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During 2015, French and foreign companies doing business in France were subject to an increase in international fraudulent wire transfers which, inter alia, led to an enhancement of investigation techniques. In this respect, one of the main innovations of 2016 should be the reinforcement of whistleblowers' protection. As a consequence, France is increasingly aggressive in terms of law enforcement as illustrated by the severity of the pecuniary sanctions imposed by national regulators on both companies and individuals, either French or foreign. In the meantime, recent case law shows that French courts and authorities have begun taking into consideration the issue of double jeopardy between criminal and administrative sanctions on the one hand and between US deferred prosecution agreements and criminal prosecution in France on the other hand. Besides these changes, 2016 and 2017 will see the French as well as the European legal landscapes modified with the upcoming anti-bribery legislation at the national scale and the transposition of the fourth EU directive on anti-money laundering.

Increase of international fraudulent wire transfers

Despite reinforcement of IT security systems, French and foreign companies doing business in France keep losing money because of fraudulent wire transfers. This type of fraud is simple: generally, an email is sent to the accounts department of a company by a person alleging to be one of its senior executive officers, usually a director. The email scammer instructs the accountant to make an urgent international wire transfer for a purported significant transaction. Relying on the employee's credulity, the scammer pretends that the transaction must be kept confidential. Consequently, the accounts person, flattered to be entrusted with such a task, makes the transfer without raising any objection. As a result, companies sometimes lose millions of euros.

Most of the time, scammers are located in jurisdictions where judicial cooperation with France is limited, such as Israel. In addition, the fraudulent wire transfer usually constitutes the first step of a well-organised money laundering scheme. Indeed, ironically wire transfers are often made to the benefit of bank accounts located in Asia before being reinvested in real estate in France.

Therefore, France remains a jurisdiction vulnerable to these fraudulent wire transfers taking place. As a result, and until international judicial cooperation is enhanced, the best way to fight this blight is to heighten awareness at company level.

More generally, companies' awareness of criminal risks must be strengthened to take into consideration the increase in the number of investigations led by French authorities and regulators.

Enhancement of investigation techniques

Following similar enforcement trends in the US and the UK, France has become an aggressive enforcement environment for local and foreign companies. More and more investigations are conducted, notably by the French financial markets authority (AMF), the French authority for banks and insurers (ACPR), the French competition authority and the national financial prosecution office. The latter has been seized 565 times since its creation on 3 March 2014 and is currently investigating 255 cases.

The 2013 Law on regulation of banking activities enhanced the AMF's prerogatives in terms of investigative powers. For example, the AMF has the power to require regulated entities to produce all documents or information it believes are necessary for its investigation. Similarly, its powers to conduct searches within companies have been broadened on a domestic basis, but also overseas with the cooperation of foreign authorities.

Indeed, investigations are facilitated by the international cooperation between national authorities and regulators through bilateral agreements. Beyond the traditional bilateral interstate conventions on mutual legal assistance, regulators such as the AMF and the Securities and Exchange Commission (SEC) or the Commodity Futures Trading Commission (CFTC) have signed cooperation agreements enabling them to exchange information in relation to ongoing investigations.

As a consequence, local and foreign companies and individuals doing business in France are increasingly subject to sanctions imposed by administrative authorities, especially the AMF and the ACPR. Such sanctions can include significant penalties for companies and individuals. For example, the AMF imposed a €16 million fine on a UK company in 2014, and a €14 million fine on a Lebanese individual in 2013.

In addition to the above traditional investigation tools, French authorities and regulators will be assisted by the information that whistleblowers, who often are company employees, will be able to give without fearing any retaliation from their employers.

Whistleblowing

In the United States, the concept of whistleblowing is a deeply rooted tradition dating back to 1778. In more recent years, the SEC has initiated a Whistleblower Incentive Program. Accordingly, the SEC is able to provide monetary awards to eligible individuals who come forward with high-quality original information that leads to an SEC enforcement action in which over US$1 million in sanctions is ordered. Awards can amount to a sum corresponding to 30 per cent of the money collected.

Contrary to the US, where monetary awards are granted to whistleblowers, the French whistleblowing system is at an embryonic stage. Indeed, notwithstanding some provisions now disseminated in multiple statutes, the French legal framework ensuring the protection of whistleblowers only arose out of the Law combating tax fraud and financial and economic delinquency on 6 December 2013. Since then, whistleblower status is granted to any employee or civil servant who 'reported or testified in good faith, facts constituting an offence or a crime of which he was aware in the exercise of its functions'.

This legal framework should be reinforced by the upcoming anti-bribery legislation: the bill on the fight against corruption

and for transparency in economic life, initiated by the Minister of Finance, Michel Sapin. This bill, which was presented to the Council of Ministers on 30 March 2016, should set up a unified legal status for whistleblowers currently set out in several instruments to ensure their protection: one of the major changes will be the prohibition of discrimination and termination of employment when a whistleblower's statement is registered at the Agency for the prevention and the detection of corruption (see below). The Agency will also financially support whistleblowers.

In a nutshell, on the one hand, France is still faced with issues of international judicial cooperation in cases of fraudulent wire transfers. On the other hand, with the enhancement of investigation techniques and the development of whistleblowing protections, the French legal system has been modernised, following the common law legal approach. Nevertheless, these innovations face limitations due to the application of the double jeopardy principle. This principle prevents one person from being tried twice for the same offence. Applied primarily at the domestic level in relation to administrative and criminal sanctions, this principle tends to be applied by French courts at the international level too, between foreign and local sanctions.

Double jeopardy

Historically, the French legal system could impose both administrative and criminal sanctions on perpetrators of financial crime. French and foreign companies doing business in France could be punished by national regulators and also by national criminal courts for the same act.

The constitutionality of this approach and how it related to the principle of double jeopardy was challenged by the defendants in the *EADS* case in March 2015. This case related to alleged market abuse by EADS, its two main shareholders at the time, and 17 of its top managers. The Sanction Committee of the AMF cleared the 20 persons concerned in 2009.

On 18 March 2015, the French Constitutional Council gave its landmark decision in the *EADS* case. According to the Council (which based its reasoning on the European Court of Human Rights' case law, particularly the *Grande Stevens* decision of 4 March 2014), a person could no longer be prosecuted and sentenced twice for the same facts by both the Sanction Committee of the AMF and a French criminal court.

In its decision, the French Constitutional Council ruled that the same person could not be subject to both a criminal prosecution for insider trading offences and an administrative action for insider trading breaches on the grounds that the criminal and the administrative definitions of insider trading were similar, therefore aimed at punishing the same facts and protecting the same public interest. The French Constitutional Council thus repealed the applicable legal provisions effective from September 2016.

Nevertheless, this situation is far from being settled. Indeed, on 14 January 2016, the French Constitutional Council decided that a person could be prosecuted both by the administrative and criminal authorities if the nature of the sanctions was different.

However, despite this latter decision, preliminary rulings on constitutionality were made in the *Cahuzac* and *Wildenstein* cases and transferred to the French Constitutional Council. In both cases, the defendants' lawyers questioned the constitutionality of the double jeopardy system in relation to tax fraud, specifically regarding the non bis in idem principle and the constitutional principle according to which criminal offences must be clearly defined by criminal statutes.

Overall, recent French case law is likely to have a significant impact on international companies doing business in France, and being investigated and/or prosecuted overseas and in France.

Consistent with the recent decision of the French Constitutional Council, on 18 June 2015, the Paris Criminal Court cleared four French companies that were facing trial under French anti-corruption laws on the grounds that the companies themselves or their parent companies had already signed deferred prosecution agreements with the US Department of Justice and thus, could not be prosecuted a second time for the same facts before a criminal court.

This court decision was rendered in the context of the 'Oil for food' scandal. The court acknowledged termination of the prosecution in relation to the payment of bribes to the Iraqi government in the United Nations programme.

In doing so, the Paris Criminal Court applied the 'international double jeopardy' principle to US deferred prosecution agreements. The Paris Criminal Court considered that the US had jurisdiction over the defendants and applied the principle non bis in idem. It must be noted, however, that this decision was appealed by the Attorney General and is therefore likely to be reversed.

Beyond the above developments, the French and the European legal systems are in perpetual evolution with regard to the prosecution of white-collar crimes. Two of the most illustrative examples are the upcoming anti-bribery legislation in France and the fourth EU directive on anti-money laundering at EU level.

Prospective law: recent developments in anti-bribery legislation and anti-money laundering

The upcoming French anti-bribery legislation

France is faced with harsh criticism from international organisations fighting corruption and from the OECD alleging that its legal tools would be too weak to prevent corruptive practices. Indeed, barely one sentence has been pronounced by French courts in the past 10 years. As a consequence, the government introduced a bill on the fight against corruption and for transparency in economic life, the purpose of which is to improve the efficiency of the fight against corruption at national level.

The bill on the fight against corruption and for transparency in economic life provides for innovative tools to fight corruption, including establishing an Agency for the prevention and the detection of corruption. This Agency would be under the joint authority of both the Ministry of Justice and the Ministry of Finance.

Its first mission will be to set up a risk mapping system, and to coordinate the French position in relation to the international institutions whose goal is to fight corruption.

In addition, the Agency will be in charge of enforcing programmes preventing corruption that all companies (of more than 500 employees and whose turnover exceeds €100 million) will have to set up. In this respect, the Agency will publish guidelines to assist companies.

In relation to this obligation (and comparable to what banks are compelled to do regarding anti-money laundering), companies will have to adopt a code of conduct describing prohibited behaviours. Similarly, companies will have to set up internal whistleblowing and risk mapping systems which will have to be regularly updated. Furthermore, companies will have to set up internal procedures to verify clients, service providers, intermediaries and commercial partners' integrity. Finally, they will have to conduct internal and external registry controls and to set up training sessions for top managers and the most exposed employees, as well as a policy of disciplinary sanctions within the company.

In the event of failure by a company to set up the above programme,

the sanctions committee of the Agency will have the power to make injunctions of compliance and to impose sanctions of up to €200,000 for natural persons and up to €1 million for legal persons.

In addition, the bill sets out an additional sanction of compliance monitorship in cases of condemnation for corruption. For a period of up to three years, this sanction consists of enforcement of a compliance programme under the monitorship of the Agency. Where there is violation of this obligation, there are heavy sanctions: up to two years' imprisonment and a €400,000 fine for natural persons and up to a €2 million fine for legal persons.

In 2004, plea bargaining was implemented in French criminal law. Ten years later, France implemented a criminal transactional system, but only for small misdemeanours. White-collar crimes remain outside the scope of these judicial tools. Initially, the bill on the fight against corruption and for transparency in economic life set out the creation of a 'convention of compensation in the public interest'. This convention, inspired by the US and the UK deferred prosecution agreements, was aimed at enabling French and foreign companies prosecuted in France for acts of corruption to enter into an agreement with the Attorney General in order to avoid a trial in exchange for the payment of a fine and the enforcement of a compliance programme under the monitorship of an independent consultant designated by the judge. However, the Council of State (the French administrative Supreme Court) released a negative opinion in relation to the provisions setting up the convention of compensation in the public interest. As a consequence, the government decided to withdraw these provisions from the bill. It is nonetheless likely that members of the French parliament will have a debate on this topic.

The Fourth EU Directive on anti-money laundering

The purpose of the EU AML Directive 2015/849 is to improve the legal framework concerning anti-money laundering and counter-terrorist financing rules across all EU member states. The Directive takes into account the 2012 Recommendations of the Financial Action Task Force (FATF). National transpositions should be achieved by 26 June 2017.

The scope of the Fourth Directive has been widened compared to the previous directive. For example, it now covers cash transfers of an amount in excess of €10,000, rather than €15,000. In addition, tax offences relating to direct and indirect tax, which are domestically punished by a sentence of at least six months' imprisonment, will be included within the scope of the Directive. Since the Directive is silent as to the definition of what constitutes a criminal tax offence, each member state will have to define this concept in order to enable exchanges of information between national financial intelligence units.

Several provisions of the Directive deal with sanctions in cases of non-compliance. These sanctions have been increased compared to the Third Directive. As an example, the most severe financial penalties that can now be imposed are fines of up to at least €5 million or 10 per cent of a business' annual turnover.

The Third Directive introduced the 'risk-based approach', which is the requirement for financial institutions to adapt their anti-money laundering and counter-terrorist financing requirements depending on their own risk assessment and mitigation. This 'risk-based approach' is reaffirmed by the Fourth Directive and the liability of all types of entities is now included. Monitoring entities, member states, European authorities and obliged entities must evaluate their anti-money laundering and counter-terrorist financing risk.

In accordance with this 'risk-based approach', the Fourth Directive is more rigid concerning the ongoing monitoring of customers. The procedure used to carry out each customer risk assessment must be evidenced and detailed.

The Directive provides a more precise definition of beneficial ownership and introduces an explicit requirement for legal persons, including companies, to hold adequate, accurate and current information on their own beneficial ownership. The Directive thus requires that ultimate beneficial owners of companies and other legal entities, including foundations and legal arrangements similar to trusts, will be listed on central registers which will be accessible by obliged entities and competent authorities. Indeed, following the FATF Recommendations, the Fourth Directive provides that member states shall require that trustees of any express trust governed under their law obtain and hold adequate, accurate and current information on beneficial ownership regarding the trust. This information shall include the identity of the settlor, the trustees, the protector (if any), the beneficiaries or class of beneficiaries, and of any other person exercising control over the trust.

In addition, the Directive provides that member states shall guarantee that trustees disclose their status and provide the above-mentioned information to obliged entities (such as banks in the course of customer due diligence).

While this greater transparency on financial institutions will probably enhance investigations and make it easier for regulators and prosecutors to identify the actual potential wrongdoers or people involved in illegal activities, on the other hand, central registers gathering financial information raises a number of data protection issues too. Hence, a balance should be found between the risk assessments of money laundering and the protection of individuals' data.

The Fourth Directive more clearly defines the need for policy and procedures to mitigate anti-money laundering and counter-terrorist financing risks. The new Directive thus introduces new requirements for entities to include data protection policies and procedures concerning the sharing of customer information. The Fourth Directive thus strengthens controls while maintaining data protection.

The Fourth Directive aims at strengthening the cooperation between Financial Intelligence Units of the member states in respect of exchanging information. In order to extend the scope of cooperation, specific requirements will be introduced: Financial Intelligence Units will have access to financial, administrative and law enforcement information and they will be enabled to take early action in response to law enforcement requests from member states.

Furthermore, the Fourth Directive broadens the definition of PEPs (people with a prominent public position domestically) to include domestic PEPs as well as domestic PEPs who work for international organisations. Moreover, whereas the Third Directive imposed enhanced due diligence on PEPs 'from another member state or a third country', the Fourth Directive no longer makes this distinction. In practice, there will be no more distinction between countries of residency and enhanced due diligence requirements will have to apply without taking into account the criterion of residency.

The new regime introduced by the Directive will bring into force new customer due diligence requirements. Indeed, under the current Directive, entities already have to take enhanced measures when a greater customer risk is identified. However, the new Directive will prescribe minimum factors to be taken into account before applying simplified customer due diligence. Entities subject to the Directive will see their obligations strengthened because they will have to evidence why they have considered the risk to be lower, whereas according to the Third Directive simplified customer due diligence was applied to specific categories of customers. The Directive is thus more prescriptive concerning customer due diligence.

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Ludovic also advises major industry players and financial institutions, such as banks and investment funds, on their regulation and compliance-related obligations. Drawing on 15 years of hands-on experience, he helps clients to satisfy legal requirements relating to bribery and corruption by adopting appropriate internal procedures, to implement compliant work safety programmes, and to limit their criminal exposure.

Ludovic shares his experience at the Paris Bar School, where he lectures on international and European cooperation in criminal affairs. He also delivers training and seminars for clients, on the prevention of corporate criminal liability for individuals and organisations, as well as the prevention of fraud and the delegation of powers.

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Jean-Pierre Picca is a partner in the white-collar crime and regulatory group of White & Case in Paris. A senior legal adviser to the President of the French Republic between 2010 and 2012 as well as senior prosecutor, Jean-Pierre Picca held a variety of high-level duties within the French judiciary before joining the firm in early 2013.

Jean-Pierre notably performed functions as a senior liaison legal adviser to the Criminal Division of the US Department of Justice and to the Embassy of France in Washington, DC between 2002 and 2007. He was an assistant prosecutor in Marseilles from 1986 to 1993 and chief public prosecutor of Lorient from 2007 to 2010, prosecuting to trial a large variety of crimes. He also held a variety of positions at the French Ministry of Justice between 1993 and 2002 and has in-depth knowledge of the French judicial system.

Jean-Pierre's practice focuses on multijurisdictional regulatory, criminal and civil proceedings. He represents major financial institutions and their senior managers. His advice is often sought on criminal law, cross-border investigations and OFAC investigations.

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