

## FRANCE

### REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

#### A. IMPLEMENTATION OF THE CONVENTION

##### Formal Issues

The OECD Convention was signed on 17 December 1997, and Act No. 99-424 of 27 May 1999 authorises its ratification. The French Government deposited its instrument of ratification with the OECD Secretary-General on 31 July 2000. The Convention came into force in France on 29 September 2000.

Previously, the only relevant criminal offences in France were passive and active corruption involving French persons entrusted with public authority, charged with a public service mission or holding an elected office (Articles 433-1 and 432-11 of the Criminal Code), but not the bribery of foreign public officials in connection with international business transactions. The latter is now also a criminal offence following the adoption of Act No. 2000-595 of 30 June 2000 amending the criminal code and the code of criminal procedure with regard to the fight against corruption (hereafter referred to as “Act of 30 June 2000”). Most of its provisions came into force on 29 September 2000. This Act, which also transposes the Convention of the European Union<sup>1</sup> into French law, amends the Criminal Code—Book IV (Crimes and Misdemeanours Against the Nation, the State and Public Peace) and Title III (Breach of the Authority of the State)—by inserting a new chapter comprising all provisions involving international corruption, and it also amends certain provisions of the Code of Criminal Procedure.

##### The Convention and the French Legal System

Article 55 of the French Constitution of 4 October 1958 provides that “Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.” While international agreements prevail over domestic law in France, they have no direct effect on the domestic legal system, and a law is needed to make the necessary adjustments. For their part, the Commentaries on the OECD Convention have only interpretative value.

#### 1. ARTICLE 1 - THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

In order to meet the requirements of Article 1 of the Convention, France has amended Title III of the Criminal Code by inserting Chapter V, entitled “Breach of the Public Administration of the European Communities, Member States of the European Union, Other Foreign States and Public International Organisations”, comprising three sections: passive corruption, active corruption, and additional penalties and the responsibility of legal persons.

In the interests of clarity, the Government felt that each new article of the Criminal Code should make explicit reference to the convention that it is intended to implement, and come into force at the same time as the reference convention, the conventions each covering different areas of application. Thus -

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1. Convention on the Fight Against Corruption Involving Officials of the European Communities or officials of Member States of the European Union, *Official Journal of the European Communities*, No. C 195 of 25 June 1997, pp. 1ff, but also four other conventions and protocols.

as the recapitulative table shows - there is a provision enacted for the purpose of implementing the OECD Convention (sub-section 2) and another one for the purpose of implementing the Convention of the European Union (sub-section 1).

***Sub-section 1: “Active corruption of officials of the European Communities, officials of Member States of the European Union and members of institutions of the European Communities”***

**Art. 435-2:** “In order to implement the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, signed in Brussels on 26 May 1997, the act of proposing, without right, offers, promises, gifts, presents or advantages of any kind whatsoever at any time, either directly or indirectly, to a Community official or a national official of another Member State of the European Union or a Member of the Commission of the European Communities, the European Parliament, the Court of Justice or the Court of Auditors of the European Communities in order that the official perform or refrain from performing an act in accordance with his function, mission or office or in a manner facilitated by his function, mission or office is punished by imprisonment for ten years and a fine of FF 1 000 000.

“Is punished by the same penalties the act of consenting to a solicitation without right, at any time, either directly or indirectly, from an aforementioned person offers, promises, gifts, presents or advantages of any kind whatsoever in order to perform or refrain from performing an act cited above.”

***Sub-section 2: Active corruption of officials of foreign States other than Member States of the European Union and of officials of public international organisations other than institutions of the European Communities”***

**Art. 435-3** paragraphs 1 and 2: “In order to implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on 17 December 1997, the act of proposing, without right, offers, promises, gifts, presents or advantages of any kind whatsoever at any time, either directly or indirectly, to a person entrusted with a public authority, charged with a public service mission or holding an elected office in a foreign State or within a public international organisation in order that the official perform or refrain from performing an act in accordance with his function, mission or office or in a manner facilitated by his function, mission or office to obtain or retain business or other improper advantage in the conduct of international business is punished by imprisonment for ten years and a fine of FF 1 000 000.

“Is punished by the same penalties the act of consenting to a solicitation without right, at any time, either directly or indirectly, from an aforementioned person offers, promises, gifts, presents or advantages of any kind whatsoever in order to perform or refrain from performing an act cited above.”

**Art. 435-4** paragraphs 1 and 2: “In order to implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on 17 December 1997, the act of proposing, without right, offers, promises, gifts, presents or advantages of any kind whatsoever at any time, either directly or indirectly, to a judge, juror or any other person holding a judicial office, an arbitrator or an expert appointed either by a jurisdiction or by the parties, or any person assigned by a judicial authority to perform a mission of conciliation or mediation in a foreign State or within a public international organisation in order that the official perform or refrain from performing an act in accordance with his function, mission or office or in a manner facilitated by his function, mission or office to obtain or retain business or other improper advantage in the conduct of international business is punished by imprisonment for ten years and a fine of FF 1 000 000.

“Is punished by the same penalties the act of consenting to a solicitation without right, at any time, either directly or indirectly, from an aforementioned person offers, promises, gifts, presents or advantages of any kind whatsoever in order to perform or refrain from performing an act cited above.”

The French authorities have made this distinction in order to “transpose the conventions on a strict basis, without going any further, so as not to expose their nationals to any legal risks greater than those to which their partners are liable”. However, only the implementing text of the OECD Convention has come into force.

According to the French authorities, the provisions of the new Articles 435-3 and 435-4 should be seen as general ones, applicable to any foreign public official, irrespective of whether he/she happens to be a Community official or an official of a Member State of the European Union. Consequently, the new Articles 435-3 and 435-4 apply to Community officials and officials of Member States of the European Union as long as the special provisions of Article 435-2 are not applicable to them. When Article 435-2 enters into force, active corruption of a Community official or an official of a Member State of the European Union will become a criminal offence under this special provision, and no longer under the general standard of Articles 435-3 and 435-4.

In other words, although the implementing text of the European Union Convention has not come into force, the French authorities feel that this does not pose a problem inasmuch as the OECD Convention is universal in scope. It therefore also applies in the Union as concerns international business.

The French authorities also state that the titles of the sub-sections have no legal value, and are for information purposes only, serving to identify the various treaties. In addition, the references to the treaties which these provisions transpose into domestic law would facilitate, in due course, the interpretation of these provisions by a national judge.

## **1.1 Elements of the offence**

The particular elements of the offence set out in Article 1 of the Convention are covered as follows:

### **1.1.1 Any person**

Under the provisions of the Act of 30 June 2000, all persons, natural or legal, are subject to prosecution for bribing a foreign public official.

### **1.1.2 Intentionally**

While the law does not make reference to intention in its definitions of active corruption, the act is always intentional insofar as Article 121-3 of the Criminal Code specifies that “there is no crime or offence without the intention of committing it”. Intentional misconduct is defined by case law as the will to commit an act knowing that it contravenes criminal law. In contrast, the concept of wilful deception (*dolus eventualis*), which exists in French law when a person is deliberately placed in danger, does not apply to cases of bribery.

### **1.1.3 To offer, promise or give**

Under the new Articles 435-2, 435-3 and 435-4 of the Criminal Code, the act of “proposing, without right, offers, promises, gifts, presents or advantages of any kind” constitutes the offence of bribery. While the provisions make explicit reference only to the act of proposing, acts of giving, without prior proposal, are covered by Articles 435-3 and 435-4. Indeed, according to the case law of the Cour de Cassation [France’s highest appellate jurisdiction] on the corruption of public officials in France (Article 433-1 of the Criminal Code), bribery results from offers or promises, gifts or presents made with the intention of bribing, irrespective of whether the persons solicited have received verbal or written proposals<sup>2</sup>.

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2. Cass. Crim., 28 January 1897, DP 1897 I, p. 240.

French legal literature and case law refer to the concept of a “corruption pact” in which there is a meeting of minds between the briber and the recipient of the bribe. The French authorities specify that this pact is not a “contract” setting out the details of how the decision is “bought”, and that it is sufficient that the briber knows that the purpose of his proposal is to buy a decision or an omission, and that the bribed party is aware that he/she will receive an unlawful advantage in return for taking or refraining from the decision.

To date, the Cour de Cassation has considered that the offence of bribery was committed only if the briber’s offer preceded the act of the recipient. Such a prior pact is very difficult to prove, however, because corruption is by its very nature unreported. With the insertion of the words “at any time”, proof of a prior pact will no longer be a condition for proving bribery<sup>3</sup>, and payments made after the fact can be prosecuted directly, and no longer in a roundabout manner, on the grounds of misuse of corporate assets (*abus de biens sociaux*) for the briber, and of receiving misused corporate assets (*recel d’abus de biens sociaux*) for the bribed party.

Nevertheless, while the new law eliminates the condition of a pact preceding the official’s act, it would seem that the existence of a pact as a wilful agreement must still be proven. Under Article 427 of the Code of Criminal Procedure, such a “corruption pact” (or, more precisely, “any proposal, without right, at any time, directly or indirectly”) may be established by any means of proof (written evidence, testimony, searches, seizures, expert opinion, etc.). It will therefore be possible to consider the payment of a bribe as an indicator of such a wilful agreement. It should be noted that according to consistent case law of the Cour de Cassation, it is not indispensable for the briber to have succeeded in obtaining acceptance of his/her offer for an offence to have been committed<sup>4</sup>. The French authorities add that, in conformity with legal literature and although case law has not ruled conclusively on the matter, the offence is fully completed by the mere fact that the briber has made a proposal of bribery. It makes little difference, in fact, whether the proposal has had any effect or whether the intended recipient was in fact aware of it, for reasons independent of the intent of the perpetrator. This would be the case where, for instance, the communication has been lost in the post, or an intermediary has not followed through with instructions.

During the parliamentary debates, the question was raised whether acts of corruption committed after the entry into force of the law pursuant to contracts concluded before the entry into force of the law would be prosecuted. The question was also raised whether acts started before the entry into force (e.g. the corruption pact or a partial payment) and continued after that date (e.g. the receipt of the benefit from the foreign public official or the making of a payment by the briber) would be prosecuted. Parliament decided that the courts should determine this issue, taking into account the very nature of the offence of corruption, and the rule of non-retroactivity of the more severe criminal consequences, rather than to include a special provision in the law.

The French authorities are of the opinion that such acts would be covered. They cite a finding of the *Cour de cassation* that the offence of bribery, committed from the moment the agreement between the briber and the bribed person is concluded, is renewed on each occasion that the agreement is acted upon<sup>5</sup>. The French authorities explain that although this ruling applied to the statute of limitations and

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3. A discussion of the bill’s articles may be found in the verbatim minutes of the 14 December 1999 session of the National Assembly, in *Journal Officiel de la République française*, December 1999, pp. 10919-10920.

4. “The offence is completed once the accused shall have employed the means specified by law to the end defined therein; accordingly, an offer of a sum of money constitutes not an attempt, which would not be punishable, but the offence of active corruption itself”. *Crim.* 10 June 1948: *Bull. Crim.* No. 154; *D.* 1949. 15, note *Carteret*; *S.* 1948. 1. 111, note *Rousselet et Patin*; *Gaz. Pal.* 1948. 2. 35.

<sup>5</sup> The Carignon case, *C. cass., Chambre criminelle*, 27 October 1997

not the retroactivity of legislation, the different principles involved, which the courts will have to take into account, are clear. In case where the bribery of a foreign public official was committed before promulgation of the Act of 30 June 2000, but continues to produce effects after this date, it will be for the court dealing with the substance of the case, under the supervision of the *Cour de cassation*, to decide the scope of the constitutional principles of French law which are common to all democratic countries.

#### *To propose but also to consent to solicitation*

The new Articles 435-2, 435-3 and 435-4 of the Criminal Code cover not only the act of making a proposal etc. (paragraph 1), but also the act of consenting to a foreign public official who at any time, either directly or indirectly, shall have without right solicited a bribe (paragraph 2). In so doing, French lawmakers wanted to penalise not only the briber who “initiates” a bribe, but also the briber who merely “consents” to an official’s request<sup>6</sup>. However the notion of consenting to the solicitation of a foreign public official does not cover the situation where the consent was obtained through blackmail, physical threat, violence, etc. or where a factor such as a state of necessity, constraint or *force majeure*, is present. According to the French authorities, the request may consist merely of the fact of asking (or soliciting), even if it is not repeated or made insistently. The briber will not be able to argue that he had no other choice or that unlawful pressure was exerted by the public official to justify his/her actions, and will therefore be sanctioned as required by the OECD Convention<sup>7</sup>. Notwithstanding this division into two paragraphs, for the purposes of prosecution it is sufficient to refer to the article itself, without referring to the individual paragraphs.

#### **1.1.4 Any undue pecuniary or other advantage**

The new Articles 435-2, 435-3 and 435-4 of the Criminal Code stipulate that active corruption involves the act of proposing “without right, offers, promises, gifts, presents or advantages of any kind whatsoever”.

#### *Pecuniary or other advantages*

French law covers offers, promises, gifts, presents or advantages of any kind whatsoever<sup>8</sup>. In addition, the French authorities make clear that the offence is committed regardless of the amount of the payment; there is no exception for facilitation payments.

#### *Undue advantages*

According to the Minister of Justice<sup>9</sup>, the term “without right” (*sans droit*) means that the advantage is neither permitted nor required by any statute or case law currently in force. Some foreign countries do in fact allow an official to receive an advantage, thus considering that a bribery offence is not

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6. T. enfants Sarreguemines, 11 May 1967: *JCP 1968. II. 15359, note Sigalas*.

7. Paragraph 7 of the Commentaries on the OECD Convention: “It is also an offence irrespective of, *inter alia*, ... the alleged necessity of the payment in order to obtain or retain business or other improper advantage.”

8. The advantages may, for example, involve remuneration or sums of money (Crim. 17 November 1955), work performed free of charge (Crim. 4 July 1974 and Crim. 1 October 1984), the promise of sexual relations (T. enfants Sarreguemines, 11 May 1967), debt forgiveness (Cass. Crim 7 September 1935) or provision of supplies at prices well below the normal price (Cass. Crim 6 February 1968).

9. Verbatim minutes of the 14 December 1999 session of the National Assembly, in *Journal Officiel de la République française*, December 1999, p. 10920.

committed when the advantage is permitted by law or case law. French law therefore applies Commentary 8 of the Convention<sup>10</sup>.

### **1.1.5 Whether directly or through intermediaries**

Under the new Articles 435-2, 435-3 and 435-4 of the Criminal Code, the act of proposing “either directly or indirectly” constitutes an act of bribery.

According to the French authorities, for bribery to be committed, the public official need not be aware of the role of the intermediary. Accordingly, a corruption offence would be committed if a business were to pay a commission to a national political party in order to buy the decision of a public official belonging to that party even if the official in question were unaware of the commission’s existence, provided that when the official acted, or refrained from acting, he/she was aware that it was in return for an unlawful advantage.

Similarly, although case law has not ruled conclusively on the matter, the French authorities consider that a bribery offence would be committed even if the briber were unaware of the role of the intermediary benefiting from the commission, although the briber must know that the purpose of the commission is to buy the public official’s decision. Criminal sentences have thus been handed down in cases where intermediaries were involved in the committing of a related offence (Article 432-12 of the Criminal Code), without regard to the identity of the intermediary.<sup>11</sup>

The intermediary may be charged with receiving or complicity in active corruption and is liable to the same penalties he/she would incur if convicted of corruption itself<sup>12</sup>.

### **1.1.6 To a foreign public official**

The French implementing legislation, in defining a person who performs a public function in a foreign country, makes a distinction depending on whether or not the public official works for a Member State of the European Union or an institution of the European Union. According to the French authorities, a “foreign State” should be taken to mean all levels and subdivisions of government, from the national to the local level.

#### *Foreign public officials “in order to implement the OECD Convention”*

The categories of persons listed in Articles 435-3 and 435-4 of the Criminal Code seem to cover all the categories of “foreign public official” within the meaning of the OECD Convention. The following categories of persons are listed: persons entrusted with a public authority, charged with a public service mission or holding an elected office in a foreign State or within a public international organisation and persons holding a judicial office.

- “Persons entrusted with public authority” should be construed as persons exercising a function of authority, whether that authority be administrative, judicial or military: whether the person’s status is private or public does not matter<sup>13</sup>.

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10. Paragraph 8 of the Commentaries: “It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law.”

11. Cass. crim., 2 Nov. 1961; Cass. crim. 16 Dec. 1975; Cass. crim. 20 Feb. 1995.

12. An offence of receiving is constituted if the intermediary knowingly benefited from the commission paid in order to buy the official’s decision. Complicity may be constituted either through aid or assistance intended to facilitate preparation or perpetration of the offence, or through provocation of the offence or the giving of instructions to commit it.

- “Persons charged with a public service mission” should be construed as persons, whether private or public, who, although not entrusted with public authority, perform a public service of some sort, on either a temporary or permanent basis, either voluntarily or because they are requisitioned to do so by the authorities<sup>14</sup>. Persons in charge of public or state-controlled companies are covered by this category. However, mere control is not always sufficient, especially if the company operates as a normal commercial undertaking in the competitive sector. In this case, it is necessary to determine on a case-by-case basis whether or not the person in question exercises a public service mission. The French authorities provide as an example the case where a NGO is charged with a public service mission of foreign development assistance.
- “Persons holding an elected office” should be construed as anyone elected to a public assembly or a public body<sup>15</sup>. According to the French authorities, persons with a legislative mandate who have not been elected do not fall into this category, but are covered by the category of “persons entrusted with public authority”, whether that authority be administrative, judicial or military.
- “Persons holding a judicial office” are covered, under the Act of 30 June 2000, by the terms “judge, juror or any other person holding a judicial office, an arbitrator or an expert appointed either by a jurisdiction or by the parties, or any person assigned by a judicial authority to perform a mission of conciliation or mediation in a foreign State or within a public international organisation”.

Although it would seem that the use of the notions of “persons entrusted with public authority” and “persons holding a judicial office” could give rise to problems of interpretation as regards the definition of the judicial authorities, the French authorities are of the opinion that the terms used are sufficiently broad to cover all judicial office situations.

In addition, the French authorities specify that persons not officially performing public functions, such as political party officials in one-party States, are covered if they effectively exercise powers delegated by the government. However, the bribery offence is not committed where advantages are promised or granted to a person in anticipation of his appointment as a public official. Instead, such conduct may be prosecuted as abuse of corporate assets or a violation of legislation on the financing of political parties and electoral campaigns.

*Officials of the European Communities, officials of the Member States of the European Union and Members of institutions of the European Communities “in application of the Convention of the European Union”*

The new Article 435-2 of the Criminal Code defines acts of active corruption vis-à-vis “a Community official or a national official of another Member State of the European Union or a Member of the Commission of the European Communities, the European Parliament, the Court of Justice or the Court

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- 13. Circular of 14 May 1993, “Commentary on the legislative part of the new Criminal Code and the provisions of the Act of 16 December 1992 concerning its coming into force”, No. 290.
  - 14. *Idem*.
  - 15. According to Cour de Cassation case law, this expression encompasses not only members of the major national bodies (Senate, National Assembly), but also members of local assemblies (regional, departmental and communal) and elected members of public administrative establishments, such as chambers of commerce and industry, chambers of agriculture and chambers of trades (Cass. crim., 8 March 1965).



of Auditors of the European Communities”. The French law does not define these categories of public officials, leaving that to the EU Convention. Contrary to the OECD Convention, the EU Convention does not give an autonomous definition of foreign public official, but rather a definition derived from the definitions of Community official and national State official<sup>16</sup>. However, according to the French authorities, if in the European Union the specific provisions of Article 435-2 do not apply to a public official on the ground that he/she does not have the status of “official”, Articles 435-3 and 435-4 would apply instead.

According to the French authorities, referral to the State’s domestic law is not a problem because as the concepts used for transposing the OECD Convention encompass all the categories of persons or officials covered by that Convention, which is the case of the terms used by Articles 435-3 and 435-4 of the Criminal Code and the very broad definitions given them in French law.

### **1.1.7 For that official or for a third party**

Although Articles 435-2, 435-3 and 435-4 of the Criminal Code do not expressly apply where a third party receives the benefit, the French authorities state that it covers the promising etc., of an advantage regardless of the beneficiary. According to the French authorities, although there is no case law on this matter, the law is unambiguous: since it does not specify who must receive the benefit, it does not matter whether it is the official or a third party, or whether it has been given directly to the latter or via the bribed party.

### **1.1.8 In order that the official act or refrain from acting in relation to the performance of official duties**

Under the new Articles 435-2, 435-3 and 435-4 of the Criminal Code, the offence is committed only if the bribe was offered, etc, in order that the foreign public official “perform or refrain from performing an act in accordance with his function, mission or office or in a manner facilitated by his function, mission or office”.

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16. Article 1 of the European Union Convention is devoted to the following definitions:

- “(a) ‘official’ shall mean any Community or national official, including any national official of another Member State;
- (b) ‘Community official’ shall mean:
  - any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities,
  - any person seconded to the European Communities by the Member States or by any public or private body, who carries out functions equivalent to those performed by European Community officials or other servants.Members of bodies set up in accordance with the Treaties establishing the European Communities and the staff of such bodies shall be treated as Community officials, inasmuch as the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities do not apply to them;
- (c) ‘national official’ shall be understood by reference to the definition of ‘official’ or ‘public officer’ in the national law of the Member State in which the person in question performs that function for the purposes of application of the criminal law of that Member State.  
Nevertheless, in the case of proceedings involving a Member State’s official initiated by another Member State, the latter shall not be bound to apply the definition of ‘national official’ except insofar as that definition is compatible with its national law.”

*Act “in accordance with his function”*

An act in accordance with an official’s function, mission or office is explained by the French authorities as an act that the official is required by statute or regulation (*réglements*) to perform, or to refrain from performing. This definition encompasses not only acts that the holder of the function, mission or office is required to perform, either alone or together with others, but also those in which he/she participates, while not being able to perform them himself/herself, or those from which the duties of his/her position oblige him/her to refrain. Similarly as the text does not distinguish acts in respect of which an official has discretionary power from those for which the official has a mandatory responsibility, both situations are covered.

*Act “facilitated by his function”*

An act facilitated by an official’s function, mission or office is one, according to the French authorities, that while not arising directly from his/her duties expressly created by statute or regulation (*réglements*), is nonetheless derived from those duties.

The French authorities state that, as a general rule, it will be important for the judge to establish that the act is either part of the function or has been facilitated by it, since this is one of the elements that constitutes the offence. However, this requirement will not hamper criminal proceedings since, by virtue of the principle of the "freedom of proof" in criminal law, the judge alone evaluates the elements, which are presented to him in order to determine whether the prerequisites for the offence are met. He will thus determine, in the light of those elements, whether the act is part of the function or facilitated by it, without being required to refer specifically to the laws and regulations establishing the foreign public official’s duties.

*Trading in Influence*

Trading in influence by national public officials is covered by the same provision of the Criminal Code (Article 433-1) as active corruption, the two offences being very similar. Trading in influence is deemed to exist when a bribe is intended to prompt a French public official to “abuse his actual or presumed influence in order to obtain distinctions, employment, contracts or any other favourable decision from a public authority or administration.” Trading in influence through a foreign public official is not punishable under the new law. However, the French authorities state that the case mentioned in Commentary 19 on the Convention concerning the scope of the definition in Article 1, paragraph 4.c<sup>17</sup>, would be covered by the offence of corruption.

**1.1.9 In order to obtain or retain business or other improper advantage in the conduct of international business**

The new Articles 435-2, 435-3 and 435-4 of the Criminal Code cover cases in which the aim of the bribe is “obtaining or retaining business or other improper advantage in the conduct of international business”<sup>18</sup>. Corruption may be deemed to exist even if the briber was the lowest bidder.

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17. Commentary 19: “One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office -- though acting outside his competence -- to make another official award a contract to that company”.

18. While Articles 435-3 and 435-4 of the Criminal Code stipulate explicitly that the offence is constituted if its aim is “obtaining or retaining business or other improper advantage in the conduct of international business”, Article 435-2 on the corruption of officials of the European Union has a

## 1.2 Complicity

Article 1.2 of the Convention requires the Parties to take measures necessary to establish as a criminal offence complicity in an act of bribery of a foreign public official, including incitement, aiding and abetting, and authorisation.

The rules on complicity, set forth in Articles 121-6 and 121-7 of the new Criminal Code, are general in scope and apply to all offences<sup>19</sup>. The first paragraph of Article 121-7 defines an accomplice as “the person who, knowingly, through aid or assistance, has facilitated preparations for or the execution of a crime or misdemeanour” (complicity by aid or assistance). The second paragraph defines an accomplice as “the person who by gift, promise, threat, order, abuse of authority or of power shall have provoked an offence or given instructions to commit one” (complicity by incitement). Accomplices are punished in the same way as perpetrators (Article 121-6 of the Criminal Code).

## 1.3 Attempt and conspiracy

Article 1.2 of the Convention requires each contracting Party to take measures necessary to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own public officials.

### *Attempt*

An attempt to bribe a domestic public official is not a distinct criminal offence in France insofar as, under Article 433-1 of the Criminal Code, the offence of active corruption of a domestic public official is fully and immediately completed once an offer has been made, whether or not it is accepted. For exactly the same reasons, the Act of 30 June 2000 does not specifically establish attempted active corruption of a foreign public official as a distinct criminal offence. The offence of bribing a foreign public official alone makes it possible to prosecute any attempt (see above, 1.1.3).

### *Conspiracy*

Conspiracy, within the meaning of Anglo-Saxon law, is not punishable under French law<sup>20</sup>.

## 2. RESPONSIBILITY OF LEGAL PERSONS

Under Article 2 of the Convention, each Party shall take any measures necessary to establish the liability of legal persons for the bribery of a foreign public official. Section 3 of the Act of 30 June 2000 creates an Article 435-6 stipulating that “Legal persons may be held criminally liable, according to the conditions laid down in Article 121-2, for offences defined in Articles 435-2, 435-3 and 435-4”.

### *Legal entities subject to criminal liability*

The scope of criminal liability of legal persons as defined by Article 121-1 of the Criminal Code includes all such persons, whether public or private, for profitable or non-profitable aims, French or foreign, with the exception of the State<sup>21</sup>.

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broader scope, the offence being constituted irrespective of the goal being pursued or the sphere of activity involved.

19. Cass. Crim. 21 June 1895.

20. Under French law, a conspiracy is constituted by a resolution agreed to between two or more persons to commit a [crime against the integrity of the institutions of the Republic or the national territory] if that resolution is given substance by one or more material acts (Article 412-2, Criminal Code).

For their part, local authorities<sup>22</sup> have criminal liability that is limited to offences committed in the performance of activities that could possibly involve agreements to delegate public services<sup>23</sup>, irrespective of the form of delegation involved (e.g., concession, etc.).

Other legal persons, including the other public entities (public establishments, public interest groups, nationalised enterprises, semi-public companies, professional associations) are criminally liable in respect of all their activities. Private legal persons include groups, voluntary or legally constituted, civil and commercial companies, duly registered associations, including religious congregations, foundations, trade unions, political parties and factions, economic interest groups, institutions representing employees and associations of co-owners.

### *Meaning of criminal liability*

Under Article 121-2 of the Criminal Code, the criminal liability of legal persons has two features. First, their responsibility is indirect, or derived, insofar as offences attributable to legal persons must have been committed by natural persons. Second, natural persons who are themselves perpetrators or accomplices to the offence cannot be shielded from responsibilities by invoking the responsibilities of a legal person. Consequently, Article 121-2, paragraph 3 stipulates that “the criminal responsibility of legal persons does not preclude that of natural persons who are perpetrators of or accomplices to the same acts”<sup>24</sup>.

### *Implementation of the criminal responsibility of legal persons*

There are two conditions for assigning criminal responsibility to legal persons under French law:

1. The offence must *first* have been committed by one or more natural persons constituting either a body or a representative of the legal person<sup>25</sup>. This provision excludes cases in

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21. The French authorities deem it inconceivable that the State, which holds a monopoly on the right to punish, could sanction itself. The term of State is understood in the strict sense, and does not encompass either the territorial authorities or public enterprises. Also, the absence of criminal liability of the State has no impact on its civil liability.

22. Local authorities include *communes*, *départements*, regions and groups thereof, such as associations of *communes*.

23. The idea of delegating public services covers all public service activities that can be performed not only by the public authority, but also by another entity, possibly private.

24. It is not, however, the intention of the law that corporate officers be systematically prosecuted as accomplices (TGI Béthune, 12 November 1996).

25. All legal entities possess at least one deliberative body which takes decisions on the legal entity's behalf, and which is made up of one or more natural persons upon whom the law or company by-laws confer a particular function in the entity's organisation, investing them with administrative or executive responsibility.

Representatives are natural persons empowered by law or the by-laws of the legal person to act on its behalf. This concept overlaps in part with that of a body, insofar as most bodies of a legal person are legal representatives thereof. However, there are cases in which representatives of a legal person are not bodies. This is the case, for example, of a provisional administrator, a liquidator of a company or an association, persons possessing a delegation of power within a business and, more generally, anyone to whom the bodies have assigned and given a general mandate to manage and represent the legal person. The concepts of body and representative are interpreted broadly by the courts. For example, the expression body or representative may apply to employees exercising the powers of director-general by delegation (TGI Grenoble, 15 May 1997). The same applies to natural persons who are not members of corporate bodies of a legal person that is also prosecuted, if an objective assessment of the circumstances of the act support the conclusion that it is they that properly wielded

which an offence has been committed by an agent or a subordinate, and it requires that the natural person has been regularly invested with the power to act on the legal person's behalf. On the other hand, the body or representative is responsible even if the natural person exceeds his/her authority or has not been regularly invested either in this function or with respect to the specific act. It is not however necessary for the body or representative to have been convicted of the offence of which the legal person is accused<sup>26</sup>. On the other hand, the natural person, the body or representative of the legal person, who is the author of the offence of bribery, which is an intentional offence, ought in principle to be identified. That person may be so identified by any means, including on the basis of presumption.

1. The French authorities specify that in the absence of case law, the legal literature takes the view that the legal person may be held criminally responsible even if the natural person has not been identified assuming, first, that the intentional element of the offence stems from the actual nature of the acts being prosecuted and, second, that there is no doubt that the offence was committed by a body or a representative, of any sort, when it appears for example that the whole commercial strategy of the firm is based on acts of bribery<sup>27</sup>.

2. The offence must *then* have been committed on behalf of the legal person. The requirement of a causal link between the legal person and the unlawful act aims to ensure that a legal person is not held liable for acts committed by individuals having a connection therewith if such individuals merely took advantage of the legal or material framework of the legal person to commit offences in their own interest or against the interest of the legal person.

According to the French authorities, an officer who acts in the name of the legal person, and in its interest, must be considered as acting on the legal person's behalf. Unlawful acts by the representative also incur the criminal responsibility of the legal person if those acts have been committed on its behalf in the broad sense of the term, i.e. in the course of activities intended to advance the organisation, operation or objectives of the grouping invested with legal personality, even if there is no resultant benefit or advantage. The offence may be constituted by a positive act or by a failure to act, in particular when the offence committed by a subordinate was made possible by the absence of the controls normally expected on the part of the body or representative<sup>28</sup>.

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the legal person's decision-making powers with regard to the business in question (Grenoble, 25 February 1998).

26. Accordingly, a discontinuance for insufficient cause that was granted to a serving mayor did not discharge the criminal responsibility of the town, provided that misconduct directly linked to the accident was established in respect of municipal bodies or representatives. Grenoble, 12 June 1998; *Gaz. Pal.* 1998, 2. 460.
27. See Francis Le Gunehec, *Le nouveau droit pénal. Ed. Economica*.
28. The offence may consist of negligence attributable to successive mayors of a city, of which they are at once bodies and representatives, in respect of proven negligence on their part in the management of their agents and control of their services, whereas their function gives them the necessary power and means to ensure proper operation of municipal public services for which they bear responsibility (Grenoble, 12 June 1998).

### 3. SANCTIONS

The Convention requires Parties to establish “effective, proportionate and dissuasive criminal penalties” comparable to the penalties applicable to the bribery of their own public officials. The Convention also requires, in respect of natural persons, that criminal penalties include “deprivation of liberty sufficient to enable effective mutual legal assistance and extradition”.

In any event, the Convention requires each Party to take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions “of comparable effect” are applicable. Lastly, the Convention asks each Party to consider the imposition of additional civil or administrative sanctions.

The Criminal Code’s new provisions for the bribery of foreign public officials impose imprisonment and fines for natural persons found guilty of bribing a public official. They also impose fines.

#### 3.1/3.2 Criminal Penalties for Bribery of a Domestic or Foreign Public Official

##### *Primary penalties: deprivation of liberty and fines*

Under the Act of 30 June 2000, the prison sentences and fines for natural persons are identical to those imposed in cases of bribery of domestic public officials, i.e. imprisonment for up to ten years and a fine of up to one million French francs<sup>29</sup>. Fines for legal persons are also identical, whether the bribery in question is of a domestic or foreign public official, and up to a limit of FF 5 million<sup>30</sup>. According to the French authorities, a FF 5 million fine is particularly high on the scale of French penalties. It can therefore be considered to be effective, proportionate and dissuasive, especially as the judge can decide, as an additional penalty, to have the proceeds of the offence confiscated (see below, 3.6). The determination of the penalty is a matter solely for the judges, who will take into account the circumstances of the perpetration of the offence and the psychological constitution and personal social circumstances of the perpetrator. When the court orders a fine, the financial resources of the perpetrator are taken into account (article 132-24 of the Criminal Code).

##### *Additional criminal penalties applicable to natural persons*

The Act of 30 June 2000 imposes four types of additional criminal penalties on natural persons to deter bribery of foreign public officials: deprivation of rights (civic, civil and family rights for five years or more); possible banishment, in the case of foreigners; professional restrictions (ban for up to five years on performing a public function or the professional or social activity in connection with which the offence was committed); confiscation; and the posting or publication of decisions. The same additional penalties are applicable in the case of bribery of domestic public officials (Article 435-22 of the Criminal Code).

##### *Additional criminal penalties applicable to legal persons*

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<sup>29</sup> French law provides only for maximum penalties, judges being free to choose the penalty within these limits. The exchange rate at 25 October 2000 was 1 US\$ for FF 7.92, or US\$ 12.63 (15.24 Euro) for FF 100. Thus, FF 1 million is equivalent to 152 449 Euro or US\$ 126 297, and FF 5 million is equivalent to 762 245 Euro or US\$ 631 483.

<sup>30</sup> Pursuant to Article 131-38 of the Criminal Code, which stipulates that “the maximum rate of fine applicable to legal persons is equal to five times the maximum fine for natural persons under the law instituting the criminal offence.”

The additional criminal penalties applicable to legal persons for the bribery of a foreign public official are similar to those provided for in respect of bribery of a domestic public official. Under the new Article 433-25 of the Criminal Code, the following additional penalties may be imposed along with a fine:

“2° For a period of no more than five years: a ban on directly or indirectly performing the professional or social activity in connection with which the offence was committed; placement under judicial supervision; closure of one or more establishments of the enterprise having been used to commit the incriminated acts; exclusion from public procurements; ban on public appeals for funds; ban on issuing cheques other than certified cheques and those drawn to withdraw the maker’s funds on deposit; and ban on the use of payment cards” (Article 435-6, paragraphs 4 to 10).

3° Confiscation [see below, 3.6].

4° Posting or publication of the court’s ruling pursuant to Article 131-35.

A review of case law shows that the court’s first one hundred penalties imposed on legal persons, in cases of bribery of French public officials, consisted essentially of fines, postings, publication and confiscation; to date there has been no exclusion from public procurements or bans on professional activity<sup>31</sup>.

### **3.3 Penalties and Mutual Legal Assistance**

The Act of 10 March 1927, which governs mutual legal assistance in the absence of an applicable convention, does not make assistance conditional upon the existence of penalties involving the deprivation of liberty for a minimum amount of time. Mutual assistance can therefore be granted whatever the penalties involved.

### **3.4 Penalties and Extradition**

Two cases must be distinguished depending on whether or not an extradition treaty is in force:

1. In the absence of an applicable multilateral or bilateral extradition treaty, the conditions for extradition are laid down by the Act of 10 March 1927, on the extradition of foreigners, and particularly Article 4, paragraphs 1 and 2. Extradition may be granted or requested by France if the offence is sanctioned by the requesting State either by a criminal penalty (without a minimum threshold) or a prison sentence of not less than two years.
2. If there is an applicable extradition treaty, the thresholds allowing extradition are set by the treaty. At the present time, none of the treaties to which France is a party requires a threshold greater than two years.

### **3.6 Seizure and Confiscation of the Bribe and its Proceeds**

#### *Seizure*

Searches and seizures are only possible for “articles and documents that can help to reveal the truth”. According to the French authorities, this notion covers both the instrument and proceeds of the

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31. Verbatim minutes of the 14 December 1999 session of the National Assembly, in *Journal Officiel de la République française*, December 1999, pp. 10923.

offence. Search and seizures must be justified by the flagrant nature of the offence<sup>32</sup> or ordered by the examining magistrate, which implies that a preliminary investigation has been started (articles 94 and 97 of the Code of Criminal Procedure), or with the consent on the part of the person concerned. Seizure can concern a sum of money (articles 54 and 97 of the Code of Criminal Procedure).

### *Confiscation*

Section 3 of the Act of 30 June 2000, on “Additional penalties and the responsibility of legal persons”, provides, in respect of natural and legal persons alike, for “confiscation, as stipulated in Article 131-21, of the instrument that was used or intended to be used to commit the offence, or of the proceeds of the offence, except for items that may be restituted.” According to the French authorities, case law provides a very broad interpretation of the notion of proceeds of the offence which can, for example, cover the price of the contract secured as a result of bribery.

According to Article 131-21 of the Criminal Code, if an item has not been seized or is no longer available for seizure, confiscation of equivalent value shall be ordered. Where an amount representative of the value in question cannot be recovered, provisions for imprisonment in default are available; in contrast, the seizure of sums of money prior to a ruling on the sole grounds that it would make it subsequently possible to confiscate proceeds or instruments that were not available for seizure, is not authorised. The instrument of bribery may be confiscated from third persons<sup>33</sup>. The French authorities explain that if the instrument of the offence was fraudulently taken or diverted to the detriment of its rightful owner, the courts will order its restitution to the victim.

## **3.8 Additional Civil and Administrative Sanctions**

In France, bribery is liable to criminal penalties only. On the other hand, some special laws provide for indirect administrative or civil sanctions if a person is sentenced for bribery.

## **4. ARTICLE 4 - JURISDICTION**

### **4.1 Territorial Jurisdiction**

#### *Scope of territorial jurisdiction*

Article 4 of the OECD Convention provides that each State has jurisdiction when the offence is committed in whole or in part in its territory. This clause is met by Article 113-2 of the new Criminal Code, which states that “French criminal law is applicable to offences committed in the territory of the Republic. The offence is considered to have been committed in the territory of the Republic when one of the acts constituting the offence took place in this territory.”<sup>34</sup>

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32 . Art. 54 CPP: “In the event of a flagrant crime, the judicial police officer (...) shall take steps to safeguard clues likely to disappear and anything that can help to reveal the truth. He shall seize the arms and instruments used, or intended to be used to commit the crime, and also everything that appears to be part of the proceeds of the crime”. Art. 56: “If the nature of the crime is such that proof thereof can be obtained by seizing papers, documents and other objects in the possession of the people who would seem to have participated in the crime or to have articles or objects relating to the facts in question, the judicial police officer shall go directly to the domicile of the said people and search the premises, drawing up a report on the results (...)”.

33 . TGI Saint-Etienne, 10 August 1994.

34. By extension of the principle of territoriality in criminal law, the taking possession in France of goods of fraudulent origin, by an intermediary acting on behalf of a foreigner residing outside the national territory, is the material element that constitutes the offence of illegal receipt that brings the alleged



The territory of France consists of the metropolis, overseas departments and territories, and territorial collectivities. While the overseas departments are governed by the same laws as the metropolis, this is not the case for the other entities. Article 5 of the Act of 30 June 2000 states that the law is also applicable in New Caledonia and French Polynesia, the Wallis and Fortuna islands and the territorial collectivity of Mayotte. The French authorities point out that it is also fully applicable in the territorial collectivity of St. Pierre et Miquelon, as in the case of the overseas departments. In contrast, Article 5 makes no mention of the French Southern and Antarctic Territories, the French authorities deeming it superfluous, as they consider the said territories do not have any involvement in international trade.

#### *Extension of the principle of territoriality*

By extension of the territoriality principle, French criminal law shall be applicable to offences committed in whole abroad if they are connected with<sup>35</sup>, or inseparable from, offences committed in France<sup>36</sup>.

Similarly, under Article 113-5 of the Criminal Code, “French criminal law shall be applicable to whoever is an accomplice in the territory of the Republic of a crime or misdemeanour committed abroad if the crime or misdemeanour is punishable under both French law and the foreign law and if it has been established by a final decision of the foreign court”. The latter provision could make it difficult in practice to proceed against French accomplices, especially when the foreign main perpetrator of the crime or misdemeanour is not tried abroad. On the other hand, the court that is competent to judge the principal offence is competent to try the accomplice, irrespective of nationality and of where the acts of complicity took place<sup>37</sup>. In other words, French courts will be competent to try the foreign accomplice of the French main perpetrator of the offence.

Lastly, in the case of a foreigner employed by a French company, who commits an act of bribery abroad, French criminal law may be applicable if it is established that the foreigner acted on behalf of the French legal person and not on his/her own account. Once it is established that the acts originated in France or that one of the elements constituting the offence was committed in France, prosecution will be initiated not only against the legal person or managers involved, but also against the foreign perpetrator of the act abroad.

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offence within French criminal jurisdiction (Crim. 1 October 1986). Similarly, if the accused recruited his accomplices in France, this constitutes a constituent element of the offence and the whole offence is considered to have been committed on the territory of the Republic (Tribunal correctionnel, Paris, 16 October 1991).

<sup>35</sup> The provisions of Article 203 of the Code of Criminal Procedure state: “Offences are connected either when they were committed at the same time by several persons acting together, or when they were committed by different persons, even at different times and in different places, but as a result of prior agreement between the said persons, or when the guilty parties committed one offence in order to obtain the means to commit others, facilitate them, perpetrate them or ensure impunity, or when the articles removed, misappropriated or obtained thanks to a crime or an offence were partly or entirely received as stolen”. According to *Cour de cassation* case law, these provisions are not restrictive: connexity also extends to cases in which there are close links between the facts - similar to those specially provided for by law (Cass. Crim. 18 August 1987, *D. 1988 somm. 194*).

<sup>36</sup> This would be the case, for example, of bribery committed abroad with the aid of a criminal association formed in France: *Crim 23/04/1981, B. No 116*.

<sup>37</sup> Crim.19 April 1988.

## **4.2 Extra-territorial jurisdiction**

### **4.2.1 Nationality jurisdiction**

The OECD Convention provides that the parties that have jurisdiction to prosecute their nationals for offences committed abroad must establish their jurisdiction with regard to the bribery of a foreign public official according to the same principles (active nationality principle).

France establishes jurisdiction to prosecute its nationals for offences of bribery of a foreign public official committed abroad under the general principle set out in Article 113-6 of the Criminal Code whereby “French criminal law is applicable to offences committed by French nationals outside the territory of the Republic if the offence involved is punishable under the law of the country where it was committed”. The prosecution procedure for such offences is set out in Articles 113-9 (*non bis in idem* principle) and 113-8 of the Criminal Code. “Proceedings may be initiated only at the request of the public prosecutor’s office. They must be preceded by a complaint lodged by the victim or legal successor or by an accusation formally made by the authorities of the country in which the acts took place”. These conditions do not affect the authority of the public prosecutor to decide whether or not to initiate proceedings.

France also establishes jurisdiction over offences, punishable by imprisonment, committed by a French national or a foreigner outside French territory against a French victim (the victim is a French national at the time of the offence, article 113-7 of the Criminal Code). This is passive nationality jurisdiction, which is not required by the Convention.

These two bases of jurisdiction rely on the concept of a victim, either to initiate proceedings (113-6) or to determine the basis of jurisdiction (113-7). However, until recently, case law concerning corruption only recognised as “victim” the State of the public official. If this interpretation was maintained concerning the bribery of foreign public officials, French nationals would be prosecuted for acts of bribery committed abroad only if the State of the corrupted public official or the State where the acts took place intervene. Consequently, passive nationality jurisdiction would not be applicable to cases of bribery of foreign public officials, as the State or the international organisation could not be French. Today, case law seems to extend the status of victim to other persons<sup>38</sup> which would facilitate the exercise of effective active nationality jurisdiction and would allow the exercise of passive nationality jurisdiction.

### **4.2.2 Non nationality jurisdiction**

“In some cases, French courts can establish non-nationality jurisdiction, based on Article 689-1 of the Code of Criminal Procedure, which enables them to prosecute the offender who is on French territory, even temporarily, and irrespective of his/her nationality, that of the victim or the place where the offence was committed”<sup>39</sup>, pursuant to the international Conventions referred to in Articles 869-2 to

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<sup>38</sup> In support of this interpretation, the French authorities submitted only one case in which a person other than the State was recognised as having been indirectly injured by corruption: an association of users of the public service of water distribution was recognised as having an actionable claim in a case alleging corruption in the attribution of the corresponding market. The corrupt acts being unjustified price increases. The Court recognised that this resulted in a collective injury for the users (Cass. crim. 8 April 1999).

<sup>39</sup> National Assembly, Report by Mr. Jacky Darne, député, on behalf of the Commission on constitutional laws, legislation and general administration of the Republic, on the bill adopted by the Senate, amending the criminal code and the code of criminal procedure with regard to the fight against corruption.

689-7 of the Code of Criminal Procedure<sup>40</sup>. The Act of 30 June 2000 adds an article, Article 689-8, for the application of the protocol of the convention on the protection of the European Communities' financial interests, signed in Dublin on 27 September 1996, and the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union signed in Brussels on 26 May 1997<sup>41</sup>. These provisions do not apply to cases of bribery, which do not harm the financial interests of the European Communities.

#### **4.3 Consultation Procedures**

Article 4 of the Convention states that when more than one Party has jurisdiction over an alleged offence, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

In French law there is no formal consultation procedure for resolving the question of competing jurisdictions. The principle of "*non bis in idem*", contained in Article 692 of the Code of Criminal Procedure, is simply applied.

A case may be transferred to another State when extradition is refused on the grounds of nationality: the State requesting extradition can ask the other State to submit the case to its competent authorities. Proceedings may also be transferred for the purposes of mutual legal assistance where an accusation has been formally made. This option, which is frequently used, is provided by the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, and most of the bilateral treaties signed by France.

#### **4.4 Effectiveness of Jurisdiction**

According to the French authorities, case law alone will demonstrate the effectiveness of jurisdiction.

### **ARTICLE 5- ENFORCEMENT**

Article 5 of the Convention states that investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. It also states that each Party must guarantee that investigations and prosecutions "shall not be influenced by consideration of national economic interests, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

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40. These articles cover certain offences which come under: the European Convention on the Suppression of Terrorism, signed in Strasbourg on 27 January 1977, and the agreement between the Member States of the European Communities concerning the application of the European Convention on the Suppression of Terrorism, done in Dublin on 4 December 1979; the Convention on the Physical Protection of Nuclear Material, signed in Vienna and New York on 3 March 1980; the protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf, done in Rome on 10 March 1988; the Convention for the suppression of the unlawful seizure of aircraft, signed in the Hague on 16 December 1970, and the Convention for the suppression of unlawful acts against the safety of civil aviation, signed in Montreal on 23 September 1971; the protocol for the suppression of unlawful acts of violence at airports serving international civil aviation, done in Montreal on 24 February 1988.

41. Article 689-8 provides for the prosecution of a " French national or anybody belonging to the French civil service who is guilty of one of the offences listed in [article] 435-2 of the criminal code or of an offence that harms the financial interests of the European Communities" and "of anybody guilty of the offences listed in article 435-2 of the criminal code or of an offence that harms the financial interests of the European Communities, when these offences are committed against a French national", without requiring that France's jurisdiction be established with respect to dual criminality. .

## 5.1 Rules and Principles Applicable to Investigations and Prosecutions

Investigations and prosecutions in respect of the bribery of a foreign public official are conducted in accordance with the rules of the code of criminal procedure. The judicial police, under the supervision of the *procureur de la République*, is responsible for establishing infringements of the criminal law, gathering proof and finding the perpetrators before a judicial inquiry is opened. Once an inquiry has been opened, the examining judge carries out all the investigations he deems necessary to arrive at the truth, and the judicial police carries out his assignments and defers to his instructions.

French criminal procedure is governed by the principle of prosecutorial discretion: the public prosecutor's office is free not to initiate a proceeding in respect of an act which bears all the marks of an offence. The prosecutor is solely responsible for deciding whether to bring a prosecution, without interference from the Minister of Justice (*Garde des Sceaux*). There is thus no obligation on the prosecutor's office to comply with any criteria or guidelines that might be laid down by a criminal policy circular of the Chancellery. However, the French authorities specify that implementation of the principle of prosecutorial discretion necessarily entails an evaluation of the disturbance to public order caused by the facts at issue, taking into account their seriousness, as measured in particular by the amount of the bribe.

The Act of 30 June 2000 contains several provisions that create a distinct set of rules and principles regarding investigations and prosecutions.

### *Distinct rules regarding prosecutions*

French common law regarding investigations and prosecutions distinguishes between whether part or all of the acts took place in French territory or whether they all took place abroad. In the former case, the law allows the victim to bring an action, thereby overriding the principle of prosecutorial discretion. In the latter case, Article 113-8 of the Criminal Code states that a prosecution can be brought only by the public prosecutor's office.

The Act of 30 June 2000 departs from common law. Under the new articles 435-3 and 435-4 of the Criminal Code, prosecutions concerning the bribery of foreign (non-EU) public officials can be initiated solely by the public prosecutors' office, even if part or all of the acts took place in French territory. In ruling out the possibility of an action being brought automatically by the victim, the legislator wanted to ensure that the conditions for bringing a prosecution were equivalent to those in other Parties, signatories to the Convention, some of which do not allow such actions to be brought. A second reason was to prevent excessive and unwarranted civil actions<sup>42</sup>, despite the mechanisms that exist to prevent such unwarranted actions. Lastly, the French authorities add that the legislator also wished to take account of the high probability that the active corruption of foreign public officials will take place entirely abroad. However, these rules do not apply to offences falling under Article 435-2; the French authorities explain this difference in treatment by the highly integrated character of the legislation of EU Member states, which does not exist within the broader framework of the OECD.

Although this differentiated regime does not seem to comply with Article 5 of the Convention, which provides that investigation and prosecution be conducted in accordance with the rules and principles of

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42. Presentation of the draft law by the Minister of Justice in: "Senate; Complete minutes. Session of Wednesday 10 November 1999," *Journal Officiel de la République française*, No. 83 s (C.R.), 1999, Thursday 11 November 1999, p. 5866; "Report "by the Commission on constitutional laws, legislation, universal suffrage, Regulations and general administration, on the draft law amending the criminal code and the code of criminal procedure with regard to the fight against corruption", Senate, 42 (1999-2000); Report by the joint Commission responsible for proposing a text on the provisions still under discussion, of the draft law amending the criminal code and the code of criminal procedure with regard to the fight against corruption, 28 March 2000, p.21.

each Party, the French authorities consider that on the contrary, Article 5 of the Convention does not require the same prosecution procedure in cases of bribery of national public officials and foreign public officials, but leaves it up to the national law of each Party to determine the procedure to be followed.

Although prevented from bringing an action, the French authorities explain that the victim has two means of recourse. Once proceedings have been initiated, the victim can bring an accessory civil action. Furthermore, anybody who considers themselves a victim can always file a complaint without bringing a civil action. By filing a mere complaint, the victim informs the public prosecutor, the police or the gendarmerie that an offence has been committed, thereby making it possible to open a criminal investigation without violating the principle of prosecutorial discretion.

Under the general rules for civil actions, claims for damages caused by an offence must be brought by the party who personally suffered from the offence, and the damage must be certain, personal and direct. Until now, only the State was considered as the victim of corruption. However the French authorities indicate that recent court decisions have tended to recognise the status of other persons as victims (cf. section 4.2.1.). As far as the French authorities are aware, there is no case law to date to confirm whether that a competitor, who has been harmed by loss of a contract, could be considered a victim. Hypothetically, the French authorities are of the opinion that such a case would not be excluded.

Under French law, the burden of proof lies with the prosecutor's office i.e. the prosecuting party.

#### *Distinct rules regarding the competent court of jurisdiction*

Under the law transposing the Convention into French law, the court competent to try cases of bribery of foreign public officials is no longer determined by common law.

*First*, the bribery of both European Union and French officials will fall within the responsibility of regional jurisdictional economic and financial poles<sup>43</sup>, which were created to adapt the law to the complexity of financial and economic crime, and to strengthen the means of combating corruption. New working methods will be introduced: modern logistical means will be available and multidisciplinary teams will be placed at the disposal of specialised courts.

*Second*, the law introduces a special provision regarding the bribery of foreign public officials outside the European Union. The new article 706-1 of the Criminal Procedure code states that, for the prosecution, investigation and trying of offences listed in articles 435-3 and 435-4 of the Criminal Code, the Paris public prosecutor, examining magistrate and the *Tribunal Correctionnel de Paris* have jurisdiction concurrent with that arising from common law<sup>44</sup>. The legislator justifies this provision on the ground that, by centralising international corruption cases in Paris, prosecutions will be better harmonised<sup>45</sup>. Parliament took the view, on the other hand, that this concern was less justified within the European Union.

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43. These jurisdictional poles are provided for by Article 704 of the Code Of Criminal Procedure: "Within the jurisdiction of each court of appeal, one or several *tribunaux de grande instance* are competent in the conditions provided by this Title to prosecute, examine and, in the case of misdemeanours, to judge the following offences in cases which are or would seem to be very complex (...)."

44. Paragraph 2: "When they are competent to prosecute and examine the offences listed in articles 435-3 and 435-4 of the criminal code, the public prosecutor and the Paris examining magistrate are competent throughout the entire national territory.

45. Report by the aforementioned joint Commission, 28 March 2000, p.23.

## 5.2 Economic, Political or other Considerations

By virtue of recognised discretionary power, only the public prosecutor's office can institute legal proceedings, and thus prosecution for offences covered by the Convention. According to the French authorities, investigation and prosecution in cases of bribery of a foreign public official may not be influenced by economic, national, political or other considerations, as for any other investigation or prosecution<sup>46</sup>. However, Article 692-2 of the Criminal Procedure Code states that "judicial authorities that receive a request for mutual legal assistance with regard to international criminal matters and that consider that to act upon it could be prejudicial to the nation's security, public order or other vital interest of the country, may take the necessary steps to enable the competent authorities to determine the follow-up to be given to the request".

Special rules apply to certain persons on account of their functions and status -- Members of Parliament, members of the government, the Head of State and persons with diplomatic and consular immunity. However, they are essentially procedural rules which do not allow the individuals concerned to escape prosecution or sanctions.

## 6. ARTICLE 6 - STATUTE OF LIMITATION

The statute of limitation for the prosecution of offences is three years (Article 8 of the Criminal Procedure Code), irrespective of whether the offence is committed by a natural person or a legal person. Bribery, being an instantaneous offence, the statute of limitation is considered to run from the day the offence was committed. However, the *Cour de Cassation*<sup>47</sup> has consistently ruled that the offence of bribery, committed from the moment the agreement between the briber and the bribed person is concluded, is renewed on each occasion that the agreement is acted upon. In consequence, the triggering of the statute of limitation is moved forward from the day the bribery agreement was concluded, to the day of the final payment or the day of the last receipt of the advantage that was promised, etc<sup>48</sup>.

The statute of limitation can be interrupted or suspended pursuant to Articles 7 and 8 of the Criminal Procedure Code. It may be interrupted by a prosecution or investigation (cancelling out the time elapsed up to then) and a new three-year period starts to run; it is suspended in the event of a legal impediment to proceedings taking place (examination of a prejudicial question, appeal in cassation, etc.) or by a factual impediment (dementia of the person charged, etc.) in which case, the statute of limitation is merely suspended, and the time that elapsed prior to the suspension is taken into account, without there being any time limit on the interruption or suspension. The French authorities consider that, given these possibilities of interrupting or suspending the statute of limitations, the three-year limitation on the prosecution of offences is not likely to impede prosecutions.

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46. In order to strengthen this principle, draft law No 470 amending the code of criminal procedure, adopted in its first reading by the National Assembly on 29 June 1999 and by the Senate on 26 October 1999, seeks to clarify the relationship between the Ministry of Justice and the public prosecutor's office, and to strengthen the safeguards for citizens in the event that the case is shelved. Thus, with regard to the relationship between the Ministry of Justice and the public prosecutor's office, the draft law lays down the principle that the Ministry may not give instructions to the public prosecutor's office in individual cases. As regards the safeguards given to citizens in the event that a case is shelved, the draft law requires that such decisions should henceforth be supported by the reasons for them, and can be appealed against in the first instance before the procurator-general and in the final instance before a commission of appeal composed of magistrates.

47. Carignon ruling, Crim. 27 October 1997, *Bull. Crim. No 352*.

48. Crim. 13 December 1972, *Bull No 391*, and Crim. 9 November 1995, 12 May 1998.

## **7. ARTICLE 7 - MONEY LAUNDERING**

Article 7 of the Convention states that each Party that has made bribery of its own public officials a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

### **7.1/7.2 Bribery of French and Foreign Public Officials**

France makes the laundering of the proceeds of any crime or misdemeanour punishable under Article 324-1 of the Criminal Code<sup>49</sup>. The laundering of money from the active corruption of a foreign public official is punishable under the same conditions as the active corruption of a French public official, since they are both offences under the new law. These provisions apply both to the assets and income of the perpetrator of an offence that brought him/her a direct or indirect profit. As the offence of money laundering is distinct from the predicate offence, it matters little whether the active corruption was committed abroad or whether it falls within the jurisdiction of a French criminal court. It should be noted that, under Article 324-9 of the Criminal Code, “legal persons can be declared to be criminally liable, under the conditions provided by Article 121-2, for offences defined in Articles 324-1 and 324-2.”

A bill concerning new economic regulations is currently being examined by Parliament. Title IV of the first part dealing with financial regulation, addresses measures to strengthen the fight against money laundering.

## **8. ARTICLE 8 - ACCOUNTING**

### **8.1 Book-keeping and Accounting Statements**

According to the French authorities, all the acts proscribed by Article 8 of the Convention (establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their objects, the use of false documents) are prohibited generally by French accounting law, irrespective of the aim involved. There are no special provisions applicable to cases where such practices are used to bribe a foreign or French public official.

The legislative and regulatory sources of French accounting law are, on the one hand, Articles 8 to 17 of the Commercial Code and the related implementing provisions (Articles 1 to 27 of the amended decree of 29 November 1983) and, on the other, the chart of accounts as resulting from the amended ministerial decree of 27 April 1982, all of which form a consistent whole in the view of the French authorities. In the case of commercial companies, the Act of 24 July 1966 and the related implementing decree of 23 March 1967 lay down rules for drawing up consolidated accounts, disclosure and auditing of annual accounts, the documents that must accompany them, and other accounting information that must be provided.

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49. “Laundering is the fact of facilitating, by any means, untruthful justification for the origin of goods or income of the perpetrator of a crime or misdemeanour, from which the latter has benefited directly or indirectly. It is also the fact of assisting the investment, concealment or recycling of the direct or indirect proceeds of a crime or misdemeanour. It is punishable by five years’ prison and a fine of FF 2 500 000.”

## 8.2 Enterprises subject to these Laws and Regulations

Under Article 8 of the Commercial Code, all traders<sup>50</sup>, natural or legal persons, are subject to the rules regarding accounting, pursuant to the Commercial Code. The law of 24 July 1966 applies to commercial companies<sup>51</sup>. Lastly, the chart of accounts, the rules of which are identical to those in the Commercial Code and the Law of 24 July 1966, apply to all industrial and commercial companies.

## 8.3 Penalties for Omissions or Falsifications

The Criminal Code, the 1966 Company law and Law No 85-98 of 25 January 1985 on compulsory reorganisation and company liquidation by a decision of the courts, impose stiff criminal penalties for infringements of French accounting law.

### *Offences and sanctions provided by the criminal code*

- The making and use of forged documents<sup>52</sup> by natural persons is punishable by a prison term of three years, a fine of FF 300 000 (Article 441, paragraph 2) and further penalties provided by Article 441-10 of the Criminal Code (i.e., loss of civic rights, ban on doing business, disqualification from public contracts and confiscation).
- The making and use of forged documents by legal persons is punishable by a fine of FF 1 500 000 and further penalties provided in Article 131-39 of the Criminal Code (i.e. winding-up of the company, ban on engaging in business, judicial supervision, definitive or temporary closing-down, disqualification from public procurements, definitive or temporary ban on soliciting funds from the public, ban on writing certain types of cheques, confiscation of the assets which were used or intended for committing the offence, posting or publication of the decision.).

### *– Offences and sanctions provided by the Law of 1966:*

- Omitting to compile accounting documents -- punishable by a fine of FF 60 000<sup>53</sup>.
- Presentation of accounts that do not give a true and fair view -- punishable by a prison term of five years and fine of FF 2 500 000 (or one or the other in the case of managers of a SARL - private limited liability company)<sup>54</sup>.

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50. "Traders are all those who engage in trade as a habitual occupation", Article 1 of the Commercial Code.

51. Article 1 of the Act of 1966: "The commercial nature of an undertakings is determined by its form and purpose. The following are commercial undertakings by virtue of their form and whatever is their purpose: general partnerships, limited partnerships, limited liability companies and joint stock companies."

52. "Forged documents is any fraudulent alteration of the truth such as to cause prejudice, by any means whatsoever, be it in writing or any other medium, whose aim or effect is to establish the evidence of a right or a fact with legal consequences." Article 441-1, paragraph 1.

53. Articles 426-1 for limited liability companies (SARL), 464-1 for simplified joint stock companies (SAS) and 439-1 for public limited liability companies (SA): "[Managers of SARLs, the chairman or managers of SAS, the chairman, directors or managing director of a SA] who have not drawn up an inventory, annual accounts and a management report for each year, will be punished by a fine of FF 60 000."

54. Articles 425-3 for SARL, 437-2 for SA and 464-1 for SAS "[Managers of SARL, the chairman or managers of SAS, the chairman, directors or managing directors of a SA] who, even if no dividends were paid out, knowingly presented annual accounts which do not give a true and fair view of the



- Distribution of fictitious dividends -- punishable by a prison term of five years and a fine of FF 2 500 000 (or one or the other in the case of managers of a SARL)<sup>55</sup>.

– *Offences and sanctions provided by Law No 85-98 of 25 January 1985 in respect of compulsory reorganisation and the winding up of a company by decision of the courts*

- Patrimonial penalties of personal assets placed in compulsory reorganisation<sup>56</sup>
- Criminal penalties for criminal bankruptcy<sup>57</sup>
- Personal sanction: personal bankruptcy<sup>58</sup>

– Furthermore, under Article 233, paragraph 2 of the 1966 Company Law, public auditors are bound to “inform the public prosecutor of offences that have come to their knowledge”, at the risk of a term of imprisonment of five years and a fine of FF 120 00.

## – **9.MUTUAL LEGAL ASSISTANCE**

– The OECD Convention requires each Party, “to the fullest extent possible under its laws and relevant treaties and arrangements”, to provide “prompt and effective legal assistance “ to other Parties for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of the Convention and for non-criminal proceedings coming within the

trading results for the year, the financial situation and assets at the end of this period, with a view to concealing the company’s true situation.”

55. Articles 425-2 for SARL, 437-1 for SA and 464-1 for SAS: “[Managers of SARL, the chairman or managers of SAS, the chairman, directors or managing directors of a SA] who, in the absence of an inventory or by means of a fraudulent inventory, knowingly distributed fictitious dividends.”
56. Article 182 states that “In the event of a legal person being placed in compulsory reorganisation or liquidated by decision of the courts, the court can institute proceedings to place in compulsory reorganisation any manager, in law or in fact, whether paid or unpaid, who is alleged to have committed one of the following: (...) 5. Have kept fictitious accounts or removed accounting documents from the company or failed to keep accounts in accordance with statutory requirements; (...) 7. Have kept accounts that are manifestly incomplete or irregular in regard of legal requirements. If the legal person is placed in compulsory reorganisation or liquidated by court order pursuant to this article, the liabilities shall comprise those of the legal person in addition to the personal liabilities.”
57. “In the event of compulsory reorganisation or winding-up proceedings being initiated, the persons mentioned in Article 196 who have committed one of the following, are guilty of criminal bankruptcy: (...) 2. Have misappropriated or concealed all or part of the debtor’s assets; (...) 4. Have kept fictitious accounts or removed accounting documents from the company or the legal person or failed to keep any accounts as required by the law; 5. Have kept accounts that are manifestly incomplete or irregular in regard of legal requirements.” Criminal bankruptcy is punishable by five years’ prison and a fine of FF 500 000, and by seven years’ prison and a fine of FF 700 000 in the case of a manager of a stock brokering company. In addition, further penalties are applicable to natural persons (loss of civic, civil and family rights, disqualification from public procurement; ban on writing cheques; posting and publication of the decision, as well as to legal persons (penalties mentioned in Article 131-19 of the criminal code).
58. Under Article 186 of the Law of 25 January 1985, persons declared bankrupt are banned from directing, managing, administering or controlling, directly or indirectly, any commercial undertaking or business activity. In addition to traders, the following persons can be declared bankrupt: tradesmen, farmers, natural persons who are managers in law or fact of legal persons with a business activity, and natural persons who are the permanent representatives of legal persons with such an activity.

scope of the Convention brought by a Party against a legal person. The Convention requires that where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which it is sought is within the scope of the Convention. Finally, the Convention states that a Party may not decline to render mutual legal assistance for criminal matters within the scope of the Convention on the ground of bank secrecy.

– **9.1 Laws, Treaties and Agreements Permitting Mutual Legal Assistance**

– In France, mutual legal assistance is based on the following various legal instruments:

- The Convention implementing the Schengen Agreements of 19 June 1990<sup>59</sup>;
- The Convention on Mutual Assistance in Criminal Matters of 20 April 1959. 39 States, including France, have ratified this convention under the aegis of the Council of Europe;
- Bilateral mutual legal assistance agreements;
- The Law of 10 March 1927 on the extradition of foreigners, which lays down the principle of reciprocity, pursuant to which the requesting State must be able to reciprocate, regardless if it has done so in practice (Articles 30 et seq.).

– The French authorities state that mutual assistance can also be provided when the liability involved is that of a legal person. They also state that if a request is made, pursuant to a treaty, for mutual legal assistance in a non-criminal administrative proceeding, France may be able to meet the request if it is possible to bring an appeal in particular in a criminal court, in respect of the decision taken by the administrative court.

– **9.2 Dual Criminality**

– According to the French authorities, the condition of dual criminality is not always required but some bilateral agreements provide for it, especially for requests for mutual assistance relating to coercive measures. It will be presumed to exist if the offence is within the scope of the Convention. The French *Garde des Sceaux* has stated in debates in the Senate that the condition of reciprocity is systematically met in the European Union<sup>60</sup>.

– **9.3 Bank secrecy**

– Under Article 132-22 of the Criminal Code, bank secrecy may not be invoked as a ground for refusing to supply information to the judicial authorities<sup>61</sup>. The French authorities explain that a petition from the magistrate or judicial police officer to the banking institution (and to which the

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59. The Schengen agreements of 14 June 1985 and 19 June 1990 contain provisions on strengthening judicial co-operation through mutual legal assistance, extradition and transmission of the execution of criminal sentences. Thirteen European States signed them: France, Germany, Belgium, Luxembourg, the Netherlands, Italy, Greece, Spain, Portugal, Denmark, Austria, Sweden and Finland. Negotiations are under way with Norway and Iceland. Furthermore, under the Amsterdam Treaty, the United Kingdom and Ireland have the possibility of joining; lastly, countries applying for accession to the European Union will have to apply the Schengen *acquis* when they join.

60. Ibid.

61. “The public prosecutor, the examining magistrate or the court handling the case can call on the parties, the administration, financial institutions or any person holding the accused’s funds, to supply financial or tax information that is useful, and they may not refuse on the grounds of secrecy.”

latter is bound to answer) is sufficient to obtain information. In the event of proven or foreseeable difficulties, searches and seizures may also be conducted.

## **10. ARTICLE 10 - EXTRADITION**

### **10.1 Extradition for the Offence of bribery of a Foreign Public Official**

In France, bribery of a foreign public official is an extraditable offence under several types of legal instruments:

- The French Act of 10 March 1927 on extradition, which constitutes the common law of extradition, provides that offences that are punishable under foreign law by a criminal sentence or a lesser sentence of a maximum of at least two years, and sentences of at least two months of prison that have already been handed down, are extraditable. The Act does not allow the extradition of French nationals, persons subject to the jurisdiction of the French courts, and fleeing slaves.
- The European Convention on Extradition of 13 December 1957, which was ratified on 10 February 1986 and entered into force on 11 May 1986<sup>62</sup>. 40 States including France have signed this Convention.
- Bilateral extradition treaties, some of which allow extradition only for a limited number of offences. The French authorities indicate that the offence of bribery of a foreign public official will be added to the list of offences, pursuant to Article 10.1 of the Convention.

### **10.2 The Convention as the Legal Basis for Extradition**

France's extradition relations are not conditional on the existence of a treaty, since domestic law (Law of 27 March 1927) allows extradition even without a treaty, on the basis of reciprocity.

### **10.3/10.4 Extradition of Nationals**

Extradition of French nationals is not permitted pursuant to the Law of 10 March 1927 on extradition, irrespective of the offence they are alleged to have committed. The French authorities point out that Article 6-2 of the European Convention on Extradition and bilateral treaties provide that, in this case, France must, at the request of the applicant party, submit the case to its competent authorities so that legal proceedings can be initiated if there are grounds for doing so. In the absence of a treaty, a formal accusation must have been made by the authorities of the country where the offence was committed for the French authorities to institute legal proceedings (Article 113-8 of the Criminal Code).

### **10.5 Dual criminality**

Article 10.4 of the Convention states that where a Party makes extradition conditional upon the existence of dual criminality, this condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of the Convention.

France always makes extradition conditional on the existence of dual criminality.

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62. France filed a reservation, stating that, "with regard to the persons being prosecuted, extradition will be granted only for offences which are punishable under French law and the law of the applicant State by a penalty or measure involving a deprivation of liberty for a period of at least two years. Regarding more serious penalties than penalties or measures involving a deprivation of liberty, extradition may be refused if such penalties do not exist in the scale of penalties applicable in France".

## **11. ARTICLE 11 - RESPONSIBLE AUTHORITIES**

### **11.1 Designation of responsible authorities**

For the purposes of the consultation provided by Article 4, paragraph 3, the mutual legal assistance provided by Article 9, and extradition as provided by Article 10, requests shall be made and received via diplomatic channels, without prejudice to other arrangements between the Parties.

## **B. IMPLEMENTATION OF THE REVISED RECOMMENDATION**

### **3. TAX DEDUCTIBILITY**

The Revised Recommendation of 1997 urges Member countries to implement promptly the 1996 Recommendation on the tax deductibility of bribes to foreign public officials: [The Council recommends] “that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility”. Similarly, the Commentaries on the Convention state that “a full participant also accepts the Recommendation on the tax deductibility of bribes to foreign public officials, adopted on 11 April 1996 ”.

French tax legislation has been modified to take account of the provisions of the OECD Convention (except New Caledonia, French Polynesia and the territorial collectivity of Mayotte). Article 39-2 *bis* of the General Tax Code states that, “from the coming into force of the Convention on combating bribery of foreign public officials in international business transactions, sums paid or advantages granted directly or through intermediaries, for the benefit of a public official within the meaning of Article 1 (4) of the said Convention, or of a third party in order that the official acts or refrains from acting in the performance of official duties, with a view to obtaining or retaining business or another improper advantage in the conduct of international business, shall not be deductible from taxable profits”. These provisions came into force on 29 September 2000.

Regarding the exchange of information between the tax administration and the judicial authorities, Article 40, paragraph 2, of the Code of Criminal Procedure provides that “any constituted authority, public officer or official who, in the course of their duties, learns of an offence, is bound to report it immediately to the Public Prosecutor and to forward all the information, records and acts relating thereto”. Tax officials are fully concerned by this obligation. Article L. 101 of the *Livre des procédures fiscales* lays down a corresponding obligation on the judicial authority to inform the tax administration of anything that might suggest that tax evasion has been committed<sup>63</sup>.

In New Caledonia, French Polynesia and the territorial collectivity of Mayotte, the Act of 30 June 2000 is automatically and fully applicable save that, in tax matters. Article 32 of the Amending Finance Act for 1997 is not directly applicable. From a formal standpoint, only an ad hoc text adopted by the assemblies of these territories can explicitly prohibit the tax deductibility of commissions paid to foreign public officials. The French government will endeavour to ensure that these territories adopt texts to that end.

However, the French authorities point out that the tax deductibility of commissions in these jurisdictions is no longer an issue, since the presentation to a tax official of documents substantiating

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63. “The judicial authority must communicate to the Finance administration any information that suggests tax fraud has been committed, or any action whose aim or result was to evade tax, whether it be a civil or commercial court, a criminal court or court of summary jurisdiction, and even if the case is eventually dismissed”.

the payment of a commission to a foreign public official, in order to obtain a tax reduction, would result in the application of Article 40 of the code of Criminal Procedure. they state that it is thus highly unlikely that a briber would risk prosecution in order to claim such a deduction in these territories.

## EVALUATION OF FRANCE

### General comments

The Working Group complimented the French authorities on the conscientious way in which they had implemented the Convention in domestic law. It thanked the authorities for having provided detailed replies which had facilitated the review procedure.

In order to meet the requirements of the Convention and the Recommendation, the French Parliament adopted the Act of 30 June 2000 on combating bribery, amending the Criminal Code, the Code of Criminal Procedure and the General Tax Code. The Group is of the opinion that the Act adopted by France generally conforms to the requirements of the Convention. However, certain aspects of the French implementing legislation, listed below, raised concerns as they may affect the effective implementation of the Convention in France. These aspects shall therefore require careful examination in Phase 2.

### Specific questions

#### The definition of foreign public officials

The Working Group noted that French legislation did not adopt the autonomous definition of a foreign public official as provided in Article 1.4.a of the Convention, but took the concept of public official as it exists in French law. As that concept is very broad, the Group considered that it covers the different categories referred to in Article 1.

#### Elements of the offence

Under French law, the act of “proposing, without right, offers, promises, gifts, presents or advantages of any kind” constitutes the offence of bribery. Although provided for implicitly by the law, it does not explicitly mention the act of giving any undue pecuniary or other advantage.

The Group raised the question whether French courts would pursue an act of giving any undue pecuniary or other advantage that takes place after the entry into force of the legislation, as a result of a corruption pact (meeting of minds between the briber and the recipient of the bribe) entered into before the law’s entry into force. On this point, the French authorities referred to their description of French case law provided for in Section 1.1.3 of the report.

The Group took note of the explanations provided by France but expressed concerns whether existing case law provides, with sufficient certainty, a positive answer to the question raised above. The Group considered that this issue should therefore be carefully monitored during Phase 2.

#### Criminal responsibility of legal persons

The Working Group noted that the conditions for implementation of the criminal responsibility of legal persons were identical to those provided for in the case of bribery of a French public official. However, in the event of a restrictive interpretation by French courts, those conditions could rule out the criminal responsibility of legal persons when the offence is committed by an employee or a subordinate.

The French authorities recalled that the conditions for implementation of the criminal responsibility of legal persons are flexible and comprehensive enough to encompass numerous situations. They believe that the situations that could give rise to an exclusion of liability would relate to problems of proof and not to a restrictive interpretation of the conditions for implementation of the criminal responsibility of legal persons.

The Group considers that this question should be re-examined in Phase 2.

## **Jurisdiction**

The Working Group noted that French law provides for both territorial jurisdiction and jurisdiction based on nationality, the latter being subject to the condition of dual criminality. In this latter case, proceedings may be initiated only after a complaint has been lodged with the French authorities by the victim or after an accusation made by the authority of the country in which the bribery took place. The Working Group considered that if the term “victim” applies only to the country of the foreign public official, this could restrict the effective exercise of jurisdiction based on nationality.

On this point, the French authorities refer to the details and their description of French case law provided for in paragraph 4.2.1. of the report.

The Group urged France to review its application of nationality jurisdiction in light of Article 4.4 of the Convention.

## **Rules for instituting prosecutions**

Prosecutions concerning the bribery of foreign public officials under the OECD Convention, unlike the case of the bribery of French or EU public officials, can be initiated solely by the public prosecutor’s office, regardless of where the offence took place. This excludes the possibility of an action being brought automatically by the victim, even if the offence was committed in France. The French authorities stated that this provision already exists in French law with regard to offences committed entirely abroad.

The Working Group nevertheless expressed reservations whether this differential treatment complies with the spirit of Article 5. Its impact on the effectiveness of prosecutions will be assessed in Phase 2.

## **Statute of limitations**

The Working Group expressed concerns with regard to the fact that the statute of limitations in France for the bribery of foreign public officials is three years, even though it may be interrupted or suspended. France drew the Group’s attention to the fact that under case-law on “concealed” offences, the statute of limitations only begins to run from discovery of the unlawful acts. The courts have not so far, however, ruled on whether bribery constitutes such an offence.

Article 6 of the Convention provides that an adequate period of time shall be allowed for investigations and prosecutions. The Group noted the explanations by the French Delegation but considered that this matter, already mentioned in previous reviews, constitutes a general problem calling for a comparative analysis of the legal situation in Member countries with a view to ensuring the coherent and effective implementation of the Convention.