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PREFACE

We are pleased to present the seventh edition of *Global Legal Insights – Bribery and Corruption*. This book sets out the legal environment in relation to bribery and corruption enforcement in 28 countries and one region worldwide.

This edition sees the addition of new chapters relating to Belgium, Poland, Hong Kong and the Czech Republic, as well as an Asia-Pacific overview. In addition to addressing the legal position, the authors have sought to identify current trends in enforcement, and anticipated changes to the law and enforcement generally.

Incidents of bribery and corruption often involve conduct and actors in several different jurisdictions. As enforcement activity increases around the world, attention is being focused on particular problems companies face when they seek to resolve cross-border issues.

Coordinating with multiple government agencies can be challenging at the best of times, and can be even more difficult when dealing with bribery and corruption laws that have been amended or have just entered into force. Sometimes a settlement in one jurisdiction can trigger a further investigation in another. Stewarding a company through these sorts of crises involves not only dealing with today's challenges, but thinking about the next day, the next week, the next month, and beyond, on a global stage.

We are very grateful to each of the authors for the contributions they have made. We hope that the book provides a helpful insight into what has become one of the hottest enforcement topics of current times.

Jonathan Pickworth & Jo Dimmock
White & Case LLP
November 2019

France

Ludovic Malgrain, Grégoire Durand & Jean-Pierre Picca
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Brief overview of the law and enforcement regime

France has seen major changes in bribery and corruption law since the landmark 9 December 2016 Law on transparency, corruption and modernisation of the economy (the "*Sapin II*" law), France's version of the FCPA.

Today, two key bodies of law make up France's anticorruption framework: criminal statutes on corruption (mostly in the French Penal Code); and the uncodified part of the above-mentioned "*Sapin II*" law that imposes anticorruption compliance obligations on corporations.

French criminal law: A complex web of bribery and corruption offences

French criminal bribery and corruption statutes are notoriously complex (an author counts as many as 34 separate criminal offences for bribery and influence peddling alone), and explicitly cover a wide range of situations and possible perpetrators.

While it would take too long to list all the applicable offences, current provisions of the French Penal Code on bribery distinguish between bribery and influence peddling. Bribery implies the improper use of authority associated with one's function, while influence peddling ("*traffic d'influence*"), implies the improper use of one's actual or alleged influence (e.g. to get another official to do or not to do something). They are different offences but usually carry the same maximum sentences.

These provisions punish both the briber and the bribed party. For each type of bribery or influence peddling, each party in the *quid pro quo* is covered symmetrically by a different offence. Depending on the individual's actions (i.e. giving or receiving the bribe), the charge will be of "active" or "passive" bribery (this also applies for influence peddling), and two parties to the "transaction" may even get different judicial outcomes.

In this respect, it is worth noting that a wide range of bribed officials or individuals, including private agents, can be sentenced. Separate provisions and lines of case law cover the bribery of public officials (defined broadly), of officials of international public organisations (like the EU), of judicial officials, of private officials (e.g. officers of a company in charge of procurement), and of foreign government officials.

Fines and prison sentences vary for each specific offence (e.g. 10 years' imprisonment and a €1m fine for active bribery of a foreign public agent). Following the general rule of art. 131-38 of the French Penal Code, fines are quintupled for legal persons. Additionally, under art. L.2141 of the French Public Tenders Code ("*Code des marchés publics*"), corporations convicted of bribery or certain other offences may be excluded from public tenders for a set time period.

Anticorruption compliance requirements under Sapin II

The 9 December 2016 Law on transparency, corruption and modernisation of the economy, nicknamed "*Sapin II*" after the minister in charge at the time, is France's comprehensive anti-corruption reform and a response to laws such as the FCPA and the UK Bribery Act. Building on existing criminal procedure statutes, the law toughened corruption sanctions and introduced new transactional tools (see below).

Most importantly, the law imposed stringent compliance obligations on large corporations and created the French Anti-Corruption Agency ("*Agence Française Anticorruption*", "AFA").

Since June 2017, companies incorporated in France and exceeding certain size and turnover thresholds are required to have an anti-corruption compliance programme that meets certain specifications.

Compliance programmes under *Sapin II* must be tailored to prevent acts of bribery and influence peddling, and must include the following measures:

- a code of conduct;
- an internal whistleblowing mechanism;
- a corruption risk-mapping system;
- a risk assessment process for clients, suppliers and intermediaries;
- internal or external accounting controls;
- training programmes for employees exposed to higher risks of corruption and influence peddling;
- a disciplinary procedure for ethics violations; and
- an audit mechanism to assess the effectiveness of the compliance programme.

The AFA provided guidance on these aspects with its 2017 recommendations and its "Guide on the corporate anti-corruption function" in January 2019. It may also answer some more specific anti-bribery compliance questions through its office in charge of supporting economic actors.

One of the AFA's missions is to audit companies to make sure such programmes are implemented.

Accordingly, presidents, directors and managers of companies subject to *Sapin II*, as well as the companies themselves as legal entities, may be held administratively liable for failure to implement a compliance programme. Notably, presidents, directors and managers of companies subject to *Sapin II* may not delegate their powers in this field. In other words, it means that although the AFA highly recommends to appoint a chief compliance officer (whose position within the company must guarantee his/her independence and direct access to the Board of Directors), the latter may not be held liable should the AFA consider that the company failed to implement its anti-bribery compliance programme.

Pecuniary sanctions can go up to €200,000 for presidents, directors and managers, and up to €1 million for companies. In addition, the AFA's Sanctions Committee (the AFA's independent body in charge of adjudicating claims of noncompliance after audits) may order the publication of the sanction in the press.

By 2018, the AFA had already conducted around 50 audits, and this figure is increasing in 2019. Consequently, companies must anticipate AFA's audits and strengthen their anti-bribery compliance programmes. To do so, companies should rely on the questionnaire

released by the AFA on its website and which AFA's agents use in the frame of on-site audits. Companies should also conduct interview training so as to be prepared for offsite audits.

To make sure that all aspects of their anti-bribery compliance programme are covered, companies should ask law firms and audit firms to assist them in this "exercise". Obtaining anti-bribery certification delivered by a recognized organisation is also recommended, because it shows the robustness of the anti-bribery compliance programme in place.

Beyond anti-bribery compliance

Sapin II must not be reduced to its anti-bribery compliance provisions. Indeed, this law also tackles bribery through other provisions that: (i) enable whistleblowing within companies and protect whistleblowers from any type of retaliation; and (ii) regulate lobbying practices.

- *Whistleblowing*

Pursuant to Sapin II, any company having at least 50 employees must determine the appropriate legal instrument for the implementation of procedures enabling whistleblowing.

Sapin II defines a whistleblower as "*a physical person who reports, selflessly and in good faith, a crime or an offence, a serious and obvious breach of an international commitment duly ratified or approved by France, of a unilateral act from an international organization issued on the basis of such commitment, of law or regulation, or a serious threat or harm to the public interest, of which he has personal knowledge*".

Whistleblowers must not be subject to discriminatory measures, and any retaliation by an employer following an alert will be considered null and void under French labour law.

Preventing someone from raising an alert is a crime punishable by up to one year of imprisonment and a criminal fine of up to €15,000 (the legal entity itself may face a criminal fine of up to five times this amount, i.e. €75,000).

According to *Sapin II*, the whistleblower should raise the alert with his/her hierarchical manager, employer or the person designated by the employer for that purpose (the referent).

If the alert is not addressed within a reasonable time period, the alert can be raised to the relevant administrative or judicial authority, or to the professional authorities and if the alert is still not addressed within three months, the whistleblower may disclose it to the public through the press or social media.

Where there is a serious and imminent threat or risk of irreversible damage, the whistleblower may bring the alert directly to the attention of the administrative or judicial authority, or to the professional authorities. The whistleblower may also alert the public directly.

During the entire whistleblowing process, the identity of the whistleblower, the information provided and the person(s) involved in the reported alert must remain confidential. Revealing information that could lead to the identification of a whistleblower is punishable by up to two years' imprisonment and a criminal fine of up to €30,000 (the legal entity itself may face a criminal fine of up to five times this amount, i.e. €150,000).

- *Regulation of lobbying practices*

Under French law, lobbyists basically include any legal entities where a director, employee or member:

- has devoted more than half of his or her time within the last six months to an activity which consists in communicating on his own initiative with public decision-makers and whose purpose is "to influence one or several public decisions"; or

- has entered into communication at least 10 times within the last 12 months (on an ongoing basis) with public decision-makers, on his own initiative, in order "to influence one or several public decisions".

These criteria apply to all companies worldwide as long as one of their directors, members or employees – working in France or abroad – meets one of the above-mentioned conditions. Lobbyists are also individuals who engage in professional activities in an individual capacity under the same conditions.

The public decision-makers with whom lobbyists may communicate "to influence one or several public decisions" include, *inter alia*: members of Government and of ministers' offices; MPs, Senators and parliamentary assistants; assistants/advisors to the President of the French Republic; directors of independent administrative authorities, etc.

Lobbyists must register with the High Authority for Transparency in the Public Life ("HATVP") and annually provide a set of information regarding their lobbying activities and the resources they allocate to such activities. This information is publicly available on the HATVP's online register.

In their relations with public decision-makers, lobbyists must declare their identity, the company they work for, and the interests they represent. Lobbyists must also follow ethical rules that notably prevent them from, *inter alia*:

- offering or giving to public decision-makers any gifts, donations or benefits whatsoever having a significant value;
- undertaking any action with such persons with a view to fraudulently obtaining information or decisions;
- obtaining or attempting to obtain information by intentionally providing such persons with false information or by using misleading tactics;
- organising conferences, events or meetings where the public speaking arrangements by such persons are tied to the payment of any form of compensation;
- using, for commercial or publicity purposes, the information obtained from such persons; or
- selling copies of documents originating from the Government or from an authority or using the official stationary or the logo of such authorities.

The HATVP ensures that lobbyists comply with these rules. In this view, the HATVP may obtain any document without business secrecy being invoked against it. The authority may also carry out on-site inspections, after having obtained authorisation from the custodial judge (JLD) of the Paris Tribunal.

Failure to comply with the above-mentioned ethical rules, and failure to provide the information required by the HATVP regarding lobbying activities, constitute criminal offences punishable by one year in prison and a fine up to €15,000 for individuals and up to €75,000 for legal entities.

Enforcement climate and tools

The enforcement climate for white-collar offences, including corruption offences, has been getting tougher over the last few years.

The 2016 *Sapin II* law and earlier changes, such as the creation of a national financial prosecutor ("*Parquet National Financier*", "PNF") in 2014, initiated a tougher enforcement culture, with French prosecutors now willing to take the lead in major cross-border cases and use newly-created transactional tools.

Sapin II introduced that change by creating an equivalent to the US deferred prosecution agreement (DPA) called the "judicial public interest agreement" ("*Convention judiciaire d'intérêt public*", "CJIP"). The agreement does not require admission of guilt (hence maintaining access to government tenders), and has been extended to white-collar offences other than bribery following its success. It cannot be entered into by physical persons (but they have access to another transactional procedure that mandates a guilty plea). French prosecutors took advantage of the tool immediately: to date, seven CJIPs have been entered into since 2017, for total penalties and disgorgements exceeding €1,084bn.

Overview of enforcement activity and policy during the last year

France's bribery and corruption law landscape is at a turning point in 2019. After a long-awaited alignment of its anti-corruption arsenal on international standards with the 2016 *Sapin II* law, the priorities of French legislators and regulators are now twofold: completing the implementation of the 2016 reform, and bringing change to other areas to continue building a French compliance law that meets or exceeds international expectations.

For bribery and corruption law, this translates in practice as a thorough effort by the AFA to provide entities with "soft law" guidance on practical compliance issues such as: how to structure the corporate compliance function; how to deal with issues that may arise in M&A; or gifts and invitations policies (see below).

Interestingly, the AFA initiated in the summer of 2019 administrative sanctions proceedings against French corporation Sonepar, following an on-site audit. The agency argued in front of its Sanctions Commission that the corporation's anticorruption programme did not comply with the law. Alleged breaches included improper cross-border implementation of the risk-mapping system, and accounting controls not adequately addressing corruption risks. In its 4 July 2019 decision, the Sanctions Commission acquitted the corporation on all charges.

Faced with criticism for both its lack of directions to companies and its lack of resources to conduct thorough audits, the AFA will be reinforced by the expertise of law firms and audit firms (notably firms from the so-called "Big 4") which will assist the Agency in its audits.

On the judicial front strictly speaking, prosecutorial "Americanisation" is on the rise, with increased use of transactional tools and fines (in deals or in court decisions) never seen before in the French system. This follows a long rise, over the last decades, of prosecutor-led proceedings ("accusatory") in a legal culture that has historically favoured "inquisitorial" proceedings.

The UBS criminal tax fraud case, which ended in February 2019 in a €3.7bn fine for provision of banking services to help tax evasion, is a good example of that new trend. The bank refused transactional solutions after long negotiations (a guilty plea, and then CJIP, were on the table), and got the largest fine ever ordered by a French criminal court. Although the outcome may eventually be different on appeal, authorities are sending the message that French justice can have significant deterrence, and that corporations should seriously consider transactional outcomes where there is clear evidence of serious wrongdoing.

Law and policy relating to issues such as facilitation payments and hospitality

French criminal law does not have a specific exception for either "facilitation payments" or gifts/hospitality offered to government officials. This means that all improper gifts or advantages may be construed as bribery (or a similar offence).

Facilitation payments

Under French Law, the fact that a bribery payment is made for the sole purpose of getting an official (such as a customs official or law enforcement officer) to do his or her job consisting of "routine governmental action" is not a valid excuse to avoid liability. This is true regardless of the party initiating the facilitation payment.

Neither the French Penal Code nor other sources allow facilitation payments, which means that individuals or corporations taking part in these payments may be charged with public domestic or international bribery offences. While it is not a prosecution or investigation agency *per se*, the AFA has a documented position of assimilating facilitation payments to bribery offences.

Corporations should therefore note the differences between French Criminal Law and the FCPA on that aspect when drafting their anti-corruption policies.

Gifts and hospitality

Similarly, the French Penal Code does not provide for any exception for gifts and hospitality offered to public officials. Until very recently, there was no official guidance, and corporations often modelled their policies on standards applicable in other countries such as the United States.

The AFA will, however, be issuing shortly a "*Guide on gifts and invitations policies for corporations, associations and foundations*" to help entities draft their anticorruption policies on that matter. The agency published a draft version for comments in July 2019 and the definitive version, while nonbinding, will serve as a useful reference tool. In its draft, the AFA offers step-by-step guidance on the items to consider when drafting a policy (e.g. whether to set fixed maximum amounts, transparency and accounting considerations…) alongside examples of problematic conduct a policy should prevent.

Finally, it is worth keeping in mind that French bribery statutes, unlike some of their foreign counterparts, also cover private bribery (see overview of the law above). This means that a well-drafted policy should address gift-giving practices to non-public-sector individuals as well (e.g. gifts to a purchasing manager of a client or prospective client).

Key issues relating to investigation, decision-making and enforcement procedures

Cooperation, a staple of US-style enforcement once seen as incompatible with French legal culture, was recently heavily encouraged by joint AFA-PNF guidelines on CJIPs published last July. In the guidelines, the agencies cite the implementation of an effective compliance programme, and cooperation of the targeted entity, as key factors to reach a CJIP agreement with prosecutors.

The agencies explicitly say that cooperation can reduce penalties, designating self-reporting and cooperation through internal investigations turned over to the government as essential factors for the prosecutors not only to decide whether to allow a transactional outcome, but also to determine the sentence/fine.

In practice when negotiating a CJIP, a lack of cooperation can result in harsher fines and/or disgorgements. In the first ever signed CJIP in the HSBC case (2017), the agreement noted to justify the heavy fine that "*[the defendant], which neither voluntarily disclosed the facts to the French criminal authorities, nor acknowledged its criminal liability during the course of the investigation, only offered minimal cooperation in the investigation*."

Overview of cross-border issues

Heavy fines on French corporations in sanctions matters (such as the US$8.9bn fine for French Bank BNP Paribas in 2014) or anti-bribery (like Alstom's 2014 US$772bn fine) have made cross-border bribery enforcement a very sensitive issue in the French political space. Many of these cases are perceived as improperly extraterritorial, and several congressional investigations were initiated on that matter since 2014.

Cross-border evidence collection and the French blocking statute

There is today a recognition, across party lines, of the need for more protection of French companies' data and documents that has incited the government to act upon the issue.

France has long been wary of certain proceedings seen as extraterritorial application of foreign jurisdiction. Consequently, since 1968 France has had a "blocking statute" (amended in 1980) designed to prevent the abuses of entering discovery requests or subpoenas (commonly considered as "fishing expeditions") on French entities or individuals. It criminalises the transmission of information to foreign courts outside the channels set forth by treaties (such as the 1970 Hague Convention for civil matters or mutual legal assistance treaties for criminal issues).

While the law is widely considered not to be strictly enforced (only one case to date sanctioned a violation), things may change soon as a consensus emerges around the need for a more credible enforcement of the statute (see reform projects below).

Local and European prosecutors take the lead in cross-border cases

Some major cases show that French prosecutors may be evolving, from not participating in major cross-border bribery cases to joining the DoJ in existing cases, and finally to now taking the lead in cross-border cases.

- For example, shortly after its creation in 2014, the PNF tacked on the DoJ case mid-investigation in *Société Générale*, which resulted in parallel US DPA and French CJIP with AFA monitoring in June 2018.
- The PNF and SFO (UK Serious Fraud Office) are currently conducting a joint investigation in the *Airbus* case following self-reporting by the corporation in 2016, with the DoJ reportedly opening its investigation later on and separately.

In the longer term, it will be interesting to see if increased anticorruption enforcement by French and European prosecutors on domestic targets means a decreased focus of US agencies on European entities. One of the rationales of stronger bribery laws and enforcement practices in France was to show that the country is "doing its part" in fighting corruption, but only time will tell if the strategy is effective.

Corporate liability for bribery and corruption offences

Criminal liability for corruption offences

Art. 121-2 of the French Penal Code sets out the liability of legal entities as a general principle for all offences committed on their account by their organs or representatives. The same article notes that "*the criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act*", meaning that both individuals and corporations can be found guilty of criminal offences like bribery, without needing different legal bases.

Anticorruption compliance as a mitigating or aggravating factor

Involvement – or lack thereof – of the top management in corruption prevention is already

a major theme in case law since, under French law, criminal liability attaches to the corporation as a result of the acts of its "organs or representatives" (i.e. its directors, officers or governing bodies).

Now that anticorruption compliance programmes are mandated for large companies and audited by the AFA, the quality of these programmes (and audit results, if the corporation was audited by the AFA) can be an important factor in a legal case.

The AFA has publicly declared that it is willing to share with French or foreign judicial authorities the results of certain audits, and corporations themselves may want to use favourable AFA audit reports as evidence of their good faith efforts to fight corruption.

Proposed reforms / The year ahead

A new emphasis on cooperation and self-reporting

Cross-border cooperation will undoubtedly be a marquee theme of next year's investigations landscape, with cases such as Airbus being pursued simultaneously, with varying degrees of cooperation, by the PNF, the SFO, and the DoJ.

Self-reporting will also be a topic to follow, as France has long had its reservations on that practice. After adopting it for tax, competition and other areas of the law, the new guidelines from the AFA and the PNF may shift French anticorruption culture on this point.

A proposed reform of the blocking statute and a reaction to the US CLOUD Act

After several failed reform attempts by previous legislatures, French MP Raphaël Gauvain was tasked with writing a report on economic intelligence issues related to cross-border proceedings, and worked closely with the Ministry of the Economy on a reform proposal that would create a clearer evidence transmission regime, in conjunction with certain recent changes introduced by the GDPR.

On 26 June 2019, a report to the Prime Minister proposed among others:

- A stricter enforcement of the statute, with heightened sanctions in case of transmission of evidence in civil or criminal proceedings (up to two years' imprisonment and a €2m fine for physical persons, €10m for legal entities).
- Mandatory registration with the Ministry of the Economy's economic intelligence office ("SISSE") of corporations targeted by foreign investigations. The executive may directly conduct the dialogue itself in certain important cases where strategic issues are at stake.
- Administrative sanctions of up to €20m for physical persons, and 4% of the global turnover for legal entities for technology companies (e.g. cloud services providers) that unlawfully transfer data abroad in anticipation of litigation. This provision aims at limiting the extraterritorial effects of the US CLOUD act and its coercive power on French or European companies.
- Finally, Mr. Gauvain suggests extending the legal privilege to in-house counsel, as only attorneys currently enjoy that protection. This would allow France to align itself with other jurisdictions on the issue, giving corporations the opportunity to assess frankly the legal implications of a situation (i.e. without creating incriminating evidence with their work product).

The Prime Minister reacted favourably to some of Gauvain's propositions. To date, the government has not yet released a timeframe for the implementation of such a reform.

The general idea of the reform is not to block cooperation but to limit extensive information-gathering operations that may have unwanted effects when target entities are deemed strategic.

The reform will be sensitive as it will have to balance fundamental national economic interests with the necessary leeway companies need to defend themselves.

* * *

Endnotes

1. Essentially having 500 employees or more in France – or globally for groups headquartered in France – and having an annual turnover of €100m or more. See art. 17 of the law and AFA's website for precise scope information and examples.
2. AFA Sanctions Commission decision 19-01 "*Société S SAS et Mme C*" dated 4 July 2019 (https://www.agence-francaise-anticorruption.gouv.fr/fr/document/premiere-decision-commission-des-sanctions-lagence-francaise-anticorruption).
3. AFA, "*Point sur la problématique des paiements de facilitation*", presentation dated September 2018 published on AFA's website (https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/2018-09_-_Paiement_de_facilitation_-_D2AE_-.pdf).
4. AFA, "*Guide Pratique: Politique cadeaux et invitations dans les entreprises, les associations et les fondations*", draft project for comments published in July 2019 (https://www.agence-francaise-anticorruption.gouv.fr/fr/lafa-ouvre-consultation-publique-sur-projet-guide-jusquau-30-septembre-2019).
5. AFA, "*Lignes directrices sur la convention judiciaire d'intérêt public*" (Guidelines on the Judicial Public interest Convention), 26 June 2019 (https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf).
6. GAUVAIN, R., "*Rétablir la souveraineté de la France et de l'Europe et protéger nos entreprises des lois et mesures à portée extraterritoriale*" (Re-establishing French and European sovereignty and protecting our companies from extraterritorial laws and measures), Report to the Prime Minister dated 26 June 2019.

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Ludovic represents French and international high-profile clients within industrial, oil and gas, banking and technology sectors before French authorities, agencies and courts. With more than 20 years of litigation experience, Ludovic is an expert in prevention of corporate criminal liability and implementation of compliance programmes (anti-bribery, anti-money laundering, etc.). He also provides assistance in internal or multi-jurisdictional investigations (DOJ, SFO, etc.). Ludovic has a strong expertise assisting listed companies in the context of administrative proceedings launched by the French Anticorruption Agency in relation with the Sapin II law.

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

Jean-Pierre has 30 years of experience in the criminal area both as a prosecutor in France and in the United States and as a defence lawyer. He has been at the forefront of headline financial investigations and cross-border complex litigations, advising leading French banks in major investigations, driven notably by the French and US authorities. He has acquired an in-depth knowledge of strategic issues and frequently advises top management of his clients.

He represented both companies and individuals in the course of major international sanctions cases. He also advises several clients on complex compliance issues. He has recognised skills in crisis management and complex cross-border disputes.

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