular posts. At the time of Phase 3, the Working Group requested that France strengthen its efforts to ensure that officials at the Ministry for Europe and Foreign Affairs (MEAE) and in the economic departments of embassies, which are part of the General Directorate of the Treasury within the Ministry of Economy, Finance and Recovery, are sufficiently aware of the foreign bribery offence and understand their role in raising the awareness of companies to the specific risks involved (recommendation 10).

41. Since Phase 3, steps have been taken to raise awareness of the foreign bribery offence and reporting mechanisms among MEAE staff (see Section A1). In addition, since 2015, the MEAE has organised training courses, some of which were developed in cooperation with the SCPC and with its successor the AFA, on the various aspects of combating corruption, including the foreign bribery offence. These courses are supported by practical case studies and are designed for supervising staff or those who are due to be posted abroad (a training course on the same topic is also available online to all MEAE officials). Newly appointed ambassadors also receive training on "integrity violations", including foreign bribery.

42. The economic departments at the General Directorate of the Treasury are responsible for promoting the interests of French companies operating abroad. In its replies to the questionnaires, France stated that the General Directorate of the Treasury organises an annual meeting on foreign bribery for officials posted abroad. France also notes that awareness raising on foreign bribery takes place annually for the heads of economic departments during the Treasury's international days. The event also provides an opportunity to remind officials posted abroad of their reporting obligation.

43. With regard to the role of the MEAE and General Directorate of the Treasury officials in raising awareness among companies, the 2018 MEAE diplomatic note emphasises that its officials are required to remind companies of their obligations to combat bribery. It encourages MEAE staff, in co-operation with the economic departments and justice attachés, to organise awareness-raising meetings on this subject. The note also emphasises that companies can contact diplomatic missions for counsel or support if they are unlawfully solicited. The above-mentioned training of newly appointed ambassadors also highlights the risks of bribery faced by companies and the conduct expected of those serving in diplomatic posts.

#### **Commentary**

**The lead examiners are concerned that no foreign bribery cases have so far been detected by diplomatic and consular posts, despite the various initiatives taken by the Ministry for Europe and Foreign Affairs and the General Directorate of the Treasury to raise awareness among their officials posted abroad about the offence and their own role in raising awareness of companies, thereby implementing Phase 3 recommendation 10.**

**The lead examiners therefore recommend that France take the following measures: (i) analyse the reasons why officials in diplomatic and consular posts and in the economic departments of embassies (MEAE and the General Directorate of the Treasury) have not been able to detect any allegations of foreign bribery themselves, including through the local media, and take the necessary measures to remedy the situation; and (ii) ensure that diplomatic officials posted abroad actively monitor the local press for the purpose of detecting foreign bribery.**

#### **A4. Capacity of the Ministry of the Armed Forces to detect and report foreign bribery offences**

44. As mentioned in the introduction, France is one of the world's leading arms exporters, a sector that is particularly vulnerable to foreign bribery risks.<sup>60</sup> In Phase 3, the Working Group recommended that France strengthen existing mechanisms within the Ministry of Defence's General Directorate of Armaments (DGA) to (i) ensure a thorough review of anti-bribery compliance programmes when granting arms export licences and (ii) allow for the suspension of access to such exports by companies found to be involved in foreign bribery (recommendation 12.c.).

45. The legal framework on arms exports was extensively overhauled after 2012.<sup>61</sup> Under the new regime introduced since the Phase 3 report, export licences are granted by the Prime Minister, on the advice of the Inter-ministerial Commission for the Study of Military Equipment Exports (CIEEMG). To make operators more accountable, the statutory and regulatory obligations of licensed companies will now be monitored *a posteriori*, rather than *a priori*.<sup>62</sup> This monitoring is carried out by the DGA.

46. These reforms do not appear to have contributed to the comprehensive review of compliance programmes as recommended in Phase 3. The criteria for granting authorisations have not changed (R. 2335-20 of the French Defence Code)<sup>63</sup> and do not include anti-bribery compliance programmes. The conditions for revoking and suspending licences are the same as under the previous regime (L. 2335-4 of the Defence Code) and include compliance with France's international obligations. The interpretation of this provision is difficult to assess. In the Phase 3 follow-up report, France had indicated that the OECD Convention was taken into account in this framework, allowing for the revocation or suspension of an authorisation in the event of a conviction for foreign bribery. However, in Phase 4, France indicated after the visit that the Convention is not cited among the international obligations taken into account during inspections because "export inspections are not intended to verify compliance with anti-bribery provisions". The DGA only checks that companies do not have any convictions when issuing a manufacturing, trade and brokering licence (AFCI), which are valid for five years.<sup>64</sup> Convictions that are not yet final and CJIPs are not taken into account. Once an AFCI has been issued, the existence of past convictions is not checked again when its holder makes specific applications for an export licence

47. Since Phase 3, the DGA has not detected any foreign bribery cases, although a number of such cases have taken place in the defence sector. In addition to the uncertainties identified above on the way

<sup>60</sup> OECD (2014), [OECD Foreign Bribery Report](#); and OECD (2018), [Strategic Approach to Combating Corruption and Promoting Integrity](#), p.27.

<sup>61</sup> [Act No. 2011-702](#) of 22 June 2011 on the control of imports and exports of war and similar materiel, the simplification of transfers of defence-related products in the EU and defence and security contracts, and Decree No. 2012-1176 of 23 October 2012 amending [Decree No. 55-965](#) of 16 July 1955 on the reorganisation of the CIEEMG.

<sup>62</sup> Directorate General of Armaments (2020), [Obligations des exportateurs au titre du contrôle a posteriori](#) [Obligations of exporters under a *a posteriori* control].

<sup>63</sup> [Order](#) of 24 March 2014 on the information to be forwarded to the administration pursuant to articles R. 2335-20 and R. 2335-31 of the Defence Code.

<sup>64</sup> It is at this stage that the DGA checks the entries in Bulletin No. 2 of the record of criminal convictions (R.2332-6 of the Defence Code).

in which bribery risks, including foreign bribery, are taken into account when issuing licences and conducting inspections, as well as in staff training, it is not clear what priority the DGA places on its monitoring role and, in particular, the detection of possible instances of foreign bribery, when one of its historical responsibilities is to support defence exports.<sup>65</sup> The French authorities underlined, however, that inspections were carried out by DGA teams that were independent of those responsible for promoting exports. France did not provide data on the number of inspections and how they were followed up, or on whether they dealt with bribery-related issues. It simply indicated that out of all the CIEEMG's decisions to refuse licences, a small number were motivated by licences or distribution channels considered suspicious, most often due to suspicions of bribery.

### **Commentary**

***The lead examiners regret that France has not implemented Phase 3 recommendation 12.c and that the DGA has not been the source of detection of any instances of foreign bribery, despite the defence sector being particularly vulnerable to this form of risk.***

***The lead examiners recommend that France (i) conduct a thorough review of companies' internal control, ethics and compliance programmes or measures when granting and monitoring arms export licences; and (ii) ensure that companies sanctioned for foreign bribery can have their arms exports authorisation suspended.***

## **A5. Capacity of the tax authorities to detect and report foreign bribery offences**

48. In Phase 3, the Working Group noted that the efforts of the tax administration (General Directorate of Public Finances - DGFIP) efforts to raise awareness of bribery detection appeared insufficient, as evidenced by the low number of reports made under article 40 CCP, particularly with respect to foreign bribery. The Working Group therefore recommended that France continue its efforts to raise tax officials' awareness on detecting illicit transactions related to foreign bribery, in both mainland France and overseas territories, and to promote information sharing between tax authorities and judicial authorities, in particular through the use of article 40 CCP reports (recommendation 9.b).

49. Since Phase 3, the share of foreign bribery cases originating from a tax administration report has decreased from 5 cases detected before 2013 (i.e. 12% of the 41 cases then in progress) to 2 cases (i.e. 3% of the 72 cases detected) since 2013. Accordingly, although we do not know the total number of reports of possible foreign bribery made by the tax authorities under article 40 CCP,<sup>66</sup> we can nevertheless assume that it is low. This poor result is difficult to reconcile with the information provided by France that its tax authorities regularly make adjustments on the basis of the non-deductibility of bribes paid to foreign public officials. This suggests that they have the capacity to detect bribes hidden in the form of legitimate expenses but only rarely transmit this information to prosecutors. This low number of reports by tax authorities is also disappointing in view of the measures recently adopted by France to encourage reporting to the Public Prosecutor's Office, both generally and in cases of foreign bribery (see Section A1).

50. In addition, the Act of 23 October 2018 on combating fraud released tax officials from their professional secrecy obligations with respect to the Public Prosecutor, with whom they may now exchange information previously covered by professional secrecy, even without a complaint or ongoing legal proceedings (article L. 142 A of the Manual of Tax Procedures). During the visit, a representative of the tax administration confirmed that this new measure had strengthened the links between the DGFIP and

<sup>65</sup> Directorate General of Armaments (2021), [Presentation](#).

<sup>66</sup> More precise statistical data should be available in the future, in accordance with an instruction of 8 September 2020, which has not been provided by France.

the Public Prosecutor's Offices, facilitating exchanges of information, particularly with regard to reports made under article 40 CCP.

51. Finally, the Belloubet circular, recognising that the tax administration can be a valuable source for detecting foreign bribery, encourages the PNF to "specifically raise awareness among auditors of the possibilities of detecting such conduct when examining supporting documents provided for expenses related to international contracts." During the visit, tax administration representatives indicated that the formalisation of exchanges between the PNF and the DGFIP was set to be the subject of a forthcoming co-operation meeting, thus indicating that the awareness-raising actions expected as a result of the circular have not yet been implemented. Nevertheless, the tax administration representatives stressed that the training of tax officials on bribery will soon undergo a "paradigm shift", emphasising the role of the tax authorities in combating corruption, which should now be sought in its own right, and no longer merely as an alternative offence to tax evasion. At the time of finalising this report, France indicated that during a conference organised on 29 September 2021 at the DGFIP's Directorate of National and International Audits, the PNF led an awareness-raising initiative on detecting foreign bribery for all of the Directorate's senior staff responsible for auditing large and multinational companies. To this end, the PNF developed an awareness-raising module, which was published online and will remain permanently available on the Directorate's intranet. During the conference, participants were also reminded that the OECD's Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors<sup>67</sup> could be accessed on the intranet. This still needed to be communicated to the rest of the tax examiners and auditors within the inspection teams in order to raise awareness of the type of information that should be brought to the judicial authorities' attention through article 40 CPP reports. However, no information was provided to the evaluation team on anti-bribery initiatives carried out in overseas territories.

52. The impact of all the above measures, some of which are very recent and carried out after the visit, or are even still in the process of being implemented, cannot be fully assessed at this stage. In addition, as noted in Section A1, it emerged from the panel with tax officials, as with other panellists, that they would only consider activating article 40 CCP in the presence of a relatively high level of evidence. This strict interpretation of article 40 CCP, despite recent awareness-raising efforts on combating bribery within the tax administration, could explain why the administration still plays only a marginal role in detecting foreign bribery. At this stage, recommendation 9.b. thus remains partially implemented.

### **Commentary**

***The lead examiners are encouraged by the recent foreign bribery awareness-raising efforts undertaken by the tax administration for tax examiners and auditors responsible for auditing large and multinational companies. Nevertheless, they are still concerned about the tax authorities' declining role in detecting foreign bribery since Phase 3. The number of cases detected bears no relation to the number of tax adjustments regularly made on the basis of the non-deductibility of bribes to foreign public officials. The lead examiners consider that the awareness-raising efforts recommended in Phase 3, and thus Phase 3 recommendation 9.b itself, have not yet been fully implemented. The lead examiners therefore recommend that France: (i) continue and intensify the awareness-raising measures, recently initiated in mainland France, for tax administration officials on detecting illicit transactions related to foreign bribery; (ii) implement, without further delay, the same measures in overseas territories; and (iii) ensure that the tax authorities promptly report to prosecutors any information collected for tax purposes when it likely pertains to acts of foreign bribery.***

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<sup>67</sup> OECD (2013), [Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors](#), OECD Editions.



## A6. Detection and reporting through anti-money laundering preventive measures

53. In Phase 3, while welcoming the important role of TRACFIN as a source of foreign bribery cases, the Working Group was disappointed by the steady decline in the number of reports made by TRACFIN to the Public Prosecutor's Office concerning acts likely involving the laundering of foreign bribery proceeds. The Working Group recommended that France pursue and increase its efforts to raise awareness among the professions required to report instances that may involve foreign bribery (recommendation 7.a.).

54. Since Phase 3, TRACFIN's judicial referrals to the Public Prosecutor's Office on the basis of article L.561-30-1 of the French Monetary and Financial Code (briefing notes produced following investigations initiated independently by TRACFIN and referred spontaneously to the Public Prosecutor's Office) have led to the opening of at least 14 investigations in which suspicions of foreign bribery or money laundering predicated on foreign bribery have emerged (out of 82 cases of foreign bribery or money laundering predicated on foreign bribery opened since 2013, i.e. 17% of the total). As of 31 December 2012, of the 43 foreign bribery or money laundering predicated on foreign bribery cases then in progress, 13 (or 30%) had a TRACFIN report as their source. Despite this relative decline, TRACFIN remains the main detection source of the foreign bribery cases handled by the judicial authorities in France. TRACFIN may also spontaneously refer unsolicited information to support the judicial authorities or criminal investigation departments in the context of ongoing criminal proceedings: since the referral of information is directly linked to existing proceedings, the suspicion of an offence is not systematically established, and the judicial authorities must then determine the nature of the offence in the context of the ongoing investigation or prosecution. TRACFIN does not have statistics identifying the number of judicial spontaneous referrals (which feed into ongoing proceedings) of acts of foreign bribery (as opposed to corruption in general).

55. Since Phase 3, the provisions relating to the prevention of money laundering and combating terrorist financing, which are mainly contained in the Monetary and Financial Code,<sup>68</sup> have been the subject of several reforms aimed at strengthening them, in connection with the adoption of the revised Financial Action Task Force (FATF) Recommendations<sup>69</sup> in 2012, as well as the transposition of the 4th and 5th EU anti-money laundering directives.<sup>70</sup> These new measures<sup>71</sup> are likely to have a positive impact on the capacity of professionals subject to anti-money laundering obligations and of TRACFIN to detect foreign bribery. In particular, the scope of professionals and activities subject to anti-money laundering obligations, and therefore by the obligation to report to TRACFIN, has been expanded (to banking and payment services intermediaries, digital asset service providers, the fiscal advisory activities of legal professionals, etc.). In addition, the risk analysis and due diligence obligations of professionals subject to anti-money laundering obligations have been strengthened, for example with regard to transactions to and from third countries with a high risk of money laundering and terrorist financing. TRACFIN has also been given wide powers to demand information from professionals subject to anti-money laundering obligations, and broader authority to exchange information with foreign financial intelligence units (FIUs). Lastly, TRACFIN has been given greater powers to forward information to other public authorities, including the AFA. The use of international co-operation, as well as TRACFIN's ability to process information received by a foreign

<sup>68</sup> Chapter 1 "Obligations relating to combating money laundering and terrorist financing" and Chapter 2 "Provisions relating to the freezing of assets and prohibiting release" of Title VI, Book V.

<sup>69</sup> FATF, (2012), [The FATF Recommendations](#), updated June 2021.

<sup>70</sup> [Directive \(EU\) 2015/849](#) of the European Parliament and of the Council of 20 May 2015 (4th Anti-Money Laundering Directive); and [Directive \(EU\) 2018/843](#) of the European Parliament and of the Council of 30 May 2018 (5th Anti-Money Laundering Directive).

<sup>71</sup> [Ordinance No. 2016-1635](#) of 1 December 2016 strengthening the French system for combating money laundering and terrorist financing and [Ordinance No. 2020-115](#) of 12 February 2020 strengthening the national system for combating money laundering and terrorist financing.

FIU in the same way as domestic suspicious transaction reports, further enhances TRACFIN's ability to detect foreign bribery cases.

56. In addition, TRACFIN's resources have been considerably strengthened since Phase 3. Its staff has increased from 104 in 2014 to 191 in 2020, and its budget has been increased from EUR 10.26 million in 2015 to EUR 18.70 million in 2020. During the visit, TRACFIN representatives emphasised that the increased budget and resources were particularly related to TRACFIN's role combatting "integrity violations". In April 2021, as part of its 2021–2023 departmental plan,<sup>72</sup> TRACFIN set up an economic and financial crime department, which includes a unit dedicated to integrity violations, made up of four specialised investigators. The full-time mobilisation of four specialised investigators corresponds to an increase in the human resources allocated to this topic, which was previously covered by four investigators who were less specialised and could dedicate only a quarter of their time approximately to this topic. TRACFIN also noted that it has appointed a lead analyst to facilitate cooperation with the AFA. Since these measures are recent, it is difficult to assess the impact of these increased resources, including the specialised resources, in this area.

57. Since Phase 3, TRACFIN has set up a system for prioritising information received in connection with certain offences, including integrity violations. This information receives priority treatment. Both the resources and the legal framework necessary to detect the underlying offence of foreign bribery thus seem to be in place. At the time of finalising this report, France indicated that three files specifically targeting foreign bribery as a predicate offence are being analysed by the investigators in the specialised "integrity violations" unit and that these files should soon be transmitted to the judicial authorities. TRACFIN notes that, since April 2021, 228 suspicious transaction reports have been allocated to the "integrity violations" unit. The number of STRs specifically concerning foreign bribery is not known.

58. In October 2021, TRACFIN organised with the PNF and the OCLCIFI a meeting on the so-called "*Biens Mal Acquis* affair" and international corruption. In addition, TRACFIN notes that it has regular exchanges on these topics with the PNF and the OCLCIFI. The level of awareness and priority given to detecting this offence raises a number of questions. While TRACFIN representatives during the visit indicated that integrity violations clearly include foreign bribery, the use of this concept raises questions about the level of priority TRACFIN pays to this specific offence and money laundering predicated on foreign bribery. France clarified after the visit that, for TRACFIN, the concept of integrity violations specifically covers the offences referred to in Section 3 CC: "breaches of the duty of integrity". However, this section is found in Chapter II "Offences against the public administration committed by persons exercising a public function" (articles 433-1 to 433-26 CC). The foreign bribery offence (articles 435-3 to 10 CC) is found in Chapter V and therefore does not fall under the category of integrity violations. TRACFIN notes that the inclusion of foreign bribery as part of the integrity violations reflects a criminological and operational, rather than a legalistic, approach. This assimilation of the underlying foreign bribery offence into a category to which it does not legally belong seems to explain, in part, TRACFIN's narrow approach to the types of financial flows that fall within the scope of money laundering predicated on foreign bribery (see also Section D1). Indeed, it emerged from the panels with TRACFIN and prosecutors that money laundering predicated on foreign bribery is primarily understood by the authorities as the laundering of bribes, notably by foreign politically exposed persons, rather than the laundering of the proceeds of supply-side bribery, such as the profits from a contract obtained through the payment of a bribe. By equating the underlying offence of foreign bribery with the concept of integrity violations, TRACFIN understands money laundering predicated on foreign bribery only as an offence committed by the public official who received the bribe and overlooks the money laundering offence committed by the company or person who paid it. France has explained that financial flows characteristic of proceeds derived from foreign bribery are more

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<sup>72</sup> Ministry of Economy and Finance, (April 2021), [TRACFIN 2021-2023, Un Service en mouvement](#) [TRACFIN 2021–2023, A Service on the Move].

difficult to detect and represent a practical challenge, hence the choice to focus attention on money laundering predicated on passive bribery.

59. This restrictive approach to the offence of money laundering predicated on foreign bribery is reflected at various levels. In terms of risk analysis, while TRACFIN regularly deals with money laundering predicated on corruption, its work rarely addresses money laundering predicated on foreign bribery. When it is mentioned (for example in the Trends and Risk Analysis report published annually by TRACFIN for 2018–2019),<sup>73</sup> it is mainly analysed from the perspective of the repatriation to France of the proceeds of passive bribery by foreign politically exposed persons. The same approach is reflected in the 2019 National Risk Assessment conducted by the Anti-Money Laundering Policy Board.<sup>74</sup> In addition, with regard to awareness-raising, France has noted a large number of initiatives, notably by TRACFIN and the oversight authorities, aimed at strengthening professionals subject to anti-money laundering obligations awareness of the risks and their capacity to detect, particularly in the area of bribery<sup>75</sup> (risk analyses, guidelines and sectoral training; awareness-raising meetings, seminars, initial and continuing training, educational documents, dedicated websites, public-private discussion groups, etc.). While these outreach efforts are to be commended, the evaluation team was unable to determine from any of the initiatives that the proceeds of money laundering predicated on foreign bribery were specifically addressed by these initiatives. A final piece of information that would have made it possible to assess possible efforts to raise awareness among professionals subject to anti-money laundering obligations is the number of suspicious transaction reports related to this offence. However, TRACFIN indicates that the number of reports is not collected because these professionals are not required to qualify the underlying offence that they suspect.

### **Commentary**

***As in Phase 3, the lead examiners welcome the significant role that TRACFIN continues to play in detecting foreign bribery or associated money laundering. However, while France has significantly strengthened the legal framework and resources allocated to the prevention of money laundering since Phase 3, commensurate attention was not paid to detecting foreign bribery or related money laundering activities. A factor of concern for the lead examiners is TRACFIN's view of money laundering predicated on foreign bribery, which appears to be limited to the laundering of bribes, neglecting the risks associated with laundering of the proceeds of active bribery.***

***The lead examiners take note of the many initiatives aimed at raising the private sector's awareness on effectively implementing its anti-money laundering obligations, including in relation to bribery in general. However, they are unable to determine the extent to which awareness-raising efforts have focused specifically on foreign bribery or associated laundering, due to the lack of precise information about the content of these initiatives, as well as the number of suspicious transaction reports related to such offences. As such, Phase 3 recommendation 7.a. is still not considered fully implemented.***

***Accordingly, as in Phase 3, the lead examiners recommend that France (i) continue and intensify its awareness-raising efforts aimed at professions required to report instances that may involve foreign bribery, while taking care to integrate the laundering of proceeds derived from active foreign bribery into TRACFIN's analysis and awareness-raising activities; and (ii) strengthen statistical monitoring of information processed by TRACFIN's "integrity violations" unit related to the foreign bribery offence.***

<sup>73</sup> TRACFIN (2019), [Tendance et analyse des risques BC/FT en 2019-2020](#) [Money laundering/terrorist financing risk trend and analysis in 2019–2020].

<sup>74</sup> Ministry of the Economy and Finance, (2019), [Analyse nationale des risques de blanchiment de capitaux et de financement du terrorisme en France](#) [National analysis of money laundering and terrorist financing risks in France].

<sup>75</sup> TRACFIN and SCPC (2014), [Guide d'aide à la détection des opérations financières susceptibles d'être liées à la corruption](#) [Guide to assist in the detection of financial transactions likely to be linked to bribery].

## A7. Detection and reporting by development aid agencies

### a. Institutional organisation

60. The institutional framework for French ODA has not changed since Phase 3. The French Development Agency (AFD) Group, under the authority of the Ministry for Europe and Foreign Affairs and the Ministry of Economy, Finance and the Recovery, is the main actor in development co-operation, delivering 40% of French bilateral ODA.<sup>76</sup> It includes the following bodies: Proparco, a subsidiary focused on private-sector development; SOGEFOM, the French overseas guarantee fund management company; and FISEA, the investment and support fund for companies in Africa.

### b. Reporting mechanisms within the AFD

61. In Phase 3, the Working Group noted the complete lack of reporting of foreign bribery by the AFD and its agencies and recommended that France strengthen the reporting mechanisms already in place within the AFD Group (recommendation 11.c).

62. Since Phase 3, the internal reporting mechanism, which was already mandatory for AFD Group staff, has been strengthened with the creation of an investigation function, attached to the Compliance Department of the AFD Group. This function is described in the section below.<sup>77</sup> Third parties also have various channels for reporting allegations of prohibited practices to the AFD Group. Furthermore, in its responses to the Phase 4 questionnaires, France indicated that a whistleblowing mechanism had been put in place under the provisions of the Sapin 2 Act. This new and separate mechanism creates a supplementary reporting channel, in addition to the existing internal reporting mechanism. Unlike the existing reporting mechanism, the second falls outside the hierarchical framework and is both optional and subsidiary. In the case of whistleblower reports, the AFD Group's whistleblower contact is the Ethics Advisor of the AFD Group.

63. Since Phase 3, the AFD Group has detected two foreign bribery cases: one is concluded and the other was mentioned by AFD Group representatives during the visit. The representatives indicated that between 2017 and 2021 the internal reporting mechanism identified approximately 94 allegations of prohibited practices per year, 40 of which may relate to foreign bribery. Most of these reports are made by whistleblowers from outside the AFD Group, who in practice are often unsuccessful bidders on a contract financed by the AFD Group. However, the representatives indicated that the difficulty of proving foreign bribery can limit their ability to report cases to the Public Prosecutor's Office under article 40 CCP (see Section A.1.). In these instances, however, the AFD Group is able to file suspicious transaction reports (STR) with TRACFIN, as the standard of proof required for an STR is lower. During the visit, the AFD Group representatives indicated that they filed two suspicious transaction reports with TRACFIN in 2020 for bribery. The AFD Group representatives also indicated that in cases of suspected bribery or fraud in relation to a contract financed by the AFD, the AFD Group can require its counterparties to re-examine ongoing contracts, request that contracts be cancelled, or refuse to finance the contracts. However, the number of times such a reassessment was made following a report is not recorded by the AFD Group.

### c. Detection capabilities through the AFD's investigation and audit functions

64. Due to the increase in reports of prohibited practices, the AFD Group created the investigation function within the Compliance Department in 2018. This function is responsible for centralising and investigating reports and feedback (e.g. following audits) on prohibited practices, including foreign bribery,

<sup>76</sup> [Development Co-operation Profiles](#) – France – 2021, Development Co-operation Profiles – France (oecd-ilibrary.org)

<sup>77</sup> AFD (2020), [AFD Group's Policy to Prevent and Combat Prohibited Practices](#), para. 25.

which may undermine the integrity of projects financed by the AFD Group.<sup>78</sup> The investigation function is made up of two AFD staff members whose role is to receive reports, investigate, propose remedial actions and disseminate the lessons learned from their investigations to the entire AFD Group. During the visit, the AFD Group's Compliance Department indicated that the resources allocated to the new function were insufficient, despite the use of temporary staff and external investigators.

65. The monitoring mechanism for AFD-financed projects has not changed since Phase 3. During the visit, the AFD Group representatives indicated that, for the projects they finance directly, the quality of the counterpart's internal audit system is assessed to provide "reasonable assurance" of integrity and therefore of the counterparts capacity to detect prohibited practices. During project implementation, the AFD Group conducts on-site inspections, monitors procurement procedures, issues objection notices when irregularities occur, and analyses audit reports and other information compiled at various stages of the project by the counterpart or the beneficiary. In addition to annual audits of operations, in the event of allegations of bribery, even if reported by third parties, citizens or local officials, the AFD Group may carry out unannounced inspections, which the counterpart must accept.

66. During the visit, the AFD Group representatives indicated that their inspections had not detected any cases of foreign bribery (either direct or through an intermediary), their financial and technical inspections only being able to identify anomalies or inconsistencies, which are then passed on to the investigation function.

#### **d. Training of AFD staff in the foreign bribery offence**

67. In Phase 3, the Working Group also recommended that France provide targeted training on foreign bribery to government aid agency staff (recommendation 12.b). Since Phase 3, the AFD Group has strengthened training initiatives for its staff. In particular, since 2016, the AFD Group's Compliance Department has been organising annual regional training sessions abroad for staff from the same geographical area, incorporating the typologies of cases handled by the investigation function in which practical case studies of foreign bribery based on actual reports were examined. Furthermore, in its responses after the visit, France indicated that the AFD Group is developing a new compulsory e-learning course for all employees. Part of the course will be devoted to defining foreign bribery in the context of AFD Group operations, as well as a foreign bribery case study.

#### **Commentary**

***The lead examiners welcome the AFD Group's efforts to strengthen its internal reporting system with the creation of an investigation function to deal with reports of prohibited practices and the establishment of a new whistleblower mechanism in addition to the existing reporting mechanism. Phase 3 recommendation 11.c. has therefore been implemented.***

***The lead examiners are also encouraged by the AFD Group's efforts to incorporate foreign bribery into training for its staff and consider Phase 3 recommendation 12.b to be fully implemented.***

***The lead examiners are concerned about the limited resources available to the investigation function, which are not consistent with the scope of its duties or with the volume of bilateral assistance provided by France. This severely limits the AFD Group's ability to respond to foreign bribery reports, as the lack of detection of any potential occurrences of foreign bribery appears to illustrate.***

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<sup>78</sup> AFD (2020), *Principes Directeurs applicables à la conduite des investigations menées par la Fonction Investigation du Département de la Conformité du groupe AFD* [Guidelines for the Conduct of Investigations by the Investigation Function of the AFD Group's Compliance Department into Alleged Prohibited Practices]

***The lead examiners therefore recommend that France: (i) ensure that sufficient resources and specialist staff are allocated to the AFD Group's investigation function; (ii) continue to regularly reassess the effectiveness of these oversight mechanisms, notably with regard to the accuracy of information provided by bidders, to avoid certain foreign bribery risks escaping the AFD's oversight, and in particular with regard to intermediaries that bidders may use; and (iii) continue its efforts to ensure that AFD Group staff receive targeted training on foreign bribery risks in projects financed by the Group.***

## **A8. Detection and reporting via export credit agencies**

68. The management of public export guarantees in the name and on behalf of the state was transferred from Coface to BPIFrance at the end of 2015. The Belloubet circular mentions operators involved in export credits as a source of detection of foreign bribery.

69. In Phase 3, Coface did not report any cases of suspected bribery to the Public Prosecutor's Office, even though such cases had been reported internally and an internal reporting mechanism had been set up. The Working Group therefore recommended that France should strengthen the existing mechanisms and work to bring them in line with the reporting obligation of public officials under article 40 CCP (recommendation 11.c).

70. With the transfer of Coface's responsibilities to BPIFrance, the context has changed and the recommendation relating to article 40 CCP is no longer relevant, as BPIFrance employees are subject to private law. BPIFrance, on the other hand, has set up an internal reporting mechanism using an anonymous feedback system, pursuant to article 8.III of the Sapin 2 Act. BPIFrance employees can use this method to report information from the processing of guarantee applications, as well as from specialist external service providers and information from press articles or decisions by French or foreign law enforcement authorities. During the visit, BPIFrance explained that when a report is admissible, i.e. when elements that could be used as evidence are produced, it is subject to an internal investigation.

71. Since Phase 3, no foreign bribery cases have been detected by BPIFrance or other export credit agencies. Only one case, which was widely reported in the media and brought to its attention by its British counterpart, UK Export Finance, was reported by Coface (*Airbus case No. 5*). The report was therefore not the result of active detection measures taken by Coface itself. This case led to the strengthening of BPIFrance's due diligence and verification measures for commercial intermediaries (see Section D5.)

72. In the absence of any foreign bribery cases detected during the six years of BPIFrance's existence, it seems clear that the level of awareness of employees of the foreign bribery offence remains insufficient. In Phase 3, the Working Group recommended that targeted training be provided on export credit verification procedures (recommendation 12.b). France has indicated that various awareness-raising measures have since been taken by BPIFrance's Compliance Department for all Group employees, including those of BPIFrance. However, the information provided does not show that these measures specifically cover foreign bribery, nor due diligence and verification procedures for bribery risks (red flags).

### **Commentary**

***The lead examiners consider that Phase 3 recommendation 12.b remains partially implemented. They regret that no foreign bribery case has been detected by BPIFrance to date, despite the strong signal that the Airbus case, which the French export authorities did not detect even though the case was ultimately jointly prosecuted with the United Kingdom and the United States. The lead examiners note that BPIFrance has subsequently reviewed and enhanced its preliminary due diligence and checks regarding commercial intermediaries (as discussed in Section D5). They note, however, that Phase 3 recommendation 11.c is not implemented for export credits and therefore recommend that France enhance the detection and reporting mechanisms in order to ensure that***

***allegations of foreign bribery are transmitted by BPIFrance to the public prosecution service. The lead examiners also recommend that France implement all the necessary training and awareness-raising measures to enable BPIFrance staff to identify and address red flags that should enable foreign bribery to be detected in the projects financed by the agency.***

## **A9. Capacity of accountants and auditors to detect and report foreign bribery offences**

73. The external auditing of accounts in France is mainly the responsibility of statutory auditors, who conduct their audit activities in accordance with legal and regulatory texts that include professional standards. They implement international auditing standards as adopted by the European Commission and, where applicable, the supplementary French standards. French standards are adopted by the High Council for Statutory Auditors (H3C) and approved by order of the Minister of Justice. Statutory auditors must report any "irregularities and inaccuracies they have noted in the course of their work" to the general meeting or other competent body of the entities that they audit, and they must disclose to the Public Prosecutor "any criminal acts of which they have become aware" (article L. 823-12 of the French Commercial Code). They are liable to five years' imprisonment and a fine of EUR 75 000 for failure to comply with this obligation (article L. 820-7 of the same code). Statutory auditors are also obliged to report suspicions to TRACFIN (articles L. 561-2 et seq. of the Monetary and Financial Code).

74. The number of auditor reports concerning criminal acts to the Public Prosecutor's Office has recently fallen significantly, from 716 in 2018–2019 to 494 in 2019–2020. The number of reports specifically related to bribery is not known. On the other hand, information provided by France on foreign bribery cases shows that only one such case has been detected through this channel since 2013. Several factors may have contributed to this situation.

75. In 2019, the legislature restricted the number of companies required to appoint an auditor to reflect the thresholds set by EU law (the so-called PACTE Act).<sup>79</sup> According to a representative of the French Association of Statutory Auditors (CNCC), whom the examiners met during the visit, 50% of auditors' mandates had not been renewed as of May 2021. In addition to the PACTE Act, the economic crisis linked to the COVID-19 pandemic seems to have contributed to this decline by pushing companies to stop using statutory auditors on a voluntary basis in order to reduce non-essential costs.

76. Furthermore, the obligation to report to the Public Prosecutor's Office does not seem to be proactively implemented by the authorities. Under new arrangements introduced in 2016,<sup>80</sup> the H3C, and by delegation the CNCC, monitor the implementation of statutory auditors' obligations. The H3C can impose disciplinary sanctions if these obligations are breached. The frequency of checks on compliance with the obligation to report to the Public Prosecutor is not known. In any event, according to the information gathered during the visit, no disciplinary or criminal sanction for failure to comply with this obligation has been imposed since Phase 3.

77. Finally, and critically, it emerged during the visit that auditors and their representative and supervisory institutions consider that the profession is not mandated to actively seek out bribery, nor is it well placed to detect it, because of the complexity of bribery schemes. A lawyer met during the visit also pointed out the lack of training on bribery of statutory auditors.

<sup>79</sup> [Act No. 2019-486](#) of 22 May 2019 on business growth and transformation. This obligation now applies to all companies, regardless of their legal status, as soon as they exceed at least two of the following three thresholds: balance sheet of EUR 4 million, pre-tax turnover of EUR 8 million, and 50 employees.

<sup>80</sup> [Ordinance No. 2016-315](#) of 17 March 2016 on statutory auditors and Decree No. 2016-1026 of 26 July 2016, implementing Ordinance No. 2016-315 of 17 March 2016 on statutory auditors.

78. However, France indicated in its replies to the questionnaires that it had taken a number of measures to raise awareness of this detection role among auditors. The H3C and the CNCC have a training and information requirement, which, France has indicated, without providing details, covers awareness of bribery, as well as vigilance and reporting obligations. A 2014 circular from the Ministry of Justice<sup>81</sup> recalls and clarifies statutory auditors' duty to disclose criminal acts. The guidance on professional practice for disclosing criminal acts to the Public Prosecutor, which is attached to the 2014 circular, contains a "table of the main offences included with their mandate "including, among others, bribery and trading in influence". However, this terminology refers only to domestic bribery and therefore does not cover foreign bribery.

79. On the other hand, the Belloubet circular notes that statutory auditors are a "valuable tool" for detecting foreign bribery and encourages the PNF to approach the H3C to organise an awareness-raising and training initiative on detecting kickbacks. During the visit, an H3C representative indicated that this initiative has begun. According to an auditor whom the examiners met during the visit, this initiative is part of a relationship described as close between the profession and the Public Prosecutor's Office.

### **Commentary**

***The lead examiners note that auditors are subject to an obligation under article 823-12 of the Commercial Code to report criminal acts of which they are aware to the public prosecution service. They note that auditors in practice play a marginal role in detecting foreign bribery in France. This can be explained, in particular, by the fact that fewer companies must engage statutory auditors following the PACTE Act and by the apparent lack of oversight and sanctions for non-compliance with the obligation to report to the Public Prosecutor. The lead examiners' main concern is the lack of awareness among auditors regarding the importance of their role in detecting foreign bribery. The lead examiners recommend that France revise the professional practice guidance for auditors on reporting criminal acts to the Public Prosecutor, to ensure that the foreign bribery offence is expressly mentioned. They also recommend that the Working Group monitor the implementation of the Belloubet circular with regard to the organisation by the PNF and the H3C of joint training and awareness raising for statutory auditors on the offence of foreign bribery.***

## **A10. Detection of foreign bribery by whistleblowers and protection of whistleblowers**

### **a. A significantly strengthened legal framework since Phase 3**

80. The legal framework for whistleblowers has changed significantly since Phase 3. The Sapin 2 Act created a general regime for whistleblowers (Chapter II), whom it defines as individuals reporting "disinterestedly and in good faith, a crime or misdemeanour, a serious and clear breach of an international commitment duly ratified or approved by France, a unilateral act of an international organisation taken on the basis of such a commitment, the law or regulations, or a serious threat or prejudice to the public interest, of which they have personal knowledge" (article 6). The law also introduced a tiered reporting procedure, whereby the report must first be made to a line manager (level 1), and, then, if the latter fails to take action, to a judicial or administrative authority or the competent professional body (level 2). Finally, if the report is not addressed by this body within three months, it can be made public (level 3). However, "in the event of serious and imminent danger or in the presence of a risk of irreversible damage", the whistleblower can immediately move to levels 2 or 3. The law obliges companies with at least 50 employees and public bodies to establish dedicated whistleblower channels (article 8).

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<sup>81</sup>[Circular of 18 April 2014](#) from the Ministry of Justice on the obligation of statutory auditors to disclose criminal acts.



81. The protections introduced by the Sapin 2 Act include confidentiality (Article 9) and the nullity of measures taken in retaliation, the latter being defined extensively (article 10). In the event of a dispute as to whether retaliation took place, it is up to the accused to prove that it did not retaliate. If the whistleblower has been dismissed, the case may be referred to a judge in summary proceedings for a quick ruling on reinstatement until the case can be judged on its merits. Obstructing whistleblowing is punishable by one year's imprisonment and a fine of EUR 15 000 (article 13), while breaching the whistleblower's confidentiality is punishable by two years' imprisonment and a fine of EUR 30 000 (Article 9). Finally, the whistleblower is not criminally liable in the event of disclosure of a secret protected by law (e.g. professional or trade secrets), provided that such disclosure is "necessary and proportionate" (article 7).

82. The Framework Act of 9 December 2016<sup>82</sup> tasks the Defender of Rights office with the role of guiding and protecting whistleblowers. The Defender of Rights office can help whistleblowers to identify the body or authority that should be contacted to establish the facts surrounding the problems that gave rise to the report and put an end to them (the Defender of Rights office is not competent to do so itself). It can also intervene to stop any retaliation or reprisals against a whistleblower (including by making representations to the judge or through mediation).

**b. Weaknesses that impede the activation of this important source of detection of foreign bribery**

83. Despite the introduction of these provisions, no foreign bribery case has resulted from a whistleblower's report. More generally, the number of reports made by whistleblowers cannot be assessed in the absence of overall figures. As civil society representatives in particular have emphasised, including during the visit, the system put in place by the Sapin 2 Act remains incomplete and has real weaknesses, which, in practice, call into question the protections granted to whistleblowers and dissuade them from coming forward.

84. First of all, the system established appears to be complex and unclear in several respects. The general status introduced by the Sapin 2 Act coexists alongside some regimes or arrangements specific to individual sectors, as well as with other reporting arrangements (see Section A1 on the reporting obligation of public officials under article 40 CCP and the thresholds for reporting in the public sector in general). In particular, the Financial Markets Authority (AMF) and the Prudential Supervision and Resolution Authority (ACPR) have set up specific reporting procedures under article 16 of the Sapin 2 Act. Furthermore, depending on their size, some companies and public authorities must set up "internal whistleblowing systems" (articles 3.6 and 17 of the same Act), in addition to the internal whistleblower channels provided for in article 8, which differ from the latter in terms of what can be reported, who is eligible to report, as well as the applicable protections and controls. This complexity, which is a source of legal uncertainty, may discourage reporting.

85. Another widespread criticism, notably by civil society, including representatives during the visit, relates to the protections offered by the Act, which does not specify whether the reporting of merely suspected acts of foreign bribery constitutes a protected report. Moreover, the protections offered to whistleblowers exist only *a posteriori* insofar as they are only implemented by the judge, at the end of a procedure that can be long and uncertain. In addition to this problem of predictability, France does not have a specific offence of retaliation against whistleblowers. Thus, some forms of retaliation may go unpunished unless they are deemed to constitute harassment or discrimination. Finally, classified national defence information, medical confidentiality and lawyer-client privilege are excluded from the scope of the Sapin 2 Act, and thus disclosures of such information can give rise to criminal liability. With regard to

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<sup>82</sup> [Framework Act No. 2016-1690](#) of 9 December 2016 on the competence of the Defender of Rights to guide and protect whistleblowers.

classified defence information, the Defender of Rights office<sup>83</sup> notes that, while the European Court of Human Rights may protect whistleblowers in matters of classified defence information,<sup>84</sup> "such a situation is prejudicial both to the imperatives of national defence, since it may lead to the public disclosure of facts and elements that should remain secret, and to the whistleblowers themselves, who are not protected by the law". It thus invites the legislature to establish a specific procedure in the law.

86. Finally, several factors affect the effectiveness of the whistleblowing regime. Firstly, the obligation to set up a reporting mechanism for whistleblowers within companies (article 8 of the Sapin 2 Act) is not subject to formal checks, and failure to establish such mechanism does not incur any sanction. Furthermore, the resources of the Defender of Rights do not seem to be sufficient to deal with even the limited number of requests for referral and/or protection received (about 80 per year), as pointed out by a senior representative of the institution, as well as a journalist, during the visit. The Defender of Rights considers that it should be the central contact point to ensure that external reports are properly processed and that they are duly followed up in conjunction with the competent authorities, including the PNF, to guarantee maximum clarity for those who submit reports. It believes that its powers should be expanded for this purpose.<sup>85</sup> Finally, and more generally, the representatives of the Defender of Rights and civil society whom the examiners met during the visit stressed a general mistrust of whistleblowers in France. Whistleblowers are still widely perceived as disloyal and not highly valued, particularly in the professional world. In its replies to the questionnaires, France mentions a number of awareness-raising initiatives in this area, notably by the Defender of Rights and the AFA. Nevertheless, the limited resources of the Defender of Rights also affect the scope of its action in this area, and the AFA's actions seem to focus more on the internal whistleblowing mechanisms that it monitors (articles 3 and 17 of the Sapin 2 Act) than on the general whistleblower regime described in Chapter II of the Act.

87. The parliamentary report by Gauvain and Marleix<sup>86</sup> makes 11 proposals for an in-depth review of the whistleblower protection system in France, including "expanding the remit of the Defender of Rights by entrusting the institution with referring and following up the reports made to them and giving the institution the human and financial resources to fulfil its remit" (Proposal 37). At the time this report was finalised, France indicated that a proposed bill for an organic law, to strengthen the role of the Defender of Rights in terms of whistleblower reporting, had been introduced before the National Assembly by the Member of Parliament Sylvain Waserman, in consultation with the Government.<sup>87</sup> This proposed bill aims to clarify the role of the Defender of Rights toward whistleblowers and the reports the Defender receives, as well as actions that can be taken to monitor the processing of reports. In addition, this new regime would allow to identify the competent authorities to process the reports. This relatively succinct proposed bill would, if adopted, need to be further clarified by way of a decree from the Conseil d'Etat.

### ***c. The transposition of the EU Whistleblowing Directive: an opportunity for France to make further ambitious progress***

88. The EU Whistleblowing Directive of 23 October 2019<sup>88</sup> establishes a common set of rules to be transposed into national law by 17 December 2021.<sup>89</sup> In its replies to the questionnaires, France noted that

<sup>83</sup> Defender of Rights, [Opinion No. 20-12 of 16 December 2020](#).

<sup>84</sup> ECHR (12 February 2008), *Guja v. Republic of Moldova*.

<sup>85</sup> [Opinion of the Defender of Rights No. 20-12](#) of 16 December 2020 on the transposition in France of Directive (EU) 2019/1937 of the Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

<sup>86</sup> *Ibid.*

<sup>87</sup> Proposed bill for an organic law n°4375 registered on 15 July 2021 at the National Assembly.

<sup>88</sup> [Directive \(EU\) 2019/1937](#) of 23 October 2019 on the protection of persons who report breaches of Union law.

<sup>89</sup> This date is based on the rules for the public sector and companies with more than 249 employees. The transposition into law of the rules for companies with 50 to 249 employees must take place before 17 December 2023.

the changes to the national system required by the directive are limited: removal of the obligation to first report to the line manager; extension of the system to the shareholders and staff of contractors, subcontractors and suppliers; and introduction of protection for facilitators. These measures should usefully strengthen the French system. In particular, as pointed out during the panels with civil society and journalists, the obligation to use the internal reporting channel before any other step can be dissuasive, because of the interest that a company or its staff, who are potentially responsible for the misconducts, may have in suppressing a report.

89. Nevertheless, many voices are calling for more ambitious measures to be adopted when the directive is transposed. A number of proposals made by civil society and the Defender of Rights<sup>90</sup> are thus aimed at addressing the weaknesses identified in the previous section, and could help to strengthen whistleblowers' ability to detect and report foreign bribery. These proposals concern, in particular, the simplification and harmonisation of all provisions relating to reporting of any type of breach of the law or harm to the public interest, in order to facilitate and secure them; the strengthening of immediate protections for whistleblowers, for example by introducing an urgent application for release, which would allow the judges in the administrative courts to order any measure necessary to safeguard the right to blow the whistle; the creation of a criminal offence of retaliation against whistleblowers, accompanied by penalties; the introduction of a penalty for failing to set up an internal whistleblowing mechanism; the strengthening of the role and resources of the Defender of Rights and the identification of authorities responsible for dealing with reports; the creation of a special mechanism for reporting classified defence information; and the establishment of a whistleblower support fund.

90. According to the information available, in particular that provided by the Defender of Rights representative and the parliamentarians whom the examiners met during the visit, the approach adopted by the authorities at the time of the visit was that of minimal transposition of the directive. However, after the visit, the French authorities indicated that the vehicle for transposition would ultimately be two proposed bills: a proposed bill for an organic law strengthening the role of the Defender of Rights regarding whistleblower reports (detailed above) and a bill for an ordinary law aiming at improving whistleblower protections introduced on 15<sup>th</sup> and 21<sup>th</sup> July 2021 at the National Assembly by Deputy Wasserman in consultation with the Government.<sup>91</sup> The proposed bill for an ordinary law on whistleblowers proposed to clarify the definition of whistleblowers and to widen the scope of the applicable protections, which would cover "a threat or harm to the general interest". The tiered reporting procedure would be phased out as well as some of the conditions to make a report public. Regarding confidentiality guarantees, they would be strengthened and extended to the processing of reports and to the identity of any person mentioned in the whistleblower report. New measures would strengthen whistleblower protections against retaliation and efforts to muzzle employees (« *les procédures bâillons* »), but also civil and criminal sanctions against reprisals, in particular by creating a criminal offense of reprisal punishable by three years' imprisonment and EUR 45 000 fine. The Defender of Rights would also be competent to pronounce on the quality of whistleblower of those persons seeking advice. Finally, psychological support and temporary financial assistance measures would be put in place for whistleblowers. These proposals, if adopted without changes, would significantly reinforce the whistleblower protection framework. Nevertheless, some weaknesses would remain, such as the lack of immediate protection for whistleblowers, the lack of sanctions for not putting into place an internal mechanism dedicated to whistleblowers, the lack of specific procedure for matters of classified defence information, and the lack of awareness-raising initiative. At the point of finalising this report, both proposed bills had been approved by the National Assembly on 17 November 2021 under the accelerated procedure and sent on 18 November to the Senate Law

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<sup>90</sup> On the transposition of the EU Whistleblowing Directive; and the proposals of the [Maison des lanceurs d'alerte](#), which co-ordinated an [appeal](#) by 29 organisations calling for the directive to be supplemented.

<sup>91</sup> [Private member's bill no. 4398](#) seeking to improve protection for whistleblowers.

Commission. The examination of the bills by the Commission is scheduled for mid-December, after the adoption of this report.

### **Commentary**

***The lead examiners welcome France's stronger legal framework for whistleblowers introduced by the Sapin 2 Act and note that the transposition of the EU Whistleblowing Directive should introduce further relevant progress.***

***However, they note that no foreign bribery cases have been initiated on the basis of this type of report. A number of obstacles limit the use of this potential detection source, including: the complexity of the legal framework; the inadequacy of protections, which can only be implemented at the end of a judicial process that can be long and uncertain; the lack of resources available to key actors such as the Defender of Rights office; and the persistence of a culture of mistrust around whistleblowing.***

***They are encouraged by some provisions of the proposed bills introduced after the visit, on 15 and 21 July 2021, in the National Assembly and still under discussion by Parliament at the time of finalisation of this report, to strengthen the role of the Defender of Rights concerning whistleblower reports and to improve protections for whistleblowers.***

***The lead examiners recommend that France take advantage of the current effort to transpose of the EU directive to take the necessary measures to (i) clarify and harmonise the whistleblower regime, and strengthen the protections afforded to whistleblowers; (ii) strengthen the position of the Defender of Rights in the system by reviewing its role and providing it with the necessary means to exercise its role effectively; and (iii) increase public awareness of the importance of whistleblowers, especially in combating bribery.***

## **A11. Detection through self-reporting**

91. Self-reporting remains, as in Phase 3, a residual source of foreign bribery detection, with three cases initiated on this basis since 2013 (or less than 3% of the 108 foreign bribery cases pending or opened since that date).

92. Since Phase 3, the Belloubet circular has emphasised the importance of self-reporting as a detection source in foreign bribery cases and the value of such disclosure for companies, who may benefit from some form of leniency with respect to the prosecutorial approach that may be considered by the PNF, namely the conclusion of a CJIP. The circular of the Director of Criminal Affairs and Pardons of 31 January 2018 (circular of 31 January 2018)<sup>92</sup> also specifies that self-reporting is one of the elements that should be taken into account when assessing the appropriateness of implementing a CJIP and determining the amount of the public interest fine. The joint guidelines of 26 June 2019, developed by the PNF and AFA (PNF-AFA Guidelines),<sup>93</sup> provide more details on the criteria for consideration of self-reporting when deciding whether to grant a CJIP. These specify that the facts must be reported within a reasonable period of time and that the disclosure must be detailed, in order to provide the Public Prosecutor with all the necessary information. However, no details are given as to how self-reporting should be taken into account in calculating the amount of the public interest fine. During the visit, lawyers and business representatives pointed to the vagueness of the framework as one of the reasons for the continuing low number of self-reports.

<sup>92</sup> [Circular](#) from the Director of Criminal Affairs and Pardons of 31 January 2018 on the presentation and implementation of the criminal provisions of the Sapin 2 Act.

<sup>93</sup> PNF and AFA, (2019), [Lignes directrices sur la mise en œuvre de la convention judiciaire d'intérêt public](#) [Guidelines on CJIP implementation].

93. In practice, none of the five companies that concluded a CJIP concerning foreign bribery had self-reported the facts to the French authorities. Self-reporting therefore does not appear to be a necessary prerequisite for obtaining a CJIP. How self-reporting can be taken into account as a mitigating factor in setting the fine in foreign bribery cases remains to be clarified both in theory and in practice.

94. France has indicated that introducing the obligation for companies (of a certain size) to establish internal reporting mechanisms would also encourage self-reporting.<sup>94</sup> While this reporting system may be a prerequisite for identifying foreign bribery cases within companies, it is not in itself an incentive for self-reporting by the company, which is a separate process.

#### **Commentary**

***The lead examiners commend France for its increased emphasis on self-reporting since Phase 3, as evidenced by the 2018 and Belloubet circulars. They note that the introduction of the CJIP into French law has encouraged companies to disclose foreign bribery cases to prosecuting authorities. Nevertheless, the number of self-reports about such cases has remained low.***

***To strengthen incentives for self-reporting by companies, the lead examiners recommend that France define, by any appropriate means, the framework and practical incentives for self-reporting, including by: (i) clarifying the extent to which self-reporting is taken into account to benefit from a CJIP; and (ii) clarifying its impact on the amount of the public interest fine and other measures that are imposed through a CJIP.***

## **A12. Other detection sources of foreign bribery allegations**

### **a. Opening parallel investigations based on information received from foreign authorities**

95. In Phase 3, the Working Group criticised the French authorities for their reluctance to act in relation to allegations of bribery brought directly to their attention by law enforcement authorities from Parties to the Convention. The Working Group therefore recommended that France take measures to encourage public prosecutors to open investigations into cases that may fall under French jurisdiction, based on information received, including information spontaneously transmitted by foreign authorities, mutual assistance requests and credible allegations that are reported to them (recommendation 4.d.).

96. Since Phase 3, detection via incoming mutual legal assistance requests has increased. France attributes this rise to the creation of the PNF, where a dedicated international co-operation group is now responsible for analysing incoming requests to determine whether the information provided justifies opening a parallel investigation in France. Specific instructions on the use of information from abroad were provided by a 9 January 2017 dispatch from the Directorate of Criminal Affairs and Pardons of the Ministry of Justice<sup>95</sup> and by the Belloubet circular, which encourages the use of incoming mutual legal assistance requests and information exchange within the framework of the OECD Working Group on Bribery. Information from foreign authorities is the second most important detection source, and 20 cases have been opened on this basis (18,5% of the 108 foreign bribery cases pending or opened since that date), including one formal notice and two spontaneous reports from foreign authorities. Recommendation 4.d. has therefore been implemented.

<sup>94</sup> Internal whistleblowing systems – articles 3 and 17 of the Sapin 2 Act; and whistleblower reporting channel – article 8 of the Sapin 2 Act.

<sup>95</sup> Directorate of Criminal Affairs and Pardons of the Ministry of Justice dispatch of 9 January 2017 on the handling of foreign mutual assistance requests in the fight against complex economic and financial crime.

### **b. A slight increase in investigative journalists as a detection source**

97. The use of media reporting as a detection source has increased since Phase 3. The PNF may choose to open preliminary investigations based on media sources, under the opportunity principle. Since it was established, the PNF has opened eight preliminary investigations into foreign bribery cases involving major French groups based on media sources, mainly French but also foreign.<sup>96</sup> By comparison, only one case was detected on this basis in Phase 3. France attributes this progress to the creation of the PNF, which has adopted a more proactive approach in this area, in accordance with the prosecution guidelines set out in the Belloubet circular. The PNF “integrity group” monitors the national and foreign press for this purpose. An “open source” group, specifically dedicated to the use of information relayed by the press, among other things, has also been established within the PNF.

98. The PNF also uses the compilation of foreign bribery allegations maintained by the Working Group as another tool in its work. During Phase 3, France did not really use this compilation; in fact, investigations were not opened in a number of cases involving French companies. Some of these cases had, however, been investigated, prosecuted or sanctioned by foreign authorities. Although the Belloubet circular now directs the PNF to harness this source, a significant number of allegations identified by the Working Group have still not been investigated in France. During the visit, PNF representatives indicated that systematic use of the compilation of allegations has just begun; however, they admitted that it has not been fully utilised until recently due to the volume of cases already being processed by the PNF. The PNF representatives stated that choices had to be made due to the limited resources of the PNF and investigative services. The PNF therefore indicated that it focused on the most contemporary cases, which are most relevant to the criminal policy set out by the Belloubet circular in particular. Even so, this pragmatic approach should not prevent French authorities from opening investigations into large-scale cases involving major French companies. Yet, investigations have not been opened for a number of allegations involving internationally renowned French companies undertaking major projects abroad.

### **c. Barriers to detection by investigative journalists**

99. There are several obstacles that may hinder the uncovering of foreign bribery allegations involving French companies and nationals. In 2020, Reporters Without Borders highlighted the increased pressure on journalists, underlining “the growing number of cases of judicial intimidation of investigative journalists to identify their sources” as well as the summoning and prosecution of French journalists for divulging classified defence information.<sup>97</sup>

100. During the visit, the journalists met mentioned classified defence information as a potential obstacle. They gave the example of the journalists summoned by prosecutors on the grounds of divulging classified defence information in a 2019 case that had raised concerns among major media outlets. These outlets denounced “a sort of trivialisation of this type of summons, which should be absolutely exceptional”.<sup>98</sup> Beyond their specific facts, these cases reveal the limitations imposed on journalists’ ability to uncover foreign bribery cases, particularly when they involve the defence and arms sector, which is an important export sector for France.

101. During the visit, civil society and journalists also mentioned measures relating to trade secrets, introduced by Act No. 2018-670 of 30 July 2018,<sup>99</sup> as a potential barrier to investigative journalism. In the

<sup>96</sup> The cases were: (i) *Schools No. 132*; (ii) *Libyan Campaign Finance No. 38*; (iii) *Mass Retail No. 112*; (iv) *Mass Retail South America No. 116*; (v) *Ships No. 71*; (vi) *Oil 2 No. 81*; (vii) *Oil and Gas 2 No. 114*; and (viii) *Société Générale (Libya) No. 90*.

<sup>97</sup> Reporters Without Borders, [World Press Freedom Index 2020](#).

<sup>98</sup> Le Monde (23 May 2019), [“Critiques après de nouvelles convocations de journalistes par la DGSI”](#) [“Criticism after new summonses of journalists by the DGSI”].

<sup>99</sup> Act No. 2018-670 of 30 July 2018 on the protection of trade secrets.

event of an alleged breach of confidentiality, the burden of proof is reversed and companies simply have to prove that they did not authorise the use or publication of the trade secret concerned, whereas journalists have to prove that the public interest outweighs the commercial interest. However, France stated that trade secrets is not an obstacle to media reporting, as strict regulations maintain a balance between the protection of trade secrets and the preservation of fundamental freedoms and the public interest, in particular the freedom of the press and the effectiveness of investigations.

### **Commentary**

***The lead examiners are encouraged by the PNF's recent approach for identifying foreign bribery allegations based on media sources. They note that these developments are nevertheless limited given the size of the French economy and the number of cases reported in the media, as evidenced by the large number of allegations involving French companies identified by the Working Group.***

***The lead examiners therefore recommend that France ensure that a larger number of credible foreign bribery allegations are promptly investigated, particularly allegations concerning major French companies reported in the national or foreign media as well as in the compilation of foreign bribery allegations maintained by the Working Group. They also recommend that the Working Group monitor the impact of obstacles to detection by investigative journalists, including claims to protect trade secrets and classified defence information.***

## **B. ENFORCEMENT OF THE FOREIGN BRIBERY OFFENCE**

### **B1. The foreign bribery offence**

102. The offence of bribing foreign public officials (or foreign bribery) is defined in articles 435-3 to 435-6 and 435-9 to 435-10 of the Criminal Code (CC), which differentiate between types of foreign officials according to their mandate and provide for different penalties in different cases. At the time of the Phase 3 written follow-up report, five recommendations relating to the foreign bribery offence remained partially implemented or not implemented by France. This Section B1 on the foreign bribery offence thus reviews the actions taken since Phase 3 to implement these five recommendations (each of which includes several sub-topics), their continued relevance in light of a largely changed context, and progress on two issues identified by the Working Group as requiring follow-up.

#### **a. Legislative changes since Phase 3**

##### *i. France's review of the enforcement of its laws*

103. In Phase 3, given the number of uncertainties regarding the foreign bribery offence, the Working Group recommended that France review the enforcement of its laws to effectively combat bribery of foreign public officials (recommendation 1.a.). Since then, the Sapin 2 Act has broadened the scope of the foreign bribery offence and removed the mainly procedural obstacles to the prosecution of foreign bribery and trading in influence concerning foreign public officials. The Sapin 2 Act, discussed in detail in the sections that follow, can therefore be seen as the culmination of France's review of how its laws are enforced to effectively combat foreign bribery.

##### *ii. Removal of the dual criminality requirement*

104. In its Phase 3 evaluation, the Working Group noted that article 113-6 CC added another element (not provided for in the Convention) to the offence of bribing foreign public officials as defined in article 435-3 CC, by requiring the Public Prosecutor's Office to prove dual criminality. The Working Group

therefore recommended that France eliminate, as soon as possible, the dual criminality requirement in relation to the bribery of foreign public officials (recommendation 1.b.). In 2016, the Sapin 2 Act (article 21) removed the requirement of dual criminality as a precondition for establishing foreign bribery offences. The new articles 435-6-2 and 435-11-2 CC provide that, in matters of bribery of foreign public officials, “French law applies in all circumstances, notwithstanding the second paragraph of article 113-6.” The requirement of dual criminality is also not applicable to the new offence of trading in influence concerning foreign public officials. As a substantive criminal provision, it cannot be applied retroactively, due to the constitutional principle of non-retroactivity of a more severe criminal law.

### **Commentary**

***The examiners commend France for reviewing the enforcement of its laws and revising its legal framework to effectively combat bribery of foreign public officials and thereby bringing about a real paradigm shift in its fight against foreign bribery. They also welcome the removal of the dual criminality condition, which previously applied to the offence. By implementing Phase 3 recommendations 1.a. and 1.b., France has therefore complied with its obligations under Article 1 of the Convention in this respect.***

### **b. Elements of the offence required in practice**

105. During Phase 3, the Working Group analysed how the foreign bribery offence was interpreted and enforced in practice. In doing so, it identified a series of material and intentional elements needed to establish the offence that limited its scope. The Working Group therefore recommended that France clarify by all appropriate means that no element of proof, other than those set out in Article 1 of the Convention, is required to constitute an offence under articles 435-3 CC *et seq.*, and in particular that the definition of foreign public official and the case-law requirement that there must be “corruption pact” does not, in practice, constitute such an element or an obstacle to the criminalisation of: (i) the offer or promise of pecuniary or other advantages; (ii) acts of bribery involving intermediaries; and (iii) payments to third parties (recommendation 1.c.).

106. Of the 16 preliminary investigations into foreign bribery that have been closed without further action since Phase 3, 12 were closed because the offences were not sufficiently established as bribery. Fourteen individuals were acquitted due to lack of proof of a causal link between payment and receipt of an undue advantage, lack of proof of commissions paid to a foreign public official, questions about the status of the person receiving the bribes as a foreign public official, or insufficient proof that benefits were paid. Of the 18 judicial inquiries into foreign bribery offences that were referred to the investigative judge and in which the charges were dismissed: seven dismissals were due to lack of sufficient evidence; two were because the conduct pre-dated the criminalisation of the foreign bribery offence under French law; five because the evidence obtained during the investigation did not establish foreign bribery; and one was thrown out because it was an investigation into trading in influence concerning foreign public officials, which was not criminalised at the time of the offence. The reasons that the remaining three cases were dismissed are unknown.

#### *i. The courts’ interpretation of the definition of foreign public official*

107. The Phase 3 Report expressed concern about the narrow definition of foreign public official adopted by a first instance court during a 2008 case in which an offence could not be established for payments made after a minister’s term of office for acts committed while still in office (reference being made to Commentary 10 to the Convention) and even though he had formed his own opposition party and planned to run in the subsequent presidential elections (reference being made to Commentary 16 to the



Convention).<sup>100</sup> However, Commentaries 10 and 16 to the Convention do not require Parties to criminalise the acts they address and merely note that these phenomena may be criminalised in some countries. Moreover, the definition of foreign public official, unchanged since Phase 3, was not perceived as problematic by any of the anti-bribery actors whom the examiners met during the Phase 4 visit. According to several judges met, the introduction into French law of the offence of trading in influence concerning foreign public officials should make it possible to criminalise some of the situations referred to in these Commentaries.

108. Based on the same 2008 case, the Working Group also recommended that France ensure that the interpretation of the principle of non-retroactivity of criminal law does not impede the prosecution and sanctioning of bribery of foreign public officials occurring after the entry into force of the offence in France (recommendation 1.d.). In its responses to the Phase 4 questionnaires, France correctly states that the concern expressed by the Working Group with this recommendation in Phase 3 is no longer relevant because the application of this principle has not posed any difficulty in any of the foreign bribery cases opened in France.

#### **Commentary**

***The lead examiners consider that the legal definition of foreign public official meets the criteria of Article 1 of the Convention and that the part of Phase 3 recommendation 1.c. requesting that France clarify this definition by all appropriate means was based on an overly broad interpretation of Commentaries 10 and 16. This recommendation is therefore no longer relevant. The same applies to recommendation 1.d. on the interpretation of the non-retroactivity of criminal law, which has also lost all relevance in Phase 4.***

#### *ii. The jurisprudential principle of a corruption pact*

109. The Phase 3 report notes that proof of a corruption pact – i.e. proof of a meeting of minds between the briber and the recipient – is not found in the statute but is created by jurisprudence. Under this doctrine, it is necessary, among other things, to prove the intention of the foreign public official. The Phase 3 report deemed the need to establish this intention to be in conflict with Commentary 3 to the Convention. During Phase 3, this issue was considered by practitioners as the main obstacle to prosecution, as such, pacts are by definition concealed in significant and complex cases and French courts do not have jurisdiction to try foreign public officials. According to the analysis, this highlighted the limits of transposing the concept of a corruption pact developed by French courts in domestic bribery cases.

110. In its responses to the Phase 4 questionnaires, France has stressed that the Belloubet circular confirmed that the foreign bribery offence does not require proof of a corruption pact: “it is sufficient to prove that the active briber has offered a sum of money in exchange for the performance of an act.” France relies on old decision of the Court of Cassation (not discussed in Phase 3) to argue that it is irrelevant whether the proposal was accepted or not and that proof of a corruption pact is not needed for criminalisation.<sup>101</sup> The term “corruption pact” is still widely used by legal professionals and case law because, according to France, this term is useful to describe the agreement consummated at an effective meeting of minds between briber and recipient. However, this tautological reasoning only emphasises that the search for “consummated agreement” does imply that the judge must seek to discover if the proposal has been accepted, which goes beyond the aforementioned case law of the Court of Cassation. Moreover, this old case has not always been followed by the Court of Cassation, which, in a decision of 16 June 2021

<sup>100</sup> Pontoise High Court, 6th Chamber 3 – collegiate – financial, case No. 0107407152, Judgment of 13 February 2008.

<sup>101</sup> Court of Cassation (Cass.), Criminal Chamber (Crim.), 10 June 1948: the offence of bribery “does not require that the offers or promises of bribery have been accepted”; this offence “is committed as soon as the guilty party has used [...] promises, offers, gifts or presents for the purpose defined by the law”, Crim. 16 October 1985.

closing the *Alcatel Costa Rica No. 7* case, referred to the concept of a corruption pact to establish the offence. In this decision, the court's Criminal Chamber noted, as the final court of appeal did before it, that: "It is established that [the defendants] entered into a corruption pact with Costa Rican public officials and politicians so that the company would obtain the contracts."<sup>102</sup>

111. The concerns expressed in Phase 3 regarding the search for a corruption pact to establish the offence therefore remain relevant, as also confirmed by the other decisions of French courts in cases resolved since Phase 3, which show that the search for a corruption pact remains central to establishing the offence in the French courts.<sup>103</sup> The corruption pact was also mentioned in the approval order of a recent CJIP.<sup>104</sup> Moreover, since Phase 3, the impossibility of establishing such a pact has been the reason for at least one partial dismissal and one decision to acquit in charges of foreign bribery.<sup>105</sup>

112. During the Phase 4 visit, academics, non-governmental organisation (NGO) representatives and lawyers pointed out that, in practice, the courts continue to seek out evidence of a corruption pact, particularly first instance courts; and by extension, the investigative judges also only bring cases to court when they can prove the existence of a corruption pact. This is harder to prove than the relevant financial flows and undue advantages. One lawyer also stated that the absence of evidence of a corruption pact is undeniably an argument in favour of the defence; on the contrary, evidence of a corruption pact establishes a form of presumption in practice. The need to demonstrate the existence of this pact was confirmed by the investigative judges whom the examiners met "not because it is required by law, but because it makes it easier to prove the offence of foreign bribery." A PNF representative emphasised that this would be the simplest way to establish a provisional pattern of wrongdoing, which can be based on a range of evidence – but evidence of financial flows is not sufficient. In the absence of evidence of such a pact, PNF officials seek to demonstrate the existence of a fall-back offence.

### **Commentary**

***The lead examiners are disappointed that the case-law concept of a "corruption pact" remains central in practice and that, although presented as simply for evidentiary ease, it continues to be used to establish foreign bribery offences, including by the Court of Cassation, and to hinder the sanctioning of certain foreign bribery violations. They note that the relevant part of Phase 3 recommendation 1.c. from Phase 3 has only been partially implemented, as the attempt at clarification in the Belloubet circular failed to achieve its objective.***

***The examiners therefore recommend that France continue its efforts to clarify, by all appropriate means, to prosecutors, investigative judges and trial judges that, contrary to the approach adopted in domestic bribery cases, evidence of foreign bribery under articles 435-3 CC et seq. does not require recourse to the case-law principle of a "corruption pact", even for ease of establishing evidence, as the line between ease and requirement remains blurred in too many cases both whether at the trial level or on appeal***

#### *iii. The criminalisation of offers and promises*

113. With regard to offers or promises (recommendation 1.c.i.), the Phase 2 and 3 reports note that the need to establish the existence of a corruption pact does not, in principle, prevent the offence of active bribery from being committed through mere offers or promises, whether or not such offers or promises have been accepted. The reactions to this point in Phase 4 were broadly similar to those in Phase 3,

<sup>102</sup> Cass., Crim., 16 June 2021: [Judgment No. 768 of 16 June 2021 \(20-83.098\) – Court of Cassation – Criminal Chamber – ECLI:FR:CCAS:2021:CR00768, Court of Cassation.](#)

<sup>103</sup> For example, *Oil Exploration (Burundi, Malawi and the Democratic Republic of Congo) case No. 1*, Paris Criminal Court, 3 December 2015, p. 29; See also summary of the *Total (Iran) case No. 103*.

<sup>104</sup> *Bolloré (Togo) case No. 34* – [CJIP approval order](#), p.4.

<sup>105</sup> *Arms (Cameroon and Mali) case No. 101*.

emphasising that while the public official's attitude to such offers or promises need not be investigated as a matter of law, it is unlikely in practice that such offers or promises can be established without more. Seeking evidence of a corruption pact, as discussed above, clearly also does not facilitate the criminalisation of offers or promises.

*iv. The criminalisation of payments through intermediaries or to third parties*

114. Discussions with PNF prosecutors during the visit highlighted the use of the concept of “indirect bribery”, which is used for ease at the investigation stage before more precise charges are filed at the referral stage, depending on whether the payments detected were made through intermediaries or to third parties.

115. With regard to the criminalisation of payments through intermediaries (recommendation 1.c.ii.), the Phase 2 and 3 reports stressed that, given the need to prove the corruption pact, the role played by the intermediary would make it more difficult to prove that the foreign official accepted the offer of a bribe. The Belloubet circular reminded judges that intermediaries (commercial agents, distributors, local brokers, etc.) are involved in three out of four international bribery cases. It therefore called magistrates to also consider prosecuting individuals or legal persons outside the company who were involved in the offence in some capacity. In this respect, it emphasised that case law considers as accomplices to supply-side bribery intermediaries<sup>106</sup>, or legal counsel if they knowingly provide information to facilitate a financial arrangement to pay a hidden commission through a foreign corporation so as to conceal the offence.<sup>107</sup> In addition, the circular issued by the Director of Criminal Affairs and Pardons of 31 January 2018 (Directorate of Criminal Affairs and Pardons circular of 2018),<sup>108</sup> stresses that the introduction in the Criminal Code of the new offence of trading in influence concerning foreign public officials (article 435-4) is particularly intended to punish the fraudulent intervention of certain intermediaries in the conclusion of international contracts. As can be seen from the summaries of foreign bribery cases resulting in final convictions since Phase 3, and in cases resulting in the conclusion of a CJIP (Annex 1), many of these cases have involved the use of intermediaries, including shell companies.<sup>109</sup>

116. With regard to the criminalisation of payments to third parties (recommendation 1.c.iii.), the clarification “for himself or another”, which was added to the text of the foreign bribery offence (article 435-3 CC) in 2007,<sup>110</sup> should have in principle removed any ambiguity as to the coverage of bribes paid to third parties. However, in Phase 3, doubts had already been expressed about the coverage of payments to third parties in practice. These doubts have since been confirmed in a foreign bribery case for the purpose of (among other things) obtaining contracts in Malawi and the Democratic Republic of the Congo.<sup>111</sup> The case – which involved the payment of cash funds to the foundation of the Malawian President’s wife – was dismissed because it was not possible to establish her position and therefore whether she was a public official or entrusted with a public function.<sup>112</sup> Yet, the purpose of criminalising payments to third parties is to enable the offence to be established without having to ascertain the third party’s position or influence.

<sup>106</sup> [Cass. Crim., 9-11-1995, 94-84.204, published in the bulletin](#) and [Cass. Crim., 19-12-2001, 01-81.495, unpublished.](#)

<sup>107</sup> Cass. Crim., 9-11-1995, 94-84.204, published in the bulletin.

<sup>108</sup> [Circular](#) from the Director of Criminal Affairs and Pardons of 31 January 2018 on the presentation and implementation of the criminal provisions of the Sapin 2 Act.

<sup>109</sup> The resolved cases in which bribes were paid through commercial intermediaries and/or shell companies are as follows: *Total (Iran) No. 103*; *TSKJ (Nigeria) No. 99*; *Oil-for-Food Equipment aspect – 12 companies sanctioned and Oil aspect – Total and Vitol and Equipment aspect, No. 70 and No. 102*; *Hydrocarbon Exploitation (Algeria) No. 4*; *Société Générale (Libya) No. 90*; *Egis Avia (Algeria) No. 78*; and *Airbus (multiple jurisdictions) No. 5*. Cases involving intermediaries that have been referred to the courts for bribery of foreign officials (among other offences) but not yet tried are: *Air Transport (Senegal) No. 24*; and *Construction (Central Africa) No. 108*.

<sup>110</sup> [Act No. 2007-1598](#) of 13 November 2007 on combating bribery (2007 Act).

<sup>111</sup> *Oil Exploration (Burundi, Malawi and the Democratic Republic of the Congo) case No. 1*.

<sup>112</sup> PNF final summing-up for the prosecution of 28 October 2014.

Furthermore, it is irrelevant whether the third party is acting in good or bad faith. This principle was also ignored in this case, where the apparent legality of the payments (not concealed and made to a foundation whose existence and activities are real and lawful) also prevented the offence from being established – as did the lack of a link between the payments obtained and the award of the contract, i.e. a corruption pact.

117. After the visit, France referred to the *Egis Avia* case No. 78, in which EUR 12 000 in bribes had been paid to a family member of an Algerian minister, ruled as bribery of a foreign public official and included in the CJIP concluded with the legal person. However encouraging this may be, particularly as regards the PNF's interpretation of article 435-3 CC, it does not demonstrate a change in the courts' approach to this issue. The only case tried in court to which France has been able to refer on this point is a passive bribery case that is not yet final.<sup>113</sup> In the absence of any specific measure taken by France to implement recommendation 1.c.iii. on payments to third parties, it must be noted that such payments have since Phase 3 only been sanctioned in one active foreign bribery case through a CJIP and have given rise to a dismissal of charges, at least once in another case. The situation therefore remains uncertain.

v. *The notion of "without right"*

118. In Phase 3, the Working Group noted differences of opinion between judges and prosecutors regarding the presumption that an advantage was without right in the offer, promise or granting of a bribe. The Working Group had therefore decided to follow up, as case law and practice develop, to ensure that the concept of "without right" was not interpreted more restrictively than the concept of "improper advantage" in the Convention and therefore did not require proof that a law in force in the country of the recipient prohibited that person from receiving a bribe (follow-up 13.a.). In its responses to the Phase 4 questionnaires, France has indicated that since 2014, the Court of Cassation has confirmed that the concept of "without right" is the functional equivalent of "improper advantage".<sup>114</sup>

**Commentary**

***The lead examiners commend France for clarifying the ability to criminalise bribery involving intermediaries and for sanctioning such bribery in cases resolved since Phase 3, both in court and through the CJIP mechanism. Phase 3 recommendation 1.c.ii. can therefore be considered implemented.***

***On the other hand, the lead examiners are disappointed that no action has been taken since Phase 3 to implement recommendation 1.c.iii. regarding the ability to criminalise foreign bribery cases involving third party payments. They note that, in practice, such payments do not result in convictions and recommend that France clarify, by all appropriate means, to prosecutors, investigative judges and trial judges, that payments to third parties are covered by the foreign bribery offence provided for in article 435-3 CC, of which they are a characteristic financial arrangement.***

***The lead examiners did not find any obstacle in the law preventing the characterisation of mere offers or promises as acts of foreign bribery. The obstacles encountered in practice are largely linked to the need to prove the existence of a "corruption pact", which reinforces the evidentiary difficulties associated with proving the offence on the basis of a mere offer or promise. The lead examiners consider that this issue is already covered in the recommendation on the "corruption pact" found in the commentary concluding section B.1.(b)(ii). Phase 3 recommendation 1.c.i. is therefore no longer necessary. On the other hand, the lead examiners welcome the clarification of the concept of "without right", which no longer requires follow-up by the Working Group (follow-up question 13.a.).***

<sup>113</sup> The *Public Services/Lobbyist (EU) – Eurotrends and Kic System* case No. 62, in which an appeal is pending.

<sup>114</sup> Cass. Crim., 14 March 2018, No. 16-82.117, *Oil-for-Food, Oil aspect – Total and Vitol*, case No. 102.

**c. Use of other offences: trading in influence directed towards foreign public officials, misuse of corporate assets and other offences**

*i. Trading in influence*

119. The Phase 3 report highlighted the narrow definition of the foreign bribery offence, whose scope excluded a wide range of cases which, under domestic law, would be covered by trading in influence and a large part of which, as mentioned above, is nevertheless covered by Article 1 of the Convention. The combined criteria of a corruption pact and a restrictive view of the type of actions carried out by a foreign official that could be unlawful seemed to exclude these cases from the scope of the offence in practice. The Working Group therefore recommended that France consider the possibility of either criminalising the bribery of a foreign public official in a sufficiently broad manner or extending the offence of trading in influence to avoid the same acts of bribery being treated differently depending on whether the intended recipient is a French or foreign official (recommendation 1.e.). With the Sapin 2 Act, France has chosen to extend the offence of trading in influence, provided for in article 435-4 CC, to foreign public officials, thereby creating a new offence of actively trading in influence concerning foreign public officials.

120. In its responses to the Phase 4 questionnaires, France has indicated that this new offence is intended to punish the fraudulent intervention of certain intermediaries in the conclusion of international contracts, as highlighted in the 2018 Directorate of Criminal Affairs and Pardons circular. France has also indicated in its responses that the new offence of trading in influence concerning foreign public officials should offer an alternative route to prosecution in situations where it is not possible to sanction payments to third parties or to prove a bribery pact. These three points are identified under recommendation 1.c.; therefore, implementation of the offence of trading in influence concerning foreign public officials could indirectly help fulfil this recommendation. The Belloubet circular also highlights the opportunities opened up by this new offence.

121. Based on the cases referred by France in preparation for the visit, no cases of trading in influence directed towards foreign public officials appear to have been tried to date. However, France has noted an ongoing judicial inquiry into charges of bribery of foreign public officials, trading in influence concerning foreign public officials, private bribery and the concealment of these offences.<sup>115</sup>

**Commentary**

***The lead examiners welcome the introduction into French law of the offence of trading in influence concerning foreign public officials (article 435-4 CC), which implements recommendation 1.e. of the Working Group and helps France to comply with its obligations under Article 1 of the Convention. This reform should improve the possibility of sanctioning bribery in international trade – which may take the form of trading in influence under French law – when other forms of indirect bribery, such as payments through intermediaries or to third parties, have not been proven. Nevertheless, they note that this fall-back offence does not carry a level of sanctions that would allow it to be considered as functionally equivalent to foreign bribery.***

***Despite the recent introduction of this offence into French law, the lead examiners regret its limited use to date and the preference given to prosecuting other offences that do not offer the same level of sanctions, nor, in some cases, the same possibilities for establishing the liability of legal persons and/or punishing them. The lead examiners therefore recommend that the Working Group follow up, as case law and practice develop, to ensure that all magistrates are sufficiently aware of the new offence of trading in influence concerning foreign public officials provided for under article 435-4 CC and that they make full use of it, thereby strengthening efforts to combat indirect bribery.***

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<sup>115</sup> Mass Retail case No. 112.

## ii. Misuse of corporate assets

122. The Phase 2 and Phase 3 reports identified a tendency of French courts to qualify acts of bribery as the misuse of corporate assets (*abus de biens sociaux*), a special criminal offence defined in articles L.241-3 and L.242-6 of the French Commercial Code, in order to sanction acts that would otherwise go unpunished, particularly where time limits apply, or where it would be much more time-consuming or difficult to prove bribery. This special offence sanctions acts by top company executives who make use of corporate assets for personal purposes, and contrary to the company's interests. The Working Group therefore decided to follow up on this issue, as case law and practice developed, to ascertain the extent of recourse to the misuse of corporate assets offence in cases involving elements of foreign bribery, based on data that France would need to collect and analyse (follow-up 13.b.i.). A related aspect of this follow-up was to determine whether liability of legal persons could be established when individuals are prosecuted for misuse of corporate assets (follow-up 13.b.ii. discussed under Section C2.d.)

123. In its questionnaire responses, France states that the Ministry of Justice has drawn up an exhaustive list of all cases involving elements of foreign bribery, which is now systematically referred to during the preliminary investigation or when an inquiry is opened, whenever there is a suspicion. This list shows that recourse to the misuse of corporate assets offence has tended to become less common since the Phase 3 evaluation. Misuse of corporate assets is being formally investigated in at least 30 of the 108 proceedings with elements of foreign bribery initiated after October 2012 or still ongoing as of that date.<sup>116</sup> However, it has only been formally investigated in 3 of the 52 new proceedings opened since 2015, with the offences under investigation not being known in 34 of the 37 ongoing preliminary investigations (offences do not have to be classified at the preliminary investigation stage, as it does not entail a formal initiation of public prosecution). France has pointed out that insofar as misuse of corporate assets was a potential fall-back offence, its practical usefulness at the start of an investigation has been reduced due to the legal reforms facilitating the prosecution of foreign bribery offences.

124. However, as confirmed by all the legal professionals met during the visit, the misuse of corporate assets offence remains useful in practice, to ensure a criminal sanction when foreign bribery offences cannot be proven. Final convictions were handed down in this regard to three individuals for misuse of corporate assets in one case where the offence of bribery of foreign public officials could not be prosecuted. No legal person was convicted in these cases. (See Section C2.d.)

## iii. Other fall-back offences

125. The other fall-back offences listed in the Belloubet circular are: money laundering (see Section D1), the offence of publishing or presenting false or misleading annual accounts (see Section D2), and tax evasion. However, these offences do not meet the criteria for functional equivalence developed by the Working Group, in particular because of the level of penalties.<sup>117</sup> In practice, these offences have been used to punish a limited number of defendants in cases where the foreign bribery offence could not be established. Since Phase 3, the use of offences concerning the forgery of private documents and the use of forgeries has led to the final conviction of two individuals in a case where the foreign bribery offence had been dismissed in the *Bridges, Chad No. 118* case and in two other cases. The classification of money laundering in foreign bribery cases has led to the final conviction of three legal persons through CRPCs in the case of *Telecommunications Uzbekistan No. 23*, which resulted in sanctions for foreign bribery being imposed on foreign legal persons in two Parties to the Convention.

<sup>116</sup> Based on figures verified by the evaluation team for active foreign bribery cases only.

<sup>117</sup> Germany's Phase 4 evaluation provides an example of the consideration of alternative offences considered for application in cases pertaining to the "foreign bribery sphere".

### Commentary

*The lead examiners are encouraged that recourse to the fall-back offence of misuse of corporate assets is beginning to decline, as the Working Group had noted in Phase 3 that it created a potential obstacle to establishing the liability of the legal persons involved (follow-up 13.b.ii. discussed under Section C).*

*They congratulate France on the pragmatic approach taken in encouraging, by means of a circular, the possibility of sanctioning acts of foreign bribery by means of fall-back offences when it is too difficult to establish the constituent elements of foreign bribery or trading in influence concerning foreign public officials. This makes it possible to sanction acts that would otherwise go unpunished. However, as with the new trading in influence offence, the lead examiners note, that these fall-back offences do not carry a level of sanction that would allow them to be considered functionally equivalent to foreign bribery and that not all of them would result in the liability of the legal person(s) involved.*

*The lead examiners consider that the Phase 3 follow-up 13.b. remains relevant and should be expanded. They therefore recommend that the Working Group follow up, as case law and practice develop, the use of the fall-back offences of trading in influence, misuse of corporate assets, money laundering, publication or presentation of false or misleading annual accounts, as well as tax evasion in cases involving elements of foreign bribery.*

## B2. Sanctions against individuals

### a. Significant increase in number of criminal sanctions against individuals

126. In Phase 3, the Working Group deemed the level of sanctions for foreign bribery offences too low and recommended that France raise the maximum amount of the fines set out in article 435-3 CC (recommendation 3.a.i.). The maximum penalties for foreign bribery offences were significantly increased in 2013.<sup>118</sup> An individual who commits the offence of foreign bribery now faces a fine of EUR 1 million (previously EUR 150 000). Judges can also now increase the fine to twice the proceeds of the offence. In addition, since 2020, when foreign bribery is committed by a criminal gang, the fine is EUR 2 million or, if the proceeds of the offence exceed this amount, twice the proceeds.<sup>119</sup> The custodial sentence remains, as in Phase 3, ten years' imprisonment.

127. In comparison, the penalties for misuse of corporate assets are significantly lower, with a basic fine three times lower than for foreign bribery offences (EUR 350 000) and a basic prison sentences of half the length – the maximum sentence provided for by legislation being five years for misuse of corporate assets, compared with ten years for foreign bribery offences. Fines can be increased to EUR 500 000 and the maximum prison sentence to seven years “when the offence of misuse of corporate assets was carried out or facilitated by means of accounts opened or contracts taken out with bodies established abroad, or by the interposition of individuals or legal persons or any body, trust or comparable institution established abroad” (articles L.241-3 and L.242-6 of the Commercial Code). However, even with this enhancement, the fine incurred is still half that for foreign bribery and the prison sentence is shorter. As a result, the penalties for misuse of corporate assets cannot be considered functionally equivalent to those for foreign bribery.

128. The penalties for the new offence of trading in influence concerning foreign public officials are also lower. An individual who commits the offence of trading in influence directed towards foreign public

<sup>118</sup> Act No. 2013-1117 of 6 December 2013 on combating tax evasion and serious economic and financial crime.

<sup>119</sup> [Act No. 2020-1672](#) of 24 December 2020 on the European Public Prosecutor's Office, environmental justice and specialised criminal justice.

officials is liable to a maximum of five years' imprisonment and a fine of EUR 500 000, which may be increased to twice the proceeds of the offence.

### **b. Criminal sanctions imposed on individuals in practice**

129. In Phase 3, the Working Group recommended that France ensure that the penalties imposed on individuals in practice are effective, proportionate and dissuasive (recommendation 3.a.ii.), in a context where only a five-month suspended prison sentence and fines of EUR 10 000 had been handed down in the three cases that had led to convictions.

130. The range of foreign bribery sanctions introduced by the 2013 reform has not yet been applied by a tribunal. Since Phase 3, the sanctions imposed on 18 individuals in the 8 foreign bribery cases concluded (excluding plea bargaining) all remain within the low range of sanctions available at the time the offences were committed (see Annex 1 on case summaries). This is the case for monetary fines (where they have been imposed), with the amounts ranging from EUR 5 000 up to EUR 80 000, even though the statutory maximum was EUR 150 000. All but one of the final prison sentences (where the defendant was tried *in absentia*, and an arrest warrant was issued) were suspended and ranged from 4 to 18 months, even though the statutory maximum was 10 years. Whether they are effective, proportionate and dissuasive therefore remains an issue (Article 3 of the Convention), as the likelihood that a person guilty of foreign bribery will receive a sentence that meets these criteria has not been demonstrated in practice.

131. In Phase 3, the CRPC procedure equivalent to plea-bargaining had never been applied in a foreign bribery case and the Working Group therefore decided to monitor the sanctions applied in this context (follow-up 13.d.). In 2019, the maximum sentence that can be offered was increased from one to three years.<sup>120</sup> In practice, under the CRPC framework, an individual was ordered to pay a fine of EUR 25 000 and handed a six-month suspended prison sentence for bribery of a foreign public official and misuse of corporate assets in the case of *Oil 1 Republic of the Congo No. 128*. This is a low penalty, comparable to the sanctions imposed as part of a trial. In addition, similar final sanctions were also imposed on three individuals for misuse of corporate assets in one case under the CRPC framework. The maximum fine imposed was EUR 375 000, and the final prison sentences were all suspended and ranged from 6 to 12 months.

#### **Commentary**

***The lead examiners welcome the significant increase in maximum penalties for individuals that have been introduced since Phase 3, including in the context of the CRPC procedure. However, they are disappointed by the low sanctions handed down in practice for the convictions imposed since Phase 3, which were all at the low end of the applicable range. While noting the 2013 increase to the maximum fines set out in article 435-3 CC, no sanctions have yet been imposed under the new regime. While Phase 3 recommendation 3.a.i. on the maximum fines has therefore been implemented, recommendation 3.a.ii. on the effectiveness, proportionality and dissuasiveness of penalties imposed in practice remains to be implemented. In light of French court jurisprudence to date, the lead examiners recommend that France ensure that the sanctions imposed in practice on individuals convicted of bribery of foreign public officials are effective, proportionate and dissuasive in accordance with Article 3 of the Convention.***

### **c. Confiscation of bribes and proceeds in foreign bribery cases**

132. For natural persons, confiscation can be imposed in two manners: either as an additional penalty following a criminal conviction (article 131-21 CC) or as a (not distinct) component of the criminal fine. Indeed, since the 2013 reform, the amount of profits obtained as a result of the offence can be taken into account for confiscation purposes in the calculation of the fine, which can now be increased to twice the

<sup>120</sup> [Act No. 2019-222](#) of 23 March 2019, 2018–2022 Framework and Reform Act for the Justice System.



proceeds of the offence for individuals (article 435-3 CC), hence facilitating the confiscation of profits. The process of calculating the fine amount thus encompasses a confiscatory component in addition to the punitive component, without specifically identifying these two components.<sup>121</sup>

133. In Phase 3, the Working Group was disappointed by the lack of a proactive seizure and confiscation policy in foreign bribery cases in France. No confiscation penalty had been imposed. The Working Group therefore recommended that France develop a proactive approach to seizure and confiscation, raise awareness and develop guidelines on methods for quantifying the proceeds of foreign bribery offences (recommendation 3.c.).

134. Since Phase 3, the additional penalty of confiscation (article 131-21 CC) has been imposed against individuals in just two of the nine cases concluded since Phase 3 (*TSKJ (Nigeria) No. 99* and *Bank Investment (Cameroon) No. 120*). However, the option of taking into account the amount of the proceeds derived from the offence has not yet been applied against either natural or legal persons in the cases tried in court since Phase 3. (The confiscation measures against legal persons are detailed under section C.4.b)

#### **Commentary**

***The lead examiners note that confiscation orders have only been issued against natural persons in two foreign bribery cases concluded by trial. The examiners consider that recommendation 3.c. is only partially implemented. They therefore recommend that France take the necessary steps to ensure that legal proceedings make full use of the confiscation measures provided for in law, as detailed under section C.4.b on confiscation measures against both natural and legal persons.***

### **B3. Investigative and prosecutorial framework**

#### **a. Investigative authorities responsible for foreign bribery cases**

135. In Phase 3, the Working Group was disappointed that the national investigative authority specialising in foreign bribery offences, the Central Anti-Corruption Brigade (BCLC), was not sufficiently consulted by prosecutors and had limited resources. The Working Group recommended that France issue a reminder to all jurisdictions that the BCLC has jurisdiction over foreign bribery cases and also increase its resources (recommendation 4.e.).

136. Despite recent efforts to increase the resources of the French justice system,<sup>122</sup> it is clearly underfunded compared with other European countries, as regularly highlighted in the reports of the European Commission for the Efficiency of Justice (CEPEJ).<sup>123</sup> The situation is particularly critical in the economic and financial justice sphere, at all stages of the criminal justice process, and the prospects for improvement are highly uncertain, as described in more detail in the sections below.

<sup>121</sup> Act No. 2013-1117 of 6 December 2013, cited above.

<sup>122</sup> [Act No. 2019-222](#) of 23 March 2019, 2018–2022 Framework and Reform Act for the Justice System.

<sup>123</sup> According to the 2020 CEPEJ Evaluation Report ([European Judicial Systems](#)), France has the lowest number of prosecutors among the 47 evaluated countries, with only 3 prosecutors per 100 000 inhabitants (average of 12.2). French prosecutors therefore have to handle a high number of cases (6.6 per 100 inhabitants) and perform a record number of different functions. France spends 0.2% of its GDP on justice, while the average expenditure of the 47 evaluated countries is 0.33% of GDP.

*i. Creation of the OCLCIFF*

137. In 2013, the BCLC was replaced by the Central Office for Combating Corruption and Financial and Fiscal Offences (OCLCIFF),<sup>124</sup> in parallel with the establishment of the PNF. The creation of the OCLCIFF was intended to strengthen and secure resources dedicated to combating the most complex economic and financial crime, and to improve specialisation and visibility.<sup>125</sup>

138. This specialised investigative unit is attached to the Central Directorate of the Judicial Police and has national jurisdiction. It deals in particular with “corporate criminal law offences”, tax evasion and “offences against integrity” when they are highly complex (as well as money laundering in these offences and related crimes).<sup>126</sup> The Belloubet circular emphasises that the OCLCIFF’s remit specifically includes investigating foreign bribery cases for the PNF. During the visit, law enforcement officials confirmed that the OCLCIFF jurisdiction over foreign bribery cases is well established and recognised in practice. The National Brigade for Combating Corruption and Financial Crime (BNLCCF), a sub-division of the OCLCIFF, is conducting 40 of the 52 ongoing foreign bribery investigations.<sup>127</sup> France has therefore clarified its institutional framework with regard to the investigative services responsible for foreign bribery cases, as recommended in Phase 3.

*ii. Insufficient resources*

139. The OCLCIFF currently has 84 officers to conduct the 246 investigations for which it is responsible, which represents a slight decrease in staffing levels since September 2020, when the OCLCIFF had 90 officers. After the visit, France clarified that the decrease in cases assigned to the OCLCIFF is due to the increase in the number of cases concluded, and the drop in the number of new cases opened. In addition, the lockdown during the COVID pandemic made it easier to conclude ongoing cases by limiting the number of field operations. The 118 investigations entrusted more specifically to the BNLCCF are carried out by 44 agents. During the visit, the OCLCIFF indicated that 20 of the BNLCCF investigators are working on bribery investigations, including foreign bribery cases. France has indicated that the BNLCCF will soon be strengthened through the creation of two additional teams of eight investigators. At the time of this report, these teams had yet to be created and no implementation date has been scheduled.

140. The serious lack of resources allocated to the OCLCIFF has been heavily criticised for a number of years, despite a recent increase in staff numbers and a relative decrease in cases. In particular, BNLCCF investigators publicly denounced this issue in an open letter to the Director-General of the national police in 2017,<sup>128</sup> as did the former National Financial Prosecutor during a parliamentary hearing in 2020.<sup>129</sup> The current Public Prosecutor at the Paris Court of Appeal has recently publicly expressed a similar concern.<sup>130</sup>

<sup>124</sup> Decree No. 2013-960 of 25 October 2013 creating a central office for combating corruption and financial and tax offences.

<sup>125</sup> See, for example, Ministry of the Interior (2014), [“Corruption et fraude fiscale en ligne de mire”](#) [“Corruption and tax evasion in the firing line”].

<sup>126</sup> *Ibid.* Decree No. 2013-960 of 25 October 2013.

<sup>127</sup> The other investigations are led by the specialised services of the judicial police in Paris, the investigation unit of the national gendarmerie in Paris, and the judicial inquiry services of the Directorate General for Customs and Excise and the Directorate General of Public Finances.

<sup>128</sup> Médiapart (27 March 2017), [“Manque de moyens, déconsidération et pressions: la colère inédite de la police anticorruption”](#) [“Lack of resources, discredit and pressure: the unprecedented anger of the anti-corruption police”].

<sup>129</sup> National Assembly, Commission of Inquiry into the Obstacles to the Independence of the Judiciary, [hearing of Mrs Éliane Houlette](#), former National Financial Prosecutor, 2020, p. 17.

<sup>130</sup> Jacquin, J.B. (8 June 2021), [“Le procès en laxisme de la justice est injuste, mais le sentiment des policiers peut s’expliquer”](#) [“The case of lenient justice is unjust, but the feeling of police officers can be explained”].

These difficulties are analysed in a 2018 report by the Court of Auditors,<sup>131</sup> which notes that “the OCLCIFI can be considered overwhelmed”, and in a 2019 report by the National Assembly evaluating the fight against financial crime,<sup>132</sup> which highlights the “congestion” of the OCLCIFI and its lack of funding compared with other countries.<sup>133</sup> During the visit, magistrates, investigators, lawyers, journalists and civil society representatives unanimously confirmed these difficulties.

141. The inadequate resources allocated to the OCLCIFI affect the quality of investigators’ work environment. Investigators also suffer a lack of recognition (as do all economic and financial justice officers) and remuneration that is not in line with the cost of living in the Paris region, where most of the specialised investigation units are concentrated. The OCLCIFI therefore has difficulty recruiting and retaining staff, which exacerbates its lack of resources and hinders the specialist training of its officers. During the visit, OCLCIFI representatives indicated that the initial training for investigators is general in nature, and that they only receive specialised training as economic and financial investigators (IMEF certificate) once they have been recruited to a post in this field. These delays in recruitment and training are particularly problematic when an experienced investigator must be replaced. The Court of Auditors therefore recommends that specialised economic and financial courses be structured through training and career development. During the visit, OCLCIFI representatives also indicated that while the new practice of recruiting specialists from the private sector on a temporary basis is emerging, it still meets strong internal resistance.

142. Overall, these difficulties affect not only the OCLCIFI’s ability to effectively carry out all the highly complex investigations it is assigned, but also its detection role, particularly in relation to foreign bribery offences. The parliamentary report mentioned above notes, for example, that the OCLCIFI has initiated almost no cases since 2013; its resources are already insufficient to carry out the investigations entrusted to it by other authorities, including the PNF. The lack of resources allocated to the OCLCIFI also raises the question of its role in cases involving economic actors with considerable means, especially when the investigation is largely based on their internal investigations within the framework of a CJIP. This calls into question the office’s ability to effectively analyse the content and conclusions of internal company investigations to verify the facts and assess the quality of co-operation from companies.

### **Commentary**

***The lead examiners welcome the creation of the OCLCIFI and the fact that it has been assigned a clearly identified lead role in investigating foreign bribery cases, thereby implementing this point of recommendation 4.e. However, the lead examiners are seriously concerned by the significant lack of resources allocated to the office, which has a significant impact on its ability to effectively carry out the complex investigations associated with foreign bribery cases and to play an active detection role in this area. This aspect of recommendation 4.e. has therefore not been implemented.***

***The lead examiners therefore urge France to take promptly, the necessary steps to ensure that: (i) sufficient resources are allocated to specialised investigative units, in particular to the OCLCIFI and the BNLCCF; and (ii) these units can recruit and retain the necessary officers with financial and economic expertise, including taking into account cost-of-living constraints in the most important economic centers.***

<sup>131</sup> Court of Auditors, (12 December 2018), [Les moyens consacrés à la lutte contre la délinquance économique et financière](#) [Methods dedicated to combating economic and financial crime], report to the Minister of Justice and the Minister of the Interior.

<sup>132</sup> National Assembly Public Policy Evaluation and Oversight Committee on the evaluation of the fight against financial crime (28 March 2019), [Report](#).

<sup>133</sup> In the joint investigation of the *Airbus (multiple jurisdictions) case No. 5*, the UK Serious Fraud Office (SFO) was able to mobilise 15 full-time officers, while France was represented by two OCLCIFI officers supervised by two part-time prosecutors and a full-time legal assistant.

## **b. Prosecutorial and investigative authorities**

### *i. Public prosecutors*

143. In Phase 3, the Working Group noted that the lead role of the Public Prosecutor's Office attached to the Paris High Court (then known as *Tribunal de grande instance de Paris*) in the prosecution of foreign bribery cases was not clearly established, and that it lacked the necessary resources to carry out its role effectively. It therefore recommended that France issue a reminder about the jurisdiction of the Paris High Court by means of a clear criminal policy, and strengthen the resources available to the Court's Financial Section (recommendation 4.e.).

### **The creation of the National Financial Prosecutor's Office**

144. The 2013 creation of the National Financial Prosecutor's Office (PNF), headed by the National Financial Prosecutor and placed under the Paris Public Prosecutor's Office, was intended to simplify the organisation of economic and financial investigations and prosecutions, harmonise approaches, and centralise resources and expertise in this area, which requires a high degree of specialist training.

145. The PNF has national and concurrent jurisdiction with the ordinary courts Public Prosecutor's Offices for foreign bribery offences. The Belloubet circular clarifies how this concurrent jurisdiction should be interpreted, highlighting that "the PNF is naturally intended to exercise its jurisdiction over all international bribery cases and to centralise the handling of such cases". The circular further states that "it is therefore appropriate, as soon as credible suspicions of international bribery are brought to the attention of a prosecutor's office, or appear in the context of proceedings (...) that the PNF be systematically informed of these cases, without distinction according to the stage of the proceedings, the level of liability of the persons involved or the financial dimension of the case." The visit confirmed that this leadership role is clear to all actors involved. France reports that the PNF is currently handling all but two of the preliminary investigations into bribery of foreign public officials, i.e. 35 cases out of a total of 37, some of which were transferred from other prosecution services. Of the 15 cases under investigation, 12 are being supervised by the PNF, while the other cases are being supervised by the Paris or Lyon Public Prosecutor's Office. France has therefore clarified its institutional framework with regard to the assignment of foreign bribery cases to the Public Prosecutor.

### **Insufficient resources available to the PNF**

146. To process the 605 pending cases it has been entrusted, the PNF has 18 prosecutors, including the National Financial Prosecutor (two additional posts are yet to be filled). They are supported by six specialist assistants, ten registry officials and three technical assistants.<sup>134</sup> All prosecutors are expected to deal with foreign bribery cases.

147. Like the other components in the economic and financial criminal justice system, the PNF has insufficient resources to effectively carry out its role. The rapid increase in the number of cases handled by the PNF has not been accompanied by an adequate strengthening of its resources. At present, each prosecutor is responsible for approximately 38 cases, whereas the original impact assessment estimated that their individual caseloads should not exceed eight "highly complex cases".<sup>135</sup> The National Assembly's evaluation report on the fight against financial crime (Bernalicis and Maire report)<sup>136</sup> notes that the number of cases resolved each year is low, which "is a major concern for tackling the PNF's backlog of cases." The report also notes the low number of investigations initiated by the PNF, indicating a limited detection

<sup>134</sup> Paris Court, [Note on the organisation of the PNF](#).

<sup>135</sup> Quoted in the [report](#) presented by deputies Ugo Bernalicis and Jacques Maire (28 March 2019), National Assembly Public Policy Evaluation and Oversight Committee on the evaluation of the fight against financial crime.

<sup>136</sup> *Ibid.*

capacity. The former National Financial Prosecutor has underlined that the PNF's lack of resources reduced both its effectiveness and independence, and she has also suggested a certain reluctance on the part of the executive to strengthen the PNF's resources.<sup>137</sup> The Council of Europe, while recognising the quality of the work carried out by the PNF, also recommended that its resources be strengthened.<sup>138</sup>

148. During the visit, PNF representatives indicated that its prosecutors are selected according to a specific recruitment procedure that takes into account candidates' experience in economic and financial matters, among other things. While the initial and continuing training of prosecutors, provided by the National School for the Judiciary, is general in nature, it also aims to develop expertise in economic, financial and accounting analysis and offers a significant number of theoretical and practical training programmes in this field. The Bernalicis and Maire report nevertheless points out that, despite the quality of this training, France is not developing a genuine strategy to create a "talent pool" of specialised prosecutors; career paths are heavily influenced by considerations of seniority, ratings and geographical choices.

### **Commentary**

***The lead examiners welcome the PNF's establishment, which has increased the visibility of the fight against economic and financial crime, and its clear role as the lead and specialised prosecutor in handling foreign bribery cases. With the creation of the PNF, France has therefore implemented recommendation 4.e. with regard to the Public Prosecutor. However, the lead examiners are seriously concerned that the PNF's resources are not commensurate with the complexity and increasing number of cases for which it is responsible. The lead examiners therefore urge France to take, as a matter of urgency, the necessary steps to: (i) strengthen the resources allocated to the PNF in terms of personnel and specialised expertise to enable it to deal effectively with foreign bribery cases; and (ii) train a sufficient number of specialised prosecutors to provide the means, in the short and long term, to consolidate the progress that France made by creating this prosecution authority.***

#### *ii. Investigative judges*

149. The investigative judge, a relatively specific feature of the French judicial system, is a statutorily independent judge, attached to a specific court. They do not judge cases but rather conduct the criminal investigation phase, known as a judicial inquiry, or inquiry, at the request of the Public Prosecutor or civil parties. The inquiry, which suspends the statute of limitations for public prosecution, consists of an investigation to determine whether or not there is sufficient evidence to bring the accused to trial and, if so, to refer them to a court to stand trial. The investigative judge directs the inquiry by referring the matter to the competent police or gendarmerie services through letters rogatory.

150. In foreign bribery cases, the financial investigation unit of the Tribunal of Paris (*Pôle de l'instruction* in the *Tribunal Judiciaire de Paris*) is exclusively responsible for the judicial inquiry. As with the investigative and prosecutorial authorities, investigative judges are seriously under-resourced to handle the cases entrusted to them, including those relating to economic and financial offences. Judicial inquiries into foreign bribery offences (of which 15 are currently ongoing) are handled by ten investigative judges specialised in economic and financial matters, who also have a large number of other cases to investigate. Each investigative judge handles 35 to 40 cases simultaneously. The investigative judges whom the examiners met during the visit felt that this was excessive, stating they would be each able to effectively investigate a maximum of 20 to 30 cases. Four assistants specialised in seizure and confiscation, accounting, and mutual legal assistance provide crucial, but largely insufficient, technical support. After the visit, however,

<sup>137</sup> National Assembly, Commission of Inquiry into the Obstacles to the Independence of the Judiciary, [hearing of Ms Éliane Houlette](#), former National Financial Prosecutor, 2020, p. 8.

<sup>138</sup> Group of States against Corruption, [Fifth Evaluation Round, France](#), 2020, para. 136.

France stated that during the 2021 management dialogues, the first President and the General Prosecutor (Head of prosecution) attached to the Tribunal of Paris had requested the creation of two investigative posts to support the work of the Paris financial investigation unit (*Juridiction Inter-Régionale Spécialisée - JIRS*). This request had been favourably received. With these two additional posts, the number of cases handled by each judge should decrease (to a constant caseload) to a maximum of 29 to 33 simultaneous cases (compared with 35 to 40 cases before the creation of these two posts), which is still much higher than the 20 to 30 cases they feel are manageable.

151. The investigative judges met during the visit attribute these difficulties in particular to: i) the fact that the creation of the PNF and the increase in the number of economic and financial cases have not been accompanied by an increase in the resources allocated to the competent investigative judges; ii) the lack of resources allocated to the investigating units, which forces them to carry out tasks that normally fall to investigators; and iii) the prevailing trend on the part of the PNF to refer “hopeless” or particularly sensitive – and therefore particularly time-consuming – cases to them.

152. The lack of resources allocated to investigative judges has a serious impact on the duration of judicial inquiries, which are not subject to any legal limitation. Inquiries are additionally extended by the lack of resources in the courts, where there are long waiting times to schedule a hearing. In terms of foreign bribery cases, 80% of the judicial inquiries in progress were initiated more than five years ago (12 of the 15 judicial inquiries in progress). The investigative judges also stressed that judicial inquiries are vulnerable to challenges to the European Court of Human Rights (ECHR) for failure to comply with reasonable time limits in criminal proceedings.

153. The limitation of the duration of preliminary investigations to two or three years, approved by Parliament on 18 November 2021, 3 weeks before finalising this report,<sup>139</sup> could result in the further transfer of a significant number of economic and financial cases to investigative judges, and thus further exacerbate this situation. The investigative judges met during the visit expressed their concern about this, believing that such a reform would make their work “impossible”.

154. Lastly, as in the investigation units and Public Prosecutors’ Offices, the lack of resources has an impact on the working environment, and therefore on staff retention and expertise. This point was emphasised during the visit both by investigating and trial judges. As has been highlighted with regard to PNF prosecutors, the initial and continued training of judges, while intended to be general in nature, is aimed in particular at developing expertise in economic, financial and accounting analysis. The National School for the Judiciary therefore offers a significant number of theoretical and practical training programmes in this field. Nevertheless, as noted in relation to prosecutors in Section B3.b.i, France is not developing a genuine strategy to create a pool of judges specialising in economic and financial matters.

### **Commentary**

***The lead examiners are concerned by the lack of resources allocated to investigative judges, who handle a significant portion of the foreign bribery cases in progress. This has a particular impact on the duration of judicial inquiries, making them vulnerable to possible challenges for failure to meet reasonable timeframes in criminal proceedings, as well as on the specialist training of the judges involved. In this context, the limitation of the duration of preliminary investigations to two or three years, approved by Parliament three weeks before the adoption of this report, which will redirect a significant proportion of economic and financial cases to investigative judges, is particularly worrying.***

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<sup>139</sup> [Bill No. 4091](#) on confidence in the judiciary.

**The examiners urge France to take urgent steps to ensure that investigative judges dealing with foreign bribery cases have: (i) the necessary resources, including specialist experts, to deal with them effectively and in a timely manner; and (ii) the necessary training for this purpose.**

*iii. Jurisdiction and resources of the European Public Prosecutor's Office*

155. The European Public Prosecutor's Office was established by Regulation (EU) 2017/1939,<sup>140</sup> adopted by 22 EU Member States, including France. It began operating in June 2021 and has jurisdiction in particular over foreign bribery cases committed after 20 November 2017 in which the offences affect the financial interests of the EU (e.g. payment of a bribe to an EU official).<sup>141</sup> The European Public Prosecutor's Office may investigate, prosecute and bring cases to judgment before the courts of the Member States, which retain jurisdiction to try cases. European Delegated Prosecutors, placed at the disposal of the European Public Prosecutor's Office, are located in their countries to conduct investigations. France must appoint five European Delegated Prosecutors. Where the European Public Prosecutor's Office has jurisdiction, the French Public Prosecutor's Office or the investigative judge hearing the case is obliged to relinquish jurisdiction in favour of the former.<sup>142</sup> National prosecutors must therefore report to the European Public Prosecutor's Office any act that may fall within its competence. In investigations that may fall under the jurisdiction of both the European Public Prosecutor's Office and national authorities (e.g. if EU and Member State officials have received a bribe from a French company in the same case), it will be interesting to monitor how they will co-ordinate in practice.<sup>143</sup>

156. European Delegated Prosecutors and national prosecution authorities follow separate rules of procedure, even when they operate in the same country. In France, the European Delegated Prosecutors will be able to conduct their investigations in accordance with the procedures for a preliminary investigation, but will also have powers reserved for the investigative judge, such as indictment, placement under assisted witness status or placement under judicial supervision.<sup>144</sup> Allocating powers to public prosecutors that were previously strictly reserved for investigative judges (who are independent magistrates) can be justified by the greater independence of the European Delegated Prosecutors, who are not subject to the hierarchical authority of the Public Prosecutor's Office or the Ministry of Justice. However, the reality of this independence has been the subject of debate. The magistrates' trade union (*Syndicat de la Magistrature*) has noted that the independence of the European Delegated Prosecutors is not accompanied by statutory guarantees, since they will simply be "made available" to the European Public Prosecutor's Office by France.<sup>145</sup> On the contrary, during the visit, one judge felt that the status of European Delegated Prosecutors, who are more independent than national prosecutors, would further highlight the independence issues surrounding national prosecutors. The trade press has considered the "hybrid" status of European Delegated Prosecutors as another step towards the abolition of investigative judges.<sup>146</sup> France has stated that, to date, no foreign bribery case opened in France falls under the jurisdiction of the European Public Prosecutor's Office.

<sup>140</sup> [Council Regulation](#) (EU) 2017/1939 of 12 October 2017 implementing enhanced co-operation on the establishment of the European Public Prosecutor's Office.

<sup>141</sup> France has indicated that, depending on the amount of damages involved, this jurisdiction is exercised exceptionally, depending on the seriousness or complexity of the proceedings, or as a matter of principle.

<sup>142</sup> [Articles 696-111 to 696-112 of the Code of Criminal Procedure](#).

<sup>143</sup> One of the cases concluded since Phase 3 might have fit into this pattern: *Public Services/Lobbyist (EU) – Eurotrends and Kic System No. 62*.

<sup>144</sup> [Act No. 2020-1672](#) of 24 December 2020 on the European Public Prosecutor's Office, environmental justice and specialised criminal justice.

<sup>145</sup> *Syndicat de la Magistrature* (17 February 2020), [Press release](#).

<sup>146</sup> Mensous, C. and Pelloux, F. (2020), "[Les forces et les faiblesses de la transposition du parquet européen en droit français](#)" ["The strengths and weaknesses of transposing the European Public Prosecutor's Office in French law"], *Dalloz Actualité*.

### Commentary

**The lead examiners note the recent establishment of the European Public Prosecutor's Office, which could be called upon to deal with certain foreign bribery cases in participating countries, including France. They recommend that the Working Group monitor how the European Public Prosecutor's Office handles the foreign bribery offence when French individuals or legal persons are involved, in particular to verify whether the European Delegated Prosecutors in France have the necessary resources and independence to manage these cases in accordance with the Convention, and to ascertain how these Delegated Prosecutors co-ordinate, where appropriate, with the French authorities during joint investigations.**

#### c. Inter-agency co-ordination

##### i. PNF co-operation with the police and gendarmerie services

157. As in Phase 3, public prosecutors direct the activities of the judicial police during preliminary investigations. While prosecutors remain free to choose the investigation services they use, they are expected to give priority to the OCLCIFI, particularly in foreign bribery cases. The Belloubet circular nevertheless provides a reminder that, whether due to the increasing number of foreign bribery investigations, or taking into account “the unique nature of the geopolitical context or the sector of economic activity involved in certain cases”, the PNF may also turn to other services, such as the investigative unit of the Paris gendarmerie, the regional services of the judicial police or the specialised brigades of the Paris Prefecture. In addition, prosecutors can rely on specialized units that trace illicit assets through the Criminal Assets Identification Platform (see Sections B2.c. and C2.c.). During the visit, a PNF representative confirmed that, while the OCLCIFI is used in principle, considerations such as the availability of investigators or the search for specific expertise may be taken into account.

##### ii. PNF co-operation with the AFA and other authorities

158. The Belloubet circular stresses the importance of co-operation between the judicial authorities, including the PNF, and other state services that may refer foreign bribery cases to them.

159. It therefore calls on public prosecutors to actively co-operate with the AFA. A 2019 Directorate of Criminal Affairs and Pardons dispatch details the terms of this co-operation.<sup>147</sup> Within the framework of an investigation, public prosecutors may ask the AFA to provide any information likely to help contextualise the offence, as well as any document collected by the AFA as part of its checks. Public prosecutors must inform the AFA, and may seek its opinion, when considering whether to impose an obligation to establish a compliance programme in the context of a CJIP or to ask the court to impose a penalty to implement a compliance programme following a conviction. The AFA consults the public prosecutors concerned when it schedules its audits, and regularly sends them reports on the basis of article 40 CCP.

160. Public prosecutors are also required to co-operate with TRACFIN, which may provide them with information upon request, but also, on its own initiative, forward information related to their activities in the context of an ongoing investigation (article L. 561-31 of the Monetary and Financial Code) or on its own initiative (article L.561-30-1 of the Monetary and Financial Code). These exchanges have intensified since Phase 3, but appear to remain stable albeit with a recent slow-down in terms of bribery offences.<sup>148</sup> Between 2017 and 2019, TRACFIN forwarded a total of 5 files to the judicial authorities concerning foreign

<sup>147</sup> The dispatch is a supplement to the circular of 31 January 2018 on the application of the Sapin 2 Act.

<sup>148</sup> TRACFIN, [Rapport d'activité et d'analyse de 2019](#) [2019 Activity and Analysis Report], p. 65; TRACFIN, [Rapport d'activité et d'analyse de 2014](#) [2014 Activity and Analysis Report], p. 39.



bribery. No file was forwarded in 2020. TRACFIN nonetheless continues to play a notable role in referring foreign bribery cases (see Section A6).

161. Co-operation with tax authorities has been strengthened since Phase 3, in particular through: i) including the National Public Prosecutor among those for whom tax confidentiality is lifted; ii) increasing specialised court assistants' access to certain tax databases;<sup>149</sup> and iii) integrating in 2019 of the National Brigade of Economic Investigations (BNEE), composed of tax inspectors, into the same sub-directorate of the Central Directorate of the Judicial Police as the OCLCIFF. The PNF has also forged closer ties with the General Directorate of Public Finances to strengthen implementation of the principle of non-deductibility of bribes paid to foreign public officials and the detection of bribery (see Section A5).

### **Commentary**

***The lead examiners commend the effective co-operation between, on one hand, the investigative and prosecutorial authorities competent in foreign bribery offences, and, on the other, the AFA and government agencies that may detect allegations of foreign bribery, as well as the measures that have helped to strengthen this co-operation since Phase 3.***

#### **d. Independence of the Public Prosecutor's Office from the Ministry of Justice**

162. In Phase 3, the Working Group recommended that France review the regulatory framework governing relationships between the Ministry of Justice and prosecutors to ensure that the role of the Public Prosecutor's Office is exercised independently of political power and to guarantee that investigations and prosecutions in foreign bribery cases are not influenced by factors prohibited by Article 5 of the Convention (recommendation 4.a.).

163. The concerns expressed in the Phase 3 Report were reinforced by the monopoly of the Public Prosecutor's Office. This was ended by the Sapin 2 Act, which created the possibility for private parties, including associations, to bring civil claims to hold perpetrators accountable for corruption violations (see, below, Section B.4.b.ii). The creation of the PNF has also alleviated concerns expressed in Phase 3 about a lack of proactivity in handling foreign bribery allegations. However, the initiation and conduct of foreign bribery investigations and prosecutions, and the negotiation of CRPC and CJIP, have been concentrated in the hands of a few specialised prosecutors. The independence of the investigative measures taken and the appropriate criminal response assessed by the PNF, therefore, remains essential to ensure that the foreign bribery offence is enforced in a determined and effective manner, free from suspicion of interference or consideration of factors prohibited by Article 5 of the Convention. Thus, despite the institutional changes since Phase 3, the evaluation of the implementation of recommendation 4.a.i. remains relevant.

##### *i. Prohibition of individual instructions*

164. The Phase 3 Report raised the issue of the independence of the Public Prosecutor's Office, given the possibility that the Minister of Justice could intervene in prosecutions by giving prosecutors not only general instructions, such as circulars, but also instructions in individual cases (individual instructions). Shortly before that report was finalised, two circulars dated 31 July 2012<sup>150</sup> and 19 September 2012<sup>151</sup> reported the Minister of Justice's decisions: (i) not to address individual instructions to prosecutors; and (ii) not to override the unfavourable decisions of the Supreme Council of Magistracy (*Conseil Supérieur de la Magistrature* - CSM) on prosecutors nominated by the executive.

<sup>149</sup> Act No. 2018-898 of 23 October 2018 on combating fraud.

<sup>150</sup> [Circular](#), Minister of Justice, 31 July 2012, on the transparency of appointment nominations.

<sup>151</sup> [Circular](#) on criminal policy, Minister of Justice, 19 September 2012.

165. The Act of 25 July 2013 on the powers of the Minister of Justice and the Public Prosecutor's Office with regard to criminal policy and the implementation of public prosecution enshrines the guidelines set out in the two circulars issued by the Minister of Justice,<sup>152</sup> ensuring the continued prohibition of individual instructions from the Minister of Justice to public prosecutors and fully implementing recommendation 4.a.ii. This Act expressly distinguishes between criminal policy, implemented by the Minister of Justice through the issuing of general and impersonal instructions to public prosecutors (article 30 CCP), and public prosecution, led by the National Public Prosecutor, in relation to which the Minister of Justice may not issue instructions to public prosecutors in individual cases (article 31 CCP).

*ii. Institutionalisation of reporting information and necessary regulation*

166. Neither the circular of 19 September 2012 nor the Act of 25 July 2013, however, called into question the principle that public prosecutors should report information to the Ministry of Justice about certain proceedings due to, among other reasons, “the nature of the defendants or victims, or the international dimension of the proceedings, or the actual or likely media coverage.” Due to the hierarchical organisation of the public prosecution service (*le parquet*), prosecutors keep their Prosecutor General's Offices (*parquets généraux*) informed of any particular cases that warrant the circulation of information. If necessary, the Prosecutor General's Offices may then notify the Minister of Justice (articles 39-1 and 35 CCP). The circular of 31 January 2014 circulating the Act of 25 July 2013 was a reminder that the prohibition of individual instructions does not effectively put an end to the practice of reporting information about these same individual cases.<sup>153</sup> As former National Financial Prosecutor Éliane Houlette noted during her hearing before a Parliamentary Commission of Inquiry into the Obstacles to the Independence of the Judiciary: “almost all, if not all, of the cases monitored by the PNF meet one or more of the criteria set out in the circular justifying the reporting of information”.<sup>154</sup> The Belloubet circular also invites public prosecutors to systematically report to the Directorate of Criminal Affairs and Pardons any proceedings for bribery or trading in influence directed towards foreign public officials that are being supervised by the Public Prosecutor's Offices. According to the circular, the purpose of reporting this information is to enable the Minister of Justice to usefully assess the practical application of any general instructions and, if necessary, to identify any additional measures for defining criminal policy.

167. In its Phase 4 responses, France has stressed that the prosecutors heard between January and July 2020 by the aforementioned Parliamentary Commission of Inquiry<sup>155</sup> all stated that they had never personally been subject to, or been aware of, pressure from the executive; that they had never, since the Act of 25 July 2013, been the subject of an instruction in an individual case; and that they only reported to the Ministry of Justice elements that were unlikely to affect ongoing investigations. This information concerns the main acts of the proceedings after the event, and the authorities stress that in no way is the reporting intended to obtain any authorisation or approval from the executive to open, close or extend investigations or prosecutions, which is moreover prohibited by law. After the visit, France also underlined that, on 14 June 2021, a priority question of constitutionality (*question prioritaire de constitutionnalité*) was submitted to the Constitutional Council concerning information communicated by the Public Prosecutor's

<sup>152</sup> [Article 1 of Act No. 2013-669](#) of 25 July 2013 on the powers of the Minister of Justice and the Public Prosecutor's Office on criminal policy and the implementation of public prosecution.

<sup>153</sup> [Circular](#) of 31 January 2014 presenting Act No. 2013-669 of 25 July 2013.

<sup>154</sup> [Parliamentary Commission of Inquiry into the Obstacles to the Independence of the Judiciary](#), record of hearing [No. 29](#) of Ms Éliane Houlette, former National Financial Prosecutor.

<sup>155</sup> Record [No. 45](#), Ms Catherine Champrenault, Prosecutor General at the Paris Court of Appeal (extraordinary session), [No. 29](#), Ms Éliane Houlette, [No. 22](#), Mr Jean-Michel Prêtre, Advocate General at the Lyon Court of Appeal, [No. 18](#), Mr Jean-François Bohnert, National Financial Prosecutor, [No. 13](#), [No. 10](#), Ms Catherine Champrenault, Prosecutor General at the Paris Court of Appeal, [No. 8](#), Mr Eric Mathais, President of the National Conference of Public Prosecutors, Mr Alexandre de Bosschere and Mr Eric Maillaud, National Public Prosecutors, [No. 6](#), Mr Rémy Heitz, National Public Prosecutor at the Judicial Court of Paris.

Offices to the Minister of Justice under articles 35 and 39-1, para. 2 CCP. The NGO applicant, the Human Rights League, maintained that these provisions were too broad to be sufficiently monitored.<sup>156</sup> On 14 September 2021, however, the Constitutional Council ruled that these provisions were constitutional given that they “ensure an equitable balance between the principle of independence of the judiciary and the government’s prerogatives stipulated under article 20 of the Constitution”.<sup>157</sup>

168. With regard to foreign bribery cases, Catherine Champrenault, Prosecutor General attached to the Paris Court of Appeal,<sup>158</sup> told the Parliamentary Commission of Inquiry that reporting information on legal and technical difficulties, and even on obstacles to international mutual legal assistance, was necessary to assess the effectiveness of France’s criminal policy in this area.<sup>159</sup> However, in her hearing before the Commission, Éliane Houlette, the former National Financial Prosecutor, while confirming that she had never been directly pressured by Minister of Justice, pointed out that “this oversight of public prosecution leaves open the possibility of an intervention the extent of whose motives is unknown, and this really harms independence.” She indicated that regular reports are requested in particular with regard to “companies with high economic visibility.” France emphasised that the Prosecutor General’s Office requested these reports from the PNF. As discussed above, the Prosecutor General’s Office would decide which information should then be reported on to the Ministry of Justice. As for reporting information as a means for the Minister of Justice, who himself reports to parliament, to assess the effectiveness of France’s criminal policy, Ms. Houlette points out that, “in reality, there is no distinction in the law between criminal policy and public prosecution.”

169. Based on the same observation, the Public Prosecutor attached to the Court of Cassation, François Molins,<sup>160</sup> suggests that the legislator should precisely define in law the cases in which information should be reported, rather than leaving it up to each Minister of Justice to decide by way of a circular. The Parliamentary Commission of Inquiry concluded its work on 2 September 2020, noting that “the adoption of the Act of 25 July 2013, which prohibits ministerial intervention in individual cases, marks a step forward, but the situation remains unsatisfactory”.<sup>161</sup> It has therefore made a series of proposals, including enshrining in law the criteria for reporting procedures and the content of the information that may be transmitted.<sup>162</sup>

170. In a report presented in the plenary session on 15 September 2020,<sup>163</sup> the CSM noted the frequency with which information was reported by public prosecutors (who obtained the information from the PNF) to the Directorate of Criminal Affairs and Pardons in an extremely politically sensitive case.<sup>164</sup> The CSM also concluded that it “considers it essential to provide a stricter framework for reporting information in cases flagged to Prosecutor General’s Offices and monitored by the Directorate of Criminal Affairs and Pardons, to try to eliminate or at least limit the suspicion of interference by the executive in the handling of individual cases.” The report by the CSM states that it is “necessary to limit reporting of

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<sup>156</sup> Décision n°2021-927 QPC

<sup>157</sup> Décision n°2021-927 QPC

<sup>158</sup> Record [No. 10](#), Ms Catherine Champrenault, Prosecutor General at the Paris Court of Appeal.

<sup>159</sup> Report [No. 45](#), Ms Catherine Champrenault (extraordinary session).

<sup>160</sup> [Parliamentary Commission of Inquiry into the Obstacles to the Independence of the Judiciary](#), record of hearing [No. 4](#), Mr François Molins, Public Prosecutor of the Court of Cassation, 5 February 2020; and Molins, F. and Nadal, J.L. (2 September 2020), “[Il est urgent de garantir l’indépendance statutaire des magistrats du parquet](#)” [“Guaranteeing the statutory independence of public prosecutors is a matter of urgency”].

<sup>161</sup> National Assembly (2020), [Rapport de la commission d’enquête sur les obstacles à l’indépendance du pouvoir judiciaire](#) [Report of the Commission of Inquiry into the Obstacles to the Independence of the Judiciary], summary p.155.

<sup>162</sup> Ibid. Proposals No. 24 and 25.

<sup>163</sup> Supreme Council of Magistracy, plenary session (15 September 2020), [Notice to the President of the Republic](#).

<sup>164</sup> In total, information was reported 49 times between the opening of the investigation in 2017 and the decision of the Criminal Court in 2020.

information to cases that allow the Minister of Justice to fully exercise his constitutional and institutional powers. The criteria for flagging a case are currently too numerous, defined in highly vague terms, and do not enable a clear identification of the reasons why the case should be flagged. It would be beneficial to enshrine these criteria in law, to formalise them and make them more prescriptive.” During the visit, a high-level representative of the Paris Public Prosecutor’s Office also stated that it would be useful to clarify the criteria and purpose of reporting information, as this would help to curb suspicions of collusion between the executive and public prosecutors.

*iii. Status of the Public Prosecutor’s Office: baseline study and reform to strengthen its independence*

171. The Phase 3 Report reported two decisions by the ECHR, which in 2008 and 2010, in its *Medvedyev and Moulin* judgments, found that the French Public Prosecutor’s Office “[did not fulfil] the requirement of independence with regard to the executive.”<sup>165</sup> The Criminal Chamber of the Court of Cassation had also noted the “non-independent and non-impartial nature of the French Public Prosecutor’s Office” and had taken a position on new conditions for appointing public prosecutors and on the need to reform its status.<sup>166</sup> In 2013, the ECHR issued another reminder, in its *Vassis* judgment, that the French Public Prosecutor’s Office could not be considered a judicial authority within the meaning of Article 5 § 3 of the Convention.

172. In its Phase 4 responses, France has stressed that several decisions by French or European courts have, on the contrary, recently reinforced the status and recognised the independence of the French Public Prosecutor’s Office. In its decision of 8 December 2017,<sup>167</sup> the Constitutional Council found that the guarantees applicable to the Public Prosecutor’s Office were, however, sufficient to ensure an appropriate balance between the principle of independence of the judicial authority and the prerogatives of the government (article 20 of the Constitution). In rulings handed down on 12 December 2019, the Court of Justice of the European Union (CJEU)<sup>168</sup> has affirmed that the status of the French Public Prosecutor’s Office gives it the necessary independence to issue European arrest warrants. As indicated below, these recent decisions, which contradict the decisions of the ECHR and the Court of Cassation do not, however, seem to undermine the consensus, particularly within the Public Prosecutor’s Office, on the need to carry out the reforms already announced at the time of France’s Phase 3 evaluation.

173. In terms of progress, under the terms of Framework Act No. 2016-1090 of 8 August 2016, public prosecutor appointments are now subject to the prior opinion of the CSM and are no longer contained in the list of jobs nominated by the Council of Ministers. However, at the time of the written follow-up to Phase 3, the Minister of Justice’s circular of 31 July 2012, which commits to not ignore the negative opinions of the CSM on proposed prosecutor appointments, had not resulted in a change in the regulatory framework (recommendation 4.a.). France indicated that this prohibition should eventually be supplemented by the reform of the CSM and by the modification of the status of prosecutors, to ensure their independence under conditions similar to those provided for judges. At the time of written follow-up, this reform, presented as a constitutional bill in March 2013, had been suspended by the government until further notice. France clarified after the visit that consideration is being given to updating the constitutional Bill, which both chambers adopted in identical terms on 26 April 2016. However, adoption of the bill also requires the approval of the parliament in a joint session.

<sup>165</sup> ECHR, Grand Chamber, 29 March 2010, *Medvedyev and others v. France*, application no. 3394/03; and ECHR, 23 November 2010, *Moulin v. France*, application no. 37104/06.

<sup>166</sup> Cass. Crim., Judgment No. 777 of 15 December 2010, *Philippe Creissen* (10-83.674).

<sup>167</sup> Decision 2017-680 of the Constitutional Council of 8 December 2017.

<sup>168</sup> CJEU judgments of 12 December 2019.

174. In its responses to the Phase 4 questionnaires, France indicated that a constitutional reform Bill “for the renewal of democratic life” was tabled on 29 August 2019.<sup>169</sup> However, this bill has not been included on the National Assembly’s agenda and the adoption process still requires approval by a joint meeting of both chambers of parliament. France has stressed that the health crisis caused by the COVID pandemic has delayed the implementation of this reform. A press release about the proposal<sup>170</sup> indicates that one of the three lines of action around which this constitutional bill is structured is “a justice system strengthened in its independence.” It is therefore “proposed to bring to fruition a reform that has been awaited for several years, by setting out that prosecutors will henceforth be appointed based on the assent of the competent panel of the CSM, and no longer on the basis of a simple advice. This panel shall also act as a disciplinary board for these prosecutors.” However, in its current state, this reform does not seem to provide for alignment between the status of the prosecution service and the investigative judges, the latter having more protections than the former. No indication of the timeframe within which this bill is expected to be passed was provided to the evaluation team. The proposed reform is particularly relevant to the implementation of the foreign bribery offence, as the PNF, even more than other prosecutorial offices, is the target of criticism and suspicion of political interference in public prosecution due to the political and economic sensitivity of the cases it handles.

175. There now seems to be real consensus that reform is necessary to ensure the independence of public prosecutors. Such reform could implement recommendation 4.a. made by the Working Group in Phase 3. In January 2020, during the Court of Cassation session marking the start of the new year, François Molins, Public Prosecutor at the Court, invited the government to adopt the reform bill without delay, judging that it justified “in itself and to the exclusion of all other provisions” the convening of both chambers of parliament to “further clarify the status of the Public Prosecutor’s Office by turning a page that has been open for 20 years. No serious consideration – political, legal or substantive – would justify yet another postponement.”<sup>171</sup> During the summer of 2020, before the Parliamentary Commission of Inquiry, prosecutors and general prosecutors called for the planned constitutional reform of the appointment and disciplinary procedures for public prosecutors,<sup>172</sup> as they had done at the National Conference of Public Prosecutors in June 2017.<sup>173</sup> In an opinion published in September 2020, without questioning the link between the Public Prosecutor’s Office and the Minister of Justice, the CSM also declared itself, for the first time, in favour of strengthening the guarantees of public prosecutor impartiality, to free the justice system from the suspicion of dependence on the executive and to prevent interference.<sup>174</sup>

176. Strong support for this reform was also widely expressed during the Phase 4 visit. A judge from the Paris Court of Appeal stressed the urgency of reforming the Public Prosecutor’s Office to “put an end to the defamatory and penalising attacks on it, which will only increase with the European Public Prosecutor’s Office, whose independence will be blatantly obvious compared to that of the French Public Prosecutor.” A senior magistrate from the Paris Public Prosecutor’s Office indicated that she was in favour of aligning the conditions of independence of public prosecutors with those of judges. She then confirmed in the press that the status of public prosecutors remains problematic and suggested, as a first step, amending article 5 of the 1958 Statutory Order, according to which “the public prosecutors are placed under the direction and control of their hierarchical superiors and under the authority of the Minister of

<sup>169</sup> [Bill No. 2203](#) on constitutional reform for a renewal of democratic life.

<sup>170</sup> Council of Ministers (28 August 2019), [Press release](#).

<sup>171</sup> Court of Cassation, 10 January 2020, [Speech by François Molins](#).

<sup>172</sup> [Parliamentary Commission of Inquiry into the Obstacles to the Independence of the Judiciary](#), record of hearing [No. 8](#), Mr Eric Mathais, President of the National Conference of Public Prosecutors.

<sup>173</sup> National Conference of Public Prosecutors (June 2017), [Le livre noir du ministère public - Propositions pour la Justice](#) [The Public Prosecutor’s Black Book – Proposals for Justice].

<sup>174</sup> Supreme Council of Magistracy, plenary session (15 September 2020), [Notice to the President of the Republic](#).

Justice,” by adding “as regards criminal policy.”<sup>175</sup> Representatives of anti-bribery NGOs and journalists whom the examiners met during the visit all stressed the urgency of this reform as well.

### **Commentary**

***The lead examiners congratulate France for ensuring the continued and permanent prohibition of individual instructions from the Minister of Justice to prosecutors, with the Act of 25 July 2013. France has therefore fully implemented Phase 3 recommendation 4.a.ii.***

***They nonetheless observe that this Act does not change the practice, whereby the Prosecutor General’s Offices transmit information to the Ministry of Justice in certain sensitive cases, notably due to their political or international dimensions. The lead examiners note that high-level magistrates, civil society, and, most recently, the Supreme Council of Magistracy call for a more precise delimitation in the law of the cases for which information should be reported, following up on prior efforts to clarify this matter through ministerial circulars.***

***Nevertheless, the lead examiners regret that neither of the constitutional reforms initiated in 2013 and 2019 to strengthen the independence of the French public prosecution service were brought to fruition. Thus, Phase 3 recommendation 4.a remains unimplemented. This creates a climate that is not as conducive to the pursuit of foreign bribery cases, as would be expected based on the reforms that France has carried out since Phase 3. The examiners point out that the concentration in the hands of the PNF of investigative, prosecutorial and non-trial resolution powers (through CRPC and CJIP) in foreign bribery cases has undeniable advantages in terms of specialisation and effectiveness, but also entails that the guarantees of prosecutorial independence cannot be in doubt, even if only on the basis of the possibility or appearance of political interference in public prosecution, in contravention of Article 5 of the Convention.***

***The lead examiners therefore recommend that France:***

***(a) clarify in law that reporting information, at least in relation to foreign bribery cases: (i) meets clearly defined criteria; and (ii) is limited to cases that enable the Minister of Justice to monitor the implementation of the criminal policy for which the Minister is responsible and accountable to parliament, as opposed to public prosecution, which is conducted by the National Public Prosecutor, and about which the Minister of Justice may not request any information on individual cases from public prosecutors outside the above-mentioned criteria and purpose;***

***(b) complete as soon as possible the necessary reforms, including the constitutional reforms initiated in 2013 and 2019 to provide the Public Prosecutor’s Office with the statutory guarantees needed to carry out its duties with all the independence necessary for the proper functioning of the justice system and to protect prosecutors from any influence or the appearance of influence from the political authorities, in particular with regard to combating foreign bribery.***

#### *iv. Criticism of the PNF and concerns about the continuation of its operations*

177. Since June 2020, the PNF’s work has been undermined by criticism regarding some of its prosecutors’ methods, but also more generally regarding its approach to investigations and prosecutions, and even its existence. While the cases that triggered this storm have intertwined political and financial aspects and are not directly related to foreign bribery cases, the criticism of one current and one former PNF prosecutor – against the backdrop of allegations of conflict of interest at the highest level of the

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<sup>175</sup> Clay, T. (30 June 2020), [“Ceux qui réclament la suppression du Parquet national financier sont ceux que le PNF dérange”](#) [“Those calling for the abolition of the PNF are those who the PNF is upsetting”], Lawyer’s Column, *Le Monde*.

Ministry of Justice – raise concerns about the continuation of this specialised prosecutor’s office’s operations, which has become an essential component in the fight against foreign bribery.

178. In the wake of various articles and pronouncements criticising the PNF, in June 2020 an opposition member of Parliament introduced a bill to abolish it.<sup>176</sup> On the other hand, a lawyer stated in an article in a major daily newspaper that “the PNF makes it possible to concentrate technical and human resources in a single prosecutor’s office, and this benefits financial investigations. The model is so successful that it has been replicated, with the creation of the National Anti-Terrorism Prosecutor’s Office in 2019. This is a sign that the concentration of powers is working. [...]. Should this institution really be abolished? Those who are calling for abolition are those who the PNF is upsetting.”<sup>177</sup> During the visit, a high-level representative of the Paris Public Prosecutor’s Office also stressed that the creation of the PNF in 2014 represented a real revolution in terms of its methods and its willingness to act quickly, and that it has since become a key fixture in the French enforcement landscape.

179. In parallel, in September 2020, the new Minister of Justice requested the opening of an administrative investigation, entrusted to the General Inspectorate of Justice<sup>178</sup> – a body under the direct authority of the minister who has the power to pronounce a sanction, but which France specifies has broad independence in exercising its remit<sup>179</sup> – against three PNF magistrates: the former National Financial Prosecutor (head of the PNF until 2019), the Deputy Financial Prosecutor, and a Vice Financial Prosecutor. France has stated that the purpose of the administrative inquiry was to enable the Minister of Justice to assess the appropriateness of referring the matter to the competent disciplinary body (the CSM) if professional misconduct was found. The General Inspectorate of Justice issued its report on 9 February 2021 and concluded that there was no misconduct on the part of the Deputy Financial Prosecutor and the Vice Financial Prosecutor, but highlighted shortcomings on the part of the former National Financial Prosecutor.

180. On 26 March 2021, the Prime Minister, whom France stresses is not bound by the General Inspectorate of Justice’s conclusions, referred the cases of the former National Financial Prosecutor and the Vice Financial Prosecutor to the CSM disciplinary panel.<sup>180</sup> After the complaint against the Deputy Financial Prosecutor was first rejected by the CSM in April 2021,<sup>181</sup> the Prime Minister sent a new referral to the CSM concerning the same prosecutor.<sup>182</sup> At the time of finalising this report, the inquiry relating to the former National Financial Prosecutor and the Deputy Financial Prosecutor was under way (but dismissed regarding the Vice financial prosecutor). France has stressed that the CSM will have to give a reasoned opinion on whether there has been any disciplinary misconduct justifying a disciplinary penalty, based on an assessment of the behaviour expected of a prosecutor under their ethical duties. However, several legal and civil society professionals whom the examiners met during the Phase 4 visit stressed

<sup>176</sup> Brengarth, V. (27 May 2021), [“Le PNF, une menace pour nos dirigeants ?”](#) [“The PNF, a threat to our leaders?”] *Dalloz Actualité*.

<sup>177</sup> Clay, T. (30 June 2020), [“Ceux qui réclament la suppression du Parquet national financier sont ceux que le PNF dérange”](#) [“Those calling for the abolition of the PNF are those who the PNF is upsetting”], Lawyer’s Column, *Le Monde*.

<sup>178</sup> This administrative inquiry followed an inspection of General Inspectorate of Justice operations, ordered by the Minister of Justice following revelations implicating the PNF in the press. In a report submitted on 20 September 2020, the General Inspectorate of Justice mission concluded that the PNF intervention framework was lawful. On the other hand, the mission reported a lack of rigour in the handling of the procedure, and questioned the failure to report information to the National Financial Prosecutor and the public prosecutors.

<sup>179</sup> Composed of judges, it alone determines the methodological principles according to which these investigations are conducted and freely determines its findings, analyses and recommendations under the terms of article 13 of Decree No. 2016-1675 of 5 December 2016, which created the IGJ.

<sup>180</sup> [Decision](#) of the Prime Minister following the administrative inquiry into three PNF prosecutors, 26 March 2021.

<sup>181</sup> Supreme Council of Magistracy, [Communication of 16 April 2021](#).

<sup>182</sup> Referral to the Supreme Council of Magistracy (17 April 2021), [Press release](#).

that the indictment of the PNF prosecutors once again highlights the dependence of public prosecutors on the executive.

181. The Minister of Justice's referral to the General Inspectorate of Justice followed revelations in the press<sup>183</sup> that in 2014, the PNF had asked investigators to analyse the telephone records of several lawyers, including the new Minister of Justice, to identify who might have informed a former President of the Republic and his lawyer, a friend of the Minister, about an ongoing case. Allegations reported in the press regarding the Minister's apparent conflict of interest,<sup>184</sup> subsequently led to the publication of a decree stating that the Minister of Justice would defer to the Prime Minister on matters related to his former work as a lawyer.<sup>185</sup> The Anticor association and three prosecutors' unions have filed a complaint against the Minister of Justice, accusing him of conflicts of interest linked to his former activities as a lawyer. The investigating committee of the Court of Justice of the Republic, which has jurisdiction over acts performed by ministers in the course of their duties, opened an investigation into the Minister of Justice,<sup>186</sup> and – in an unprecedented move – carried out a search of the Ministry of Justice. It then indicted the Minister for “unlawful acquisition of an interest”, on the suspicion that he took advantage of his new duties to benefit his former activities as a lawyer and to settle scores with prosecutors.<sup>187</sup> The investigation was still ongoing at the time of finalising this report. France emphasises that the current proceedings underline the total independence of all aspects of the French judiciary.

182. At the same time, the PNF runs the imminent risk of having its operations and methods called into question by the entry into force of the law on “confidence in the judiciary”.<sup>188</sup> This law would introduce a two-year limit on the duration of preliminary investigations, which can be extended once for a maximum of one year. This provision (discussed under Section B4.b.) could act as a significant brake on enforcement of the foreign bribery offence, or even impede it entirely. The bill could also indirectly call into question the very existence of the PNF, a point raised by several judges, lawyers and civil society representatives during the visit. In a law review article about this bill, a prosecutor from the Paris Public Prosecutor's Office estimated that with the inevitable substitution effect between judicial inquiry and preliminary investigation that this reform would bring about, the increase in the overall duration of economic and financial proceedings will be such that “it is not certain that the system will be able to support such an increase in workload” – and this despite the equally inevitable increase in the number of cases that will be dismissed.<sup>189</sup> This reform could therefore not only call into question the role of the PNF and its working methods, but also jeopardise the entire criminal justice system and thus the enforcement of the foreign bribery offence itself.

<sup>183</sup> Le Point (24 June 2020), [“La nouvelle affaire des écoutes”](#) [“The new wiretapping case”].

<sup>184</sup> Médiapart (7 October 2020), [“L'attaque d'Éric Dupond-Moretti contre le PNF était préméditée”](#) [“Éric Dupond-Moretti's attack on the PNF was premeditated”]; Médiapart (13 October 2020), [“Conflit d'intérêts: Dupond-Moretti rétropédale, les magistrats maintiennent la pression.”](#) [“Conflict of Interest: Dupond-Moretti backpedals, judges maintain pressure”].

<sup>185</sup> [Decree No. 2020-1293](#) of 23 October 2020 made pursuant to article 2-1 of Decree No. 59-178 of 22 January 1959 on the powers of ministers.

<sup>186</sup> L'Obs and AFP (8 January 2021), [“Eric Dupond-Moretti visé par une information judiciaire pour « prises illégales d'intérêts »”](#) [“Eric Dupond-Moretti targeted by judicial inquiry for ‘unlawful acquisitions of an interest’”]; and also Le Monde and AFP (4 July 2021), [“Après la perquisition au ministère de la justice, Dupond-Moretti met en cause un syndicat de magistrats”](#) [“After Ministry of Justice raid, Dupond-Moretti challenges magistrates' union”].

<sup>187</sup> Le Monde (17 July 2021), [“Eric Dupond-Moretti mis en examen pour « prise illégale d'intérêts », une première pour un garde des Sceaux”](#) [“Eric Dupond-Moretti under investigation for “unlawful acquisition of an interest”, a first for a justice minister”].

<sup>188</sup> [Bill No. 4091](#) on confidence in the judiciary

<sup>189</sup> Goldszlagierle, J. (27 May 2021), [“Durée maximale des enquêtes préliminaires: de la lenteur à l'arrêt ?”](#) [“Maximum duration of preliminary investigations: from slow to stop?”], *Dalloz Actualité*.



183. In a recent press interview, the Prosecutor General attached to the Paris Court of Appeal considered that limiting the duration of preliminary investigations to “two years plus one” would have serious consequences for combating economic crime: “More than two thirds of current PNF proceedings are now at the preliminary investigation stage. What has been considered as progress in working methods, such as the use of specialised assistants, and which the larger jurisdictions are now employing, would be undermined. We are not eliminating the PNF but the method that has made it effective.”<sup>190</sup>

### **Commentary**

***The lead examiners are deeply concerned about the criticism directed towards the PNF, whether directly by proposing its abolition (an idea not taken up by the government), or indirectly by calling into question its officials or the methods that have enabled France to play a recognised role in the fight against bribery through the resolution of high-profile foreign bribery cases. In particular, the lead examiners fear the potential impact that the limitation of the duration of preliminary investigations to a maximum of three years – even if this limit could be suspended while awaiting a response to an MLA request – could have on the PNF, and consequently on France’s ability to provide an appropriate law enforcement response to foreign bribery cases.***

***The lead examiners urge France to take urgent steps to preserve the PNF’s role in the investigation, prosecution and resolution of foreign bribery cases by restoring an appropriate environment for the investigation and prosecution of its cases.***

## **B4. Conducting a foreign bribery investigation and prosecution**

### **a. Reform of criminal policy on bribery of foreign public officials: the Belloubet circular**

184. The Phase 3 Report highlighted the lack of a criminal policy to combat foreign bribery and the need to raise awareness among investigators and magistrates so that bribery cases are uncovered. The Working Group had therefore recommended that France formally clarify its criminal policy on foreign bribery to ensure that public prosecutors and judicial police officers were committed to systematically investigating the liability of persons suspected of committing the offence (recommendation 4.d.). Since then, the Belloubet circular has set forth the Ministry of Justice’s strategy for combating foreign bribery.

185. The circular emphasises the PNF’s central role in combating foreign bribery offences, not only because of its visibility on the international stage, but also because of its technical and legal expertise as well as the specific resources at its disposal. Therefore, it is entirely natural that PNF would exercise its jurisdiction over all foreign bribery cases and centralise the handling of these cases. The circular stresses the need to use all existing reporting channels in relation to the foreign bribery offences, and it invites public prosecutors to inform the PNF whenever they encounter credible suspicions of foreign bribery at the PNF has the prerogative to pursue these cases, without regard to the stage of the proceedings, the level of responsibility of the persons involved, or the financial dimension of the case.

186. The circular also invites the PNF to design and monitor an investigation strategy based on a rigorous methodology, aimed at quickly gathering all the evidence necessary to establish the elements of bribery, and in particular to: (i) identify the financial channel for remuneration and exhaustively identify all the individuals involved in the bribery scheme and their respective roles; (ii) preferably refer foreign bribery investigations to the OCLCIFI, a specialised unit with national jurisdiction in bribery matters, but also

<sup>190</sup> Jacquin, J.B. (8 June 2021), [“Le procès en laxisme de la justice est injuste, mais le sentiment des policiers peut s’expliquer”](#) [“The case of lenient justice is unjust, but the feeling of police officers can be explained”], Interview with Catherine Champrenault; *Dalloz Actualité* (2 July 2021), [“La procureur générale de Paris s’inquiète de l’avenir de la justice financière”](#) [“Paris Prosecutor General is concerned about the future of financial justice”], Interview.

consider involving other departments, depending on the specific nature of the case; (iii) implement, where appropriate, all special investigative techniques available in foreign bribery cases; and (iv) implement an inclusive approach and establish ever closer links with the various foreign public bodies responsible for combating international bribery, in order to promote the development of mutual assistance in criminal matters and overcome the difficulties that this may present. Finally, the circular stresses the importance of determining an appropriate prosecution approach for effective, proportionate and dissuasive sanctions. With regard to the prosecution of legal persons, the circular calls for the criminal liability of legal persons to be effectively enforced. It also specifies the criteria to be taken into account in choosing the most appropriate enforcement response (recourse to the CRPC procedure, CJIP or referral to the criminal court) and in setting penalties.

### **Commentary**

***The lead examiners consider that, through the Belloubet circular, France has implemented recommendation 4.d., both in terms of its determination to detect, investigate, prosecute and punish the offence of bribery of foreign officials and by the scope of the means it can employ to do so.***

### ***b. Preliminary investigation as the preferred procedure for foreign bribery cases: evolution and challenge***

187. French criminal procedure is governed by the opportunity principle. The public prosecutor has the obligation to prove all elements constituting the offence of bribery of a foreign public official – the moral element (criminal intent) and the material element. The prosecutor may therefore first launch a preliminary investigation under his or her own supervision (articles 75-78 CCP). Most often, at the end of this preliminary investigation the prosecutor decides either to close the case without further action or to initiate public prosecution by referring the matter to an investigative judge to open a judicial inquiry. At the end of this inquiry, the accused may be indicted or dismissed. The prosecutor may also propose an alternative to prosecution for foreign bribery offences, mainly through a CJIP or a CPRC (article 40, paragraph 1 CCP).

#### *i. The preliminary investigation*

#### **The PNF favours preliminary investigations for foreign bribery cases**

188. In Phase 3, the Working Group had already noted a general trend among public prosecutors towards using preliminary investigations to handle an increasing number of cases, although the proportion of cases in which investigative judges, who are independent magistrates, were involved remained high. A profound change has since taken place. During the Phase 4 visit, the PNF members whom the examiners met, including those at the highest level, expressed a clear preference for the preliminary investigation, which they felt was appropriate for a specialised prosecutor's office such as the PNF, and would shorten the investigation time compared with a judicial inquiry entrusted to an investigative judge. The former National Financial Prosecutor had already made this clear to the Parliamentary Commission of Inquiry, stating: "the PNF was created for this purpose. The role of the prosecutors is to carefully supervise the preliminary investigations entrusted to specialised police services. A dynamic conception of criminal proceedings was needed."<sup>191</sup> The introduction of the CJIP into the French judicial landscape has strengthened this trend, with the PNF itself co-ordinating the company's internal investigation, so that at present, at the end of a preliminary investigation, a foreign bribery case will more often be referred for settlement, again with a view to optimising judicial time.

189. During the visit, members of the PNF confirmed that almost all foreign bribery cases are subject to a thorough preliminary investigation, before either the opening of a judicial inquiry or direct referral to a

<sup>191</sup> Ibid., [Parliamentary Commission of Inquiry into the Obstacles to the Independence of the Judiciary](#).

judge. Several judges emphasised that in the context of a judicial inquiry, the individuals and legal persons accused often challenge each act of the investigation, which considerably lengthens the time taken because of the resulting appeals. According to the PNF judges, the aim is therefore to only refer to the investigative judges, whose offices are overwhelmed, cases that are sufficiently completed to limit the number of investigative measures at that stage. In total, between Phase 3 in late 2012 through 19 March 2021, 97 of the 108 foreign bribery cases have resulted in a preliminary investigation being opened. Sixty cases did not go beyond the preliminary investigation stage and 37 cases resulted in a judicial inquiry.

### **The adversarial process in preliminary investigations**

190. The Bill on “confidence in the judiciary”, now adopted by Parliament, seeks to limit the length of the preliminary enquiry, citing the conclusion of the Commission Mattéi,<sup>192</sup> appointed by the Ministry of Justice, that the preliminary investigation still lacks, despite past reforms, sufficient due process safeguards as compared with the judicial inquiry.<sup>193</sup> Measures to strengthen the defence’s access to the case file have also been adopted by Parliament as part of the bill.

191. In their responses to the Phase 4 questionnaires, the French authorities point out that, since Phase 3, the legislator has already substantially enlarged the opportunity for those under investigation to contest the investigation during the preliminary investigation procedure before the prosecutor decides to prosecute or close the case, whereas previously the accused could only contest the investigation once the case had been brought to court.<sup>194</sup> In addition to the right that individuals formally declared to be a suspect (have to consult the file (article 77-2 CCP), the legislator has also created the possibility for persons of interest, as well as complainants and victims to consult the file and observe proceedings. The Bill on “confidence in the judiciary”, as adopted by Parliament, extends this possibility further, while retaining limits so as not to hinder the investigation.

192. In practice, the members of the PNF met during the visit emphasised that the PNF now systematically uses the provision of the Sapin 2 Act at the end of its preliminary investigations when it considers whether to refer the matter to the trial court. Where appropriate, the provision allows the proceedings to be directed towards a CPRC when the defendant agrees to acknowledge the facts of the proceedings as communicated to them. The PNF also uses the Sapin 2 Act to coordinate the company’s internal investigation and the judicial inquiry when resort to a CJIP is being considered, especially when the company implicated in foreign bribery offences cooperates with the investigation.

193. France’s responses to the Phase 4 questionnaires also emphasise that a secondary benefit expected from reform introduced with the Sapin 2 Act was the reduction of the overall duration of complex proceedings by reducing the number of inquiries led by an investigative judge, the initiation of which was motivated more by a desire from both the prosecution and the other parties concerned to enhance the adversarial process, rather than by the added value of conducting a judicial inquiry. In this case, the objective of limiting the overall duration of complex proceedings could be nullified with the limitation of the duration of the preliminary investigation to a maximum of three years.<sup>195</sup> This risk would be all the more serious if the investigative judges’ resources remained unchanged (as discussed above under section B3.d.iv.).

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<sup>192</sup> Report of the Commission on [Strengthening the Balance of Preliminary Investigations and Lawyer-Client Privilege](#) chaired by Dominique Mattei (Mattei Report), submitted to the Minister of Justice in February 2021.

<sup>193</sup> [Bill No. 4091](#) on confidence in the judiciary, adopted by Parliament on 18 November 2018.

<sup>194</sup> [Act No. 2016-731](#) of 3 June 2016.

<sup>195</sup> [Bill No. 4091](#) on confidence in the judiciary, adopted by Parliament on 18 November 2018.

### Duration of the preliminary investigation

194. The Phase 3 Report noted that once the prosecutor has decided to launch a preliminary investigation, there is a risk that it will take a long time to see any results as the length of the investigation is not limited by law. Until shortly before finalising this report, preliminary investigations were not subject to any time limit other than the need to initiate them within the statute of limitations for public prosecution. However, the Bill on “confidence in the judiciary”, definitively adopted by Parliament on 18 November 2021, three weeks before the adoption of this report, now provides for a two-year limit for the preliminary investigation starting from the first act of investigation. It may be extended for one more year by decision of the prosecutor (two years plus one).<sup>196</sup> The bill was awaiting approval from the Constitutional Council at the time this report was adopted.

195. The reform is based on the Mattéi report, which had deplored the absence of a limit on the duration of preliminary investigations in substantive law. In a press interview, the presiding judge of the Tribunal of Paris nevertheless regretted the lack of representation on this commission,<sup>197</sup> whose recommendations have provoked numerous reactions. The commission notes in particular that in practice only 3.2% of preliminary investigations exceed three years. In the bill on confidence in the judiciary, adopted on 18 November 2021, a special five-year period was proposed for preliminary investigations into terrorism and organised crime. On the other hand, no such exception has been proposed for the economic and financial cases dealt with by the PNF, despite requests from the PNF and other judges. The Law Commission rejected all amendments to this effect, which had been tabled by several opposition parliamentarians.<sup>198</sup> These parliamentarians questioned the logic behind limiting the duration of preliminary investigations into economic and financial crime, the main target of the bill, since 97% of preliminary investigations do not exceed three years and investigations into terrorism and organised crime would have a five-year limitation period. They emphasised that the objective pursued seems diametrically opposed to the aim that has prevailed for several years, in particular with the creation of the PNF, which was intended to give priority to preliminary investigations to speed up proceedings and conclude CJIP.

196. Concerns about this reform have also been expressed in the general and specialised press. In a law review,<sup>199</sup> a judge from the Paris Public Prosecutor’s Office notes that the low percentage (3.2%) of preliminary investigations that exceed three years conceals the huge number of cases concerned, i.e. nearly 50 000 cases in 2020.<sup>200</sup> According to the author, given that the backlog of proceedings exceeding three years has not stopped increasing since 2015, nearly 63 000 proceedings could be affected by proposed shortened time limit if no transitional arrangement is foreseen. If resources remain constant (no significant increase is planned), the average processing time would at least double, and in the worst-case scenario modelled by the judge (a five-fold increase in the usual incoming caseload into the offices of investigative judges), case processing times could exceed 17 years. Lastly, the judge emphasises the specific risk jeopardising the operation of specialised economic and financial divisions, such as the PNF, in which the saturation effect will be more pronounced because the technical files will be distributed among a smaller number of specialised investigating offices. He states, “the increase in the overall length of proceedings will also be even more significant, assuming of course, that the system manages to support such an increase, which, in view of the working hypotheses, is not certain.” After the 18 November 2021 adoption of the bill to limit the duration of the preliminary enquiry, France asserted that these projections

<sup>196</sup> Ibid.

<sup>197</sup> Lazard, V. and M. Delahousse (2020), “Stéphane Noël: [“Un vent mauvais souffle sur la justice”](#) [A bad wind is blowing on justice], L’Obs.

<sup>198</sup> Constitutional Acts, Legislation and General Administration Committee (5 May 2021), [Report](#) No. 87.

<sup>199</sup> See in particular Arfi, Philippin and Rouget (2021), [“Corruption et fraude fiscale : les vices cachés de la loi Dupond-Moretti”](#) [Corruption and tax evasion: the hidden defects of the Dupond-Moretti Law], *Médiapart*, or Goldszlagier, J. (27 May 2021), [“Durée maximale des enquêtes préliminaires : de la lenteur à l’arrêt ?”](#) [Maximum duration of preliminary investigations: from slow to stop?], Dalloz Actualité.

<sup>200</sup> Ibid., Goldszlagier, J. (27 May 2021).

were based on the assumption that reform would immediately apply to the investigations already underway. Even if the new law's consequences are temporarily delayed, they will still remain uncertain and troubling in foreign bribery cases even if only based on the statistics for foreign bribery investigations mentioned in the paragraph below.

197. This reform will therefore mainly affect the implementation of economic and financial cases, including foreign bribery offences, which are essentially handled through preliminary investigations by the PNF, which has made this its preferred method. Data on the implementation of foreign bribery cases show that the length of time cases remain at the preliminary investigation stage has increased since Phase 3, following the general trend in France.<sup>201</sup> According to the information provided by France, in more than 40% of foreign bribery cases for which the duration of the preliminary investigation is known, this investigation exceeded three years. More than 15% of these cases lasted at least five years. More precisely, in the 37 preliminary investigations ongoing in March 2021, mainly conducted by the PNF: almost 50% have lasted for more than three years, and a 25% have lasted for more than five years. These preliminary investigations were still ongoing when this report was finalised.

198. According to the PNF members met during the visit, while the PNF could conceivably adapt its working methods to a five-year limitation to preliminary investigations, a three-year limitation would represent a serious challenge to the progress made in combating economic and financial crime. Far from speeding up the processing of foreign bribery cases, this time limitation would simply no longer allow this specialised prosecutor's office to process these complex cases, which require the mobilisation of already-too-limited resources to implement investigative measures that are known to be especially time-consuming – in particular with the necessary recourse to international co-operation to obtain evidence that is, by definition, located abroad but also given the need to use many investigative techniques and the analysis of considerable amounts of information. The judges and investigation units met during the visit expressed serious concerns about the potential effects of the reform, stating that it appears to fundamentally ignore the lack of resources allocated to economic and financial justice.

199. Consequently, it is feared that, if resources remain unchanged, most preliminary investigations into foreign bribery allegations will not be finalised at the end of the two or three years allowed, and cases will not be submitted to the trial judge; instead, they will have to be dismissed much more frequently than at present and/or referred in greater numbers and at a less advanced stage to the investigative judges, who already face serious problems of resources and case backlogs in their offices. France's performance in implementing the foreign bribery offence could therefore be significantly affected and the progress made in recent years in this area called into question. The Paris Prosecutor General has publicly expressed her concerns in this regard on several occasions.<sup>202</sup> While welcoming the desire to limit the duration of preliminary investigations, the lawyers met on site widely acknowledged that such a reform could only work if the competent authorities were given the resources to conduct these procedures more quickly.

200. Finally, this reform could also have an adverse effect on the functioning of the CJIP and the CPRC framework. The resulting pressure of limiting the duration of preliminary investigations could weaken prosecutors' negotiating position, by forcing them, at best, to accept an unsatisfactory agreement rather than risk the case being dismissed or a judicial inquiry opened with increasingly distant and uncertain prospects. Overall, this could call into question the effectiveness, dissuasiveness and proportionality of the penalties imposed under the CJIP and CRPC frameworks.

201. After the visit, France initially indicated that the government was considering proposing, as it has for preliminary investigations related to acts of terrorism and organised crime, the special five-year

<sup>201</sup> Ibid. Mattei report.

<sup>202</sup> Interview with Catherine Champrenault: Jacquin, J-B. (2021), "[Le procès en laxisme de la justice est injuste, mais le sentiment des policiers peut s'expliquer](#)" [The case of lenient justice is unjust, but the feeling of police officers can be explained], *Le Monde*; Dalloz Actualité (2 July 2021), "[La procureure générale de Paris s'inquiète de l'avenir de la justice financière](#)" [Paris Prosecutor General is concerned about the future of financial justice].

limitation regime for preliminary investigations of foreign bribery and related offences (offences mentioned in articles 435-1 to 435-10 CC, and the offences of concealment or money laundering related to these offences). A government amendment to this effect was approved by the Senate before being rejected by both deputies and senators in joint session on 21 October 2021. France indicated that the approach finally retained was to preserve the three year “cut-off date”, while providing that the deadline will be suspended in the event of a mutual legal assistance request,<sup>203</sup> thus responding to one of the PNF’s requests. The consideration of this unique issue appears to disregard the complex, multidimensional nature of foreign bribery investigations as well as the lack of resources for fighting white-collar crime in France. Investigating foreign bribery requires resorting to numerous investigative techniques, which are all the more time consuming given that the investigative authorities are known to have reached saturation (section B.3.a). Analysis of the often considerable amounts of information and data thus collected – such as, email exchanges, accounting records, etc. – are equally time consuming and require the use of substantial technical and human resources. When these data are acquired through mutual legal assistance, the problem is compounded by the need to translate the received information, sometimes from unfamiliar languages, before they can be used. However, the now-approved bill provides that the suspension of the duration of preliminary investigations ceases to apply upon receiving the executed request. A sufficient period of time should also be left for coordination among the various French authorities (namely the tax authorities, TRACFIN, or AFA) likely to contribute to the investigation. France specifies that the reform will only affect investigations that begin after the law is enacted.

### **Commentary**

***The limitation of the duration of preliminary investigations to two or three years, approved by Parliament on 18 November 2021, at the time of finalising this report, is a matter of very serious concern to the lead examiners. This reform could lead to serious difficulties in resolving a large number of foreign bribery cases and in particular those involving the most complex bribery schemes. It could therefore negatively affect France’s performance in enforcing its foreign bribery offence, and call into question the progress made in this area in recent years. This is all the more true in the current general context where the entire criminal justice system lacks resources. The lead examiners alert the Working Group to the risk that there will be a higher number of closed cases and to the extremely troubling quantitative analyses coming from several sources concerning the expected impact that this reform will have on the backlog of cases handled by the specialised investigative judges, as set forth above.***

***More generally, the lead examiners question the message sent through the Bill, now approved by the Parliament, in terms of France’s criminal policy priorities, insofar as it did not extend the special limitations period proposed for terrorism and organised crime to economic and financial cases. It also presents a significant risk of putting into question the PNF’s positive achievements, a central actor in the fight against bribery, by imposing time limits on its activity that the lead examiners consider to be ill-suited to the constraints inherent to these complex cases – which often require recourse to international co-operation – and to the already overburdened capacities of the specialised investigation, prosecution, trial and judgment bodies.***

***The lead examiners regret that France’s intention, as announced after the visit, to extend a special five-year limitations period (instead of three years) for preliminary investigations into foreign bribery and related offences did not come to fruition. They regret that a partial technical solution was sought instead of comprehensively addressing the criminal policy issues surrounding foreign bribery investigations in light of the reforms adopted since Phase 3. They consider that the***

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<sup>203</sup> The bill adopted in joint session of Parliament provides that “For computing the prescribed deadlines in the present article, periods of time not taken into account, (...) in cases of requests of mutual legal assistance, the period of time between the signature of the request by the requesting prosecution authorities and the reception by these same authorities of the executed request.”

***possibility of suspending the duration of preliminary investigations in cases involving mutual legal assistance requests could have been a useful complement to a five-year limitations period but that it is not equivalent, as it only partially addresses the issues relating to the multidimensional complexity of foreign bribery investigations and the fundamental lack of resources for combatting white-collar crime in France.***

***They therefore urge France to take the necessary legislative measures to extend the duration of preliminary investigations in foreign bribery cases to allow for the timely and effective enforcement of the foreign bribery offence.***

*ii. A mechanism to counter the possible inertia of the Public Prosecutor's Office: The filing of civil complaints by victims and anti-bribery associations*

202. The possibility for the victim or victims of a criminal offence to file a civil complaint is an important legal instrument in France, which may counteract possible inertia on the part of the Public Prosecutor's Office. At the time of Phase 3, however, French law gave the public prosecutor the monopoly on initiating proceedings for any offence committed abroad, with a limited exception within the European Union (articles 435-6 and 435-11 CC). The victim of an offence committed abroad, therefore, could not use this mechanism (article 113-8 CC). The Working Group therefore recommended that France accord the same rights to all victims of foreign bribery of any state, without distinction, with regard to the instigation of public proceedings and bringing civil complaints (recommendation 4.b.). The law of 6 December 2013<sup>204</sup> repealed articles 435-6 and 435-11 CC and therefore removed a procedural provision that was specific to the foreign bribery offence and which prevented the initiation of prosecutions by victims alone. This recommendation also invited France to eliminate the requirement of a prior complaint by the victim or their representative or an official complaint by the authority of the country where the act was committed, a requirement that was removed by the Sapin 2 Act.

203. The possibility of filing a civil complaint before the investigative judge or the criminal court is reserved, under the terms of article 2 CCP, for "all those who have personally suffered damage directly caused by the offence." Nevertheless, articles 2-1 CCP *et seq.* establish a series of exceptions to this principle, in order to allow certain associations, whose statutory purpose is to combat certain phenomena, to filing civil complaints. The Act of 6 December 2013 inserted article 2-23 CCP, which authorises any association (accredited for at least five years) whose statutory purpose is to combat bribery, to be a civil party for certain offences and in particular for the foreign bribery offence. In this regard, the Belloubet circular invited public prosecutors to pay particular attention to complaints and reports from accredited associations.

204. Applications for approval or renewal as an accredited association entitled to filing civil complaints is addressed to the Minister of Justice, who examines the file in accordance with the criteria laid down by legislation.<sup>205</sup> Three anti-corruption associations are currently approved: Anticor, Sherpa and Transparency International France. Like the victims, these associations can not only report acts to the public prosecutor so that it can open an investigation (on the basis of a simple complaint, open to all), but also, thanks to their approved status, file a complaint as a civil party to refer the matter to an investigative judge for investigation (articles 80 and 85 CCP). Once constituted as a civil party, the civil party association has access to the entire procedural file, can request acts or demand the nullification of certain acts, or even challenge certain decisions before the investigating chamber, in particular a potential dismissal.

205. The executive can be slow to renew the accreditation of anti-bribery associations, without which they cannot bring civil complaints. Applications for renewal of approval, which are required every three

<sup>204</sup> [Act No. 2013-117](#) of 6 December 2013 on combating tax evasion and serious economic and financial crime.

<sup>205</sup> [Decree No. 2014-327](#) of 12 March 2014 on the conditions for the approval of anti-bribery associations to exercise the rights recognised to the civil party, NOR: JUSD1331911D.

years, can take up to six months to process. This happened with Sherpa in 2019<sup>206</sup> and then in 2021 with Anticor. Anticor specialises in litigation and has instigated several legal proceedings against people close to the president,<sup>207</sup> as well as the complaint, mentioned above, before the Court of Justice of the Republic against the Minister of Justice for “unlawful acquisition of an interest”. France stresses that the length of the approval procedure, which is strictly regulated by law, is most often linked to difficulties experienced by the administration in obtaining the information needed to ensure, in complete neutrality, that the required conditions are met. The decision rendered is reasoned and, like any administrative decision that causes prejudice, may be appealed before the administrative court. On the other hand, during the visit, representatives of two of the three approved associations felt that it was paradoxical to entrust this decision-making power to the executive and that it was not healthy for such political tension to exist over whether an association should be approved. These associations have therefore already proposed an amendment to article 2-23 CCP on several occasions, so that approval would no longer be granted by the Minister of Justice but by the High Authority for Transparency in Public Life.

206. France reports that seven cases have been initiated since 2013 for foreign bribery or money laundering predicated on foreign bribery following a complaint by an accredited anti-corruption NGO, including three cases in which the associations filed a complaint seeking status as a civil party in order to have the matter referred directly to an investigative judge.<sup>208</sup> The first case is *Asian Highway case No. 111*, in which a judicial inquiry is still under way. The second case is *Laundering of Foreign Bribes Syria case No. 6*, which was partially dismissed for foreign bribery and related money laundering allegations, but is still pending for other offences. The third case is *Combat Aircraft case No. 25*, in which a complaint seeking status as a civil party was filed by Sherpa in April 2021, following an initial complaint filed on 26 October 2018, which had brought the facts and suspicions surrounding the sale of combat aircraft to a South Asian country to the attention of the PNF. This was revealed by one of the main investigative media outlets in France,<sup>209</sup> and should, according to the NGO, have justified the opening of an investigation.<sup>210</sup>

### **Commentary**

***The lead examiners congratulate France on the full implementation of recommendation 4.b. by ending the public prosecutor’s monopoly on initiating public action, thanks to the possibility for the victim(s) of foreign bribery offences, including accredited anti-corruption NGOs, to lodge a complaint seeking status as a civil party, therefore making it possible to counter possible inertia on the part of the Public Prosecutor’s Office, which is hierarchically subject to the Minister of Justice. They recommend that the Working Group recognise this role given to such associations as a positive development.***

***However, the examiners stress that in order for associations to be able to take legal action on bribery and to play their role as citizen watchdogs in the event of prosecutorial inertia, it is***

<sup>206</sup> Press release: Sherpa (25 November 2019), [“Sherpa obtient son agrément corruption après un long silence du ministère de la Justice”](#) [Sherpa gets corruption approval after long silence from the Ministry of Justice].

<sup>207</sup> Laurent, S. and A. Michel (2021), [“Le gouvernement renouvelle l’agrément d’Anticor après six mois de suspense”](#) [Government renews Anticor approval after six months of suspense], *Le Monde*; and Press release: Anticor (11 February 2021), [“Report de la décision d’agrément d’Anticor : à qui s’attaque-t-on vraiment ?”](#) [Report of the decision to approve Anticor: Who are we really attacking?], *Anticor*

<sup>208</sup> Cases: (i) *Asian Highway case No. 111*; (ii) *Laundering of Foreign Bribes Syria case No. 6*; (iii) *Combat Aircraft case No. 25*; (iv) *Laundering of Foreign Bribes Algeria case No. 95*; (v) *Population Census case No. 80*; (vi) *Construction of Nuclear Power Plant 2 case No. 21*; and (vii) *Environment Central Asia case No. 104*.

<sup>209</sup> Médiapart (2021), [“The “Rafale papers”, investigation in three parts](#) (8 April 2021), *Médiapart*.

<sup>210</sup> Press release: Sherpa (28 April 2021), [“Sherpa dépose une plainte avec constitution de partie civile dans l’affaire de la vente des rafales en Inde”](#) [Sherpa files a complaint with civil party in the case of the sale of Rafales to India], Sherpa, Michel, A. and S. Piel (2021), [“Affaire des Rafale vendus à l’Inde : nouvelle plainte pour corruption afin d’obtenir une enquête”](#) [Case of the Rafales sold to India: New bribery complaint to instigate investigation], *Le Monde*.



**important that they be able to do so independently. The conditions for renewing their certification, at least as they have been applied for several years, do not seem to fully meet this criterion.**

**The lead examiners recommend that France examine the possibility of entrusting the renewal of anti-bribery NGOs' certification to an independent authority, such as the High Authority for Transparency in Public Life for example, or, at the very least, strengthening the impartiality guarantees surrounding the procedure for renewing the certification of anti-bribery NGOs which, since 2013, has allowed them to take legal action on behalf of citizens.**

### **c. Investigative techniques and means available to the Public Prosecutor's Office and the investigative judge**

207. The gradual strengthening of the investigative techniques and resources entrusted to the Public Prosecutor's Office in the context of preliminary investigations is a long-term trend in the French judicial system, thus bringing public prosecutors closer to the judicial inquiry carried out by the investigative judge. This trend is also fuelling the recurrent debate on whether the role of the investigative judge should be abolished and the independence of the Public Prosecutor's Office strengthened. However, there are a number of fundamental differences between the means at the two groups' disposal. Certain measures restricting or depriving liberty (judicial supervision, house arrest and pre-trial detention) require an indictment, which can only be issued by the investigative judge. In addition, the investigative judge may mobilise certain techniques for a longer period of time, without the same constraints that public prosecutors face to obtain prior authorisation from the *juges des libertés et de la détention* (specialised judges for bail and pre-trial detention issues) (during preliminary investigations).

208. Since Phase 3, various measures have strengthened the investigative techniques and resources available for foreign bribery cases. The availability of so-called "special" investigative techniques in these cases has been increased<sup>211</sup> (e.g. the use of *international mobile subscriber identity-catchers* or "IMSI-catchers", surveillance devices to intercept mobile communications traffic and track users' movements). In addition, several measures have increased investigating and prosecuting authorities' access to financial information, including the expanded scope of information in the FICOBA (bank account database),<sup>212</sup> the introduction of an obligation for banks in particular to respond to requests in digital form,<sup>213</sup> which speeds up response times and facilitates processing, and the strengthening of communication between TRACFIN and the judicial authorities.<sup>214</sup> In addition, the Act of 23 October 2018 on the fight against fraud<sup>215</sup> lifted tax secrecy with respect to the public prosecutor in matters of tax evasion, regardless of the existence of a complaint or ongoing legal proceedings.

209. Lastly, in 2016, in accordance with the European Union's fourth and fifth Anti-Money Laundering Directives,<sup>216</sup> France implemented a register of beneficial owners.<sup>217</sup> The judicial authorities and

<sup>211</sup> [Act No. 2013-1117](#) of 6 December 2013, cited above of 3 June 2016 strengthening the fight against organised crime, terrorism and their financing and improving the efficiency and guarantees of criminal procedure and [Act No. 2019-222](#) of 23 March 2019, cited above.

<sup>212</sup> [Order No. 2020-115](#) of 12 February 2020 strengthening the national system for combating money laundering and the financing of terrorism.

<sup>213</sup> [Act No. 2019-222](#) of 23 March 2019, cited above (article 47).

<sup>214</sup> Dispatch No. 2019/F/01109/FD52 from the Directorate of Criminal Affairs and Pardons of 22 November 2019.

<sup>215</sup> [Act No. 2018-898](#) of 23 October 2018, cited above.

<sup>216</sup> [Directive \(EU\) 2015/849](#) of the European Parliament and of the Council of 20 May 2015 (4th Anti-Money Laundering Directive); and [Directive \(EU\) 2018/843](#) of the European Parliament and of the Council of 30 May 2018 (fifth Anti-Money Laundering Directive).

<sup>217</sup> [Order No. 2016-1635 of 1 December 2016](#) strengthening the national system for combating money laundering and the financing of terrorism.

investigative services have full access to this information.<sup>218</sup> The PNF has signed a partnership agreement with the National Council of Commercial Court Registrars, which sets out the conditions for the PNF's direct access to the register of beneficial owners and other legal registers, including the Trade and Companies Register. While the register of beneficial owners does not yet appear to be fully operational,<sup>219</sup> the PNF representatives met during the visit welcomed the introduction of this new tool, which they consider offers interesting prospects, including for mutual legal assistance.

### **Commentary**

***The lead examiners welcome the strengthening of the investigative capacity and techniques available in foreign bribery cases since Phase 3.***

#### **d. Barriers to investigation and prosecution**

##### *i. Defence secrecy (classified information)*

210. In Phase 3, the Working Group noted that the implementation of defence secrecy presented significant risks of impeding foreign bribery investigations and prosecutions. The report pointed out that companies were overly classifying information as defence secrets and that, despite an *a priori* restrictive regulatory framework, they had a certain amount of latitude in this area, which potentially allowed them to conceal illicit activities. The report also expressed reservations about a declassification procedure for investigations and prosecutions, which was not transparent and left the final word to the administrative authorities. The Working Group therefore recommended that France clarify that the law on defence secrecy cannot impede the investigation and prosecution of foreign bribery cases and that the factors prohibited by Article 5 of the Convention should not be taken into account in decisions to classify or, even more so, to declassify information necessary for investigations and prosecutions (recommendation 4.g).

#### **Defence secrecy classification**

211. Since Phase 3, France has taken regulatory measures<sup>220</sup> to combat the “proliferation” of the defence secrecy classification and to enhance the value of this secrecy through a stricter framework. These measures include the reduction from three to two levels of classification, to limit the excessive use of the lowest level of classification in particular, as well as the reduction of the duration of the classification. These measures also take better account of the electronic formats in which classified material may be maintained.

212. During the visit, a civil society representative welcomed the effort to overhaul the classification of defence secrets. While this reform is useful in promoting a more rigorous classification of defence secrets, both by the administrative authorities and by companies holding defence secrets, its impact has yet to be assessed. France indicates that the effects of this reform will be studied as part of the annual evaluation of the protection of secrets in 2022.

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<sup>218</sup> See in particular [Decree No. 2017-1094](#) of 12 June 2017 on the beneficial ownership register defined in article L. 561-2-2 of the Monetary and Financial Code and [Decree No. 2018-284](#) of 18 April 2018 strengthening the national system for combating money laundering and the financing of terrorism.

<sup>219</sup> Damgé (2021), [“Une enquête comme OpenLux est-elle possible en France ?”](#) [Is an investigation like OpenLux possible in France?], *Le Monde*.

<sup>220</sup> [Decree No. 2019-1271](#) of 2 December 2019 on the arrangements for classifying and protecting national defence secrets; [Order](#) of 13 November 2020 approving the Inter-ministerial General Instruction (IGI) No. 1300 on the protection of national defence secrets

### Declassification for investigative or prosecutorial purposes

213. The rules governing declassification requests for investigations or prosecutions, including foreign bribery offences, have not changed since Phase 3.<sup>221</sup> The national defence classification covers numerous activities associated with the "fundamental interests of the nation", including military and civil defence, diplomacy, internal security and protection of France's scientific and economic potential. The duty to classify documents covered by defence secrecy applies to companies that are in possession, even temporarily, of such a classifiable document, including in the framework of the award and performance of a contract.<sup>222</sup> The declassification requests are raised by a judicial authority (investigative magistrates and prosecutors) and evaluated by the National Defence Secrecy Commission (Commission du secret de la défense nationale – CSDN), an independent administrative authority.<sup>223</sup> After carrying out all the necessary investigations, the CSDN issues an opinion to the administrative authority responsible for supervising the use of the classification by the companies concerned (in practice, the Ministry for the Armed Forces in almost half of cases). The administrative authority then delivers its decision to the court that made the request for declassification, together with "the meaning of the opinion" of the CSDN, which is also published in the Official Journal. Searches of premises containing classified material must be conducted in the presence of the CSDN. Only the CSDN president may view any classified material found on the premises. The judge then requests declassification of these elements according to the procedure described above.

214. This procedure remains problematic. While, in practice, the minister follows the advice of the CSDN in almost all cases, they are not required to do so by law. Furthermore, the opinions and decisions of the CSDN and the minister do not have to be reasoned. The law defines (in broad terms) the considerations to be taken into account by the CSDN ("on the one hand, preserving the interest of justice, respecting the presumption of innocence and the rights of the defence, or exercising parliament's power of oversight, and on the other hand, respecting France's international commitments as well as the need to preserve defence capabilities and the security of personnel [i.e. agents and members of the intelligence services]"),<sup>224</sup> but is silent on the factors to be taken into account by the relevant minister. Most significantly, the minister's final decision is not subject to appeal. This procedure therefore continues to leave the power to grant or deny access to possible evidence in potentially sensitive legal proceedings to the executive, without oversight. There is therefore a real risk that the factors prohibited by Article 5 of the Convention may be taken into account. The civil society representatives met during the visit stressed that in France, the power given to the political authority in declassification matters is inadequate, and proposed that it be counterbalanced by involving the judge or by strengthening the role of the CSDN in the procedure.<sup>225</sup>

215. It cannot be ruled out that the defence secrecy framework may have been an obstacle to certain investigations or prosecutions of foreign bribery offences since Phase 3. Of the ten declassification requests made in five foreign bribery cases (several applications can be made in the same case), two received an unfavourable opinion since Phase 3. In its questionnaires responses, France points out that, for each of these ten declassification requests, the minister has followed the advice of the CSDN and that

<sup>221</sup> Articles L. 2312-1 to L. 2312-8 of the Defence Code.

<sup>222</sup> Phase 3 Report of France, paras. 116 and 118.

<sup>223</sup> The National Defence Secrecy Advisory Commission (*Commission consultative sur le secret de la défense nationale* – CCSDN) was renamed the CSDN by [Act No. 2017-55](#) of 20 January 2017 on the general status of independent administrative authorities and independent public authorities.

<sup>224</sup> Article L. 2312-7 of the Defence Code

<sup>225</sup> See also Anticor (2021), "[Contribution Anticor à la consultation de l'OCDE](#)" [Anticor contribution to the OECD consultation], Anticor,; and Transparency International France (2021), "[Contribution écrite de Transparency International France suite à son audition le 7 mai 2021 par le Groupe de travail anti-corruption de l'OCDE dans le cadre de l'évaluation de Phase 4 de la France](#)" [Written contribution of Transparency International France following its hearing on 7 May 2021 by the OECD Anti-Bribery Working Group as part of the Phase 4 evaluation of France], Transparency International France, and Transparency International France (2016), "[Secret défense – Rapport final](#)" [Defence Secrets – Final Report], Transparency International France.

this advice has taken account of the Convention.<sup>226</sup> However, this last point cannot be verified because of the lack of reasoning, or the very limited reasoning, provided in CSDN opinions. In addition, France reports that responses to declassification requests in foreign bribery offences are “essentially favourable” and that the proportion of unfavourable opinions in terms of declassification requests in foreign bribery cases (two out of ten applications) is similar to the overall average (20% for the period 1999–2018). However, the number of foreign bribery cases in which declassification requests have been denied (two out of five foreign bribery cases i.e. 40%) is two times higher than the overall average for all criminal cases.

216. During the visit, a senior PNF representative indicated that none of the investigations carried out by his institution had been affected by the rules on defence secrecy. Nevertheless, another PNF representative noted that in *Airbus case No. 5*, the public prosecutor chose to focus on allegations relating to the group’s civilian activities to avoid possible difficulties related to defence secrecy. In addition, according to the information provided by France, declassification has been refused in two foreign bribery cases. In *Helicopters and Co. case No. 31*, the CSDN refused declassification in 2014 because the requested document was “without any possible connection to the facts described in the request.” The impact of this refusal on the proceedings is unknown. The proceedings, which began in 2013, are still ongoing. In the other foreign bribery case concerned (a judicial inquiry opened in 2007 and still ongoing), a significant number of declassifications were obtained; only one request concerning the identity of a witness, an intelligence officer, was refused.

#### **Commentary**

***The lead examiners welcome the measures taken by France to strengthen the rigour of defence secrecy classifications. They regret, however, that the declassification procedure for investigation and prosecution remains unchanged, as it remains vulnerable to the consideration of factors prohibited by Article 5 of the Convention and is still likely to impede investigations and prosecutions for foreign bribery. Phase 3 recommendation 4.g. is therefore still not fully implemented.***

***The lead examiners therefore recommend that the Working Group monitor the impact of the new rules on defence secrecy classification on company practice in this area. They further recommend that France clarify, by all means and as soon as possible, that the factors of Article 5 of the Convention should not be taken into account concerning declassification requests in the context of defence secrecy procedures so as not to impede foreign bribery investigations and prosecutions.***

#### *ii. Protection of personal data – GDPR law*

217. Data relating to individuals’ offences and convictions are particularly sensitive and their processing is strictly regulated in criminal matters. Since Phase 3, two European instruments have been adopted in the field of personal data protection: the General Data Protection Regulation (GDPR) and the so-called Law Enforcement Directive.<sup>227</sup> France integrated the obligations of the GDPR and transposed the Law Enforcement Directive in 2018.<sup>228</sup> France states that these developments have had a marginal impact on the French data protection system, as many similar provisions were already in place, and the developments have not influenced the conduct of foreign bribery investigations and prosecutions.

<sup>226</sup> The 2016–2018 CCSDN report stresses that “several opinions issued during the period took particular account of the fact that France is a party to the 1997 OECD Convention,” and that the Commission is “particularly attentive to requests relating to investigations into bribery of foreign public officials, which it expressly assesses in the light of the Convention.”

<sup>227</sup> [Regulation 2016/679](#) (GDPR), and [Directive 2016/680](#).

<sup>228</sup> [Act No. 2018-493](#) of 20 June 2018 on the protection of personal data and Order No. 2018-1125 of 12 December 2018, Act No. 78-17 of 6 January 1978 on data processing, files and freedoms. [Ordinance](#) No. 2018-1125 of 12 December 2018 in application of article 32 of the Act No.2018-493 of 20 June 2018.

218. Although a special regime applies to the processing of personal data in criminal matters,<sup>229</sup> the rules on personal data protection can create difficulties in the context of foreign bribery investigations and prosecutions, in particular when internal investigations are conducted by a company with a view to negotiating a CJIP or in relation to mutual legal assistance outside the European Union. Data protection regulations may pose a greater obstacle to coordination between companies and the PNF, in a context where CJIP are prioritised to resolve foreign bribery cases and the use of internal investigations may increase. (The impact of data protection on mutual legal assistance is discussed in Section B6).

### **Commentary**

***The lead examiners recommend that the Working Group monitor the impact of data protection regulations on foreign bribery investigations and prosecutions, including in particular where companies and the PNF co-operate in concluding a CJIP.***

## **e. Nationality and territorial jurisdiction**

### *i. Nationality jurisdiction without preconditions*

219. The Phase 2 and 3 reports expressed doubts about the effectiveness of personal jurisdiction over the offence of bribery of foreign public officials because of the condition of a prior complaint from the victim or an official complaint in order to prosecute (recommendation 4.b.). Since the entry into force of article 21 of the Sapin 2 Act,<sup>230</sup> the Public Prosecutor's Office no longer enjoys a monopoly on prosecution, and there is no longer a requirement for either the victim or the foreign jurisdiction to make a formal a complaint before a prosecution can commence in foreign bribery cases, by way of exception from the provisions of articles 113-6 and 113-8 CC.. This issue has therefore been resolved and no longer requires follow-up by the Working Group.

### *ii. Territorial jurisdiction now extended to foreign bribery offences*

220. Territorial jurisdiction had not been revisited by the Working Group since Phase 2, which had not identified any particular difficulties in this area. Article 113-2 CC provides that French criminal law is applicable not only to an offence committed in France but also to an offence deemed to have been committed in France when one of its "constituent acts" is committed on the territory. The examiners considered that French law and case law conferred broad territorial jurisdiction on French courts in bribery cases. As France points out in its responses to the Phase 4 questionnaires, the Court of Cassation has consistently interpreted the provisions of article 113(2) CC broadly. Since Phase 3, the court has also issued a first decision on bribery, which ruled that the French courts have jurisdiction if the funds intended for bribery were remitted in France.<sup>231</sup> This broadened understanding of the jurisdiction of French courts has been applied specifically to two foreign bribery cases by the Court of Cassation.<sup>232</sup> In the first case, the Court of Cassation proposed a particularly broad interpretation of the jurisdiction of the French courts, since for the jurisdiction to apply, it is sufficient for the acts, even if they are committed entirely abroad, to be indivisible from those carried out in part on French territory, i.e. that they are "linked in such a way that the existence of the one would not be understood without the existence of the other."

<sup>229</sup> Notably on the basis of [Report No. 350](#) (2017-2018) of the Senate Law Commission, submitted on 14 March 2018 in the context of the examination of the bill on the protection of personal data, and in particular the rapporteur's observations on Title III of the bill.

<sup>230</sup> Creating [articles 435-6-2](#) and [435-11-2](#) CC.

<sup>231</sup> Cass. Crim., [31 October 2012, No. 12-84.220](#).

<sup>232</sup> 2012, *Arms Materials (Cameroon and Mali) case No. 101*; and 2017, *Oil-for-Food case, Oil aspect – Total and Vitol case No. 102*, Cass. Crim., [14 March 2018](#), No. 16-82.117.

### **Abolition of the requirement of dual criminality and conviction by the foreign court in the case of an accomplice.**

221. While the dual criminality requirement (see Section A1) seriously limited this jurisdiction until 2016, article 21 of the Sapin 2 Act introduced articles 435-6-2 and 435-11-2 into the Criminal Code, which abolish the dual criminality requirement provided for in the second paragraph of article 113-6 CC for bribery and influence peddling offences committed abroad. Personal jurisdiction is now the sole basis for judging the facts in France. This measure therefore makes it possible to prosecute foreign bribery offences even in countries where it is not an offence.

222. In its questionnaire responses, France emphasises that the absence of dual criminality has been raised only once by the defence lawyers, unsuccessfully.<sup>233</sup> The French courts are therefore deemed competent when one of the legal persons involved had its registered office and headquarters in France<sup>234</sup> or when the signature of contracts that allowed payments to corrupt agents was decided during board meetings held in Paris.<sup>235</sup> France also states that the issue of territorial jurisdiction has not been contested in foreign bribery cases where the acts of bribery were committed abroad.<sup>236</sup>

223. Furthermore, with regard to the prosecution in France of an individual as an accomplice in an offence of influence peddling or bribery committed abroad, the condition that the offence be established by a final decision of a foreign court, as provided for in article 113-5 CC, is no longer applicable. This facilitates the prosecution of parent companies acting as accomplices to their foreign subsidiaries.

### **Extension of the application of French criminal law to bribery and influence peddling offences committed abroad with a link to French territory**

224. By means of the new article 435-11-2 CC, the Sapin 2 Act also extended the application of French criminal law to foreign bribery and trading in influence directed towards foreign public officials offences committed abroad by individuals “habitually residing or carrying out all or part of [their] economic activity on French territory.”<sup>237</sup> The Belloubet circular suggests that the concept of a person “carrying out all or part of their economic activity in France” covers at least foreign legal persons having a subsidiary, branches, commercial offices or other establishments in France, even if they do not have their own legal personality.

### **Territoriality principle of French criminal law and interpretation of the *non bis in idem* principle**

225. The *non bis in idem* principle, also known as the protection against “double jeopardy” can be seen as providing legal certainty to companies and individuals as they are protected from being punished multiple times for the same conduct.<sup>238</sup> The Convention does not address this principle *per se*, but Article 4.3 attempts to prevent such a situation by providing that the Parties shall consult each other, at the request of one of them, in cases of concurrent jurisdiction. International recognition of the *non bis in idem* principle

<sup>233</sup> *Oil Exploration (Burundi, Malawi and the Democratic Republic of Congo) case No. 1.*

<sup>234</sup> *Oil-for-Food case, Equipment aspect – 12 companies sanctioned case No. 70.*

<sup>235</sup> *TSKJ (Nigeria) case No. 99.*

<sup>236</sup> Cases concluded: (i) through the plea-bargaining framework: *Oil 1 Republic of the Congo case No. 128*; (ii) through a CJIP: *Airbus (multiple jurisdictions) case No. 5*, *Egis Avia (Algeria) case No. 78*, *Société Générale (Libya) case No. 90*; and (iii) through correctional judgments: *Alcatel (Costa Rica) case No. 7*, *Bank Investment (Cameroon) case No. 120*, *Public Services/Lobbyist (EU) – Eurotrends and Kic System case No. 62*, *Safran (Nigeria) case No. 79*, and *Total (Iran) case No. 103.*

<sup>237</sup> Article 21 of the Sapin 2 Act.

<sup>238</sup> OECD (2020), [Resolving Foreign Bribery Cases with Non-Trial Resolutions](#), OECD Publishing, Paris.

varies from country to country and continues to evolve in many countries, particularly through case law.<sup>239</sup> It may also be based on treaties, as in the European Union.<sup>240</sup> In countries without such a treaty basis, the application of this principle is far from recognised, and in practice, many technical difficulties arise when the cross-border *non bis in idem* principle is applied,<sup>241</sup> in this case for France when it has to deal with cases resolved in non-European Union countries.

226. The position of the French courts on this issue has varied greatly over time. In particular, courts at different levels had interpreted the *non bis in idem* provision of article 14(7) of the International Covenant on Civil and Political Rights<sup>242</sup> in foreign bribery cases under the Oil-for-Food Programme, with varying results that did not provide a clear approach on this issue.<sup>243</sup> One of the decisions that sparked the debate in France was the *TSKJ (Nigeria) case No. 99*,<sup>244</sup> in which the Paris High Court had initially retained the principle of *non bis in idem* as applicable.

227. In its Phase 4 responses, France states that the case law in this area has developed substantially since the Sapin 2 Act. One of the landmark rulings by the Court of Cassation in this area is the ruling by the Criminal Chamber on 14 March 2018,<sup>245</sup> against a major French oil company in the *Oil-for-Food, Oil aspect – Total and Vitol case No. 102*, which clarified the application of the international *non bis in idem* principle by narrowing its scope in cross-border cases. This judgment, widely discussed by legal professionals,<sup>246</sup> has in fact set aside the international *non bis in idem* principle in the case of acts committed on national territory. This is an important jurisprudential reversal since, in a ruling handed down less than two months earlier, on 17 January 2018, the Court of Cassation had instead overturned a decision of the Paris Court of Appeal and dismissed the public prosecution by application of the *non bis in idem* principle.<sup>247</sup>

228. In its decision of 14 March 2018, the Court held that in the context of cross-border relations outside the European Union, French courts can only rule on facts that have been finally adjudicated abroad if French jurisdiction is extraterritorial (articles 113-9 CC and 692 CCP). Conversely, if the prosecution is based on French territorial jurisdiction, then the *non bis in idem* principle does not prevent prosecution in France in cases that have already resulted in convictions or other resolution abroad<sup>248</sup>. In this case, the territorial jurisdiction of the French criminal courts arose from the fact that the plaintiff “had his centre of economic and financial interest in Paris.” In addition, the Court of Cassation recalled that an offence is

<sup>239</sup> See, for example: Mignon Colombet, A. (2015), [“Vers une reconnaissance internationale du principe non bis in idem”](#) [Towards international recognition of the non bis in idem principle], *La Semaine Juridique - Entreprise et Affaires*, No. 36, LexisNexis, Paris, pp. 44-47.

<sup>240</sup> In particular, article 54 of the Convention implementing the Schengen Agreement and article 50 of the Charter of Fundamental Rights of the European Union.

<sup>241</sup> Lelieur, J. (2013), [“Transnationalising ne bis in idem: How the rule of ne bis in idem reveals the principle of personal legal certainty”](#), *Utrecht Law Review*, Vol. 9/4,; Davis, F. (2016), [“Does international law require an international double jeopardy bar?”](#), *The Global Anticorruption Blog – Law, Social Science and Policy*, M. Stephenson (ed.), as well as other related publications by the same author.

<sup>242</sup> [United Nations International Covenant on Civil and Political Rights of 16 December 1966](#).

<sup>243</sup> Ibid. Mignon Colombet, A. and Davis, F. (19 April 2018), [“Further developments on French law regarding anti-bribery prosecutions by multiple states”](#), *The Global Anticorruption Blog – Law, Social Science and Policy*.

<sup>244</sup> TGI Paris, 11th Criminal Chamber, 24 Jun 2014.

<sup>245</sup> Cass. Crim., [14 March 2018](#), No. 16-82.117, *Oil-for-Food, Oil aspect – Total and Vitol case No. 102*.

<sup>246</sup> For example, Bonifassi, S. (5 April 2018), [“French supreme court finds no double jeopardy based on foreign plea agreement”](#) FCPA blog.

<sup>247</sup> Cass., 17 January 2018, 16-86.491. Davis, F.

<sup>248</sup> In the Oil-for-Food case, Oil aspect – Total and Vitol case No. 102, the foreign decisions at issue were Non-Prosecution Agreements and Deferred Prosecution Agreements (NPAs/DPAs) in the United States.

deemed to have been committed in France when only one of its “constitutive facts” is carried out in the territory.<sup>249</sup> This decision of principle has since been applied in at least two other foreign bribery cases.<sup>250</sup>

229. In its responses to the Phase 4 questionnaires, France emphasises that, as reiterated in the Belloubet circular, the PNF is now called upon to retain jurisdiction and prosecute this type of multi-jurisdictional case.

### **Immediately applicable criminal procedural provisions and their application to date**

230. Except for the abolition of the dual criminality requirement, which constitutes a substantive criminal provision to which the principle of non-retroactivity of the more severe criminal law applies, the new provisions must be regarded as criminal procedural provisions that lay down the conditions for prosecution and are immediately applicable to the punishment of offences committed before they entered into force. In practice, in the six cases that have resulted in court convictions since Phase 3<sup>251</sup> and the five cases that have resulted in CJIP,<sup>252</sup> territorial jurisdiction has been established.

#### **Commentary**

*The lead examiners commend France for expanding its territorial jurisdiction over foreign bribery offences, which has removed the limitations, in particular the dual criminality requirement that raised serious concerns on the part of the Working Group in Phase 2 and 3. The examiners commend the extended territorial jurisdiction that France has now acquired, which goes beyond the requirements of the Convention, by allowing it to exercise jurisdiction over foreign bribery and trading in influence directed towards foreign public officials offences committed abroad by persons “habitually residing or exercising all or part of [their] economic activity in French territory.” They also note the clarifications provided by case law as to the scope of the non bis in idem principle in multi-jurisdictional foreign bribery cases, enlarging its ability to prosecute offences that occur in its territory, so long as a treaty does not provide otherwise*

#### **f. Limitation periods**

231. In Phase 3, the Working Group welcomed the development in the Court of Cassation’s jurisprudence that the start of the three-year limitation period for prosecution in foreign bribery cases is the day on which the facts are discovered, not the day on which they are committed. The fragility of this development, which was vulnerable to possible reversal in subsequent case law or through legislative reforms, was nevertheless considered one of the reasons that prosecutors preferred to resort to charges based on misuse of corporate assets. This latter offence was preferred over of the foreign bribery offence, as it is less difficult to prove and therefore less likely to come up against the constraints of the limitation period. The Working Group therefore reiterated its Phase 2 recommendation that France appropriately extend the statute of limitations applicable to the foreign bribery offence (recommendation 5).

232. The legal framework relating to prescription was overhauled in 2017.<sup>253</sup> The time limit for felony offences, including foreign bribery, has been extended from three to six years. In addition, the court jurisprudence holding that the statute of limitations period runs from the day of disclosure for concealed and hidden offences, including foreign bribery, has been codified in law. The law nevertheless introduced a 12-year time limit from the commission of the concealed or hidden offence, therefore putting an end to the *de facto* imprescriptibility that characterised such offences under the previous case law. Finally, the

<sup>249</sup> Cass. Crim., [14 March 2018](#), No. 16-82.117, *Oil-for-Food case, Oil aspect – Total and Vitol case No. 102*.

<sup>250</sup> *TSKJ (Nigeria) case No. 99 and Alcatel (Costa Rica) case No. 7*.

<sup>251</sup> Excluding the *Oil-for-Food* cases.

<sup>252</sup> These are four cases (*Société Générale, Egis Avia, Airbus and Bolloré*) in which five legal persons were sanctioned (as the CJIP was signed by two legal persons in the *Bolloré case*).

<sup>253</sup> [Act No. 2017-242](#) of 27 February 2017 reforming the statute of limitation in criminal matters.



law also codified prior case law holding that interruptions of the limitation period will extend to related offences as well as to perpetrators or accomplices even if they are not directly subject to one of the interruptive investigative acts (see, for example, *Oil-for-Food, Equipment aspect – 12 companies sanctioned case No. 70*).<sup>254</sup> The 2017 reform did not change the regulations on the suspension of limitation periods. The Sapin 2 Act provided for the suspension of the limitation period during the execution of a CJIP.

233. France reports that, in practice, no foreign bribery cases were affected by the statute of limitations under the 2017 law. Since Phase 3, only one partial dismissal has been issued, and it was issued under the pre-2017 regime: in *Bolloré (Togo) case No. 34*, the Paris Court of Appeal considered that the facts that occurred in Guinea-Conakry were time-barred under the old three-year limitations period, since five years had elapsed, without any suspensive or interruptive act of the statute of limitations, between the time the judicial authorities became aware of the facts and the initiation of prosecution. France emphasises that, in this case, the facts would not have been time-barred under the 2017 law's new six-year limitation period. During the visit, prosecutors and academics viewed the 2017 reform as positive because it anchored well-established case law on the start of the limitation period and, by extending the statute of limitations, offered more security in conducting complex and often time-consuming investigations. This reform has probably helped reduce the need to bring charges based on the misuse of corporate assets, instead of charging the foreign bribery offence (noted under Section B1).

#### **Commentary**

***The lead examiners welcome the adoption of the Act of 2017 reforming the statute of limitations in criminal matters, which consolidated and strengthened the statute of limitations for the prosecution of foreign bribery, thereby implementing recommendation 5 from Phase 3, which dates back to Phase 2.***

## **B5. Conclusion of foreign bribery cases**

### **a. Organisation and jurisdiction**

234. Since Phase 3, there have been changes in the organisation of the courts that deal with foreign bribery cases at both the trial and appeal levels. In 2019, the law<sup>255</sup> created the so-called “judicial courts”, which are the result of the merger of the high courts, previously in charge of foreign bribery cases in particular, and the lower courts. The 32nd Correctional Chamber of the Tribunal of Paris (*Cour judiciaire de Paris*, previously known as the Paris High Court) was specially created in 2015 to try cases handled by the PNF in first instance, including foreign bribery cases. The 11th Correctional Chamber of the Tribunal of Paris deals with the remaining foreign bribery cases handled by the Paris Public Prosecutor's Office. These two chambers, which specialise in economic and financial matters, are each composed of six presiding judges and ten assessor judges. Also in 2015, the Tribunal of Paris (then the Paris High Court) merged the 11th, 13th, 31st and 32nd Correctional Chambers to form an economic and financial division with 39 judges, including 14 presiding judges. This reorganisation, which was accompanied by an increase in resources, was aimed primarily at strengthening the expertise of magistrates in this area and facilitating their consultation and co-operation with specialised prosecutors. Appeals in foreign bribery cases are heard by three chambers specialising in serious economic and financial crime at the Paris Court of Appeal. In January 2021, these chambers were grouped together as a single centre to improve their specialisation and the consistency of their work.

<sup>254</sup> Cass. Crim., 4 December 2019, No. 19-82.929.

<sup>255</sup> [Act No. 2019-222](#) of 23 March 2019, cited above.

235. During the visit, trial and investigative judges stressed the lack of resources in the courts handling foreign bribery cases, particularly the lower courts. These difficulties result in significant delays in scheduling hearings, which, as noted in Section B3, contribute to lengthy proceedings and make them vulnerable to appeals for failure to comply with reasonable time limits in criminal proceedings. Like the other parts of the criminal justice system focused on economic and financial crime, the courts concerned seem to have difficulty recruiting and retaining staff, which affects their ability to specialise. A judge during the visit considered that the budgetary underinvestment in the work of judges combating economic and financial crime, which jeopardises the independent handling of these sensitive cases, must be understood as a political message from the authorities.

236. The judges interviewed on site consider that they need, as a matter of priority, more specialist assistants to support them in their responsibilities. At present, six assistants specialised in combating economic and financial crime are assigned to the headquarters of the Tribunal of Paris. The need to develop specialised career pathways in economic and financial criminal matters was emphasised by several judges met during the visit, which corroborates the conclusions of the Bernalicis and Maire report cited in Section B3 above. As noted above with regard to prosecutors and investigative judges, the current career structure in the judiciary does not provide for any real specialised courses in economic and financial matters, through there are some opportunities for initial and continuing training in economic, financial and accounting analysis.

237. More specifically, it appears that in addition to the problems relating to the criminal liability of legal persons, the training for judges dealing with foreign bribery cases (see Section C1.c.) should address in detail the question of the evidence to be established in this area, to remove the difficulties relating to the search for evidence of the “corruption pact”.

### **Commentary**

***The lead examiners welcome the organisational reforms that have taken place since Phase 3 to strengthen the resources and specialisation of courts dealing with foreign bribery cases. However, despite recent efforts, judges, like the other actors in criminal justice system working on economic and financial crimes, still do not have the necessary resources to deal with these complex cases within a reasonable timeframe and with the appropriate degree of specialisation.***

***As with investigative judges, the lead examiners urge France to promptly take steps to ensure that trial judges dealing with foreign bribery cases have (i) the necessary resources, including specialist experts, to deal with them effectively and in a timely manner and (ii) the necessary training for this purpose.***

## **b. Non-trial resolution of cross-border bribery cases involving individuals**

### *i. Plea bargaining*

#### **Plea bargaining: definition and framework**

238. Until the introduction of the CJIP into French law as a result of the Sapin 2 Act (see section C3), the only non-trial resolution available in France for foreign bribery matters was a plea bargaining procedure known as *comparution sur reconnaissance préalable de culpabilité* (CRPC), which entails an appearance before the court after recognising one’s guilt. Thus, it is a form of criminal settlement available for both natural and legal persons in foreign bribery cases. Crucially, it does not replace the prosecution or conviction, though it avoids a trial. While it is, in principle, also available for legal persons, the CRPC is perceived by the judges and lawyers interviewed during the Phase 4 visit more as a complement to the CJIP, and thus mainly applicable to natural persons, which is why it is dealt with in this section (see section C3.a. for the CJIP).

239. With the Act of 13 December 2011<sup>256</sup>, the CPRC is available for offences punishable by ten years' imprisonment, including the foreign bribery offence<sup>257</sup>. As a result, under article 495-7 CCP, public prosecutors may, on their own initiative or upon the request of the person concerned or their lawyer, resort to the CPRC procedure, provided that the accused person acknowledges the alleged wrongdoing. The CRPC procedure may also be used by an investigative judge at the end of a judicial inquiry (article 180-1 CCP). In a CPRC, the accused does not appear in court to have the facts adjudicated at trial but rather attends a simple hearing to have the CPRC approved (article 495-9 CCP). If the CRPC is approved, the order has the effect of a judgment of conviction (article 495-11 CCP). If the judge refuses to approve the order, the Public Prosecutor's Office must initiate a prosecution and bring the case to trial before the criminal court. The resulting plea bargain may be appealed by the convicted person, whether they are an individual or legal person, or by the Public Prosecutor's Office. This is one of the differences from a CJIP involving a legal person, which does not carry a right of appeal.

240. The CPRC's track record in foreign bribery cases is still limited, though it is split between natural and legal persons (see below). In a general circular issued on 9 February 2012, prosecutors were told that the use of the CPRC in foreign bribery cases should be strictly limited to the simplest cases in which the corruption pact constitutes an isolated event (see section A1), rather than a recurring business practices for the company in question. The Working Group had therefore decided to follow up on developments in case law and practice in order to verify how the CPRC procedure is applied in foreign bribery cases (Follow-up 13.e.).

### Changes in the plea bargaining framework since Phase 3

241. The Belloubet circular specifies that the choice of the most appropriate enforcement action, e.g. the CPRC or an indictment for trial, must take into account the defendant's past record, as well as their degree of involvement, acknowledgement of the facts, and co-operation with the judicial authorities. The criterion noted in Phase 3 that the CPRC should be reserved for the simplest cases is not reiterated in the circular, and the PNF representatives met during the visit indicated that they systematically take into account the possibility of resolving a foreign bribery case through CPRC at the end of the preliminary investigation, when the defendant admits their guilt.

242. The circular also clarified the instructions addressed to judges regarding the liability of legal persons, and specified that when the conditions for concluding a CJIP do not appear to be met, the CPRC procedure may be considered. An indictment may be reserved for the most serious and/or systemic acts and/or those involving legal persons that do not co-operate and/or refuse to acknowledge the facts of the case. In procedural terms, the Sapin 2 Act has increased the defendant's ability to access the file, and the 2018–2022 Framework and Reform Act for the Justice System<sup>258</sup> has raised the maximum limit on the prison sentence that may be proposed. The Act also created a new article 495-11-1 CCP specifying the role of the trial judges in charge of approving the prosecutor's proposal for a CRPC and the reasons why they might refuse to do so. A review of the (few) foreign bribery cases that have involved this CRPC procedure shows that the approving judges have not hesitated to use this refusal prerogative where appropriate.

243. In its replies to the questionnaires, France stated that consultations were initiated in 2015 between the judicial system (the investigative authorities and the criminal courts responsible for judging minor offences) and the prosecuting authorities (the PNF and Paris Public Prosecutor's Office), later including the Paris bar, for the extension of this procedure to all economic and financial matters. At the end of these consultations, the PNF, in agreement with the presiding judge of the Tribunal of Paris, experimented with

<sup>256</sup> [Act no. 2011-1862 of 13 December 2011](#) on the allocation of litigation and the simplification of certain judicial proceedings.

<sup>257</sup> Plea bargaining was instituted by [Act No. 204](#) of 9 March 2004 adapting the justice system to changes in criminality.

<sup>258</sup> [Act No. 2019-222](#) of 23 March 2019, cited above

the use of the CPRC in its cases and then made it permanent, by establishing operating principles combining a strengthened legal framework and coordinated implementation by the prosecution and the courts, based on transparency and strict control by the courts over the penalties imposed. However, this reinforced framework and consultation were not enough to prevent the presiding judge of the Paris Criminal Court from rejecting three proposed CPRC resolutions with individuals involved in *Bolloré (Togo) case No. 34*, even though a CJIP was nevertheless concluded with legal persons in that case (see discussion on this case below).

### **Implementation of plea bargaining in practice**

244. Since 2012, a CPRC has only been used once, in 2016, to convict one natural person for foreign bribery (and for misuse of company funds unrelated to foreign bribery).<sup>259</sup> A CPRC was also used once, in 2019, to convict three legal persons on charges of money laundering foreign bribes as a criminal group.<sup>260</sup> In another case, the defendant, an individual, refused an offered CPRC for foreign bribery and was later tried and acquitted by the Paris Criminal Court.<sup>261</sup> In a third case, A CJIP was approved on 26 February 2021 for a legal person, but proposed CPRCs for three individuals were not approved.<sup>262</sup> (This latter case and the situation it created are discussed in more detail in section C below)

### **Disclosure of certain elements of the plea bargain**

245. The Phase 3 report notes that while the CPRC approval process takes place in open court, the substance of the case is not revealed in any way, thus considerably limiting disclosure. The Working Group had therefore recommended that France make public certain elements of the CPRC, such as the terms of the agreement, and in particular the sanction(s) approved (recommendation 4.c.). The Phase 3 report further stressed that the success of such a procedure requires an independent prosecution service, without which the system suffers from the cumulative shortcomings of risk of political interference and lack of transparency. The role of the Public Prosecutor's Office in the conclusion of CPRC resolutions not only remains unchanged, but is now concentrated in the hands of specialist prosecutors at the PNF, without any reforms to strengthen its independence. This context therefore reinforces the relevance of recommendation 4.c.

246. At the time of its written follow-up to Phase 3, France indicated that it had not taken any measures to implement this recommendation and did not envisage taking any such measures. The authorities stated that the Public Prosecutor's Office, in the context of a CPRC, may decide to include in its proposed sanctions the additional penalty requiring the posting or disseminating of the decision. This additional penalty must also be approved by the judge. These measures do not address the Group's concern to ensure the transparency of all CPRC resolutions.

247. In its replies to the Phase 4 questionnaires, France maintains that the combination (detailed in the section above) of the strengthened legal framework and its implementation in co-operation between the prosecution service and the judicial system ensures that recourse to this procedure does not lead to a loss of transparency or less stringent control by the courts over the penalties imposed. These developments, while interesting, nonetheless do not address recommendation 4.c., which goes far beyond ensuring transparency between the prosecution and the judiciary but rather seeks to ensure transparency for the public at large.

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<sup>259</sup> Plea bargain of 13 November 2016 in *Oil 1 Republic of the Congo case No. 128*.

<sup>260</sup> Plea bargain of 26 June 2019 in *Telecommunication Uzbekistan case No. 53*.

<sup>261</sup> Judgment of 18 June 2020 in the case of *Arms (Cameroon and Mali) case No. 101*.

<sup>262</sup> *Bolloré (Togo) case No. 34*.

ii. *The need for another mode of resolution more closely aligned with the CJIPs?*

**Reasons for limiting the CJIP to legal persons**

248. With regard to the reasons why the CJIP was only introduced into French law for legal persons, the Phase 4 responses state that when the CJIP was created by the Sapin 2 Act (article 22), the legislature, in agreement with the government, expressly wished to exclude individuals from the scope of this mechanism. France considers that, in the light of the principles of French criminal law, the introduction of a special resolution mechanism that does not result in a conviction with an entry in the criminal record, even though it concerns particularly serious offences, can only be justified by several considerations particular to legal persons, namely: (i) the serious economic repercussions incurred in the event of a conviction, which could threaten the company's very survival (particularly in terms of access to international markets); and (ii) the possibility that a legal person can be required to implement a compliance programme designed to ensure that the company will adopt and implement measures and procedures to prevent and detect bribery. France stresses that the transposition of this mechanism to individuals would foster a perception of a "two-tier" justice system, in which those with the financial wherewithal can escape the criminal consequences of their actions by paying a fine.

249. However, this position is not universally accepted. Thus, the Conseil d'État, in its 2016 opinion on the legality of the Sapin 2 bill, stressed that it did not appear to be "in the interest of the proper administration of justice" to introduce differentiated judicial treatment for legal persons and individuals who commit the same acts.<sup>263</sup> Lawyers and academics also point out that when an internal investigation uncovers possible offences, a company can enter into a CJIP concerning those facts, whereas individuals do not have this option. The latter may thus be exposed to the uncertainty of lengthy criminal proceedings years after a CJIP is concluded by the legal person.<sup>264</sup> For similar reasons, during the National Assembly's consideration of the Bill on the "European Public Prosecutor's Office and specialised criminal justice", several amendments were tabled either to authorise a criminal settlement known as "*composition pénale*" for individuals in parallel with the CJIP, or to extend the possibility for natural persons to conclude a CJIP themselves.<sup>265</sup>

**Relationship between the CJIP for legal persons and CRPC for individuals**

250. In its replies to the questionnaires, France states that the use of a CJIP against a legal person in no way excludes the possibility of an enforcement action against individuals for their acts, in particular to anyone implicated as the legal person's representative. The Directorate of Criminal Affairs and Pardons invites public prosecutors to assess the appropriateness of either prosecuting an individual or carrying out one of the alternative measures to prosecution provided for in article 41-1 CCP, on a case-by-case basis. Similarly, as indicated above, when the CJIP is concluded in the context of a judicial inquiry, article 180-2 paragraph 4 CCP specifies that "the investigation shall continue with regard to the other parties to the proceedings". Thus, individuals may still either be indicted and brought to trial or offered a CRPC in cases involving foreign bribery or trading in influence in relation to foreign public officials.

<sup>263</sup> [Opinion](#) on a draft law on transparency, combating corruption and the modernisation of economic life of the Conseil d'État, session of Thursday 24 March 2016.

<sup>264</sup> Dufourq, P. and Capucine Lanta de Berard (2019), "[Justice négociée : quel sort pour les personnes physiques ?](#)" [Negotiated justice: what outcomes for individuals?], Dalloz Actualité; or Le Monde du Droit (2021), "[Enquête interne et défense pénale : un collectif d'avocats publie un rapport en faveur de la protection des salariés et des dirigeants](#)" [Internal investigations and criminal defence: a group of lawyers publishes a report supporting protection for employees and senior managers], Le Monde du Droit.

<sup>265</sup> Amendment CL117 tabled by Ms Naïma Moutchou on 23 November 2020, National Assembly Law Commission, Bill no. 2731, first reading.

251. As its members confirmed during the visit, the PNF has gradually begun to use the CPRC for individuals alongside the CJIP for legal persons, despite the differences in the nature and consequences of the two types of resolution (unlike the CJIP, the CPRC entails an admission of guilt).<sup>266</sup> In a recent article, lawyers note that not only combining but also synchronising the use of the CJIP for legal persons and the CPRC for individuals in the same case offers numerous advantages, the main ones being speed, confidentiality and complementarity.<sup>267</sup> During the visit, both prosecutors and judges confirmed that this approach makes it possible to avoid the difficulty of a resolution that would necessarily be delayed and of which one part would remain uncertain for a long time, with a traditional criminal case proceeding all the way to the trial of an individual. On the other hand, academics and other lawyers have expressed more reservations, believing that CPRC is not intended to be used alongside the CJIP, that this combination poses problems of appropriateness, and that further changes are necessary. These changes seem all the more pertinent after the failure of *Bolloré (Togo) case No. 34* (see below), which presented a particularly advanced version of the CJIP/CPRC combination.

### **Is this CJIP/CPRC combination still viable in light of the Bolloré SE case?**

252. In January 2021, one of the four foreign bribery cases in which a CJIP was concluded reignited the debate about the mismatch in treatment between legal persons and individuals in such complex cases. In *Bolloré (Togo) case No. 34*, on 9 February 2021, a CJIP was signed between the PNF and the two accused companies. On the same day, three individuals involved agreed to be convicted through a CPRC. The CJIP and the CPRC were then submitted to the judge for approval. On 26 February 2021, the presiding judge of the Paris Criminal Court approved the CJIP but rejected the CPRC, thus requiring the PNF to reconsider the terms of the proposed CPRC.

253. The court cited article 495-11-1 CCP, which allows the presiding judges of the Criminal Court to refuse to approve the plea bargain "if they consider that the nature of the facts, the personality of the person concerned, the situation of the victim or the interests of society justify an ordinary criminal hearing [...]". The presiding judge refused to approve the plea bargain, considering that the sentences were inappropriate in light of "the seriousness of the charges" and that it was "necessary" for these actions to be tried by a criminal court. This decision is not subject to appeal (unlike the approval decision). This case thus highlights that the judge has more discretion to review the terms of a CPRC than a CJIP. The trial judges met during the visit considered that in this case, the judge was simply fulfilling the duties of the office. Some lawyers interpreted the case as reflecting the judges' desire to remain involved in the merits of a case despite the rise of non-trial mechanisms for resolving cases.<sup>268</sup> This interpretation was confirmed by several judges and lawyers during the visit. The fact remains that the lack of transparency surrounding this decision (no element of the decision was published or disclosed to the evaluation team, as France considers that its publication or disclosure would breach the secrecy of the ongoing judicial inquiry concerning the case) does not contribute to a proper understanding of the reasoning behind the rejection of the CPRC.

254. Paradoxically, while the judge's refusal to approve the CPRC seemed to be based on the weakness of the proposed sanctions in view of the seriousness of the offence, the investigative judges met during the visit nevertheless maintained that, given the investigation services' excessive workload, it was unlikely, in practice, that the individuals concerned would ever be sanctioned.

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<sup>266</sup> For example, in the proceedings against the former managing director of HSBC Private Bank ("HSBC"), following the conclusion of a CJIP in the same case.

<sup>267</sup> Brunelle, E. et al. (2021), "[L'affaire Bolloré ou les limites d'une justice pénale négociée](#)" [The Bolloré case, or the limits of negotiated criminal justice], Dalloz Actualité.

<sup>268</sup> Ibid. "[L'affaire Bolloré ou les limites d'une justice pénale négociée](#)" [The Bolloré case, or the limits of negotiated criminal justice], Dalloz Actualité.

255. What is particularly questionable in the combination of these two decisions (approval of the CJIP and refusal to approve the CPRC) is that the facts had been acknowledged within the framework of the CJIP, and that the defendants had acknowledged their guilt in the context of the plea bargain. The combination of the two types of resolution was conceived as an indivisible whole, so that the approval order for the CJIP still referred to the fact that the individuals had admitted the facts for which they were individually responsible as well as their legal classification as offences, even if the plea bargains were not ultimately approved.<sup>269</sup> The disconnect in the outcomes of these two related proceedings brings into question the coherence of resolving enforcement actions through settlement, particularly for complex offences like foreign bribery after years of multi-jurisdictional investigations. Lawyers have thus questioned this difference in treatment between legal persons and individuals.<sup>270</sup>

### **Consequences and lessons of the refusal to approve the CPRC in the Bolloré case.**

256. Some commentators go so far as to opine that "through this decision putting a halt to the CRPC, (...) the judges at the Paris Criminal Court have largely destroyed the legislature's efforts to develop a system of non-trial resolutions in criminal matters in France".<sup>271</sup> Indeed, they wonder, "which company leader will, in light of this recent decision, seriously agree to engage in a discussion with the prosecuting authorities".<sup>272</sup> The visit confirmed that this analysis is shared by a broad spectrum of panellists, from investigative judges to lawyers and private-sector representatives. One investigative judge even stated that this "quite catastrophic" decision marked an abrupt end to this method of non-trial resolution without trial and that she was no longer in a position to offer it to the lawyers of the accused party. Lawyers have indicated that it would no longer be reasonable to advise their clients to use this method of resolution because of the risk posed, if they admitted their guilt but the approval for the CPRC was refused.

257. The admission of guilt under a CPRC, combined with the disclosure of the facts under a CJIP with the legal person, places the individuals under investigation in a particularly vulnerable situation in the event that the trial process resumes. Prison sentences may be more difficult to avoid in this context. During the visit, judges, lawyers and private-sector representatives considered that given the risk that CPRCs may now be refused for individuals could also have an indirect effect on the willingness of individuals potentially implicated in the allegations, to co-operate in the investigation of the legal person, and thus on the possibility of entering into CJIPs. After the visit, however, France argued that the natural persons in the Bolloré's case did not exercise their right to withdraw from the agreement with the legal person even after the refusal to approve the plea bargains, although they were entitled to do so, and that a CJIP in relation to foreign bribery had since been agreed, in *Systra case No. 87*. According to France, these elements tend to put concerns about the future of the CJIP into perspective. However, at the time of finalising this report, no CPRC had been agreed in that case.

258. If such an impact on the CJIP were to be confirmed, this would call into question a central aspect of France's progress in recent years to strengthen its capacity to resolve foreign bribery cases and to participate in multi-jurisdictional resolutions. However, the PNF representatives met during the visit still expressed confidence that they could enter into CJIPs and CPRCs in a coordinated manner. They believe that they are still in a position to negotiate CPRCs because of the proposed sentence reductions and indicate that several negotiations are under way, mainly in the area of tax evasion, although they admit that the number of plea bargains agreed in the area of foreign bribery remains very limited. However,

<sup>269</sup> Paris Court of Appeal, Judicial Court of Paris, [CJIP approval order](#) proceedings against Bolloré S.A.

<sup>270</sup> Pickworth, H. et al. (2021), "[The Bolloré case: Inconsistent justice is no justice at all](#)", Global Investigations Review

<sup>271</sup> Dethomas, Arthur (2021), "[Le parquet national financier et la justice négociée fortement désavoués](#)" [A strong disavowal of the National Financial Prosecutor and negotiated justice], *L'Opinion*,.

<sup>272</sup> Ibid. "[L'affaire Bolloré ou les limites d'une justice pénale négociée](#)" [The Bolloré case, or the limits of negotiated criminal justice], Dalloz Actualité.

drawing lessons from the failure of the above-mentioned case, they indicated that the approval of the CJIP and CPRC could in future be separated to avoid the repeat of such a situation.

259. In any case, beyond the limited possibility of coordinating the CJIP and the CPRC, this development in the case law revives the problem raised by the Conseil d'État when the CJIP was adopted (see above) regarding the "interest of the proper administration of justice" of establishing a different judicial approach for legal persons and for individuals who commit the same acts.<sup>273</sup> The limited use of the CPRC for foreign bribery, which the data collected for this evaluation illustrate, is also symptomatic of the limited use that can be made of a non-trial resolution system requiring an admission of guilt. Some commentators believe that prosecutors should have the means to approach economic crime in a more holistic manner so as to avoid such disparate results (as those obtained in the Bolloré case) which reveal a "dysfunctional judicial system" that can only increase the suspicion of those subject to trial.<sup>274</sup>

260. The lawyers and several academics met during the visit thus called for either an extension of the CJIP to individuals, or a tool specific to individuals that is harmoniously and predictably linked to the CJIP. All of them emphasised that the CPRC's requirements that the accused recognise their guilt and have a conviction on their record represents a hindrance on the development of negotiated justice. One lawyer indicated that he saw the CJIP/CPRC combination as a transitional phase in the ongoing evolution towards faster and more effective negotiated justice for economic crime.

261. The parliamentary report by Gauvain and Marleix<sup>275</sup> proposes the creation of a specific plea-bargaining procedure for bribery offences, which could only be proposed in the event of spontaneous disclosure of the facts and the individual's full co-operation in the investigations. Drawing on the lessons of the Bolloré case, the report also proposes that the procedures for approving the plea bargain should be more closely supervised: the approval judge's assessment would focus essentially on the legal characterisation of the facts, the spontaneous nature of their disclosure, and the reality of the individual's co-operation in the investigations (proposal 26). This proposal was not included in the draft bill introduced by Deputy Gauvain on 21 October 2021.<sup>276</sup>

### **Commentary**

***The lead examiners welcome the developments in the CRPC's framework since Phase 3, as well as the changes in criminal policy that no longer reserve the CRPC only for the simplest cases, as evidenced by the PNF's more systematic approach to considering the possibility of concluding the enforcement action with a CPRC when individuals admit their guilt at the end of the preliminary investigation.***

***The lead examiners are disappointed, however, that these developments were not accompanied by more disclosure and transparency, leaving Phase 3 recommendation 4.c. unimplemented. They therefore reiterate their recommendation that France take the necessary steps as soon as possible to make public certain elements of the CRPC, such as the terms of the agreement and, in particular, the sanction or sanctions approved. The examiners note that the number of CRPCs with individuals approved with individuals in foreign bribery cases (one person in one case) remains extremely limited. They thus note the low attractiveness to defendants of a resolution involving an admission of guilt.***

***They are also concerned about the consequences that the rejection of the CPRC proposed in conjunction with a CJIP in a major case could have on the ability of the PNF and investigative***

<sup>273</sup> [Opinion on a draft law on transparency, combating corruption and the modernisation of economic life of the Council of State](#), session of Thursday 24 March 2016.

<sup>274</sup> Ibid. ["The Bolloré case: Inconsistent justice is no justice at all"](#), Global Investigations Review <https://globalinvestigationsreview.com/bribery/the-bolloré-case-inconsistent-justice-no-justice-all>.

<sup>275</sup> [Gauvain and Marleix report](#), Ibid.

<sup>276</sup> Proposed Bill n°4586 to strengthen the fight against corruption, introduced on 21 October 2021.



*judges to enter into CPRCs with individuals in particular. They also fear the possible effects that it might have on the level of co-operation necessary to conclude a CPRC and, more generally, fear that it may jeopardise France's progress in recent years to strengthen its capacity to resolve foreign bribery cases and to take part in multi-jurisdictional resolutions. The lead examiners therefore recommend that France continue its efforts to develop effective non-trial resolution mechanisms and in particular, reconsider, as soon as possible, the possibility of permitting individuals to be covered by CJIPs or other appropriate non-trial mechanisms and, to take the necessary measures to ensure better coordination between non-trial resolution mechanisms respectively applicable to natural and legal persons in foreign bribery cases.*

## B6. International co-operation

### a. Mutual legal assistance

#### i. Specialised and dedicated resources, but still limited in number

262. Mutual legal assistance in criminal matters is governed by the provisions of Title X of the Code of Criminal Procedure and by multilateral and bilateral treaties. In Phase 3, the Working Group considered that the resources allocated to the processing of requests for mutual legal assistance (MLA) were insufficient and recommended that France provide additional resources to the judiciary to ensure prompt and effective MLA to other Parties to the Convention (recommendation 4.e).

263. The Bureau for International Mutual Assistance in Criminal Matters (*Bureau de l'entraide pénale internationale* – BEPI) of the Ministry of Justice is the central competent authority for MLA, excluding direct requests for mutual assistance between EU judicial authorities. France has indicated that the BEPI has 30 staff (judges, registrars, civil servants and contract lawyers) and that it has been allocated specialist, dedicated resources. However, no details were provided on the level and nature of these resources or on their possible evolution since Phase 3. Within the PNF, a group of three judges is now dedicated to international co-operation and responsible for the execution of all MLA requests and European investigation decisions in the field of foreign bribery. This group also analyses incoming requests to determine whether they contain elements that could justify the opening of a parallel investigation in France.

264. Abroad, France deploys an extensive network of 18 justice attachés, including one seconded to Eurojust, to facilitate MLA.<sup>277</sup> The two justice attachés present during the visit explained that they play an important role in strengthening France's co-operation network. They indicated that they play a facilitating role, helping the authorities understand the respective investigative frameworks and procedural specificities that may hinder co-operation (e.g. evidentiary standards, rules on attorney-client privilege or the blocking statute). The justice attaché also has an operational role to play in supporting French MLA requests. Lastly, the justice attaché monitors developments in investigations opened by foreign authorities (such as the U.S. authorities), in particular those targeting French companies, in order to inform the PNF for the purpose of opening a parallel investigation, if appropriate. Concerning their role in detection, the justice attachés are subject to the same framework that applies to diplomatic and consular missions (see Section A.3 above). The PNF representatives indicated during the visit that this network of justice attaché is a resource that makes it possible to bring together the law enforcement and diplomatic counterparts when necessary. The justice attachés, for instance, were involved in coordinating the investigations in two major multi-jurisdictional cases that resulted in a coordinated resolution between several authorities. In particular, in the *Airbus case No. 5*, the French justice attaché in the United Kingdom indicated during the visit that she had facilitated relations between the PNF and the Serious Fraud Office (SFO) to better define

<sup>277</sup> List of Working Group countries where justice attachés are posted: Belgium, Brazil, Germany, Italy, the Netherlands, the Russian Federation, Spain, Turkey, the United Kingdom and the United States.

the jurisdictional competence of the two countries. During the consultation with members of the French Phase 4 Working Group, two countries commented positively on the co-operation of justice attachés in relation to foreign bribery.

*ii. Statistics still to be developed*

265. In Phase 3, the Working Group regretted the fact that France does not have statistics on incoming and outgoing MLA requests, including those executed directly between judges. The Working Group therefore decided to follow up on this point (follow-up 13.f.).

266. France still does not have overall statistics on the number of incoming and outgoing MLA requests related to foreign bribery. In its questionnaires responses, France indicated that the BEPI is not in a position to provide statistical data on the number of MLA requests related to foreign bribery received since Phase 3. After the visit, France provided statistics maintained by the PNF on incoming and outgoing MLA requests in relation to foreign bribery for 2014–2021. The PNF stated that these statistics relate only to MLA requests made as part of the preliminary investigations it conducts. France was thus unable to provide overall figures on the MLA requests sent and received by the BEPI, in particular for the period before the PNF's creation or in relations to investigations carried out by investigative judges.

267. Against this background, France indicated that the BEPI had recently undertaken to develop an IT tool to provide it with real-time updated statistical data on MLA requests processed by its services. In addition, a separate project had been initiated to integrate all MLA data, including intra-EU data. These data, which will be accessible by the Ministry of Justice, should enable the central authority to have a complete overview of mutual assistance. Although still at the project stage, these latest developments are encouraging.

*iii. Delays in the responses to foreign requests for assistance*

268. To assess France's responses to MLA requests received from other Parties to the Convention, the Secretariat asked Working Group members to share their experiences with how France handles such requests. Of the 44 Parties to the Convention, 9 Parties responded. Six Parties report having had a satisfactory experience of co-operation with the French authorities, whether with the PNF, the investigative judges, the police responsible for carrying out requests or the AFA. However, two Working Group members point out that there are considerable delays before France completes MLA requests, particularly when the requests concern French legal persons. One of these two countries mentioned the potential delays caused in particular by the so-called "blocking statute" (section B6.c.i.). These delays may have hampered the foreign bribery investigations of other Parties to the Convention, especially since an additional authority (the PNF) has been added to the chain of entities involved in transmitting MLA requests in foreign bribery cases. This slowness of MLA procedures was mentioned as a problem by one of the justice attachés present during the visit, who indicated that delays were due in particular to different investigation methods, evidentiary standards and institutional organisation.

269. Since Phase 3, the PNF has received a total of 86 MLA requests in foreign bribery cases involving French companies or citizens between 2014 and 2021: 63 from Parties to the Convention and 23 from non-Parties to the Convention. The purpose of these requests was most often to obtain procedural documents and bank records. Requests for hearings were also frequently sought by other countries not Party to the Convention. France has received no requests for MLA in non-criminal proceedings involving legal persons for foreign bribery offences. A significant proportion of the requests received are still in progress.

270. As in Phase 3, the French authorities indicated during the visit that it has not notified any foreign authority that it would refuse to grant a request. France's average timeframe is about nine months for requests from Parties to the Convention and 14 months for non-Parties to the Convention. After the visit,

France explained, by way of example, that there had been difficulties and delays in fulfilling MLA requests from a Party to the Convention. These requests were to obtain several thousand documents collected as part of French proceedings or to be collected in order to respond to the request, with the judicial authority then having to check each document before passing it on.

*iv. A more proactive approach to requests for mutual assistance from the French authorities*

271. Since Phase 3, the PNF has taken a more proactive approach to MLA requests. During Phase 3, France only issued 13 requests. In contrast, the PNF reported that between 2014 and 2021, 78 mutual assistance requests were issued to other countries as part of its preliminary investigations into foreign bribery cases, with 46 issued to Parties to the Convention and 32 to non-Parties to the Convention. A significant proportion of these requests are in progress. France reported that the average timeframe for its requests to be processed was 13 months for Parties to the Convention and 11 months for non-Parties to the Convention. The purpose of these requests was most often to obtain bank and asset information or procedural documents, as well as searches and requests for hearings.

272. Seven MLA requests made to non-Parties to the Convention did not receive any response from the requested authorities within three years. This lack of response led to one case being dismissed.

**Commentary**

***The lead examiners note that most of the Parties to the Convention that responded to the evaluation questionnaire on MLA provided generally positive feedback on their co-operation with France. However, they note that delays have been identified in France’s execution of foreign MLA requests. Furthermore, they consider that although resources have been allocated within the PNF to process MLA requests, these still appear to be inadequate. The lead examiners consider that recommendation 4.e is only partially implemented. They therefore reiterate their recommendation that France take the necessary measures without further delay to ensure that sufficient resources are allocated to law enforcement authorities to ensure the provision of prompt and effective MLA to other Parties to the Convention. They also recommend that the Working Group monitor the time taken by France to execute MLA requests.***

***In addition, the lead examiners are encouraged by BEPI’s recent plans to develop IT tools to provide statistical data on MLA. They therefore recommend that France take the necessary measures to implement these projects without further delay and maintain detailed statistics on the incoming and outgoing MLA requests that are accepted or rejected, the grounds for refusal, the types of measures requested, and the time it took to execute the requests.***

***Furthermore, the lead examiners wish to emphasise that France’s deployment of a network of justice attachés abroad is an undeniable resource for MLA. They consider that the role of these attachés can be decisive in several respects, in particular in strengthening co-operation between authorities and overcoming possible obstacles. They recommend that France’s deployment of this network be identified by the Working Group as a good practice.***

***Finally, the lead examiners recognise the PNF’s increasing involvement in international co-operation with other Parties to the Convention and the use of the various means of co-operation available to them. The PNF has taken a more proactive approach to MLA in foreign bribery cases, with a greater number of requests being issued in these cases. However, many of these requests are still in progress and some have remained unanswered after several years. They therefore recommend that France take steps to ensure more systematic follow-up of its outgoing MLA requests when foreign authorities fail to respond.***

## **b. Mutual assistance in multi-jurisdictional case resolution**

273. Since Phase 3, two major multi-jurisdictional cases have been resolved in a coordinated manner among France and foreign authorities. The resolution of these cases was made possible by the introduction into French law of the CJIP settlement mechanism. Co-operation with the UK SFO and the US Department of Justice in *Airbus (multiple jurisdictions) case No. 5* resulted in the simultaneous conclusion of a CJIP in France and Deferred Prosecution Agreements in the United Kingdom and the United States in January 2020. During the visit, the PNF indicated that, in the absence of a settlement mechanism in France at the beginning of the case, Airbus had initially made a spontaneous report to the UK authorities. The PNF and the SFO then worked together as part of a joint investigation team formed at the end of January 2017 under the aegis of Eurojust. The joint investigation team has enabled authorities to develop a coordinated investigative strategy, to facilitate the collection of evidence and the technical data analysis, to ensure the sharing of relevant information between the authorities, and to use of this evidence for criminal prosecution or resolution purposes. During the visit, the PNF indicated that the establishment of the joint investigation team – thanks to its less cumbersome formal framework than that of a formal MLA request– made it possible to circumvent the difficulties posed by the application of the blocking statute and classified information (defence secrecy), and thus to disclose to the United Kingdom some of the documents gathered by the company in the course of its internal investigation.

274. Furthermore, PNF representatives indicated that the agreement concluded to set up the joint investigation team allowed the PNF and SFO to divide the investigative priorities and then prioritise the countries on which they would focus their investigations. The joint investigation framework also facilitated co-operation with the company in its internal investigation. A separate co-operation agreement was signed between the PNF, SFO and Department of Justice in March 2019. This agreement allowed the PNF to share certain aspects of its investigation with the Department of Justice, including some that had been given by Airbus to the PNF under conditions designed to preserve the blocking statute and the secrecy of the investigation as strictly as possible.

275. *Société Générale (Libya) case No. 90* also illustrates this form of co-operation in a multi-jurisdictional case between France and the United States. In this case, parallel investigations were conducted by the PNF and the Department of Justice. During the visit, PNF representatives indicated that they were aware that an investigation was under way across the Atlantic following the receipt of a MLA request, even though proceedings were already under way in France. The PNF stated that it asserted France's territorial jurisdiction in order to link up with the US proceedings, which were further along at the time, as Société Générale was preparing to reach a resolution. In the context of this co-operation, the French authorities were able to rely on the investigative work of their counterparts and on information obtained through the use of assisted witnesses. The PNF was also able to benefit from the Department of Justice's expertise on how to calculate the fine. The case was resolved by the simultaneous conclusion of a CJIP and a Deferred Prosecution Agreement in the United States. This coordination resulted in the equal sharing of financial penalties.

### **Commentary**

***The lead examiners commend France for its role in the coordinated resolution of two high-profile foreign bribery cases involving major French companies. The resolution of these cases has enabled France to position itself as a recognised point of contact for countries that enforced the foreign bribery offence. They note that the resolution of these cases was made possible by the introduction into French law of the CJIP resolution mechanism.***

***In light of the concerns expressed above (section B.3.d.4), the lead examiners recommend that the Working Group follow up on the evolution of the PNF's role in the resolution of multi-jurisdictional cases.***

### c. **Grounds for non-execution of mutual legal assistance or limitation of scope**

276. Incoming and outgoing MLA requests in foreign bribery cases may be reported to the Paris Public Prosecutor's Office, where they are followed up under special arrangements (article 35-36 CCP). The Executive can thus be informed of the most sensitive requests. MLA requests to support investigations into bribery are identified as flagged cases, which are subject to specific increased monitoring by the BEPI once they concern complex offences or offences of particular interest, especially in economic and financial matters. For MLA requests within the EU, French law sets forth specific grounds for refusal (article 694-31 CCP). These are defence secrecy (para. 3) and the application of the *non bis in idem* principle (para. 5). For requests made outside the EU context, the grounds for refusal expressly provided for by law are, the lack of sufficient personal data protection guarantees (not examined here), violations of public order, and harm to the essential interests of the Nation (article 694-4CCP) (examined under subsection ii.). The blocking statute, although not mentioned by France in its responses as a ground for refusing to grant MLA requests, is discussed below because of the concerns it raised for the Working Group in Phase 3 and the developments it may undergo (examined under subsection i.).

#### i. *Blocking statute of 1968 and its reform*

277. The Phase 3 Report provides extensive commentary on the implications of the law of 26 July 1968, as amended by the law of 16 July 1980,<sup>278</sup> known as the “blocking statute”, for MLA as well as the investigation and prosecution of foreign bribery offences. Subject to international treaties or agreements, the blocking statute establishes two separate prohibitions, both punishable by law, on: (1) transmitting to foreign public authorities documents or information of an economic, commercial, industrial, financial or technical nature, the communication of which is likely to undermine France's sovereignty, security, essential economic interests or public order (article 1); and (2) requesting or transmitting any information of an economic, commercial, industrial, financial or technical nature, where the purpose is to constitute evidence for contemplated or ongoing foreign judicial or administrative proceedings (article 1bis). These prohibitions provide for criminal penalties (a six-month maximum prison sentence, a fine of EUR 18 000, or both). The Phase 3 Report noted that the purpose of the law was to protect French companies against discovery proceedings initiated by foreign authorities seeking access to information, including confidential information, held by them, without resorting to judicial co-operation procedures such as international letters rogatory.

278. In Phase 3, the Working Group concluded that the provisions of the Act were likely to impede the collection of evidence in foreign bribery cases and recommended that France take all appropriate measures, including possibly amending the blocking statute, to ensure that the conditions governing access to information held by French companies under this Act do not impede the conduct of foreign investigations and prosecutions for foreign bribery (recommendation 4.h.).

### **Implementation of article 1 of the blocking statute: Agencies involved and limitations**

279. Under article 1 of the blocking statute, an administrative authority is responsible for specifying, where necessary, the types of documents or information covered by the blocking statute, and for advising companies when they want to know whether the information requested from them by a foreign authority is of such a nature as to harm the sovereignty, security, essential economic interests of France or public order. Although France did not identify this authority in its Phase 4 questionnaire responses, the evaluation team's research shows that this mission is now entrusted to the *Service de l'information stratégique et de la sécurité économiques* (Department of Strategic Information and Economic Security – SISSE), a department with national competence created in 2016 and attached to the *Direction générale des*

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<sup>278</sup> [Act No. 68-678](#) of 26 July 1968 on the communication of economic, commercial, industrial, financial or technical documents and information to foreign individuals or legal persons, as amended by Act No. 80-538 of 16 July 1980.

*entreprises* (Directorate General for Enterprise).<sup>279</sup> The SISSE develops and proposes public policy on economic security as well as on the protection and promotion of the country's economic, industrial and scientific interests. Among its duties, is the goal of “combating extraterritoriality in the law”. The aim is to propose and implement “a mechanism to protect French companies against provisions of foreign law that are applied with an extremely tenuous territorial connection”.

280. During the visit, a representative of this department, invited at the request of the evaluation team, indicated that SISSE serves as a point of reference for the blocking statute and that it has a two-fold mission, namely: (i) blocking the transmission to foreign authorities of information deemed strategic under article 1, and (ii) redirecting article 1bis requests, which SISSE refers to the Ministry of Justice in the context of international mutual assistance in criminal matters. With regard to article 1, the purpose of the SISSE is to identify and prevent the transmission of information not relevant to the ongoing investigation (matters that are outside the scope of the litigation). The SISSE adopts a “very restrictive interpretation” of the blocking statute and limits itself to strictly sensitive information. It is not so much a question of withholding information, as of suppressing or hiding sensitive and strategic elements. The SISSE may also be asked to transmit information in the context of company monitorships, particularly when this is likely to involve industrial secrets. In this situation, the AFA normally has the main responsibility for transmitting information though the SISSE can intervene more specifically on the scope of the blocking statute.

281. On its website, the SISSE states that companies referred cases to it 12 times in 2020, compared with eight times in 2018–2019. This shows, as its representative pointed out during the visit, that in practice very few matters are referred to the SISSE, as companies prefer to respond to requests from foreign authorities at the risk of breaching the blocking statute. Few companies are willing to talk to SISSE officials, who are subject to the reporting obligation on public officials under article 40 CCP. Once negotiations have begun with a foreign authority, it becomes very difficult for a company to refer the matter to the SISSE.

282. This echoes a problem already highlighted in the Phase 3 Report and confirmed by some private sector stakeholders during the Phase 4 visit, albeit with much more discretion. In practice, the Act places companies in a dilemma that they are likely to resolve without the French authorities even being informed. By forwarding information likely to fall within the scope of the blocking statute, companies expose themselves to sanctions in France. However, the Act is rarely implemented and sanctions are weak. On the other hand, by not forwarding certain information to the foreign country where they are being investigated, companies expose themselves to sanctions and to a series of serious consequences that could result from their lack of co-operation in the foreign jurisdiction. It is therefore likely that some companies will not make use of the mechanism provided for in article 1. Article 1bis, on the other hand, can be implemented by the French authorities and in particular, the Public Prosecutor's Office. At the time this report was finalised, France indicated that while the referrals received by the SISSE since 2019 were mainly related to the circumvention of MLA channels (article 1bis), the recent referrals also relate to the protection of sensitive information under article 1 of the law. France indicates that the information that was not transmitted in the specific cases was unrelated to the litigation at stake or to the alleged offences and that the fact that the information was not transmitted did not constitute an obstacle to the proceeding and did not prevent the transmission of information relevant to that proceeding.

283. In addition, the Sapin 2 Act gives the AFA the role of ensuring compliance with the blocking statute on the disclosure of economic, commercial, industrial, financial or technical documents and information to foreign authorities, in the context of the enforcement of decisions by these authorities imposing a compliance obligation on a company headquartered in France (article 3.5). The information forwarded by companies in this context is subject to monitoring by the AFA, which ensures that the obligations to communicate information to foreign authorities are implemented in compliance with the provisions of the 1968 Act.

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<sup>279</sup> Ministry of the Economy, Finance and the Recovery: [SISSE for business: who are we?](#)

284. For example, the Deferred Prosecution Agreements signed by the French companies involved in *Société Générale (Libya) case No. 90* and *Airbus (multiple jurisdictions) case No. 5* provide for them to send an annual report to the United States Department of Justice. Accordingly, the companies asked the AFA to assess the compliance of draft reports intended for the Department of Justice with the 1968 Act. The AFA brought together the government departments responsible for this matter (the SISSE, Directorate General of the Treasury, Office for Financial Crime and International Sanctions, Ministry for Europe and Foreign Affairs, Regulation and Fair Competition Mission and Directorate of Criminal Affairs and Pardons) to seek their opinions on compliance with the obligations of the 1968 Act in the documents submitted by the companies. According to France, these consultations are carried out within a very short time (a few days).

### **Implementation of article 1bis of the blocking statute: an obstacle to mutual legal assistance?**

285. In its responses to the questionnaires, France states that the Act is in no way intended to undermine the appropriate co-operation of the French authorities with their foreign counterparts, or the implementation of the conventions signed by France. Its alleged purpose (in particular in article 1bis) is to ensure that requests for information sent by foreign authorities (including those responsible for combating foreign bribery) follow the MLA channels negotiated by states. France concludes that “In fact, to the best of our knowledge, the Act of 26 July 1968 has not affected the proper conduct of law enforcement proceedings by these authorities”. According to France, *Airbus (multiple jurisdictions) case No. 5* is a good example. In this case, the Act of 26 July 1968 did not prevent France’s successful co-operation with the United Kingdom and the United States, thanks to the creation of the joint investigation team, which made it possible to circumvent the difficulties posed by the application of the blocking statute and defence secrecy (see section B.6.b.).

286. France therefore considers that the blocking statute, beyond simply not hindering investigations and prosecutions, actually helps facilitate France’s detection of cases because it obliges foreign authorities to use treaty-based MLA mechanisms to obtain evidence. As France is informed of such cases in a timely manner, it can thus “where appropriate, open a parallel investigation, with a view to improving law enforcement and coordinating prosecutions, as desired by all parties concerned”. Among the lawyers met, one expressed the view that “the blocking statute does not block, but creates a framework that ensures that requests for assistance go through the normal framework between sovereign nations, thus avoiding approaches that are based on pressure and waiver of rights.”

287. However, this point appears to require some qualification. For instance, the former National Financial Prosecutor told the Parliamentary Commission of Inquiry that interviewed her in 2020 on the independence of the judiciary that, with regard to companies with a very high economic profile, and in particular in the Airbus case, she would have liked to see greater responsiveness on the part of the Prosecutor General’s Office when she was questioned about the blocking statute.<sup>280</sup> Likewise, another Party to the Convention<sup>281</sup> pointed out that where French companies are involved in foreign bribery cases in particular, the blocking statute presents a real challenge, as its scope and impact on the mutual assistance procedure are unclear. According to the experience of this country, the Ministry of Justice often takes more than a year to forward the results of the request for mutual assistance to the requesting country.

288. When asked about this during the visit, PNF members reiterated the position that the blocking statute cannot be an impediment to a foreign investigation as it merely reiterates the rules of international mutual assistance in criminal matters. They indicated that they had never postponed the granting of a

<sup>280</sup> [Parliamentary Commission of Inquiry into the Obstacles to the Independence of the Judiciary](#), record of the hearing [No. 29](#) of Ms. Éliane Houlette, former National Financial Prosecutor, 10 June 2020.

<sup>281</sup> Response to the letter sent at the beginning of the Phase 4 evaluation process, inviting other countries in the Working Group to submit comments on the evaluated country.

request for mutual assistance due to the blocking statute. Rather, while conceding that in some cases there had been delays, they maintained that this was because the Public Prosecutor's Office wanted to bring itself up to the level of its partners in order to be able to exercise its sovereignty in criminal matters. The Ministry of Justice was not aware of any delays in providing information for MLAs related to foreign bribery. After the visit, France emphasised that the blocking statute could not be an obstacle to the processing of an MLA request since it applied only to private actors (i.e. requests made by a foreign authority directly to private companies, outside formal MLA channels) and not to judicial authorities exchanging information within the framework of mutual assistance.

### **The Gauvain report: towards strengthening the blocking statute?**

289. In recent years, the blocking statute has been the subject of discussions that could result in it being strengthened. In June 2019, Deputy Gauvain, a member of the French National Assembly (also co-author, with Deputy Marleix, of another parliamentary report following the parliamentary fact-finding commission evaluating the impact of the Sapin 2 Act, referred to several times above) submitted a report concluding the mandate he had been given by the French Prime Minister to examine measures to protect French companies facing judicial or administrative proceedings giving effect to legislation with extraterritorial reach. The report, entitled "*Rétablir la souveraineté de la France et de l'Europe et protéger nos entreprises des lois et mesures à portée extraterritoriale*" [Restoring French and European sovereignty and protecting our companies from extraterritorial laws and measures] (the Gauvain report),<sup>282</sup> was based, in particular, on the premise (set out in the Prime Minister's letter of appointment) that "several French companies have in fact been the subject, in recent years, of legal proceedings initiated on the basis of legislation with extraterritorial scope, which have had major economic and financial consequences". However, the alleged extent of this phenomenon does not correspond to the findings of the Working Group in a recent report.<sup>283</sup>

290. The Gauvain mandate focused, in particular, on an evaluation of the blocking statute and also on "the consequences of the enactment, in March 2018 by the United States, of the Clarifying Lawful Overseas Use of Data Act (CLOUD Act)". The mission also focused on the search for solutions that could be found in national or EU law.<sup>284</sup> The report underlines a "vulnerability" in French companies that is largely due to "the shortcomings of [our] law", among which "[...] the so-called 'blocking statute' of 1968, which is in reality a law for the referral and orientation of foreign requests towards the normal channels of international co-operation, has never been seriously and systematically implemented. It is now outdated and inadequate for compelling foreign authorities to respect mutual assistance treaties and international co-operation agreements in obtaining documents and/or information on our companies." The member of the National Assembly tasked with producing the report confirmed during the visit that this approach and these conclusions remain valid and he expressed confidence that the law could be amended before the end of 2021.

291. When asked about the follow-up to these proposals, France, in its Phase 4 responses, indicated that the aim at this stage was not to question the purpose of the existing law, but to clarify its provisions, the objective being "to ensure greater legal certainty for companies, without hindering the obtaining of evidence by foreign authorities through international mutual assistance channels". At the time of finalising this report, France indicated that a draft reform, by way of a decree,<sup>285</sup> of article 2 of the blocking statute

<sup>282</sup> A public report requested by the Prime Minister. Gauvain, R., C. D'Urso, A. Damais and S. Jemai (2019), [Rétablir la souveraineté de la France et de l'Europe et protéger nos entreprises des lois et mesures à portée extraterritoriale \[Restoring French and European sovereignty and protecting French companies from extraterritorial laws and measures\]](#).

<sup>283</sup> [OECD \(2020\), Phase 4 Report United States](#), para. 229, p. 63.

<sup>284</sup> Possible revision of Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.

<sup>285</sup> Draft Decree by the Conseil d'Etat on the implementation of articles 1 to 2 of law n° 68-678 of 26 July 1968.



was being discussed. Article 2 provides that the persons referred under articles 1 and 1bis must inform, without delay, the competent minister when they receive any request to share information. The draft reform aims at proposing: (i) the implementation of a notification procedure by the persons subjected to article 1 of any requests made by a foreign public authority; and (ii) the possibility for the SISSE to issue non-binding legal opinions to these persons regarding the application or non-application of article 1 in a specific case – after consulting with the Ministries of Justice and of Europe and Foreign Affairs. The SISSE, within the Ministry of Economy, would be clearly designated as the competent authority under article 2 of the law. The current situation, whereby several authorities may be competent would thus be clarified. However, the consultation of several ministries by the SISSE, may result in delays in the provision of MLA by France. This draft decree, which aims at reinforcing the protection of information detained by French companies, would thus not contribute to the implementation of Phase 3 recommendation 4.h. Even though the draft decree stipulates that the SISSE's opinions should be included in the procedure and hence be known to all the parties, which “with time, should clarify the criteria retained to define to scope of the criminal law”, it is premature for the Working Group to pronounce on the indirect effect of a decree that is still under discussion.

*ii. Requests for mutual assistance that are likely to affect public order or the “essential interests of the Nation” (article 694-4 CCP)*

292. Under French law, the main ground for not granting mutual assistance concerns requests that are likely to affect “public order” or the “essential interests of the Nation” (article 694-4 CCP). This text has not been changed since Phase 3. The Phase 3 Report noted that mutual assistance treaties generally contain a reservation in terms similar to article 694-4 CCP. The Working Group had recommended that France take all necessary measures to ensure that the granting of MLA in cases of foreign bribery is not influenced by considerations of national economic interest under the guise of protecting the “essential interests of the Nation” (second part of recommendation 6).

293. A circular dated 29 December 1999 had stated that “the provision of article 694-4 of the Code of Criminal Procedure must be applied very rarely and only certain requests involving secrets whose disclosure would harm the country’s essential interests – a concept that concerns not only the military sphere but also, in particular, the economic, ecological or social spheres – appear to fall within the scope of application of this text.” A concrete example provided by the PNF during the visit concerns the filtering of the accounting records transferred to a foreign authority in a major foreign bribery case, in order to provide the information required for the investigation without disclosing sales prices or other confidential information.

294. In its responses to the Phase 4 questionnaires, France indicates that in practice, the PNF transmits such requests to the public prosecutor at the Paris Court of Appeal, who in turn refers the matter to the Minister of Justice, if necessary, while also notifying any investigative judge in charge of a judicial inquiry in connection with the request. If the matter is referred, the Minister of Justice will inform the requesting foreign authority, where appropriate, if the request cannot be granted, either in whole or in part. This information is then notified to the judicial authority concerned and precludes the granting of the request for mutual assistance or the return of documents relating to the request. According to France, a refusal on the grounds of interference with the essential interests of the Nation was made only once during the period under consideration, in proceedings that did not involve the foreign bribery offence. France stresses that the conduct of the *Airbus case No. 5* illustrates the guarantees provided in respect of the independent conduct of investigations and the granting of mutual assistance, given that the aeronautics sector is both highly strategic and extremely competitive. However, according to France, no economic consideration prevented France, the United Kingdom and the United States from working together successfully on this issue.

295. France also indicated that while refusals on the grounds of disrupting public order have been made on rare occasions (fewer than ten occurrences since 2016), essentially because the alleged offences did not constitute criminal offences under French law, it has never been used in a foreign bribery matter during this period. However, comments received from another Party to the Convention (cited above in the section on the blocking statute) suggest that problems of mutual assistance have arisen on this ground in one or more foreign bribery cases, though this could not be confirmed during or after the visit. When asked about this point, members of the PNF indicated that in some foreign bribery cases, when faced with requests involving the transmission of a considerable number of documents, they may have been concerned internally about forwarding them without risking harm to strategic interests. This may have resulted in a delay in carrying out requests. In one case, the issue of public order could be raised because of the conditions under which the requesting state had come into possession of information. Ignorance of the applicable procedural rules for obtaining information may, in this case, have justified the decision to suspend co-operation until the issue was resolved. However, this was not a refusal of an MLA request but merely a suspension, as the documents were eventually forwarded through the proper channels. This case would not have been formally handled under article 694-4 CCP.

### **Commentary**

***The lead examiners note France's explanations that the blocking statute's purpose is to channel requests from foreign authorities through established international mutual assistance procedures in criminal matters, which also ensures that the French authorities receive information obtained from such requests. They note, however, that various actors involved in combating bribery, both domestically and internationally, continue to deplore the slowness of the mutual assistance process caused, in their view, by the blocking statute and the implementation of article 694-4 CCP.***

***They also note that, even if the blocking statute applies only to direct requests outside the scope of formal mutual assistance, it is still likely to slow down mutual assistance in general. This is evidenced in particular by the creation of a joint investigation team in one of the cases mentioned previously to circumvent the difficulties posed by the application of the blocking statute and to provide a foreign authority with certain documents in the file collected by the company in the course of its internal investigation. The lead examiners also express serious concerns about the lack of clear criteria for applying these mechanisms in investigations by other Parties to the Convention.***

***Against this background, the lead examiners consider that the lack of action taken since Phase 3 to implement recommendations 4h and 6 is particularly problematic. The lead examiners find this problem all the more serious given that France has deployed significant resources by appointing a parliamentary commission, which has issued a report that instead proposes to strengthen the blocking statute on terms that should be confirmed, but whose presuppositions are nonetheless worrying, as is the defensive atmosphere surrounding its work.***

***The lead examiners therefore recommend that France: (i) clarify the scope and consequences of the blocking statute; (ii) clarify the criteria under which the French authorities select, produce, withhold or request companies to withhold certain information about companies involved in foreign bribery cases under the blocking statute or article 694-4 CCP; (iii) expedite the execution of formal mutual assistance, including when the blocking statute or article 694-4 CCP is applicable – even though both mechanisms operate at different stages and in different formal settings and the blocking statute may have only an indirect effect on formal mutual assistance – and in particular at the stage of referral to the Ministry of Justice or any other authority, as foreseen in the draft decree being discussed at the time of finalising this report; and (iv) ensure that the conditions for access to information held by French companies under the blocking statute, in its current form or after any future reform, do not impede the conduct of foreign investigations and***

*prosecutions for foreign bribery, as the Working Group already recommended in Phase 3 (recommendation 4.h).*

## C. RESPONSIBILITY OF LEGAL PERSONS

### C1. Scope of corporate liability for foreign bribery or related offences

#### a. A legal framework that remains unclear and difficult to enforce in court

296. In Phase 3, the Working Group was disappointed by the lack of enforcement of corporate criminal liability for foreign bribery, attributing this to the lack of clarity of the legal framework on several key issues, including the liability of legal persons for acts committed by intermediaries, including related entities. The Working Group therefore recommended that the requirements for the liability of legal person be clarified to ensure that they take into account Annex I of the 2009 Recommendation (recommendation 2.a). This recommendation was only partially implemented during the Phase 3 follow-up.

297. The legal framework remains unchanged since Phase 3. The criminal liability of legal persons for any offence (including foreign bribery, laundering of foreign bribes and forgery and use of forgeries in private documents) is triggered when two cumulative conditions are met: the offence must have been committed “on their behalf” and “by their bodies or representatives” (article 121-2 CP). The jurisprudence has not clearly addressed some of the key points of interpretation discussed below.

##### i. General approach

298. As in Phase 3, it is difficult to determine, which of the approaches described in Annex I to the 2009 Recommendation France follows in establishing the liability of legal persons. Indeed, neither the need to specifically identify the body or representative likely to trigger the liability of the legal person, nor the definition of the body or representative are clearly established in the law or in practice.

299. With regard to the need to specifically identify the body or representative whose actions engage the liability of the legal person, the jurisprudence has fluctuated in recent years, both in relation to foreign bribery and other offences, and does not seem to have stabilised. In 2011–2012,<sup>286</sup> the Court of Cassation overturned a 2008 ruling and reaffirmed the need to identify the body or representative in the context of labour law, in particular. This decision was largely deemed *contra legem* by the legal doctrine<sup>287</sup> according to which, this identification was unnecessary, since the involvement of the body or representative could be deduced from the existence of a wrongful *business policy* implemented by the company. The position of the Court of Cassation in relation to foreign bribery has recently evolved again. In June 2021, in the *Alcatel Costa Rica case No. 7*,<sup>288</sup> the Court upheld the parent company’s conviction on the basis of group policy, without requiring the identification of the bodies or representatives who committed the acts. This judgment thus seems to revert to the old case law on business policy.

300. This decision of the Court of Cassation was still pending at the time of the visit. The practitioners met by the evaluation team had different views of the jurisprudential fluctuations over the years: while the magistrates mentioned the hardening of the jurisprudence on the precise identification of the body or representative, some lawyers were, on the contrary, concerned about a trend towards greater flexibility with attributing liability to companies.

<sup>286</sup> Cass. Crim., 11 October 2011, No. 10-87.212; Cass. Crim., 11 April 2012, No. 10-86.974.

<sup>287</sup> Lelieur, J. (2017), French report on prosecuting corporations for violations of international criminal law.

<sup>288</sup> Cass. Crim., 16 June 2021, No. 768 (20-83.098).

301. In any event, to date, the need to precisely identify the body or representative that committed the offence has been followed in most foreign bribery cases. However, as in Phase 3, the definition of the bodies or representatives who may engage the liability of legal persons lacks clarity. In its responses to the Phase 4 questionnaires, France states that the jurisprudence has extended the definition of these concepts to cover the diversity of decision-making systems within legal persons in addition to *de jure* managers. The Court of Cassation thus held that *de jure* and *de facto* managers, as well as non-managerial employees holding a power of attorney, a secondary power of attorney or a *de facto* power of attorney, could constitute representatives. Moreover, in the *Oil-for-Food, Oil – Total and Vitol case No. 102*,<sup>289</sup> the Court of Cassation adopted a broad interpretation of the concept of “body”, considering that the latter may be identified with regard to the decision-making system set up by the legal person, without being provided for in law; that the liability of the legal person may be engaged by the collective acts of the body, without specifying the individual role of the natural persons who make up the body, and that the commission of the acts by the body may be proven with circumstantial evidence.

302. Although this more expansive interpretation of the concepts of “representative” and corporate “body” is a positive development, difficulties remain. First, not all of these jurisprudential developments relate specifically to foreign bribery cases and may have occurred in other legal domains, such as labour law, an area in which, the courts traditionally take a more flexible approach towards the liability of legal persons. Thus, it remains to be seen whether they are applicable to the foreign bribery offence. Second, the power of attorney, even indirect or informal, remains a prerequisite for engaging the liability of the legal person. A representative without power of attorney, who has acted on behalf of the legal person, cannot trigger corporate liability. In the *Safran (Nigeria) case No. 79*, the only legal person convicted at first instance in Phase 3 was acquitted. The Court of Appeal followed the Public Prosecutor’s Office request, which considered that the offence, assuming it was established, could not be attributed to the legal person on the grounds that the only person with power of attorney was not prosecuted and that the two employees prosecuted did not have the power of attorney to enable them to engage the liability of the legal person.

303. The Gauvain and Marleix parliamentary report proposes to “make the conditions for the criminal liability of legal persons more flexible” (proposal 25) with the aim of sanctioning legal persons more effectively and thus encouraging companies to self-report and to enter into a CJIP. At the time of finalising this report, the proposed law introduced on 21 October 2021, by Deputy Gauvain, proposes that corporate criminal liability can be triggered when the legal person’s lack of supervision has enabled an employee to commit an offence.<sup>290</sup> This proposal was not listed by the Government on the agenda of the debates at the National Assembly for the current legislature, so its future is thus unsure.

*ii. Autonomous liability of legal persons from the prosecution or conviction of natural persons*

304. According to Annex I of the 2009 Recommendation, the liability of legal persons should not be restricted to cases where the individual(s) who committed the offence are prosecuted or convicted. In connection with the uncertainties noted above, this issue is not clearly resolved in practice in France. This point was not specifically addressed in Phase 2 or Phase 3. In Phase 1, it was noted that it was “not necessary for the body or representative to have been personally convicted of the acts of which the legal person is accused” in order to establish the criminal liability of the latter.<sup>291</sup> This principle has been explicitly reiterated in recent jurisprudence related to foreign bribery.<sup>292</sup> While convictions have been handed down

<sup>289</sup> Cass. Crim., 14 March 2018, No. 16-82.117.

<sup>290</sup> Draft Bill No. 4586 of 21 October 2021, article 8.

<sup>291</sup> [OECD \(2000\), Phase 1 Report France](#), pp. 11–12.

<sup>292</sup> In *Alcatel (Costa Rica) case No. 7*, the Paris Criminal Court stated that “the criminal liability of a legal person does not require the concurrent implication of an individual who acted on its behalf”. In *Total (Iran) case No. 103*, the same

against legal persons in cases where the prosecution of related individuals was unsuccessful,<sup>293</sup> the final conviction of legal persons in the absence of the prosecution of one or more related individuals could only be established in one case (*Oil-for-Food, Equipment – 12 companies sanctioned case No. 70*). In this case, 11 of the 12 legal persons were finally convicted in the absence of proceedings against their directors.

305. However, as one academic pointed out during the visit, in practice, the method of attributing criminal liability to legal persons, insofar as it requires, as the law stands, establishing the commission of an offence by a representative or body (most often a natural person), necessitates the prosecution of the latter, in particular in order to prove the intentional element. While the jurisprudential future of the group policy concept may change this situation, at this stage, it does not appear that the autonomous liability of legal persons has been established so far in practice.

### *iii. The liability of parent companies for acts committed by subsidiaries*

306. Despite recent developments, France has not clearly demonstrated that it has overcome the difficulties identified in Phase 3 regarding the attribution of criminal liability to legal persons for acts committed by intermediaries, including foreign subsidiaries. In *the Oil-for-Food, Oil – Total and Vitol case No. 102* and *Total (Iran) case No. 103*<sup>294</sup>, the parent companies were held liable for acts committed by subsidiaries that were not autonomous. Similarly, in the *Alcatel (Costa Rica) case No. 7*, the direct involvement of the parent company convicted of foreign bribery (in particular in the recruitment and remuneration of intermediaries) was demonstrated on the basis of accounting data relating to the parent company itself (the foreign subsidiary had itself been convicted of foreign bribery by a foreign court).

307. With the exception of these cases, however, and in particular in the case of foreign bribery committed by a subsidiary with a certain degree of autonomy, France's ability to convict a parent company has not been demonstrated. In theory, it can do so on the basis of collusion or complicity. In Phase 3, the Working Group considered that other legal requirements required to establish liability in these cases<sup>295</sup> made it very difficult in practice to establish the liability of the parent company. The Sapin 2 Act removed these other requirements for the foreign bribery offence.<sup>296</sup> However, in the absence of relevant jurisprudence, the impact of this removal has yet to be demonstrated. During the visit, an investigative judge also pointed out the practical difficulties of obtaining evidence relating to acts committed abroad by a foreign entity when the entity has not been convicted in another jurisdiction.

### *iv. Liability for failure to supervise*

308. As pointed out by panellists during the visit, particularly by private-sector representatives, the relationship between the liability of legal persons for foreign bribery and the implementation (or failure to implement) a compliance programme as promoted or required by the Sapin 2 Act, is not clear. No conviction, dismissal or acquittal in this area appears to have been based on these programmes. Although

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court recalled that the liability of the legal person is independent of that of the individuals involved and that, in this case, the termination of the public prosecution with respect to the individuals did not necessarily exclude the criminal liability of the legal person.

<sup>293</sup> This is the case, for example, in *Alcatel (Costa Rica) case No. 7*, where the two legal persons were acquitted, and in *Total (Iran) case No. 103*, where the proceedings against the related individual were unsuccessful because the prosecution was terminated (due to death).

<sup>294</sup> Paris Criminal Court, 21 December 2018.

<sup>295</sup> Reciprocity of criminality and monopoly of the Public Prosecutor's Office for the attribution of liability for acts committed abroad on the grounds of nationality; reciprocity of criminality and establishment of the principal offence by a final decision of the foreign court for acts of complicity committed in France.

<sup>296</sup> The removal of the condition of reciprocity of criminality is a substantive criminal provision and therefore does not apply retroactively. As regards the removal of the conditions relating to the monopoly of the Public Prosecutor's Office and the establishment of the principal offence by a final decision of the foreign court, these are procedural provisions and are therefore applicable retroactively to the punishment of offences committed before their entry into force.

the proposed bill by Deputy Gauvain, introduced on 21 October 2021, proposes to broaden the scope of criminal corporate liability to cover failures to supervise, it does not provide any elements regarding consideration of the existence (or absence) of internal corporate compliance measures.<sup>297</sup>

*v. Using the CJIP to circumvent difficulties linked to the corporate liability framework does not solve its inherent problems*

309. In general, the criminal corporate liability framework remains unclear and suffers from several critical uncertainties. This view seems to be widely shared by practitioners, including the prosecutors met during the visit. In particular, the need to identify a body or representative that committed the offence (a complex task in large companies and international groups), the restrictive definition of bodies and representatives, and, more generally, the unstable nature of the legal framework are likely to hinder the enforcement of corporate liability for foreign bribery and undoubtedly contribute to the low number of convictions obtained to date. In turn, this weak enforcement limits the prospects for clarification through judicial interpretation.

310. The CJIP makes it possible to effectively circumvent the difficulties relating to the legal framework without a trial in order to sanction legal persons, including parent companies, for acts committed by their subsidiaries. This is a key factor in its success with prosecuting authorities. Nevertheless, by offering a non-trial resolution, the CJIP indirectly contributes to limiting the prospects for clarification of the jurisprudence. Moreover, the balance of a non-trial resolution system relies, in particular, on the dissuasive nature of prosecution to which it offers an alternative. If the risk of criminal conviction at trial for legal persons is low because of unclear and difficult-to-establish conditions, this may weaken the prosecutors' position when negotiating a CJIP and lead either to the imposition of sanctions that are insufficiently effective, proportionate and dissuasive or to the inability to obtain a non-trial resolution.

311. In the interests of the corporate criminal liability regime as a whole, it is therefore essential to clarify its terms and conditions, so as to remove any uncertainty as to its applicability at trial. In view of the low prospects for clarification through jurisprudence, it seems that it is necessary to amend the law, including the condition relating to "bodies and representatives".

**b. Recent developments regarding successor liability**

312. According to jurisprudence in force in Phase 3, mergers and acquisitions definitively ended any criminal liability attributable to the acquired company for offences committed but not subjected to a final judgment. This principle had constituted an obstacle to establishing corporate liability in several foreign bribery cases.

313. On 25 November 2020,<sup>298</sup> the Court of Cassation completely reversed the jurisprudence. Following the Court of Justice of the European Union<sup>299</sup> and the European Court of Human Rights,<sup>300</sup> it held that "in the event that one company merges into another, the acquiring company may henceforth, under certain conditions, be convicted of criminal offences for acts that the acquired company committed before the merger". This clarification is extremely important, even if the ruling only concerns joint stock companies (*sociétés anonymes*) and simplified joint-stock companies (*sociétés par actions simplifiées*) that have been sentenced to fines or confiscation. The new jurisprudence can only apply to mergers and

<sup>297</sup> Proposed law n°4586, 21 October 2021, article 8.

<sup>298</sup> Cass., Crim., 25 November 2020, No. 18-86.955.

<sup>299</sup> Court of Justice of the European Union, 5 March 2015, No. C-343/13: merger by acquisition does not extinguish the obligation to pay a fine for breach of labour law by the acquired company.

<sup>300</sup> European Court of Human Rights, 1 October 2019, Carrefour France v. France, No. 37858/14: the payment of a fine by the acquiring company for restrictive acts of competition committed by the acquired company before the merger does not affect the nature of the penalties.

acquisitions that occur after 25 November 2020.<sup>301</sup> As before, a fraudulent merger and acquisition (i.e. one designed to shield the acquired company from criminal liability) exposes the acquiring company to the full range of criminal penalties incurred by the acquired company.

314. France stresses that this judgment remedies a major factor contributing to legal uncertainty in ongoing foreign bribery cases. There is no longer any risk of these being interrupted by a merger or acquisition, as was the case in the *Alcatel Costa Rica case No. 7* or the *Oil-for-Food, Equipment – 12 companies sanctioned case No. 70*. The authorities also note that this ruling introduces a powerful incentive for acquiring companies to conduct audits of possible foreign bribery and the compliance practices of the companies they are considering acquiring. Even before the Court of Cassation’s ruling, the AFA had published a “Practical guide on anti-bribery audits in merger and acquisition transactions” in January 2020 (now updated<sup>302</sup> to take into account the new jurisprudence).

### **Commentary**

***The lead examiners note that the legal framework for corporate criminal liability has witnessed a number of encouraging developments since Phase 3, including: the broadening of the definition of corporate “body” and “representative”; the attribution of liability to acquiring companies through the case law; and the removal of the conditions for establishing complicity and collusion in foreign bribery cases, which could make it easier to hold parent companies liable for acts committed by their subsidiaries. Nevertheless, they note that these developments have not been sufficient to establish a clear and stable legal framework for corporate criminal liability. Major difficulties remain, in particular in relation to the need to establish that the acts were committed by the corporate “body” or “representative”. In conclusion, as in Phase 3, it is difficult to establish whether France follows either of the approaches described in Annex I to the 2009 Recommendation regarding the liability of legal persons.***

***The weaknesses of this framework remain a major obstacle to its enforcement, for which the recourse to the CJIP cannot compensate. The lead examiners therefore consider that Phase 3 recommendation 2.a. remains not only not implemented but now requires the amendment of the legal framework for corporate liability.***

***They recommend that France clarify in law the requirements for criminal liability of legal persons to ensure that: (i) its approach takes into account Annex I to the 2009 Recommendation; and (ii) a legal person cannot avoid liability for bribery by using an intermediary, including a related legal person.***

***They also recommend that France seize the opportunity of the proposed law to broaden the scope of corporate liability for lack of supervision to clarify the conditions for attributing liability, and in particular, whether to take into account the existence (or absence) of internal corporate compliance measures that are either promoted or required by the Sapin 2 Act.***

### **c. The need to strengthen magistrates’ training on corporate liability**

315. In Phase 3, the Working Group highlighted the lack of training for magistrates to effectively implement the principles of corporate criminal liability in complex transnational schemes involving international business groups. It therefore recommended that France set up professional development training for law enforcement authorities specifically on the application of corporate criminal liability in foreign bribery cases (recommendation 2.b.). This recommendation was partially implemented at the time of the Phase 3 follow-up report.

<sup>301</sup> Dispatch No. 2020 F 0085FB1 of 2 December 2020.

<sup>302</sup> AFA (2021), [Guide pratique sur les vérifications anticorruption dans le cadre des opérations de fusions-acquisitions](#) (Practical guide on anti-bribery audits in merger and acquisition transactions).

316. In its questionnaire responses, France reported only one three-day training course specifically on corporate liability. This training was organised by the National School for the Judiciary in 2019, for investigating and trial judges to complete once every two years. The course, which covers the Court of Cassation's jurisprudence on corporate liability, certain investigative techniques and internal investigations, among other topics, was attended by 25 magistrates and one specialist assistant in 2021. France also indicated that in the area of bribery, corporate criminal liability is included in the ongoing training course that began in 2019 on "Bribery: detection, prevention and enforcement". This five-day training course is organised once a year and is directed at French magistrates and investigators in particular. However, the course is limited to recalling the general principles of corporate liability without going into more detail on how to enforce it in the field of economic and financial crimes. This ongoing training offering therefore still appears to be limited, especially given the technical nature of the subject.

### **Commentary**

*The lead examiners consider that although the scope of ongoing training for magistrates on corporate criminal liability has been expanded since Phase 3, it is still too limited given the subject's technical nature and complexity in terms of economic and financial crimes. They also consider that in view of the small number of legal persons sanctioned, the acquittals, and the persistent difficulty in establishing the corporate liability at trial, Phase 3 recommendation 2.b. is only partially implemented and that France's efforts to raise awareness among prosecutors, investigative judges and trial judges should be continued and strengthened. They therefore recommend that France expand its professional development trainings for prosecutors, investigative judges and trial judges on corporate liability for foreign bribery and related economic and financial crimes.*

## **C2. Enforcement of corporate liability by the courts: increasingly, a secondary option**

### **a. A limited number of corporate convictions in rather old cases**

317. It should be noted that a small number of legal persons have been convicted of foreign bribery since Phase 3. Excluding the Oil-for-Food cases, which resulted in the conviction of 14 legal persons in two old parts of the case, only four legal persons have been convicted of foreign bribery or complicity in foreign bribery in three of the seven cases concluded since Phase 3. No company was prosecuted in the other four cases, though they resulted in the conviction of French company directors for foreign bribery. France explained the lack of corporate prosecutions by the fact that some of the cases concerned mainly small and medium-sized enterprises (SMEs). France also explained that the decision not to prosecute the legal persons relates to investigative or prosecutorial decisions in older cases and thus do not reflect the current approach. No state-owned or state-controlled company has been referred to court and convicted in a foreign bribery case to date, although proceedings against such companies are ongoing in six cases.<sup>303</sup>

318. Since Phase 3, there has been a marked difference in the enforcement of corporate liability between cases tried in court and those resolved by way of a CJIP. Basically, the cases referred for trial are either old or relatively uncomplicated, thus perpetuating the approach observed by the Working Group in Phase 3, or, where they are more complex, are cases that have already been resolved by foreign authorities through non-trial resolutions.<sup>304</sup> Hence, in practice, the facts have already been established by

<sup>303</sup> *Airports case No. 2; Hotel Construction case No. 3; Submarines case No. 88; Nuclear Power Plant Construction 1 case No. 12; Mining Deposits 1 case No. 14; and Helicopters and Co. case No. 31.*

<sup>304</sup> *Total (Iran) case No. 103; Oil-for-Food, Oil – Total and Vitol case No. 102; and Alcatel Costa Rica case No. 7.*



foreign authorities. In contrast, the cases resolved by way of a CJIP are recent and involve larger-scale bribery cases.

**b. CJIP: the new approach favoured by the PNF for sanctioning legal persons**

319. Since its creation in 2013, none of the foreign bribery cases that the PF referred to investigative judges have resulted in the legal persons being subsequently charged. The PNF has also not referred any legal person to a court for trial in foreign bribery matters, but has instead favoured the use of CJIPs. This explains the low rate of corporate prosecutions and, ultimately, convictions (see section C3.a.). France's new criminal policy on corporate liability in the Belloubet circular mainly advocates the use of this mechanism in foreign bribery cases. As the PNF representatives observed during the visit, the practical obstacles to building a case against legal persons are thus largely removed, such as the need to identify the legal person's representative or body and to prove that the criminal acts were committed on behalf of the legal person.

320. The priority that the PNF has given to this resolution mechanism in foreign bribery cases has had a significant effect on the approach to corporate liability, favouring internal investigations and an admission of facts. The lack of an admission of guilt apparently no longer constitutes an obstacle to ascertaining the offences in issue (as in the Airbus case, where bribery between private parties was widely used to classify some of the events, alongside the offence of foreign bribery). In addition, it has fostered co-operation between companies and the PNF at a very early stage in the preliminary investigation – which is now preferred over a judicial inquiry – and encouraged efforts to prevent recidivism, with the implementation of compliance measures monitored by the AFA (see section C3.).

**c. A relative increase in the number of investigations against legal persons**

321. In Phase 3, the Working Group deplored the low number of investigations initiated by France against legal persons for foreign bribery. Only nine foreign bribery investigations against legal persons were ongoing at the time (follow-up 13.c). While there has been some increase in the number of investigations initiated against legal persons since Phase 3, the enforcement of corporate liability at trial has not yet developed to the extent expected by the Working Group, despite the Belloubet circular, which invites public prosecutors to seek such liability systematically. During the visit, PNF representatives indicated that, in practice, investigations focus first on legal persons rather than on individuals. This approach of the PNF contrasts with the practice noted at the time of Phase 3, when legal persons tended to be considered as victims of the actions of their directors.

322. France has indicated that 35 of the PNF's 37 preliminary investigations concern acts possibly committed on behalf of legal persons and may result in criminal charges. At the stage of judicial inquiry, five legal persons are currently under investigation, notably for foreign bribery, in 3 of the 14 ongoing judicial inquiries (i.e. in less than a quarter of the cases investigated).<sup>305</sup> A sixth legal person has been referred to court for foreign bribery in a fourth case currently awaiting a hearing.<sup>306</sup> There were no decisions to dismiss accused legal persons indicted for foreign bribery. The dissolution of the legal person prevented its prosecution in two cases.<sup>307</sup>

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<sup>305</sup> (i) *Military Equipment case No. 59*, one legal person indicted for foreign bribery, among other things; (ii) *Submarine Asia case No. 66*, two legal persons indicted for foreign bribery and complicity in foreign bribery, among other things; and (iii) *Central Africa Equipment case No. 85*, two legal persons indicted for foreign bribery and concealment.

<sup>306</sup> *Back-taxes (West Africa) case No. 19*.

<sup>307</sup> *Air Transport (Senegal) case No. 24* and *Construction (Central Africa) case No. 108*.

**d. The use of the offence of misuse of corporate assets for individuals has had limited practical effect on corporate liability**

323. In Phase 3, the widespread use of the offence of misuse of corporate assets to prosecute individuals in foreign bribery cases, coupled with the absence of a final conviction of a legal person, had raised concerns among the Working Group that this offence could be an obstacle to establishing corporate liability (follow-up question 13.b.ii.). It was pointed out that in the case of misuse of corporate assets, where the legal person is the victim of the actions of the individual, it could not, by definition, be held liable (see also section B1. on the offence).

324. In its responses to the Phase 4 questionnaires, France indicates that even when the individuals involved were indicted for misuse of corporate assets, the legal person could still be held liable. Their argument was based, in particular, on *Oil-for-Food, Equipment – 12 companies sanctioned case No. 70*, in which the legal person was convicted of foreign bribery, though the director was prosecuted for misuse of corporate assets and foreign bribery. It is important to note, however, that this director was acquitted of misuse of corporate assets and convicted of foreign bribery. France also cites other cases in which individuals were, at some point in the proceedings, charged for both misuse of corporate assets and foreign bribery. However, the prosecution was subsequently brought only for the foreign bribery offence.<sup>308</sup>

325. In practice, discussions with prosecutors during the visit revealed that a number of different charges are being considered during the preliminary investigation and judicial investigation stages. The charge for the abuse of corporate assets thus appears more like a safety net in case the other offences cannot be established, and the prosecution of an individual for this offence, when other offences are also being pursued, does not in itself prevent the prosecution of a legal person. On the other hand, PNF representatives and academics confirmed during the visit that resorting to the abuse of assets offence does indeed prevent the legal person from being convicted. Indeed no legal person has been convicted in a case where the individual has been convicted of misusing corporate assets. However, the number of individuals convicted of the abuse of assets in foreign bribery cases has dropped significantly since Phase 3. The Working Group's concern in Phase 3 is, therefore, no longer relevant and a specific follow-up of this point no longer appears necessary.

**Commentary**

***The lead examiners are concerned about the low number of corporate convictions in foreign bribery cases. Unfortunately, the enforcement of corporate liability has not yet developed to the extent that the Working Group had expected since Phase 3, ten years ago. They note that the priority given to resolving foreign bribery cases by way of a CJIP has significantly changed France's approach to corporate liability and has produced promising results, which the Working Group should encourage to continue. They, therefore, recommend that, in light of developments in jurisprudence and practice, the Working Group monitor the level of enforcement of the corporate liability regime by the courts and through the CJIP.***

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<sup>308</sup> *Military Equipment case No. 59; Total (Iran) case No. 103; Airbus (multiple jurisdictions) case No. 5; and Egis Avia (Algeria) case No. 78.*

### C3. Enforcement of liability of legal persons through the CJIP

#### a. *The CJIP: a new mechanism for non-trial resolution of foreign bribery cases*

##### i. *Introduction of the CJIP into French law*

326. Article 22 of the Sapin 2 Act created an innovative procedural mechanism in France, known as a Public Interest Judicial Agreement (the “CJIP” or “agreement”), which is a non-trial resolution intended to allow for more efficient and timely processing of enforcement actions initiated against legal persons, particularly for foreign bribery offences (new article 41-1-2 CCP). France stresses that the CJIP mechanism was introduced into the law specifically to improve judicial means of combating foreign bribery and to respond to the particular challenges presented by this crime in terms of detection, conducting investigations, the multiplication of relevant jurisdictions, and the consequent need to coordinate investigations and sanctions.<sup>309</sup>

327. The 2020 Act relating to the European Public Prosecutor’s Office, environmental justice and specialised criminal justice extended the possibility of using the CJIP for any act of money laundering predicated on bribery and trading in influence offence. Its implementation procedures were set out in article 1 of the Decree of 27 April 2017 on the CJIP and the judicial bond.<sup>310</sup> On 31 January 2018, the Directorate of Criminal Affairs and Pardons published a circular<sup>311</sup> addressed to Public Prosecutor’s Office setting out the main guidelines for implementing this mechanism. The PNF-AFA Guidelines<sup>312</sup> aim to clarify the PNF’s criminal policy and its relationship with the AFA on compliance measures for companies, with a view to promoting co-operation and predictability. The Belloubet circular specified the conditions of application of the CJIP in relation to foreign bribery.

##### ii. *Overview of the CJIP*

328. The CJIP is an alternative to prosecution that provides for a resolution mechanism between the Public Prosecutor’s Office and the accused legal person. Its purpose is to impose one or more of the following obligations on the legal person concerned:

- Pay a public interest fine to the Treasury, the amount of which must be set in proportion to the identified benefits derived from the offences, up to a limit of 30% of the average annual turnover calculated based on the last three years’ turnover known at the time when the offences were identified.
- Submit, for a maximum of three years, under the supervision of the AFA, to an obligation to implement a compliance programme (OPMC) designed to ensure the existence and implementation of measures and procedures for the prevention and detection of bribery (article 17.II of the Sapin 2 Act).
- Where the victim is identified, and unless the legal person defending the case proves that it has provided compensation for their loss, the agreement shall also provide for the amount and the terms of compensation for the damage caused by the offence within a period of time not exceeding one year.

<sup>309</sup> Parliamentary debates leading up to its adoption, including [the speech presenting the legislation by the Minister of the Economy and Finance](#) when it was voted on by the Senate.

<sup>310</sup> Codified in articles R. 15-33-60-1 et seq.

<sup>311</sup> [Circular](#) of 31 January 2018 on the presentation and implementation of the criminal provisions provided for by the Sapin 2 Act.

<sup>312</sup> PNF and AFA, [Guidelines on the implementation of the Judicial Public Interest Agreement](#) of 27 June 2019 (available in French and English).

*iii. Points in criminal proceedings at which a CJIP may be offered*

329. At the end of a preliminary investigation, the public prosecutor may, as long as the public prosecution has not been initiated, propose a CJIP to a public or private legal person implicated in one or more of the following offences: foreign bribery, trading in influence of foreign public officials, active private bribery, tax evasion, money laundering, as well as related offences. This is the PNF favoured approach. When a CJIP is envisaged in the context of a judicial inquiry, the investigative judge may, at the request, or with the agreement, of the public prosecutor, issue an order transferring the proceedings to the public prosecutor for the purpose of implementing the CJIP procedure. The Public Prosecutor's Office (in this case, the PNF) can thus either request the CJIP or be asked for its opinion on resorting to the CJIP by the investigative judge. The investigation is suspended insofar as it concerns the legal person and continues in respect of the other parties to the proceedings. The CJIP must be concluded within three months. If the agreement is approved, the prosecutor forwards the approval order to the investigative judge.

*iv. Criteria set to frame the recourse to the CJIP*

330. Apart from the criteria set out in article 41-1-2 CCP, the law does not provide any criteria on the use of the CJIP, in accordance with the principle of discretionary prosecution. Within the framework of its power of general instruction and direction of the criminal policy of the Public Prosecutor's Offices, the Directorate of Criminal Affairs and Pardons set out criteria for the prosecution service in the aforementioned circular of 2018, which were further refined in respect of foreign bribery in the Belloubet circular.

331. The latter provides that the appropriateness of resorting to a CJIP must be assessed in terms of: (i) the absence of a prior record of the legal person; (ii) the voluntary nature of the legal person's disclosure of the facts; and (iii) the degree of co-operation with the judicial authority shown by the directors of the legal person, particularly to allow the identification of the individuals most involved in the bribery scheme in question. An examination of the legal person's record will, in most cases, exclude the possibility of a CJIP for a legal person that has entered into a previous agreement. The Minister further clarified that if a CJIP is entered into, special attention should be paid to the specific characteristics of the compliance programme imposed and to the calculation of the amount of the proposed fine, in accordance with the PNF-AFA Guidelines specified in the circular of 31 January 2018.

332. According to the PNF-AFA Guidelines, the PNF specifies the way in which it takes into account the main criteria laid down by the Belloubet circular. At the time of finalising the report, the Guidelines were only available on the AFA website, and, through a link on the PNF website that did not expressly refer to the Guidelines by name.

*v. Finalising the CJIP and review by the judge*

333. The presiding judge of the court is sent a request to approve the CJIP by the public prosecutor (article R. 15-33-60-3 CCP). The proposed CJIP accepted by the legal person, the document attesting to its agreement, and the procedural history of the preliminary or judicial inquiry are attached. The judge thus has at its disposal all the information needed to make a final assessment as to whether the criteria set out in article 41-1-2 CCP have been met. Against this background, the judge also decides on the appropriateness and proportionality of the obligations that would be imposed on the company and, where appropriate, the provisions of the agreement relating to compensation for victims. The decision by the presiding judge of the court to approve the proposed CJIP does not entail a declaration of guilt and is not entered in Bulletin No. 1 of the criminal record: it cannot therefore be classified as a first offence in respect of recidivism or automatically exclude the legal person from public procurement contracts.

334. The statute of limitations for prosecution is suspended during the execution of the obligations under the agreement. Where the agreement provides for the establishment of a compliance programme under the supervision of the AFA, the latter reports annually to the public prosecutor on its implementation and

submits a report to the public prosecutor at the conclusion of the supervision period. The AFA or the legal person must inform the public prosecutor of any difficulties. The CJIP is approved by the presiding judge of the court after a public hearing. If the presiding judge of the court does not approve the proposed CJIP, the public prosecutor may not refer to the statements made, or the documents handed over, by the legal person in the course of the proceedings.

335. In *Bolloré (Togo) case No. 34* (see section B5.b. on plea bargaining), the PNF appealed against the order approving the CJIP with the legal person, arguing that the presiding judge of the Tribunal of Paris had exceeded her authority by citing the admission of guilt made by three individuals through a proposed CRPC, which the presiding judge of the court had refused to approve on the same day. The PNF's appeal was rejected by the Court of Cassation on 12 April 2021<sup>313</sup> on the grounds that the order in question was final and therefore not subject to appeal (Sapin 2 Act, article 22, II, 1). The approval order for the CJIP therefore became final.<sup>314</sup>

#### *vi. Disclosure and transparency*

336. France has indicated that the public prosecutor sends the approved CJIP and the approval order to the Ministry of Justice, which forwards the relevant information to the Ministry of the Budget for simultaneous publication. The order is the subject of a press release by the Public Prosecutor's Office (paragraph 12 of article 41-1-2 CCP). This order, together with the amount of the public interest fine and the agreement, is published on the websites of the Ministry of Justice and the Ministry responsible for the Budget. Before the Act of 24 December 2020, the documents were published on the AFA website. The AFA always publishes a copy on its website for CJIP dealing with what it considers to be integrity violations. The PNF also publishes all the CJIPs but not their corresponding approval orders.<sup>315</sup>

337. While the publication of these two documents on four sites is likely to contribute to the transparency and access to information for those involved in cases advocated by the Working Group, it is still essential for documents to be published with the necessary rigour and follow-up, on a comprehensive and comparable basis, for all cases. At the time of finalising this report, the approval order did not appear on the PNF site despite its recent update. This site was no longer providing a link to the AFA website, although it was the most complete – though it was still not fully complete as some press releases were missing. The PNF's press releases no longer appeared on its own website, nor on the two Ministries' sites. Furthermore, the format used to publish this information could be improved, since it does not currently allow for the use of online translation software or keyword searches, which greatly limits the dissemination of this information among the Parties to the Convention, in particular.

#### *vii. Execution of the CJIP*

338. The discharge of the obligations under the CJIP terminates the public prosecution. If the agreement was concluded in the context of a judicial inquiry, the public prosecutor informs the investigative judge that the public prosecution has been terminated and requests an order dismissing the case against the legal person on this ground.

<sup>313</sup> Piel, S. (2021), *Le Monde*, [Affaire Bolloré: nouveau revers pour le Parquet national financier](#) [The Bolloré case: another setback for the National Financial Prosecutor's Office].

<sup>314</sup> 9 February 2021 – [CJIP concluded between the National Financial Prosecutor at the Judicial Court of Paris and the companies Bolloré SE and Financière de l'Odet SE](#); and 26 February 2021 – [Approval order](#).

<sup>315</sup> Since the Act of 24 December 2020, the Ministry of Justice (<http://www.justice.gouv.fr/publications-10047/cjip-13002/>) and the Ministry of the Economy, Finance and the Recovery (<https://www.economie.gouv.fr/cedef/convention-judiciaire-interet-public-cjip>) are responsible for publishing the CJIPs entered into by the judicial authority. CJIPs also continue to be published on the AFA website: <https://www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public>. They are also available on the PNF website: [Publications | Court of Paris \(justice.fr\)](#).

339. If the legal person cannot prove that it has fully discharged its obligations, the public prosecutor must “on pain of nullity, (...) notify the accused legal person of the interruption in the performance of the agreement” (article 41-1-2 CCP). For CJIPs concluded during a preliminary investigation, the Public Prosecutor’s Office initiates a prosecution unless new information emerges. For CJIPs concluded during the course of a judicial investigation, the public prosecutor issues an order to resume the investigation. The public interest fine paid to the Treasury must be returned to the legal person by right.

*viii. Towards an evolution of the CJIP?*

340. In making 15 proposals on the CJIP, the parliamentary report by Gauvain and Marleix seeks to make this instrument of non-trial resolution more attractive.<sup>316</sup> Among the measures proposed are the publication of guidelines and a new circular from the Minister of Justice strengthening guarantees that a company that voluntarily discloses bribery and co-operates fully will be offered a CJIP, as well as a reduced fine, based on a publicly available scale. The report also suggests encouraging the use of internal investigations by providing a better framework for them, extending the deadline for compliance to five years and offering the possibility of extending the duration of the monitoring period by means of an amendment.

**Commentary**

***The lead examiners welcome France’s introduction of the CJIP and commend France for this new resolution procedure, which allows for more efficient and timely handling of proceedings against legal persons in foreign bribery cases and facilitates the coordinated and simultaneous resolution of such cases with other Parties to the Convention. They note with interest certain parliamentary proposals aimed at making this procedure more attractive. They recommend that the Working Group monitor the possible development of the CJIP to ensure that it continues to be guided, in its conditions and enforcement means, by the non-trial resolution systems and good practices in this field used by the other Parties to the Convention.***

***The lead examiners also commend France for the guidelines on CJIP developed jointly by the PNF and the AFA, and for the transparency with which it has chosen to surround the CJIP approved by the courts, following the Working Group’s consistent recommendations in countries that have established non-trial resolutions for foreign bribery cases. They note, however, that the guidelines are not available on the PNF website and that the effort to be transparent in publishing information on approved CJIP has slowed since December 2020.***

***They therefore recommend that France: (a) disseminate more widely the PNF-AFA’s joint guidelines on the CJIP; and (b) ensure that the information made public on the CJIP in relation to foreign bribery is (i) complete and equivalent for all cases, including in relation to the PNF’s approval order and press release, (ii) published promptly and in a format that facilitates dissemination and use among the Parties to the Convention, and (iii) clearly aggregated and accessible on the website of at least one government agency with a recognised role in combating foreign bribery.***

**b. Application of the CJIP**

*i. A non-trial resolution mechanism marking a turning point incorporate liability enforcement*

341. Since the 2016 introduction of the CJIP, five foreign bribery cases have been resolved with the legal persons involved. Only legal persons have been sanctioned in these cases, since no individual has been convicted to date (either through trial or a CPRC). These CJIPs were concluded in cases that are

<sup>316</sup> Gauvain and Marleix Report, proposals 15–29, pp. 174–175.

newer than those that have been brought to court. The alleged bribery in these cases involved large amounts and complex schemes. This mechanism has been used to sanction parent companies of international corporate groups for the actions of their subsidiaries abroad, committed through intermediaries.<sup>317</sup> In addition, CJIPs have also been approved in two cases involving state-controlled companies.<sup>318</sup>

342. France has emphasised that the CJIP has resulted in a new approach for attributing corporate liability for the foreign bribery offence based on the company's acceptance that the conduct was committed and that it is responsible. As a result, the approval orders of the five concluded CJIPs do not explain how corporate liability was attributed. France has also indicated that this new procedure has led to a change in the work of investigators, who have concentrated on verifying the information provided by companies, rather than on an independent search for evidence.

343. The introduction of the CJIP has enabled the coordinated resolution of two major cases with foreign authorities in *Airbus (multiple jurisdictions) case No. 5* and *Société Générale (Libya) case No. 90*. As the Working Group study on non-trial resolutions notes: "One recognised advantage that resolutions have over trials is that multi-jurisdictional cases can be resolved between several authorities at the same time, giving both prosecution authorities and companies some certainty in the outcome and in particular the amount of the combined financial penalty. This close coordination would not have been possible in cases involving trials."<sup>319</sup> The justice attachés confirmed during the visit that these cases could not have been resolved in France without the CJIP (see section B6.b on multi-jurisdictional resolution of foreign bribery cases).

344. The CJIP has also led to quicker resolution of these cases with regards to legal persons. This has been one its benefits. In its questionnaires responses, France stressed that the delay in obtaining a judgment of legal person through trial in foreign bribery cases is unsatisfactory both for the relevance and dissuasiveness of the final judgment. For example, by way of comparison, in the *Oil-for-Food, Oil – Total and Vitol case No. 102*, the investigation was opened in 2002, the case was brought to court on 28 July 2011, and the Court of Cassation's ruling definitively confirming the conviction was issued on 14 March 2018. In contrast, in the *Airbus (multiple jurisdictions) case No. 5*, the investigation was opened on 20 July 2016 and the CJIP was approved on 31 January 2020. In the two cases resolved in a coordinated manner with foreign authorities, the CJIPs were concluded at the preliminary investigation stage a little more than a year and a half after the opening of the investigation for the *Société Générale (Libya) case No. 90* and three and a half years for the *Airbus (multiple jurisdictions) case No. 5*. In the third CJIP concluded at the preliminary investigation stage, the agreement was reached four years after the opening of the investigation in *Systra (Uzbekistan and Azerbaijan) case No. 87*. The *Egis Avia (Algeria) case No. 78* and *Bolloré (Togo) case No. 34* took longer to resolve, since the CJIP were approved at the stage of the judicial inquiry, more than eight years after the preliminary investigations commenced.

## ii. Prospects for the use of the CJIP in future foreign bribery cases

345. One of the challenges now is to secure the use of this non-trial resolution mechanism so that France can effectively enforce corporate liability in foreign bribery cases. Until then, it is reassuring that CJIPs are currently being negotiated in about ten cases. At the same time, the limitation of the duration of preliminary investigations to two or three years could have a negative impact on the CJIP mechanism by weakening the negotiating position of prosecutors. Such a limitation would also compromise the effective, dissuasive and proportionate nature of the sanctions imposed a through the CJIP (see section B4.b).

<sup>317</sup> *Airbus (multiple jurisdictions) case No. 5*; *Société Générale (Libya) case No. 90*; *Bolloré (Togo) case No. 34*; and *Systra (Uzbekistan and Azerbaijan) case No. 87*.

<sup>318</sup> *Egis Avia (Algeria) case No. 78* and *Airbus (multiple jurisdictions) case No. 5*.

<sup>319</sup> OECD (2020), [Resolving Foreign Bribery Cases with Non-Trial Resolutions](#) – Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention.

346. No individuals have yet been convicted at trial or through a CRPC in the five cases in which CJIPs have been concluded. During the visit, the PNF representatives confirmed that no proceedings would be initiated against individuals in *Société Générale (Libya) case No. 90* on the grounds that it is very difficult to identify the liable individuals. In the other four cases, proceedings are still pending against the natural persons.

347. If implemented, several recommendations of the Gauvain and Marleix parliamentary report (mentioned above) are mentioned in the Bill introduced, on 21 October, by Deputy Gauvain in the National Assembly. They could, if adopted and implemented, help increase the use of this non-trial resolution mechanism in foreign bribery cases.

### **Commentary**

***The lead examiners note that France's new criminal policy on corporate liability is now mainly implemented by way of the CJIP, whose creation marks a turning point in France's enforcement of corporate liability in foreign bribery cases. They consider that the challenge now lies in maintaining the use of this non-trial resolution mechanism in foreign bribery cases.***

## **C4. Sanctions available for legal persons in foreign bribery cases**

### **a. Enhanced criminal sanctions after court convictions**

#### *i. A significant increase in the main penalty applicable to legal persons for foreign bribery*

348. In Phase 3, the Working Group recommended that France: i) increase the maximum amount of the fine available for the foreign bribery offence, which, at the time, was considered insignificant for the largest French companies, particularly in the aerospace or the armaments sectors (EUR 750 000); and ii) make full use of additional penalties, in particular debarment from public procurement, in order to contribute to sanctioning that is effective, proportionate and dissuasive in practice (recommendation 3.b.i. and ii.). The Act of 6 December 2013<sup>320</sup> have significantly enhanced the sanctions incurred by legal persons in the context of litigation. This recommendation was deemed partially implemented during the Phase 3 follow-up.

349. Since the Act of 6 December 2013, legal persons are subject to a maximum fine of EUR 5 million for foreign bribery, which may be increased to ten times the proceeds of the offence (articles 435-3 and 131-38 CC). In case of recidivism, the maximum fine is doubled, i.e. EUR 10 million or 20 times the proceeds of the offence (articles 132-12 to 14 CC). However, the main penalties applicable to legal persons for money laundering predicated on foreign bribery as well as forgery and the use of forgeries have not been changed since Phase 3.<sup>321</sup>

350. The current maximum fine now gives the trial judge considerable discretion to impose a fine that is proportionate to the size of the bribery scheme for which the legal person is convicted.

351. There are no guidelines in France on how these penalties may be calculated, particularly in relation to imposing a fine calculated on the basis of ten times the proceeds of the offence (articles 435-3 and 131-38 CC). Thus, it remains uncertain whether the proceeds of foreign bribery are considered to be the contract amount or the profits derived from the contract, even how the relevant amount would be calculated. Nor do any guidelines clarify the factors that may reduce or increase the fine. Therefore, in the

<sup>320</sup> [Act No. 2013-1117](#) of 6 December 2013 on combating tax evasion and serious economic and financial crime.

<sup>321</sup> Maximum fine of EUR 1 875 000 for laundering foreign bribes (articles 324-1, 324-2 and 131-38 CC) and EUR 225 000 for forgery and use of forged private written documents (articles 441-1 and 131-38 CC).



absence of jurisprudence, it is impossible to know how these fines will be calculated. This poses a problem of predictability, particularly for companies.

*ii. Extremely low fines imposed in practice and so far only cases under the old sentencing regime*

352. The sanctions regime as amended in 2013 has not yet been applied by a court. Since Phase 3, fines have been imposed on 18 legal persons in 5 cases (including 12 in one case: *Oil-for-Food, Equipment aspect – 12 companies sanctioned case No. 70*). France stresses that a long time had elapsed since the offences punished in these cases, which predated the reforms raising the maximum penalties. The amount of the fines imposed at trial contrasts significantly with the fines imposed by way of a CJIP (see section below).

353. An analysis of the fines imposed on the 18 legal persons sanctioned for offences committed before the 2013 reform confirms that the penalties available under the former law were not effective, proportionate or dissuasive, even when the maximum fine was applied (in one case). The fines imposed ranged from EUR 30 000 to EUR 750 000, which seems extremely low given the amounts of the bribes paid, the contracts obtained, and the profits made. In the *Alcatel (Costa Rica) case No. 7* and the *Total (Iran) case No. 103*, these fines were imposed years after the same legal persons had entered into resolutions in another Party to the Convention for the same offences, with significantly higher penalties.<sup>322</sup> France justifies this situation by “the concern for a global multi-jurisdictional sanction proportionate to the offence” even though these resolutions were not co-ordinated and the *non-bis in idem* claim was rejected by the courts. Even if this consideration might conceivably justify the sanctions imposed in these two cases, the fact remains that the fines imposed on the vast majority of the 18 legal persons sanctioned since Phase 4 are not proportionate, effective or dissuasive in view of the underlying bribery schemes.

**Table 1. Correctional sanctions imposed since Phase 3**

Case	Number of legal persons	Fine amount	Bribe amount <sup>323</sup>	Net profit obtained
<i>Total (Iran) case No. 103</i>	1	EUR 500 000	More than USD 30 million	USD 147 million
<i>Public Services (EU) case No. 62</i>	2	EUR 100 000 EUR 100 000	Estimated at EUR 132 000	Not determined

<sup>322</sup> In *Alcatel (Costa Rica) case No. 7*, the sanction cited above was imposed more than ten years after Alcatel was sanctioned through a Deferred Prosecution Agreement in the United States for the same conduct. In the United States, Alcatel-Lucent Ltd was fined USD 137 million (December 2010). (See US Department of Justice (2010), [Press release](https://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsi-daries-agree-pay-92-million-resolve-foreign-corr-upt), 27 December 2010) <https://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsi-daries-agree-pay-92-million-resolve-foreign-corr-upt>. In the French case, the French Public Prosecutor’s Office took into account the amounts already paid and the company’s co-operation with the United States proceedings when proposing a correctional fine.) <https://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsi-daries-agree-pay-92-million-resolve-foreign-corr-upt> In *Total (Iran) case No. 103*, the sanction cited above was imposed more than five years after Total was sanctioned through a Deferred Prosecution Agreement in the United States for the same conduct and paid a fine of USD 245.2 million (May 2013). (See US Department of Justice (2013), [Press release](https://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international), 29 May 2013) <https://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international>. While the foreign fine did not affect the amount of the fine imposed, it did result in the rejection of the prosecution’s request to impose confiscation as an additional penalty.

<sup>323</sup> The bribe amounts in this table are based on the values set out in the decisions of the French courts. In these decisions, the courts mention amounts in both EUR and USD, particularly when decisions have also been handed down by foreign authorities in the same cases.

<i>Alcatel (Costa Rica) case No. 7</i>	1	EUR 150 000	Commissions of more than USD 20 million, more than half of which was paid in bribes	Not determined
<i>Oil-for-Food case No. 102</i>	2	EUR 300 000 EUR 750 000	10% of the value of the contracts obtained (contract value estimated to more than USD 41 million)	Not determined
<i>Oil-for-Food case No. 70</i>	10 and 2 legal persons exempted from punishment despite being found guilty	EUR 30 000 to EUR 100 000	10% of the value of the contracts obtained (contract value estimated to over EUR 6.6 million)	Not determined

*iii. Consideration of compliance programmes in determining the correctional penalty*

354. In its questionnaire responses, France indicates that the subsequent creation or enhancement of a compliance programme after the alleged wrongdoing may be taken into account when determining the penalties – particularly the amount of the fine – as well as additional penalties, such as the compliance program penalty (see Section e. below on additional penalties). Although article 132-1 CC does not expressly refer to compliance programmes, France indicates that judicial authorities may take them into account as part of “the personality of the enterprise” when determining the criminal sanctions to impose, alongside other factors (e.g. turnover, number of employees, structure). In practice, compliance measures have not yet been taken into account when determining sanctions in foreign bribery cases concluded in court. They were, however, expressly taken into account in some concluded CJIPs.

**Commentary**

***The lead examiners welcome the significant increase in the maximum fine applicable to legal persons since Phase 3, thus implementing Phase 3 recommendation 3.b.i. and providing trial judges not only with a sizeable statutory maximum fine but also with the ability to impose an alternative fine based on the proceeds of the offence.***

***They note that this reform was indispensable as demonstrated by the criminal penalties actually imposed on the 18 companies convicted of foreign bribery offences since Phase 3, which were clearly insufficient to satisfy to the effective, proportionate and dissuasive nature of sanctions required by Article 3 of the Convention.***

***They nevertheless recommend that France clarify, by means of a circular or any other appropriate means, the procedures for identifying and quantifying the proceeds of foreign bribery obtained by the legal person, with a view to confiscating such proceeds as an additional penalty or as a component of the fine imposed.***

***They note that since the statutory maximum penalties were raised in 2013, no fine has been imposed on a legal person; only five companies have been sanctioned, all through the CJIP. As analysed above, the limited number of proceedings against legal persons brought to court is partly due to the shortcomings of the corporate liability regime (see Section C1).***

***With a view to changing this situation, the lead examiners recommend that the Working Group monitor, as case law and practice develop, whether the sanctions applied in practice against legal persons convicted of foreign bribery are effective, proportionate and dissuasive, in accordance with Article 3 of the Convention.***

## **b. Confiscation of bribes and proceeds in foreign bribery cases**

### *i. A renewed legal framework with greater emphasis on confiscation*

355. As for natural persons, confiscation measures can be imposed against legal persons as an additional penalty following a criminal conviction (articles 131-39 and 435-14 CC) or, since the 2013 reform, as a component of the criminal fine, calculated based on the amount of profits obtained as a result of the offence, which can now be increased to ten times the proceeds of the offence for legal persons (articles 131-38 et 435-3 CC).

### *ii. The application of confiscation measures remains limited in correctional cases*

356. In Phase 3, the Working Group was disappointed by the lack of a proactive seizure and confiscation policy in foreign bribery cases in France, particularly in proceedings involving legal persons. No confiscation penalty had been imposed, notably because of the difficulty of quantifying the direct or indirect proceeds of the offence. The Working Group therefore recommended that France develop a proactive approach to seizure and confiscation of the instrument and proceeds of the bribery of foreign public officials, raise awareness among judges and law enforcement authorities, and develop guidelines on methods for quantifying the proceeds of foreign bribery offences (recommendation 3.c.).

357. The Belloubet circular expressly stresses the need to confiscate the proceeds of foreign bribery and invites public prosecutors to conduct systematic asset investigations to identify the proceeds of the offence. In practice, however, the circular not yet been fully effective regarding legal persons as no confiscation penalty has been imposed on a legal person in the cases tried in court since Phase 3 despite the request from the Public Prosecutor's Office for confiscation in the case *Total (Iran) No. 103*.<sup>324</sup> Neither the additional penalty of confiscation, nor the possibility to take into account the value of the profits obtained from the offence in the criminal fine has been applied to date. France notes that, given the length of foreign bribery proceedings, the effects of the Belloubet circular, which is relatively recent, cannot yet be fully seen in litigation. France reports that precautionary seizure measures have, however, been implemented in 13 cases where preliminary investigations or judicial investigations into foreign bribery offences have been opened.

### **Commentary**

***The lead examiners note that while steps have been taken since Phase 3 to give greater prominence to confiscation in foreign bribery cases, these are not yet fully effective in practice; confiscation orders have only been issued in two foreign bribery cases during the litigation process. The examiners consider that recommendation 3.c. is only partially implemented, as indicated for natural persons under section B.2.c. They therefore recommend that France take the necessary steps to ensure that legal proceedings make full use of the confiscation measures provided for in law against both natural and legal persons, and in particular: (i) Ensure that magistrates and investigators adopt a more proactive approach to the seizure and confiscation of the instrument and proceeds of foreign bribery offences or assets of equivalent value; (ii) Conduct awareness-raising activities among magistrates and investigators on the importance of confiscating the proceeds of foreign bribery offences (especially when the perpetrator is a legal person, including outside the CJIP framework); and (iii) develop guidelines on methods for quantifying the proceeds of foreign bribery offences (outside the CJIP framework).***

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<sup>324</sup> In this case, the court took into account the fact that a foreign authority prosecuted the legal person for the same acts and that the amount of the fine imposed by the foreign court, which resulted in the proceeds of the offence being confiscated. This made it inappropriate to impose confiscation measures in France.

### c. *The introduction of the public interest fine in the CJIP context*

#### i. *The purpose and calculation of the CJIP's public interest fine*

358. In the CJIP context, the Sapin 2 Act introduced the possibility for legal persons to pay a public interest fine to the Treasury (article 41-1-2 CCP). The public interest fine has two components: one is intended to forfeit the illicit profit obtained (the “confiscatory component”) and the other to punish the legal person itself (the punitive component, known as the “complementary penalty”). The total amount of the public interest fine is calculated proportionally to the benefit obtained from the offence and may not exceed 30% of the average annual turnover, calculated on the basis of the last three annual turnovers from when the offences were uncovered. The signing of a CJIP has neither the equivalent nature nor effects of a criminal conviction (article 2 of the Sapin 2 Act). As a result, it is not entered in Bulletin No. 1 of the record of criminal convictions, and does not trigger any of the additional sanctions mentioned below, including debarment from public procurement. This is an important inducement to conclude a CJIP, despite the potentially high fine incurred. The circular of 31 January 2018 on the presentation and implementation of the criminal provisions provided for by the Sapin 2 Act,<sup>325</sup> as well as the PNF - AFA guidelines, provide further details on the appropriateness and calculation methods of the public interest fine.

#### - Calculation of the benefits obtained from the identified misconduct

359. According to the circular of 31 January 2018 and the PNF - AFA guidelines<sup>326</sup>, the amount of the benefits obtained from the identified misconduct must be calculated on the basis of the turnover generated by the tainted contract, once the expenses directly attributable to the project (excluding the bribes) have been deducted. Gross operating surplus is considered the benchmark for assessing these benefits. These include accounting and non-accounting benefits (market share gains, increased visibility, etc.). Expected gains may also be taken into account, based on a case-by-case analysis. While the confiscation of the amount of the bribe does not seem to pose any particular difficulties, representatives of the Central Office for Fighting Major Financial Crime (*Office central pour la répression de la grande délinquance financière – OCRGDF*) have indicated that the same does not apply to confiscation of the amount of the proceeds of the offence, in the absence of specific jurisprudence on the subject.

360. During the visit, the PNF representatives indicated that they were now seeking more systematically to identify and seize the proceeds of foreign bribery offence, with a view to concluding a CJIP with the legal persons involved. In practice, seizures for the purpose of confiscating the proceeds of foreign bribery occur at the stage of negotiating a potential CJIP. The PNF has a specialist assistant who supports the financial prosecutors in calculating the benefit obtained, and can also rely on the expertise of the Agency for the Collection and Management of Seized and Confiscated Assets (*Agence de gestion et de recouvrement des avoirs saisis et confisqués – AGRASC*), whose role is detailed in the Phase 3 Report.<sup>327</sup> During the visit, the PNF representatives indicated that calculating the amount of profit obtained is an integral part of the negotiation with the company when entering into a CJIP. They also reported that in two ongoing foreign bribery cases, negotiations with the legal person failed and the PNF seized the sums equivalent to the bribe paid to the public official (but not the profits obtained from the commission of the offence) based on a ruling of 4 March 2020 of the Court of Cassation, which confirmed the possibility of seizing the equivalent value of bribes (instruments) from the company's accounts.<sup>328</sup>

361. However, it is not yet clear how the PNF will calculate the amounts obtained from the offence in foreign bribery cases. During the visit, PNF representatives indicated that they had contacted the AGRASC

<sup>325</sup> Circular of 31 January 2018, cited above <https://www.legifrance.gouv.fr/circulaire/id/43109>.

<sup>326</sup> PNF and AFA (2019), [Guidelines on the implementation of the Judicial Public Interest Agreement of 27 June 2019 \(available in French and English\), p. 12.](#)

<sup>327</sup> OECD (2012), [Phase 3 Report France](#), para 69-74, OECD Publishing, Paris.

<sup>328</sup> [Decision](#) of the Criminal Chamber of the Court of Cassation of 4 March 2020, No. 19-81.818.

once in advance of seizing the proceeds of foreign bribery offences and in particular to determine whether the gross full market price or the net output obtained should be used as the basis for calculating the benefit obtained. In the absence of stable jurisprudence and more detailed guidelines, the PNF representatives indicated that they seize the increase in assets occasioned by the offence committed.

- Calculation of the complementary penalty

362. The calculation of the complementary penalty must take into account various aggravating and mitigating factors mentioned in the circular of 31 January 2018 and specified in the PNF - AFA guidelines. While the circular mainly identifies elements concerning the nature of the offences committed (seriousness, duration of the breach) as aggravating factors, the guidelines includes elements that are more directly related to the legal person. As per the guidelines, aggravating factors include the seriousness of the facts and their systemic or repeated nature, the fact that the legal person falls within the scope of articles 3.3 and 17 of the Sapin 2 Act, and the existence of prior convictions and/or sanctions imposed on the legal person for bribery in France and abroad. Mitigating factors include self-reporting the facts before any criminal investigation is opened and within a reasonable time, the degree and manner of co-operation with the judicial authorities, and the existing or corrective compliance measures put in place by the legal person, including the voluntary implementation of a compliance programme by a legal person that is not under any legal obligation to do so. The circular also includes the length of time that has elapsed since the commission of the offence as one of several mitigating factors to consider along with the other circumstances of the case. This is a horizontal issue that should be examined further by the Working Group.

363. The circular and the PNF-AFA guidelines seem to contradict each other on one point. The circular provides that “the existence or establishment of corruption detection and prevention programmes after the misconduct will mainly be taken into account by reducing the cost of the obligation to implement a compliance programme (OPMC) rather than through a reduction in the fine”; however, the guidelines mention that the implementation of a compliance programme may act as a mitigating factor in the calculation of the additional penalty.

364. The complementary penalty is calculated by applying a multiplying factor, taking into account the considerations above. The circular states that the multiplying factor should normally be at least two to ensure that the fine is dissuasive. An analysis of the five CJIP concluded for foreign bribery offences thus far does not, however, make it possible to establish all the details of the methodology used to determine and use the multiplying factors, even in the case of the CJIP concluded with Airbus, which is the most detailed on this point.

ii. *Large public interest fines imposed under CJIP*

**The impact of the CJIP on the level of sanctions.**

365. The use of the CJIP has allowed significantly higher fines to be imposed on legal persons in foreign bribery cases. The circular of 31 January 2018 and the PNF - AFA guidelines state that “*the transactional fine is often higher than the amount incurred in court proceedings.*” “*This is the trade-off for the absence of a conviction and criminal record, (...) which is likely to have far greater economic consequences than payment of the public interest fine, particularly in terms of access to international markets.*” In practice, the public interest fines imposed in the five foreign bribery cases concluded to date appear to be proportionate to the amounts of the bribes, contracts and profits obtained. To date, the CJIP concluded with Société Générale is the only one that has been fully executed in relation to foreign bribery offences.<sup>329</sup> The cases concluded through a CJIP are described in Annex 1.

<sup>329</sup> National Financial Prosecutor (2020), “[Constatation de l’extinction de l’action publique](#)” [Statement of termination of criminal proceedings], 11 December 2020.

**Table 2. Table of public interest sanctions imposed through a CJIP<sup>330</sup>**

Cases	Offence(s)	Total public interest fine	Public interest fine components		Additional sanctions	Bribe amounts	Net profit obtained
			Complementary penalty	Confiscation			
<b>Société Générale No. 90</b>	Foreign bribery	EUR 250 150 755	EUR 82 713 324	EUR 167 437 431	Compliance	Estimated at a minimum of USD 43,300,000 (of which USD 90,740,000 paid to an intermediary)	EUR 334,874,863
<b>Egis Avia No. 78</b>	Foreign bribery	EUR 2 600 000	EUR 918 655	EUR 1 600 000	N/A	EUR 390,640 paid to an intermediary)	EUR 1,681,345
<b>Airbus No. 5</b>	Foreign bribery and private bribery	EUR 2 083 137 455	EUR 1 029 760 342	EUR 1 053 377 113	Targeted audits	Not determined	EUR 1,053,377,113
<b>Bolloré No. 34</b>	Foreign bribery and complicity in breach of trust	EUR 12 000 000	EUR 5 600 000	EUR 6 400 000	Compliance	Not determined	EUR 6,400,000
<b>Systra No. 87</b>	Foreign bribery	EUR 7 496 000	EUR 2 498 572	EUR 4 997 428	N/A	Payment identified so far of USD 575,954	EUR 4,997,428

### The complementary penalty portion of the total public interest fine

366. In these five CJIP, the share of the complementary penalty (punitive component) in the total amount of the public interest fine varies from approximately one-third to one-half of the total fine. During the virtual visit, the PNF representatives explained that the methods for calculating the public interest fine, including the complementary penalty, are not based on numerical scales. They are determined instead on a case-by-case basis in negotiation with the legal person.

### Factors considered by the PNF in determining the public interest fine

367. The PNF considers various factors when calculating fines (see Annex 1). During the visit, the PNF representatives stated that the calculation of the fine is an integral part of its negotiation with companies. In the two multi-jurisdictional cases that were concluded in co-ordination with foreign authorities, the PNF took into account the level of sanctions imposed in other jurisdictions when calculating the public interest fine, as recommended by the PNF - AFA guidelines. The information provided by the foreign authorities facilitated the calculation.

#### - Taking into account co-operation with the judicial authority

368. None of the companies sanctioned had their penalty reduced based on self-reporting of the facts within a reasonable time. However, the PNF took into account the degree of co-operation with the judicial authority when calculating the amount of the complementary penalty, in accordance with the PNF - AFA

<sup>330</sup> The bribe and net profit amounts in this table are based on the values set out in the approval orders of CJIPs. In these orders, these amounts are set either in euros or dollars.

guidelines.<sup>331</sup> Active co-operation was applied as a mitigating factor in the *Airbus (multiple jurisdictions) case No. 5*, as was the thorough internal investigation conducted, which was coordinated with the judicial inquiry. The active co-operation of the new management was also a mitigating factor in the calculation of the fine in the *Systra (Uzbekistan and Azerbaijan) case No. 87*. Conversely, in the *Egis Avia (Algeria) case No. 78* and the *Bolloré (Togo) case No. 34*, the companies' delayed co-operation with the criminal proceedings was applied as an aggravating factor for the complementary penalty.

- Consideration of the effective implementation of a compliance programme

369. In practice, the existence of a pre-existing compliance programme, and the continuous strengthening of this programme since the discovery of the misconduct, was applied as a mitigating factor in one case: *Systra (Uzbekistan and Azerbaijan) No 87*. On the other hand, in the *Airbus (multiple jurisdictions) case No. 5*, the PNF considered that the implementation of corrective compliance measures justified a 50% reduction of the complementary penalty, in accordance with the PNF - AFA guidelines. As indicated above, this appears to contradict the provision of the circular of 31 January 2018. On this basis, the decision was also taken not to impose the obligation to implement a compliance programme under AFA supervision.<sup>332</sup>

**Commentary**

***The lead examiners commend France for its ability to impose effective, proportionate and dissuasive sanctions on legal persons through CJIPs, which it has now done in five cases of bribery of foreign public officials, therefore bringing France into compliance with its obligations under Article 3 of the Convention. They recommend to the Working Group to follow-up on the level of sanctions imposed in practice through a CJIP to ensure that these are effective, proportionate and dissuasive. They consider that the joint PNF-AFA guidelines constitute a good practice that will contribute to the publicity and transparency of the parameters taken into account in the calculation of the sanctions available and imposed on legal persons in foreign bribery cases resolved by means of a CJIP.***

***The lead examiners note, however, that France is still in the early stages of developing the confiscation framework and measures for calculating the confiscatory component of the public interest fine. They recommend that France develop more precise guidelines to clarify how the confiscatory component of the public interest fine is calculated.***

***The lead examiners are pleased to note that the public interest fines – amounting to millions or even billions of euros – imposed in the five CJIPs concluded in foreign bribery cases are proportionally much higher than the fines imposed as a result of court convictions. There is therefore a real contrast with sanctions imposed through trial, despite the increased level of sanctions introduced by the 2013 reform, which has not yet been fully applied.***

**d. Tax treatment of financial penalties and confiscated assets**

370. Article 39.2. of the General Tax Code (GTC) stipulates that “financial sanctions and penalties of any kind imposed on those who fail to comply with legal obligations” are not deductible from taxable profits. According to a 2012 tax administration instruction,<sup>333</sup> this provision covers “all financial sanctions and penalties”, including “surcharges, fines, confiscations and periodic penalty payments.” In their responses

<sup>331</sup> PNF and AFA (2019), Guidelines on the implementation of the Judicial Public Interest Agreement of 27 June 2019 (available in French and English), p.8.

<sup>332</sup> [Public interest judicial agreement between the Public Prosecutor and Airbus SE](#), 29 January 2020, PNF

16 159 000 839, paras. 170-176.

<sup>333</sup> [Instruction of the tax authorities of 12 September 2012](#).

to the Phase 4 questionnaires, the French authorities indicate that public interest fines imposed under a CJIP also fall under article 39.2 GTC and are therefore non-deductible.

### **Commentary**

***The lead examiners welcome the clarification provided by France concerning the non-deductibility of the public interest fine paid under a CJIP.***

#### **e. Additional penalties**

##### *i. A new additional penalty: the penalty to implement a compliance programme*

371. Since the Sapin 2 Act, the penalty to implement a compliance programme (PPMC) under - article 131-39-2 CCP has been added to the additional penalties already incurred by legal persons for foreign bribery offences (article 435-15 CC).<sup>334</sup> The PPMC may be imposed for a maximum period of five years. It may be terminated early by a reasoned decision of the judge responsible for enforcing sentences (*juges d'application des peines*), upon the public prosecutor's request, after at least one year has elapsed, and if the legal person has taken appropriate measures and procedures to prevent and detect acts of bribery or trading in influence. The content of the compliance programme is defined by law and corresponds to the measures and procedures mentioned in article 17. II. of the Sapin 2 Act (excluding Point 8 on the "internal control and evaluation system for the measures implemented"). The PPMC scheme is specified in the 2018 DACG circular.<sup>335</sup> In addition, the AFA published an explanatory note on the PPMC in April 2019.<sup>336</sup>

372. The AFA oversees the implementation of the PPMC in accordance with the relevant sections of the above-mentioned explanatory note, which is similar to the methodology followed in overseeing the obligation to implement a compliance programme when imposed by a CJIP (see below). The public prosecutor in turn monitors the implementation of the PPMC based on information presented by the AFA (in regular reports provided for by law as well as *ad hoc* reports on particular implementation challenges). When the AFA oversees the implementation of the PPMC, the legal person bears the costs incurred by the AFA in its recourse to experts or to qualified persons or authorities for assistance in carrying out legal, financial, tax or accounting analyses, but up to the amount of the fine incurred for the offence which led to the imposition of the PPMC. The failure to implement or the improper implementation of the PPMC is a new specific offence (article 434-43-1 CC), for which legal persons are subject to a fine and all the sanctions applicable to the offence that led to the PPMC being imposed (as well as the sanctions of posting or disseminating the decision).

373. In practice, the PPMC has never been imposed in relation to foreign bribery, as no legal person has been convicted by a court for an offence that occurred after the entry into force of the Sapin 2 Act.

##### *ii. Obligation to implement a compliance programme as part of a CJIP*

374. The additional compliance penalty introduced by the Sapin 2 Act may also be imposed when a CJIP is concluded, where it will be referred to as an obligation to implement a compliance programme (OPMC) for a minimum of two years and a maximum of three years (article 41-1-2 CCP). The scope and duration of this obligation take into account the quality of the company's pre-existing anti-bribery mechanism. This obligation is monitored by the AFA (see Section C5). The draft bill introduced on 21 October 2021 by Deputy Gauvain suggests to align the maximum duration of the OPMC to the one available for the PPMC,

<sup>334</sup> The penalty to implement a compliance programme is not incurred by legal persons, nor for money laundering nor forgery or use of forged private written documents.

<sup>335</sup> Circular of 31 January 2018, cited above.

<sup>336</sup> AFA (2019), "[Note explicative](#) sur la peine de programme de mise en conformité" (available in French) [



i.e. five years, and to allow for the possibility of extending its length by an addendum to the CJIP, subject to the review of a judge<sup>337</sup>.

375. The OPMC has been imposed in two foreign bribery cases concluded by a CJIP. In the *Société Générale (Libya) case No. 90* and *Bolloré (Togo) case No. 34*, the legal persons agreed to have the AFA assess the quality and effectiveness of their internal compliance measures (for two years in the case of *Société Générale* and three years in the case of *Bolloré*). In addition, *Société Générale* agreed to set aside EUR 3 million and *Bolloré* EUR 4 million for the potential costs that the AFA might incur to engage experts or qualified authorities to carrying out its oversight responsibilities. For *Société Générale*, this obligation expired in November 2020. The AFA submitted its monitoring report and concluded that almost all the actions set out in the AFA-validated plan had been implemented and that remaining actions were ongoing, beyond the two-year period imposed by the CJIP.<sup>338</sup>

376. Intermediate measures were imposed in the *Airbus (multiple jurisdictions) case No. 5*, in which the PNF decided, based on a pre-CJIP examination report provided by the AFA, that there was no need to provide for measures to ensure the existence of a compliance programme, as proof had already been provided by audits and inspections carried out on the AFA's own initiative under article 17. III prior to and in parallel with the PNF's criminal investigation. However, the PNF deemed it necessary for the AFA to carry out targeted audits for a three-year period to ensure that the compliance programme was fully deployed in the group's entities and subsidiaries. As a result, Airbus agreed to provide EUR 8.5 million for AFA oversight. The AFA will report at least annually to the PNF on its oversight, and the PNF will inform the UK SFO and the United States Department of Justice of the measures taken by Airbus.

### *iii. Criminal and administrative debarment from public procurement*

377. In Phase 3, the Working Group recommended that France make full use of additional penalties, in particular debarment from public procurement (recommendation 3.b). This recommendation goes further than the Convention, which provides in Article 3.4. that the application of additional sanctions should simply be considered. It is also not in line with the recommendations made to other Parties to the Convention. It is therefore no longer relevant to evaluate its implementation.

378. The legislative framework remains largely unchanged since Phase 3. In addition to the additional criminal penalty of debarment from public procurement for legal persons (article 435-15 CC), the law provides for the administrative exclusion of legal persons with a final conviction in France or the European Union, in particular for offences of foreign bribery, money laundering, forgery and use of forged private written documents.<sup>339</sup> While both exclusions have a maximum duration of five years (for foreign bribery), they differ in terms of the authorities that enforce them and how they are imposed (as well as the possibility to appeal against this penalty). The judicial authority imposes the criminal penalty of debarment from public procurement, while the administrative authority would impose administrative exclusion. The criminal penalty of debarment is imposed by the judge on an *ad hoc* basis, without necessarily waiting for a final conviction (provisional debarment), whereas administrative exclusion is automatic once a conviction is final. However, the criminal judge may decide, on an *ad hoc* basis, that the administrative exclusion should not be applied. In practice, France indicates that the criminal courts have not yet made use of this prerogative, as no request has been made to that effect by legal persons convicted of foreign bribery offences.

379. In practice, it is necessary to have access to the criminal records of candidates and bidders in order to effectively debar from public procurement those who has been convicted of bribery by a final

<sup>337</sup> Draft Bill n°4586 introduced on 21 Octobre 2021, article 6.

<sup>338</sup> [Notice of termination of criminal proceedings](#) dated 11 December 2020.

<sup>339</sup> Since the [ordinance of 23 July 2015 on public procurement](#), and then the codification ordinances, this administrative exclusion is based on article L 2141-1 of the Public Order Code.

judgment. In Phase 3, the Working Group considered that the implementation of this provision did not raise any particular problem for individuals. On the other hand, the Working Group recommended that France take the necessary steps to allow all authorities in charge of public procurement contracts to have access to the criminal records of legal persons (recommendation 12.a.). This recommendation has not yet been implemented.

380. Since 2012, the 18 legal persons convicted have been subject to an administrative exclusion from public procurement now into force, resulting from their final conviction for foreign bribery offences. As mentioned above, these provisions do not apply to legal persons who entered into a CJIP, as the public interest fine does not have the equivalent effect of a conviction. This is an essential reason why the CJIP appeals to companies.

### **Commentary**

***The lead examiners note that recommendation 12.a. to give access to all authorities in charge of public procurement contracts to the criminal records of legal persons remains unimplemented. They therefore recommend that France take the necessary steps to implement it.***

## **C5. The central role of the AFA in company development of compliance measures**

381. The AFA's role in detecting foreign bribery offences is detailed in Section A2. This section deals more generally with the compliance obligation imposed on certain companies by the Sapin 2 Act, AFA's advisory, prevention and oversight missions, as well as the limitations inherent in the AFA's status, resources and future, which are already under serious threat.

### **a. Introduction by the Sapin 2 Act of a compliance obligation subject to an administrative penalty and monitored by the AFA**

382. Article 17 of the Sapin 2 Act introduced a general obligation to prevent corruption, which is imposed on managers and legal persons. This obligation, known as "compliance", is intended to prevent and detect the commission, in France or abroad, of acts of bribery by companies or groups "whose parent company has its registered office in France", provided that two additional conditions are met linked to the number of employees and turnover (companies or groups with more than 500 employees and a turnover in excess of EUR 100 million). The aforementioned proposed bill, introduced on 21 October 2021, proposes to remove the condition that the parent company has its registered office in France and to broaden the compliance obligation under article 17 of the Sapin 2 Act to apply it to the small subsidiaries registered in France of large foreign groups, provided that the parent company meets the thresholds foreseen under the Sapin 2 Act.<sup>340</sup> (The proposed bill is examined under section C5.e.iv.)

383. The implementation of this obligation requires the existence and effective application of eight measures provided in article 17.II of the Sapin 2 Act: i) a code of conduct; ii) an internal whistleblowing system; iii) a risk mapping; iv) procedures for assessing the situation of clients, first and middle-tier suppliers and intermediaries; v) accounting controls; vi) a training system for the most exposed managers and staff; vii) a disciplinary regime; and viii) an internal control and evaluation system. The AFA checks the existence, quality and effectiveness of these various measures prior to the commission of any offence and independently of investigations and prosecutions for acts of bribery.<sup>341</sup>

<sup>340</sup> Draft bill n°4586 registered on 21 octobre 2021, article 1(16).

<sup>341</sup> FCPA (23 March 2021), "[In France, bribery is not needed to violate the anti-bribery law](#)", FCPA blog; FCPA (2019), "[Anti-Corruption Agency's Sanctions Committee holds blockbuster hearing](#)".

384. Therefore, companies subject to these measures can now be sanctioned for the lack of implementation of this administrative compliance obligation, even in the absence of any suspected foreign bribery violation. Failure to comply with this obligation is punishable by an injunction to comply and/or an administrative penalty of up to EUR 1 million for legal persons and EUR 200 000 for individuals, which may also be published, broadcasted or displayed. This administrative penalty does not result in a criminal record for the legal person. It is up to the AFA to monitor the implementation of this administrative compliance obligation through the audits it conducts, and to the AFA Sanctions Commission to impose these sanctions.

385. During the visit, AFA representatives indicated that their audits are hindered by tax and statistical secrecy, which prevent the agency from assessing precisely the number of exporting companies with registered offices in France that are subject to these measures. However, the AFA indicates that this has not to date hindered its monitoring of the implementation of this compliance obligation, as the audits carried out have concerned CAC 40<sup>342</sup> companies and large public companies. The AFA estimates that approximately 3 000 entities in France – companies or groups (parent/subsidiary corporations) – could be subject to this compliance obligation. The Gauvain and Marleix parliamentary report<sup>343</sup> proposes “removing the condition that the parent corporation be legally domiciled in France, in order to subject the small subsidiaries of large foreign groups established in France to the obligations set out in article 17 as soon as the parent company exceeds the thresholds provided for by law” (Proposal 1).

## **b. AFA Recommendations to companies on implementing their compliance obligations**

### *i. Target and content of the AFA Recommendations*

386. In line with article 3.2° of the Sapin 2 Act, the AFA draws up Recommendations intended to help legal persons under private law to implement the compliance obligation provided for in article 17 of the Sapin 2 Act.<sup>344</sup> These Recommendations define the modalities for implementing programmes for preventing and detecting integrity violations that can be deployed, in a proportionate manner to their risk profile, by all legal persons, particularly those governed by private law, whether French or foreign (para. 6 of the AFA Recommendations). These Recommendations are intended for all companies, including exporting companies legally domiciled in France, whether or not they are covered by the compliance obligation set out in article 17 of the Sapin 2 Act. This means that while companies below the article 17 thresholds are not subject to compliance, they are strongly encouraged to implement a compliance programme that meets the criteria of article 17, including the eight compliance measures, though adapted to their risk profile. These Recommendations, originally published in 2017, were revised in January 2021, and now expressly cover the foreign bribery offence.

387. In substance, the revised AFA Recommendations indicate that the obligation under article 17 to implement these eight compliance measures leads the obligated companies to deploy an anti-corruption programme that must be based on three inseparable pillars (para. 16 of the AFA Recommendations): (1) Commitment of the senior management to ensure that the entity’s tasks, competences or business are carried out without any integrity violations; (2) risk mapping to raise awareness of the entity’s exposure to risks of integrity violations; and (3) Management of these risks by implementing effective measures and procedures to prevent these risks and to detect possible behaviours or situations that are contrary to the code of conduct or that may constitute integrity violations, and to sanction them.

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<sup>342</sup> The [CAC 40](#) is the main stock index in Paris. It is a basket of 40 French companies selected from the 100 French companies with the highest trading volumes. Each company has a weighting determined by its capitalisation on the [NYSE Euronext](#).

<sup>343</sup> [Gauvain and Marleix report](#), *Ibid.*

<sup>344</sup> AFA (2021), “[Recommandations de l’AFA](#)”.

388. In the opinion of companies and commentators, the eight measures provided in article 17 of the Sapin 2 Act, as developed and supplemented by the Recommendations and guides published by the AFA,<sup>345</sup> as well as the decisions handed down by the Sanctions Commission, form a relevant and consistent arsenal of prevention and compliance measures. The publication and dissemination of these Recommendations by the AFA has provided companies with a clear and transparent framework for implementing their compliance programme. These measures have been the catalyst for companies to adopt new approaches and to accelerate the development of their internal compliance measures, though some companies had already adopted these measures in response to foreign legislation. In the context of a recent OECD study on the drivers for the development of compliance measures, the representative of a French company indicated that while internal compliance measures had already been in place for years within his company, the Sapin 2 Act led the company to adopt a considerably more robust internal controls.<sup>346</sup>

389. During the visit, private sector representatives, including compliance officers from major French groups, described this framework and the audits conducted by the AFA as rigorous. They also stressed that the AFA Recommendations have enabled the initiation of a real dialogue between the AFA and companies on the implementation of these measures, and commented positively on the educational and co-operation efforts undertaken by the AFA on this basis. They also indicated that the Recommendations contribute to the harmonisation of compliance practices and the dissemination of compliance measures throughout the sub-contractor chain. These measures have been positively received, including abroad, and are in line with the guidelines developed by the most advanced Parties to the Convention in terms of encouraging compliance measures.<sup>347</sup>

#### *ii. Scope of the AFA Recommendations*

390. Although, under the Sapin 2 Act, the AFA Recommendations are the subject of a notice published in the Official Gazette, they are not binding and do not create any legal obligation. The Sanctions Commission also emphasised the non-mandatory nature of the AFA Recommendations in its first decisions issued on 4 July 2019 and 18 February 2020, stating that they “are only a benchmark, the use of which is in no way mandatory.” While not binding, they are part of the “French anti-corruption reference framework” along with the law, its implementing decrees and the guides published on the AFA website. According to the AFA director, they constitute “a factor of legal certainty for companies”.<sup>348</sup>

391. Within the framework of the AFA’s ad hoc audits for the evaluation of compliance programme (see below), the Recommendations not only constitute a “benchmark document”, but are also enforceable against the AFA.<sup>349</sup> In the two decisions made public on 4 July 2019 and 18 February 2020, the AFA Sanctions Commission established a rebuttable presumption of compliance that was then enshrined in the 2021 revised Recommendations.<sup>350</sup> During the visit, private sector representatives indicated that they welcomed these clarifications of the scope of the Recommendations. Henceforth, if a company subject to the Recommendations decides to implement them, the AFA must then demonstrate, if necessary, that the audited company has failed to comply with its compliance obligation. However, if a company decides not

<sup>345</sup> AFA [Guides and Charters](#).

<sup>346</sup> OECD (2020), [Corporate Anti-Corruption Compliance Drivers, Mechanisms, and Ideas for Change](#), OECD Publishing, p. 25.

<sup>347</sup> FCPA (23 March 2021), [“In France, bribery is not needed to violate the anti-bribery law”](#), FCPA blog; FCPA (2019), [“France: Anti-Corruption Agency’s Sanctions Committee holds blockbuster hearing”](#), FCPA blog; Global Investigations Review (12 June 2020), [“France’s anti-bribery regime provides blueprint for EU enforcement”](#), Global Investigations Review blog; Tokar, D. (2020), [“France moves to embrace fight against corporate corruption”](#), *Wall Street Journal*.

<sup>348</sup> [Notice of the Ministry of the Economy, Finance and the Recovery](#), Official Gazette No. 0010 of 12 January 2021.

<sup>349</sup> AFA (2021), [“Recommandations de l’AFA”](#), para.10.

<sup>350</sup> AFA Sanctions Committee, [Decision No. 19-02](#) Société I. and M.C.K. of 7 February 2020.

to follow all or part of the Recommendations, the burden of proof is reversed. The AFA indicated during the visit that in almost all the audits conducted to date, the companies had followed its Recommendations.

### **c. Ad-hoc implementation audits of the compliance obligation**

392. The AFA's core mandate is to monitor the implementation of the compliance obligation by the companies subject to it. The AFA has the administrative power to audit the existence, relevance and effectiveness of the anti-corruption compliance mechanisms put in place by these companies, even without any suspected criminal offence of foreign bribery or trading in influence.<sup>351</sup> These so-called "ad hoc audits" are initiated by the AFA director or possibly at the request of certain actors listed in article 3.3 of the Sapin 2 Act, including accredited NGOs. All the audits that had been conducted at the time of writing this report had been initiated by the AFA director. The Economic Actors' Audit Department of the AFA Sub-Directorate for Audits is in charge of auditing companies subject to article 17 of the Sapin 2 Act. These inspections seek to verify the existence, relevance and effectiveness of the eight measures provided for in article 17 II of the Sapin 2 Act.<sup>352</sup> The inspection involves verifying the existence, quality and effectiveness of these measures based on documentation and on-site visits. The audits may be thematic and examine how several entities have implemented in parallel certain of the eight measures. The AFA may also carry out audits targeting specific business sectors (in the construction and public works sector in 2019, in the water and sanitation, and insurance sectors in 2020, and in the digital services and technology consulting sectors in 2021). The themes chosen in these sectoral audits focussed on senior management commitment and corruption-risk mapping, which constitute the first two pillars of anti-corruption systems, as well as on the evaluation of third parties, which is one of the measures and procedures that were particularly poorly implemented according to the findings of the first audits. The audit is conducted in particular through interviews to assess the level of knowledge of the various actors in charge of, or associated with, the operation of the anti-corruption system, analysing the quality of the vigilance measures deployed by sampling files or accounting entries, and analysing the operation of the whistleblowing system. The conduct of the audit procedures is detailed in the Charter of Rights and Duties of the stakeholders involved in the audits.

393. At the end of the audit, the AFA produces a report containing, if necessary, recommendations for improving existing procedures. Companies that have received recommendations from the AFA are not subject to a follow-up audit but may in theory be subject to a new ad hoc audit. In the event of non-compliance, the AFA director may also decide to issue a warning. The audited companies would then have one and a half years to comply with the AFA's warnings before being subject to a follow-up audit. In 2020, the AFA initiated four additional inspections following warnings issued to companies initially audited in 2018. Finally, the AFA director may refer the matter to the Sanctions Commission, which may issue an injunction to adapt internal compliance procedures or may impose an administrative penalty on the legal person inspected and its managers. During the visit, the AFA indicated that all the companies that had received recommendations and/or warnings had since implemented them, thus remedying the initial shortcomings.

394. Within the framework of these audits, the AFA may also detect foreign bribery offences, although the AFA director has stated that its capacity in this area is limited and that "[the] audits will only lead us to uncover acts of bribery in a rather coincidental manner", due in particular to the agency's lack of resources.<sup>353</sup>

395. During the visit, an AFA representative stressed that the professional secrecy obligation of external auditors was one of the main difficulties encountered in the course of the agency's audits. The AFA is not

<sup>351</sup> Presentation of the AFA <https://www.agence-francaise-anticorruption.gouv.fr/fr/lagence>.

<sup>352</sup> The conduct of the inspection procedures is detailed in the [Charter of Rights and Duties of the stakeholders involved in the inspections](#), AFA, April 2019,.

<sup>353</sup> Reuters, Jarry, E. (2017), "Le patron de l'agence anticorruption réclame plus de moyens".

one of the authorities for which this secrecy can be lifted under the Commercial Code. Yet, according to the AFA, the external auditors' reports are an important source of information for assessing the implementation of adequate compliance programmes and potentially for detecting foreign bribery offences.

396. During the visit, the AFA explained that, in practice, it has thus far focused on auditing large exporting companies which registered office is in France, targeting industry segments at risk of corruption. With this approach, the AFA hopes that, the audit of these large enterprises, at the forefront of certain sectors, will allow its audits to have a “domino effect” and to indirectly reach smaller enterprises operating in the same industry segment.

397. Finally, the initial fear expressed at the time of its creation – that the AFA would limit its audits to public sector actors (also subject to the compliance obligation) – has not materialised. Most of the audits conducted to date have focused on private enterprises, and to a lesser extent on public sector actors. Between 2017 and December 2020, the AFA carried out a total of 114 ad hoc audits, 72 of which targeted private enterprises subject to the compliance obligation<sup>354</sup> and 42 of which concerned public actors subject to article 3.3 of the Sapin 2 Act (including one mixed-ownership government corporation and one state-owned industrial and commercial establishment). Audits targeting private enterprises therefore represent more than 60% of the audits carried out by the AFA over this period. Of the 72 ad hoc audits of private enterprises subject to the compliance obligation under article 17 of the Sapin 2 Act, 53 initial and follow-up audits were completed, and the audit reports were submitted to the companies concerned. The AFA made recommendations in each of these 53 audits. Warnings were also issued in 42 of these inspections, two of which were followed by referral to the Sanctions Commission.

### **Commentary**

***The lead examiners commend the steps taken by France since Phase 3 to develop a framework that places prevention and the development of internal compliance measures at the heart of its policy to combat foreign bribery. They emphasise the innovative approach of the Sapin 2 Act which introduced into French law an obligation to prevent and detect corruption, known as compliance, whose implementation can be audited even absent any criminal offence, and which non-compliance can give rise to an administrative penalty. They emphasise that this innovative approach is not provided for in the Convention or its related instruments.***

***The lead examiners also commend France for the development of an anti-corruption framework – including the law, its implementing decrees, the AFA Recommendations and the guides published on the AFA website. This framework now gives France the means to encourage companies to set up compliance programmes in line with the recommendations of the Good Practice Guidance on Internal Controls, Ethics and Compliance contained in Annex 2 to the 2009 Recommendation.***

***In this respect, the lead examiners welcome the steps that AFA has taken to update its Recommendations in 2021, in particular by: (i) incorporating the conclusions of the first two decisions of the Sanctions Commission and thus clarifying their scope; (ii) developing the pillars around which the eight compliance measures must be structured; and (iii) extending their scope of application by encouraging companies not subject to the compliance obligation to also implement a compliance programme comprising the eight measures provided in the law, as adapted according to their risk profile.***

***They consider that the AFA's duties with regard to the private sector, and more particularly its ad hoc compliance audits, play an essential role in the development of a compliance model that incorporates international best practices in this area. They are also encouraged by the AFA's targeting of certain industries identified as being at risk. However, the lead examiners note that auditors' professional secrecy may be a significant obstacle to the implementation of AFA***

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<sup>354</sup> Excluding state-owned industrial and commercial establishments and mixed-ownership government corporations.

*inspections, and therefore to its ability to monitor the implementation of corporate compliance programmes and, potentially, detect foreign bribery offences.*

*They recommend that the Working Group monitor the AFA's development of its anti-corruption guidelines as well as the number and scope of its ad hoc audits of companies' implementation of their compliance obligations under the Sapin 2 Act.*

**d. Post-resolution audits: the AFA's role in imposing and monitoring the enforcement of compliance measures in foreign bribery cases**

*i. Prior AFA opinions on the appropriateness of implementing a compliance programme within a company*

398. The 21 March 2019 dispatch of the Directorate of Criminal Affairs and Pardons provides that the PNF may rely on the expertise of the AFA and seek its advice in deciding whether to subject a legal person to the implementation of a compliance programme (PPMC) as an additional penalty in a judgment or agreed as an additional obligation in a CJIP (OPMC).<sup>355</sup> Between 2017 and January 2021, the AFA conducted four pre-resolution audits in foreign bribery cases at the request of the PNF – *Société Générale (Libya) case No. 90, Egis Avia (Algeria) case No. 78, Airbus (multiple jurisdictions) case No. 5, and Bolloré (Togo) case No. 34* – to decide whether it was appropriate to subject the legal person to an OPMC the duration and scope of the obligation and/or to determine the ceiling of costs that the company would incur to cover the AFA's recourse to experts to monitor the implementation of the obligation. Only one of the legal persons that has concluded a CJIP in relation to foreign bribery had previously been subject to an *ad hoc* audit by the AFA (Airbus).

*ii. Enforcement of the PPMC and the OPMC*

399. The AFA also has the task of carrying out post resolution audits. The AFA oversees the implementation of PPMCs under article 131-39-2 CC, pronounced by a court in the context of a conviction for bribery of foreign public officials. The AFA similarly oversees the implementation of the OPMC, when these are provided in the context of a CJIP under article 41-1-2 CC (article 3.4 of the Sapin 2 Act). The PNF and AFA developed co-operation protocols to facilitate information exchange as well as Joint Guidelines on CJIPs in foreign bribery cases, in June 2019.<sup>356</sup>

400. The PNF and AFA Guidelines on the Implementation of the CJIP provide that when a French company is subject to an anti-bribery compliance programme decided by a foreign authority, the foreign authority may either receive information on the implementation of this programme from the company itself or from a third party designated as a monitor. The guidelines specify that the AFA must be designated as the monitor if the legal person in question “has its registered or operational office in France, or if it carries out all or part of its economic activity on the French territory.”

401. The AFA may call upon experts or qualified persons or authorities to assist it in conducting legal, financial, tax and accounting analyses, the costs of which are borne by the sanctioned legal person. The AFA PPMC Guide<sup>357</sup> and the PNF-AFA Guidelines, for the OPMC, clarify the agency's role in this framework. In both cases, the PNF reviews the implementation of the PPMC or the OPMC, on the basis of reports presented at least annually by the AFA. Reports are also submitted as soon as a difficulty arises in the development or implementation of the compliance programme and at the end of the period over

<sup>355</sup> Directorate of Criminal Affairs and Pardons dispatch 2019/F/0419/FA1 presenting the French Anti-Corruption Agency and the methods of exchange between public prosecutors and the French Anti-Corruption Agency.

<sup>356</sup> PNF and AFA (2019), [Guidelines on the implementation of the Judicial Public Interest Agreement of 27 June 2019 \(available in French and English\)](#).

<sup>357</sup> AFA (2019), [“Guide sur la peine de programme de mise en conformité”](#).

which the penalty or obligation is enforced. These reports are not made public. If the AFA considers that the compliance measures taken by a legal person in the execution of a CJIP are not sufficient, the public prosecution may be re-opened. Just as in the case of *ad hoc* audits, the AFA seems to have applied a “collaborative approach” to its audits in the context of the post-resolution audits conducted by the agency. In practice, the opportunities for AFA post-resolution audits have remained limited to date. Indeed, the PPMC has never before been imposed as a result of a foreign bribery judgment. However, an OPMC was part of the CJIPs concluded in *Société Générale (Libya) case No. 90* and *Bolloré (Togo) case No. 34*, while measures of targeted audits under the control of the AFA were decided in a third case – (*Airbus (multiple jurisdictions) case No. 5*). To date, the AFA has not been formally designated as a monitor in a resolution concluded with a foreign authority. However, in the cases of *Société Générale (Libya) No. 90* and *Airbus (multiple jurisdictions) No. 5*, the foreign authorities did not, through a Deferred Prosecution Agreement, impose any independent monitoring measures (monitoring or “compliance monitor”) in addition to the post resolution audit conducted by the AFA of the implementation of the OPMC imposed under the CJIP. Legal persons have undertaken to submit regular reports to these foreign authorities.<sup>358</sup> Upon receipt of these draft reports to the foreign authorities from the companies concerned, the AFA makes comments on the status of the compliance programme as presented by the company, to ensure: (i) consistency with the results of its post-resolution audit of the obligation to implement a compliance programme; and (ii) compliance with the company’s obligations under the blocking statute.

402. Finally, the AFA may also oversee the enforcement of an administrative order to implement a compliance programme, issued by the Sanctions Commission against a company (article 17. V. of the Sapin 2 Act). The Sanctions Commission used its power of injunction in one of its two decisions and ordered a legal person to adopt certain compliance measures within a time limit set by the Commission.<sup>359</sup> The AFA may oversee the enforcement of these injunctions at the request of either the Sanctions Committee or the company concerned, or it may be asked by the Sanctions Commission to present written comments on the report submitted by the company on the compliance measures it has introduced. The latter option was chosen to oversee enforcement of one of the injunctions issued against *Société I* in Decision No. 19-02 of 7 February 2020.

### **Commentary**

***The lead examiners commend France for the ability to use the AFA's expertise to conduct audits on the enforcement of penalties to, or obligations to, implement a compliance programme imposed through court judgments or CJIPs respectively. They welcome the co-operation that has thus been established with the PNF before these penalties and obligations to implement a compliance programme are imposed, as well as when monitoring enforcement of this obligation in the context of CJIPs. The lead examiners recommend that France continue to rely on the AFA's expertise: (i) before imposing penalties and compliance obligations by companies; and (ii) to monitor their implementation in the context of post resolution audits as well as the administrative injunction sanction imposed by the AFA Sanction Commission to implement corporate compliance measures in the context of overseeing companies' compliance programmes.***

<sup>358</sup> US Department of Justice against Société Générale, [Deferred prosecution agreement](#); US Department of Justice, 31 January 2020, United States against Airbus SE, [Deferred prosecution agreement](#).

<sup>359</sup> AFA Sanctions Commission (7 February 2020), [Decision No. 19-02](#) Société I. and M.C.K.



**e. Achieving equilibrium and stability in the AFA's activities, resources, and status: threats to its future**

*i. Achieving equilibrium across multiple mandates*

403. The AFA is responsible for a number of duties aimed at both private-sector companies and French public authorities – including a particularly broad remit to audit French public bodies and regional administrations at the national and local levels (article 3.3 of the Sapin 2 Act).<sup>360</sup> These responsibilities also cover the whole field of integrity violations, which goes far beyond foreign bribery. A reform of the AFA's mandates is at the heart of the above-mentioned draft bill introduced in October 2021 (see section C5.e.iv)<sup>361</sup>. Since the AFA's inception,<sup>362</sup> its multiple responsibilities have led to fears that the agency will be unable to fully assume the central role it has been called on to play in developing the internal compliance measures that companies subject to the article 17 compliance obligation must adopt. The audits conducted to date provide some reassurance concerning the priority given to the audit of companies, since they represented more than 60% of the audits conducted by the AFA between 2017 and the end of 2020 (for all bodies combined, including legal persons governed by public law).

404. With regard to its private-sector remit, interviews with business representatives showed that they appreciate the AFA's collaborative and dialogue-based approach to the audits it conducts on its own initiative. Nevertheless, the concentration within the AFA of the various detection (detailed in Section A2), advisory, oversight, reporting and sanction functions creates a risk with regard to the perception of the agency's role and positioning in relation to companies. This remains true even though the AFA's organisational framework ensures that its advisory functions, on the one hand, and its control and sanction functions, on the other, are separated into two distinct sub-directorates.<sup>363</sup> This dual mission has, indeed, been the subject of criticism,<sup>364</sup> also echoed by some private-sector representatives during the visit.

**Commentary**

***The lead examiners note the AFA's multiple advisory, oversight, reporting and sanction functions, as well as the sometimes critical perception that these functions may have generated with regard to the agency's role and positioning in relation to companies. They note, however, that this is a new and innovative body both in France and among the Parties to the Convention, and they are encouraged by the priority that the agency has so far given to private-sector audits, thus contributing to the development of compliance measures within companies and therefore to preventing and deterring foreign bribery. They nevertheless recommend that the Working Group follows-up on the AFA's implementation of its supervisory duty to ensure that it continues to accord high priority to monitoring companies' implementation of compliance obligations when they are subject to article 17 of the Sapin 2 Act.***

*ii. Lack of budgetary autonomy and declining resources and means*

405. The scope of the AFA's responsibilities also raises questions about the availability and adequacy of its financial and human resources. The resources currently allocated to the agency do not appear to be commensurate with the number and scope of the agency's duties, and in particular with the extent, diversity and complexity of its mandate to ensure that companies develop compliance measures.

<sup>360</sup> The AFA's missions are defined in articles 3 and 17.III of the Sapin 2 Act.

<sup>361</sup> Draft Bill n°4586.

<sup>362</sup> The agency has been operational since 17 March 2017, when its director was appointed.

<sup>363</sup> Order of 14 March 2017 on the organisation of the French Anti-Corruption Agency (articles 2 and 3).

<sup>364</sup> Katlama J. and Rodot P., Lawyers (28 January 2019), "[L'AFA : une agence qui vous veut du bien... ?](#)" ["The AFA: an agency that wishes you well... ?"], Village de la Justice.

406. Because of its status as a “service with national jurisdiction” (“service de compétence nationale”), the AFA has no budgetary or functional autonomy and is attached to the Ministry of the Economy, Finance and Recovery. The Director of the AFA indicated that this situation has not created any issues so far, given the support for the agency’s mandate from successive Ministers of Justice and Budget.<sup>365</sup> However, this status does not offer the AFA the stability and continuity it needs to perform its duties, as the support it currently receives could be revisited depending on the political agenda.

407. The agency’s budget allocation is limited and declining. In its replies to the questionnaires, France stated that the total annual operating budget allocated for the AFA’s day-to-day expenses had fallen from EUR 533 000 in 2017 to EUR 407 131 in 2019. France also indicated that since 2020, the AFA has received a budget for its expert appraisal services, which replaced its total annual operating budget. The new budget amounted to EUR 350 000 in 2020 and was reduced to EUR 250 000 in 2021. France could not provide the budget specifically allocated to the Audit Sub-Directorate since 2017 due to the fungibility and pooling of funds allocated to the agency. France considers that since it was created, the agency has had all the budgetary and material resources necessary to perform its duties. During the visit, however, AFA’s representatives indicated that two-thirds of the budget for *ad hoc* audits are allocated to audits of companies subject to the obligation to implement a compliance programme (article 17 of the Sapin 2 Act), and it is still too limited given the scale of this mandate.

408. The human resources allocated to the AFA are not proportionate to the agency’s numerous duties. The maximum of 70 staff planned when the AFA was created in 2017 was never reached and has since decreased to 53 in 2021. As of 1 July 2021, the agency will have 56 staff (including 4 on secondment), more than half of whom will be assigned to the Audit Sub-Directorate (33 staff). Some commentators have pointed to the administrative constraints that limit the AFA’s ability to recruit staff from the private sector, particularly for its advisory and audit functions in relation to companies subject to the obligation to implement a compliance programme.<sup>366</sup> During the visit, the AFA indicated that it had recruited more contract staff from the private sector to provide the agency with the necessary expertise for carrying out its audits. However, apart from additional short-term resources, staff can only be recruited in accordance with the rules applicable to the civil service, under the authority of the Minister for the Budget. This last constraint may limit the AFA’s capacity to recruit staff from the private sector to meet the needs of its duties.<sup>367</sup>

409. During the visit, the AFA members present indicated that although it can currently perform all of its duties, the resources available will have an impact on the agency’s arrangements for how it will exercise these functions in the future. The Director of the AFA emphasised on several occasions, including during the visit, the lack of sufficient investigative resources and the decrease in the number of AFA’s staff since its creation, as “compared with TRACFIN, which has seen its staff increase considerably”.<sup>368</sup> He said that “if we want to fight corruption, we must have the means to do so”.<sup>369</sup> France indicated that in 2020, the Court of Auditors considered proceeding with a review of the AFA’s activity, resources and use of funds, but that this review was conducted.<sup>370</sup> The media has reported that an inspection report on evaluating the implementation of the Sapin 2 Act and the AFA has, however, been commissioned and produced by the General Finance Inspection (*Inspection général des finances* – IGF) and the Justice Inspection (*Inspection*

<sup>365</sup> Le Club des Juristes (a working group chaired by the former French Prime Minister, Bernard Cazeneuve), (November 2020), [Pour un droit européen de la compliance \[In support of a European compliance law\]](#), Rapporteur: Gaudemet A., Professor at the University of Paris II Panthéon-Assas.

<sup>366</sup> Ibid., Le Club des Juristes.

<sup>367</sup> Ibid., Le Club des Juristes.

<sup>368</sup> [Evidence](#) of the Director of the AFA, Evaluation of the Sapin 2 Act by the National Assembly, 7 April 2021. [Record of the hearing on 22 February 2018 of Mr Charles Duchaine, Director of the AFA.](#)

<sup>369</sup> National Assembly Committee of Inquiry in charge of examining the state’s decisions on industrial policy, with regard to recent company mergers, in particular in the cases of Alstom, Alcatel and STX, as well as the means likely to protect France’s industrial flagships in a globalised commercial context.

<sup>370</sup> Global Investigation Review, (8 April 2020), [“AFA awaits results of enquiry by independent auditor”](#).

*de la justice* – IGJ) in July 2020. The evaluation of the implementation of the Sapin 2 Act and the AFA is mentioned in the IGJ annual report 2020, but its conclusions have not been made public. According to the media, the inspection report apparently flagged in particular the low level of resources allocated to the agency.<sup>371</sup> The impact of the above-mentioned Bill, introduced on 21 October 2021, regarding the resources allocated to the AFA, is discussed under section C5.e.iv.

### **Commentary**

***The lead examiners are concerned that the reduction in the AFA's allocated budget could negatively affect its ability to promote and monitor companies' development of compliance measures. They consider that the AFA's level of financial and human resources is not commensurate with the number of important duties entrusted to it. In particular, the lead examiners note that the AFA's current resources do not allow it to cover its corporate audit functions satisfactorily. The question of resources is all the more acute because, if the majority of audits have so far focused on companies, the lead examiners are aware that a significant part of the AFA's responsibilities concerns the inspection of the many public bodies subject to article 3.3 of the Sapin 2 Act. Moreover, they note that these audits require expertise that the AFA has had difficulty mobilising and retaining.***

***The lead examiners therefore recommend that France take the necessary measures to provide the AFA with sufficient resources to promote and monitor companies' development of compliance measures in the context of its advisory and audit functions for entities subject to the compliance obligation and thus provide it with the means to implement the changes and priorities initiated by the Sapin 2 Act for preventing foreign bribery, including in the context of the possible overhaul of the AFA's mandates or the potential transfer of its mandates to another institution.***

#### *iii. Inherent limits to the AFA's status*

410. As regards the AFA's independence, France notes, in its replies to the questionnaires, the guarantees linked to the agency's status and its inter-ministerial nature. The AFA is a body with national jurisdiction whose dual ministerial attachment (to the Minister of Justice and the Minister for the Budget) distinguishes it from a body with national jurisdiction attached to the central administration, but also from previous anti-bribery organisations, as the SCPC was attached solely to the Ministry of Justice. The Sanctions Commission, which is separate from the audit authority and responsible for imposing the penalties provided in article 17.IV of the Sapin 2 Act, enjoys greater autonomy and independence. It does not report to the Director of the AFA (article 2 of the Act).

411. France states that the conditions for appointing the Director of the AFA – who is a magistrate but outside the hierarchy of the judiciary – provide the agency with guarantees of independence, particularly in the exercise of its audit functions. The Director may not receive or seek instructions "from any administrative or governmental authority in the exercise of the oversight functions entrusted to the agency" (article 2 of the Sapin 2 Act). As regards the AFA's staff, the agency's current legal status does not grant the agency's officials any particular independence outside the statutory rules of the ordinary civil service. The provisions of the aforementioned proposed bill, introduced on 21 October 2021,<sup>372</sup> would alter these guarantees of independence by proposing that the AFA Director should not necessarily be a magistrate outside the hierarchy of the judiciary and by reducing the term of office from a currently non-renewable six-year period to a four-year renewable term. Some commentators note that it seems difficult to conceive that the agency can neither receive nor seek instructions from any administrative or governmental authority insofar as the AFA is placed under the dual supervision of the Ministry of Justice and the Ministry for the

<sup>371</sup> Ministry of Justice, Inspection Générale de la Justice, Annual Report 2020 p. 36, et Médiapart, (2 November 2021), «Un rapport d'inspection charge l'Agence française anticorruption».

<sup>372</sup> Proposed bill 4586, article 1(5).

Budget.<sup>373</sup> During his hearing before a Parliamentary Commission of Inquiry, in February 2018, the AFA Director stressed: "I have complete independence in audit, not in other areas".<sup>374</sup> Nonetheless, the proposed bill of 21 October 2021 would remove this dual ministerial attachment to place the AFA under the responsibility of the Prime Minister. The choice of a single ministerial attachment, at a more political than technical level, also carries the risk of altering the agency's independence.

412. The AFA's position as a *sui generis* entity does not give it the status of an independent administrative authority. This point has generated and continues to generate debate, starting with the parliamentary debates during the adoption of the Sapin 2 Act, during which some deputies indicated their preference for the status of independent administrative authority.<sup>375</sup> The AFA, unlike an independent administrative authority, does not have budgetary and functional autonomy, which places certain constraints on it, particularly in terms of staff recruitment. During its hearing at the National Assembly on the evaluation of the Sapin 2 Act, in January 2021, Transparency International France stated that "*the independence of the AFA must be strengthened by raising it to the status of an independent administrative authority and by boosting its resources.*"<sup>376</sup>

*iv. Uncertainties about the future of the AFA: change of status and potential merger with the High Authority for Transparency in Public Life*

413. The change in the AFA's status was discussed during the hearings conducted by the Parliamentary fact-finding commission, which the National Assembly's Law Commission appointed, to review the Sapin 2 Act.<sup>377</sup> Already in November 2020, an *ad hoc* committee of the Club des Juristes chaired by former Prime Minister Bernard Cazeneuve considered the need to change the AFA's status to facilitate the performance of its duties and clarify the scope of its recommendations.<sup>378</sup> Some are openly calling for the AFA to merge with the High Authority for Transparency in Public Life (*Haute autorité pour la transparence de la vie publique* – HATVP),<sup>379</sup> whose president has reportedly appointed an honorary judge from the Court of Auditors to work on the issue.<sup>380</sup> France reported having no information on this appointment.

414. Conversely, others are firmly opposed to such a merger, including Michel Sapin, the former Minister of the Economy who authored the Sapin 2 Act, as well as Sébastien Denaja, the former rapporteur for the Act. Both insist on the need to avoid destabilising the agency, which has earned international recognition in just a few years.<sup>381</sup> The Director of the AFA was also opposed to a change of status or a merger with the HATVP, considering, in particular, that there was "no conflict of jurisdiction except to the extent that one would want to create one between two institutions powers and duties of which are precisely

<sup>373</sup> Dufourq P. (10 November 2017), "[Les contrôles de la nouvelle Agence française anticorruption](#)" ["The controls of the new French Anti-Corruption Agency"], *Dalloz Actualité*.

<sup>374</sup> National Assembly Commission of Inquiry charged with examining state decisions on industrial policy, [Record No. 30](#) of the hearing of the Director of the AFA, 22 February 2018.

<sup>375</sup> Transparency International France press release, 2016; *Ibid.*, Club des Juristes, pp.26–27; and Dufourq P. (10 November 2017), "[Les contrôles de la nouvelle Agence française anticorruption](#)" ["The controls of the new French Anti-Corruption Agency"], *Dalloz Actualité*.

<sup>376</sup> Transparency International France, [Quatre ans après l'adoption de la loi Sapin2: quel bilan ? Analyse et recommandations prioritaires de Transparency International France](#) [Four years after the adoption of the Sapin 2 Act, what has been achieved? Analysis and priority recommendations of Transparency International France].

<sup>377</sup> Evaluation of the act on transparency, combating corruption and the modernisation of economic life, [information mission](#).

<sup>378</sup> *Ibid.*, Club des Juristes.

<sup>379</sup> [High Authority for Transparency in Public Life](#).

<sup>380</sup> Januel P. (8 April 2021), "[L'AFA défend son bilan et suggère des évolutions](#)" ["The AFA defends its record and suggests changes"].

<sup>381</sup> *Ibid.*

defined in law and, it seems to me, are different".<sup>382</sup> This idea of a potential merger is also not positively received by the companies directly supervised by the AFA. These companies have indicated, as part of the work carried out by the *ad hoc* Committee of the Club des Juristes,<sup>383</sup> that they co-operate well with the AFA under its current status. In its most recent evaluation report, the Group of States Against Corruption (GRECO) did not recommend the merger of the two agencies or even a change of status for the AFA.<sup>384</sup> The Club des Juristes committee also does not recommend a change of status in the short term on the grounds that "such a merger could weaken the AFA and the HATVP, which have only recently been created".<sup>385</sup>

415. The co-rapporteurs of the parliamentary fact-finding commission for evaluating the impact of the Sapin 2 Act, whom the examiners met during the visit, indicated that, for their part, they were convinced of the benefits of merging the AFA with the HATVP, particularly in terms of independence, since the High Authority is an autonomous agency. They expressed the view that such a merger, if agreed, should not undermine the pillars enshrined in the Sapin 2 Act on strengthening the internal compliance measures adopted by companies in the private sector. Published after the visit, their report<sup>386</sup> indeed proposes to "transfer the AFA's support and oversight missions to the HATVP, in order to create a major authority with jurisdiction in matters of public ethics and preventing corruption, the High Authority for Integrity" (Proposal No. 11).

416. Following the report by the Parliamentary fact-finding commission, the bill introduced on 21 October 2021 by Deputy Gauvain, apparently proposes a partial transfer of the AFA's duties to the HATVP. It is indeed suggested that duties currently allocated to the AFA on advising and overseeing public entities be transferred to the HATVP. However, the AFA would remain responsible for advising and overseeing economic actors (article 1 of the proposed bill). The AFA's other duties would be kept unchanged. The AFA would, however, receive another important mandate insofar as it would also be responsible for assisting the Government in defining France's multi-year national plan regarding the fight against corruption and would be placed under the responsibility of the Prime Minister.

### **Commentary**

***The lead examiners are concerned about the uncertainties surrounding the AFA's future in terms of promoting and monitoring the development of compliance measures by companies subject to the obligations of article 17 of the Sapin 2 Act, particularly in the context of a potential merger with the High Authority for Transparency in Public Life (HATVP). While they note with interest the HATVP's status as an autonomous and therefore independent agency, the lead examiners nevertheless note that, since the HATVP is focused on integrity in the public sector, such a merger raises concerns that the AFA's role in monitoring companies' adoption of compliance measures may be diluted or even disappear. Such a merger would risk adding to the already highlighted difficulties associated with the AFA's many duties, which would merge with the HATVP's numerous pre-existing roles. The lead examiners note that the proposed bill to strengthen the fight against corruption, introduced on 21 October 2021, proposes, in its current text, a partial transfer of the AFA's duties to the HATVP, namely, the transfer of its mandates to advise and audit public entities. They consider that, if this proposal is pursued, it would lead to the refocusing of the AFA's mandate on advising and auditing economic actors (see under section C5.e.i.), provided that the resources***

<sup>382</sup> [Hearing of the Director of the AFA on 1 April as part of the evaluation of the Sapin 2 Act by the National Assembly](#); Acteurs Publics (6 April 2021), "[Le patron de l'Agence anticorruption refuse tout rapprochement avec la HATVP](#)" ["The head of the AFA refuses any closer relationship with the High Authority for Transparency in Public Life"].

<sup>383</sup> Ibid., Club des Juristes, p.10.

<sup>384</sup> GRECO merely notes the difference in the status of the two agencies and the complementarity of their respective remits. GRECO, [5th Evaluation Round of France](#), 2020, paras. 55–56.

<sup>385</sup> Ibid., Club des Juristes, p.30.

<sup>386</sup> [Gauvain-Marleix report](#) Ibid.

*allocated to that mandate remain commensurate to the expectations that prevailed at the creation of the agency.*

*The lead examiners, however, note that by virtue of this same proposed bill, the new mandate allocated in parallel to the AFA to develop governmental policy in the fight against corruption might continue to fuel the sometimes critical perception already mentioned above (section C5.i.), that the mandates may have generated regarding the role and positioning of the agency toward companies.*

*The lead examiners note that the implementation and enforcement of internal controls, ethics and compliance programmes by French companies, as set out in Annex II of the 2009 Recommendation, are an integral part of preventing foreign bribery. They point out that the AFA's creation and its assigned mandate are the cornerstone for encouraging French companies to adopt internal compliance measures. The lead examiners consider that this is a notable development in the French legal framework, which has, among other things, allowed France to regain credibility and visibility in its efforts to combat foreign bribery. Since its inception, the agency has been successful in establishing a dialogue with, and gaining acceptance from, the private sector. The lead examiners consider it important that the Sapin 2 Act's achievements in terms of preventing and detecting foreign bribery are not undermined and recommend that France preserve, including in the context of the reforms currently envisaged, the independence of the AFA, as well as the role, the mandates and – at a minimum – the funding currently allocated to the AFA for developing and monitoring compliance measures by the companies subject to the obligations of article 17b of the Sapin 2 Act.*

## C6. Sanctions Commission the incentive effect of a possible administrative sanction

417. The AFA Sanctions Commission is responsible for sanctioning breaches of the compliance obligation. In order to do so, the Sanctions Commission must first have been informed by the AFA Director of the issues identified during an audit. The AFA Director's opinion on these issues is not binding on the Sanctions Commission, either on whether to impose a sanction or on the amount.<sup>387</sup> Appeals against the decisions of the Sanctions Commission are heard in the first instance by the Paris Administrative Court, which has the discretion to fully re-examine the merits of the case (*recours de pleine juridiction*).<sup>388</sup>

418. Decree No. 2017-329 of 14 March 2017, which provides a framework for the proceedings before the Sanctions Commission, does not specify whether the Commission consider claims with the discretion to fully re-examine the merits or through a more deferential review that would uphold the AFA's findings unless they constituted an abuse of discretion. However, the Sanctions Commission has subsequently established the former approach in the two decisions it has handed down.<sup>389</sup> As a result, the Sanctions Commission assesses the issues itself as they exist at the time of the hearing and not based on the facts found by the AFA at the time of its audit. There is therefore a risk that, if the company has taken corrective measures following the AFA's audit, the issues will no longer be relevant once the matter is referred to, or reviewed by, the Commission. During the visit, the AFA representatives indicated that, unlike the AFA Sanctions Commission, other sanctions commissions, such as that of the AMF, decide on the facts at the time the issues are reported. Accordingly, the AMF Sanctions Commission takes the measures

<sup>387</sup> AFA (April 2019), [Les sanctions prononcées par la Commission des sanctions de l'Agence française anticorruption et leur suivi \[The sanctions imposed by the AFA's Sanctions Committee and their follow-up\]](#).

<sup>388</sup> This type of dispute allows the administrative judge, for example, to set aside or confirm the validity of an administrative act but also to modify it or even replace it with a new one. The judge may also order the administration to pay damages.

<sup>389</sup> Sanctions Committee, Decision No. 19-01 Société Sonepar SAS and Ms. C of 4 July 2019 and Decision No. 19-02 Société I. and M.C.K. of 7 February 2020.

implemented by companies after the issues have been reported into account only as a possible mitigating factor on the level of the sanction and not in assessing the nature of the breaches referred to it (article L. 621-15 III ter of the Monetary and Financial Code).<sup>390</sup> France has stated that this is also the approach adopted by the restricted panel of the French Data Protection Authority (CNIL) (article 47 of the Act of 6 January 1978)<sup>391</sup> as well as the Sanctions Commission of the ACPR<sup>392</sup> and that of the former Online Gambling Regulatory Authority (ARJEL), whether or not they have a text requiring them to rule in this way. The advantage of judging the facts at the time of the hearing, and not at the time of their discovery by the AFA, is thus a strong incentive for companies to comply with the findings of the AFA's audits. However, as the members of the Commission and the members of the AFA's Audit Sub-Directorate admitted during the visit, it is therefore unlikely that the AFA's Sanctions Commission will impose a sanction, given the time between the referral to the Commission and the judgment hearing. According to the media, the inspection report, which was commissioned and produced by the IGF and IGJ, to evaluate the implementation of the Sapin 2 Act and the AFA indicates that the AFA Director allegedly also maintained that assessing the issues as they exist at the time of the hearing and rather than at the time of the audit "might weaken [the] position [of the AFA]."<sup>393</sup>

419. The aforementioned proposed bill, introduced on 21 October 2021, does not include any change regarding the jurisdictional scope of the AFA's Sanctions Commission. Nonetheless, it proposes to also give the AFA Director the power to impose administrative order to implement a compliance programme, which was originally the prerogatives of the AFA Sanctions Commission. The AFA Director would impose such an order through a new formal notice procedure. It is foreseen that this procedure would take place before the Sanctions Commission is seized. The entities subject to the AFA's audit would then have between six months and two years to take appropriate measures to comply with the notice and the decision could be made public. The Sanctions Commission could still be seized directly, in case of serious breach. Moreover, the debates in front of the Sanctions Commission would no longer be public, unless decided otherwise by the Commission (article 5 of the proposed draft law).

420. In practice, only two decisions have been issued by the Sanctions Commission. The AFA Director did not appeal these decisions and has not referred another case to the Sanctions Commission since then. None of these decisions resulted in the imposition of monetary penalties.<sup>394</sup> In Decision No. 19-02 Société I and M.C.K. of 7 February 2020,<sup>395</sup> the Sanctions Commission nevertheless ordered the legal person to take certain compliance measures relating to the code of conduct and accounting procedures, and to submit proof of full compliance by September 2020 for the former and 31 March 2021 for the latter.<sup>396</sup> The Sanctions Commission has since examined the measures taken by the legal person and found that the compliance order relating to the code of conduct has been executed. The Commission will have to rule on the implementation of the second order at a later date.<sup>397</sup>

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<sup>390</sup> See Decision SAN-2013-07 of the AMF Sanctions Committee of 13 March 2013.

<sup>391</sup> See Decision SAN 2018-002 of the CNIL's restricted panel of 7 May 2018.

<sup>392</sup> See Decision 2016-07 of the ACPR Sanctions Committee of 19 July 2017.

<sup>393</sup> Médiapart, (2 November 2021), «Un rapport d'inspection charge l'Agence française anticorruption».

<sup>394</sup> Sanctions Committee, [Decision No. 19-01](#) Société Sonepar SAS and Ms. C of 4 July 2019 and [Decision No. 19-02](#) Société I. and M.C.K. of 7 February 2020.

<sup>395</sup> Sanctions Committee, [Decision No. 19-02](#), cited above.

<sup>396</sup> *Le Monde du Droit* (26 February 2020), "[AFA: deux injonctions mais toujours aucune sanction, la Commission des sanctions a rendu sa deuxième décision](#)" ["AFA: two orders but still no sanction – the Sanctions Committee has handed down its second ruling"]; Global Investigations Review (20 February 2020), "[Second French company avoids AFA penalty over compliance failures](#)".

<sup>397</sup> AFA Sanctions Committee, [Decision No. 19-02](#), Société I.SA, 7 July 2021.

421. While the lack of financial penalties imposed to date may have been viewed negatively by some,<sup>398</sup> others have a more nuanced assessment of the significance of these decisions.<sup>399</sup> The private-sector representatives whom the examiners met during the visit nevertheless considered that these decisions had a positive effect in that they prompted companies to take the necessary corrective measures to strengthen their internal compliance arrangements under the AFA's guidance and pressure in order to avoid a referral to the Sanctions Commission. As a result, the risk of companies being referred to the Sanctions Commission is becoming increasingly remote, as is the possibility of an administrative penalty being imposed for non-compliance.

### **Commentary**

*The lead examiners note that the nature of the review carried out by the Sanctions Commission, which leads it to rule on the underlying facts of the issues referred to it at the time of the hearing and not at the time the issues are identified by the AFA during its audit. This makes it unlikely, in practice, that penalties will be imposed for non-compliance under article 17 of the Sapin 2 Act. While the prospect of a referral to the Sanctions Commission and the potential compliance costs associated with it seem, for the moment, sufficient to encourage companies to comply at the point of the audits being carried out, the lead examiners question whether these effects will persist in the long term. They note that the proposed Bill to Strengthen the Fight Against Corruption introduced on 21 October 2021, suggests to replace the injunction power that is currently the prerogative of the AFA Sanctions Commission by a new procedure to impose administrative orders to implement a compliance programme by the AFA Director. However, as the proposed bill is not capable of clarifying the jurisdictional nature of litigation before the AFA Sanctions Commission, it appears unable to resolve the paradoxical situation in which the Sanction Commission has limited its ability to impose sanctions in practice.*

*The lead examiners therefore recommend that France consider re-examining the legal framework within which the Sanctions Commission makes its decisions in order to align its approach and its sanctioning power with that of other existing sanctions commissions in France, which decide on the issues submitted to them as established by the administrative authority referring the matters.*

## **C7. Mobilising the private sector**

422. In Phase 3, the Working Group recommended that France continue its efforts to raise awareness among companies of the need to set up compliance programmes, with particular emphasis on including foreign subsidiaries in these programmes and on SMEs involved in international trade (recommendation 8.b.).

### **a. Measures taken by the authorities**

423. France, led by the AFA, has implemented various measures to promote companies' adoption of anti-bribery compliance programmes. This objective is a key part of the AFA's Multi-Year Anti-Corruption Plan.<sup>400</sup> The AFA's Support Charter for Businesses<sup>401</sup> describes the types of assistance offered by the agency to help set up bribery prevention and detection systems. In general, the AFA Recommendations provide detailed guidelines in this area (Section C5.b). The development of these guidelines in 2017 and their revision in 2021 involved public consultations, including with the private sector. More specifically, the AFA co-organised 50 technical workshops on the French anti-bribery framework with general and sector-

<sup>398</sup> Ibid. *Le Monde du Droit*.

<sup>399</sup> The FCPA Blog (29 August 2019), [French enforcement: No sanctions in landmark Sapin 2 Act action](#).

<sup>400</sup> [Plan pluriannuel de lutte contre la corruption 2020-2022](#) [Multi-Year Anti-Corruption Plan 2020–2022].

<sup>401</sup> AFA (September 2018), [Charte d'appui aux acteurs économiques de l'AFA](#) [AFA Support Charter for Businesses].



specific business federations. The AFA has also worked with these federations to produce themed factsheets and other materials to raise awareness of the challenges of combating bribery and the practicalities of preventing and detecting such misconduct. Finally, at the individual level, the AFA assists companies, including SMEs, in developing anti-bribery compliance measures. Since 2018, 21 businesses, of different sizes and from different sectors, have benefited from this support. The AFA has also responded to 150 requests for legal assistance in this area over the same period. During the visit, business representatives and professional federations praised the AFA's proactive role in advising companies, as well as the quality of the dialogue and the educational tools developed by the agency.

424. As regards the inclusion of foreign subsidiaries in compliance programmes, the AFA has clarified the concept of "group" in a factsheet on the scope of the checks provided for under article 17 of the Sapin 2 Act. In addition, the AFA Recommendations state that companies with control over other entities are encouraged to ensure the quality of anti-bribery measures taken in all areas under their control. France has emphasised that the AFA systematically reminds groups of this when carrying out its checks and providing advice.

425. With regard to mobilising SMEs, the French authorities have also stressed that the AFA systematically reminds them of the criminal, economic and reputational benefits of setting up anti-bribery programmes. The AFA has also held meetings with professional federations, set up local sessions, published a flyer for SMEs and intermediate-sized enterprises on the challenges of combating bribery as well as articles on the subject, and is working on a practical guide on preventing bribery aimed at SMEs and intermediate-sized enterprises. In their responses after the visit, the French authorities indicated that the practical guide, co-written with specialised trade federations, is due to be submitted for public consultation in the fourth quarter, with a view to publication before the end of 2021. The AFA plans to offer a presentation of the guide to professional federations during workshops with companies. The *Groupement des industries françaises aéronautiques et spatiales* (French Aerospace Industries Association) has accepted this proposal from the AFA.

426. Other awareness-raising initiatives have been carried out by the General Directorate of the Treasury, which has developed an operational information sheet summarising French anti-bribery rules. This is distributed to companies developing international projects. The General Directorate of the Treasury has also conducted awareness-raising activities on bribery for French companies operating abroad (including a white paper on detecting and preventing bribery for companies, interviews with the heads and managers of French companies operating locally, etc.), through the economic departments of embassies (e.g. in Nairobi, Abidjan, Washington and Mexico). The General Directorate of the Treasury and the Business France agency note on their websites for companies operating abroad "their adherence to the principles of the OECD Convention on Combating Bribery of Foreign Public Officials".

### **b. Awareness-raising by trade organisations**

427. As mentioned above, the professional federations co-operate closely with the AFA. With regard to independent private-sector initiatives, the National Committee of the International Chamber of Commerce reports that it is working on an update of RESIST, a compilation of practical advice based on real-life business situations. In their responses after the visit, the French authorities indicated that the final document expected by the end of 2021 would be disseminated to a wide audience.

### **c. Situation in companies, including SMEs**

428. Despite the efforts undertaken, France has emphasised the unevenness of companies' responses to the challenges of combating bribery and the enforcement of anti-bribery measures. The assessment of

anti-bribery measures in companies carried out by the AFA in 2020<sup>402</sup> concluded that intermediate-sized enterprises and SMEs have little knowledge of anti-bribery issues and rules, and that they have difficulty adapting them to their constraints, particularly in terms of budget and staff. Accordingly, the study shows that only half of SMEs had implemented a compliance programme, compared with 92% of companies subject to article 17 of the Sapin 2 Act. A survey of 1 500 companies of different sizes conducted by the French Association of Corporate Lawyers (AFJE) in 2020 concluded that only one third of them had a compliance programme that met the criteria of the Sapin 2 Act, but that a compliance process was under way in around 87% of companies.<sup>403</sup>

429. The information gathered during the visit confirms the uneven level of development of compliance and knowledge of the Sapin 2 Act provisions within French companies. Large companies demonstrated a high level of ownership of standards in this area, for which legislation in other major countries had prepared them. They stressed their role in disseminating these standards within intermediate-sized enterprises and SMEs through the use of charters or other mechanisms imposing these principles on their subcontractors or other business partners. However, the representative of a professional federation for intermediate-sized enterprises and SMEs specialising in innovation and defence, one of whose objectives is to promote partnerships with large exporters, indicated that, despite these practices, his members, who were surveyed just before the visit, were not aware of either the Sapin 2 Act or the AFA.

### **Commentary**

***The lead examiners commend France's efforts, and in particular those of the AFA, in promoting the development of compliance programmes in French companies, especially those operating abroad. While these measures have focused primarily on clarifying the role of foreign subsidiaries in compliance programmes, recommendation 8.b has only been partially implemented, since, more than ten years after this recommendation was made, intermediate-sized enterprises and SMEs, including those operating in sectors with a high risk of bribery, are still insufficiently aware of the challenges and requirements of combating the problem, particularly in the area of foreign bribery.***

***The lead examiners recommend that France step up its efforts with intermediate-sized enterprises and SMEs involved in international trade to promote the adoption and implementation of compliance programmes that are appropriate and proportionate to the specific circumstances of each group, paying particular attention to those operating in regions and sectors at high risk of bribery.***

## **D. OTHER ISSUES**

### **D1. Money laundering**

430. The offence of money laundering, defined in article 324-1 CC, has not changed since Phase 3. Like all crimes, foreign bribery is one of the predicate offences for money laundering. Individuals are liable to five years' imprisonment and a fine of EUR 375 000 for money laundering, or ten years' imprisonment and a fine of EUR 750 000 for aggravated money laundering (article 324-2 CC). All the additional sanctions set out in article 131-39 CC (except for the PPMC) are applicable to legal persons in relation to money laundering (article 324-9 CC).

<sup>402</sup> AFA, 2020, [Diagnostic national sur les dispositifs anticorruption dans les entreprises](#) [National assessment of anti-bribery measures in companies].

<sup>403</sup> AFJE and ethicorp.org (2020), [Compliance & anticorruption : où en sont vraiment les entreprises en France ?](#) [Compliance & anti-bribery: where do companies in France really stand?], p.47.

431. Like the foreign bribery offence, money laundering predicated on foreign bribery is normally handled by the PNF, with support from the OCLCIFI.<sup>404</sup> The remainder of these cases continue to be handled by the authorities responsible for such cases before the PNF and OCLCIFI were created. The European Public Prosecutor's Office has jurisdiction over cases involving money laundering predicated on foreign bribery when the financial interests of the EU are involved. The investigative tools and techniques available in foreign bribery cases are also available in related money laundering cases. The CJIP is available for money laundering predicated on foreign bribery or trading in influence concerning foreign public officials since December 2020.<sup>405</sup> Previously, the CJIP was only available for money laundering offences predicated on tax evasion.

432. In its questionnaire responses, France stressed that the prosecution of money laundering predicated on bribery is one of its criminal policy priorities, as evidenced in particular by the 11 December 2020 dispatch on money laundering issued by the Directorate of Criminal Affairs and Pardons, which invite public prosecutors to pay particular attention to such acts and to strengthen seizure and confiscation actions in this area.<sup>406</sup> France has stated that it is particularly attentive to the risks that the proceeds of offences committed abroad might be laundered, on French territory, in particular because of the attractiveness of its luxury property market. This last point, together with the focus on seizing illicit funds and participants' views during the visit, nevertheless suggests that the authorities are more focused on combating the laundering of the proceeds of passive rather than active bribery.

433. The Belloubet circular also emphasises the value of using "peripheral" offences, including money laundering, as a means of sanctioning foreign bribery offences. The circular notes, in particular, the advantages offered by the money laundering offence in terms of evidence, in particular because of the presumption of illegality of assets established by article 324-1-1 CC for the money laundering offence may also circumvent the difficulties involved in obtaining mutual legal assistance to prove the foreign bribery offence, since the former does not necessarily require establishing all the elements of the underlying offence.

434. During the visit, prosecutors confirmed that they follow both of the strategic approaches mentioned above. A PNF representative stressed that money laundering predicated on foreign bribery is investigated in its own right, as a primary offence in the same way as foreign bribery, rather than as an alternative to investigating foreign bribery. Prosecutors also widely acknowledged the value of the money laundering offence for sanctioning wrongdoing, when the foreign bribery offence itself is difficult to prove, particularly thanks to the above-mentioned presumption of illegality.

435. After the visit, France indicated in its responses to follow-up questions that 13 cases, "for which foreign bribery is not a standalone offence in the proceedings apart from associated money laundering", have been opened since Phase 3. None of these cases involve the laundering by a French company of the proceeds derived from foreign bribery. To date, only one of these cases has resulted in final convictions for money laundering predicated on foreign bribery (three legal persons in a plea bargain approved on 26 June 2019 in the *Telecommunications Uzbekistan case No. 23*). One case resulted in an acquittal for money laundering predicated on foreign bribery but it remains under appeal. One case was referred to the criminal court. The PNF has ten cases involving money laundering predicated on foreign bribery under way, six of which are at the preliminary investigation stage and four at the judicial investigation stage. The investigative measures in half of these cases are being carried out by the Central Office for Fighting Major Financial Crime (*Office central pour la répression de la grande délinquance financière – OCRGDF*). The OCLCIFI and the investigations section of the Paris Gendarmerie are handling the investigative measures

<sup>404</sup> Decree No. 2013-960 of 25 October 2013 creating a central office for combating bribery and financial and tax offences.

<sup>405</sup> [Act No. 2020-1672](#) of 24 December 2020 on the European Public Prosecutor's Office.

<sup>406</sup> Directorate of Criminal Affairs and Pardons, Ministry of Justice, Criminal policy dispatch on combating money laundering no. 2020/F/0055/FB3, 11 December 2020.

for two cases each, while the Economic Crime Brigade (BRDE) is handling one case. CJIP have not been concluded in cases involving money laundering predicated on foreign bribery.

436. A large majority of the 13 cases mentioned above concern the laundering of bribes, including passive bribery, i.e. the laundering of a bribe in France by a foreign public official. Technically, some of these cases would be likely to fall under the scope of the Convention, which covers the laundering of bribes as an instrument of active bribery. Nevertheless, the fact that the authorities characterise them as cases of "money laundering predicated on foreign bribery" appears to illustrate a certain conceptual difficulty, as noted in Phase 3 (and also attributed to TRACFIN in Section A6), precluding consideration of the offence these as also covering the laundering of the proceeds of active bribery. During the visit, a PNF prosecutor expressed doubts as to whether it was even possible to apply the characterisation of money laundering to "lawful" profits. This is also the position of TRACFIN, which considers that if the income from the performance of a contract obtained through bribery constitutes, in part, the proceeds of foreign bribery, this income is neither hidden, nor concealed, nor converted. This income cannot therefore be characterised as money laundering predicated on foreign bribery. As explained in Section A6, this approach reveals an unduly narrow interpretation by the French authorities of the offence of money laundering predicated on foreign bribery.

### **Commentary**

***The lead examiners note France's active enforcement of the money laundering offence predicated on bribery, which has resulted both in final convictions and ongoing proceedings. They note, however, that, like TRACFIN, the prosecutorial authorities seem to consider this offence as primarily focusing on the laundering of a bribe in France by a foreign public official, with persistent doubts remaining on France's approach to prosecuting the laundering of the proceeds of active bribery as money laundering. The lead examiners thus recommend that France ensure that both the laundering of the instrumentalities of bribery and the proceeds obtained from the offence can be prosecuted as money laundering predicated on foreign bribery.***

## **D2. Accounting standards**

### **a. Forgery of private business and banking documents**

437. As in Phase 3, France criminalises the acts mentioned in Article 8 of the Convention mainly as forgery of private documents and using forged documents under article 441-1 CC. This offence is punishable by three years' imprisonment and a fine of EUR 45 000 for individuals and of EUR 225 000 for legal persons, which can also be liable to all the additional penalties provided for in article 131-39 CC.

438. Since Phase 3, 14 of the initiated or already ongoing foreign bribery cases have included an element of forgery and use of forged documents. Three of these resulted in convictions for this offence. The precise links between forgery, use of forged documents and foreign bribery are not always explicitly made by the authorities in these 14 cases.<sup>407</sup>

439. The Belloubet circular recently provided prosecuting authorities with strategic guidance on the use of the offence of forgery and use of forged documents in foreign bribery cases. The circular invites public prosecutors to investigate certain peripheral offences, including the forgery of private documents and the presentation or publication of false or misleading annual accounts, especially when the constituting elements of the foreign bribery offence are difficult to prove. In the absence of precise information on the reasons and objectives for prosecutors' use of forgery and use of forged documents in foreign bribery cases, it is difficult to know whether this approach is already followed in practice. However, a PNF

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<sup>407</sup> The link is only clearly established in *Equipment (Central Africa) case No. 85*.

representative noted during the visit that forgery and use of forged documents were "unprofitable" offences, insofar as they are difficult to prove, since they require lengthy and costly technical expertise, and carry limited penalties. The value of this offence as an alternative to foreign bribery in prosecution strategies therefore remains to be demonstrated.

440. In its questionnaires responses, France also indicated that the offences of forgery and use of forged documents may not be sought where it would entail a longer investigation without any real contribution to the effectiveness of the penalty or where it constitutes one of the substantive elements in establishing the foreign bribery offence.

**b. Accounting standards and controls introduced by the Sapin 2 Act**

441. The compliance programmes that companies must implement under article 17 of the Sapin 2 Act must include, among other things, "auditing procedures, whether internal or external, designed to ensure that books, records and accounts are not used to conceal bribery or trading in influence", as also provided for in Article 8 of the Convention. Such audits must be carried out either by the company's auditing and financial control departments or by statutory auditors. France has stated that the anti-bribery audits defined in article 17 of the Sapin 2 Act do not interfere with general French accounting and auditing standards; on the contrary, they are intended to align with them. The AFA's Recommendations of 12 January 2021 specified what these anti-bribery audits cover, in accordance with the risk profile of the entity, and their articulation with existing auditing mechanisms (paragraphs 295 to 299). The Recommendations specify, in particular, the fact that: (1) these anti-bribery audits ultimately guarantee compliance with the same principles as general audits (regularity, fairness and accuracy of accounting and financial transactions); (2) are aimed, in particular, at detecting baseless or unjustified transactions (e.g. payments which are wholly or partly unjustified and which are intended to feed "slush funds"); and (3) are based on the same methods as general audits (with, for example, checks based on sampling, checks on consistency, comparison with the physical reality (inventory) or confirmation by a third party). These audits are conducted based on the bribery risks that were identified in the bribery risk mapping, in the context of prior regular audits, and either enhance or supplement those audits. After the visit, France also indicated that a practical guide on anti-bribery auditing is being prepared by a working group led by the AFA together with the H3C, the professional bodies representing the accountancy professions (the *Compagnie Nationale des Commissaires aux Comptes* (CNCC) for statutory auditors and the *Ordre des Experts-Comptables* (OEC) for chartered accountants), and two business professional associations working in auditing, internal control and management control (the French Institute of Auditors and Internal Controllers (IFACI) and the National Association of Finance Directors and Management Controllers (DFCG)).

442. During the visit, AFA and business representatives noted that this audit component of the compliance programme obligation is the most difficult to implement. One of the reasons for this seems to be the difficulty of getting compliance and accounting departments to co-operate within the company, as they are not necessarily accustomed to doing so. The AFA's *ad hoc* compliance audits confirm that the audited entities have not yet adopted these measures. As of 31 December 2020, the AFA *ad hoc* compliance audits completed since January 2019 have highlighted a delay in the deployment of measures relating to company audits, with 38% of AFA audits having resulted in finding the entity non-compliant on this component purely on the basis that such measures did not exist. Nevertheless, the AFA notes that the recommendations made in this area are almost always followed, which is an encouraging sign.

**Commentary**

***The lead examiners note with interest that companies' compliance obligations under article 17 of the Sapin 2 Act include auditing procedures, whose relationship with general national accounting and auditing standards has been clarified in the AFA's 2021 Recommendations and are expected to be the subject of a practical guide on anti-bribery auditing, which is under development. In view of the difficulties in encouraging companies to take ownership of the new provisions in practice,***

***the lead examiners recommend that the Working Group monitor the progress of the companies' implementation of the accounting provisions set out in article 17 of the Sapin 2 Act, implementing Article 8 of the Convention, through the records produced by the AFA and other specialised bodies.***

### D3. Tax measures

443. In Phase 3, the Working Group recommended that France urge French Polynesia and St. Pierre and Miquelon, which enjoy autonomy in tax regulation, to adopt provisions on the non-deductibility of bribes to foreign public officials (recommendation 9.a). The principle of non-deductibility of bribes for tax purposes (article 39 2 bis of the General Tax Code – GTC) is now applicable throughout France. On 8 October 2019, the Territorial Council of St Pierre and Miquelon approved the introduction of a provision to this effect in its Local Tax Code. On 17 June 2021, the Assembly of French Polynesia adopted an act on measures to strengthen the requirement on exemplary fiscal practices, which also contains such a provision.<sup>408</sup>

444. In practice, France has not been able to provide data on the enforcement of the non-deductibility of bribes paid to foreign public officials in overseas territories. In mainland France, 20 tax adjustments have been made on this basis since 2013, mainly against medium-sized companies for a total amount of EUR 10.34 million. The source of detection of the false statements in these transactions (the tax administration itself or a report from a judicial authority) is not known.

445. The limited role played by the Directorate of National and International Audits, the department responsible for auditing large business, in enforcing the principle of non-deductibility of bribes raises questions. During the visit, a representative of the directorate indicated that in practice, it was more difficult to enforce the principle of non-deductibility of bribes in the context of audits of large companies, due to the complexity of existing bribery schemes.

446. In theory, the application of the non-deductibility of bribes does not require a conviction for foreign bribery and the judicial authority is obliged to disclose to the tax authorities "any indication that it is collecting, in the course of any judicial proceedings, which may lead to the presumption of tax evasion" (article L. 101 of the Manual of Tax Procedures). In practice, however, the evidentiary requirements for establishing the merit of tax adjustments, at least before the company is convicted of foreign bribery, appear to be high, as demonstrated, for example, in *Alcatel (Costa Rica) case No. 7*.<sup>409</sup> Moreover, during the visit, a representative of the Directorate of National and International Audits pointed out that, in practice, judicial authorities, do not systematically disclose information under article L. 101 mentioned above, with the exception of the PNF, with which good co-operation has been established. However, the circular of 7 March 2019 from the Minister for the Budget and the Minister of Justice<sup>410</sup> reminds that disclosure must be systematic. In practice, it appears that some prosecutors may be reluctant to release information about their investigations for fear of compromising them.

447. Moreover, waiting for a foreign bribery conviction does not guarantee that the difficulties relating to access to information and the standard of proof can be circumvented in order to apply article 39 2 bis GTC. Indeed, as a representative of the Directorate of National and International Audits pointed out during the visit, the maximum period under the statute of limitations in tax matters is ten years from the

<sup>408</sup> [Act No. 2021-29](#) of 21 June 2021 on measures to strengthen the requirement for exemplary fiscal practices.

<sup>409</sup> In this case, as noted by the Council of State (Judgment No. 364708 of 4 February 2015), these elements included an affidavit by an FBI agent in the context of legal proceedings in the United States against a former company executive, a "guilty plea" agreement by that same executive, the results of the company's internal investigation, the initiation of criminal proceedings against the company by foreign authorities, and the company's failure to substantiate the effectiveness of the services obtained in exchange for the commissions at issue.

<sup>410</sup> [Circular](#) from the Minister for the Budget and the Minister of Justice of 7 March 2019 on the reform of the criminal prosecution procedure for tax evasion and the strengthening of co-operation between the tax administration and the justice system in combating tax evasion.

date of the disputed tax return. Given the time required to obtain a conviction for foreign bribery in France, it is then too late to review the convicted person's tax returns in order to apply the non-deductibility of bribes.

448. As already noted in Phase 3, if the tax authorities are unable to demonstrate that a foreign official is the ultimate beneficiary of the bribe, they may nevertheless question the deductibility of the commission paid on the basis of the general criteria for deducting expenses (article 39 1 GTC) or if the intermediary is located in a country with a special tax status (article 238 A GTC). In 2017–2019, 394 adjustments were made based on the first provision and 77 on the second.

### **Commentary**

***The lead examiners welcome the adoption of provisions prohibiting the tax deductibility of bribes to foreign officials in St Pierre and Miquelon and French Polynesia, thus implementing Phase 3 recommendation 9.a. The lead examiners regret the lack of information on the enforcement of this measure in overseas territories.***

***More generally, as far as the whole French territory is concerned, they note that tax adjustments are regularly made on the basis of article 39 2 bis of the General Tax Code, but do not seem to primarily concern large companies. Similarly, they note that the disclosure of information by the judicial authority to the tax authorities, under article L. 101, is not systematic and is mostly done by the PNF.***

***The lead examiners therefore recommend that France (i) collect information on the enforcement, in overseas territories, of the non-deductibility of bribes paid to foreign public officials; (ii) take measures, throughout the French territory, to ensure that the judicial authority systematically discloses to the tax authorities information necessary for the latter to ascertain that bribes have not been improperly deducted in accordance with article L. 101 of the Manual of Tax Procedures and as reminded in the circular of 7 March 2019; and (iii) re-examine, also throughout the entire country, the adequacy of the limitation period for re-assessing tax returns for the purposes of the effective application of article 39 2 bis of the General Tax Code.***

## **D4. Development aid**

449. This Phase 4 evaluation is the first evaluation of France's ODA system in light of the 2016 Recommendation for Development Co-operation Actors on Managing Risks of Corruption,<sup>411</sup> and in particular Sections 6-8 and 10, which relate most directly to foreign bribery. (The specific detection aspects of this Recommendation are dealt with in Section A7.)

### **a. Volume and distribution of French ODA**

450. In 2020, among the 30 member countries of the Development Assistance Committee (DAC), France was the fifth largest contributor in terms of ODA volume and eighth in terms of percentage of gross national income (GNI) allocated to ODA, with a contribution of USD 14.1 billion in 2020 (representing 0.53% of its GNI).<sup>412</sup> France's ODA is scheduled to reach 0.70% of its GNI in 2025 following the adoption of the Act on Development Solidarity and Combating Global Inequalities of 4 August 2021.<sup>413</sup> In 2019 (according to DAC's most recent data of France), 41.3% of French ODA was directed to Africa and 16.5%

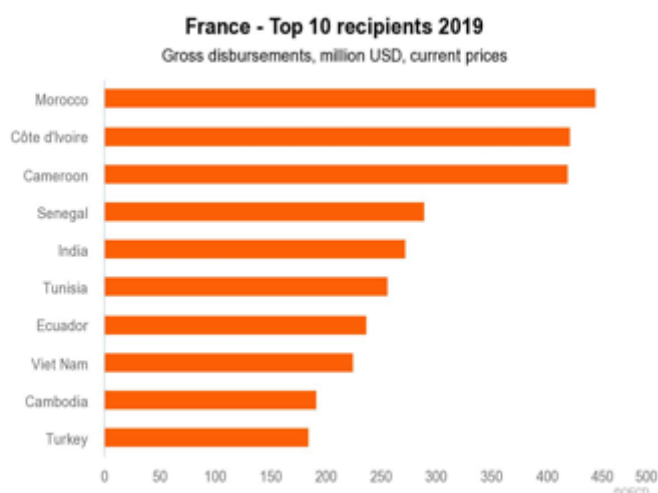
<sup>411</sup> OECD (2016), [Recommendation of the Council for Development Co-operation Actors on Managing Risks of Corruption](#).

<sup>412</sup> OECD (2021), [Development Co-operation Profiles](#).

<sup>413</sup> [Act No. 2021-1031](#) of 4 August 2021 on Development Solidarity and Combating Global Inequalities.

to Asia.<sup>414</sup> In 2019, the top five recipients of France's bilateral ODA were Morocco, Côte d'Ivoire, Cameroon, Senegal and India. In 2019, the infrastructure and social services sector was the largest recipient of France's bilateral ODA (38.2% or USD 5.3 billion).

**Figure 4. France – Top ten recipients in 2019, gross payment in USD million (current prices)**



Source: OECD (2021), Development Co-operation Profiles

### **b. Strengthening the AFD's anti-bribery framework**

451. In 2020, the AFD Group revised its general policy on preventing and combating prohibited practices.<sup>415</sup> This policy applies to the AFD and all of the Group's organisations, employees and stakeholders. It sets out the procedures and mechanisms available to the AFD Group to prevent and combat prohibited practices, including bribery, which may affect its activities or operations. The AFD's policy sets out the mechanisms for reporting prohibited practices, the measures to prevent and deter any prohibited practices during the various stages of a project, and the penalties for non-compliance with the AFD's policies and procedures.<sup>416</sup> In the same year, the AFD Group also adopted guidelines on the conduct of investigations by the AFD Group Compliance Department's investigation function for reports of prohibited practices.<sup>417</sup>

452. In 2018, the AFD Group adopted an anti-corruption code of conduct clarifying expected or prohibited behaviours for its employees, particularly in terms of preventing and combating bribery and trading in influence, including foreign bribery.<sup>418</sup> It is also applicable to the Board of Directors of the AFD Group's social entities. The code sets forth the obligations and mechanisms for reporting prohibited practices and also specifically addresses the offence of foreign bribery. During the visit, the AFD Group confirmed that this code was sent to all its employees.

<sup>414</sup> OECD (2021), [Development Co-operation Profiles](#).

<sup>415</sup> AFD (2020), [AFD Group's Policy to Prevent and Combat Prohibited Practices](#).

<sup>416</sup> Ibid.

<sup>417</sup> AFD (2020), *Principes Directeurs applicables à la conduite des investigations menées par la Fonction Investigation du Département de la Conformité du groupe AFD* [Guidelines for the Conduct of Investigations by the Investigation Function of the AFD Group's Compliance Department into Alleged Prohibited Practices]

<sup>418</sup> AFD (2018), AFD Group Anti-Corruption Code of Conduct.



### **c. Statement of integrity and exclusion from contracts**

453. The AFD's guidelines for the award of contracts financed by the agency in foreign countries<sup>419</sup> stipulate that bidders for contracts financed by the AFD are required to submit a statement of integrity to the agency, stating, in particular, that they have not been convicted of bribery offences and that they have not been placed on the United Nations, EU or French financial sanctions lists in the last five years. Failure to submit and false declarations are punishable (articles 1.4 and 1.6.5 of the guidelines).

454. During the visit, AFD Group representatives indicated that only final convictions are taken into account when awarding contracts. Decisions by first instance courts and CJIPs are therefore not considered. Furthermore, exclusion from AFD-financed contracts is not automatic in the event of a final conviction for bribery, except if this conviction results from a bribery offence committed in the context of a contract financed by the AFD Group, or in the event of being listed for financial sanctions by the United Nations, the European Union, and/or France. Similarly, for example, debarments by the World Bank, do not result in automatic exclusion from contracts financed by the AFD Group. The bidder remains eligible, provided that it has a compliance programme in place that is deemed "robust". During the visit, the AFD Group also indicated that the Compliance Department has developed an evaluation grid to ensure that the components of the compliance programme are taken into account consistently, based on the provisions of the Sapin 2 Act but also those of the UK's Bribery Act and the US's Foreign Corrupt Practices Act.

### **d. Preventive contractual measures**

455. During the visit, the AFD Group indicated that all financing agreements signed with counterparties must include clauses (i) requiring the above-mentioned statement of integrity from bidders, (ii) providing for a ban on engaging in prohibited practices including bribery and foreign bribery, in projects, operations and activities financed by the AFD Group, and (iii) allowing the AFD Group to carry out audits (including unannounced audits) in the event of allegations of prohibited practices. Furthermore, counterparties are contractually obliged to inform the AFD Group in the event such acts occur during the project and to take remedial action to the Group's satisfaction. Bidders must also provide the counterpart with any information that could change the accuracy of the information initially reported to the AFD Group, including in relation to the statement of integrity.<sup>420</sup> During the visit, AFD Group representatives indicated that bidders are obliged to inform the counterpart of any final convictions for corruption to which they are subject. Neither ongoing bribery prosecutions nor CJIPs are covered by this disclosure obligation.

456. During the visit, the AFD Group indicated that bidders had to certify that their suppliers, consultants and subcontractors assigned to a project were not subject to any of the exclusion criteria contained in the statement of integrity, but that in the absence of any means of verification, this obligation was essentially declarative.

### **e. Sanctions regime**

457. As in Phase 3, the AFD Group may impose a range of sanctions in the event of non-compliance with contractual obligations. During the visit, AFD Group representatives also indicated that these sanctions can even be imposed based on allegations of bribery. Accordingly, the sanctions mechanism is activated if a contractor is guilty or suspected of bribery, either directly or through an agent, or if the AFD Group concludes that a contractor has provided incomplete, inaccurate or misleading information, or that the terms and conditions of the contract have been modified without the AFD Group's approval. The AFD Group may conduct audits, demand the return of funds or the early repayment of a loan, terminate or suspend a contract, initiate legal proceedings or report the operator to the competent authorities, and may

<sup>419</sup> AFD (2019), [Procurement Guidelines for AFD-Financed Contracts in Foreign Countries](#), p.13.

<sup>420</sup> AFD (2019), [Procurement Guidelines for AFD-Financed Contracts in Foreign Countries](#), article 1.6.2(j).

refuse to issue a no-objection notice for the award of a contract. The AFD Group reimburses funds, refuses to provide funding or cancels a call for tenders in about four or five cases each year, in response to suspicions or substantiated facts (all prohibited practices included). None of these measures were implemented as a result of reports of potential foreign bribery during the period 2015–2021 due to the Investigation Function's inability to substantiate the foreign bribery allegations, unlike other irregularities, which, for their part, were sanctioned.

### **Commentary**

***The lead examiners welcome the efforts undertaken by the AFD Group through its various anti-corruption measures, in particular the revision of its prevention policy and the adoption of a code of conduct applicable to its staff. However, they recommend that France revise the AFD Group's Guidelines for Procurement in Foreign Countries to ensure that, as in the case of final convictions or, for example, debarments pronounced by the World Bank, the conclusion of a CJIP or any other non-trial resolution for foreign bribery in France or abroad can lead to a review of the operator's eligibility to participate in current or future contracts financed by the Group or its agencies, in particular taking into account the robustness of the compliance programme implemented by the bidder.***

## **D5. Export credits**

458. Since Phase 3, Bpifrance Assurance Export (BPIFrance) has strengthened its anti-bribery assessment measures for applicants. Systematic checks, appropriate to the type of guarantee and the underlying risks, have been put in place for the various stakeholders, including agents and other intermediaries. As part of a screening process, these verification measures are based on declarations by exporters and applicants as well as specialised external data sources. The exclusion lists of development banks are also systematically checked. In terms of the declarations that exporters must make, since April 2021 they have also been required to indicate whether they, or an individual or legal person acting on their behalf in relation to the transaction, are the subject of an official investigation by the Public Prosecutor's Office, or have been prosecuted or convicted for bribery in a court of law in France or abroad within the last five years. Exporters must also declare whether they have been subject to equivalent measures or have been found guilty in the context of a published arbitration award. France has explained that CJIPs are to be reported as "equivalent measures", although there is no need to report the amount of the public interest fine.

459. Exporters are also required to complete an anti-bribery questionnaire to provide background information on the transaction, including the use of agents. Information on the anti-bribery arrangements in place for the transaction is also requested. Finally, a questionnaire must be completed and signed by exporters subject to article 17 of the Sapin 2 Act to ensure that they have implemented measures and procedures to meet their statutory obligations.

460. Lessons have been learned from the *Airbus (multiple jurisdictions) case No. 5* on operational matters relating to the treatment of commissions paid to agents associated with the transaction. These operational measures include the implementation of systematised verification measures as well as the enhancement of the requirements concerning the use of agents, their functions and the amounts and terms of their remuneration. Assistance is requested from the networks of embassies economic departments to verify the reputation and the good standing of the agent as well as the nature and amount of the commissions paid to them, and in particular to ensure that the amount of the commission is reasonable, proportionate and consistent with normal practice in the country. In addition, BPIFrance has indicated that it asks whether a contract with an agent has been signed and reserves the right to request the document.

461. The internal anti-bribery compliance measures of exporters and applicants are also taken into account. BPIFrance indicated that it was assessing the compliance measures of some major exporters. These BPIFrance checks are conducted independently and are not co-ordinated with *ad hoc* compliance audits instigated by the AFA. However, the procedure can be simplified if exporters have already been subject to a prior audit by the AFA and inform BPIFrance accordingly.

462. An increasing number of applications are subject to in-depth inspections by the Bpifrance Group's Compliance and Permanent Control Department. During the virtual visit, BPIFrance representatives indicated that there are multiple red flags that would lead to in-depth inspections. These include the fact that the exporter or any other individual or legal person involved in the transaction appearing on the exclusion lists of multilateral banks, as well as any negative media reports. On the other hand, the involvement of a state-owned enterprise or a politically exposed person in the transaction is not in itself a factor that triggers in-depth inspections. These inspections are carried out on the basis of the exporter's declarations, cross-referenced with information extracted from specialised external databases (notably Dow Jones, LexisNexis and Urios). Of the 322 applications for guarantees submitted to BPIFrance in 2020, 241 were subject to in-depth inspections.

463. Once the guarantee has been granted, BPIFrance may still suspend the guarantee and/or request a refund or withdraw it. No guarantees have been withdrawn to date. In practice, there was a temporary closure of export guarantees followed by remedial measures in April 2016 after a report was received from the UK Export Finance regarding the guarantees granted to Airbus before its signing of the CJIP with the French authorities. France has stated that the suspension was initially based on the disclosures made by UK Export Finance to the SFO and then on the opening of several judicial proceedings. This in-depth inspection mechanism remained in place after the conclusion of the CJIP.

#### **Commentary**

***The lead examiners note that the revelations in the Airbus (multiple jurisdictions) case No. 5 have led BPIFrance to strengthen its internal mechanisms for examining export credit applications, notably concerning the use of agents. During the visit, BPIFrance representatives outlined a system for assessing credit applications to prevent and detect bribery which is more sophisticated than the measures in place at the time of Phase 3. However, these measures are recent and have yet to produce their full effect in practice. As previously indicated, no foreign bribery cases have been detected and reported by BPIFrance to date. The lead examiners therefore recommend that the Working Group follow up on the recent measures taken by BPIFrance to ensure their effectiveness in practice.***

## CONCLUSION

The Working Group commends France for the progress it has made in implementing the Convention since Phase 3. The country has introduced significant legislative and institutional changes, in particular, the creation of the PNF in 2013 and the Sapin 2 Act, which since 2016, have enabled France to revise its approach in the fight against foreign bribery. In addition, France has made notable progress in enforcing the offence since Phase 3, by being significantly more proactive in opening foreign bribery cases brought to its attention. France must now consolidate its recent achievements, which are undermined by structural resource issues that impact the entire criminal justice system, as well as by reforms or plans for reform – in particular concerning the time limit for preliminary investigations, adopted just before the approval of this report, and the plans for reform of the AFA. In the opinion of the lead examiners, all of these developments raise concerns calling into question the continuation of recent progress. The weaknesses in the framework for imposing liability on legal persons remain a major obstacle to enforcement, for which the use of the CJIP cannot fully compensate.

With regard to the implementation of the Phase 3 recommendations, France has fully implemented recommendations 1.a (reviewing the manner in which foreign bribery laws are enforced); 1.b and 1.e (offence); 3.b (sanctions for legal persons); 4.a (monopoly of the Public Prosecutor's Office, opening of investigations, and individual instructions); 4.b (initiation of public prosecution and prior requirement of a complaint or official report); 4.d (clarification of France's criminal policy on foreign bribery); 5 (statute of limitations); 9.a (non-tax deductibility of bribes); 10 (awareness-raising by the Ministry for Europe and Foreign Affairs and the General Directorate of the Treasury); and 12.b (training to the staff of agencies mandated to provide public advantages on the verification procedure for the granting of ODA). Two Phase 3 recommendations no longer appear relevant (1.d and 11.b).

Limited progress has been made in implementing the remaining Phase 3 recommendations, which are therefore incorporated below, as appropriate, into the Phase 4 recommendations addressed to France by the Working Group. The recommendations that remain partially implemented are: 1.c (offence – corruption pact); 2.a (liability of legal persons); 2.b (training for judicial authorities on corporate criminal liability); 3.a (sanctions for natural persons); 3.c (confiscation); 4.e (resources for investigation and prosecution and processing of requests for international assistance); 4.g (defence secrecy); 7.a (money laundering); 8.b (internal compliance measures); 9.b (reporting by tax authorities); and 11.c (ODA and export credits). Finally, the recommendations that remain unimplemented are: 4.c (publication of certain elements of plea bargains); 4.h (blocking statute); 6 (Article 5 of the Convention and mutual legal assistance); 12.a (public procurement) and 12.c (arms).

Based on the findings of this report, the Working Group acknowledges the good practices and positive achievements set out in Part 1 below and makes the recommendations set out in Part 2 below. The Working Group will also follow up on the issues identified in Part 3 below. The Working Group invites France to submit, within one year, an oral report on the measures taken to implement recommendations 7.a(i); b(i); and c(i) (on increasing the means and resources available to investigators, prosecutors and trial judges), 10.a (on preserving the role of the PNF in resolving foreign bribery cases); and 18.a (on preserving the role of the AFA in developing and monitoring compliance measures by companies). The Working Group also invites France to submit a written report on the implementation of all recommendations and follow-up questions raised by the Working Group in two years' time (i.e. December 2023). The Working Group further invites France to provide detailed information on its enforcement of the foreign bribery offence when submitting this report.

## Good practices and positive achievements

This report has identified several good practices and positive achievements in France's implementation of the Convention and related instruments that may be effective in combating foreign bribery and strengthening enforcement. Following the creation of the PNF and the OCLCIFF, France has a specialised prosecutor's office and investigative unit capable of developing enhanced expertise in combating foreign bribery. By centralising the handling of foreign bribery cases within these two agencies, France has usefully clarified its institutional framework for law enforcement in this area. The question of their resources is now critical, so that the agencies can achieve their full potential in the face of the complexity and ever increasing number of cases for which they are responsible. France has also clarified and formalised the strategic framework of its criminal policy on combating foreign bribery in the circular of 2 June 2020 on international corruption, known as the Belloubet circular. The evaluation of the impact of the Sapin 2 Act, five years after its entry into force, by a parliamentary fact-finding commission, on the basis of hearings with more than 100 actors involved in combating bribery, is in line with the relevant provisions in the 2009 Recommendation insofar as this evaluation aims at supporting law enforcement authorities and improvements to the legal framework to reinforce the fight against corruption.

The 2016 introduction of the CJIP by the Sapin 2 Act has significantly changed France's approach to corporate liability and produced promising results that should be encouraged by the Working Group. The CJIP has made it possible to deal more swiftly and effectively with proceedings against legal persons in five foreign bribery cases and to impose public interest fines, the amounts of which are significantly higher than the criminal fines imposed to date as a result of a conviction at trial. The introduction of the CJIP has also enabled the coordinated and simultaneous resolution of two major multi-jurisdictional cases with other Parties to the Convention. In addition, the development of a circular and joint guidelines on the CJIP by the PNF and the AFA has contributed to greater public awareness and transparency surrounding the factors considered to qualify for a CJIP and the calculation of the penalties that can be imposed on legal persons in foreign bribery cases. The transparent approach that France has taken to CJIPs is in line with the repeated recommendations of the Working Group concerning non-trial resolution mechanisms available in foreign bribery cases. Finally, in terms of mutual legal assistance, France's deployment of a network of justice attachés abroad is an undeniable resource that France was able to draw on in the resolution of two major foreign bribery cases.

In terms of positive achievements, the creation of the AFA and the introduction into French law of an administrative compliance obligation by article 17 of the Sapin 2 Act have placed prevention and the development of internal compliance measures at the heart of France's anti-bribery policy. This approach, which is not required by the Convention or the related instruments, is a notable leap in the French legal framework for combating bribery that has allowed France to regain credibility and visibility in this area. In addition, France has adopted an anti-bribery benchmark for internal compliance measures, of which the recommendations developed and updated by the AFA are an integral part. This framework now gives France the means to encourage companies to set up compliance programmes that are in line with the recommendations of the Good Practice Guidance on Internal Controls, Ethics and Compliance contained in Annex II of the 2009 Recommendations. Finally, the new possibility for certified anti-bribery NGOs to initiate a public prosecution by filing a complaint seeking status as a civil party is likely to counteract possible inertia on the part of the Public Prosecutor's Office, which reports to the Minister of Justice.

## Recommendations of the Working Group

### *Recommendations regarding detection of foreign bribery*

#### 1. Regarding **detection of foreign bribery**, the Working Group recommends that France:

- a. (i) Clarify the relationship between the reporting obligation incumbent on public officials under article 40 CCP and the possibility of reporting open to them under article 6 and 8 of the Sapin 2 Act, in particular with regard to reporting channels, the criteria applicable for using either of these mechanisms, and the related protections; and (ii) ensure that the thresholds for reporting a credible allegations of foreign bribery are not interpreted in an overly demanding manner and do not create obstacles to such reporting. [Phase 3 recommendation 11.b; 2009 Recommendation, IX]
- b. Ensure that the AFA has the necessary tools to continue to play its full part in detecting potential foreign bribery in the course of its duties by: (i) training its staff on the red flags for foreign bribery to ensure that offences are reported to the PNF, which can then assess the appropriateness of opening an investigation; and (ii) taking the necessary measures to ensure that companies' assertions of professional secrecy obligations will not impede the identification of suspicious financial transactions during AFA's audits. [2009 Recommendation, III.i. III.iv. and IX.i.]
- c. (i) Analyse the reasons why officials in diplomatic and consular posts and in economic departments of embassies (MEAE and General Directorate of the Treasury) have not been able to detect any allegations of foreign bribery themselves, including through the local media, and take the necessary measures to remedy the situation; and (ii) Ensure that diplomatic officials posted abroad actively monitor the local press for the purpose of detecting foreign bribery. [Phase 3 recommendation 10; 2009 Recommendation 2009 III.i; iv. and IX.ii.]
- d. (i) Conduct a thorough review of companies' internal control, ethics and compliance programmes or measures when granting and monitoring arms export licences; and (ii) Ensure that companies sanctioned for foreign bribery can have their arms exports authorisations suspended. [Phase 3 recommendation 12.c; Recommendation XI.i]
- e. (i) Continue and intensify awareness-raising measures, recently initiated in mainland France, for tax administration officials, on detecting illicit transactions related to foreign bribery; (ii) Implement, without further delay, the same measures in overseas territories; and (iii) Ensure that the tax authorities promptly report to prosecutors any information collected for tax purposes when it likely pertains to acts of foreign bribery. [Phase 3 Recommendation 9.b; 2009 Recommendation VIII.i.; 2009 Recommendation on tax measures II.]
- f. (i) Enhance the detection and reporting mechanisms in order to ensure that allegations of foreign bribery are transmitted by BPIFrance to the public prosecution service (ii) Implement all the necessary training and awareness-raising measures to enable BPIFrance staff to identify and address red flags that should enable foreign bribery to be detected in the projects financed by the agency. [recommendation 11.c.; 2009 Recommendation, III (vii); and 2019 Recommendation on bribery and officially-supported export credits, V]
- g. Revise the professional practice guidance for auditors on reporting criminal acts to the Public Prosecutor, to ensure that the foreign bribery offence is expressly mentioned. [2009 Recommendation, X.B.iii. and v.]
- h. Define, by any appropriate means, the framework and practical incentives for self-reporting, including by: (i) clarifying the extent to which self-reporting is taken into account to benefit from a CJIP; and (ii) clarifying its impact on the amount of the public interest fine and other measures that are imposed through a CJIP. [2009 Recommendation III.iv. and Annex I.D.]

- i. Ensure that a larger number of credible foreign bribery allegations are promptly investigated, particularly allegations concerning major French companies reported in the national or foreign media as well as in the compilation of foreign bribery allegations maintained by the Working Group. [Convention, Article 5, 2009 Recommendation, Annex I.D.]

2. Regarding detection of foreign bribery via mechanisms to combat **money laundering**, the Working Group recommends that France (i) Continue and intensify its awareness-raising efforts aimed at professions required to report instances that may involve foreign bribery, while taking care to integrate the laundering of proceeds derived from active foreign bribery into TRACFIN's analysis and awareness-raising activities; and (ii) Strengthen statistical monitoring of information processed by TRACFIN "integrity violations" unit related to the foreign bribery offence. [Phase 3 recommendation 7.a; 2009 Recommendation, III.i.]

3. Regarding **protection for whistleblowers**, the Working Group recommends that France take advantage of the current effort to transpose the EU directive to take the necessary measures to (i) Clarify and harmonise the whistleblower regime, and strengthen the protections afforded to whistleblowers; (ii) Strengthen the position of the Defender of Rights in the system by reviewing its role and providing it with the necessary means to exercise its role effectively; and (iii) Increase public awareness of the importance of whistleblowers, especially in combating bribery. [2009 Recommendation, III.i., iv., and IX.iii.]

4. Regarding the capacity of the **AFD Group** to detect and report foreign bribery offences, the Working Group recommends that France:

- a. (i) Ensure that sufficient resources and specialist staff are allocated to the AFD Group's investigation function; (ii) Continue to regularly reassess the effectiveness of these oversight mechanisms, notably with regard to the accuracy of information provided by bidders, to avoid certain foreign bribery risks escaping the AFD's oversight, and in particular with regard to intermediaries that bidders may use; and (iii) Continue its efforts to ensure that AFD Group staff receive targeted training on foreign bribery risks in projects financed by the Group. [Phase 3 recommendation 12.b, 2016 Recommendation for development co-operation actors, 4.ii., 6.iii., 3.ii.]
- b. Revise the AFD Group's Guidelines for Procurement in Foreign Countries to ensure that, as in the case of final convictions or, for example, debarments pronounced by the World Bank, the conclusion of a CJIP or any other non-trial resolution for foreign bribery in France or abroad can lead to a review of the operator's eligibility to participate in current or future contracts financed by the Group or its agencies, in particular taking into account the robustness of the compliance programme implemented by the bidder. [2016 Recommendation for development co-operation actors, 6.i. and iv.]

### ***Recommendations regarding enforcement of the foreign bribery offence***

5. Regarding the **foreign bribery offence**, the Working Group recommends that France:

- a. Continue its efforts to clarify, by all appropriate means, to prosecutors, investigative judges and trial judges that, contrary to the approach adopted in domestic bribery cases, evidence of foreign bribery under articles 435-3 CC et seq. does not require recourse to the case-law principle of a corruption pact, even for ease of establishing evidence; [Phase 3 recommendation 1.c. and Convention, Article 1, Comment 3; 2009 Recommendation, III.ii. and V] and
- b. Clarify by all appropriate means, to prosecutors, investigative judges and trial judges, that payments to third parties are covered by the foreign bribery offence under article 435-3 CC, of which they are a characteristic financial arrangement. [Phase 3 recommendation 1.c. and Convention, Article 1, Comment 3; 2009 Recommendation, III.ii. and V]

6. Regarding the **enforcement of the foreign bribery offence**, the Working Group recommends that France take all necessary measures to enable the various components of the criminal justice system, including the entities set up since Phase 3, to pursue with the increase in the enforcement of the foreign bribery offence and, more particularly, to proactively and effectively detect, investigate, prosecute and sanction the individuals and legal persons who commit foreign bribery. [Convention, Article 5, 2009 Recommendation, II; III.ii; V; and Annex I.D.]

7. Regarding the **means and resources, expertise and training** of investigators, prosecutors, investigative judges and trial judges, the Working Group urges France to promptly take the necessary measures to:

- a. Ensure that (i) Sufficient resources are allocated to specialised investigative units, in particular to the OCLCIFF and the BNLCCF; and (ii) These units can recruit and retain the necessary officers with financial and economic expertise, including taking into account cost-of-living constraints in the most important economic centres. [Phase 3 recommendation 4.e; Convention, Article 5; 2009 Recommendation, II, V, Annex I.D.]
- b. (i) Strengthen the resources allocated to the PNF in terms of personnel and specialised expertise to enable it to deal effectively with foreign bribery cases; and (ii) Train a sufficient number of specialised prosecutors to provide the means, in the short and long term, to consolidate the progress that France made by creating this prosecution authority. [Phase 3 recommendation 4.e; Convention, Article 5; 2009 Recommendation, II, V, Annex I.D.]
- c. Ensure that investigative judges and trial judges dealing with foreign bribery cases have: (i) The necessary resources, including specialist experts, to deal with them effectively and in a timely manner; and (ii) The necessary training for this purpose. [Convention, Articles 1 and 5; 2009 Recommendation, II, V, Annex I.D.]

8. Regarding **sanctions and confiscation**, the Working Group recommends that France:

- a. Ensure that the sanctions imposed in practice on individuals convicted of foreign bribery are effective, proportionate and dissuasive in accordance with Article 3 of the Convention. [Phase 4 recommendation 3.a.ii.; Convention, Article 3(1)]
- b. Take the necessary steps to ensure that legal proceedings make full use of the confiscation measures provided for in law for both natural and legal persons, and in particular: (i) Ensure that magistrates and investigators adopt a more proactive approach to the seizure and confiscation of the instrument and proceeds of foreign bribery offences or assets of equivalent value; (ii) Conduct awareness-raising activities among magistrates and investigators on the importance of confiscating the proceeds of foreign bribery offences (especially when the perpetrator is a legal person, including outside the CJIP framework); and (iii) Develop guidelines on methods for quantifying the proceeds of foreign bribery offences (outside the CJIP framework). [Phase 3 recommendation 3.c; Convention, Article 3(3)]

9. Regarding **investigations and prosecutions**, the Working Group recommends that France:

- a. Clarify in law that reporting information, at least in relation to foreign bribery cases: (i) meets clearly defined criteria; and (ii) is limited to cases that enable the Minister of Justice to monitor the implementation of the criminal policy, for which the Minister is responsible and accountable to parliament, as opposed to public prosecution, which is conducted by the National Public Prosecutor; and about which the Minister of Justice may not request any information on individual cases from the public prosecutors outside the above-mentioned criteria and purpose; [Convention, Article 5, 2009 Recommendation, V and Annex I.D.]
- b. Complete as soon as possible the necessary reforms, including the constitutional reforms initiated in 2013 and 2019 to provide the Public Prosecutor's Office with the statutory guarantees needed



to carry out its duties with all the independence necessary for the proper functioning of the justice system and to protect prosecutors from any influence or the appearance of influence from the political authorities, in particular with regard to combating foreign bribery. [Convention, Article 5, 2009 Recommendation, V and Annex I.D.]

- c. Examine the possibility of entrusting the renewal of anti-bribery NGOs' certification to an independent authority, such as the High Authority for Transparency in Public Life for example, or, at the least, strengthening the impartiality guarantees surrounding the procedure for renewing the certification of anti-bribery NGOs which, since 2013, has allowed them to take legal action on behalf of citizens. [Convention, Article 5, 2009 Recommendation, Annex I.D.]
- d. Clarify, by all means and as soon as possible, that the factors of Article 5 of the Convention should not be taken into account concerning declassification requests in the context of defence secrecy procedures so as not to impede foreign bribery investigations and prosecutions. [Phase 3 recommendation 4.g., Convention, Article 5]

10. Regarding the **PNF's role in foreign bribery cases**, the Working Group urges France to:

- a. Take urgent steps to preserve the PNF's role in the investigation, prosecution and non-trial resolution of foreign bribery cases by restoring an appropriate environment for the investigation and prosecution of its cases. [Convention, Article 5, 2009 Recommendation, V and Annex I.D.]
- b. Take the necessary legislative measures to extend the duration of preliminary investigations in foreign bribery cases to allow for the timely and effective enforcement of the foreign bribery offence. [Convention, Article 5, 2009 Recommendation, V and Annex I.D.]

11. With regard to the **non-trial resolution of cases of foreign bribery**, the Working Group recommends that France:

- a. Take the necessary steps as soon as possible to make public certain elements of the CRPC, such as the terms of the agreement and, in particular, the sanction or sanctions approved. [Phase 3, Recommendation 4.c., Convention, Articles 3 and 5; 2009 Recommendation III.ii.]
- b. Continue its efforts to develop effective non-trial resolution mechanisms and in particular, reconsider, as soon as possible, the possibility of permitting individuals to be covered by the CJIPs or other appropriate non-trial mechanisms and, to take the necessary measures to ensure better coordination between non-trial resolution mechanisms respectively applicable to natural and legal persons in foreign bribery cases. [Convention, Articles 3 and 5; 2009 Recommendation, III.ii.]

12. With regard to **mutual legal assistance**, the Working Group recommends that France:

- a. Take the necessary steps without further delay to: (i) Ensure that sufficient resources are allocated to law enforcement authorities to guarantee the provision of prompt and effective MLA to other Parties to the Convention; (ii) Implement the BEPI's plans to develop IT tools to maintain detailed statistics on the incoming and outgoing MLA requests that are accepted or rejected, the grounds for refusals, the types of measures requested, and the time it took to execute the requests; and (iii) Ensure more systematic follow-up of its outgoing MLA requests when foreign authorities fail to respond. [Phase 3 recommendation 4.e; Convention, Article 9; 2009 Recommendation, III.ix.]
- b. (i) Clarify the scope and consequences of the blocking statute; (ii) clarify the criteria under which the French authorities select, produce, withhold or request businesses to withhold certain information about businesses involved in foreign bribery cases under the blocking statute or article 694-4 CCP; (iii) expedite the execution of formal mutual assistance, including when the blocking statute or article 694-4 CCP are applicable – even though both mechanisms operate at different stages and in different formal settings and the blocking statute may have only an indirect effect on

formal mutual assistance – and in particular at the stage of referral to the Ministry of Justice or any other authority, including, as foreseen in the draft decree under discussion at the time of finalising this report; and (iv) ensure that the conditions for access to information held by French businesses under the blocking statute, in its current form or after any future reform, do not impede the conduct of foreign investigations and prosecutions for foreign bribery. [Phase 3, recommendation 6 and 4.h, Convention Article 9, 2009 Recommendation, XIII]

### **Recommendations concerning the liability of legal persons**

13. With regard to the **liability of legal persons**, the Working Group recommends that France:

- a. Clarify in law the requirements for corporate criminal liability, to ensure that: (i.) Its approach takes into account Annex I to the 2009 Recommendation; and (ii.) A legal person cannot avoid liability for bribery by using an intermediary, including a related legal person. [Phase 3 recommendation 2.a, Convention, Article 2, 2009 Recommendation, Annex I.B.]
- b. Seize the opportunity of the proposed law to broaden the scope of corporate liability for lack of supervision to clarify the conditions when it would apply, and, in particular, whether to take into account the existence (or absence) of internal corporate compliance measures that are either promoted or required by the Sapin 2 Act. [Convention, Article 2, 2009 Recommendation, Annex I.B.]
- c. Expand its professional development trainings for prosecutors, investigative judges, and trial judges on corporate liability for foreign bribery and related economic and financial crimes. [Phase 3 recommendation 2.b; Convention, Article 2, 2009 Recommendation, III.ii. and V, Annex I.B.]

14. With regard to the **enforcement of the corporate liability through CJIPs**, the Working Group recommends that France:

- a. Disseminate more widely the joint PNF-AFA's joint guidelines on the CJIP. [Convention, Articles 2, 3 and 5, 2009 Recommendation III.ii.; Annex I.B.];
- b. Ensure that the information made public on the CJIP in relation to foreign bribery is (i) complete and equivalent for all cases, including in relation to the approval order and PNF's press release, (ii) published promptly and in a format that facilitates dissemination and use among the Parties to the Convention, and (iii) clearly aggregated and accessible on the website of at least one government agency with a recognised role in tackling foreign bribery. [Convention, Articles 2, 3 and 5, 2009 Recommendation III.ii.; Annex I.B.]

15. With regard to the **framework and means for confiscation for legal persons**, the Working Group recommends that France (i) Through a circular or any other appropriate means, clarify the procedures for identifying and quantifying the proceeds of foreign bribery offence obtained by the legal person, with a view to confiscating such proceeds as an additional penalty or as a component of the fine imposed; and (ii) Develop more precise guidelines in order to also clarify the arrangements for calculating the confiscatory component of the public interest fine. [Convention, Article 3(3), 2009 Recommendation, III.ii.]

16. With regard to the implementation of the **additional sanction of exclusion from public procurement**, the Working Group recommends that France take the necessary measures to give access to all authorities in charge of public procurement contracts to the criminal records of legal persons. [2009 Recommendation XI.i.]

17. With regard to promoting the development of **corporate compliance programmes**, the Working Group recommends that France step up its efforts with intermediate-sized enterprises and SMEs involved in international trade to promote the adoption and implementation of compliance programmes that are appropriate and proportionate to their specific circumstances, paying particular attention to those operating

in regions and sectors at high risk of bribery. [Phase 3 recommendation 8.b; 2009 Recommendation, X.C i. and v.; Annex II]

### ***Other recommendations to strengthen the implementation of the Convention***

18. With regard to **the AFA's role in the development of corporate compliance measures**, the Working Group recommends that France:

- a. (i) Preserve, including in the context of the reforms currently envisaged, the independence of the AFA, as well as its role, the mandates, and – at a minimum – the funding currently allocated to the AFA for developing and monitoring compliance measures by the companies subject to the obligations of article 17b of the Sapin 2 Act; and (ii) Provide the AFA with sufficient resources to promote and monitor companies' development of compliance measures, in particular in the context of its advisory and audit functions for entities subject to the compliance obligation, and thereby give itself the means to implement the changes and priorities initiated by the Sapin 2 Act in tackling foreign bribery, including in the context of the possible overhaul of the AFA's mandates or the potential transfer of its mandates to another institution. [2009 Recommendation, II; III.v. and viii.; V, X.C; and Annex II]
- b. Continue to rely on the AFA's expertise: (i) before imposing penalties and compliance obligations on companies and (ii) to monitor their implementation in the context of post-resolution audits of companies as well as the implementation of the administrative injunction sanction imposed by the AFA Sanction Commission to implement corporate compliance measures in the context of overseeing companies' compliance programmes. [2009 Recommendation, II; III.v.; X.C; and Annex II]

19. With regard to the **AFA's Sanctions Commission**, the Working Group recommends that France consider re-examining the legal framework within which the Sanctions Commission makes its decisions in order to align its approach and its sanctioning power with that of other existing sanctions commissions in France, which decide on the issues submitted to them as established by the administrative authority referring the matters. [2009 Recommendation, II; III.v.; X.C; and Annex II]

20. With respect to the **implementation of the offence of laundering of foreign bribery**, the Working Group recommends that France ensure that both the laundering of the instrumentalities of bribery and the proceeds obtained from the offence can be prosecuted as money laundering predicated on foreign bribery [Convention, Article 7].

21. With regard to the **non-tax deductibility of bribes**, the Working Group recommends that France (i) collect information on the enforcement, in overseas territories, of the non-deductibility of bribes paid to foreign public officials; (ii) take measures, throughout the French territory, to ensure that the judicial authority systematically discloses to the tax authorities information necessary for the latter to ascertain that bribes have not been improperly deducted in accordance with article L. 101 of the Manual of Tax Procedures; and (iii) re-examine, also throughout the entire country, the adequacy of the limitation period for re-assessing tax returns for the purposes of the effective application of article 39 2 bis General Tax Code. [2009 Recommendation on tax measures, I.i. and ii.]

### **Follow-up by the Working Group**

22. The Working Group will follow up on the following issues as case law and practice develop:

- a. The implementation of the Belloubet circular with regard to the organisation, by the PNF and the H3C of joint training and awareness-raising for statutory auditors on the offence of foreign bribery.

- b. The impact of obstacles to detection by investigative journalists, including claims to protect trade secrets and classified defence information.
- c. The use of the new offence of trading in influence concerning foreign public officials under article 435-4 CC to ensure that all magistrates are sufficiently aware of this new offence so that they make full use of it, thereby strengthening efforts to combat indirect bribery.
- d. The use of the fall-back offences, trading in influence offence, misuse of corporate assets, money laundering, the publication or presentation of false or misleading annual accounts, as well as tax evasion in cases involving elements of foreign bribery.
- e. The implementation of the foreign bribery offence by the European Public Prosecutor's Office when French individuals or legal persons are involved, in particular to verify whether the European Delegated Prosecutors in France have the necessary resources and independence to manage these cases in accordance with the Convention, and to ascertain how these Delegated Prosecutors coordinate, where appropriate, with the French authorities during joint investigations.
- f. The impact of the new rules on defence secrecy classification on company practice in this area.
- g. The impact of data protection regulations on foreign bribery investigations and prosecutions, including in particular where companies and the PNF co-operate in concluding a CJIP.
- h. The time limits for the execution of requests for mutual assistance by France.
- i. On the evolution of the PNF's role in the resolution of multi-jurisdictional cases.
- j. The level of enforcement of the corporate liability regime by the courts and through the CJIP.
- k. The possible development of the CJIP to ensure that it continues to be guided, in its conditions and enforcement means, by the non-trial resolution systems and good practices in this field used by the other Parties to the Convention.
- l. Sanctions applied in practice against legal persons convicted of foreign bribery to ensure that they are effective, proportionate and dissuasive in accordance with Article 3 of the Convention.
- m. The level of sanctions imposed in practice through a CJIP to ensure that these are effective, proportionate and dissuasive.
- n. The AFA's development of its anti-corruption guidelines as well as the number and scope of its *ad hoc* audits of companies' implementation of their compliance obligations under the Sapin 2 Act.
- o. The AFA's implementation of its supervisory duty to ensure that it continues to accord high priority to monitoring companies' implementation of compliance obligations when they are subject to article 17 of the Sapin 2 Act.
- p. The progress of the companies' implementation of the accounting provisions set out in article 17 of the Sapin 2 Act, implementing Article 8 of the Convention, through the records produced from the AFA and other specialised bodies.
- q. The measures taken by Bpifrance Assurance Export to strengthen internal mechanisms for examining export credit applications, particularly with regard to the use of agents to ensure their effectiveness in practice.

## ANNEX 1 – FOREIGN BRIBERY CASES SUMMARY OF CASES CLOSED SINCE PHASE 3

### Cases with a final court conviction for foreign bribery

#### **Bank Investment (Cameroon), case No. 120**

*Final conviction of one individual in first instance on 15 November 2012*

In 2003, a commercial director and member of the executive committee of the French branch of a global Swiss bank (the defendant) paid commissions totalling EUR 177 525 to a Cameroonian public official – who held positions both in government and as chief financial officer (CFO) at the national oil company of the Republic of Cameroon (SNH) – in return for bringing SNH's clients to the bank. The Cameroonian public official invested a sum of EUR 50 million belonging to SNH in the company UBS France, in an account opened by the defendant. The defendant paid the commissions to the foreign official through a London shell company, which the defendant presented to the bank as a business provider. The kickbacks were discovered during an internal audit and the company filed a complaint seeking status as a civil party in January 2004.

Following this complaint, a preliminary investigation was initiated by the Paris Public Prosecutor's Office and handled by the Financial Unit. In June 2005, the Paris Public Prosecutor's Office requested the opening of a judicial inquiry into the charges of foreign bribery, breach of trust, and attempted breach of trust against an unnamed person. The case was investigated for six years before the Paris Public Prosecutor's Office issued a final order at the end of March 2011 to charge an individual before the court on charges for fraud and attempted fraud against UBS, and foreign bribery. In July 2011, the investigative judge issued a referral order to the court that was not consistent with the public prosecution's request, on the grounds that there was no basis to issue charges of foreign bribery offence, but only for fraud and attempted fraud. Following an appeal by the Public Prosecutor's Office and the civil party, the Investigations Chamber of the Paris Court of Appeal ruled in March 2012 that there were sufficient charges to justify the referral of the individual to the Paris Criminal Court on the charge of foreign bribery. The French authorities state that the Investigations Chamber then specifically dismissed the proceedings against the legal person on the grounds that the defendant had acted without the knowledge of their superiors.

On 15 November 2012, the Paris Criminal Court convicted the defendant for foreign bribery. The defendant was fined EUR 20,000 and ordered to forfeit the sums seized as an additional penalty. The court considered that the director of the SNH was a public official within the meaning of the OECD Convention, as the SNH was a public-private company with a public service mission. The defendant was acquitted of fraud and attempted fraud. No appeal was filed against this decision.

#### **Total (Iran) case, No. 103**

*Final conviction of a legal person in first instance on 21 December 2018*

Between 1997 and 2003, Total SA paid approximately USD 30 million in commissions to an Iranian official who controlled the subsidiaries of the National Iranian Oil Company (NIOC), to use his influence to secure a gas contract worth USD 2 billion. The bribes were paid by a Total subsidiary to two intermediaries and were concealed in fictitious consultant contracts. The alleged facts were brought to the attention of the French authorities by the Swiss authorities.

A preliminary investigation was initiated by the Paris Public Prosecutor's Office in June 2006 (lasting six months), followed by a judicial investigation into the charges of misuse of corporate assets, concealment of the offence and foreign bribery in December 2006. The case was investigated for almost eight years. In

October 2014, the investigative judge referred Total SA (the parent company) to court on the charge of foreign bribery for acts committed from October 2000, the date on which the offence of foreign bribery came into force under French law, and two individuals on charges of complicity in foreign bribery. On 21 December 2018, the Paris Criminal Court sentenced Total SA to a fine of EUR 500 000 for foreign bribery. The Public Prosecutor's Office had requested the maximum fine at the time of the events (EUR 750 000). No confiscation order was issued, despite the prosecutor's request to confiscate EUR 250 million, equivalent to the proceeds of the offence.<sup>421</sup> The court also sentenced one of the two intermediaries to four years' imprisonment and an arrest warrant was issued. The prosecution of two other individuals was terminated, as they had since died.

The conviction came more than five years after Total SA entered into a Deferred Prosecution Agreement with the Department of Justice in May 2013 for breaches of the Foreign Corrupt Practices Act (FCPA)'s anti-bribery provisions, falsification of the company's accounts and records, and breaches of internal compliance rules. The company agreed to pay a fine of USD 245.2 million to the Department of Justice. At the same time, the company reached a settlement with the U.S. Securities and Exchange Commission (SEC) in a related civil action, and agreed to pay USD 153 million in restitution for the illicit profits obtained.

### **Oil-for-Food case, oil aspect – Total and Vitol, No. 102**

*Final conviction of two legal persons and seven individuals confirmed by the Court of Cassation on 14 March 2018 (acquittal on first instance, overturned on appeal)*

Between 1997 and 2003, two oil companies – Total and Vitol – paid illegal surcharges to Iraqi officials through intermediaries in return for the sale of crude oil by the Iraqi State Oil Marketing Organization, SOMO. The payments were made through intermediaries and shell companies to bank accounts opened abroad by Iraqi officials. These surcharges were paid by circumventing the marketing channel for Iraqi oil, which was regulated at the time of the events under the embargo resulting from United Nations Security Council Resolution 986. Kickbacks were then made in return for action to lift sanctions and the embargo.

This case was initiated following TRACFIN alerts in June 2001 and 2002. These alerts were based on elements discovered by the tax authorities when auditing the companies. In July 2002, the Paris Public Prosecutor's Office opened a judicial investigation against an unnamed person on charges of misuse of corporate assets, complicity and concealment, without any preliminary investigation having been conducted beforehand. This judicial inquiry involved an intermediary specialising in assisting large industrial groups in their search for export markets. The judicial investigation was then extended by supplementary indictments and covered the charges of trading in influence, foreign bribery and misuse of corporate assets. The judicial investigation lasted nine years. On 28 July 2011, the investigative judge ordered that Total, Vitol and 18 individuals, including 13 initially indicted for foreign bribery or complicity in foreign bribery, be referred to the criminal court.

On 8 July 2013, the Paris Criminal Court issued a general acquittal on the basis of the application of the *non bis in idem* principle, as the defendants had previously been convicted for the same acts by foreign authorities; the lack of real influence of certain defendants; and the failure to characterise the acts as bribery. The court found that the payments were imposed by the Iraqi government and paid into the Iraqi treasury and therefore did not increase the personal wealth of a foreign public official. The Paris Public Prosecutor's Office appealed against the acquittal of 11 individuals and two legal persons, two defendants having since died.

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<sup>421</sup> Le Monde (21 December 2018), ["Total condamné à 500 000 euros d'amende pour corruption en Iran"](#) [Total fined EUR 500 000 for bribery in Iran].

On 26 July 2016, the Paris Court of Appeal overturned the acquittal judgment on the grounds that the offence of foreign bribery had been established.<sup>422</sup> The court held that the offence of foreign bribery was fully applicable to SOMO, a state-owned enterprise attached to the Iraqi Ministry of Oil, and that consequently its officials were indeed entrusted with a public service mission. It also held that the failure to demonstrate personal accumulation of wealth of these officials was irrelevant, since the offence of foreign bribery in French law does not require personal accumulation of wealth. The Court of Appeal also rejected the application of the *non bis in idem* principle. Vitol and Total were fined EUR 750 000 and EUR 300 000 respectively for foreign bribery. Seven individuals were fined between EUR 15 000 and EUR 75 000 for foreign bribery or complicity in foreign bribery. Three individuals were fined between EUR 20 000 and EUR 100 000 for complicity in misuse of corporate assets and one was given a suspended fine of EUR 5 000 for trading in influence.

On 14 March 2018, the Court of Cassation dismissed the appeals against the convictions of seven individuals and two legal persons for foreign bribery, and these have therefore become final. The Court of Cassation held that "the fact, for any individual or legal person, of yielding to requests with no legal basis made by the officials of an organisation with the capacity of a person tasked with a public service mission within the meaning of the provisions of article 435-3 CC, relaying a request for the payment of kickbacks formulated by the representative bodies of a State, which would be the beneficiaries thereof and in the absence of the payment of which any commercial relationship would be interrupted" was covered by article 435-3 para 2. CC in the version in force at the time of the events. However, the convictions of the three individuals convicted of complicity in misuse of corporate assets to the detriment of Total were partially overturned, confirming the acquittal judgment.

### **TSKJ (Nigeria) case, No. 99**

*Final conviction of two individuals by the Paris Criminal Court on 30 January 2013.*

*Final conviction of a third individual confirmed by the Court of Cassation on 1 April 2020 (acquittal decision initially pronounced on first instance and overturned on appeal)*

Between 2001 and 2002, the TSKJ consortium, consisting of a French company (Technip) and foreign companies, paid bribes amounting to USD 40 to 45 million to very high-level Nigerian officials in order to obtain their support for public contracts regarding the construction of a liquefaction plant for LNG Nigeria. The payments were transferred through several intermediaries, including a shell company run by a British lawyer, Mr. T. This case was detected as part of an investigation into other offences in 2002.

In October 2003, the Paris Public Prosecutor's Office opened a judicial investigation into charges of foreign bribery, misuse of corporate assets, complicity and concealment of the offence committed to the detriment of Technip, without a preliminary investigation having been conducted. The judicial investigation lasted seven years. At the end of November 2010, the investigative judge issued an order in accordance with the prosecutor's request against Mr. T and two former Technip executives, including the commercial director, for foreign bribery. On 30 January 2013, the Paris Criminal Court sentenced the two former Technip executives to fines of EUR 10 000 and EUR 5 000 respectively.

On 24 June 2014, the Paris Criminal Court, however, acquitted Mr. T. on the ground of the *non bis in idem* principle, as the defendant had entered into a plea agreement with the US authorities in February 2011. The Paris Prosecutor's Office lodged an appeal. On 21 September 2016, the Paris Court of Appeal upheld the judgment at first instance and noted the termination of the public prosecution. The Public Prosecutor's Office then appealed to the Court of Cassation. On 17 January 2018, the Court of Cassation overturned

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<sup>422</sup> Le Monde (26 February 2016), "[Pétrole contre nourriture: Total condamné à 750 000 euros d'amende en appel](#)" [Oil-for-Food: Total fined EUR 750 000 on appeal]; and Le Monde (29 October 2015), "[Pétrole contre nourriture : une amende de 750 000 euros requise contre Total](#)" [Oil-for-Food: Total ordered to pay a fine of EUR 750 000].

the Paris Court of Appeal's decision<sup>423</sup> and concluded that the defendant's appearance before the French court was not governed by the provisions of the agreement he had entered into abroad with the US authorities and that he was free not to incriminate himself and to exercise all rights of defence. Furthermore, the Court of Cassation ruled that the Court of Appeal, which had found that the acts that were the subject of the prosecution had been committed, even partially, on French territory, had disregarded article 692 CCP. The case was therefore quashed on these grounds, and the case and the parties were referred back to the Versailles Court of Appeal.

On 9 May 2019, the Versailles Court of Appeal dismissed the defence arguments relating to the *non bis in idem* principle and the failure to respect the rights of the defence. The court ruled that the foreign bribery offence was sufficiently characterised and sentenced Mr. T. to a fine of EUR 30 000 and the confiscation of the sum of USD 55.8 million. This conviction became final in April 2020,<sup>424</sup> following the dismissal of the appeal lodged by Mr. T.

#### **Hydrocarbons (Algeria) case, No. 4**

##### *Final conviction of three individuals by the Paris Court of Appeal on 4 May 2020*

From 2003 to 2008, the directors of three French companies were involved in various schemes to bribe public officials in Algeria in order to obtain several public contracts. The bribes, estimated to a total more than EUR 1.2 million, were paid through several shell companies domiciled abroad to employees of Sonatrach (the Algerian oil and gas company) in exchange for confidential information during the bidding phase for several public contracts. The bribes were also paid in order to obtain a favourable decision for public service contracts from the General Directorate of Civil Protection, within the Algerian Ministry of the Interior. The payments were detected by the tax authorities (national Tax Investigations Department (DNEF)), which sent a report (art. 40 CCP) to the Public Prosecutor's Office at the Nanterre High Court, in September 2007.

Following this report, a preliminary investigation was opened by the Public Prosecutor's Office in Nanterre. In December 2008, the Nanterre Public Prosecutor's Office handed the case over to the Paris Public Prosecutor's Office, which initiated a judicial investigation lasting six years (September 2009 to August 2015). In this case, the status of the company Sonatrach and the status of the beneficiary of the bribes as a public official were challenged by the defence on the grounds that since Sonatrach had no public service mission, the beneficiary was a private employee. However, on the basis of information received in the context of letters rogatory, the court held, firstly, that Sonatrach had the prerogatives of a public authority by virtue of the control exercised by the State and the purpose and methods of its intervention and, secondly, that the Algerian State had entrusted Sonatrach with the prerogatives of a public authority by giving it a monopoly on managing resources that were vital to the country's economy. The court accepted the classification of public official.

On 3 November 2016, four individuals (three managers and one employee) were convicted by the Paris Criminal Court on charges of misuse of corporate assets and foreign bribery (two individuals), complicity in foreign bribery (one individual) and misuse of corporate assets, foreign bribery, forgery and use of forged documents (one individual).<sup>425</sup> Three defendants were finally sentenced on appeal on 4 May 2020 and given suspended prison sentences ranging from four months to two years and fines ranging from EUR 10 000 to EUR 80 000. The fourth appealed to the Court of Cassation against the convictions for misuse of corporate assets, foreign bribery, forgery and use of forgeries (the non-final sentences imposed were a two-year suspended prison sentence and a fine of EUR 300 000). The case is awaiting a hearing.

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<sup>423</sup> Crim. no. 16-86.491 of 17 January 2018, No.16-86.491.

<sup>424</sup> Crim. 1 April 2020, No.19-83.969

<sup>425</sup> A fifth individual was also prosecuted for passive bribery and concealment.



### Public Services/Lobbyist (EU) – Eurotrends and Kic System case No. 62

*Final conviction of two legal persons and one individual by the Paris Court of Appeal on 6 October 2020 (confirmation of the judgment of the Court of First Instance).*

Between 2006 and 2008, the two directors of two French companies, Eurotrends LLC and Kic System LLC, bribed members of European delegations to obtain information on tender processes launched by the European Commission, which they then sold to companies applying for these contracts. In this case, the defendants obtained and sold information relating to the award of several public contracts in Turkey, Slovenia, Lithuania, the Russian Federation, Kazakhstan and Kyrgyzstan. The total amount of the bribes is estimated at EUR 132 000. This case was brought to the attention of the French authorities by the European Anti-Fraud Office (OLAF).

The Paris Public Prosecutor's Office opened a preliminary investigation on 5 March 2007, which it entrusted to the National Financial and Tax Investigation Division. A judicial inquiry was opened two years later, on 17 March 2009, into charges of foreign bribery, forgery and use of forgeries. In December 2017 (i.e. more than eight years after the start of the judicial inquiry), at the prosecutor's request, the investigative judge issued a referral order to the court compliant with the public prosecution's request referring, *inter alia*, the two individuals (the Eurotrends and Kic System directors) and the two legal persons (Eurotrends and Kic System) on the charge of bribing foreign public officials. One of the defendants was also charged with forgery and use of forgeries.

On 18 October 2018, the Paris Criminal Court convicted all the defendants of foreign bribery and acquitted the defendant accused of forgery and use of forgeries.<sup>426</sup> On 6 October 2020, the Paris Court of Appeal confirmed the convictions and overturned the acquittal. The sentences handed down were prison sentences ranging from six months to one year and a fine of EUR 50 000 for each of the individuals.<sup>427</sup> The two legal persons were also fined EUR 100 000 each. These convictions are now final, except for the conviction of one individual, who has appealed to the Court of Cassation. The case is awaiting a hearing.

### Oil-for-Food, Equipment aspect – 12 companies sanctioned, case No. 70

*Final conviction of 12 legal persons and two individuals confirmed by the Court of Cassation on 10 March 2021 (acquittal on First Instance, overturned on appeal).*

This case involves 12 legal persons (Hazemeyer, TLD Europe, SIDES, Legrand, Schneider Electric Industries, Manitowoc Crane Group France, Cofrapex, Genoyer, Sovam, David Brown Transmission France, Renault Trucks and Flowserve Pompes) and 2 individuals who violated the embargo imposed by the United Nations Security Council resolution 986 on persons who benefited from allocations of barrels of oil from the Iraqi regime, via the Iraqi oil company State Organisation for Marketing of Oil (SOMO), in return for taking a favourable position on Iraq. In this context, several French companies paid Iraqi public officials commissions equivalent to at least 10% of the value of the contracts obtained through intermediaries and shell companies. This case was detected during an investigation into other offences.

The Public Prosecutor's Office of the Paris High Court opened a judicial inquiry on 31 March 2006 against the French companies for foreign bribery, misuse of corporate assets and concealment of misuse of corporate assets. The companies are alleged to have paid more than EUR 250 000 in commissions. A preliminary investigation was not conducted beforehand. The judicial inquiry lasted almost seven years. On 28 May 2013, the investigative judge issued an order to refer 14 legal persons to the criminal court on the charge of foreign bribery, and three individuals on the charge of foreign bribery and misuse of corporate assets. On 18 June 2015, the Paris Criminal Court dismissed the prosecution of four legal persons on the

<sup>426</sup> *Le Figaro* (2018), [Un fonctionnaire européen condamné pour corruption](#) [EU official convicted of bribery].

<sup>427</sup> At the Court of First Instance, the individuals were given suspended prison sentences ranging from 9 to 15 months and fines of EUR 150 000 and EUR 100 000 each, with the two legal persons each fined EUR 200 000.

grounds of the *non bis in idem principle*, as agreements had been reached with the US authorities for the same facts. The other ten legal persons and three individuals were acquitted on the grounds that the commissions paid were used by the Iraqi State and not by its officials. Therefore, this was not a case of foreign bribery as there was no evidence that public officials had personally benefited from the commissions. The court also noted that the billing surcharges had been imposed on the foreign companies by decisions taken by Iraq's Council of Ministers and that, consequently, these sums could not be qualified as "unlawful" or "undue" within the meaning of article 435-3 CCP and the OECD Convention. Since the case of misuse of corporate assets originated from the case of foreign bribery, the individuals were also acquitted of these charges. The Public Prosecutor's Office lodged an appeal against this judgment.

The Paris Court of Appeal overturned the acquittal judgment on 15 February 2019, considering that the foreign bribery offence was characterised and dismissing the application of the *non bis in idem principle*. The 12 legal persons previously mentioned, as well as Clyde Union and two individuals, were convicted of bribing foreign public officials. The acquittal of one individual of misuse of corporate assets was confirmed and the Court of Appeal noted the termination of the public prosecution with regard to one legal person. Appeals were lodged by the two individuals and six of the legal persons convicted.

In a decision dated 10 March 2021, the Court of Cassation dismissed the appeals and confirmed the convictions and sentences handed down on appeal for foreign bribery against 12 legal persons and 2 individuals. The court also noted that the public prosecution had been terminated in respect of 1 of the 13 companies concerned (Clyde Union), which had been subject to corporate restructuring (merger and acquisition). The fines imposed on the legal persons ranged from EUR 30 000 to EUR 100 000, and the suspended prison sentences for individuals ranged from six to eight months.

### **Alcatel (Costa Rica) case No. 7**

*Final conviction of the legal person confirmed by the Court of Cassation on 16 June 2021 (acquittal decision initially pronounced at first instance and reversed on appeal).*

*Final acquittal of two individuals by the Paris Court of Appeal on 15 May 2020.*

Between 2001 and 2004, an Alcatel subsidiary (Alcatel Costa Rica) paid more than USD 20 million in bribes, concealed as fictitious consultancy contracts, to Costa Rican politicians and directors or former directors of the state-owned enterprise Instituto Costarricense de Electricidad (ICE), the Costa Rican national electricity operator, to obtain three contracts worth a total of approximately USD 312 million to supply telephone equipment. This case was brought to the attention of the judicial authorities when Alcatel Lucent France (formerly Alcatel CIT) filed a complaint seeking status as a civil party in October 2004 on charges of theft, complicity and concealment of offences, in connection with the operations of its subsidiary in Costa Rica.

The Paris Public Prosecutor's Office opened a judicial investigation in December 2004 into foreign bribery and the investigation was entrusted to the National Financial and Tax Investigation Division. No preliminary investigation was conducted beforehand. The judicial inquiry lasted more than 11 years. Only the parent corporation, Alcatel Lucent Ltd, was finally referred to the criminal court, as the investigation chamber cancelled the indictment of another legal person in November 2015 following a merger and acquisition. On 24 May 2016, the investigative judge issued an order in accordance with the prosecutor's request and referred Alcatel Lucent Ltd and two individuals to the court.

On 30 August 2017, the Paris Criminal Court acquitted Alcatel Lucent Ltd on the grounds that the inquiry had not identified the body or representative that had acted fraudulently on behalf of the company. The two individuals were also acquitted on the grounds that there was no evidence they were active in establishing the corruption system. According to the court, their position in the hierarchical structure, which suggested that "they were necessarily aware", was not sufficient to characterise their intention to commit the offence and therefore to convict them. The Public Prosecutor's Office lodged an appeal.

On 15 May 2020, the Paris Court of Appeal overturned the acquittal and ordered Alcatel Lucent Ltd to pay a fine of EUR 150 000 for the offence of bribing foreign public officials. The Court of Appeal retained the notion of group policy to impose liability on the legal person. However, it confirmed the acquittals of the two individuals on the grounds of lack of delegation. The company lodged an appeal to the Court of Cassation. In a judgment of 16 June 2021, the Court of Cassation dismissed the appeal lodged by Alcatel Lucent Ltd, rendering the conviction and the fine of EUR 150 000 final. No confiscation orders were issued.

This conviction comes more than ten years after Alcatel Lucent Ltd entered into a Deferred Prosecution Agreement with the Department of Justice, conditional on the payment of USD 92 million, and an agreement between Alcatel's subsidiary and the Costa Rican authorities under which Alcatel paid the equivalent of EUR 9 million in compensation to the Costa Rican State.<sup>428</sup>

## Case tried resulting in final dismissal of charges of bribing foreign public officials

### Safran (Nigeria) case No. 79

*Final dismissal of charges against the legal person and individuals on appeal on 7 January 2015.*

Between 2000 and 2003, Safran was suspected of having paid bribes amounting to EUR 6.5 million to Nigerian public officials through its representatives in order to obtain a public contract worth EUR 216 million to supply 70 million electronic national identity cards. The funds were allegedly paid through an intermediary via several shell companies. This case was brought to the attention of the French authorities following two formal notices by the Nigerian and British authorities in February 2005<sup>429</sup> and an international rogatory commission on 9 February 2005 by the US authorities.<sup>430</sup>

In January 2006, the Paris Public Prosecutor's Office opened a judicial investigation into charges of foreign bribery and complicity in this offence, misuse of corporate assets, and complicity and concealment committed to the detriment of the legal person. The judicial investigation lasted five years. The legal person, Safran, and two of its employees were indicted and then referred to court on 28 February 2011, charged with foreign bribery. The supervisors of these employees were granted assisted witness status.

On 5 September 2012, the Paris Criminal Court acquitted the two individuals on the grounds that they did not have sufficient autonomy to be held liable, given their position in Safran's hierarchy. However, the court held that these two individuals had undoubtedly facilitated Safran obtaining the contract, by participating "on its behalf, in a general, organised and coherent system of payment of commissions to intermediaries" and that "they were able to regularly inform the entire hierarchy of these actions without encountering the slightest obstacle, insofar as they participated in the overall economics of the project." The court found that the two defendants implemented Safran's trade policy in Nigeria by paying bribes to Nigerian public officials and fined the legal person EUR 500 000. Appeals have been filed against this decision.

On 7 January 2015, the Paris Court of Appeal overturned Safran's conviction and definitively acquitted the legal person. The Court of Appeal followed the prosecution's request, which considered that the offence, assuming it was established, could not be attributed to the legal person on the grounds that the only person with power of attorney was not prosecuted and that the two employees prosecuted did not have the power

<sup>428</sup> Department of Justice, Press Release (2010), [Alcatel-Lucent S.A. and three subsidiaries agree to pay USD 92 million to resolve Foreign Corrupt Practices Act investigation.](#)

<sup>429</sup> The British authorities had opened an investigation into alleged money laundering of USD 3 million during the execution of the contract (obtained by Safran between 2002 and 2003) by a Nigerian national who was then a public official of the Ministry of Interior and in charge of the national identity card project.

<sup>430</sup> This request for mutual assistance was made in the context of an investigation into violations of the Foreign Corrupt Practices Act (FCPA) by a US company, a subcontractor of Safran in the national identity card contract.

of attorney to enable them to trigger the liability of the legal person. The two individuals were also acquitted in the absence of sufficient evidence that the funds received by the Nigerian public officials were intended to encourage the recipients to perform or not perform one of their duties.

### **Oil Exploration (Burundi, Malawi and the Democratic Republic of the Congo) case No. 1**

*Final acquittal of an individual of foreign bribery, on appeal on 28 November 2017.*

The French manager of a British oil exploration company was accused of paying bribes in Burundi, Malawi and the Democratic Republic of the Congo (DRC) between 2007 and 2011 to secure hydrocarbon exploration contracts and have its operating licences renewed. In Malawi, payments were allegedly made to members of a contract award committee and to the foundation of the DRC President's wife. In Burundi, the manager is said to have agreed to pay the school fees of the children of the adviser to the Minister of Energy and Mines and to buy a plane ticket for the Minister of Energy and Mines, so that they would intervene favourably in the interests of the British oil exploration company in the context of its oil exploration and exploitation activities, in particular to obtain a decree renewing its licence. The offences were detected during a tax audit.

In October 2010, the Paris Public Prosecutor's Office opened a preliminary investigation into tax evasion, entrusted to the National Brigade for Combating Tax Crime (BNRDF), now the OCLCIFF, followed by a judicial investigation into charges of tax evasion and laundering in March 2011. The investigative judge's referral was then extended to include foreign bribery. This case was transferred to the PNF, which issued its final indictment in October 2014 (i.e. three years after the start of the judicial inquiry) and requested a partial dismissal of several foreign bribery charges. As regards the facts in the DRC, the PNF requested that the case be dismissed, considering that although monetary payments had been detected, the judicial inquiry had not been able to determine precisely to whom these sums were intended. With regard to the facts in Malawi, the PNF also requested that the case be dismissed because neither the preliminary investigation nor the judicial inquiry had determined the identity of the members of the awarding committee and it had not been possible to establish the function of the President's wife, i.e. whether she was a custodian of public authority or entrusted with a public service mission or invested with an elective mandate.

The investigative judge issued an order on 18 March 2015, referring the defendant to the Paris Criminal Court on charges of foreign bribery in Burundi, tax evasion and laundering of tax evasion. On 3 December 2015, the court acquitted the defendant of part of the foreign bribery charges, on the grounds that there was doubt as to whether the person sought out to renew the oil permit was a public official. However, the court sentenced the defendant to a 30-month suspended prison sentence and a EUR 1.5 million fine for the foreign bribery offences involving benefits granted to the Minister of Energy and Mines, as well as for tax evasion and money laundering. In a judgment dated 28 November 2017, the Paris Court of Appeal overturned the conviction and definitively acquitted the defendant of all foreign bribery charges, as the court considered that there was insufficient proof of the benefits paid.<sup>431</sup>

### **Arms (Cameroon and Mali) case No. 101**

*Final acquittal of an individual of foreign bribery on 18 June 2020, after refusing the terms of a plea bargain.*

Between 2011 and 2013, a French intermediary (M.T.) allegedly used his connections with government officials in Mali and Cameroon, including the defence ministers of both countries, to facilitate the procurement of various military equipment contracts by several French companies. Several bribes, the

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<sup>431</sup> However, the Court of Appeal convicted the defendant of the other offences of tax evasion and money laundering. This conviction was then overturned by the Court of Cassation, which referred the case to the Versailles Court of Appeal.

exact amounts of which have not been established, were allegedly paid to these public officials. Only one payment of EUR 76 000 was identified. In Cameroon, M.T. allegedly put the director of company M (M.B.) in contact with a Cameroonian government official working with the Minister of Defence and with a technical adviser to the minister, enabling the signing of a contract in 2011. This case was detected during an investigation into other offences.

On 25 July 2013, the Paris Public Prosecutor's Office opened a judicial investigation into charges of laundering of tax evasion, misuse of corporate assets, forgery and foreign bribery. The investigation was entrusted to the OCLCIFF. No preliminary investigation was conducted beforehand. The judicial inquiry lasted five years and six individuals were indicted. In September 2018, the investigative judge partially dismissed several of the foreign bribery charges against M.T. on the grounds that it had not been proven that M.T. had paid a commission to public officials after his own commission had been paid. The case against one individual was dismissed. Five of the defendants requested that the plea-bargaining procedure be triggered for the charges of misuse of corporate assets and concealment of this offence, complicity in unduly obtaining an administrative document, complicity in forgery and use of forgeries, complicity in breach of trust, and disguised work. The foreign bribery charges were dropped against these five individuals. Under the plea-bargaining mechanism, they were sentenced on 21 December 2018 to one-year suspended prison sentences and ordered to pay a EUR 375 000 fine.

However, having refused the plea bargain, M.B. was referred to the Paris Criminal Court for the offence of foreign bribery committed in Cameroon between 2011 and 2013. The defendant was definitively acquitted on 18 June 2020 by the Paris Criminal Court, which considered that the investigations had not established that the payments in question had been used to pay commissions to foreign public officials. No appeal was filed against this decision.

#### **Arms 1 (Cameroon) case No. 124**

*Final acquittal of three individuals of foreign bribery, on appeal on 6 June 2014.*

Between July 2003 and 2009, the three directors of several limited liability companies allegedly paid bribes to Cameroonian public officials in connection with arms contracts. This case was detected by TRACFIN reports in March 2006.

In July 2006, the Paris Public Prosecutor's Office opened a judicial inquiry into charges of money laundering, misuse of corporate assets and concealment of this offence. The investigative judge's referral was then extended to foreign bribery. No preliminary investigation was conducted beforehand. The judicial inquiry lasted four and a half years and the defendants were referred to court on charges of foreign bribery, misuse of corporate assets, laundering of foreign bribes and unauthorised trading or intermediary activity in the arms trade.

On 2 September 2011, the Paris Criminal Court acquitted the defendants of the foreign bribery charge. The decision to acquit was confirmed on 6 June 2014 by the Paris Court of Appeal, which definitively acquitted the three individuals of foreign bribery, misuse of corporate assets and money laundering.<sup>432</sup> The court considered that although the judicial investigation had established that numerous wire transfers of substantial amounts of money had been made to several persons linked to Cameroon, the existence of a causal link between the remittance of funds and the award of an arms contract had not been demonstrated.

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<sup>432</sup> The Paris Court of Appeal definitively acquitted the three individuals of bribing foreign public officials, misuse of corporate assets and money laundering. However, one of the defendants was sentenced by the Court of Appeal to a six-month suspended prison sentence and a fine of EUR 30 000 for the offence of exercising a regulated professional activity without authorisation, confirming the judgment of the Paris Criminal Court of 2 September 2011.

### **Oil-for-Food case, oil aspect – Total and Vitol, No. 102**

*Final acquittal of six individuals of foreign bribery or complicity in this offence by the Paris Criminal Court on 8 July 2013.*

This case and the judicial proceedings are described previously, along with the cases that resulted in final convictions. The final acquittal of six individuals by the Paris Criminal Court was not appealed. The acquittals were on the grounds that the commissions paid were used by the Iraqi State and not by its public officials, meaning it was not a case of foreign bribery as there was no evidence that public officials had personally benefited from the commissions. The court also noted that the billing surcharges had been imposed on the foreign companies by decisions taken by Iraq's Council of Ministers and that, consequently, these sums could not be qualified as "unlawful" or "undue" within the meaning of article 435-3 CP and the OECD Convention.

## **Cases appealed at the Court of Cassation**

### **Subsidy (Mali) case No. 96**

This case concerns suspected undue payments, particularly by French company BBC Finance LLC, of an estimated EUR 381 135 to a director at the Centre for the Development of Enterprise with European Institutions, to facilitate the granting of subsidies between 2001 and 2007 for the Malian company Fitina, in which BBC Finance is a shareholder. The case was brought to the attention of the French authorities by the European Anti-Fraud Office (OLAF).

The Mulhouse Public Prosecutor's Office opened a preliminary investigation in February 2008. A judicial investigation was then opened in November 2009, lasting more than eight years. Two individuals were referred to the Mulhouse Criminal Court for misuse of corporate assets and active bribery of a person entrusted with a public function within an international public organisation.

On 10 January 2019, the Mulhouse Criminal Court acquitted the two defendants and the director of the Centre for the Development of Enterprise, who was prosecuted for passive bribery, on the grounds that the director of the Centre for the Development of Enterprise was merely a private contractual agent and not a public official, community official or national official of another EU Member State, according to the texts in force at the time of the offence. The Public Prosecutor's Office lodged an appeal.

On 9 October 2020, the Colmar Court of Appeal found both defendants guilty of misuse of corporate assets and bribing foreign public officials and handed down 12-month suspended prison sentences. The recipient of the bribes was also convicted. All three were also jointly and severally liable to pay a total of EUR 5.1 million as compensation for the damage suffered by the company's Centre for the Development of Enterprise and the European Investment Bank – both of which were civil parties. The defendants have lodged an appeal to the Court of Cassation and the case is awaiting hearing.

### **Hydrocarbons (Algeria) case No. 4**

This case and the judicial proceedings are described previously, along with the cases that resulted in final convictions. In this case, one of the defendants (an individual) lodged an appeal to the Court of Cassation against the decision to convict him on charges of misuse of corporate assets, foreign bribery, forgery and use of forgeries, pronounced against him by the Paris Criminal Court in October 2016 and upheld by the Paris Court of Appeal on 4 May 2020. The non-final sentences imposed are a two-year suspended prison sentence and a fine of EUR 300 000. The case is awaiting a hearing.

## Public Services/Lobbyist (EU) – Eurotrends and Kic System case No. 62

This case and the judicial proceedings are described previously, along with the cases that resulted in final convictions. In this case, one of the defendants (an individual) lodged an appeal to the Court of Cassation against the decision to convict him on charges of foreign bribery pronounced against him by the Paris Criminal Court on 18 October 2018 and upheld by the Paris Court of Appeal on 6 October 2020. The non-final sentences imposed are a 12-month suspended prison sentence and a fine of EUR 50 000. The case is awaiting a hearing.

## Cases resolved through the plea-bargaining procedure

### Oil 1 (Republic of the Congo) case No. 128

*Final conviction of an individual through a plea bargain, approved on 13 September 2016.*

Between 2013 and 2014, the director of a French company in the hydrocarbon sector paid a total of EUR 68 100 in commissions to the directors and employees of the National Petroleum Company of Congo (SNPC) to obtain and/or retain contracts from this company. The payments in question were detected by TRACFIN and the Paris Public Prosecutor's Office opened a preliminary investigation in July 2014 into money laundering, which was entrusted to the Central Office for Fighting Major Financial Crime. The Paris Public Prosecutor's Office then relinquished jurisdiction to the PNF in April 2015. At the end of the investigation, it appeared that the offences could be classified as foreign bribery and misuse of corporate assets. The defendant admitted to the charges and on 13 September 2016 the Paris Criminal Court approved the terms of a plea bargain for foreign bribery and misuse of corporate assets and sanctions against the defendant of six-month suspended prison sentence and a EUR 25 000 fine.

## Cases resolved through a CJIP<sup>433</sup>

### Société Générale (Libya) case No. 90

*CJIP approval decision on 4 June 2018 by the Paris High Court*

Between 2004 and 2009, Société Générale made illicit payments through a Libyan intermediary, estimated at a minimum of USD 43.3 million in total, and provided various undue benefits (such as leisure trips and entertainment) to Libyan public officials in charge of the country's main financial institutions, to encourage these financial institutions to invest in Société Générale's structured financial products. The payments were made through a shell company in Panama (Leinada Inc.) via a Swiss bank account. Société Générale secured 13 investments and a restructuring of Libyan public institutions for a total amount of approximately USD 3.66 billion, with profits of approximately EUR 335 million.

Based on press articles, the PNF opened a preliminary investigation in November 2016, which it entrusted to the OCLCIFI. In this case, parallel investigations were conducted by the PNF and the United States Department of Justice. During the visit, PNF representatives indicated that they were aware that an investigation was under way in the United States, following the receipt of a request for mutual legal

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<sup>433</sup> Since the Act of 24 December 2020, the Ministry of Justice (<http://www.justice.gouv.fr/publications-10047/cjip-13002/>) and the Ministry of the Economy, Finance and the Recovery (<https://www.economie.gouv.fr/cedef/convention-judiciaire-interet-public-cjip>) are responsible for publishing the CJIPs entered into by the judicial authority. The AFA also continues to publish CJIPs on its website: <https://www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public>. They are also available on the PNF website: [Publications | Court of Paris \(justice.fr\)](https://www.justice.fr/publications).

assistance, even though proceedings were already under way in France. The preliminary investigation lasted less than two years.

On 24 May 2018, Société Générale and the PNF entered into a CJIP, under which Société Générale agreed to pay the Treasury a total of EUR 250 million and have the AFA assess the quality and effectiveness of its anti-bribery compliance measures for two years.<sup>434</sup> The CJIP was validated by the presiding judge at the Paris High Court on 4 June 2018.<sup>435</sup> This CJIP was part of a co-ordinated resolution of the case with the US authorities, with whom Société Générale has entered into a Deferred Prosecution Agreement for violations of the FCPA anti-bribery provisions. The total penalties to be paid by Société Générale amount to over EUR 500 million. The PNF declared the public action against the bank terminated on 11 December 2020. This investigation is now closed and no individuals have been prosecuted.

### **Egis Avia (Algeria) case No. 78**

*CJIP approval decision on 10 December 2019 by the Paris High Court*

Between 2009 and 2012, Egis Avia made illicit payments to Algerian public officials through a shell company domiciled in the British Virgin Islands (Amphora Consultant Ltd), with a view to concluding a contract with Sonatrach to construct and equip an airport terminal in Oran (Algeria) worth EUR 3.9 million. Amphora Consultant Ltd was to receive 10% of the amount if the contract with Sonatrach was concluded. The amount of the bribes is not known but invoices were seized for the payment of a total of EUR 390 640 to Amphora Consultant Ltd. This case was detected by the tax authorities, who brought the facts to the attention of the Nanterre Public Prosecutor's Office in July 2011, in application of article 40CCP.

The Nanterre Public Prosecutor's Office opened a preliminary investigation at the end of September 2011, which it entrusted to the BRDE. A judicial investigation followed in October 2013 into charges of forgery and use of forgeries, active and passive bribery of foreign public officials, misuse of corporate assets and concealment of this offence. The Nanterre Public Prosecutor's Office then relinquished jurisdiction to the PNF in 2014. In August 2018, Egis Avia was indicted on foreign bribery charges. The company acknowledged the facts of the case and accepted their qualification as criminal offences. The judicial inquiry lasted a total of six years. On 28 November 2019, Egis Avia and the PNF entered into a CJIP, under which the company agreed to pay a public interest fine of EUR 2.6 million.<sup>436</sup> The CJIP was validated by the presiding judge at the Paris High Court on 10 December 2019.<sup>437</sup> The judicial investigation is still ongoing with regard to the individuals involved. One individual was indicted in April 2018 for foreign bribery, forgery and use of forgeries.

### **Airbus (multiple jurisdictions) case No. 4**

*CJIP approval decision on 31 January 2020 by the Judicial Court of Paris.*

The case involves foreign public official and private bribery offences committed by Airbus between 2004 and 2016, in connection with contracts for the sale of civil aircraft and satellites entered into by entities of the Airbus Group. Millions of euros in commissions and hidden benefits in kind were paid through the network of commercial intermediaries employed by Airbus to obtain contracts in as many as 20 countries (including the People's Republic of China, the United Arab Emirates, Korea, Japan, Saudi Arabia, Chinese Taipei, Kuwait, Turkey, the Russian Federation, Mexico, Thailand, Brazil, Viet Nam, India, Colombia, Nepal, Sri Lanka, Ghana, Malaysia and Indonesia). This case was brought to the attention of the PNF

<sup>434</sup> [Judicial Public Interest Agreement between the Public Prosecutor and Société Générale](#), 24 May 2018, PNF 15 254 000 424.

<sup>435</sup> Paris High Court, [CJIP approval order](#), 4 June 2018.

<sup>436</sup> [Judicial Public Interest Agreement between the Public Prosecutor and Egis Aviva](#), 28 November 2019, PNF 14153000230.

<sup>437</sup> Paris High Court, [CJIP approval order](#), 10 December 2019.



following a report under article 40 CCP by the Director General of the Treasury, who relayed information transmitted by UK Export Finance (the UK export credit agency) to Coface (now Bpifrance – the French export credit agency). This information concerned irregularities in Airbus declarations on the use of commercial intermediaries, initially reported by Airbus to UK Export Finance.

The PNF opened a preliminary investigation in July 2016 for foreign bribery, misuse of corporate assets, breach of trust, organised fraud, money laundering, forgery and use of forgeries. The investigation was undertaken by a joint investigation team from the PNF and the UK SFO, in parallel with an investigation by the US Department of Justice for violations of the FCPA and the International Traffic in Arms Regulations (ITAR). Within the joint investigation framework, the PNF and the SFO agreed to divide investigation priorities on a geographical basis, using representative samples of the markets concerned.

On 29 January 2020, Airbus SE and the PNF entered into a CJIP, under which the company agreed to pay a public interest fine of more than EUR 2 billion and to have the AFA assess the effectiveness of its compliance programme for three years.<sup>438</sup> The CJIP was validated by the presiding judge at the Judicial Court of Paris on 31 January 2020.<sup>439</sup> The preliminary investigation opened in July 2016 is still ongoing with regard to the individuals involved. The case was resolved in a co-ordinated manner and resulted in the conclusion of two separate Deferred Prosecution Agreements in the United Kingdom and the United States, which provide for Airbus to pay fines of more than EUR 983 million to the UK authorities and EUR 525.65 million to the US authorities. The total amount of fines paid by Airbus SE is EUR 3.59 billion.

### **Bolloré (Togo) case No. 34**

*CJIP approval decision on 26 February 2021 by the Judicial Court of Paris.*

This case concerns the payment of bribes between 2009 and 2011 by the Bolloré Group via various subsidiaries to finance the electoral campaigns of public officials in Togo and Guinea, in order to obtain port concessions in these two countries. The amount of bribes paid is unknown. The suspicion of foreign bribery was brought to the attention of the Paris Public Prosecutor's Office by TRACFIN in April 2012.

In July 2012, a preliminary investigation was opened by the Paris Public Prosecutor's Office and entrusted to the OCLCIFF. A judicial inquiry was then opened in November 2013 on charges of foreign bribery, organised money laundering, complicity and concealment of these offences. The Paris Public Prosecutor's Office relinquished the case to the PNF in February 2016 and the PNF requested that the judicial investigation be extended into the charges of misuse of corporate assets and breach of trust. On 12 December 2018, Bolloré SE was indicted on charges of foreign bribery (Togo), complicity in breach of trust (Togo and Guinea) and complicity in forgery and use of forgeries. The alleged foreign bribery acts in Guinea were prosecuted in parallel, but were dismissed due to the statute of limitations. On 5 February 2021, after more than seven years of judicial inquiry, an order was issued, based on the recommendations of the Public Prosecutor's Office, to refer three individuals to the Judicial Court of Paris to validate the terms of a CRPC for the charges of foreign bribery (two individuals) and complicity in breach of trust (three individuals).

On 9 February 2021, Bolloré SE, its parent company Financière de l'Odét and the PNF entered into a CJIP, under the terms of which the company agreed to pay a public interest fine of EUR 12 million and to have the AFA assess the effectiveness of its compliance programme for two years (at the company's expense, up to EUR 4 million).<sup>440</sup> Financière de l'Odét is a co-signatory to the CJIP in its capacity as the

<sup>438</sup> [Judicial Public Interest Agreement between the Public Prosecutor and Airbus SE](#), 29 January 2020, PNF 16 159 000 839.

<sup>439</sup> Judicial Court of Paris, [CJIP approval order](#), 31 January 2020.

<sup>440</sup> [Judicial Public Interest Agreement between the Public Prosecutor and Bolloré SE and Financière de l'Odét SE](#); 9 February 2021, PNF 12 111 072 209.

parent company of the Bolloré Group and beneficiary of the actions of which Bolloré SE is accused. The CJIP was validated by the presiding judge at the Judicial Court of Paris on 26 January 2021.<sup>441</sup>

On the same day, a CRPC providing for the conviction of the three individuals and the payment of a fine of EUR 375 000 each was submitted for approval. However, at the hearing, the presiding judge at the Judicial Court of Paris refused to approve the terms of the agreements, saying that the sentences were “inappropriate in view” of the seriousness of the offences. The presiding judge considered that the facts had seriously undermined “public economic order” and “the sovereignty of the Togolese State” and therefore required a criminal trial.<sup>442</sup> The order to refer the three defendants to approve their plea bargain was therefore rendered null and void, as the procedure was not approved.<sup>443</sup>

Despite the refusal to approve the plea bargain concerning its executives, Bolloré SE did not make use of its right to withdraw (based on article 41-1-2 CCP) and paid the public interest fine on 8 March 2021. The PNF chose to refer the case to an investigative judge and not to summon the individuals concerned directly before the Paris Criminal Court, as authorised by article 495-14 CCP.<sup>444</sup>

The PNF lodged an appeal before the Criminal Chamber of the Court of Cassation on the grounds of abuse of authority, to challenge the order of the presiding judge at the Judicial Court of Paris that rejected the approval of the CRPC.<sup>445</sup> The PNF argued that the presiding judge exceeded her powers by mentioning in her CJIP approval order that three individuals had admitted the facts and their legal qualification, even though she had refused to approve the terms of the CRPC the same day. On 12 April 2021, the Court of Cassation refused to admit the appeal lodged by the PNF against the CJIP approval order on the grounds that it is not subject to appeal.<sup>446</sup>

### **Systra (Uzbekistan and Azerbaijan) case No. 87**

*CJIP approval decision on 13 July 2021 by the Judicial Court of Paris.*

This case concerns bribes paid by the French engineering company Systra Ltd in Uzbekistan between January and December 2013, in connection with the award of a public engineering contract to modernise and electrify a railway line in Uzbekistan. The bribes, totalling USD 575 954.97, were paid to a public official in charge of awarding public contracts via an account in Latvia, which was held by a shell company of which the public official was the beneficial owner. The value of the contract obtained is not known, but the CJIP reveals that the turnover generated by this contract amounts to EUR 3.5 million and that this turnover enabled Systra to generate an operating margin of EUR 339 428. This case was brought to the attention

<sup>441</sup> Judicial Court of Paris, [CJIP approval order](#), 26 February 2021.

<sup>442</sup> Piel, S. (2021), [Dans une affaire de corruption en Afrique, la justice française refuse le plaider-coupable de Vincent Bolloré](#) [In a case of bribery in Africa, French judge refuses Vincent Bolloré’s guilty plea]; *France Info* (2021), [Corruption au Togo: une juge rejette le plaider-coupable de Vincent Bolloré et estime “nécessaire” la tenue d’un procès](#) [Corruption in Togo: Judge rejects Vincent Bolloré’s guilty plea and considers trial “necessary”].

<sup>443</sup> Piel, S. (2021), [Vers un procès contre Vincent Bolloré dans une affaire de corruption en Afrique](#) [Towards proceedings against Vincent Bolloré in African corruption case]; *Le Figaro* (2021), [Corruption au Togo: le dossier de Vincent Bolloré retourne chez un juge d’instruction](#) [Corruption in Togo: Vincent Bolloré’s case returns to an investigating judge].

<sup>444</sup> Cazeneuve, B., Van Gaver, B. and Mennucci, A. (2021), [Justice pénale négociée : quels rapports entre la responsabilité des entreprises et celle des dirigeants?](#) [Criminal justice negotiated: What are links between company liability and directors’ liability?].

<sup>445</sup> Cazeneuve, B., Van Gaver, B. and Mennucci, A. (2021), [Justice pénale négociée : quels rapports entre la responsabilité des entreprises et celle des dirigeants?](#) [Criminal justice negotiated: What are links between company liability and directors’ liability?]; Brunelle, E., Lachassagne, M., Brihi, S. and Bousquet, A. (2021), [L’affaire Bolloré ou les limites d’une justice pénale négociée](#) [The Bolloré case or the limits of negotiated criminal justice].

<sup>446</sup> Piel, S. (2021), [Affaire Bolloré : nouveau revers pour le Parquet national financier](#) [The Bolloré case: another setback for the National Financial Prosecutor’s Office].

of the French authorities by a report from the Japanese judicial authorities in August 2015. Two years later, the PNF opened a preliminary investigation on 1 June 2017 into foreign bribery .

Through searches and hearings, investigators uncovered a second bribery scheme in Azerbaijan, in which Systra paid bribes to an Azerbaijani public official to win a public engineering contract to modernise and expand the Baku metro network in May 2009. A consortium was established with a Czech and a Korean company and a local branch, Systra AZ, was established in 2010 for the purpose of this contract. The bribes were paid as commissions to two sub-contractors, including a company registered in Delaware (United States) and an Israeli sales agent who had access to the Azerbaijani Minister of Economy (who had oversight of the Baku Metro Company). These commissions were as high as 30% of the invoiced amounts. The value of the contract obtained is not known, but the CJIP reveals that the turnover generated by this contract amounts to EUR 44.4 million.

On 12 July 2021, Systra Ltd and the PNF entered into a CJIP (four years after the preliminary investigation was opened), under which the company agreed to pay a public interest fine of EUR 7.49 million, and which indicates that Systra generated an operating margin of approximately EUR 4.7 million as a result of the contract obtained through bribery. No AFA assessment of the effectiveness of the company's compliance programme has been imposed. The CJIP was validated by the presiding judge at the Judicial Court of Paris on 13 July 2021. The preliminary investigation opened in June 2017 is still ongoing with regard to the individuals involved.

## ANNEX 2: FOREIGN BRIBERY CASES SINCE PHASE 3

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
<b>CASES RESOLVED OR CLOSED (AT ANY STAGE OF THE PROCEEDINGS)</b>												
1.	PUBLIC TRANSPORT 2 (No. 11)	g)	N/A (proceedings dismissed)	Judicial inquiry opened on 31 January 2014	N/A (proceedings dismissed)	1998–2002	Suspected foreign bribery in connection with consultancy contracts concluded following three calls for tender in the field of public transport issued by the municipality of the capital of an Eastern European country	N/A (proceedings dismissed)	N/A (proceedings dismissed)  Judicial inquiry opened into foreign bribery and misuse of corporate assets	Proceedings dismissed on 22 November 2018	N/A (proceedings dismissed)	
3.	MIDDLE EAST CONTRACTS (No. 26)	e)	N/A (closed without further action)	Preliminary investigation opened on 3 June 2015	N/A (closed without further action)	2009–2011	Suspected foreign bribery in connection with the award of arms contracts in the Middle East	N/A (closed without further action)	N/A (closed without further action)	Closed without further action on 3 January 2019, insufficiently characterised offence	N/A (closed without further action)	
4.	<u>BANK INVESTMENT (No. 120)</u>	i)	15 November 2012	Judicial inquiry opened on 21 June 2005	one individual, company director	2003–2004	Suspected foreign bribery in connection with competition for customers	EUR 177 525	Foreign bribery (conviction) Fraud (acquittal)	Final conviction for foreign bribery (acquittal for fraud) by the	EUR 20 000 fine	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
							(financial investments) of a Cameroonian national hydrocarbon company, through payments to its director, who is also the chief of staff of an African minister			Paris Criminal Court		
5.	MASS RETAIL SOUTH AMERICA (No. 116)	h)	N/A (closed without further action)	Preliminary investigation opened on 24 October 2017	N/A (closed without further action)	2011–2012	Suspected bribery of foreign public officials in connection with the blocking of a transaction by a shareholder wishing to ally itself with a competitor based in South America	N/A (closed without further action)	N/A (closed without further action)	Closed without further action on 1 October 2020, no offence	N/A (closed without further action)	
6.	OIL 1 REPUBLIC OF THE CONGO (No. 128)	b)	Plea bargain of 13 September 2016	Preliminary investigation opened on 31 July 2014	One individual, company director	2012–2014	Suspected foreign bribery in connection with being awarded and maintaining contracts with a Congolese public company through the payment of sums of money to employees of that company	EUR 68 100	Bribery of foreign public officials Misuse of corporate assets	Final conviction of one individual through a plea bargain for foreign bribery and misuse of corporate assets, approved by the Paris Criminal Court	Six-month suspended prison sentence and EUR 25 000 fine	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
7.	<u>INCINERATION PLANT</u> (No. 121)	k)	N/A (proceedings dismissed)	Judicial inquiry opened on 14 January 2013, after preliminary investigation opened on 28 September 2010	N/A (proceedings dismissed)	2007–2009	Suspected bribery of foreign public officials in connection with the award of a contract to design and construct a waste incineration plant in Central Asia	N/A (proceedings dismissed)	N/A (proceedings dismissed)  Judicial inquiry opened into foreign bribery and money laundering	Proceedings dismissed on 10 April 2014	N/A (proceedings dismissed)	
8.	MIDDLE EAST SANITATION (No. 39)	g)	N/A (closed without further action)	Preliminary investigation ongoing, opened in 2014	N/A (closed without further action)	2004–2005	Suspected foreign bribery in relation to a project to reconstruct and renovate sanitation systems in a Middle Eastern city	N/A (closed without further action)	N/A (closed without further action)	Closed without further action on 28 December 2015, insufficiently characterised offence	N/A (closed without further action)	
9.	EASTERN EUROPE MONEY LAUNDERING (No. 42)	b)	N/A (closed without further action)	Preliminary investigation opened on 17 April 2017	N/A (closed without further action)	2013–2017	Suspected foreign bribery and money laundering in connection with the acquisition in France of a large real estate portfolio by nationals of an Eastern European country	N/A (closed without further action)	N/A (closed without further action)	Closed without further action on 16 September 2020, insufficiently characterised offence	N/A (closed without further action)	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
10.	HONEYWELL (No. 45)	a)	30 May 2016	Judicial inquiry opened on 27 November 2012, after preliminary investigation opened on 9 March 2011	N/A (proceedings for foreign bribery dismissed)  One individual convicted for breaching compliance obligations	2011	Suspected foreign bribery in connection with the establishment of the Honeywell joint venture between a French company and a company from a North African country, through payments to the government of that country	N/A (proceedings for foreign bribery dismissed)	Foreign bribery (proceedings dismissed) Money laundering (proceedings dismissed) Forgery (proceedings dismissed) Breach of compliance obligations (conviction)	Partial dismissal of the offence of foreign bribery  Final conviction of one individual for breaching compliance obligations by the Paris Criminal Court	EUR 375 000 customs fine for breach of compliance obligations and failure to return the EUR 1.5 million seized	
11.	DRUGS AFRICA (No. 47)	f)	N/A (closed without further action)	Preliminary investigation opened on 20 August 2015	N/A (closed without further action)	2012–2013	Suspected foreign bribery in connection with the awarding of contracts to sell drugs in several African countries, through payments to African ministers	N/A (closed without further action)	N/A (closed without further action)	Closed without further action on 3 March 2019, insufficiently characterised offence	N/A (closed without further action)	
12.	HOSPITAL EQUIPMENT ASIA (No. 49)	g)	N/A (closed without further action)	Preliminary investigation opened on 2 October 2015	N/A (closed without further action)	2001–2014	Suspected foreign bribery in connection with the award of a contract to equip a hospital in Asia	N/A (closed without further action)	N/A (closed without further action)	Closed without further action on 17 August 2019, insufficiently characterised offence	N/A (closed without further action)	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
13.	<u>DIGITAL VAT REPORT (No. 50)</u>	e)	N/A (proceedings dismissed)	Judicial inquiry opened on 1 July 2009, after preliminary investigation opened on 14 May 2008	N/A (proceedings dismissed)	2001–2004	Suspected foreign bribery in connection with the conclusion of contracts with public enterprises, particularly in Eastern Europe, through payments by a French printing company to intermediaries and foreign commercial agents under the guise of lobbying agreements	N/A (proceedings dismissed)	N/A (proceedings dismissed)  Judicial inquiry opened into foreign bribery and misuse of corporate assets	Proceedings dismissed on 1 June 2015	N/A (proceedings dismissed)	
14.	RADIO AND TELEVISION REPUBLIC OF THE CONGO (No. 55)	b)	Plea bargain of 18 December 2018	Judicial inquiry opened on 9 March 2015, after preliminary investigation opened on 18 June 2013	N/A (proceedings for foreign bribery dismissed)  Three individuals, convicted of misappropriation of public funds	2008–2014	Suspected foreign bribery in connection with the award of a public contract to supply and install a radio and television station in the Republic of the Congo	N/A (proceedings for foreign bribery dismissed)	Foreign bribery (proceedings dismissed) Forgery and use of forgeries (proceedings dismissed) Laundering of public funds (conviction)	Partial dismissal of the offence of foreign bribery  Final convictions of three individuals through plea bargaining for concealment of misappropriation of public funds and complicity in this offence,	- Individual 1: 12-month suspended prison sentence and EUR 301 500 fine - Individual 2: Ten-month suspended prison sentence and EUR 61 500 fine - Individual 3: Three-month suspended	The facts were initially described as bribing foreign public officials, but in reality amounted to trading in influence directed towards foreign public officials, which was not punishable at the time the offence was committed. The offence was therefore reclassified as concealment and complicity in concealment of the misappropriation of public funds and the laundering of this offence. Since then, the offence directed towards foreign public officials has been introduced



	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
										approved by the Paris Criminal Court	prison sentence and EUR 25 000 fine	into French law.
15.	GAS COMPLEX CONSTRUCTION (No. 57)	n)	N/A (closed without further action)	Preliminary investigation opened on 20 August 2012	N/A (closed without further action)	2011–2012	Suspected foreign bribery in relation to construction projects abroad, particularly in the Middle East	N/A (closed without further action)	N/A (closed without further action)	Closed without further action on 1 December 2020 due to other non-criminal proceedings or sanctions	N/A (closed without further action)	
16.	REAL ESTATE PROJECT (No. 60)	e)	N/A (proceedings dismissed)	Judicial inquiry opened on 18 March 2014, after preliminary investigation opened on 24 January 2014	N/A (proceedings dismissed)	2011	Suspected foreign bribery in connection with obtaining an increase in the size of a building project by the administration of a European country	N/A (proceedings dismissed)	N/A (proceedings dismissed)  Judicial inquiry opened into charges of foreign bribery, breach of trust, active or passive bribery of a judicial expert, trading in influence, forgery and use of forgeries, illegal practice of the profession of real estate agent and	Proceedings dismissed on 3 July 2017	N/A (proceedings dismissed)	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
									money laundering			
17.	<u>SENEGAL CONTRACTS</u> (No. 123)	b)	N/A (closed without further action)	Preliminary investigation opened on 21 September 2011	N/A (closed without further action)	Not provided	Suspected foreign bribery in relation to public procurement awards in Senegal	N/A (closed without further action)	N/A (closed without further action)	Closed without further action on 24 December 2012, no offence	N/A (closed without further action)	
18.	SUPERMARKETS (No. 64)	k)	N/A (closed without further action)	Preliminary investigation opened on 20 January 2012	N/A (closed without further action)	2007–2008	Suspected foreign bribery in connection with the establishment of several hypermarkets in Eastern Europe	N/A (closed without further action)	N/A (closed without further action)	Closed without further action on 25 April 2016, insufficiently characterised offence	N/A (closed without further action)	
19.	<u>ARMS 1 CAMEROON</u> (No. 124)	b)	Judgment of 2 September 2011  Appeal decision of 6 June 2014	Judicial inquiry opened on 28 July 2006	Two individuals, company managers	2004–2006	Suspected foreign bribery in connection with illicit activity of brokering war material to Cameroonian authorities; existence of a kickback system to Cameroonian officials	EUR 700 000	Foreign bribery (acquittal) Misuse of corporate assets (acquittal) Money laundering and unauthorised trading or intermediary activity in connection with the manufacture of or trade in war	Final conviction of one individual for unauthorised brokering in the arms trade by the Paris Court of Appeal, and confirmation of the acquittal of two individuals on charges of foreign bribery, aggravated money laundering and misuse of	N/A for foreign bribery  Six-month suspended prison sentence and EUR 30 000 fine	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
									material, arms and defence ammunition of the first four categories (conviction)	corporate assets by the Paris Criminal Court		
20.	SHIPS (No. 71)	h)	N/A (closed without further action)	Preliminary investigation opened on 19 September 2017	N/A (closed without further action)	2013–2016	Suspected foreign bribery in connection with the award and performance of a contract for the supply of fishing vessels to a fishing company in an East African state	N/A (closed without further action)	N/A (closed without further action)	Closed without further action on 8 January 2020, insufficiently characterised offence	N/A (closed without further action)	
21.	AUTOMOTIVE MANUFACTURER (No. 74)	g)	N/A (proceedings dismissed)	Judicial inquiry opened on 24 February 2017, after preliminary investigation opened on 13 January 2014	N/A (proceedings dismissed)	1997–2003	Suspected foreign bribery in connection with vehicle imports into a Maghreb country	N/A (proceedings dismissed)	N/A (proceedings dismissed)	Proceedings dismissed on 19 April 2019	N/A (proceedings dismissed)	
22.	<a href="#">SAFRAN ID CARDS NIGERIA (No. 79)</a>	g)	Judgment of 5 September 2012  Appeal decision of	Judicial inquiry opened on 21 January 2006	Two individuals, a director and an engineer from SAFRAN SA	2000–2003	Suspected foreign bribery in connection with an ID card contract in Nigeria	Approximately EUR 6 500 000	Foreign bribery (acquittals) Misuse of corporate assets	Final acquittal of the two individuals and the legal person by the Paris Court of Appeal, after	At first instance: EUR 500 000 fine  Appeal: N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
			7 January 2015		One legal person, SAFRAN SA				(proceedings dismissed)	conviction of the legal person for foreign bribery by the Paris Criminal Court, and acquittal of the two individuals	(general acquittal)	
23.	POPULATION CENSUS (No. 80)	o)	N/A (closed without further action)	Analysis conducted by the PNF in 2018	N/A (closed without further action)	2016	Suspected foreign bribery in connection with the award of a contract to conduct a population census in a West African country, through payments to members of the executive branch of that country	N/A (closed without further action)	N/A (closed without further action)	Closed without further action on 16 January 2020, insufficiently characterised offence	N/A (closed without further action)	
24.	<u>BOATS (No. 84)</u>	b)	N/A (proceedings dismissed)	Judicial inquiry opened on 5 September 2008, after preliminary investigation opened on 21 April 2007	N/A (proceedings dismissed)	2005–2007	Suspected foreign bribery in connection with the award of a government contract with the navy of a North African country	N/A (proceedings dismissed)	N/A (proceedings dismissed)  Judicial inquiry opened into foreign bribery and misuse of corporate assets	Proceedings dismissed on 8 July 2020	N/A (proceedings dismissed)	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
25.	WEST AFRICA HEALTH SYSTEM (No. 94)	g)	N/A (closed without further action)	Preliminary investigation opened on 11 February 2015	N/A (closed without further action)	2010–2011	Suspected foreign bribery in connection with the award of a contract for the modernisation of a health system in a West African country	N/A (closed without further action)	N/A (closed without further action)	Closed without further action on 21 January 2016, insufficiently characterised offence	N/A (closed without further action)	
26.	<u>TSKJ (No. 99)</u>	f)	Judgments of 30 January 2013 and 24 June 2014 (separation of proceedings)  Following the separation of proceedings judgment in 2014, appeal judgments of 21 September 2016 (Paris) and 9 May 2015 (Versailles, quashed and referred back after appeal)	Judicial inquiry opened on 8 January 2003	Individuals 1 and 2, former Technip managers  Individual 3, Tristar director	2001–2002	Suspected foreign bribery in connection with the construction of the Nigeria LNG liquefaction plant by the TSKJ consortium composed of Technip, Snamprogetti, JGC Corporation and Kellogg Brown & Root (KBR), a subsidiary of Halliburton, through payments to Nigerian public officials via Tristar	Not determined	Foreign bribery (convictions) Misuse of corporate assets (proceedings dismissed)	Final convictions of three individuals for foreign bribery: - Individuals 1 and 2 (Technip managers) convicted by the Paris Criminal Court - Individual 3 convicted by the Versailles Court of Appeal, after acquittal by the Paris Criminal Court, confirmed by the Paris Court of Appeal	- Individual 1: EUR 10 000 fine - Individual 2: EUR 5 000 fine - Individual 3: EUR 30 000 fine and confiscation of USD 55.8 million	Two judgments in cassation were handed down in this case. Following the separation of proceedings, individual 3 (the Tristar director) was acquitted by the court and then by the Paris Court of Appeal. In a decision dated 17 January 2018, the Court of Cassation quashed and annulled the decision of the Paris Court of Appeal and referred the case back to the Versailles Court of Appeal, which convicted individual 3. An appeal was lodged with the Court of Cassation but was rejected on 1 April 2020, making the decision of the Versailles Court of Appeal final.
27.	FRIGATES SOUTH AMERICA (No. 100)	b)	N/A (closed without	Preliminary investigation opened on	N/A (closed without further	2009–2010	Suspected foreign bribery in connection with the signing of a	N/A (closed without	N/A (closed without further action)	Closed without further action on 27 May 2019,	N/A (closed without further action)	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
			further action)	8 August 2012	action)		frigate modernisation contract with a South American country	further action)		insufficiently characterised offence		
28.	<u>INTERNATIONAL CONTRACTS</u> (No. 125)	f)	N/A	Judicial inquiry opened on 8 December 2005, after preliminary investigation opened on 13 July 2005	N/A (proceedings dismissed)	2000–2003	Suspected foreign bribery in connection with the award of several contracts by subsidiaries of a French company in numerous countries	N/A (proceedings dismissed)	N/A (proceedings dismissed)  Judicial inquiry opened into foreign bribery and misuse of corporate assets	Proceedings dismissed on 21 November 2012	N/A (proceedings dismissed)	
29.	KABI (No. 101)	f)	Plea bargain (excluding foreign bribery) of 21 December 2018  Judgment of 18 June 2020	Judicial inquiry opened on 25 July 2013	Partial dismissal of foreign bribery and complicity in foreign bribery, after four individuals indicted for these offences  Individual (the only one referred for foreign bribery), director of a	2010–2012	Suspected foreign bribery in relation to “intermediary” activities between various companies and local authorities in various African countries	Not determined	Foreign bribery (dismissal and acquittal)  Money laundering by criminal gang (proceedings dismissed)  Misuse of corporate assets, complicity and concealment (convictions)  Forgery and use of forgeries (dismissed but	Partial dismissal  Final acquittal by the Paris Criminal Court of the only individual referred for foreign bribery, final convictions by plea bargain of five individuals for other offences (in particular for complicity and concealment of	N/A (dismissal and acquittal for foreign bribery)	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
					French company				convicted of concealment) Breach of trust (dismissed but convicted of concealment) Disguised work (proceedings dismissed)	misuse of corporate assets, complicity in improperly obtaining an administrative document, complicity in forgery and use of forgeries, complicity in breach of trust, failure to make a declaration by name prior to hiring), approved by the Paris Criminal Court		
30.	<u>TOTAL IRAN SOUTH PARS</u> (No. 103)	g)	21 December 2018	Judicial inquiry opened on 18 December 2006, after preliminary investigation opened on 22 June 2006	Three individuals: - One Total director (deceased) - Two intermediaries (one deceased)  one legal person, Total SA	1997–2003	Suspected foreign bribery in connection with Total's development of the South Pars oil field in Iran	USD 63 million	Foreign bribery (conviction) Misuse of corporate assets (dismissal)	Final convictions by the Paris Criminal Court: - One individual acting as an intermediary (by default) for complicity in foreign bribery (arrest warrant issued) - One legal person for foreign bribery	- Individual: Four years' imprisonment - Legal person: EUR 500 000 fine	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
										It was noted that the public prosecution was terminated due to the death of the other two individuals		
31.	CENTRAL ASIA ENVIRONMENT (No. 104)	o)	N/A (closed without further action)	Analysis conducted by the PNF in 2015	N/A (closed without further action)	2013	Suspected foreign bribery in connection with avoiding prosecution for environmental offences in Central Asia	N/A (closed without further action)	N/A (closed without further action)	Closed without further action on 17 December 2015, insufficiently characterised offence	N/A (closed without further action)	
32.	OIL AND GAS 3 (No. 105)	f)	N/A (proceedings dismissed)	Judicial inquiry opened on 26 June 2013	N/A (proceedings dismissed)	2008	Suspected foreign bribery in connection with negotiations for the exploration or exploitation of gas fields in a North African country	N/A (proceedings dismissed)	N/A (proceedings dismissed)  Judicial inquiry opened for foreign bribery	Proceedings dismissed on 16 June 2016	N/A (proceedings dismissed)	
33.	MATERNITY HOSPITALS GABON (No. 106)	e)	22 May 2019	Preliminary investigation opened on 14 January 2014	N/A (no prosecutions for foreign bribery)	2012–2013	Suspected foreign bribery in connection with a tender for renovating and equipping maternity hospitals in Gabon	N/A (no prosecutions for foreign bribery)	Trading in influence (in connection with referral to court)	Final judgment of acquittal rendered by the Paris Criminal Court against one individual	N/A	



	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
34.	WATER SANITATION EASTERN EUROPE (No. 109)	o)	N/A (closed without further action)	Preliminary investigation opened on 7 January 2016	N/A (closed without further action)	2000–2015	Suspected foreign bribery in connection with the award of a water supply and sanitation contract for the capital of an Eastern European country	N/A (closed without further action)	N/A (closed without further action)	Closed without further action on 24 July 2020, no offence committed	N/A (closed without further action)	
35.	<u>TELEPHONY EAST AFRICA (No. 126)</u>	b)	N/A (proceedings dismissed)	Judicial inquiry opened on 21 November 2001	N/A (proceedings dismissed)	1999–2000	Suspected foreign bribery in connection with telecommunication contracts in several African countries (particularly in East Africa)	N/A (proceedings dismissed)	N/A (proceedings dismissed)	Proceedings dismissed on 6 November 2012  Follow-up judicial inquiry for foreign bribery and misuse of corporate assets	N/A (proceedings dismissed)	
36.	<u>TOTAL OIL-FOR-FOOD – OIL ASPECT (No. 102)</u>	b)	Judgment of 8 July 2013  Appeal decision of 26 February 2016	Judicial inquiry opened on 29 July 2002	Two legal persons: - TOTAL SA - VITOL SA  18 individuals referred but 13 for foreign bribery in particular	1997–2003	Suspected foreign bribery in connection with obtaining oil contracts in breach of regulations established by a United Nations resolution, through payments to Iraqi	Not determined	Foreign bribery (six individuals acquitted at first instance, five individuals and two legal persons convicted on appeal) Complicity in foreign bribery	Final convictions of seven individuals and two legal persons for foreign bribery or complicity in foreign bribery by the Paris Court of Appeal, final	At first instance: General acquittal, two legal persons and 13 individuals for foreign bribery or complicity in foreign bribery	The Public Prosecutor did not appeal all the acquittals pronounced at first instance, so only seven individuals and two legal persons were retried on appeal.  The Court of Cassation, in a judgment of 14 March 2018, dismissed the appeals lodged by individuals 3, 10, 12 and 13, and the two legal persons,

Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
						public officials		<p>(acquittal then conviction of two individuals)  Misuse of corporate assets (conviction of one individual but acquittal of two individuals)  Trading in influence (acquittals, conviction of one individual)</p> <p>Of the 13 individuals referred, including for foreign bribery:  - Individual 1: complicity in foreign bribery (acquitted) and misuse of corporate assets (convicted)  - Individual 2: trading in influence and foreign bribery (acquitted of both)</p>	acquittals of six individuals for foreign bribery or complicity by the Paris Criminal Court (no appeal)	Appeal (two legal persons and seven individuals for foreign bribery): - TOTAL SA, EUR 750 000 fine - VITOL SA, EUR 300 000 fine - Individual 3, EUR 75 000 fine - Individual 4, EUR 50 000 fine - Individual 5, EUR 50 000 fine - Individual 6, EUR 15 000 fine - Individual 10, EUR 20 000 fine - Individual 12, EUR 30 000 fine - Individual 13, EUR 50 000 fine	but partially quashed the judgment handed down by the Paris Court of Appeal on 26 February 2016 with regard to three individuals convicted on appeal for complicity in misuse of corporate assets and referred the case back to the Paris Court of Appeal with a different bench. The Paris Court of Appeal acquitted the three individuals concerned of complicity in misuse of corporate assets on 26 February 2020.

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
									<ul style="list-style-type: none"> <li>- Individual 3: trading in influence and foreign bribery (convicted of foreign bribery)</li> <li>- Individual 4: foreign bribery and misuse of corporate assets (convicted of both)</li> <li>- Individual 5, foreign bribery and trading in influence (convicted of foreign bribery)</li> <li>- Individual 6, complicity in foreign bribery (convicted)</li> <li>- Individual 7, foreign bribery and trading in influence (acquitted)</li> <li>- Individual 8, foreign bribery (acquitted)</li> <li>- Individual 9, foreign bribery and trading in influence</li> </ul>			

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
									(acquitted) - Individual 10, foreign bribery and trading in influence (convicted of foreign bribery) - Individual 11, complicity in foreign bribery and misuse of corporate assets (acquitted) - Individual 12, complicity in foreign bribery and misuse of corporate assets (convicted of foreign bribery) - Individual 13, foreign bribery (convicted)			
37.	<u>OIL-FOR-FOOD – EQUIPMENT</u> (No. 70)	f)	Judgment of 18 June 2015  Appeal decision of 15 February 2019	Judicial inquiry opened on 31 March 2006	14 legal persons: - HAZEMEYER - TLD EUROPE - SIDES	2001–2004	Suspected foreign bribery in connection with several French companies which, in breach of United Nations resolutions, allegedly paid commissions to	Estimated at about 10% of the value of the contracts	Foreign bribery (acquittals and subsequent convictions)  Misuse of corporate assets (acquittal)	Final convictions of 13 legal persons and two individuals for foreign bribery, acquittal of one individual for misuse of	At first instance: General acquittal of ten legal persons and three individuals, and declaration of termination of public	The Court of Cassation, in a decision dated 10 March 2021, dismissed the appeals lodged by individual 1 and six legal persons: HAZEMEYER, SIDES, CLYDE UNION, MANITOWOC, RENAULT TRUCKS and FLOWSERVE POMPES

Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
				<ul style="list-style-type: none"> <li>- LEGRAND</li> <li>- SCHNEIDER ELECTRIC INDUSTRIES</li> <li>- MANITOWO C CRANE GROUP France</li> <li>- COFRAPEX</li> <li>- GENOYER</li> <li>- SIRAGA</li> <li>- SOVAM</li> <li>- DAVID BROWN TRANSMISSIONS France</li> <li>- CLYDE UNION</li> <li>- RENAULT TRUCKS</li> <li>- FLOWSERVE POMPES</li> </ul> <p>Three individuals:  <ul style="list-style-type: none"> <li>- Individuals 1 and 2, senior managers at FLOWSERVE</li> </ul> </p>		the Iraqi regime in return for signing or continuing contracts		All legal persons and individuals 1 and 2 were referred for foreign bribery; individual 3 was referred on the basis of misuse of corporate assets only	corporate assets and declaration of termination of public prosecution for one legal person by the Paris Court of Appeal, after a general acquittal at first instance	<p>prosecution in respect of four legal persons</p> <p>Appeal:</p> <ul style="list-style-type: none"> <li>- HAZEMEYER: EUR 100 000 suspended fine</li> <li>- TLD EUROPE: EUR 80 000 suspended fine</li> <li>- SIDES: guilty but no sanctions imposed</li> <li>- LEGRAND: EUR 30 000 suspended fine</li> <li>- SCHNEIDER ELECTRIC INDUSTRIES: EUR 30 000 suspended fine</li> <li>- MANITOWO CRANE GROUP France: EUR 30 000 suspended fine</li> <li>- COFRAPEX: EUR 50 000 suspended fine</li> </ul>	

Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
				E POMPES - Individual 3, corporate officer						<ul style="list-style-type: none"> <li>- GENOYER: EUR 80 000 suspended fine</li> <li>- SIRAGA: termination of public prosecution</li> <li>- SOVAM: guilty but no sanctions imposed</li> <li>- DAVID BROWN TRANSMISSIONS France: EUR 80 000 suspended fine</li> <li>- CLYDE UNION: guilty but no sanctions imposed</li> <li>- RENAULT TRUCKS: EUR 30 000 suspended fine</li> <li>- FLOWSERVE POMPES: EUR 80 000 suspended fine</li> <li>- Individual 1: eight-month suspended prison sentence</li> </ul>	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
											- Individual 2: six-month suspended prison sentence - Individual 3: acquitted	
31.	SOCIETE GENERALE (No. 90)	h)	N/A	Preliminary investigation opened on 18 November 2016	One legal person, SOCIETE GENERALE N/A as still in progress for individuals	2004–2009	Suspected foreign bribery in connection with investments in SOCIETE GENERALE's financial products, through SOCIETE GENERALE's use of the services of a Libyan business agent in order to offer these services to Libyan financial institutions, in particular to the LIBYAN INVESTMENT AUTHORITY	Amount of bribes estimated to be at least USD 43 300 000 (of the USD 90 740 000 paid to the intermediary)	Foreign bribery under a CJIP N/A at this stage for the individuals	CJIP signed on 24 May 2018 concerning SOCIETE GENERALE (confirmed on 4 June 2018) Ongoing investigation concerning individuals	EUR 250 150 755 in fines under the CJIP	SOCIETE GENERALE had also undertaken to have the quality and effectiveness of the bribery prevention measures it had implemented since 2014 assessed by the AFA over a two-year period. It paid the fine on 21 June 2018. The public prosecution against the bank was terminated on 11 December 2020 following the fulfilment of all the obligations under the CJIP.
5.	PUBLIC TRANSPORT 1 (No. 10)	g)	N/A	Judicial inquiry opened on 22 February 2013, after preliminary investigation	N/A (proceedings dismissed)	2004–2012	Suspected foreign bribery in connection with the award of contracts for the supply of metro	Not determined	Follow-up judicial inquiry for foreign bribery and misuse of	Proceedings dismissed on 21 November 2018	N/A (proceedings dismissed)	An appeal against the order to dismiss the case was lodged by the civil party with the Investigations Chamber of the Paris Court of Appeal, which confirmed the dismissal of the

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
				opened on 20 September 2012			trains in a North African country and in a Central European country and for the construction of a power plant in the same North African country		corporate assets			case in a judgment handed down on 16 December 2019. A final appeal was then lodged. This was dismissed in a decision handed down on 6 January 2021.
4.	<u>ALCATEL COSTA RICA (No. 7)</u>	i)	Judgment of 30 August 2017  Appeal decision of 15 May 2020	Judicial inquiry opened on 10 December 2004	one legal person, ALCATEL  Individuals: - Individual 1, senior manager of an ALCATEL subsidiary - Individual 2, ALCATEL executive	2001–2004	Suspected foreign bribery in connection with ALCATEL's procurement of telephone equipment in Costa Rica, through payments to Costa Rican executives of the state-owned Costa Rican Electricity Institute (ICE).	Estimated at all or part of USD 20 381 300	Foreign bribery (conviction and acquittals)  Follow-up judicial inquiry also opened for theft and breach of trust (dismissed)  Legal person, convicted of foreign bribery  Individuals 1 and 2 acquitted of foreign bribery	Final acquittal of the two individuals and the legal person for foreign bribery by the Paris Criminal Court, acquittal of the individuals confirmed but conviction of the legal person by the Paris Court of Appeal  Final appeal lodged by the legal person, rejected in a ruling of 16 June 2021  Pending hearing before	At first instance: general acquittal  Appeal: EUR 150 000 fine for the legal person and acquittal of the two individuals  Appeal: legal person fined EUR 150 000	



	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
										the Court of Cassation, after appeal by the legal person		
<b>PENDING CASES (APPEAL OR FINAL APPEAL)</b>												
1.	SURESTREAM PETROLEUM (No. 1)	a)	Judgment of 3 December 2015  Appeal decision of 23 January 2018	Judicial inquiry opened on 3 March 2011, after preliminary investigation opened on 29 October 2010	One individual, a senior manager at SURESTREAM PETROLEUM	2007–2011	Suspected foreign bribery in connection with the award of two contracts with the Democratic Republic of the Congo for hydrocarbon exploration in two regions in the country	Not determined	Foreign bribery (acquittal of some of the foreign bribery allegations at first instance, acquittal of all foreign bribery allegations on appeal) Tax evasion (conviction, upheld on appeal) Laundering of tax evasion proceeds (conviction upheld on appeal)	Final acquittal of individual for foreign bribery by the Paris Court of Appeal  Hearing pending before the Versailles Court of Appeal, referred back following appeal in respect of money laundering, and civil penalties and interest	At first instance: 30-month suspended prison sentence and EUR 1 500 000 fine  Appeal: 30-month suspended prison sentence and EUR 1 000 000 (not foreign bribery)	The Court of Cassation, in a decision handed down on 11 September 2019, partially overturned the ruling handed down by the Paris Court of Appeal on 23 January 2018 with regard to the conviction for money laundering and civil penalties and interest awarded, and referred the case back to the Versailles Court of Appeal.  The individual was also ordered to pay EUR 50 000 in damages and interest (with an additional EUR 1 500 on appeal)
2.	<u>AI GROUP SBPI AND INTERACT</u> (No. 4)	a)	Judgment of 3 October 2016  Appeal decision of 4 May 2020	Judicial inquiry opened on 26 December 2009	Six individuals: - Individual 1, AI GROUP senior manager - Individual 2, SIDES senior	2003–2008	Suspected foreign bribery in Algeria in connection with: - AI GROUP, for obtaining three public procurement	Total amount estimated at approximately EUR 1 200 000	Foreign bribery (convictions and acquittals) Misuse of corporate assets (convictions)	Final convictions of four individuals (No.s 1 to 4) for active foreign bribery and complicity in foreign bribery	At first instance: - Individual 1: two-year suspended prison sentence and EUR 300 000	Only one individual (No. 11) had appealed to the Court of Cassation against the decision of the Paris Court of Appeal of 4 May 2020.  Individual 1 was also ordered to pay EUR 1 170 978 in

Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
				manager - Individual 3, SBPI senior manager - Individual 4, AI GROUP employee - Individual 5, company senior manager - Individual 6, company senior manager		contracts (sale of torch cartridges, sale of water cannons, restructuring of a natural gas site) - SBPI and AI GROUP, for the award of a contract to repair the tanks at an oil port - SIDES, for obtaining confidential information and a favourable decision on public procurement contracts		Forgery and use of forgeries (convictions) Complicity and concealment (convictions) Tax evasion (conviction) Seven individuals were referred to court: - Individual 1 for foreign bribery, misuse of corporate assets, forgery and use of forgeries - Individual 2 for foreign bribery and misuse of corporate assets - Individual 3 for foreign bribery, misuse of corporate assets and private bribery - Individual 4 for foreign	and final acquittals of two individuals (No.s 5 and 6) for foreign bribery and complicity in foreign bribery by the Paris Criminal Court, confirmed by the Paris Court of Appeal in the case of the two appellant individuals convicted of active and passive foreign bribery Hearing pending before the Court of Cassation, after a final appeal by individual 1	fine - Individual 2: 18-month suspended prison sentence and EUR 80 000 fine - Individual 3: six-month suspended prison sentence and EUR 20 000 fine - Individual 4: four-month suspended prison sentence and EUR 10 000 fine Appeal: - Individual: same as at first instance	damages and EUR 5 000 in damages and interest, as well as a five-year ban on practising a commercial or industrial profession, or on directing, administering, managing or controlling an undertaking or a company.

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
									bribery and concealment - Individual 5 for passive foreign bribery and concealment of misuse of corporate assets - Individual 6 for complicity in foreign bribery and private bribery - Individual 7 for foreign bribery, forgery and use of forgeries, concealment and complicity in misuse of corporate assets			
3.	LAUNDERING OF PROCEEDS OF FOREIGN BRIBES SYRIA (No. 6)	o)	17 June 2020	Judicial inquiry opened on 4 April 2014, after preliminary investigation opened on 26 September 2013	N/A (proceedings for foreign bribery dismissed)	Not provided	Suspected foreign bribery and laundering of proceeds of foreign bribes in connection with senior Syrian officials	N/A (proceedings for foreign bribery dismissed)	Follow-up judicial inquiry into the charges of foreign bribery, laundering of foreign bribes by a criminal gang, disguised work	Partial dismissal of the offence of foreign bribery  Hearing pending before the Court of Appeal, following the	N/A (proceedings for foreign bribery dismissed)	The case was partially dismissed for foreign bribery and laundering of the proceeds of foreign bribes, but is still pending for the other offences.

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
									by a criminal gang, laundering of proceeds of misuse of corporate assets by a criminal gang, misappropriation of public funds and aggravated tax evasion, complicity and concealment  Dismissal of the case, in particular for foreign bribery, referral of one individual for disguised work, laundering of misappropriation of public funds and aggravated tax evasion	defendant's appeal of their conviction by the Paris Criminal Court for disguised work, aggravated misappropriation of public funds and aggravated tax evasion		
6.	<u>BALARDGONE</u> (No. 16)	o)	24 June 2020	Judicial inquiry opened on 21 February 2011, after preliminary investigation opened on 4	N/A (proceedings for foreign bribery dismissed)	2009–2010	Suspected foreign bribery in connection with countries, particularly African countries, in the context of	N/A (proceedings for foreign bribery dismissed)	Follow-up judicial inquiry on the grounds of foreign bribery, private bribery, breach of freedom and	Partial dismissal of the offence of foreign bribery	N/A (proceedings for foreign bribery dismissed)	This case was partially dismissed for foreign bribery and a judgment was handed down by the 32 <sup>nd</sup> Chamber of the Judicial Court of Paris on 24 June 2020 for the other offences, which all the

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
				October 2010			the consultation implemented by the Ministry of Defence for the reorganisation of its central services on a single site, termed the "Balardgone" contract		equal access to public procurement contracts, forgery and use of forgeries, cartel agreement, money laundering, concessions and concealment of favouritism  Dismissal of the case, in particular for foreign bribery, conviction of five individuals and one legal person for favouritism, bribery of a national public official, forgery and use of forgeries	Hearing pending before the Court of Appeal to appeal the judgment		defendants appealed.
7.	BRIDGES, CHAD (No. 118)	o)	Judgment of 29 March 2016	Judicial inquiry opened on 22 June 2006	N/A (proceedings for foreign bribery dismissed)	2003–2004	Suspected foreign bribery in connection with the award of a public contract for the construction of	N/A (proceedings for foreign bribery dismissed)	Follow-up judicial inquiry on the grounds of foreign bribery, forgery and use of forgeries, fraud	Partial dismissal of the offence of foreign bribery	N/A (proceedings for foreign bribery dismissed)	This case was partially dismissed for foreign bribery but is still pending for the other offences. The Court of Cassation, in a judgment handed down on 4 December 2019, quashed the judgment

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
			Appeal decision of 17 July 2018				three bridges in Chad		by a criminal gang, breach of trust and bribing a witness to give false evidence  Dismissal of the case for foreign bribery, conviction of three individuals for forgery, use of forgeries and breach of trust	Hearing pending before the Orleans Court of Appeal, referred back following appeal		handed down by the Orleans Court of Appeal on 17 July 2018 and referred the case back to the Court with a different bench.
8.	MILITARY SUBMARINES PAKISTAN (No. 65)	f)	15 June 2020	Judicial inquiry opened on 25 February 2008, after preliminary investigation opened on 6 March 2006	N/A (proceedings for foreign bribery dismissed)	1994–1996	Suspected foreign bribery in connection with the awarding of arms contracts signed between France and Saudi Arabia (frigates) on the one hand, and between France and Pakistan (submarines) on the other hand; kickbacks allegedly financed a candidate's campaign in the 1995 presidential	N/A (proceedings for foreign bribery dismissed)	Follow-up judicial inquiry for foreign bribery and misuse of corporate assets  Dismissal of the case for foreign bribery, conviction of six individuals for misuse of corporate assets, complicity and concealment, perjury,	Partial dismissal of the offence of foreign bribery  Hearing pending before the Court of Appeal to appeal the judgment	N/A (proceedings for foreign bribery dismissed)	This case was partially dismissed for foreign bribery but is still pending for the other offences.

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
							election		fraudulent organisation of insolvency, use of forgeries, tax evasion and laundering, and fraud and laundering			
9.	<u>PUBLIC SERVICES (No. 62)</u>	g)	Judgment of 18 October 2018  Appeal decision of 6 October 2020	Judicial inquiry opened on 17 March 2009, after preliminary investigation opened on 17 March 2007	Two legal persons: - Legal person 1, SARL KIC SYSTEM - Legal person 2, SARL EUROTRENDS  Two individuals: - Individual 1, manager of the two legal persons - Individual, manager of legal person 1	2006–2008	Suspected foreign bribery in connection with the sale of information to be favoured in the invitation to tender for technical assistance launched by the Turkish government, as well as offering services in connection with contracts in Ukraine, Serbia and Lithuania	Total estimated amount: EUR 132 000	Active and passive foreign bribery (convictions) Forgery (acquittal and conviction) Use of forgeries (acquittal then conviction)  - Legal person 1, convicted of active foreign bribery - Legal person 2, convicted of active foreign bribery - Individual 1, convicted of passive foreign bribery; acquitted of	Convictions of the two legal persons and two individuals (final conviction for individual 2 only) for active foreign bribery by the Paris Criminal Court; acquittal for forgery and use of forgeries for individual 1, also referred on this ground; confirmation of the convictions by a decision of the Paris Court of Appeal, but reversal of the decision and subsequent conviction of individual 1 for forgery and use of forgeries	At first instance: - Legal person 1: EUR 200 000 fine - Legal person 2: EUR 200 000 fine - - Individual 1: 15-month suspended prison sentence and EUR 150 000 fine - Individual 2: nine-month suspended prison sentence and EUR 100 000 fine  Appeal: - Legal person	Individuals 1 and 2 were banned from advising on European Union-funded projects for five years at first instance (not upheld on appeal). All the individuals and legal persons were also ordered to pay EUR 100 000 jointly and severally to the European Union as compensation for non-material damage.  On appeal, all the individuals and legal persons were ordered to pay EUR 50 000 jointly and severally to the European Union.

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
									forgery and use of forgeries at first instance, convicted on these grounds on appeal - Individual 2, convicted of active foreign bribery - Individual 3, convicted of active foreign bribery	Hearing pending before the Court of Cassation, following appeals by individual 1	1: EUR 100 000 fine - Legal person 2: EUR 100 000 fine  - Individual 1: 12-month suspended prison sentence and EUR 50 000 fine - Individual 2: six-month suspended prison sentence and EUR 50 000 fine	
10.	<u>MALI GRANT (No. 96)</u>	g)	Judgment of 10 January 2019  Appeal decision of 30 September 2020	Judicial inquiry opened on 23 November 2009, after preliminary investigation opened on 14 February 2008	Three individuals: - Individual 1, head of the <i>Centre pour le développement de l'entreprise</i> [Centre for Enterprise Development ] - Individual 2,	2001–2007	Suspected foreign bribery in connection with the actions of a manager of the Centre for Enterprise Development in relation to European institutions, in order to obtain grants and loans for African companies	Total amount estimated at EUR 381 135	Active and passive foreign bribery (acquittals and subsequent convictions, individual 1 for passive foreign bribery, and individuals 2 and 3 for active foreign bribery)  Misuse of corporate assets	Hearing pending before the Court of Cassation, following appeals by the three individuals against the decision of the Paris Court of Appeal, which convicted them following their	At first instance: general acquittal of three individuals  Appeal: - Individual 1: two-year suspended prison sentence and EUR 100 000	On appeal, the three defendants were ordered jointly and severally to pay a total of EUR 5 193 492 to the civil parties.



	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
					manager of a Malian company - Individual 3, manager of a corporate shareholder in the Malian company		(particularly Malian companies) in development		(acquittal and subsequent conviction) Concealment of misuse of corporate assets (acquittal and subsequent conviction) Fraud (dismissed)	acquittal at first instance	fine - Individual 2: 12-month suspended prison sentence - Individual 3: 12-month suspended prison sentence	
6.	PORT CONCESSIONS (No. 30)	j)	N/A	Judicial inquiry opened on 10 October 2014, after preliminary investigation opened on 3 August 2012	N/A at this stage	2003–2011	Suspected foreign bribery in connection with a competitor group's failure to obtain port concessions in several African countries	Not determined at this stage	Follow-up judicial inquiry into charges of foreign bribery, trading in influence and concealment of these offences	Ongoing judicial inquiry	N/A	The investigative judge ordered that the case should be dismissed on 4 February 2021. An appeal against the order has been lodged.
<b>CURRENT CASES (JUDICIAL INQUIRY AWAITING A HEARING)</b>												
1.	BACK-TAXES, WEST AFRICA (No. 19)	a)	N/A at this stage	Judicial inquiry opened on 21 October 2012, after preliminary investigation opened on 19 October 2012	One legal person  Eight individuals: - Six individuals: senior managers and	2011–2012	Suspected foreign bribery in connection with the negotiation of a reduction in back-taxes by the tax authorities of the African States in which the accused legal person was	Total amount estimated at EUR 991 000	Follow-up judicial inquiry on the grounds of foreign bribery, criminal conspiracy, breach of reporting obligations, failure to justify	Pending hearing (eight individuals and one legal person referred primarily for foreign bribery/complicity in foreign bribery; one other individual	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
					employees of the legal person - Two individuals: managers of foreign subsidiaries of the legal person involved		established		resources, misuse of corporate assets, concealment of misuse of corporate assets and disguised work  One legal person, referred for foreign bribery Three individuals, referred for foreign bribery Four individuals, referred for complicity in foreign bribery One individual, referred for complicity in foreign bribery, breach of reporting obligations and concealment of foreign bribery	referred for another offence)		
2.	TRANSPORT AERIEN SENEGAL	i)	N/A at this stage	Judicial inquiry opened on 25	Two individuals:	2005–2012	Suspected foreign bribery in	Total amount estimated at	Follow-up judicial inquiry	Hearing pending (two	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
	[AIR TRANSPORT SENEGAL] (No. 24)			November 2013, after preliminary investigation opened in late 2012	- Individual 1, company director - Individual 2, intermediary		connection with transport contracts with Senegal	EUR 1 182 000	into foreign bribery, misuse of corporate assets, concealment, complicity, and concealment and laundering of misappropriation of public funds  - Individual 1, referred for active foreign bribery and misuse of corporate assets - Individual 2, referred for passive foreign bribery and concealment of misuse of corporate assets	individuals referred, notably for foreign bribery)		
<b>CURRENT CASES (CURRENT JUDICIAL INQUIRY)</b>												
2.	COMBAT AIRCRAFT (No. 25)	o)	N/A (closed without further action)	Analysis conducted by the PNF in 2018	N/A (closed without further action)	2014–2016	Suspected foreign bribery in connection with a contract for the sale and	N/A (closed without further action)	N/A (closed without further action)	Closed without further action in 2018 (reason unknown)	N/A (closed without further action)	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
				Judicial inquiry opened on 14 June 2021			construction of combat aircraft in South Asia		Judicial inquiry opened for active and passive bribery and trading in influence, concealment of bribery, trading in influence and favouritism, laundering of proceeds of active bribery and trading in influence, and corruption	Complaint with constitution of civil party on 28 February 2021 – judicial inquiry ongoing		
1.	CONSTRUCTION OF NUCLEAR POWER PLANT 1 (No. 12)	o)	N/A	Judicial inquiry opened on 3 February 2020, after preliminary investigation opened on 31 July 2015	N/A at this stage	2011–2012	Suspected foreign bribery in connection with the construction of a false scheme for the sale of uranium in order to hide transactions and pay public officials in a South American country	Not determined at this stage	Judicial inquiry opened on grounds of foreign bribery, bribery, criminal conspiracy, misuse of corporate assets and concealment, breach of trust and concealment, and money laundering by a criminal gang	Ongoing judicial inquiry	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
2.	MINING DEPOSITS 1 (No. 14)	e)	N/A	Judicial inquiry opened on 19 May 2015, after preliminary investigation opened on 21 February 2014	Two individuals indicted for foreign bribery: - Individual 1, senior manager of legal person - Individual 2, executive at the same legal person	2007–2010	Suspected foreign bribery in connection with the award of mining rights concession contracts in two African countries	Not determined at this stage	Follow-up judicial inquiry into foreign bribery, misuse of corporate assets, fraud, insider crime, laundering, complicity and concealment of these offences  - Individual 1 indicted for foreign bribery and breach of trust - Individual 2 indicted for complicity in foreign bribery, breach of trust and private bribery	Judicial inquiry under way – Two individuals indicted for foreign bribery and complicity in foreign bribery, and four others indicted but for other offences	N/A	
3.	MASS RETAIL (No. 112)	h)	N/A	Judicial inquiry opened on 10 March 2020, after preliminary investigation opened on 6 March 2020	N/A at this stage	2017–2020	Suspected foreign bribery in connection with the operation of a subsidiary of a large French retailer in North Asia	Not determined at this stage	Judicial inquiry into foreign bribery, trading in influence directed towards foreign public officials, private bribery and concealment of these offences	Ongoing judicial inquiry	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
4.	DIPLOMATIC PROTECTION (No. 129)	g)	N/A	Judicial inquiry opened on 10 June 2011, after preliminary investigation opened in 2009	N/A at this stage	Not provided	Suspected foreign bribery in connection with obtaining diplomatic protection in return for payments to members of the government of a Central American country	Not determined at this stage	Follow-up judicial inquiry into foreign bribery, VAT fraud by a criminal gang, money laundering by a criminal gang, handling of stolen goods by a criminal gang, complicity, forgery and use of forgeries, improperly obtaining an administrative document and tax evasion	Ongoing judicial inquiry	N/A	
5.	MEDICINAL PLANTS (No. 23)	j)	N/A	Judicial inquiry opened on 25 June 2015	N/A at this stage	2014	Suspected foreign bribery in connection with obtaining a medicinal plant export licence and suspending the licences of the competitor company in an East African country	Not determined at this stage	Judicial inquiry opened for active and passive foreign bribery	Ongoing judicial inquiry	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
6.	PORT CONCESSIONS (No. 30)	j)	N/A	Judicial inquiry opened on 10 October 2014, after preliminary investigation opened on 3 August 2012	N/A at this stage	2003–2011	Suspected foreign bribery in connection with a competitor group's failure to obtain port concessions in several African countries	Not determined at this stage	Follow-up judicial inquiry into charges of foreign bribery, trading in influence and concealment of these offences	Ongoing judicial inquiry	N/A	
7.	HELICOPTERS AND CO. (No. 31)	b)	N/A	Judicial inquiry opened on 18 March 2013, after preliminary investigation opened in 2012	Four individuals indicted, including for foreign bribery: - Individual 1, French intermediary - Individual 2, French intermediary - Individual 3, French intermediary - Individual 4, company manager	2008–2014	Suspected foreign bribery in connection with the adoption of a law in a Western European country, French intervention for the signature of commercial contracts, including the acquisition of helicopters, the construction of a factory and the construction of a tramway	Not determined at this stage	Follow-up judicial inquiry into active and passive bribery, money laundering, complicity, concealment, misuse of corporate assets, corruption and trading in influence  - Individual 1 indicted for foreign bribery and money laundering - Individual 2 indicted for foreign bribery, complicity in passive foreign bribery and	Judicial inquiry under way – Four individuals indicted for active and passive foreign bribery and complicity in foreign bribery, and two others indicted but for other offences	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
									money laundering - Individual 3, indicted for passive foreign bribery and complicity in money laundering by a criminal gang - Individual 4, indicted for foreign bribery and money laundering by a criminal gang			
8.	WEST AFRICA PORTS – BOLLORE (No. 34)	b)	N/A	Judicial inquiry opened on 15 November 2013, after preliminary investigation opened on 13 July 2012	Two legal persons, BOLLORE SE and FINANCIERE DE L'ODET (parent company benefiting from the actions of BOLLORE)  Three individuals: - Individual 1, senior manager at the	2010–2011	Suspected foreign bribery in connection with obtaining an extension of rights to manage the autonomous port of Lomé in Togo, in exchange for the provision of under-invoiced communications services to a Togolese executive	Not determined	Follow-up judicial inquiry into foreign bribery, money laundering of foreign bribes by a criminal gang, complicity, concealment, breach of trust, misuse of corporate assets, forgery and use of forgeries	CJIP signed on 9 February 2021 concerning BOLLORE SE and FINANCIERE DE L'ODET (confirmed on 26 February 2021)  Ongoing judicial inquiry into individuals – Indictments for foreign bribery, among others	EUR 12 000 000 fine under the CJIP (paid by the parent company FINANCIERE DE L'ODET)	BOLLORE SE has also undertaken to submit to the two-year implementation of an AFA compliance programme, with an obligation to bear the costs up to the sum of EUR 4 000 000. FINANCIERE DE L'ODET paid the fine on 8 March 2021, on behalf of BOLLORE SE.  The Judicial Court of Paris refused to approve the plea bargain for the three individuals.



	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
					<p>BOLLORE group</p> <ul style="list-style-type: none"> <li>- Individual 2, senior manager at the BOLLORE group</li> <li>- Individual 3, senior manager at a subsidiary of the BOLLORE group</li> </ul>				<ul style="list-style-type: none"> <li>- Legal person, foreign bribery under a CJIP</li> <li>- Individual 1, referred for foreign bribery and complicity in breach of trust</li> <li>- Individual 2, referred for foreign bribery and breach of trust</li> <li>- Individual 3, referred for complicity in breach of trust</li> </ul>			
9.	LIBYAN CAMPAIGN FINANCING (No. 38)	h)	N/A	Judicial inquiry opened on 19 April 2013, after preliminary investigation opened on 30 April 2012	Several indictments of individuals, but only one indicted for foreign bribery and money laundering of foreign bribes by a criminal gang, and one individual indicted for complicity in active and passive	2005–2009	Suspected foreign bribery in connection with the financing a French presidential candidate's campaign by the Libyan African Investment Fund	Not determined at this stage	Follow-up judicial inquiry into active and passive foreign bribery, misappropriation of public funds, money laundering by a criminal gang, concealment by a criminal gang, complicity, misuse of corporate assets, forgery	Judicial inquiry under way – Several people, including X, are under investigation for foreign bribery and complicity in foreign bribery	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
					foreign bribery  Individual 1, intermediary Individual 2, bank manager				and use of forgeries, trading in influence, bribery, money laundering and concealment of these offences			
10.	MILITARY EQUIPMENT (No. 59)	f)	N/A	Judicial inquiry opened in October 2014, after preliminary investigation opened in May 2014	One legal person  Three individuals: - Individuals 1 and 2, senior managers at the legal person - Individual 3, employee of the legal person	2010–2014	Suspected foreign bribery in connection with public procurement contracts with several African countries	Estimated amount at this stage, at least: EUR 764 000	Judicial inquiry on the grounds of foreign bribery, misuse of corporate assets, laundering of the proceeds of these offences by a criminal gang, complicity and concealment  - Legal person indicted for foreign bribery, money laundering by a criminal gang and concealment of foreign bribery - Individual 1, indicted for foreign bribery,	Judicial inquiry under way – three individuals and one legal person indicted for foreign bribery, among other things – Settlement in progress	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
									<p>misuse of corporate assets, breach of trust, laundering of breach of trust and misappropriation of public funds</p> <p>- Individual 2, indicted for foreign bribery, money laundering by a criminal gang and misuse of corporate assets</p> <p>- Individual 3, indicted for foreign bribery, complicity in money laundering by a criminal gang and misuse of corporate assets</p>			
11.	<u>SUBMARINES ASIA (No. 66)</u>	o)	N/A	Judicial inquiry opened on 29 February 2012, after preliminary	Two legal persons  Five	2000–2006	Suspected foreign bribery in connection with the sale of three submarines to a	Not determined, EUR 114 000 000	Follow-up judicial inquiry on the grounds of foreign bribery, active	Judicial inquiry under way – five individuals and two legal persons	N/A	

Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
			investigation opened on 28 December 2009	individuals: Individual 1, intermediary - Individuals 2 and 3, senior managers at one of the companies implicated - Individual 4, senior manager at the other company implicated - Individual 5, company senior manager		South-East Asian state	paid to an intermediary	and passive bribery, breach of trust, misuse of corporate assets, complicity and concealment  - Individual 1, indicted for complicity in foreign bribery and concealment of misuse of corporate assets - Individuals 2, 3 and 5, indicted for foreign bribery and misuse of corporate assets - Individual 4, indicted for foreign bribery and complicity in misuse of corporate assets - Legal person 1, indicted for complicity in foreign bribery and	indicted for foreign bribery and complicity in foreign bribery		

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
									concealment of misuse of corporate assets - Legal person 2, indicted for foreign bribery and complicity in breach of trust			
12.	BANKNOTES (No. 68)	o)	N/A	Judicial inquiry opened in November 2013, after preliminary investigation opened in 2012	N/A	2003	Suspected foreign bribery in connection with the circumstances in which certain contracts were awarded, in particular a contract for the printing of banknotes with a South-East Asian country	Payment identified: USD 855 000	Judicial inquiry opened on grounds of forgery and use of forgeries, misuse of corporate assets, concealment of misuse of corporate assets and money laundering	Judicial inquiry under way – Indictments but for misuse of corporate assets and money laundering – Settlement in progress	N/A	Case in the compilation of foreign bribery allegations maintained by the Working Group where the original complaint included suspected foreign bribery. The preliminary investigation was opened for foreign bribery, among other things, but not the judicial inquiry.
13.	EGIS AVIA (No. 78)	a)	N/A	Judicial inquiry opened on 11 October 2013, after preliminary investigation opened on 26 September 2011	One legal person, EGIS AVIA SA  One individual, intermediary	2009–2012	Suspected foreign bribery in connection with the award of a contract with the public company SONATRACH for the construction of an annex to Oran airport in Algeria	Not determined, EUR 390 640 paid to an intermediary	Judicial inquiry opened on grounds of active and passive foreign bribery, misuse of corporate assets, concealment of misuse of corporate	CJIP signed on 28 November 2019 concerning EGIS AVIA SA (approved on 10 December 2019)	EUR 2 600 000 fine under the CJIP	No compliance programme under the CJIP. The company paid the fine in three instalments on 15 January, 10 June and 6 July 2020 and a notice of termination of the public prosecution was issued on 22 July 2020.

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
									assets, forgery and use of forgeries  - Legal person, foreign bribery under a CJIP - Individual, indicted on grounds of foreign bribery, forgery and use of forgeries	Ongoing judicial inquiry into the individual		
14.	<u>EQUIPMENT, CENTRAL AFRICA (No. 85)</u>	b)	N/A	Judicial inquiry opened on 7 August 2015, after preliminary investigation opened on 9 July 2007	Two French legal persons  Two individuals: - Individual 1, senior manager in foreign corporation, intermediary - Individual 2, chief of staff to a foreign minister	2005–2011	Suspected foreign bribery in connection with the award of a public contract for the supply of clothing and law enforcement equipment in a Central African country	Not determined	Judicial inquiry on the grounds of foreign bribery, misuse of corporate assets, laundering of the proceeds of these offences by a criminal gang, concealment, forgery and use of forgeries  - Legal person 1, indicted for foreign bribery, money laundering by a criminal gang	Judicial inquiry under way – Two legal persons indicted for foreign bribery and concealment of foreign bribery	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
									and use of forgeries - Legal person 2, indicted for laundering of proceeds of misuse of corporate assets and foreign bribery - Individual 1, indicted for active and passive foreign bribery, misuse of corporate assets, money laundering by a criminal gang, concealment, forgery and use of forgeries - Individual 2, indicted for passive foreign bribery, money laundering by a criminal gang, forgery and use of forgeries			
15.	TELEPHONE BOOTHS (No. 119)	b)	N/A	Judicial inquiry opened on 14 January 2013, after preliminary	N/A at this stage	2009–2011	Suspected foreign bribery in connection with a contract for telephone booths	Not determined	Follow-up judicial inquiry into active and passive foreign bribery, misuse	Judicial inquiry under way – Indictments but for money	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
				investigation opened on 1 December 2010			with a West African country		of corporate assets and money laundering by a criminal gang of any offence	laundrying by a criminal gang		
<b>CURRENT CASES (PRELIMINARY INVESTIGATIONS UNDER WAY)</b>												
1.	AIRPORTS (No. 2)	i)	N/A	Preliminary investigation opened on 9 October 2013	N/A	2006–2013	Suspected foreign bribery in connection with the award of contracts for the study, design, supervision and management of terminals at three city airports in a North African country, through payments to the military	Not determined at this stage	N/A	Ongoing investigation	N/A	
2.	HOTEL CONSTRUCTION (No. 3)	i)	N/A	Preliminary investigation opened on 19 February 2018	N/A	2011	Suspected foreign bribery in connection with the award of a contract for the construction of a complex consisting of two hotels, a residential complex and a shopping centre in the Middle	Estimated amount at this stage: EUR 863 000	N/A	Ongoing investigation	N/A	



	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
							East					
3.	AIRBUS (No. 5)	e)	N/A	Preliminary investigation opened on 20 July 2016	One legal person, AIRBUS N/A as still in progress for individuals	2006–2016	Suspected foreign bribery in connection with obtaining contracts for the sale of aircraft to airlines including Chinese, Nepalese, Taiwanese and Colombian carriers	Not determined	Foreign bribery and private bribery in the context of the CJIP N/A at this stage for the individuals	CJIP signed on 29 January 2020 concerning AIRBUS (approved on 31 January 2020) Ongoing investigation concerning individuals	EUR 2 083 137 455 in fines under the CJIP	AIRBUS also undertook to have the AFA assess the effectiveness of its compliance programme over a period of three years, which the AFA's audit had shown was already complete. The company paid the fine on 31 January 2020.
4.	OPTICAL FIBRE NETWORK (No. 8)	k)	N/A	Preliminary investigation opened on 4 September 2017	N/A	2013–2016	Suspected foreign bribery in connection with a contract awarded by a public company for the development of a fibre optic network in a Middle Eastern country	Not determined at this stage	N/A	Ongoing investigation	N/A	
5.	FOREIGN INVESTMENTS (No. 9)	e)	N/A	Preliminary investigation opened on 30 January 2019	N/A	2000	Suspected foreign bribery in connection with business with foreign investors	Not determined at this stage	N/A	Ongoing investigation	N/A	
6.	NUCLEAR AND MILITARY AVIATION (No. 13)	b)	N/A	Preliminary investigation opened on 3 June 2015	N/A	2013–2014	Suspected foreign bribery in connection with obtaining a	Payment identified at this stage: EUR 725 000	N/A	Ongoing investigation	N/A	This investigation has been joined to the one below (7 – NUCLEAR AND MILITARY AVIATION) due to the

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
							favourable market position or decisions, including the granting of operating licences by a member of the government of an East Asian country					presence of the same legal person acting as an intermediary and the same individuals implicated in active foreign bribery.
7.	NUCLEAR AND MILITARY AVIATION – JOINED (No. 35)	b)	N/A	Preliminary investigation opened in 2014	N/A	2012–2014	Suspected foreign bribery in connection with obtaining or retaining market share in the military aviation sector of a South American country	Payment identified at this stage: EUR 75 000	N/A	Ongoing investigation	N/A	This investigation has been joined to the one above (6 – NUCLEAR AND MILITARY AVIATION) due to the presence of the same legal person acting as an intermediary and the same individuals implicated in active foreign bribery.
8.	CIVIL AIRCRAFT (No. 15)	a)	N/A	Preliminary investigation opened in early 2019	N/A	2014–2015	Suspected foreign bribery in connection with civil aircraft sales campaigns	Not determined at this stage	N/A	Ongoing investigation	N/A	
9.	CONSTRUCTION OF NUCLEAR POWER PLANT 2 (No. 21)	o)	N/A	Preliminary investigation opened on 3 December 2019	N/A	2017	Suspected foreign bribery in connection with the granting of a concession to build and operate a power plant in a Western European	Estimated amount at this stage EUR 2 500 000	N/A	Ongoing investigation	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
							country					
10.	RAILWAY CONTRACTS (No. 22)	i)	N/A	Preliminary investigation opened on 12 June 2017	N/A	2011–2016	Suspected foreign bribery in connection with the award of railway contracts in a South-East Asian country	Not determined at this stage	N/A	Ongoing investigation	N/A	
11.	SURVEILLANCE DRONES (No. 27)	b)	N/A	Preliminary investigation opened on 6 June 2015	N/A	2014–2015	Suspected foreign bribery in connection with a contract for surveillance drones with a Central African country (which did not ultimately materialise)	Estimated amount at this stage: EUR 2 500 000		Ongoing investigation	N/A	
12.	ENGINEERING (No. 28)	g)	N/A	Preliminary investigation opened on 31 December 2018	N/A	2008–2016	Suspected foreign bribery in connection with the award of the engineering portion of an oil and gas exploitation and production contract through payments to officials of a state-owned enterprise in a Central African country	Estimated amount at this stage: USD 2 000 000	N/A	Ongoing investigation	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
13.	AERONAUTICS TRAINING (No. 32)	n)	N/A	Preliminary investigation opened on 3 October 2019	N/A	2015	Suspected foreign bribery in connection with the award of an aviation maintenance training contract signed with a North African country	Payment identified at this stage: EUR 750 000	N/A	Ongoing investigation	N/A	
14.	WATER TREATMENT IN CENTRAL AMERICA (No. 130)	c)	N/A	Preliminary investigation opened in December 2019	N/A	Not provided	Suspected foreign bribery in connection with a sanitation contract with a Central American country	Not determined at this stage	N/A	Ongoing investigation	N/A	
15.	ROAD OPERATION (No. 131)	f)	N/A	Preliminary investigation opened on 11 April 2019	N/A	2010–2011	Suspected foreign bribery in connection with the award of a civil engineering contract with a Central African country	Not determined at this stage	N/A	Ongoing investigation	N/A	
16.	HOTEL OPERATION (No. 33)	o)	N/A	Preliminary investigation opened on 2 January 2017	N/A	2012–2015	Suspected foreign bribery in connection with obtaining a favourable court decision in a South-East Asian country	Payment identified at this stage: USD 1 000 000	N/A	Ongoing investigation	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
17.	GAMING MACHINES (No. 43)	b)	N/A	Preliminary investigation opened on 26 January 2016	N/A	2007–2015	Suspected foreign bribery in connection with the renewal of a contract for the sale of "gaming machines" signed with a company in a West African country	Estimated amount at this stage: EUR 2 500 000	N/A	Ongoing investigation	N/A	
18.	AERONAUTICS WEST AFRICA (No. 44)	g)	N/A	Preliminary investigation opened on 14 February 2018	N/A	2009–2014	Suspected foreign bribery in connection with payments to executives and managers of a foreign state-owned enterprise in a West African country	Estimated amount at this stage: EUR 5 000 000	N/A	Ongoing investigation	N/A	
19.	HOSPITAL EQUIPMENT (No. 48)	g)	N/A	Preliminary investigation opened on 2 October 2015	N/A	2007–2011	Suspected foreign bribery in connection with the award of hospital equipment contracts in Eastern Europe	Payment identified at this stage: EUR 317 889	N/A	Ongoing investigation	N/A	
20.	MEDICINES NORTH AFRICA (No. 67)	b)	N/A	Preliminary investigation on 30 April 2015	N/A	2009–2014	Suspected foreign bribery in connection with a pharmaceutical transaction with a North African	Not determined at this stage	N/A	Ongoing investigation	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
							country					
21.	PORT INFRASTRUCTURE IN AFRICA (No. 40)	c)	N/A	Preliminary investigation opened in July 2020	N/A	Not provided	Suspected foreign bribery in connection with the award of public procurement contracts in West Africa, including an autonomous port	Not determined at this stage	N/A	Ongoing investigation	N/A	
22.	IDENTITY CARDS (No. 69)	g)	N/A	Preliminary investigation opened on 21 July 2017	N/A	2011–2017	Suspected foreign bribery in connection with the award of a contract for the production of identity cards in a South Asian country	Estimated amount at this stage: EUR 6 100 000	N/A	Ongoing investigation	N/A	
23.	AIRPORT SECURITY (No. 72)	f)	N/A	Preliminary investigation opened on 10 February 2016	N/A	2013–2016	Suspected foreign bribery in connection with the negotiation and implementation of a public service agreement for the delegation of airport security in East Africa	Not determined at this stage	N/A	Ongoing investigation	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
24.	OIL 2 (No. 81)	h)	N/A	Preliminary investigation opened on 22 July 2019	N/A	2011	Suspected foreign bribery in connection with an oil services contract in South America	Not determined at this stage	N/A	Ongoing investigation	N/A	
25.	CONSTRUCTION 1 (No. 82)	g)	N/A	Preliminary investigation opened on 13 June 2018	N/A	2010–2016	Suspected foreign bribery in connection with the award of several public procurement construction contracts in a Central African country	Not determined at this stage	N/A	Ongoing investigation	N/A	
26.	RIOT CONTROL EQUIPMENT (No. 83)	a)	N/A	Preliminary investigation opened on 5 February 2015	N/A	2010–2012	Suspected foreign bribery in connection with the signing of a contract for the supply of riot control equipment with a Central African country	Payment identified at this stage: EUR 378 884	N/A	Ongoing investigation	N/A	
27.	SECURE DIPLOMATIC QUARTER (No. 86)	k)	N/A	Preliminary investigation opened on 4 May 2016	N/A	2014–2015	Suspected foreign bribery in connection with the award of a contract for the construction and management of a diplomatic	Payment identified at this stage: EUR 9 540	N/A	Ongoing investigation	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
							quarter in an East African country					
28.	RAILWAY LINES (No. 87)	g)	N/A	Preliminary investigation opened on 1 June 2017	One legal person, SYSTRA SA  N/A as still in progress for individuals	2012–2013  2009–2014	Suspected foreign bribery in connection with a contract for the electrification of railway lines in a Central Asian country Foreign bribery under a CJIP	Payment identified at this stage: USD 575 954	N/A	Ongoing investigation of individuals CJIP signed on 12 July 2021 concerning SYSTRA SA (approved on 13 July 2021)	N/A EUR 7 496 000 in fines under the CJIP	No compliance programme under the CJIP
29.	SUBMARINES (No. 88)	f)	N/A	Preliminary investigation opened on 6 December 2016	N/A	2008–2010	Suspected foreign bribery in connection with a contract to sell submarines to a South American country	Not determined at this stage	N/A	Ongoing investigation	N/A	
30.	VISAS (No. 89)	e)	N/A	Preliminary investigation opened on 8 July 2015	N/A	2014	Suspected foreign bribery in connection with the successful completion of rejected visa applications, in a context of corruption in a West African country	Not determined at this stage	N/A	Ongoing investigation	N/A	



	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
32.	GLASS INSULATORS (No. 93)	n)	N/A	Preliminary investigation opened on 5 October 2018	N/A	2010–2012	Suspected foreign bribery in connection with a power line refurbishment contract in a Central African country	Not determined at this stage	N/A	Ongoing investigation	N/A	
33.	SCHOOLS (No. 132)	h)	N/A	Preliminary investigation opened on 17 December 2020	N/A	2016	Suspected foreign bribery in connection with a settlement agreement following a dispute arising from the poor performance of a contract for the construction of 50 schools with a North African country	Not determined at this stage	N/A	Ongoing investigation	N/A	
34.	OIL AND GAS 1 (No. 97)	l)	N/A	Preliminary investigation opened on 30 April 2018	N/A	2015	Suspected foreign bribery in connection with police authorities in a South-East Asian country to imprison an employee and have him waive his right to contest his dismissal	Estimated amount at this stage: USD 100 000	N/A	Ongoing investigation	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
35.	OIL 3 (No. 98)	g)	N/A	Preliminary investigation opened on 5 March 2017	N/A	2011–2013	Suspected foreign bribery in connection with a company specialising in international consultancy in the energy sector	Not determined at this stage	N/A	Ongoing investigation	N/A	
36.	OIL AND GAS 2 (No. 114)	h)	N/A	Preliminary investigation opened on 16 October 2017	N/A	2007–2010	Suspected foreign bribery in connection with agreements signed with sales representatives in connection with the development of oil and gas fields in Africa and in a South American country	Not determined at this stage	N/A	Ongoing investigation	N/A	
37.	CONSTRUCTION, CENTRAL AFRICA (No. 108)	b)	N/A	Preliminary investigation opened on 18 February 2014	Three individuals:	2012	Suspected foreign bribery in connection with the award of civil engineering contracts in a Central African country	Estimated amount: EUR 1 844 200	Foreign bribery (referral of two individuals) Complicity in foreign bribery (referral of one individual) Money laundering (referral of two individuals)	Referral of three individuals to court – Hearing scheduled for September 2021	N/A	

	Name of the case	Source(s) of detection	Date of judgment	Type of proceedings and date of initiation	Individuals and legal persons involved	Date of events	Events	Total amount of bribes	Charge(s)	Stage of the proceedings	Sanction(s)	Commentary
38.	MOTORWAY, ASIA (No. 111)	o)	N/A	Preliminary investigation opened in August 2013	N/A	2009	Suspected foreign bribery in connection with the award of a contract for the construction and operation of a section of a toll motorway in a North Asian country	Not determined at this stage	N/A	Ongoing investigation	N/A	The case was dismissed by the PNF, but is still pending at the Nanterre Public Prosecutor's Office, as a complaint with a civil party was filed at the Nanterre Public Prosecutor's Office after the PNF opened an investigation.

### ANNEX 3: PHASE 3 RECOMMENDATIONS TO FRANCE AND EVALUATION OF THEIR IMPLEMENTATION BY THE WORKING GROUP IN DECEMBER 2014

Phase 3 Recommendations – October 2012		Written follow-up report – October 2014
1.	Regarding the <u>offence of bribery of foreign public officials</u> , the Working Group recommends that France:	
	(a) review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials [Convention, Articles 1 and 5; 2009 Recommendation, V].	<i>Partially implemented</i>
	(b) eliminate, as soon as possible, the dual criminality requirement set out in article 113-6 of the Penal Code in relation to bribery of foreign public officials committed by French nationals outside French territory (that the acts are “punishable by the law of the country where the acts are committed”) [Convention, Article 1; 2009 Recommendation III (ii) and V].	<i>Not implemented</i>
	(c) clarify by all appropriate means that no element of proof, other than those set out in Article 1 of the Convention is required to constitute an offence under article 435-3 et seq. of the Penal Code with regard to bribery of foreign public officials, and in particular that the definition of “foreign public official” and the case-law principle of “corruption pact” do not, in practice, constitute such elements or obstacles to the criminalisation of the (i) offer or promise of pecuniary or other advantages; (ii) acts of bribery involving intermediaries; and (iii) payments to third parties [Convention, Article 1; 2009 Recommendation, III (ii) and V].	<i>Not implemented</i>
	(d) ensure by all appropriate means that the interpretation of the principle of non-retroactivity of criminal law does not impede the prosecution and sanctioning of bribery of foreign public officials occurring after the entry into force of the offence in France [Convention, Article 1; 2009 Recommendation, V] and	<i>Not implemented</i>
	(e) examine the possibility either of criminalising the bribery of a foreign public official sufficiently broadly, or of extending the offence of trading in influence, to avoid a difference of approach for the same acts of bribery based on whether the intended recipient is a French or a foreign public official [Convention, Article 1; 2009 Recommendation, III (ii) and V].	<i>Partially implemented</i>
2.	Concerning the <u>criminal liability of legal persons</u> , the Working Group recommends that France:	
	(a) clarify the requirements for the criminal liability of legal persons to: (i) ensure that their approach fully takes into account Annex I of the 2009 Recommendation; and (ii) that a legal person cannot escape liability for acts of bribery by making use of an intermediary, including a related legal person [Convention, Article 2; 2009 Recommendation, Annex I(B)].	<i>Partially implemented</i>
	(b) introduce ongoing training for the French law enforcement authorities relating specifically to enforcement of the criminal liability of legal persons in foreign bribery cases [Convention, Article 2; 2009 Recommendation, III (i), Annex I(D)].	<i>Partially implemented</i>
3.	Concerning <u>sanctions</u> in cases of transnational bribery, the Working Group recommends that France:	
	(a) with regard to the penalties applicable to individuals, (i) raise the maximum amount of the fines set out in article 435-3 of the Penal Code, in particular to bring it into line with the amount of available fines for the offence of misuse of corporate assets; and (ii) ensure that the penalties imposed in practice are	<i>Partially implemented</i>

	effective, proportionate and dissuasive [Convention, Article 3; 2009 Recommendation].	
	(b) with regard to the penalties applicable to legal persons, (i) raise the maximum amount of the available fine to a level that is effective, proportionate and dissuasive; and (ii) make full use of the additional penalties available in the law and, in particular, debarment from public procurement, in order to contribute to the application of sanctions that are effective, proportionate and dissuasive [Convention, Articles 2 and 3; 2009 Recommendation, III (vii) and XI (i)].	<i>Partially implemented</i>
	(c) make full use of the confiscation measures available in the law in order to contribute to the application of penalties that are effective, proportionate and dissuasive and, in this context: (i) develop a proactive approach to seizure and confiscation of the instrument and proceeds of the bribery of foreign public officials or assets of equal value, including in the context of proceedings involving legal persons; (ii) raise awareness among judges and law enforcement authorities of the importance of confiscating the proceeds of bribery of a foreign public official (especially where the perpetrator is a legal person); and (iii) develop and disseminate guidelines on methods for quantifying the proceeds of corruption offences [Convention, Article 3.3].	<i>Not implemented</i>
4.	Concerning <u>investigation and prosecution</u> , the Working Group recommends that France:	
	(a) pursue the changes initiated by the two circulars by the Minister of Justice concerning new relationships between the Ministry of Justice and prosecutors by progressing to amendment of the legal framework to (i) ensure that the Public Prosecutor's Office monopoly on the instigation of investigations and prosecutions, together with its role in the conduct of judicial investigations and the procedure for appearance on prior admission of guilt, are exercised independently of the executive in order to guarantee that investigations and prosecutions in cases of bribery of foreign public officials are not influenced by factors prohibited by Article 5 of the Convention; and (ii) to break with past practices of individual instructions, as announced by the circular [Convention, Article 5 and 2009 Recommendation, V. and Annex 1(D)].	<i>Partially implemented</i>
	(b) accord the same rights to all victims of the bribery of foreign public officials, without differentiating between states, with regard to the instigation of criminal proceedings and bringing civil party claims and abolish the requirement of a prior complaint by a victim or his/her legal representatives or an official complaint by the country where the acts were committed, contained in article 113-8 of the Penal Code [Convention, Articles 4 and 5, 2009 Recommendation, Annex 1(D) and Phase 2 recommendation 8].	<i>Partially implemented</i>
	(c) as necessary and in compliance with the relevant rules and procedures, make public by all appropriate means, and respecting the fundamental rights of the Defendant, certain elements of the plea bargain, such as the terms of the agreement, especially the approved penalty or penalties [Convention, Article 3].	<i>Not implemented</i>
	(d) formally clarify, by circulars or any other official means, France's criminal justice policy with regard to bribery of foreign public officials in order to ensure a determined commitment on the part of public prosecutors and criminal police officers placed under their authority to systematically investigate the liability of persons suspected of committing the offence, including on the basis of information spontaneously transmitted by foreign authorities, mutual legal assistance requests and credible allegations that are reported to them or that come to their attention in the performance of their duties [Convention, Article 5; 2009 Recommendation, XIII (i) and (ii) and Annex 1(D)].	<i>Not implemented</i>
	(e) issue a comprehensive reminder to all jurisdictions that the Paris jurisdiction and the BCLC have jurisdiction over all cases of bribery of foreign public officials and, in this context, (i) ensure that resources are in place in each appellate	<i>Partially implemented</i>

	jurisdiction such as to allow Prosecutors General to identify cases suitable for referral to the Paris jurisdiction, including by holding regular meetings with the relevant decentralised units of the judicial police; and (ii) ensure that sufficient resources are allocated to investigations and prosecutions, in particular to the Financial Section of the Paris High Court and to the Central Brigade, including for processing mutual legal assistance requests [Convention, Articles 5 and 9; 2009 Recommendation, II, V and XIII, Annex 1(D) 2) and 3); Phase 2 recommendation 10].	
	(f) within the overall review of the remit of the Public Prosecutor's Office, give thought to the status of the judicial police in order to ensure its capacity to conduct investigations that are not influenced by the considerations mentioned in Article 5 of the Convention; [Convention, Article 5 and Commentary 27; 2009 Recommendation, Annex 1(D)].	<i>Fully implemented</i>
	(g) clarify by all means that the law governing classification of information covered by defence secrecy cannot impede the investigation and prosecution of foreign bribery cases and that the provisions of Article 5 of the Convention are taken into account in decisions to classify or, even more so, to declassify information necessary for investigations and prosecutions of foreign bribery [Convention, Article 5].	<i>Not implemented</i>
	(h) take all appropriate steps, including potentially amending the "blocking statute", to ensure that the conditions governing access to information in the possession of French companies under this law do not stand in the way of foreign authorities' ability to investigate and prosecute the bribery of foreign public officials [Convention, Article 5].	<i>Not implemented</i>
5.	Concerning the <u>statute of limitations</u> , the Working Group recommends that France take necessary measures to extend, to an appropriate period, the statute of limitations applicable to the offence of bribery of foreign public officials [Convention, Article 6; Phase 2 recommendation 9].	<i>Not implemented</i>
6.	Concerning <u>mutual legal assistance</u> , the Working Group recommends that France take all necessary measures to ensure that investigations conducted by the criminal police under the supervision and direction of the Public Prosecutor's Office before the opening of any formal criminal proceedings are not influenced by the identity of the natural or legal persons involved and, more generally, that decisions to grant mutual legal assistance in foreign bribery cases are not influenced by considerations of national economic interest under the guise of protecting "the fundamental interests of the nation" [Convention, Articles 5 and 9].	<i>Partially implemented</i>
7.	Concerning <u>money laundering</u> , the Working Group recommends that France:	
	(a) pursue and increase its efforts to raise awareness of professions required to detect acts that may involve foreign bribery [2009 Recommendation, III (i)].	<i>Partially implemented</i>
	(b) consider a review of the money laundering methods and schemes that could be used in instances of transnational bribery review and share, if appropriate, the results of this review with private-sector professionals who are in a position to detect foreign bribery [Convention, Article 7].	<i>Fully implemented</i>
8.	Regarding <u>accounting rules, external audit and corporate compliance programmes</u> , the Working Group recommends that France:	
	(a) support existing initiatives to train statutory auditors in the detection of bribery and the obligation to report criminal acts, ensuring that, in accordance with the provisions of ISA 500, such training also extends to criminal acts committed by the foreign subsidiaries of companies that they are responsible for auditing [2009 Recommendation, III (i), X B. (v)].	<i>Fully implemented</i>

	(b) increase efforts to raise awareness among French companies of the need to take account, in their compliance programmes, of the role of their foreign subsidiaries and promote the adoption and implementation of compliance programmes in SMEs involved in international trade, according to the specific circumstances of each one [2009 Recommendation X. C. (i) and (v); Annex II].	<i>Partially implemented</i>
9.	Regarding <u>tax measures</u> to tackle bribery of foreign public officials, the Working Group recommends that France:	
	(a) urge French Polynesia and Saint Pierre and Miquelon to apply the principle of the non-deductibility of bribes as soon as possible [2009 Tax Recommendation I(i) and Phase 2 recommendation 13]	<i>Not implemented</i>
	(b) pursue efforts to raise the awareness of tax officials in their role of detecting illicit transactions related to the bribery of foreign public officials, both in mainland France and in the overseas territories, and take all appropriate steps to promote the exchange of information in the possession of tax authorities for use by law enforcement authorities, notably through reporting under article 40 of the Code of Criminal Procedure [2009 Tax Recommendation VIII(i)].	<i>Partially implemented</i>
10.	Regarding <u>raising awareness</u> of the offence of bribery of foreign public officials, the Working Group recommends that France strengthen its existing activities to ensure that officials of the Ministry of Foreign Affairs and of the General Directorate of the Treasury are suitably aware of the offence and of their role in raising awareness of the risks among companies [2009 Recommendation III(i) and (iv)].	
11.	Regarding the <u>reporting</u> of transnational bribery, the Working Group recommends that France:	
	(a) persevere in its efforts to raise the awareness of large, medium-sized and small companies of the protection the law affords to private-sector whistleblowers [2009 Recommendation, III(i) and IX(i) and (iii)]	<i>Fully implemented</i>
	(b) ensure that appropriate measures are in place to encourage reporting under article 40 paragraph 2 of the Code of Criminal Procedure, in particular by concluding protocols for reporting bribery offences between law enforcement authorities and relevant government sectors, accompanied by ongoing training for officials [2009 Recommendation, IX]	<i>Not implemented</i>
	(c) strengthen the reporting framework in place in the French Development Agency (AFD), Coface and UBIFRANCE and work towards aligning this with article 40 of the Code of Criminal Procedure [2009 Recommendation, IX].	<i>Partially implemented</i>
12.	Regarding <u>public advantages</u> , the Working Group recommends that France:	
	(a) take the necessary steps to give all authorities mandated to approve public procurement contracts access to the criminal records of legal persons [2009 Recommendation XI(i)]	<i>Not implemented</i>
	(b) provide specific training to the staff of agencies mandated to provide public advantages on the due diligence procedures that need to be undertaken when providing such benefits [2009 Recommendation XI(i)]	<i>Partially implemented</i>
	(c) strengthen arrangements within the Directorate General of Armaments to ensure that (i) internal controls, ethics and compliance programmes or measures undergo thorough scrutiny when application is made for prior approval by the Ministry of Defence and an arms export licence, and (ii) that the eligibility of companies to export arms be suspended if they are convicted of bribery of foreign public officials [2009 Recommendation X.C(vi); XI(i)].	<i>Partially implemented</i>

### Follow-up by the Working Group

13. The Working Group will follow up the following issues, as case law and practice develop, to ensure:

(a) that the definition of “without right” is not interpreted more restrictively than the definition of “improper advantage” in the Convention and therefore does not require proof that a law in force in the country of the recipient of the bribe prohibits that person from receiving a bribe [Convention, Article 1];

(b) (i) the extent of recourse to the offence of misuse of corporate assets in cases involving elements of foreign bribery, based on data that France should collect and analyse; and (ii) whether liability of legal persons can be established, in practice, in foreign bribery cases where individuals are prosecuted for misuse of corporate assets, to determine whether this represents an obstacle to liability of legal persons in France for the offence of bribery of foreign public officials [Convention, Articles 1 and 2];

(c) the development of ongoing foreign bribery cases against legal persons [Convention, Article 2];

(d) that sanctions applied within a plea bargain are effective, proportionate and dissuasive [Convention, Article 1];

(e) the application of a plea bargain in foreign bribery cases [Convention, Articles 3 and 5; and 2009 Recommendation, Annex 1, D].

(f) that statistics are collected on incoming and outgoing requests for mutual legal assistance executed directly between prosecutors [Convention, Article 9];

(g) measures taken to encourage reporting under Article 40 of the Code of Criminal Procedure.



## ANNEX 4: LIST OF PARTICIPANTS IN THE ON-SITE VISIT

### Government ministries and agencies

- Prime Minister's Office – General Secretariat for European Affairs (SGAE)
- Ministry of the Economy, Finance and the Recovery
- Ministry of Justice
- Ministry for Europe and Foreign Affairs
- Ministry for the Armed Forces
- Ministry of the Interior
- Defender of Rights

### Parliamentarians

- Parliamentary mission evaluating the act on transparency, combating corruption and the modernisation of economic life (Sapin 2 Act), members of the French National Assembly

### Law enforcement and the Judiciary

- National Financial Prosecutor's Office (PNF)
- Public Prosecutor's Office of the Paris Court of Appeal
- Public Prosecutor's Office of the Judicial Court of Paris
- Court of Cassation
- Paris Court of Appeal
- Judicial Court of Paris
- Bobigny Judicial Court
- Versailles Judicial Court
- Ministry of the Interior – Central Office for Combating Corruption and Financial and Tax Offences (OCLCIFF)
- Central Office for Fighting Major Financial Crime
- Paris Police Headquarters
- Agency for the Collection and Management of Seized and Confiscated Assets (AGRASC)
- French Financial Intelligence Unit (TRACFIN)
- Criminal Assets Identification Platform

### Regulatory and supervisory authorities

- French Anti-Corruption Agency (AFA)
- AFA Sanctions Committee
- National Defence Secrecy Advisory Commission (CCSDN)
- Department of Strategic Information and Economic Security (SISSE) of the Ministry of the Economy
- General Secretariat for National Defence and Security (SGDSN)
- French Prudential Supervision and Resolution Authority (ACPR)

### Public institutions

- French Development Agency (AFD)
- Bpifrance Export Insurance
- Expertise France

### Business organisations and auditing associations

- Accounting Standards Authority (ANC)
- Supreme Council of the Order of Chartered Accountants
- High Council for Statutory Auditors (H3C)
- Alliance Experts

- French Association of Statutory Auditors (CNCC)
- Deloitte
- Ernest & Young France
- Grant Thornton France
- PWC

#### **Employer and professional organisations**

- *Mouvement des entreprises de France* [French employers' federation – MEDEF]
- International Chamber of Commerce France (ICC)
- French Association of Corporate Lawyers (AFJE)
- French Council of Investors in Africa
- Richelieu Committee

#### **Private enterprises**

- Airbus
- Alstom
- Dassault Aviation
- Egis
- Naval Group
- Natixis
- Sonepar
- Société Générale
- Servier
- Total
- Thales
- UBS
- Vinci

#### **Legal profession**

- August Debouzy law firm
- Gide Loyrette Nouel law firm
- Paul Hastings law firm
- Clifford Chance law firm
- Hughes Hubbard & Reed law firm
- Navacelle law firm
- Herbert Smith Freehills law firm
- Bonifassi Avocats law firm
- Lombard Baratelli & associés law firm

#### **Civil society and journalists**

- Transparency International France
- Sherpa
- Anticor
- Mediapart
- France 2
- Les Jours
- Radio France

**Academics**

- Paris 2 Panthéon-Assas University
- University of Strasbourg
- Sciences Po Paris
- University of Paris-Nanterre
- University of Cergy-Pontoise

## ANNEX 5: LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

AFA	French Anti-Corruption Agency
AFCI	Production, trade and brokering licence
AFD	French Development Agency
AGRASC	Agency for the Collection and Management of Seized and Confiscated Assets
AMF	French Financial Markets Authority
BCLC	Central Anti-Corruption Brigade
BEPI	Bureau for International Mutual Assistance in Criminal Matters
BNEE	National Brigade of Economic Investigations
BNLCCF	National Brigade for Combating Corruption and Financial Crime
BPIFrance	Bpifrance Export Insurance
BRDE	Economic Crime Brigade of the Criminal Investigation Department of the Paris Police Headquarters
CC	Criminal Code
CCP	Criminal Code of Procedure
CEPEJ	European Commission for the Efficiency of Justice
CIEEMG	Inter-ministerial Commission for the Study of War Materiel Exports
CJEU	Court of Justice of the European Union
CJIP	Judicial Public Interest Agreement
CNCC	French Association of Statutory Auditors
Coface	French National Insurance Company for External Trade
CRPC	Plea bargain - <i>comparution sur reconnaissance préalable de culpabilité</i>
CSDN	National Defence Secrecy Commission
CSM	Supreme Council of Magistracy - Conseil Supérieur de la Magistrature
DAC	Development Assistance Committee
ECHR	European Court of Human Rights
EU	European Union
EUR	Euro
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act
FDI	Foreign direct investment
FICOBA	Bank account database
FISEA	Investment and Support Fund for Businesses in Africa
FIU	Financial intelligence unit
GDP	Gross domestic product
GDPR	General Data Protection Regulation
GNI	Gross national income
GRECO	Group of States against Corruption
GTC	General Tax Code
H3C	High Council for Statutory Auditors
IMEF	Economic and financial investigator
MLA	Mutual Legal Assistance request
NGO	Non-governmental organisation
OCLCIFF	Central Office for Combating Corruption and Financial and Tax Offences
OCRGDF	Central Office for Fighting Major Financial Crime
ODA	Official development assistance
OECD	Organisation for Economic Co-operation and Development

OECD Convention	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
OPMC	Obligation to implement a compliance programme
PNF	National Financial Prosecutor's Office
PPMC	Penalty to implement a compliance programme
Proparco	Subsidiary of the AFD focused on private sector development
SCPC	Central Corruption Prevention Department
SFO	Serious Fraud Office
SISSE	Department of Strategic Information and Economic Security
SME	Small and medium-sized enterprises
SOGEFOM	French overseas guarantee fund management company
TRACFIN	French Financial Intelligence Unit
UKEF	UK Export Finance
USD	United States dollar
Working Group	OECD Working Group on Bribery

[www.oecd.org/corruption/anti-bribery](http://www.oecd.org/corruption/anti-bribery)

