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Law, Social Science, and Policy

Guest Post: How France Is Modernizing Its Criminal Procedure and Streamlining Its Resolution of Corporate Crime Cases

Posted on [May 27, 2020](#) by [Matthew Stephenson](#)

GAB is pleased to welcome back [Frederick Davis](#), a lawyer in the Paris and New York offices of Debevoise & Plimpton and a Lecturer at Columbia Law School, who contributes the following guest post:

For approximately two decades, at least since 2000, France—a signatory to the 1997 [OECD Anti-Bribery Convention](#) — has had laws on the books that emulate the U.S. [Foreign Corruption Practices Act](#) (FCPA) by criminalizing bribes to foreign public officials. For most of that time, these laws were not effectively enforced: During the first 15 years after France prohibited foreign bribery, not a single corporation was convicted in France. The reasons for this—previously discussed on this blog [by me](#) and [others](#)—included the low maximum penalties applicable to corporations, imprecision in French laws relating to corporate criminal responsibility, lengthy investigations (often lasting over a decade) run by investigating magistrates, and the virtual absence of any possibility of a negotiated outcome. In the absence of French enforcement of its laws against foreign bribery, the U.S. Department of Justice (DOJ) took it upon itself to investigate and prosecute a number of French corporations for FCPA and other violations. These [enforcement actions](#), which were typically resolved by guilty pleas or deferred prosecution agreements (DPAs), netted aggregate fines and other penalties of over \$2 billion, not a penny of which was paid to France.

This situation provoked widespread discussion and debate in France, and eventually led to a number of changes in its criminal procedures. Among the most important were the creation, in 2013, of a National Financial Prosecutor's office (PNF) with nationwide authority to prosecute a variety of financial crimes,

and the adoption, in December 2016, of the so-called *Loi Sapin II*, which overhauled many of the criminal laws relating to corporate and financial crime, increasing corporate penalties, adopting a new settlement procedure called the *Convention Judiciaire d'Intérêt Public* (CJIP) closely modeled on the US DPA, and creating a [French Anticorruption Agency](#) (AFA) to supervise newly-mandatory corporate compliance programs and issue guidelines for corporate behavior. These reforms have already produced some impressive results, including major settlements (sometimes in cooperation with other countries like the US and UK) with large French and multinational companies (see, for example, [here](#), [here](#), and [here](#)).

An [interview](#) published this past April with Jean-François Bohnert, who has served since October 2019 as the National Financial Prosecutor, sheds some light on how France's recent legal and institutional reforms are transforming its enforcement of its laws against foreign bribery and other complex corporate crime. In that interview, M. Bohnert understandably focused on his office's successes; he was particularly proud of the number of cases his office had handled with a relatively small staff. But to my mind, by far the most interesting and important thing that came out of this interview was the fact that, of the 592 cases handled by the PNF in 2019, 81% were so-called "preliminary investigations" managed exclusively by the PNF, while only 19% were led by investigating magistrates. To someone unfamiliar with the French legal system, the significance of this statistic may not be readily apparent, but in fact it suggests an important change in the French approach to corporate misbehavior.

Under [classic French criminal procedural laws](#), large, complex, and international matters have traditionally been assigned to a specially trained judge known as an investigating magistrate in a procedure known as an "*instruction*." Under this procedure, the prosecutor in essence cedes control over the investigation, leaving it up to the investigating magistrate rather than the prosecutor to decide whether to prosecute or not. A major problem with this procedure is its slowness: Due to a combination of staffing constraints and procedural complexity, an *instruction* can easily take ten years. The *instruction* process also inhibits negotiated outcomes because once an investigating magistrate is involved, her participation in the outcome is necessary. Overall, the process sidelines the prosecutors, leaving them without the authority, flexibility, and negotiating power enjoyed by their U.S. and other counterparts.

M. Bohnert and his predecessor at the PNF were able to shift the critical focus from investigating magistrates to the PNF by developing a little-noticed provision in the *Loi Sapin II*. That law created two different procedures for negotiating a CJIP (the French DPA equivalent). Under one procedure, once an investigating magistrate was engaged, a CJIP could only be negotiated with the involvement and approval of the investigating magistrate. The law also provided, however, that if a case was still in the "preliminary investigation" phase—meaning that no reference to an investigating magistrate had yet been made—the prosecutor could negotiate a CJIP without investigating magistrate participation. (All CJIPs still have to be approved by a sitting judge, but so far at least this has been done rather quickly and without challenge.) The critical significance of the statistics M. Bohnert cited in his interview is that his office is now successfully keeping investigations at the preliminary investigation stage and resolving them at that stage

through CJIPs, without turning the process over to an investigating magistrate. (The first few reported CJIPs had involved investigating magistrates because those cases were in the pipeline when the CJIP procedure was first adopted in 2016.)

This shift from investigations centering on judges to procedures controlled by a prosecutor is historic, and shows that legislative efforts in France to modernize its approach to international crime may have succeeded in giving its prosecutors the nimbleness and procedural flexibility needed to achieve outcomes comparable to prosecutors in the U.S. and elsewhere.

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