Financial crime in France: overview

by *Antoine Kirry*, *Frederick T Davis and Alexandre Bisch*, ***Debevoise & Plimpton LLP***

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Fraud

Regulatory provisions and authorities

1. What are the main regulatory provisions and legislation relevant to corporate fraud?

"Fraud" is not a separately defined crime under French law, and there is no exact equivalent of the "mail fraud" and "wire fraud" provisions of the US Criminal Code (*18 U.S.C sections 1341 and 1343*). Rather, fraudulent conduct can be an element of various criminal provisions arising under the Criminal Code (*Code Pénal*).

Offences

2. What are the specific offences that can be used to prosecute corporate fraud?

The following are the offences most likely to be applicable to business or corporate fraud. The list does not address, for example, criminal offences such as common "theft".

- **Swindling (*escroquerie*).** Swindling consists of depriving a physical person or a company of money or a thing of value, or of services, or inducing the discharge of a debt by trickery, including by use of a false name, identity or pretences (*Article 313-1, Criminal Code*).
- **Breach of trust (*abus de confiance*).** Breach of trust consists of the misappropriation of funds or property that were received on the understanding that they would be handled in a certain way (*Article 314-1, Criminal Code*).

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- **Taking advantage (*abus de faiblesse*).** Taking advantage means causing a victim to act, or abstain from acting, in a way that causes them injury, by taking advantage of a state of ignorance, weakness or vulnerability, including the use of psychological pressure (*Article 223-15-2, Criminal Code*).
- **Extortion (*extorsion*).** Extortion consists of obtaining anything of value (information, funds, signatures and so on) by violence or the threat of violence (*Article 312-1, Criminal Code*).
- **Bankruptcy fraud (*organisation frauduleuse de son insolvabilité*).** This is the misstatement by a debtor of his financial position in the context of a bankruptcy (*Article 314-7, Criminal Code*).
- **Money laundering (*blanchiment*).** This consists of fraudulently hiding the origin or nature of funds or property (*Article 324-1, Criminal Code*) (*see Question 19*).
- **Falsification (*faux*).** This is the fraudulent alteration of the veracity of a document or other medium that creates a right or obligation (*Article 441-1, Criminal Code*).
- **Tax fraud (*fraude fiscale*).** This is tax evasion, including a material element (taking or attempting to take steps designed unlawfully to minimise taxes) and an element of intention (knowledge that the tax is due) (*Article 1741, General Tax Code (Code Général des Impôts)*).
- **Misuse of corporate funds (*abus de biens sociaux*).** This applies to corporate managers who directly or indirectly use corporate property for purposes inconsistent with the interest of the company they manage (*Articles L241-3 and L242-6, Commercial Code* (*Code de Commerce*)).
- **Consumer fraud (*tromperie*).** This is deceiving a purchaser as to the nature, quality, quantity or appropriateness of merchandise (*Article L213-1, Consumer Code* (*Code de la Consommation*)).

Enforcement

3. Which authorities have the powers of prosecution, investigation and enforcement in cases of corporate or business fraud? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

Authorities

Criminal violations are divided into three categories, which determine applicable procedures, and participants in the process. High crimes (*crimes*) are criminal matters punishable by more than 10 years in prison. Ordinary crimes (*délits*) are violations punishable by imprisonment between two months and 10 years and by financial penalties. Misdemeanours (*contraventions*) are violations punishable by financial penalties. Most business crimes fall within the ordinary crime category.

High crimes are always pursued by an Investigating Magistrate and are tried before a mixed jury in a special court (*cour d'assises*). Ordinary crimes are generally pursued by the Public Prosecutor, with an Investigating Magistrate (*Juge d'Instruction*) being appointed in case of complex violations.

In December 2013, the laws for tax fraud and financial crimes were reformed, and a new prosecutorial office for financial matters was created (*Parquet National Financier*). This prosecutorial office aims to take the lead

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in complex financial crimes, including those where the victims are "geographically dispersed", for example, in international fraud cases.

For more information on the Public Prosecutor, the Investigating Magistrate see box: *The authorities*.

Prosecution powers

The Public Prosecutor, working with police agencies (including those with special expertise), investigates criminal activity arising under the criminal code and other criminal laws. On completion of an investigation, a matter deemed to be supported by evidence will be referred to trial, generally before the first instance criminal court (*Tribunal correctionnel*) for a trial without a jury.

In unusually complex or large cases, the Public Prosecutor may refer the matter to an Investigating Magistrate who then conducts an investigation and decides whether to refer the matter to trial.

Under some circumstances, victims can apply to an Investigating Magistrate for a criminal investigation, and may participate in it (and in a trial) as "civil parties" (*parties civiles*). Under certain circumstances, a non-governmental organisation with a pre-existing demonstrable interest in the subject matter may also be considered a civil party to a criminal investigation.

The procedures governing such investigations and trials are found in the French Code of Criminal Procedure (*Code de Procédure Pénale*).

Although French law does not provide a specific requirement that either a corporation or its officers must report criminal activity of which they have knowledge, auditors face criminal penalties if they fail to report such information. Any French public servant must report high crimes or ordinary crimes to the Public Prosecutor's office (*Article 40, Code of Criminal Procedure*).

Both the Public Prosecutor and the Investigating Magistrate, who work in conjunction with the police, have a full range of investigative powers.

Powers of interview

During an investigation a suspect can, on a voluntary basis, be questioned by the police for no more than 4 hours (*audition libre*). The suspect, who is not deprived for his liberty, is always free to leave. If the suspected infraction carries a prison sentence, the suspect is entitled to legal assistance.

The Public Prosecutor can summon a suspect for questioning under a custody procedure (*garde à vue*), where the suspect can be held for a period of 24 hours (subject to several renewal periods depending on the severity of the suspected offence), during which he has the right to the presence of an attorney. A person may be taken into such a custody only if there are one or more plausible reasons to suspect that he has committed or attempted to commit a crime or offense punishable by a prison sentence.

The Investigating Magistrate can summon any witness whose testimony appears useful. He can ask the police to question a suspect under the above mentioned custody procedure. And where there are serious and consistent indications that the suspect participated in the alleged infraction, the latter is summoned before Investigating Magistrate and formally put under investigation (*mis en examen* status).

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Non-compliance with investigative demands can lead to several consequences. For a police investigation or a criminal investigation led by an Investigating Magistrate, non-compliance with a specific order can result in immediate arrest and other criminal consequences (*Penalties*). Other regulators that require either systematic reporting or conduct their own investigations have their own rules relating to non-compliance, which will vary according to the severity of the conduct and whether or not the conduct was intentional.

Powers of search/to compel disclosure

The Public Prosecutor and the Investigating Magistrate can conduct dawn raids on premises and seize documents.

Powers to obtain evidence

The Public Prosecutor and the Investigating Magistrates have broad powers to obtain evidence, including evidence held by third parties, for instance: interviews of targeted person or third-parties, conduct dawn raids, obtain wiretaps and data held by telecommunication operators.

Authorities have power to obtain evidence abroad. The Ministry of Justice has an Office for International Co-operation on Criminal Matters (*Bureau de l'Entraide Pénale Internationale*) which facilitates such co-operation, often under mutual legal assistance treaties (MLATs) or memoranda of understanding (MOUs).

In May 2017, the European Investigation Order (*Décision d'Enquête Européenne*) entered into force (Articles 694-15 to 694-49, Code of Criminal Procedure). This new tool created by EU Directive 2014/41/EU of April 3, 2014 aims to simplify and speed up cross-border criminal investigations in the EU. It enables judicial authorities in one EU member state to request that evidence be gathered and transferred from another EU member state. This new instrument replaces the existing fragmented legal framework for obtaining evidence within the EU.

Power of arrest

A suspect can be arrested and held for a period of 24 hours (subject to renewal periods) for questioning if there are one or more plausible reasons to suspect that he has committed or attempted to commit a crime or offense punishable by a prison sentence (*garde à vue* mentioned above).

A suspect under formal investigation by an Investigating Magistrate (*mis en examen*) for an infraction that carries a prison sentence may also be placed "under judicial control" (*contrôle judiciaire*). One measure that may be ordered as part of that control is the provision of a bond as a security. Providing a bond is only one of several measures, including measures that would restrict liberty, with which an individual under judicial control may be ordered to comply. The bond can be used to secure the appearance or the representation of an individual before the court or the reparation of damage caused by the infraction.

An individual under formal investigation for an infraction that carries a sentence of three years' prison minimum can be taken into pre-trial custody for a 4-month period (subject to several renewal periods).

Court orders or injunctions

In the course of an investigation, courts have no authority to issue orders or injunctions. The Public Prosecutor can, in his initial submission and at any point during an Investigating Magistrate procedure, ask that the latter undertake all acts that are necessary to understand the truth, including any measures that are necessary to provide a security

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(*Article 82, Criminal Procedure Code*). The Investigating Magistrate carries out all acts which he deems necessary for his investigation and issues orders accordingly.

4. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

If no Investigating Magistrate is appointed, the Public Prosecutor has the authority to charge and turn the case over for trial before the first instance criminal court (*citation directe*).

In complex cases, the Public Prosecutor may request the presiding judge of the local court to appoint an Investigating Magistrate. The Public Prosecutor determines the scope of the Investigating Magistrate's treatment of the case.

If the Investigating Magistrate decides there are important and consistent indications of culpability of a particular legal person (including a company or other entity), that person or entity is put under formal investigation (*mise en examen*). At that point, the party has a right to engage in all of the following actions:

- Accessing the file compiled by the Investigating Magistrate.
- Filing formal demands with the Investigating Magistrate. The party can, for example, request the appointment of an expert to give an opinion on a particular issue, or the exploration of further aspects of the case.
- Submitting observations relevant to the Investigating Magistrate's ultimate decision as to whether to turn the case over to the court.

After the completion of the Investigating Magistrate's investigation of the case, the Public Prosecutor issues a non-binding submission that either there is no sustainable case and, as a result, the charges should be dropped or that the case should be turned over to the court for trial. The Investigating Magistrate must then give his final closing order and has the discretion to either drop some or all of the charges or to turn the case over for trial.

The parties can, through a written and reasoned request, ask the Investigating Magistrate to accomplish acts which include, for example, proceeding with a hearing or an interview, interviewing a witness, ordering the production of a document or exhibit, or ordering any other acts that are necessary to establish the truth. If the Investigating Magistrate does not grant a party's request, a decision to that effect will be issued, at the latest, one month after the request is received. If the individual who makes such a written request is the individual under formal investigation, following the expiration of four months from the time of that individual's last appearance, he or she must be heard by the Investigating Magistrate. The Investigating Magistrate must proceed with an interview of the individual under formal investigation within thirty days of the receipt of a properly made request.

Since March 2004, a pre-trial guilty plea procedure also exists for most ordinary crimes, including business crimes (*comparution sur reconnaissance préalable de culpabilité*) (*Articles 495-7 to 495-16, Code of Criminal Procedure*). The procedure can be initiated by the Public Prosecutor, on his own initiative or at the request of the suspect or, under certain conditions, by an Investigating Magistrate *(Article 180-1, Code of Criminal Procedure)*. The suspect agrees to plead guilty to a particular charge in return for a more lenient sentence. The Public Prosecutor can propose

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a prison sentence not exceeding 1 year and a fine not exceeding the maximum amount faced before the criminal court. If the suspect accepts the agreement, it still needs to be approved by the court. If the suspect refuses it, the case will be tried in the normal way. In January 2016, a guilty plea was successfully used for the first time in a white-collar crime involving a bank charged with tax evasion laundering.

Conviction and sanctions

5. What are the sanctions for participating in corporate fraud?

Civil/administrative proceedings or penalties

The business and corporate frauds listed above (see *Question 2*) are ordinary criminal offences. Civil and administrative sanctions do not apply.

Criminal proceedings

The maximum sentences permitted under the penal statutes are:

- **Swindling.** Five years' prison and/or a EUR375,000 fine.
- **Breach of trust.** Three years' prison and/or a EUR375,000 fine.
- **Taking advantage.** Three years' prison and/or a EUR375,000 fine.
- **Extortion.** Seven years' prison and/or a EUR100,000 fine.
- **Bankruptcy fraud.** Three years' prison and/or a EUR45,000 fine.
- **Money laundering.** Five years' prison and/or a EUR375,000 fine.
- **Falsification.** Three years' prison and/or a EUR45,000 fine.
- **Tax fraud.** Five years' prison and/or a EUR500,000 fine.
- **Misuse of corporate funds.** Five years' prison and/or a EUR375,000 fine.
- **Consumer fraud.** Two years' prison and/or a EUR300,000 fine.

Judges have discretion to impose sentences up to the maximum amount. Under certain circumstances, such as recidivism or aggravating elements (such as taking advantage of a minor) enhanced sanctions may be applicable.

The principal sanction incurred by corporate entities is a fine (*Articles 131-37 to 131-39, Criminal Code*). The maximum amount of a fine is five times that which is applicable to natural persons. In case of high crimes (*crimes*) when the law makes no provision for a fine to be paid by a natural person, the fine incurred by a corporate entity is EUR1 million.

Corporate entities can also be punished by one or more of the following penalties:

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- Dissolution, where the legal person was created to commit a high crime (punishable by more than ten years' imprisonment for individuals) or where it was diverted from its objects to commit an ordinary crime that carries a sentence of imprisonment of three years or more.
- Prohibition from exercising, directly or indirectly, one or more social or professional activities, either permanently or for a maximum of five years.
- Placement under judicial supervision for a maximum of five years.
- Permanent closure or closure for up to five years of one or more of the company's establishments that was used to commit the offences in question.
- Disqualification from public tenders, either permanently or for a maximum of five years.
- Prohibition from offering securities to the public or listing securities on regulated markets, either permanently or for a maximum of five years.
- Prohibition from drawing cheques (except those allowing the withdrawal of funds by the drawer from the drawee, or certified cheques) and prohibition from using payment cards, for a maximum of five years.
- Confiscation of property that was used or intended for the commission of the offence, or of resulting property.
- Posting a public notice of a decision or disseminating a decision in the written press or using any form of communication to the public by electronic means.

An individual who is under formal investigation for an infraction that carries a penalty of imprisonment may be placed under judicial control. One measure that may be ordered in that context is the provision of a bond as a security. Under extreme circumstances, generally involving a risk of flight, a person under investigation may be detained (*see Question 3*).

Civil suits

Civil parties (*see Enforcement*) can participate as parties in a criminal proceeding through trial (and appeal) and be awarded damages by the same court that decides on the issue of criminal responsibility. In the absence of such a proceeding, victims can commence a separate civil suit. Their damages are generally limited to actual losses and to lost opportunities (*perte de chance*). The court may also impose general damages not linked to a specific loss, called "moral damages" (*préjudice moral*) to compensate the victim for mental anguish or distress. Punitive damages do not exist under French law, but the question is currently under discussion after the notion of "civil penalty" has been introduced in the reform bill on civil liability presented by the French Ministry of Justice on March 2017.

In some limited circumstances, a "foundation" or other group may be established to seek compensation for its participants, generally in the area of consumer injuries. On 17 March 2014, French law introduced an opt-in system class action proceeding available for individual consumers. Consumers can only bring the class action through a consumer association registered under French law and they may only seek remedies for the material loss they have suffered (damages for physical or moral loss may be recovered only through individual lawsuits). Before 2016; this proceeding applied to consumer and competition law violations only. It has recently been extended to cases of discrimination, damages caused to the environment and breach of the data protection law.

Safeguards

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6. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

The conduct of criminal investigations is subject to provisions from the European Convention on Human Rights, the French Constitution and the French Code of Criminal Procedure. When led by a Public Prosecutor, the conduct of investigations is discussed during the trial. When an Investigating Magistrate is appointed to lead the proceeding, the conduct of investigations may be reviewable prior the trial by the Investigating Chamber (a dedicated chamber of the Court of Appeals).

The professional secrecy (*secret professionnel*), the French near equivalent of the attorney-client privilege, protects all communications between lawyers and their clients from being disclosed. A lawyer may not violate the professional secrecy, even if the client provides his permission. If a lawyer violates the privilege, he may be subject to criminal and professional sanctions. The professional secrecy therefore provides significant protection to individuals under investigation.

Pursuant to Article 11 of the Code of Criminal Procedure, the investigation phase by the Public Prosecutor or the Investigating Magistrate is secret. Only formal participants in the investigation (magistrates, clerks, police officers, experts) are bound by that secrecy, but the accused, the victim, and journalists are not. Lawyers are not bound by the aforementioned Article 11, but by Article 2bis of the national code of ethics (*Règlement Intérieur National*), which provides for a similar secrecy obligation. Copies of documents from the file cannot be automatically be shared by a lawyer with his client, but only under specific conditions laid down in Article 114 of the Code of Criminal Procedure. The violation of the secret can be criminally penalized by a one year' prison sentence and a EUR15,000 fine (*Article 226-13, Criminal Code*).

Bribery and corruption

Regulatory provisions and authorities

7. What are the main regulatory provisions and legislation relevant to bribery and corruption?

Passive and active corruption are unlawful under French law. Passive corruption occurs when a domestic or foreign public official or private actor unlawfully solicits a bribe either directly or indirectly. Active corruption occurs when another person either directly or indirectly unlawfully induces, or attempts to induce, a domestic or foreign public official or private actor to accept a bribe (*Articles 433-1, 433-2, and 433-3, Criminal Code*).

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Attempt of corruption does not constitute a specific offence. Corruption however exists as soon as a bribe is proposed or solicited, regardless of its acceptance by the counterpart.

French Public Prosecutors have only infrequently attempted to prosecute companies for overseas corruption and, when they do attempt such prosecution, they are not often successful. In September 2012, the French Public Prosecutors counted their first victory in successfully prosecuting an overseas corruption case against Safran before the Paris first instance criminal court. But in January 2015, the Paris court of appeal overturned the company's conviction. In July 2013, the Paris first instance criminal court found two companies and several individuals not guilty of active corruption charges for allegedly having circumvented the U.N. Oil For Food program in Iraq. In February 2016, however, the Paris court of appeal overturned the judgment and found them guilty of active corruption of foreign public officials. On June 2015, in a related case, the Paris first instance criminal court found 14 companies not guilty of active corruption of foreign public officials. In October 2016, the Paris first instance criminal court found an individual guilty of active corruption of a foreign public official (an official of Algerian public company).

In December 2016, France adopted a new anti-bribery law known as the "Sapin II Law". Pursuant to this law, in substance, companies operating in France with more than 500 employees, whose annual turnover is more than EUR100 million are required to implement compliance programs to detect corruption. The law also creates a new anti-corruption agency (*Agence française anticorruption)* which will supervise the implementation of corporate compliance programmes and can impose regulatory sanctions of up to EUR200,000 against directors and EUR1 million against companies for failure to have appropriate compliance measures. It also provides a new procedure for corporations – but not individuals – accused of corruption or certain money laundering offences to negotiate an outcome without a judgment of conviction (known as the French deferred prosecution agreement).

8. What international anti-corruption conventions apply in your jurisdiction?

France is a party to two international anti-corruption conventions:

- OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions 1997.
- UN Convention Against Corruption 2003, ratified in France in 2005.

France is also a party to two Council of Europe Corruption Conventions:

- Civil Law Convention on Corruption 1999, ratified in France in 2008.
- Criminal Law Convention on Corruption 1999, ratified in France in 2008.

France is a party to the Convention on the fight against corruption involving officials of the European Communities or officials of member states of the EU, which entered into force on 28 September 2005. France implemented the Convention in Articles 435-1 through 435-4 of the Criminal Code.

France has also adopted Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (*Article 445-1, Criminal Code*).

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Offences

9. What are the specific bribery and corruption offences in your jurisdiction?

Foreign public officials

Passive and active corruption of foreign public officials are criminal offences (*Articles 435-1 and 435-3, Criminal Code*). A foreign public official is defined as an officer or employee of a foreign government or international organisation.

Active and passive corruption of international judicial personnel is also unlawful (*Articles 435-7 and 435-9, Criminal Code*).

The Sapin II Law of December 2016 introduced a new criminal offence of influence peddling of foreign public officials (*Article 435-2, Criminal Code*).

Domestic public officials

The core offence of bribery is defined as unlawfully making, at any time, directly or indirectly, any offer, promise, donation, gift or reward, to induce a person holding public authority, discharging a public service mission, or vested with a public electoral mandate to either:

- Carry out or abstain from carrying out an act pertaining to his office, duty or mandate, or which is facilitated by his office duty or mandate.
- Abuse his real or apparent influence with a view to obtaining advantages, employment, contracts or any other favourable decision from a public authority or the government (*Article 433-1, Criminal Code*).

It is also an offence for such a person to, directly or indirectly, solicit such offers, promises, donations, gifts or rewards.

Private commercial bribery

Active and passive bribery of a private person to abuse a contractual relationship or relationship of trust is punishable by five years' imprisonment and a fine of up to EUR500,000 (*Articles 445-1 and 445-2, Criminal Code*).

Intent

Article 121-3 of the Criminal Code requires intent as a basis for criminal conviction. It also contains provisions defining the level or specificity of the intent required in a particular case to increase the maximum penalty.

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Defences

10. What defences, safe harbours or exemptions are available and who can qualify?

Facilitation payments are illegal. There are no safe harbours or exemptions. A defence can be raised based on absence of intent or the failure to establish the material elements of a corruption offence. Another defence, available to corporations, is to argue that the acts were not committed by an "organ or representative" capable of binding the corporation (*Article 121-2, Criminal Code*).

11. Can associated persons (such as spouses) and agents be liable for these offences and in what circumstances?

Associated persons and agents are not liable as such for corruption. However, French law does recognise the principle of "aiding and abetting" (*complicité*), by which an agent who directs or helps a principal in accomplishing a criminal act may also be liable for it (*Articles 121-6 and 121-7, Criminal Code*).

Enforcement

12. Which authorities have the powers of prosecution, investigation and enforcement in cases of bribery and corruption? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

The Public Prosecutor is generally responsible for initiating prosecution and investigating criminal offences. In complex cases of corruption an Investigating Magistrate is usually appointed (*see Question 3*).

In the context of acts of corruption of a foreign public official committed abroad, the Sapin II Law of December 2016 provides that the Public Prosecutor no longer has a monopoly on initiating the prosecution. Associations fighting corruption will be able to file a complaint with an Investigating Magistrate in order to trigger such prosecution.

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French courts may generally exercise extra-territorial jurisdiction over offences committed outside French territory by or against French nationals, including corporations (*Article 113-6 and 113-7, Criminal Code*). The Sapin II Law has extended that extra-territorial reach in the context of acts of corruption: French law now applies to acts of corruption committed abroad so long as the perpetrator is a French national, a French resident or someone conducting, in whole or in part, business in France (regardless of the nationality of the victim).

International investigations are often especially long, particularly since most of them are conducted by Investigating Magistrates who are highly professional but understaffed. Compared with the active prosecution of internal corruption cases, instances of the French courts' prosecution of foreign corruption cases have been few and far between (*see Question 4*).

While France has not been active investigating or prosecuting foreign corruption itself so far, it co-operates with US and other countries' efforts in this area. The Ministry of Justice has an Office for International Co-operation on Criminal Matters (*Bureau de l'Entraide Pénale Internationale*) which facilitates such co-operation, often under mutual legal assistance treaties (MLATs) or memoranda of understanding (MOUs).

For more information on the Public Prosecutor and Investigating Magistrate, see box: *The authorities*.

Court orders or injunctions
See *Question 3*.

13. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

See Question 3. When no Investigating Magistrate is appointed, the Public Prosecutor has the authority to charge and turn the case over for trial before the criminal court. When an Investigating Magistrate is appointed, he decides whether to turn the case over for trial. A guilty plea procedure is also possible.

In the specific context of corruption, influence peddling and laundering of the proceeds of tax fraud, the Sapin II Law of December 2016 introduced a new procedure called a "Judicial Convention in the Public Interest" (*convention judiciaire d'intérêt public*) which is roughly similar to a Deferred Prosecution Agreement in the US and the UK. It permits a Public Prosecutor to propose an agreement whereby a corporation, without admission of guilt, agrees to pay a fine that may be as high as 30 per cent of annual turnover, and may agree to certain other obligations such as an enhanced compliance programme and supervision by a monitor. If an Investigating Magistrate leads the investigation and the corporation is under formal investigation (*mise en examen*) an agreement can only be proposed once the Investigating Magistrate has concluded that there exist facts sufficient to constitute the commission of a criminal offence. The agreement must also be approved by any victims formally identified as civil parties and must provide for their compensation. The agreement is then presented to a judge who must evaluate whether the agreement is in the public interest. The agreement does not have the effect of a conviction. If the corporation observes

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the terms of the agreement for a period of three years, the charges are dismissed, giving the corporation protection against prosecution in France.

Conviction and sanctions

14. What are the sanctions for participating in bribery and corruption?

Civil/administrative proceedings or penalties

Bribery is a criminal offence and civil and administrative sanctions do not apply.

Criminal proceedings

An individual under formal investigation for corruption may be subject to measures that could restrict his or her liberty and may be ordered to pay a bond in order to guarantee his or her appearance in court or to secure the reparation of damages caused by the alleged crime (*see Question 3*).

Individuals and corporate entities that are convicted for active corruption of public officials may be subject to the following fines and prison sentences:

- Individuals: ten years' imprisonment and a fine up to EUR1 million or double the amount gained.
- Corporate entities: a fine up to EUR5 million.
- Public officials that are convicted for passive corruption may be subject to ten years' imprisonment and a fine up to EUR1 million.
- Corporate entities can also be punished by one or more of the penalties mentioned in question 5 above. They can also be compelled to implement, under the control of the French Anti-Corruption Agency, a compliance program for a maximum period of five years (*Article 131-39-2, Criminal Code*). Where a company fails to implement a compliance program, the Agency may either issue a warning or impose a fine of up to EUR1 million on the company and of up to EUR200,000 on any director.

Safeguards

15. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

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See Question 3.

Tax treatment

16. Are there any circumstances under which payments such as bribes, ransoms or other payments arising from blackmail or extortion are tax-deductible as a business expense?

Bribes, ransoms or payments arising from blackmail and extortion are not tax-deductible in France.

Insider dealing and market abuse

Regulatory provisions and authorities

17. What are the main regulatory provisions and legislation relevant to insider dealing and market abuse?

For many years, market abuses were prosecuted and sanctioned by both the criminal justice and the Financial Markets Authority (AMF). In a landmark decision of March 18, 2015 the French Constitutional Court (*Conseil Constitutionnel*) reversed that long standing position of French law.

A law passed on June 21, 2016 now ensures that suspects of financial market abuses are subject to one type of prosecution only, either criminal prosecution by the Public Prosecutor/Investigating Magistrate or administrative prosecution by the AMF (*Article L465-3-6 of the Monetary and Financial Code*).

From July 2016, market abuses prosecuted by the AMF are governed by EU Regulation n°596/2014 of April 16, 2014 and by provisions of the Sixth Part of the General Regulation of the AMF. Market abuses that are criminally prosecuted are mainly governed by the Monetary and Financial Code (*Articles L465-1 to L465-3-6 of the Monetary and Financial Code*).

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Offences

18. What are the specific offences that can be used to prosecute insider dealing and market abuse?

Insider trading
The offence of insider trading is committed when a party deals – or recommend that another person deal – in securities on the basis of inside information, that is, information that is not publicly known and which would affect the price of the securities if it were made public.

The prohibition of insider trading applies to any person who possesses inside information as a result of: (a) being a member of the administrative, management or supervisory bodies of the issuer; (b) having a position in the capital of the issuer; (c) having access to the information through the exercise of an employment, profession or duties; or (d) being involved in criminal activities.

The prohibition also applies to any other person who possesses inside information under circumstances where that person knows or ought to know that it is inside information.

Market manipulation and misleading statements
The offence of market manipulation basically applies to whoever:

- enters into a transaction which gives false or misleading signals to the market or secures the price of a financial instrument at an abnormal or artificial level;
- enters into a transaction which affects the price of a financial instrument, which employs a fictitious device or any other form of deception or contrivance;
- disseminates information which gives false or misleading signals to the market or is likely to secure the price of a financial instrument at an abnormal or artificial level, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.

Intent
Awareness of breaking the law is required to establish criminal offences (*Articles L465-1 to L465-3-6 of the Monetary and Financial Code Article 121-3, Criminal Code*), but usually not to establish administrative offences.

Attempt
Attempt of market abuses is punishable both before criminal courts (*Articles L465-1 to L465-3-3 of the Monetary and Financial Code*) and the AMF (Article 15 of EU Regulation n°596/2014).

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Defences

19. What defences, safe harbours or exemptions are available and who can qualify?

Article 9 of EU Regulation n°596/2014 provides a list of legitimate uses of inside information and Article 13 provides a list of accepted market practices that do not constitute market manipulations.

Enforcement

20. Which authorities have the powers of prosecution, investigation and enforcement in cases of insider dealing and market abuse? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

Authorities

Market abuses are subject to one type of prosecution only, either criminal by the Public Prosecutor/Investigating Magistrate or administrative by the AMF (*see Question 17*).

After a first-level investigation is carried out (usually by the AMF investigators), the AMF and the Public Prosecutor choose between criminal or administrative prosecution.

If authorities consider the gravity of the alleged wrongdoing is such that it deserves a prison sentence, then the case will be prosecuted criminally. To date, the vast majority of market abuses cases have been prosecuted by the AMF.

From 2014, the new national prosecutorial office for financial matters (*Parquet National Financier*) has exclusive jurisdiction over the criminal investigation of market abuses. However, for complex cases, the Investigating Magistrate may also be involved in the investigation.

Prosecution powers

In case of criminal prosecution, the Public Prosecutor and Investigating Magistrate have no special powers that are granted in relation to market abuses (for general powers, see *Question 3*).

The AMF can, without prior judicial authorization, request the delivery of any documents on a voluntary basis, access business premises and obtain documents and correspondence (including e-mail correspondence) or make

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copies of any such material, including copies of audio portions of documents, and can summon individuals to attend interviews.

The AMF can also require data held by telecommunication operators. But in a decision of July 2017, the Constitutional Court ruled this procedure unconstitutional as it does not provide guarantees to ensure a balance between the right to respect one's private life and the prevention of offences. The Court however postponed the suppression of the law to December 31, 2018, so the Parliament has time to pass a new law.

When the AMF is investigating facts that are susceptible of being qualified as a criminal market abuse, it may request the authorisation of a judge to undertake searches and seizures in any location and collection of documents, and may request immediate explanations from individuals during the search.

Powers of interview

For powers of interview in the context of a criminal proceeding, see *Question 3*.

In the context of administrative proceeding, the AMF can require the appearance of any person who could provide information (see above).

Powers of search/to compel disclosure

In case of criminal proceeding, see above *Question 3*.

Powers to obtain evidence

In case of criminal proceeding, see above *Question 3*. In case of administrative proceeding, see above. The AMF can obtain evidence through international cooperation (MLAT and MMOUs).

Power of arrest

In case of criminal proceeding, see above *Question 3*. In case of administrative proceeding, the AMF has no power of arrest of any sort.

Court orders or injunctions

In case of criminal proceeding, see above *Question 3*.

The AMF Sanction Committee has no authority to issue orders or injunctions in the course of an AMF investigation. The AMF may, in a non-adversarial procedure, ask the President of the Paris first instance court to sequester funds, things of value, and rights or titles of individuals who are under investigation. In an urgent and adversarial procedure, the President of the Paris first instance court may order the deposit of a sum of money as a security (*Article 621-13, Monetary and Financial Code*).

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21. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

When the alleged market abuse is criminally prosecuted, the decision to charge is made by the Public Prosecutor or the Investigating Magistrate (*see Question 4*).

In case of administrative proceeding, the board of the AMF acts as the investigating and prosecuting authority. The board makes the decision to charge after it has reviewed both the report drafted by the investigators and the written explanations submitted by the suspect.

Conviction and sanctions

22. What are the sanctions for participating in insider dealing and market abuse?

Civil/administrative proceedings or penalties

The AMF Sanction Committee can impose administrative sanctions for market abuses. The administrative penalties imposed can be disciplinary and/or pecuniary and can reach EUR100 million or ten times the amount of the profit or, for legal entities, 15% of the annual consolidated turnover.

A decision by the AMF Sanctions Committee may be challenged before the Paris court of appeals or the *Conseil d'Etat* (depending on the status of the sanctioned person), which review the factual findings and the legal reasoning of the AMF Sanction Committee.

Criminal proceedings

Requirement to pay a bond. An individual under formal investigation for market abuse may be subject to measures that could restrict his or her liberty and may be ordered to pay a bond in order to guarantee his or her appearance in court or to secure the reparation of damages caused by the alleged crime (*see Question 4*).

Penalties. Any person convicted of the crime of market abuse can be sentenced by a criminal court to five years' imprisonment (for individuals) and a EUR100 million fine (*Article L465-1, Monetary and Financial Code*) (a corporation may have a fine imposed). The fine may be increased to up to ten times the amount of the profit of the offence and must never be less than the amount of that profit.

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Civil suits

In case of criminal proceeding, parties that have suffered damages can seek to participate as "civil parties" before the criminal court (*see Enforcement*).

In case of administrative proceeding, parties that have suffered damages can only seek compensation before civil courts (not before the AMF).

Safeguards

23. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

In case of criminal investigation, see *Question 6*.

Conduct of the AMF investigations is first reviewed by the AMF Sanction Committee. If the decision is challenged, it is then reviewed by the Paris court of appeals and the Cassation court or by the *Conseil d'Etat* (depending on the status of the sanctioned person).

Communications between attorneys and their clients are covered by the professional secrecy (the French near equivalent of the attorney-client privilege). Such communications may not be seized by the AMF and a lawyer may not waive the privilege. The AMF may obtain information covered by professional secrecy only if the client independently decides to provide the privileged communication without the intervention of his or her lawyer in the communication (*Article 621-9-3, Monetary and Financial Code*).

Money laundering, terrorist financing and financial/trade sanctions

Regulatory provisions and authorities

24. What is the main legislation and regulatory provisions relevant to money laundering, terrorist financing and/or breach of financial/trade sanctions?

Money laundering

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Money laundering and terrorist financing acts are unlawful in France. To reduce the risk of money laundering and terrorist financing activities, mandatory reporting requirements apply to many financial sector professionals.

Terrorist financing
See above, *Money laundering*.

Financial/trade sanctions
The French Ministry of Foreign Affairs is responsible for French foreign policy, including financial and trade sanctions. The French Ministry of Economics and Finance implements these sanctions. Trade and financial sanctions may be put into place in accordance with UN Security Council Resolutions, which are implemented by EU Regulations. EU Regulations are directly applicable in France. Sanctions can be implemented by decree (*Articles L151-1 and L152-2, L562-1 and L562-2, Monetary and Financial Code*).

Legislation relating to trade sanctions varies significantly from country to country, and over time as the French government responds to diplomatic and economic international issues. It is therefore necessary to consult with a specialist to determine risks that may be posed by doing business with any particular country at any point in time.

Offences

25. What are the specific offences that can be used to prosecute money laundering, terrorist financing and breach of financial/trade sanctions?

Money laundering
The material elements of the offence of money laundering are (*Article 324-1, Criminal Code*):

- Facilitating by any means the false justification of the origin of the property or income of a perpetrator of a high crime (*crime*) or ordinary crime (*délit*) that brings the perpetrator a direct or indirect benefit.
- Assistance in investing, concealing or converting the direct or indirect products of a high crime or ordinary crime.

Since December 2013, the goods or revenue are presumed to be the product of a high crime or secondary crime when the material, judicial or financial conditions of the operation of placement, of dissimulation, or of conversion could not have a justification other than to conceal the origin or the effective beneficiary of the goods or revenues (*Article 324-1-1, Criminal Code*). With this reform, the burden of proof is reversed and it is the accused that must prove the legality of the funds or goods in question.

Money laundering is not a strict liability offence. Intent must also be established, which requires proving that the accused acted with the requisite intent to commit the crime (*Article 121-3, Criminal Code*).

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Attempted money laundering is subject to the same penalties as money laundering (*Articles 121-5 and 324-6, Criminal Code*).

Terrorist financing

Financing a terrorist enterprise by supplying, bringing together or directing funds, value or goods, or in giving counsel to that end, with the intention or understanding that such will be used, fully or in part, to commit one or more acts of terrorism under the Criminal Code, is punishable, independent of the occurrence of an actual terrorist act (*Article 421-2-2, Criminal Code*).

Financial/trade sanctions

Customs Code offences. Contravention or attempted contravention of the legislation and regulations of foreign financial relations constitutes an offence, which may be established based on the following elements (*Article 459, para. 1, Customs Code*):

- Failure to respect obligations of declaration and repatriation.
- Failure to observe the procedures prescribed or the formalities required.
- Failure to provide required authorisations or not satisfying the conditions under which the authorisations were made.

The following actions are also offences:

- Violation or attempted violation of the restrictive measures on economic relations set out by EU Regulations made in application of Article 215 of the Treaty on the Functioning of the European Union (TFEU) or by international treaties and agreements approved and ratified by France (*Article 459, para. 1 bis, Customs Code*).
- Incitement by writing, propaganda or publicity to commit one of the offences set out by the Customs Code, whether or not it resulted in the infraction being committed (*Article 459, para. 3, Customs Code*).

Offences under the Monetary and Financial Code. It is an offence for the following parties to fail to comply with their resulting obligations or to create an obstacle to their implementation:

- The leaders or employees of a financial organisation.
- Organisations and institutions referenced by Article 562-4, including a relatively extensive list of professionals and entities which include, for example, legal professionals and certain investment companies.
- People who are the object of an asset freeze or other restriction made in application of Chapter II of the section of the Monetary and Financial Code that relates to money laundering and financing acts of terrorism (*Article 574-3, Monetary and Financial Code*).

Participation in a criminal association

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A criminal association is defined as any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more crimes punishable by more than five years' imprisonment for individuals. Participation in a criminal association or group is a criminal offence (*Article 450-1, Criminal Code*).

Failure to disclose

Individuals and organisations that effect, control or counsel on operations resulting in movements of capital must make certain declarations of suspicious activities to TRACFIN (the Ministry of Economics and Finance service against money laundering) (*Article L561-15 Monetary and Financial Code).*

These individuals and organisations include (*L561-2, Monetary and Financial Code*):

- Banks and credit establishments.
- Insurance companies.
- Investment enterprises.
- Building agents.
- Casino managers.
- Auditors and expert accountants.
- Sports agents.
- Counsellors in participatory investments.
- Physical persons who provide assistance with operations related to property belonging to other people including contracts relating to the use of buildings.

The circumstances under which declarations must be made include (*Article L561-15, Monetary and Financial Code*):

- Operations of which they had knowledge and that concern sums that they know came from offences (such as money laundering) that are punishable by a prison sentence of more than one year, or are related to terrorist financing.
- Declarations of sums or operations of which they know, suspect or have reason to suspect came from tax fraud.

For more information on TRACFIN, see box: *The authorities*.

Protections available

Under strictly defined conditions, when a lawyer suspects that a client's activities are linked to money laundering, the lawyer may be required to make declarations to the President of his Bar to decide whether to transmit the relevant information to TRACFIN. In these limited circumstances, some of the protections that would otherwise protect a client under the French professional secrecy (*see Question 3*) may be derogated in accordance with the applicable provisions of French law (*Article 561-2, Article 561-3, Article 561-15-1, Article 561-17, Monetary and Financial Code*).

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Defences

26. What defences, safe harbours or exemptions are available and who can qualify?

There are no statutory defences to money laundering or terrorist financing other than those based on the failure to establish intent or a material element of the offence.

When professionals fulfil their obligation to report suspicious activities to TRACFIN, Article L561-22 of the Monetary and Financial Code provides that they cannot be prosecuted for:

- Improper disclosure (*Article 226-10, Criminal Code*).
- Violation of professional privilege or confidentiality rules (*Article 226-13 and Article 226-14, Criminal Code*).

There are also no statutory defences to the offences related to violation or attempted violations of the legislation and regulations of foreign financial relations that are described in *Question 19*.

Enforcement

27. Which authorities have the powers of prosecution, investigation and enforcement in cases of money laundering? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

Money laundering and terrorist financing
Authorities

TRACFIN is an entity which receives and analyses information about suspicious activity relating to money laundering or terrorist financing. It receives the reports required of professionals and organisations by Article L561-2 of the Monetary and Financial Code (*see Question 19*). It can then refer the matter to the Public Prosecutor if the known facts may constitute a criminal offence that is punishable by more than one year's imprisonment, or if the facts evidence the offence of financing terrorism (*Article L561-30-1, Monetary and Financial Code*). The Public Prosecutor could then decide to open a criminal investigation and, in complex cases, to appoint an Investigating Magistrate (*see Question 3*).

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The ACPR (Prudential Control and Resolution Authority), the AMF and the National Enforcement Commission are among the bodies responsible for monitoring the compliance of individuals and organisations named in Article L561-2 of the Monetary and Financial Code with their anti-money laundering and anti-terrorist financing obligations, including their obligation to make declarations to TRACFIN. If a professional or organisation does not respect anti-money laundering and terrorist financing obligations and exhibits a grave lack of vigilance or a grave violation regarding the organisation of internal control procedures, a disciplinary procedure is undertaken and the Public Prosecutor is notified (*Article L561-36-II, Monetary and Financial Code*).

Prosecution powers

If a criminal investigation is initiated, the Public Prosecutor and Investigating Magistrates have broad powers (*see Question 3*).

The ACPR monitors compliance with anti-money laundering and terrorist financing obligations of the *Caisse des Dépôts et Consignations* (the state-owned investment authority charged with investing public funds), credit establishments, investment enterprises and other asset management companies or market operators.

The ACPR's supervisory board examines compliance with anti-money laundering and anti-terrorist financing requirements by reviewing responses to questionnaires as well as through diligent on-site controls. The ACPR's Sanction Committee can take administrative enforcement measures and impose penalties, including disciplinary and pecuniary sanctions. In 2017, the Sanction Committee imposed a EUR10 million fine on BNP Paribas and a EUR5 million fine on Société Générale.

The AMF (Financial Markets Authority) monitors compliance with anti-money laundering and terrorist financing obligations of asset management companies, central depositories, clearing houses and financial investment advisors. The AMF can conduct on-site controls. Its Sanction Committee can take administrative enforcement measures and impose disciplinary and pecuniary sanctions.

The National Enforcement Commission monitors compliance with anti-money laundering and terrorist financing obligations such as real estate agents or betting operators. In March 2017, the law creating this Commission was ruled unconstitutional by the French Constitutional Court on the grounds that it do not operate any separation within the National Enforcement Commission between the functions of prosecuting and the functions of judgment.

Depending on the status of the individuals or organisations, other authorities are also responsible for monitoring the compliance with their anti-money laundering and anti-terrorist financing obligations. For instance, bar association boards are responsible for monitoring lawyers.

Powers of interview

In case of criminal proceeding, see *Question 3*. In case of administrative proceeding by the AMF see *Question 20* (similar powers applies in case of an ACPR investigation).

Powers of search/to compel disclosure

In case of criminal proceeding, see *Question 3*. In case of administrative proceeding by the AMF see *Question 20* (similar powers applies in case of an ACPR investigation).

TRACFIN can request all exhibits and documents that were retained in relation to a high-risk operation from the professionals and entities mentioned in Article L561-2 (*Article L561-25, Monetary and Financial Code*).

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Powers to obtain evidence

Please outline powers to obtain evidence, including evidence held by third parties. Do the authorities have power to obtain evidence abroad?

In case of criminal proceeding Public Prosecutor/Investigating have power to obtain evidence abroad under mutual legal assistance treaties (MLATs) or memoranda of understanding (MOUs).

The AMF and ACPR can obtain evidence through international cooperation (MMOU).

TRACFIN can also receive and solicit information necessary to achieving its mission from all levels of the French administration and from its foreign counterparts (*Article L561-27, L561-29, Monetary and Financial Code*).

Power of arrest

In case of criminal proceeding, see *Question 3*. In case of administrative proceeding by the AMF/ACPR there is no power of arrest.

Court orders or injunctions

In case of criminal proceeding, see *Question 3*.

Protections available

See *Question 25*.

Financial/trade sanctions

The Minister of the Economy and Finance or one of its representatives has the sole authority to begin proceedings related to the contravention of legislation and regulations for financial relations abroad (*Article 458, Customs Code*).

The following individuals hold the power of inquiry for these offences:

- Customs agents.
- Other agents of the administration of finances.
- Officers of the judicial police.

These agents can require all public services to produce information that is necessary to their investigative mission and may not be denied information based on professional secrecy rules (*Articles 453 to 456, Customs Code*).

These agents have the following investigative powers:

- The right to search all locations (domiciles and professional locations).
- The right to require the communication of and seize documents from public services, the French administration, corporations and private individuals.

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- The right to interrogate individuals.

The investigating agents submit their findings to the Minister of the Economy, who then decides whether to make a complaint to the Public Prosecutor (*Article 453, Customs Code*). An individual suspected of violating a financial or trade sanction may be prosecuted in the criminal courts in separate actions by the Public Prosecutor and the administration. The Public Prosecutor can ask for the application of criminal sanctions, while the administration can ask for tax sanctions (*Article 343, Customs Code*). The Public Prosecutor may, if it so chooses, ask for both tax and criminal sanctions.

28. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

In case of criminal proceeding, the decision to charge is made by the Public Prosecutor or the Investigating Magistrate (see *Question 3*). In case of an ACPR or AMF administrative proceedings, the decision to charge is made by their respective boards.

Conviction and sanctions

29. What are the sanctions for participating in money laundering, terrorist financing offences and/or for breaches of financial/trade sanctions?

An individual under formal investigation for money laundering, terrorist financing or financial trade sanctions may be subject to measures that could restrict his or her liberty and may be ordered to pay a bond in order to guarantee his or her appearance in court or to secure the reparation of damages caused by the alleged crime (*Article 138, paragraph 11 of the Criminal Procedure Code, see Question 4*).

Money laundering

Money laundering is punishable by five years' imprisonment and a fine of EUR375,000 (*Article 324-1, Criminal Code*).

Legal entities such as corporations are subject to additional sanctions such as the prohibition from exercising a professional activity for a maximum five-year period (*Article 324-9, Criminal Code*).

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Money laundering in relation to an individual or collective enterprise with the goal of gravely disturbing public order with intimidation or terror is itself an act of terrorism, punishable by ten years' imprisonment when it is committed intentionally (*Article 421-1, Criminal Code*).

Terrorist financing

Terrorist financing is punishable by ten years' imprisonment and a fine of EUR225,000 (*Article 421-5, Criminal Code*).

Financial/trade sanctions

Customs Code offences are punishable by:

- Five years' imprisonment.
- Confiscation of the object of the infraction.
- Confiscation of the means of transport used for the fraud.
- Confiscation of the goods or assets that are the direct or indirect product of the offence and a fine equal to, at a minimum, the amount at issue and, at maximum, double the sum of the offence or attempted offence (*Article 459, para. 1 and para. 1 bis, Customs Code*).

When the objects subject to confiscation cannot be seized or are not presented by the offender or when the budget minister or his representative so requests, the court can order that the offender pay a sum equal to the value of the object (*Article 459, para. 2, Customs Code*).

Corporations that are found guilty of the offences defined in Article 459 can be subject to a fine as provided for in Article 131-38 of the Criminal Code. Corporations may also be subject to additional penalties set out in Article 131-39 of the Criminal Code. These additional penalties can include the following:

- Dissolution.
- Placement for five years under judicial supervision.
- Public posting of part or all of the decision delivered.
- Dissemination of the decision in the written press or by any other means of communication to the public through electronic means.

Any person who incites one of the offences under Article 459-1 of the Customs Code, by writing, propaganda, or publicity may be subject to five years' imprisonment and a fine ranging from EUR450 to EUR225,000 (Article 459, para. 3, Customs Code).

Any individual found guilty of violating laws and regulations relating to foreign financial relations is ineligible to work as a stockbroker, elector or elected member of chambers of commerce, of the commercial courts and of the labour courts, as long as that incapacity is not lifted.

Court decisions finding a violation of Article 459 of the Customs Code will be, at the expense of the person found guilty, published in their entirety or via extracts in designated journals.

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Offences under the Monetary and Financial Code. A Monetary and Financial Code offence is punished by the penalties provided for in Article 459 of the Customs Code (*Financial/trade sanctions*). For further details of the offences, see *Financial/trade sanctions*.

Other. Other banks and other financial institutions may be vulnerable to investigation and prosecution under the laws of other countries. In June 2014, BNP Paribas reached an agreement with US prosecutors and regulators where it made payments totalling US$8.9 billion, and pleaded guilty to a US federal crime. This outcome and Total's large 2013 settlement of US criminal charges under the Foreign Corrupt Practices Act has raised questions on the extra-territorial effect of US criminal laws and enforcement efforts in France.

Safeguards

30. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

See *Question 22*.

Financial record keeping

31. What are the general requirements for financial record keeping and disclosure?

Commercial entities must (*Article L123-12, Commercial Code*):

- Keep accounting records (in French and in Euros) of all transactions.
- Carry out at least an annual inventory of the existence and value of their assets.
- Maintain annual financial statements (including a balance sheet with an annex, a profit and loss statement and an inventory).

The accounting records must be kept as a:

- *Livre-journal* (recording transactions in chronological order).
- *Grand livre* (a ledger recording the transactions, broken down according to the applicable accounting items).

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- Inventory book.

The *livre-journal* and the inventory book must be filed with, and certified by, the clerk of the commercial court, or in a specific approved electronic fashion.

The accounting records must be retained, with all supporting documentation (invoices and contracts), for ten years (*Article L123-22, Commercial Code*). The annual financial statements must be submitted to, and approved by, the shareholders and then filed with the office of the clerk of the commercial court. They are available to the public.

32. What are the penalties for failure to keep or disclose accurate financial records?

If accounting records have not been properly kept, the record holder cannot use them as evidence in his defence (*Article L123-23, Commercial Code*). A criminal fine of EUR9,000 can be imposed on managers.

If the annual financial statements do not provide an accurate reflection of the company, the company's managers may be subject to a prison term of up to five years and/or a criminal fine of up to EUR375,000 (*Articles L242-6 2, L244-1, L241-3 3 and L243-1, Commercial Code*). The statutory auditor can be prosecuted for aiding and abetting. In addition, the managers are liable for damages, together with the statutory auditor who did not report the violation when he knew of it. Shareholders who knowingly benefitted from undue dividends must return them.

33. Are the financial record keeping rules used to prosecute white-collar crimes?

Financial records and documentation reported to TRACFIN can be referred by it to the Public Prosecutor if they appear to reflect criminal activity (*Article 40, Criminal Procedure Code and Article L561-30-1, Monetary and Financial Code*). The Public Prosecutor can then use these records and documentation in its investigation and pursuit of the case.

Compliant financial records are binding on their holders. Any evidence of violation found in properly kept financial records can be used to support corporate offence charges.

Improperly kept financial records may result in a finding that false information has been provided which may distort the price of listed securities. The AMF can fine companies that provide false information which may affect the value of a listed security (see *Question 18*). Such information may also be sanctioned by the criminal court by five years' imprisonment and a fine of EUR100 million (*Article L465-1, Monetary and Financial Code*). If the accounting records have not been properly kept or if there are strong reasons to conclude that the financial records are wrong,

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the tax authorities can disregard them and reassess the taxable basis on an external basis; as a result, the burden of proof is reversed.

Due diligence

34. What are the general due diligence requirements and procedures in relation to corruption, fraud or money laundering when contracting with external parties?

General due diligence procedures comprise: identification of clients; analysis of the reasons for the transfer of money; and maintaining good knowledge of the business and market.

Market practice is to conduct due diligence in accordance with French law, including laws that protect individuals' right to data privacy. Due diligence standards often require that companies retain information that may be considered "personal data" under the law and, in that context, the person involved must consent to the processing of "personal data".

No official public source identifies businesses subject to criminal or administrative decisions for corruption, fraud or money laundering. Investigations by the Public Prosecutor or an Investigating Magistrate are subject to confidentiality and third parties cannot access such files. Due diligence in respect to such matters is therefore generally limited to: questions to management; obtaining copies of communications to and from TRACFIN; reports on any internal investigations or reviews of issues, practice or procedure; representations on any court decisions and past investigations.

Certain financial and advisory businesses are subject to particular organisational rules, including the appointment of an anti-money laundering officer and certain anti-corruption internal procedures (*Article L561-32 and following, Monetary and Financial Code*). The due diligence arrangement may invoke an interview with the appointed money laundering officer and obtaining copies of any internal rules, reports on investigations and tests.

Corporate liability

35. Under what circumstances can a corporate body itself be subject to criminal liability?

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Corporations (or other legal entities other than the French state) can be held criminally responsible under Article 121-2 of the Criminal Code. Such entities may be found guilty for acts committed on their behalf (or for their benefit) by responsible individuals, described in the Code as “organs” or “representatives” of the corporation.

An “organ” is generally some person or group exercising powers inherent to their position or deriving from a corporation‘s by-laws or internal governance. A “representative” is generally someone to whom certain responsibilities have been delegated by the corporation. Court decisions continue to explore who may qualify as an “organ” or “representative”.

A corporation must be shown to have had a requisite level of knowledge and intent under Article 121-3 of the Criminal Code but the threshold may be lower than for an individual.

The establishment of corporate criminal responsibility does not exclude the possibility of individual responsibility for the same act. A managing director (*chef d’entreprise*) may be criminally responsible for acts committed within a corporation subject to his supervision, unless there is a specific delegation of authority to someone else in relation to that activity.

In the specific context of corporate mergers, the French Cassation Court regularly prohibits criminal proceedings against an acquiring company for acts previously committed by the absorbed company. In a March 2015 decision, the European Court of Justice held a different solution: a merger by acquisition results in the transfer to the acquiring company of the obligation to pay a fine imposed by final decision, adopted after the merger by acquisition, for infringements of employment law committed by the acquired company prior to that merger. By an October 2016 decision, the French Cassation Court however maintained its traditional solution.

Cartels

36. Are cartels prohibited in your jurisdiction? How are cartel offences defined? Under what circumstances can a corporate body be subject to criminal liability for cartel offences?

Cartels are prohibited by Articles 101 and 102 of the Treaty on the Functioning of the European Union and are likewise prohibited by French law.

Under Article L420-1 of the Commercial Code, coordinated actions, whether they are express or tacit, or coalitions, even when made by a direct or indirect intermediary that is located outside of France, are prohibited when they tend to do any of the following: limit access to the market or to the free access to competition by other enterprises; create an obstacle to the establishment of prices through favouring artificial increases or decreases in prices; limit or control the production, the outlets, the investments or technical progress; or allocate the markets or the sources of supply.

Under Article L420-2 of the Commercial Code, an enterprise or a group of enterprises is also prohibited from abusing a dominant position on an internal market or a substantial part of an internal market. The following actions could constitute an abuse of a dominant position: a refusal of sale; tied sales; discriminatory sales terms; the breaking of an established commercial relationship for the sole reason that a commercial partner refuses to submit to unjustified

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commercial terms. The exploitation by an enterprise or by a group of enterprises of the state of economic dependence with regard to a client or a supplier is also prohibited by the same article (*Article L420-2, Commercial Code*).

Offers of sale prices or practicing consumer prices that are abusively low with regard to the cost of production, transformation and commercialization, where these offers or practices have as a goal or could have the effect of eliminating from a market or preventing the access to a market in respect of an enterprise or one of its products, are also prohibited (*Article L420-5, Commercial Code*).

Cartels are usually prosecuted and sanctioned as an administrative violation by the French Competition Authority. The latter can, according to Article L464-2 of the Commercial Code, take any of the following actions:

- Order the end of the anti-competitive activity within a fixed delay or impose specific conditions.
- Accept engagements proposed by enterprises or organizations that are of a nature to rectify their obligations.
- Apply an immediate pecuniary sanction or apply a pecuniary sanction in the event of the failure to respect the terms of an injunction or in case of non-respect of engagements that have been accepted.

When the Competition Authority applies pecuniary sanctions, they must be proportionate. The maximum sanction for an individual (an entity that is not an enterprise) is EUR3 million and the maximum sanction for an enterprise is 10% of its global profits before the application of any adjustment for tax. The calculation of an enterprise's profit for the purpose of applying the sanction is based on the highest profit that was realized in any fiscal year following the fiscal year that preceded the fiscal year during which the practices were put into place (*Article L464-2, Commercial Code*). Final decisions of the Competition Authority may be subject to appeal before the Court of Appeal of Paris.

In urgent situations, the Competition Authority may order conservatory measures, which can include the suspension of the anti-competitive practice at issue or an injunction to return to a previous state but must be limited to measures that are strictly necessary to address an urgent situation (*Article L464-1, Commercial Code*). Conservatory measures may only be ordered if the alleged anti-competitive practice is a grave and immediate threat to the general economy, to the interested sector, to the interest of the consumers, or to the complaining enterprise and such measures may only be put into place after the affected parties have the opportunity to be heard. The Competition Authority's orders for conservatory measures may be appealed before the Paris court of appeal.

In certain circumstances, the Minister of the Economy can order enterprises to stop the same anti-competitive practices that would otherwise be handled by the Competition Authority. The Minister of the Economy has this power when the practice at issue affects a local market, does not concern Articles 101 and 102 of the Treaty on the Functioning of the European Union, and when the profits of the enterprise at issue that are made in France are not more than EUR50 million at the time of its last closing of its accounts. The cumulative profits of such an enterprise must not be more than EUR200 million (*Article 464-9, Commercial Code*).

It is also an ordinary crime (*délit*) for any individual – not for a corporate entity – to fraudulently participate personally and significantly in the conception, the organization, or the putting into place of a cartel. The Public Prosecutor or a civil party may initiate prosecution of an individual for this offense. The Public Prosecutor's powers of investigation described in *Question 3* also apply to investigations of cartels. If an individual is convicted, the criminal sanction may be as high as the following: a fine of EUR75,000; up to four years of imprisonment; and possible complementary sanctions such as full or partial publication of the court decision at the cost of a convicted individual may also apply.

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Immunity and leniency

37. In what circumstances is it possible to obtain immunity/leniency for co-operation with the authorities?

Other than certain limited situations (such as participation in a cartel, where the first company to alert the authorities may avoid prosecution), no formal immunity or leniency is granted to corporations or individuals for co-operation.

Since March 2004, French criminal procedure provides for a pre-trial guilty plea under specific conditions set forth in the Code of Criminal Procedure. In January 2016, a guilty plea was successfully used for the first time in a white-collar crime involving a bank charged with tax evasion laundering (see above *Question 4*). At this stage, however, there is no real tradition for negotiating guilty plea in corporate crimes.

Since December 2016, a rough equivalent to a US "Deferred Prosecution Agreement" is now available to corporations charged with corruption, influence peddling or laundering of the proceeds of tax fraud (see *Question 13*).

Cross-border co-operation

38. What international agreements and legal instruments are available for local authorities?

Obtaining evidence
France is a signatory to a number of international agreements providing for co-operation in criminal matters. These include:

- The HCCH Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970, which may apply to non-criminal investigations.
- Bi-lateral extradition agreements with its trading partners.
- European conventions relating to extradition from France to other countries in Europe.
- More specialised agreements such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, which requires co-operation among its signatories.
- Numerous bi-lateral mutual legal assistance treaties (MLATs) and memoranda of understanding (MOU) with most of its trading partners.

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France has designated a special office of the Ministry of Justice to handle requests made under such treaties. The Ministry of Justice, the AMF and other organisations also have practical relationships with their non-French counterparts (such as the US Securities and Exchange Commission). The United States currently posts a federal prosecutor and several agents of the Federal Bureau of Investigation at its Embassy in Paris. Their work includes co-ordinating cross-border co-operation with their French counterparts, with whom they generally have good relations.

In May 2017, the European Investigation Order (*Décision d'Enquête Européenne*) entered into force (Articles 694-15 to 694-49, Code of Criminal Procedure). This new tool created by EU Directive 2014/41/EU of April 3, 2014 aims to simplify and speed up cross-border criminal investigations in the EU. It enables judicial authorities in one EU member state to request that evidence be gathered and transferred from another EU member state. This new instrument replaces the existing fragmented legal framework for obtaining evidence within the EU.

Seizing assets

Where no international convention provides otherwise, assets, including funds that are the fruits of criminal activity, can be seized by the police under a court order (*Articles 713-36 to 713-41, Code of Criminal Procedure*). At the request of the Public Prosecutor, the French authorities may obtain a court order permitting them to seize assets found in France that have been found by a decision of a foreign court to be the fruits of illegal activity elsewhere, if the activity would be criminal if committed in France.

Sharing information

As there is no tradition or any criminal procedures that encourage "self-reporting", prosecutors and regulatory authorities are unlikely to be aware of possible criminal activity due to voluntary disclosure to them by a company that discovers past incidents. However, whistle-blowers or their own investigations may reveal possible criminal activity to French authorities. The Sapin II Law adopted In December 2016 strengthens the encouragement and protection of whistle-blowers (*see Question 33*).

If the activity relates to possible economic crimes committed by domestic companies or citizens, the French authorities are unlikely to share information with prosecutors or regulators in other jurisdictions. They may share information relating to non-French companies or citizens with jurisdictions capable of investigating them.

39. In what circumstance will domestic criminal courts assert extra-territorial jurisdiction?

The territorial application of French criminal provisions is governed by Articles 113-6 to 113-12 of the Criminal Code. French criminal law applies to offences where either: one material element took place on French soil, the perpetrator is a French national or corporation or the victim is French.

In the specific context of acts of corruption: French law applies to acts committed abroad so long as the perpetrator is a French national, a French resident or someone exercising, in whole or in part, business in France (regardless of the nationality of the victim).

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The criminal procedures applicable to prosecutions based on acts committed outside of France may be different from the procedures applicable to domestic crimes.

40. Does your jurisdiction have any statutes aimed at blocking the assertion of foreign jurisdictions within your territory? Are there statutes aimed at blocking the assertion of foreign jurisdictions within their territory?

France has adopted legislation, commonly known as the Blocking Statute, which makes it a criminal offence for any person to provide information of scientific or commercial value to a foreign investigator or court for use in a non-French judicial or administrative procedure, other than through the exercise of an international agreement.

The National Commission on Databases and Liberty (*Commission Nationale de l'Informatique et des Libertés*) (CNIL), created in 1978, has rules that prohibit the transfer of certain kinds of data outside of France.

France generally does not extradite its citizens, other than to other countries in the European Union.

Whistleblowing

41. Are whistleblowers given statutory protection?

The Sapin II Law of December 2016 defines whistleblower as "*any individual who reveals or reports, acting selflessly and in good faith, a crime or an offence, a serious and clear violation of an international commitment which has been ratified or approved by France or of an unilateral act of an international organization adopted on the basis of such commitment, or a serious breach of a law or regulation, or a serious threat or harm to the public interest, of which the individual has had personal knowledge*".

A person who legally qualifies as a whistleblower and complies with the procedure for reporting provided by the law cannot be held criminally liable for disclosing confidential information, as long as this action was necessary and proportionate to the safeguards of the interests involved. The whistleblower cannot either be discriminated against or terminated on the grounds of the disclosure.

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Reform, trends and developments

42. Are there any impending developments or proposals for reform?

With regards to financial crimes, France recently adopted tools to enhance the possibility to reach negotiated outcomes. It remains to be seen how these tools will be used in practice. In the context of market abuses, the AMF has recently used a new settlement procedure – without admission of guilt – in two cases of insider trading and market manipulation. And in the context of corruption, as reported by the press, Airbus has recently made the choice to disclose potential corruption wrongdoing to the UK and French authorities who subsequently opened investigations.

In February 2017, a law was passed to extend the statute of limitations applicable to criminal prosecution. The limitation period is now extended from 10 to 20 years for high crimes (*crimes*) and from 3 to 6 years for ordinary crimes (*délits*). For concealed infringement, the limitation period for prosecution starts from the day on which the infringement is established. This period shall however not exceed 30 years for high crimes and 12 years for ordinary crimes as of the day on which the offense was committed.

In October 2017; the French Ministry of Justice announced its intention to reform French criminal proceedings. The announced reform aims "*to reduce the formality throughout the criminal procedure in order to improve the efficiency of criminal justice in the investigation and conviction of offenders, and also with respect for rights*". According to the Ministry, a bill should be presented to the Parliament in the first half of 2018.

Market practice

43. What are the main steps foreign and local companies are taking to manage their exposure to corruption/corporate crime?

The Sapin II Law of December 2016 provides that companies operating in France with more than 500 employees, whose annual turnover is more than EUR100 million are required to implement compliance programs to detect corruption. An increasing number of large French companies have therefore established compliance functions in order to cope with this new requirement.

The new anti-corruption agency (*Agence française anticorruption)* controls the implementation of compliance programmes within companies and can impose sanctions of up to EUR200,000 against directors and EUR1 million against companies.

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The authorities

Public Prosecutor
Status. Public Prosecutors are trained as judges and elect to act as prosecutors. They can move between prosecutorial and judicial roles during their careers. They are not considered "lawyers" in the sense of being members of a local bar.

Principal responsibilities. The Public Prosecutor, working with police agencies investigates criminal activity arising under the Criminal Code and other criminal laws.

The office of the prosecutor includes a chief prosecutor (*procureur de la République*) assisted by deputy prosecutors (*procureurs adjoints*) and assistant prosecutors (*substituts*). The chief prosecutor generally initiates preliminary investigations and, if necessary, asks that an Investigating Magistrate (*juge d'instruction*) be assigned to lead a formal judicial investigation. During criminal proceedings, prosecutors are responsible for presenting the case at trial to either the bench or (for matters punishable by more than ten years' imprisonment) a jury. They suggest advisory sentencing guidelines, but it remains at the court's discretion to determine its own sentence.

Investigating Magistrate
Status. An Investigating Magistrate is a judge who has received judicial training at the National Judges School in Bordeaux. Judges are not considered "lawyers" and are not members of a Bar. Certain crimes require an investigation (*instruction*) by an Investigating Magistrate.

Principal responsibilities. An Investigating Magistrate acts on the facts that have been given to him by the Public Prosecutors and is formally mandated to seek all information in order to establish the facts of the case, including both exculpatory as well as incriminating evidence. The Investigating Magistrate has a wide array of investigating powers, including:

- Authorising "dawn raids" by the police of premises likely to contain information.
- Authorising wiretaps.
- Interrogating witnesses pursuant to "garde à vue", by which a witness may be kept in custody for 24 hours for questioning by the police (subject to several renewal periods of 24 hours, and up to a maximum of 144 hours for persons suspected of terrorism).

The results of the investigation are maintained in a formal file, which subjects of the investigation can access once they are put under formal investigation. Upon completion of the investigation, after obtaining the views of the Public Prosecutor and subjects put under formal investigation, the Investigating Magistrate decides whether to bind the subject of the investigation over to trial, describing the charges for which sufficient evidence has been found to merit a trial.

Financial Markets Authority (Autorité des Marchés Financiers) (AMF)

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W *www.amf-france.org*

Status. Independent public body.

Principal responsibilities. The AMF's main responsibilities include:

- Safeguarding investments in financial instruments and in all other savings and investment vehicles.
- Ensuring that investors receive material information.
- Maintaining orderly financial markets.
- Investigating, judging and imposing administrative sanctions (fines) against financial market violations.

Prudential Control and Resolution Authority (Autorité de Contrôle Prudentiel et de Résolution) (ACPR)
W *www.acpr.banque-france.fr*

Status. Independent public body.

Principal responsibilities. ACPR's principal responsibilities are to:

- Contribute to the stability of the financial sector.
- Protect customers.
- Strengthen French influence on the international and European financial markets.

Ministry of Economics and Finance Service against Money Laundering (TRACFIN) (Traitement du Renseignement et Action Contre les Circuits Financiers Clandestins)
W *www.economie.gouv.fr/tracfin/accueil-tracfin*

Status. Public body attached to the Ministry of Economics and Finance.

Principal responsibilities. TRACFIN is the Ministry of Finance service that works against money laundering. It receives reports of money laundering from individuals.

TRACFIN analyses the information contained in these reports and may investigate further if necessary.

If TRACFIN suspects that a transaction is illegal, it transfers the files to the Public Prosecutor's office.

National Enforcement Commission (Commission Nationale des Sanctions)
W *www.tresor.economie.gouv.fr/3826_commission-nationale-des-sanctions*

Status. Public body attached to the Ministry of Economics and Finance.

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Principal responsibilities. The National Enforcement Committee can impose sanctions for money laundering and terrorist financing against professionals working in sectors that are not organised under independent governing bodies, including, for example:

- Real estate professionals.
- Casino managers and gambling groupings, circles and companies.
- Persons operating tax-related domiciliation services.

Online resources

Legifrance
W *www.legifrance.gouv.fr*

English translations available at www.legifrance.gouv.fr/Traductions/en-English.

Description. Official updated portal for law resources in France (statute, case law, convention, and so on). Translations are available on the Legifrance website for principal codes but these translated texts are for reference only and have no legal force.

Cour de cassation
W *www.courdecassation.fr*

Description. French Supreme Court official website.

Unofficial English translations of French jurisprudence are available on the website of the University of Texas at Austin.

University of Texas
W *www.utexas.edu/law/academics/centers/transnational/work_new*

Description. Unofficial English translations of French jurisprudence are available on the website of the University of Texas at Austin.

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Contributor profiles

Antoine Kirry, Partner

Debevoise & Plimpton LLP

T +33 1 40 73 12 12
F +33 1 47 20 50 82
E *akirry@debevoise.com*
W *www.debevoise.com*
Professional qualifications. Admitted to the Bar: New York and Paris

Areas of practice. International arbitration; criminal, regulatory and civil litigation; investigations involving US and French laws.

Recent transactions

- Extensive experience in criminal and investigative investigations, as well as complex litigation, in France.
- The successful defence of a French bank on appeal of a judgment that had found the bank liable for negligence in providing investment advice (judgment reversed).
- The successful defence of one of the individual defendants in the EADS insider trading case.
- Advising a US Fortune 500 company in a US$200 million contract dispute against a French CAC 40 company.
- Advising a leading Australian financial institution in the resolution of a dispute over a shareholders' agreement relating to a French listed company.

Publications

- Co-author of the Privilege 2016 – France chapter in "GIR Know How", part of the *Know How* series published by *Global Investigations Review* (November 2016).

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- The French chapter in “The Internal Investigations Review", part of *The Law Reviews* series published by *Law Business Research*, *Sixth Edition* (2016).
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- “L’avocat et son témoin", *Procédures* (December, 2016).
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- “Un progrès en trompe l’œil: le nouveau texte sur la notification des sentences rendue en France en matière d’arbitrage international”, *Procédures* (March, 2014).
- “Transactions Pénales Aux États-Unis: Une Certaine Logique", *Le Magazine des Affaires* (2014).
- “Un outil probatoire méconnu: l’utilisation de la procédure de *discovery* devant les tribunaux français", *Gazette du Palais* (December, 2013).

Frederick T Davis, Of Counsel

Debevoise & Plimpton LLP

T +33 1 40 73 12 12
F +33 1 47 20 50 82
E *ftdavis@debevoise.com*
W *www.debevoise.com*
Professional qualifications. Admitted to the Bar: New York and Paris

Areas of practice. Criminal, regulatory and civil litigation; investigations involving US and French laws.

- Served as an Assistant United States Attorney in the Southern District of New York and in private practice in New York before moving to Paris, where he appears in French courts.
- Successful defence of a US hi-tech company investigated in France under the UN Oil-for-Food programme.
- Representation of a UK national in a cross-border investigation involving tax fraud (ongoing).

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- Representation of a US construction company in French criminal investigation involving tax matters.
- Representation of a US industrial company in French criminal investigation involving negligent homicide (now on appeal).

Professional associations/memberships. An elected Fellow of the American College of Trial Lawyers. The French government named him a Chevalier of the National Order of Merit of France. He is a recipient of the Thurgood Marshall Award of the New York City Bar Association. He taught a full academic course at Harvard Law School as the Nomura Lecturer on International Law.

Publications

- Co-author of the France chapter in "The Internal Investigations Review", part of The Law Reviews series published by Law Business Research, Third Edition (2013).
- Co-author of "The Foreign Corrupt Practices Act", published in Business and Commercial Litigation in Federal Courts, Third Edition (2011).

Alexandre Bisch, Associate

Debevoise & Plimpton LLP

T +33 1 40 73 13 37
F +33 1 47 20 50 82
E *abisch@debevoise.com*
W *www.debevoise.com*
Professional qualifications. Admitted to the Paris Bar

- **Areas of practice.** Complex domestic and international commercial litigations; white-collar criminal defence before French criminal courts and before the French financial markets regulator (AMF).

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