NAVACELLE

Bastille Day

July 2021

Lawyers at Navacelle thought you might be interested in reviewing a selection we made of noticeable events which occurred in France in the fields of corporate criminal liability, criminal procedure, enforcement and compliance over the past 12 months, so we put together our sixth Bastille Day Newsletter!

Despite lasting covid-related restrictions, corporate criminal novelties have flourished: from the environmental law DPA to anticorruption enforcement action, an upcoming law on restitution of ill-gotten assets, as well as new guidelines by the French Anticorruption Authority (AFA) regarding probity violations prevention and detection in compliance systems.

Caselaw also entered uncharted lands, including proper training required for companies to sanction violations of internal rules (a standard not required for sanctioning a violation of the law) as well as court-imposed requirements for corporates to comply to supply chain due diligence (devoir de vigilance). Significant changes include the possibility for criminal liability to pass on to the surviving company and confirmation by the Supreme court that a plea deal (CRPC) can be rejected by a homologating judge without possibility for appeal.

A law providing attorney-client privilege to in-house counsel was rejected and the same privilege may be limited to litigation-related communications to outside counsel.

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Stay safe & in touch!

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Sommaire

A.

ENFORCEMENT AND COURT DECISIONS

Criminal liability's transfer to the acquiring company in the event of a merger by acquisition and consecutive due diligence requirements

On 25 November 2020, the criminal chamber of the French Cour de cassation rendered a landmark decision for legal entities, relating to the issue of criminal liability of an absorbing company for offences committed prior to the merger by the absorbed entity[i].

Previously, the principle of personal liability prevented the absorbing company from being held liable for such offences because of the existing legal personality of each of the companies[ii]. As of 25 November 2020, in the event of a merger by acquisition, the absorbing company may be held criminally liable for offenses committed prior to the merger by the acquired company while it was still a separate entity[iii].

In the case at hand, a company was accused of unintentional destruction by fire dated 2002. Following judicial investigation, it was summoned in 2017 to the criminal court hearing. However, a few months earlier, the company was absorbed by another during a merger operation, which led to the subpoena of the latter to the hearing. The criminal court rendered a decision ordering additional information to determine the reasons, modalities, and conditions of the merger so as to verify whether such operation had not been made fraudulently[iv].

I. If the acquired company transfers its liabilities to the acquiring company, this transfer remains limited

As such, the French *Cour de Cassation* ruled that in the event of a merger by acquisition, the absorbing company may be sentenced to a fine or confiscation for acts constituting an offence committed by the absorbed company before the operation. Indeed, a merger by acquisition does not imply liquidation of the merged company, but merely the transfer of all assets of the absorbed company to the absorbing company, these latter cannot be considered as distinct from one another[v]. Until such decision, the criminal chamber of the French *Cour de Cassation*, had consistently held that article 121-1 of the French criminal code, according to which no one is responsible for anything other than his or her own actions, precluded the absorbing company from being prosecuted for acts committed by the absorbed company before the merger[vi].

Yet, such innovative solution is consistent with the European jurisprudential context as in the Court of Justice of the European Union had previously ruled in favor of the transfer to the merging company of the merged company's obligation to pay a fine for infringements of employment law[vii]. In addition, the European Court of Human Rights regarding anti-competitive practices committed by a later absorbed company had considered that "*the approach of the domestic courts based on the economic and functional continuity of the company, seeking to take account of the specific situation created by the merger of one company into another, did not contravene the principle of personal liability for penalties* (in French "*principle de personalité des peines*")"[viii].

That is to say, that the transfer of criminal liability following absorption however remains materially and timely limited.

Materially speaking, the scope of such criminal liability is restricted to specific types of corporations and penalties. First, the acquiring company can only be criminally fined or confiscated[ix], excluding any other additional penalties generally incurred[x]. Second, the solution is restricted to the scope of the European Union Directive concerning mergers of public limited liability companies[xi], meaning that only public limited liability companies ("*sociétés anonymes*") or simplified joint-stock companies ("*sociétés par actions simplifiées*") may be subject to successor criminal liability[xii].

Temporally speaking, successor liability will only apply to merger transactions entered into after this decision, thus, after 25 November 2020.[xiii]., since more severe solutions may not, in principle, be retroactively applied [xiv].

However, this landmark decision also permits the emergence of a new principle of criminal liability in the event of fraud in the merger-acquisition transaction. The Criminal Chamber of the French *Cour de Cassation* affirms, for the first time, that the existence of fraudulent conduct allows the judge to pronounce a criminal sanction against the absorbing "*when the purpose of the M&A operation was for the target company to avoid criminal liability, therefore constituting legal fraud*"[xv], the reason for which the ruling did not have any consequences on the case at hand.

II. It is henceforth essential to strengthen due diligence verifications regarding the situation of the acquired company

The French Anti-corruption Agency ("AFA") also highlights the fact that if corruption practices continue after the merger, they could be attributed either to the absorbing company or to the new company resulting from the merger[xvi].

It can be noted that this decision emphasizes the need for anti-bribery due diligence before M&A, stating that "*nothing prevents the acquiring company from carrying out a detailed audit of the economic and legal situation of the company to be acquired before the merger*" to identify bribery risks[xvii].

Such enlargement of criminal liability comes in a context of growing penalization of business law, notably in matters of corruption or tax fraud[xviii].

To this end, in March 2021, the French Anti-Corruption Agency updated its *Practical Guide on Anti-Corruption Due Diligence for M&A*, initially published in January 2020[xix], promoting anticorruption due diligence.

The first identified step to anti-bribery due diligence seeks to evaluate corruption risk in the target company using open sources, questionnaires and information available in the data room (industry sector, country risk in light of Transparency International Corruption Perception Index, shareholding and management, the target's third parties and customers, links to politically exposed persons or civil servants, anti-corruption compliance policies, past corruption cases, eventual internal investigation report)[xx].

In practice, an anticorruption due diligence officer should be appointed and can either be an existing compliance officer, or a third-party service provider. In the latter event, it is recommended that he or she inform the latter of the progress of the bribery due diligence[xxi].

Between signing and closing the deal, a bribery due diligence report should be drafted based on the information obtained, especially regarding high risk third parties, accounting controls on transactions, gifts and invitations, sponsorship activities, and on the whistleblowing system[xxii]. If management then decides to proceed with the M&A, the next stage is integrating the target company into the absorbing company's anti-corruption program[xxiii].

A post-acquisition audit should also be conducted to identify dysfunctions in the acquired company's anti-corruption program, assess its fitness to risks and decide on corrective measures, thanks to accounting financial tests, review of the risk map, analysis of whistle-blower reports handling, analysis of payments made, and so on[xxiv].

The final stage consists in harmonizing the target's compliance policies. The newly parent company will decide to either create an anti-corruption program within the acquired entity, update the existing one, or extend its own system to the subsidiary[xxv].

In the end, training management remains an efficient way to prevent the commission of offences during a company's activities, but also to raise awareness on the burden and challenges of criminal proceedings[xxvi].

[i] *Cour de cassation*, Crim., 25 November 2020, no. 18-86.955.
[ii] Criminal liability of the absorbed company for offences committed by the absorbed company, Julie Gallois, Dalloz Actualité, 10 December 2020, para. 5 and 11.
[iii] *Cour de cassation*, Crim., 25 November 2021, no. 18-86.955 ("*It follows from the foregoing that in the event of a merger of one company with another that falls within the scope of the aforementioned directive, the acquiring company may be sentenced to a fine or confiscation for acts constituting an offence committed by the absorbed company prior to the merger*").
[iv] Criminal liability of the absorbed company for offences committed by the absorbed company, Julie Gallois, Dalloz Actualité, 10 December 2020, para. 3-4.3.
[v] Criminal liability of the absorbed company for offences committed by the absorbed company, Julie Gallois, Dalloz Actualité, 10 December 2020, para. 7 and 10.
[vi] *Cour de cassation*, Crim., 20 June 2000, no. 99-86.742, Bull. crim., 2000, no 237 ; *Cour de cassation*, Crim., 14 October 2003, no. 02-86.376, Bull. crim. 2003, no 189 ; *Cour de Cassation*, Crim., 18 February 2014, no. 12-85.807.
[vii] Court of Justice of the European Union, 5 March 2015, in Case C-343/13, *Modelo Continente Hipermercados SA c/ Autoridade para as Condiçoes de Trabalho*, D. 2015. 735 ("*Consequently, the answer to the first three questions referred is that Article 19(1) of Directive 78/855 must be interpreted as meaning that a 'merger by acquisition' in Article 3(1) of the directive 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*").
[viii] European Court of Human Rights, 24 October 2019, no. 37858/14, *Carrefour France v. France* ("*While it was true that the merged company had formally ceased to exist following the operation in question, its business had been continued by the applicant company; it was the same business with merely a change in legal structure. It was precisely for anti-competitive acts committed in the context of that very business that the legal proceedings had been brought against the former company. The principle that punishment should only be applied to the offender had therefore not been breached*").
[ix] *Cour de cassation*, Crim., 25 November 2020, no. 18-86.955, para. 35 ("*the acquiring company may be subject to a criminal fine or confiscation*").
[x] Criminal liability of the absorbed company for offences committed by the absorbed company, Julie Gallois, Dalloz Actualité, 10 December 2020, para. 18.
[xi] Directive 2011/35/UE concerning mergers of public limited liability companies, 5 April 2011, Official Journal of the European Union L. 110/1 of 29 April 2011.
[xii] "Criminal liability of the absorbed company for offences committed by the absorbed company", Julie Gallois, Dalloz Actualité, 10 December 2020, para. 19.
[xiii] *Cour de cassation*, Crim., 25 November 2020, no. 18-86.955, para. 38-39 ("*This new interpretation, which constitutes an overruling of case law, will apply only to merger operations concluded after 25 November 2020, date of delivery of the judgment, so as not to undermine the principle of legal predictability arising from Article 7 of the European Convention on Human Rights (...) It will therefore only apply to merger transactions concluded after the delivery of this judgment and will have no effect in the present case*").
[xiv] Criminal liability of the absorbed company for offences committed by the absorbed company, Julie Gallois, Dalloz Actualité, 10 December 2020, para. 23.
[xv] *Cour de cassation*, Crim., 25 November 2020, no. 18-86.955, para. 41-42.
[xvi] French Anticorruption Agency, *Practical Guide - Anti-Corruption Due Diligence for Mergers and Acquisitions*, January 2020 (updated March 2021), p. 9.

[xvii] *Cour de cassation*, Crim., 25 November 2020, no. 18-86.955, para. 33 ("*Furthermore, nothing prevents the acquiring company from having a detailed audit of the economic and legal situation of the company to be acquired carried out prior to the merger in order to obtain, in addition to the documents and information available under the statutory provisions, a more complete view of the obligations of that company*").
[xviii] Criminal liability audits in the context of mergers and acquisition operations, Hannes Scheibitz, Lionel Yemal, Le Monde du Droit, 22 February 2021, para. 3-4.
[xix] French Anticorruption Agency, *Practical Guide - Anti-Corruption Due Diligence for Mergers and Acquisitions*, January 2020 (updated March 2021).
[xx] French Anticorruption Agency, *Practical Guide - Anti-Corruption Due Diligence for Mergers and Acquisitions*, January 2020 (updated March 2021), p. 14 ("*At this stage, the purpose of anti-corruption due diligence is to: - Understand the target's history, activities and its economic environment (competitive, regulatory, geographical or the context leading the seller to carry out the transaction); - Know about its shareholding structure, its management and its ultimate beneficial owners; - Identify the key third parties with whom it may have a relationship; - Determine any links with politically exposed persons and the extent of the target's interactions with public servants; Secure knowledge of the main elements of its anti-corruption programme (e.g. existence of a code of conduct and an anti-corruption policy, corruption risk mapping, etc.); - Where applicable and subject to the availability of information, identify corruption cases in which the target may have been implicated (ongoing legal action); - Check for current sanctions to which the target may have been sentenced by a French or foreign authority (e.g. ongoing French, US or UK deferred prosecution agreement)*").
[xxi] French Anticorruption Agency, *Practical Guide - Anti-Corruption Due Diligence for Mergers and Acquisitions*, January 2020 (updated March 2021), p. 12 ("*Managing bodies may entrust the performance of due diligence to someone within the company, for example the compliance officer or an external service provider (...) As such, if the appointed anti-corruption due diligence officer is not the compliance officer or is from another department, it is recommended that he or she regularly informs the compliance officer of the progress of the anti-corruption due diligence carried out and their outcome*").
[xxii] French Anticorruption Agency, *Practical Guide - Anti-Corruption Due Diligence for Mergers and Acquisitions*, January 2020 (updated March 2021), p. 15-16 ("*In this regard, the auditor may ask the acquiring company about the maturity of the anti-corruption system, in particular about : - high risk third parties (customers, suppliers and intermediaries) with regard to corruption risk mapping; - accounting controls, particularly those relating to risky transactions, gifts and invitations, and sponsorship activities; - the effectiveness of the internal whistleblowing system (for example, handling of the latest reports concerning suspected corruption)*").
[xxiii] French Anticorruption Agency, *Practical Guide - Anti-Corruption Due Diligence for Mergers and Acquisitions*, January 2020 (updated March 2021), scheme p. 10.
[xxiv] French Anticorruption Agency, *Practical Guide - Anti-Corruption Due Diligence for Mergers and Acquisitions*, January 2020 (updated March 2021), p. 16 ("*The main purpose of the audit is to: - Identify dysfunctions in the target's anti-corruption programme; - Ensure that its anti-corruption programme is appropriate for its specific risks; - Identify the corrective actions to be taken for each of the eight measures stipulated in Article 17 of the act of 9 December 2016 (...) The anti-corruption programme audit could consist of: - Reviewing the corruption and influence peddling risk map, if there is one; - Using accounting and financial tests to check a sample of transactions identified from the target's corruption risk map; - Analysing the whistleblowing reports received and their handling by the target; - Examining the management of third parties considered to be at risk (selection process, reviews of tenders and contracts, analysis of payments made, etc.)*").
[xxv] French Anticorruption Agency, *Practical Guide - Anti-Corruption Due Diligence for Mergers and Acquisitions*, January 2020 (updated March 2021), p. 17 ("*Depending on the target's situation, it is the purchaser's responsibility as parent company to set up an anti-corruption programme in the target company and update it or extend its own system to the target with the necessary adjustments*").
[xxvi] Criminal liability audits in the context of mergers and acquisition operations, Hannes Scheibitz, Lionel Yemal, Le Monde du Droit, 22 February 2021, para. 14.

The Bolloré case and the risks attached to the French Individual Guilty Pleas

French criminal law does not have a very long-standing tradition of negotiated justice. Negotiated justice in France first appeared with a form of guilty plea known as Comparution sur Reconnaissance Préalable de Culpabilité or "CRPC" introduced in 2004 for minor offenses[i] and then extended in 2011 to more serious offences, including white-collar crime[ii].

The CRPC procedure is applicable to both natural and legal persons and enables a defendant to agree to an offer from the prosecutor for a reduced sentence in exchange for an admission of guilt[iii].

Once the prosecutor and the defendant agree on a sentence, the CRPC agreement has to be homologated by a Judge to come into effect. However, the homologation Judge may refuse to do so, in particular if he finds that the nature of the facts, the personality of the defendant, the situation of the victim or the general interests of society justify that a public trial should be held[iv].

In addition to this procedure, a new form of negotiated justice, the Judicial Public Interest Agreement ("Convention Judiciaire d'intérêt public" or "CJIP") was implemented in 2016 by the Sapin II Law for legal persons accused of corruption, influence peddling, or tax offense[v].

The CJIP does not apply to natural persons[vi]. In this regard, the French Criminal Procedure Code expressly states that when a CJIP is signed by a legal person the legal representatives of the accused legal person remain liable as natural persons[vii].

Therefore, when both a legal person and an individual are prosecuted in the same case, the former may engage in a CJIP, while the later may engage in a CRPC[viii].

However, a recent case of 26 February 2021[ix], highlights the risk attached to the CRPC procedure conducted in parallel with a CJIP. In this case, following a French investigation regarding public procurement contracts in Togo[x], Mr. Vincent Bolloré, one of the richest businessmen in France, and the company Bolloré SE, decided to settle this investigation with the French prosecuting authorities.

Bolloré SE signed a CJIP and did not admit to any wrongdoing but agreed to pay a €12-million fine and set up a compliance program[xi]. Vincent Bolloré, for his part and in the context of a CRPC, admitted to wrongdoing and acknowledged his guilt, in exchange for a sentence limited to a €375,000 fine. However, Vincent Bolloré had his CRPC agreement refused by the homologation Judge during the public hearing[xii]. According to the journalists who attended this public homologation hearing, the Homologation Judge stated that Vincent Bollore's was not going to be granted a CRPC, because his conduct had "seriously undermined public economic order" and "undermined Togo's sovereignty" and that he should therefore be held accountable in a public trial[xiii].

This refusal was unexpected. Indeed, Vincent Bolloré's attorneys had negotiated with the French national financial prosecutor ("parquet national financier" or "PNF") to settle this case.

The Bolloré case shows that the homologation of a CRPC by the Judge is not automatically granted. The judge can refuse to homologate the CRPC on a discretionary basis, without the possibility of an appeal against this decision of non-homologation by the defendant[xiv].

This is not the first instance where a CRPC was rejected in a high-profile case. In 2017, a French member of Parliament had negotiated with the Paris prosecutor for a CRPC to settle allegations of money laundering and violation of financial reporting requirements. The judge refused the homologation indicating that the sentence was "unsuitable in view of the circumstances of the offence and the personality of the perpetrator" who was a "representative of the Nation"[xv]. It seems that the risk that a guilty plea will not be accepted is increased for high-profile individuals or where public interests may be involved. Whilst French law provides for a possibility to appeal an homologated CRPC, it does not provide for such a mechanism when the homologation is refused. In that respect, the French Constitutional Supreme Court recently confirmed that the absence of an appeal mechanism for a homologation refusal was not contrary to the Constitution and the right to an effective remedy [xvi].

Finally, the Bolloré case raises the question of whether an individual who has admitted guilt in the context of an unsuccessful CRPC and in whose case a CJIP is signed with a legal entity, can receive a fair trial during the subsequent proceeding. Indeed, if the Criminal Procedure Code states that the public prosecutor and the parties may not refer to statements made or documents handed over during the CRPC procedure before the future investigating or trial court[xvii], media reports of the defendant's admission of guilt may impair the ability of the Judge in charge of the continuation of the case to be impartial[xvii].

[i] Law no2004-204 of 9 March 2004, adapting the justice system to changes in crime, accessible at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000249995; Circular of 2 September 2004 on the procedure of CRPC, accessible at: http://www.textes.justice.gouv.fr/art_pix/circulaire020904comparution.pdf.
[ii] Law no2011-1862 of 13 December 2011, on the distribution of litigation and the simplification of certain court procedures, accessible at: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000024960344/.
[iii] Article 495-7 of the Criminal Procedure Code ("*For all offenses, with the exception of those mentioned in Article 495-16 and the offenses of intentional and unintentional attacks on the integrity of persons and sexual assaults provided for in Articles 222-9 to 222-31-2 of the Penal Code when they are punishable by a prison sentence of more than five years, the public prosecutor may ex officio or at the request of the interested party or his lawyer, resort to the procedure of appearance upon prior admission of guilt in accordance with the provisions of this section with regard to any person summoned for this purpose or brought before him in application of article 393 of the present code, when this person acknowledges the facts for which he is accused*").
[iv] Article 495-11-1 of the of the Criminal Procedure Code ("*Without prejudice to cases where the conditions provided in the first paragraph of article 495-11 are not met, the President can refuse to homologate if he holds that the nature of the facts, the personality of the of the concerned party, the situation of the victim or the interests of society justify that an ordinary criminal trial hearing must be held or when the statement of the victims heard in application of article 495-13 shed new light in the conditions in which the offense was committed or on the personality of the defendant*").
[v] Law no2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of economic life, accessible at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000033558528 ; The Risks of Individual Guilty Pleas in France, Stéphane de Navacelle, Julie Zorrilla and Thomas Lapierre, Anti-Corruption Report, 14 April 2021 ("*Separately from CRPCs, a new form of negotiated deferred prosecution agreement (DPA) for legal entities, the Judicial Public Interest Agreement (Convention Judiciaire d'Intérêt Public or CJIP), was implemented in 2016 by the Sapin II Law, a comprehensive set of legislation aimed at preventing corruption*").
[vi] The Risks of Individual Guilty Pleas in France, Stéphane de Navacelle, Julie Zorrilla and Thomas Lapierre, Anti-Corruption Report, 14 April 2021 ("*Although a CJIP can bring an end to legal proceedings initiated against legal entities for corruption offences, private individuals (such as current or former executives or employees involved in misconduct) can still find themselves criminally liable before French courts for related offenses*").
[vii] Article 41-1-2 of the Criminal Procedure Code ("*The legal representatives of the defendant legal person remain liable as natural persons. They are informed, as soon as the public prosecutor proposes, that they may be assisted by a lawyer before agreeing to the proposed agreement*").
[viii] The Bolloré case or the limits of negotiated criminal justice, Dalloz Actualité, 23 March 2021 ("*Despite the fundamental difference between the CJIP and the CRPC (no admission of guilt for the former, admission of guilt for the latter), practice has revealed the frequent use of the CRPC for natural persons implicated in parallel with the conclusion of a CJIP. In the context of the development of negotiated criminal justice, the CRPC has thus emerged as a complementary tool to the CJIP for dealing with the fate of individuals*"), accessible at https://www.dalloz-actualite.fr/node/l-affaire-ibollorei-ou-limites-d-une-justice-penale-negociee.
[ix] The Bolloré case or the limits of negotiated criminal justice, Dalloz Actualité, 23 March 2021 ("*On 26 February 2021, against all expectations, the Paris Criminal Court refused to approve the three CRPCs accepted by Mr Bolloré*"), accessible at https://www.dalloz-actualite.fr/node/l-affaire-ibollorei-ou-limites-d-une-justice-penale-negociee.

[x] Port concessions in Africa: Vincent Bolloré referred to investigating judges, *in* le Monde, 24 April 2018, ("*The billionaire has been interrogated since Tuesday in an investigation into suspicions of corruption surrounding the award of port concessions to his group in Togo and Guinea*"), accessible at: https://www.lemonde.fr/societe/article/2018/04/24/ports-africains-vincent-bollore-en-garde-a-vue_5289749_3224.html.
[xi] CJIP signed by Bollore SE on February 9, 2021, accessible at: http://www.justice.gouv.fr/art_pix/CJIP_bollore_20210902.pdf.
[xii] The Risks of Individual Guilty Pleas in France, Stéphane de Navacelle, Julie Zorrilla and Thomas Lapierre, Anti-Corruption Report, 14 April 2021 ("*On January 26, 2021, Vincent Bollore, one of the richest businessmen in France, appeared before a judge to homologate a CRPC and settle allegations of corruption and embezzlement. The French press reported that that the CRPC stemmed from allegations regarding public procurement contracts related to the prolongation and extension of the concession of Port of Lomé, in Togo. The companies involved signed a CJIP in which they did not admit to any wrongdoing but agreed to pay a €12-million fine and set up a compliance program*").
[xiii] Corruption/Togo: a judge considers "necessary" a trial of Vincent Bolloré, *in* Le Point, 26 February 2021, accessible at: https://www.le-point.fr/societe/corruption-togo-une-juge-estime-necessaire-un-proces-de-vincent-bollore-26-02-2021-2415611_23.php.
[xiv] The Risks of Individual Guilty Pleas in France, Stéphane de Navacelle, Julie Zorrilla and Thomas Lapierre, Anti-Corruption Report, 14 April 2021 ("*Although a decision homologating a CRPC may be appealed, French law does not provide the defendant with the possibility to appeal a judge's refusal to approve a guilty plea* (…) *These two cases show from a procedural standpoint that the homologation judge has the discretionary power to block a CRPC and, in fact, does not need to so much as justify the decision to refuse to homologate*"); Constitutional Council, Decision no2021-918 QPC of 18 June 2021. In this case, the applicant challenged the constitutionality of the law before the Constitutional Council, because the law does not provide for any appeal against the decision by which the judge refuses to homologate the sentence proposed by the prosecutor and accepted by the person prosecuted who has admitted his guilt: ("*the contested provisions, which do not disregard the principle of equality before the law or any other right or freedom guaranteed by the Constitution, must be declared consistent with the Constitution*").
[xv] The Risks of Individual Guilty Pleas in France, Stéphane de Navacelle, Julie Zorrilla and Thomas Lapierre, Anti-Corruption Report, 14 April 2021 ("*Based on the two examples, the risk that a guilty plea will not be accepted is increased for high-profile individuals or where public interests may be involved in serious offences such as corruption or influence peddling*"); the Court of Cassation opens the way to a trial for the deputy and former mayor of Cannes Bernard Brochand, France 3 Régions, accessible at: https://france3-regions.francetvinfo.fr/provence-alpes-cote-d-azur/alpes-maritimes/cannes/cour-cassation-ouvre-voie-proces-depute-ex-maire-cannes-bernard-brochand-1868404.html.
[xvi] French Constitutional Supreme Court, 18 June 2021, no2021-918 ("*First, the procedure of appearance on prior recognition of guilt is a special procedure for the trial of certain offences which can be freely implemented by the public prosecutor once the person prosecuted has admitted the facts. Thus, the person prosecuted does not have a right to be judged according to this procedure even though he or she has admitted the facts of which he or she is accused. Nor does he or she have the right to have the sentence homologated by the president of the judicial court when the public prosecutor has decided to use this procedure and he or she has accepted the sentence proposed. Moreover, it follows from article 495-12 of the Code of Criminal Procedure that the only effect of an order refusing homologation is that, unless there is a new element, the public prosecutor refers the matter to the criminal court under the conditions of ordinary law or requests that a judicial investigation be opened. The absence of a remedy to challenge the decision to refuse homologation does not, therefore, infringe the right to an effective judicial remedy.Secondly, when, at the end of the procedure of appearance on prior recognition of guilt, the president of the judicial court, or the judge delegated by him, has not approved the proposed sentence, the second paragraph of article 495-14 of the Code of Criminal Procedure provides that the record of the proceedings cannot be transmitted to the investigating judge or trial court and that neither the public prosecutor's office nor the parties may refer to the statements made or the documents handed over in the course of the proceedings before that court. Consequently, the contested provisions do not infringe the rights of the defense*").
[xvii] Article 495-14 of the Criminal procedure Code ("*Where the person has not accepted the proposed sentence or sentences or where the president of the judicial court or the judge delegated by him or her has not approved the public prosecutor's proposal, the report may not be transmitted to the investigating or trial court, and neither the public prosecutor's office nor the parties may refer to statements made or documents handed over in the course of the proceedings before that court*").

Jurisdictional issues: when case law does not help clarifying unclear provisions of the law on the corporate duty of vigilance law

Following the adoption of the French Corporate Duty of Vigilance Law in March 2017[i], companies which, at the end of two consecutive financial years, employ at least five thousand employees in France or ten thousand within the company and its subsidiaries, have a legally binding obligation to identify and prevent, by means of a vigilance that is made public, adverse human rights and environmental impact resulting from their own activities, from activities of companies they control, and from activities of their subcontractors and suppliers, with whom they have an established commercial relationship[ii].

The law provides that if a company fails to establish, implement, or publish a vigilance plan containing reasonable measures preventing serious human rights or fundamental freedom violations, any party that has standing may send a formal notice to a company to comply with this obligation. The French Economy Ministry is nonetheless reluctant for the public authorities to send a formal notice against uncompliant companies[iii]. It is therefore up to the private parties.

In the event of non-compliance with this legal obligation after a three-month period, any person with standing may seek an injunction before competent courts to compel the company to comply with the law, under penalty if necessary[iv].

As the Law did not elaborate on the competent court, the Versailles Court of Appeal on 10 December 2020, therefore provided clarifications on the competent court to hear injunction proceedings in a case brought by NGOs against Total, seeking to compel the company to comply with its obligations under the corporate duty of vigilance law[v].

Following the company's procedural objections, the Versailles Court of Appeal confirmed the lack of jurisdiction of the Nanterre judicial court on injunction proceeding to the benefit of the commercial court.

It recalled that commercial courts have a special jurisdiction pursuant to Article 721-3 of the Code of Commerce[vi]. In the absence of clear provisions of the Duty of Vigilance Law, the Court stressed that the drafting of a vigilance plan was part of the management of the company.[vii] It noted that the legislative provisions of the corporate duty of vigilance law were introduced in article L. 225-102-4 of the Commercial Code, in Title II concerning commercial companies, in Chapter V concerning public limited companies and in Section 3 concerning shareholders' meetings. It also emphasized that the due diligence plan and the report on its implementation were to be appended to the annual management report, which is presented at the shareholders' meeting, thus integrating social and environmental issues into the business of the commercial company. The Court also noted that the corporate duty of vigilance law necessarily impacts the functioning of the company, in that it imposes an obligation of transparency and disclosure on corporate governance. The Court thereby inferred that there is a direct link between the

establishment of a due diligence plan and the management of the company, providing jurisdiction to the commercial court[viii].

Non-commercial parties NGOs, on the other hand, supported that they had an option on the competent court between judicial and commercial ones on the ground of the mixed act theory[ix]. According to NGOs, granting jurisdiction to commercial courts would unduly divide duty of vigilance disputes between injunction and liability[x]. Yet, the Versailles Court of Appeal rejected the call for an option since the vigilance plan is a unilateral commercial act and the company is the sole debtor of this obligation[xi].

Nonetheless, a pre-trial ordinance of 11 February 2021, by the Nanterre judicial court in another corporate vigilance case against Total followed another path[xii]. The pre-trial judge relied on the Uber Cour de cassation ruling on 18 November 2020 whereby non-commercial parties may lodge their claim before commercial or judicial court on dispute relating to a commercial act of a company, irrespective of the mixed nature of such act[xiii].

Considering the full jurisdiction of the judicial court, the non-commercial nature of plaintiffs and that the drafting of a vigilance plan exceeds the strict management of a company, the pre-trial judge granted an option between judicial and commercial courts for NGOs plaintiffs seeking injunction in vigilance plan dispute[xiv].

In any case, given their distinct nature and rationale, injunction proceedings of Article L. 225-102-4 and liability proceedings of Article L. 225-102-5 may have different rules regarding the competent court according to the Versailles Court of Appeal[xv].

The Cour de cassation will rule on this issue following the NGOs' appeal of the Versailles Court of Appeal's ruling[xvi]. The French MPs seized the occasion of the Bill on Climate to adopt an amendment granting jurisdiction to one or two specialized judicial tribunal probably in Nanterre or Paris[xvii]. Most recently, deputies and senators put an end to this judicial debate by granting jurisdiction to "one or more specially designated judicial courts [xviii].

[i] Law no.2017-399 of 27 March 2017 on the duty of vigilance of parent companies and instructing companies.
[ii] Article L. 225-102-4 I° of the Commercial Code ("*Any company which employs, at the end of two consecutive financial years, at least five thousand employees within its own company and in its direct or indirect subsidiaries whose registered office is located on French territory, or at least ten thousand employees within its own company and in its direct or indirect subsidiaries whose registered office is located on French territory or abroad, shall draw up and effectively implement a vigilance plan.* [...] *The plan shall include reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, the health and safety of individuals and the environment, resulting from the activities of the company and those of the companies it controls within the meaning of II of Article L. 233-16, directly or indirectly, as well as from the activities of subcontractors or suppliers with which it has an established business relationship, when these activities are linked to this relationship*").
[iii] Response from the French Ministry of the Economy and Finance , 21 January 2021, Senate Official Journal, p. 393 ("*Under the current sanctions system adopted by the French legislator, it is not up to public authorities to issue a formal notice to companies that have not published a vigilance plan*").
[iv] Article L. 225-102-4 II° of the Commercial Code ("*Where a company, which has been given formal notice to comply with the obligations provided for in I, fails to do so within three months of the formal notice, the competent court may, at the request of any person which has an interest in the matter, order the company to comply with such obligations, where appropriate under a penalty payment. The president of the court, ruling in summary proceedings, may be seized for the same purpose*").
[v] Court of Appeal of Versailles, 13th and 14th Joint Chambers, 10 December 2020, no.20/01692.
[vi] Article L.721-3 of the Code of Commerce ("*The commercial courts shall hear: 1° disputes relating to commitments between traders, between credit institutions, between finance companies or between them; 2° those relating to commercial companies; 3° those relating to commercial acts between all persons. However, the parties may, at the time of contracting, agree to submit to arbitration the disputes listed above*").
[vii] Court of Appeal of Versailles, 13th and 14th Joint Chambers, 10 December 2020, no.20/01692 ("*The mechanism itself of these control measures demonstrates that it is indeed the functioning of the company and therefore its management that are concerned by the vigilance plan*" and "*the vigilance plan*

concerns the company itself but also each of the companies it controls as well as its subcontractors or suppliers, with obvious consequences for the operation of all of them and in particular the company itself").

[viii] Court of Appeal of Versailles, 13th and 14th Joint Chambers, 10 December 2020, no.20/01692 ("*there is a direct link between the due diligence plan, its establishment and implementation, and the management of the commercial company in its operation, a necessary and sufficient criterion for the jurisdiction of the commercial judge to be retained*").

[ix] Court of Appeal of Versailles, 13th and 14th Joint Chambers, 10 December 2020, no.20/01692 ("*according to the appellant non-profits, the right of option enshrined in case law for legal acts as well as for legal facts, authorises them, in their capacity as non-traders, to bring an action before the judicial court*").

[x] Court of Appeal of Versailles, 13th and 14th Joint Chambers, 10 December 2020, no.20/01692 ("*They oppose the division of disputes whether Articles L. 225-102-4 or L. 225-102-5 of the Commercial Code are applied, in the interests of legal certainty*").

[xi] Court of Appeal of Versailles, 13th and 14th Joint Chambers, 10 December 2020, no.20/01692 ("*it is indeed "the company that* [...] *draws up and effectively implements a due diligence plan" and Total remains the sole debtor of the obligation, so that a civil classification of the act cannot be based solely on the conditions of its establishment and implementation*") ; The Versailles Court of Appeal upholds the commercial Courts jurisdiction to hear disputes regarding the vigilance plan of commercial companies, Noëlle Lenoir, *in* Recueil Dalloz 2021, p. 515, para. 17-18 ("*the Versailles Court of Appeal considers that it is "the company which* [...] *establishes and effectively implements a vigilance plan" and that it is therefore solely liable for this obligation to establish this plan, which cannot therefore have the nature of a mixed act*").

[xii] Nanterre Judicial Court, Pre-trial Ordinance, 11 February 2020, no.20/00915.

[xiii] Nanterre Judicial Court, Pre-trial Ordinance, 11 February 2020, no.20/00915, p. 10 ("*the vigilance plan of such a company directly affects the Company as a whole, an impact which constitutes its purpose, and falls within the scope of Total SE's social responsibility even more clearly than the action in the Uber judgment*"); *Cour de Cassation*, com., 18 November 2020, no.19-19.463 ("*After recalling that the jurisdiction of the commercial courts may be retained when the defendants are persons who are neither commercial parties nor directors of a commercial company, provided that the acts of which they are accused are directly related to the management of that company, the judgment correctly states that, however when the plaintiff is a non-trading person, he has the choice of bringing the case before the civil court or the commercial court and that, having noted that the plaintiffs were not commercial parties, it deduced that they had an option of jurisdiction allowing them to validly bring before the judicial court an action for unfair competition directed against a commercial company and two of its employees*").

[xiv] Nanterre Judicial Court, Pre-trial Ordinance, 11 February 2020, no.20/00915, p. 11 ("*the full jurisdiction of the judicial court combined with the absence of any provision for the exclusive jurisdiction of the commercial court, as well as the direct involvement of the corporate liability of the Total SE far beyond the effectively direct link with its management taken in connection with the plaintiffs' status as non-traders, give them a right of option, which they can exercise at their convenience, between the judicial court, which they have validly referred to, and the commercial court*").

[xv] Court of Appeal of Versailles, 13th and 14th Joint Chambers, 10 December 2020, no.20/01692 ("*The jurisdiction to judge each of these two actions [under Articles L. 225-102-4 and L. 225-102-5], which follow their own logic and are based on distinct legal grounds, one seeking an injunction to do so and the other seeking compensation, may therefore be different*").

[xvi] Total Uganda: Organizations file an application to the French Supreme Court (*Cour de Cassation*) as the Project accelerates, Friends of the Earth France, 12 April 2021

[xvii]Disputes relating to the duty of Care: Designation of Dedicated Courts of Justice Passed in Senate, Miren Lartigue, Dalloz Actualité, 13 july 2021 ("*On 17 April, during the examination of the Climate Bill in the public session of the National Assembly, the deputies adopted amendments that provide for the addition of an Article L. 211-21 to the Judicial Organisation Code, worded as follows "One or more specially designated judicial courts shall hear actions relating to the duty of care based on Articles L. 225-102-4 and L. 225-102-5 of the Commercial Code*" and "*During the discussions on this amendment in the National Assembly, the Minister for Ecological Transition, Barbara Pompili, explained that it was a question of "refocusing this technical and complex litigation on one or two specialised jurisdictions, which will have the competence and the means to deal with it. Specifically, the Paris court and possibly the Nanterre court*") accessible at: https://www.dalloz-actualite.fr/flash/contentieux-relatif-au-devoir-de-vigilance-vers-designation-de-tribunaux-judiciaires-dedies

[xviii] A legislative initiative report with recommendations was adopted by the European Parliament on 10 March 2021; European Parliament, Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, accessible at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html.

What will be the impact of the transposition of the EU Directive on the protection of whistleblowers into French law?

The transposition of the European Union ("EU") Directive dated 23 October 2019 on the protection of whistleblowers into the laws of the member States must take place on 17 December 2021, thus impacting all companies comprised of more than 50 employees[i]. However, such transposition should not imply a major change in French law, which is already quite protective of whistleblowers. Some clarifications and reinforcements are nevertheless expected.

The European Directive is similar to the so-called "Sapin II Law"[ii] in some respects, notably with regards to the obligation to prohibit retaliation measures against the whistleblower[iii], which is codified in several areas of French law (Criminal Code, Labour Code, Monetary and Financial Code), and the statement of an immunity of whistleblowers' from liability in the context of proceedings brought against them following an alert, for example in cases of business secrets' disclosure, copyright infringement or defamation[iv].

It remains that the Directive clarifies and strengthens the scope of protection.

Firstly, the *Sapin II* law provides for the protection of whistleblowers for all breaches of probity[v]. The Directive specifies the scope of protection by listing the breaches, the report for which whistleblower will be protected, including those breaches affecting the financial interests of the EU, breaches relating to the internal market, or breaches falling within the scope of Union acts concerning various areas (public procurement, financial services, food and feed or transport safety, protection of the environment, public health, protection of privacy, and others)[vi].

It should be specified that mere suspicions, if reasonable, of potential breaches or attempts to conceal breaches, are sufficient to justify the protection of whistleblowers[vii].

Secondly, the European text extends the protection of whistleblowers to all "workers", and not just the employees. This notion of "workers" includes civil servants, self-employed workers, but also shareholders and persons belonging of the administrative, management or supervisory body of an undertaking, including non-executive members, volunteers and paid or unpaid trainees, as well as any persons working under the supervision and direction of contractors, subcontractors, and suppliers. This is the case even where information on reported breaches was acquired in an employment relationship which has since ended or in a work-based relationship which has yet to begin (ongoing recruitment process or pre-contractual negotiations) [viii].

Protection is also extended to facilitators, third persons connected with the whistleblowers and who could suffer retaliation in an employment context (whistleblowers' colleagues or relatives), but also to legal entities owned by whistleblowers, work for or are, in any other way, connected with in a work-related context[ix].

In addition, both the Sapin II Law and the Directive require private and public sector entities to establish internal reporting and follow-up channels and procedures for[x], which guarantee the confidentiality of the identity of the whistleblowers and persons referred to in the report, as wells as the information contained in the report[xi].

As for the private sector, these procedures are only required for legal entities with 50 or more employees[xii], although entities with 50 to 249 employees may choose to share resources for the receipt of alerts and the necessary investigations[xiii].

The Directive further strengthens the protection in this regard by allowing Member States to require private law entities with fewer than 50 employees, to implement internal channels following a risk assessment based on the nature of their activities and the level of risk to the environment and public health[xiv].

As for the public sector, unlike French legislation which only obliges municipalities with more than 10,000 inhabitants, all entities are subject to the implementation of whistleblowing systems, though member states remain free to exempt municipalities or entities with fewer than 50 employees from this obligation[xv].

Finally, French law provides that the reporting of an alert must follow a three-step process. It must first be relayed to the supervisor or the employer, and then, only in the event of a lack of diligence from the latter, to the judicial or administrative authority or to professional orders. As a last resort, it may be made public[xvi]. It may be directly brought to the attention of external bodies or the public, only in the event of serious and imminent danger[xvii].

In most cases, a whistleblower will feel more comfortable internally reporting behavior in order for risks to be resolved potentially faster and in a more effective way, although he or she may also fear retaliation[xviii].

The European Directive therefore offers greater freedom of choice to the whistleblower, considering that the latter should be able to choose the most appropriate course of action considering the particular situation he or she is confronted to[xix].

The transposition of this Directive into French law should therefore open interesting avenues for greater whistleblower protection. In this respect, the conclusions published in June 2021 of a public consultation launched by the French Ministry of Justice show that most participants are in favor of whistleblowers receiving financial support (73.4%) and psychological assistance (78%)[xx]. The details of this greater protection should be known in the next few months. ■

[i] Article 26.1. of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019 ("*1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 17 December 2021. 2. By way of derogation from paragraph 1, as regards legal entities in the private sector with 50 to 249 workers, Member States shall by 17 December 2023 bring into force the laws, regulations and administrative provisions necessary to comply with the obligation to establish internal reporting channels under Article 8(3)*").
[ii] Law no. 2016-1691 on transparency, the fight against corruption and the modernization of the economy ("*Sapin II*") on 9 December 2016.
[iii] Article 19 of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019 ("*Member States shall take the necessary measures to prohibit any form of retaliation against persons referred to in Article 4, including threats of retaliation and attempts of retaliation including in particular in the form of: (a) suspension, lay-off, dismissal or equivalent measures; (b) demotion or withholding of promotion; (c) transfer of duties, change of location of place of work, reduction in wages, change in working hours; (d) withholding of training; (e) a negative performance assessment or employment reference; (f) imposition or administering of any disciplinary measure, reprimand or other penalty, including a financial penalty; (g) coercion, intimidation, harassment or ostracism; (h) discrimination, disadvantageous or unfair treatment; (i) failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that he or she would be offered permanent employment; (j) failure to renew, or early termination of, a temporary employment contract; (k) harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income; (l) blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry; (m) early termination or cancellation of a contract for goods or services; (n) cancellation of a license or permit; (o) psychiatric or medical referrals*").
[iv] Article 21 of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019 ("*1. Member States shall take the necessary measures to ensure that persons referred to in Article 4 are protected against retaliation. Such measures shall include, in particular, those set out in paragraphs 2 to 8 of this Article. 2. Without prejudice to Article 3(2) and (3), where persons report information on breaches or make a public*

disclosure in accordance with this Directive they shall not be considered to have breached any restriction on disclosure of information and shall not incur liability of any kind in respect of such a report or public disclosure provided that they had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach pursuant to this Directive. 3. Reporting persons shall not incur liability in respect of the acquisition of or access to the information which is reported or publicly disclosed, provided that such acquisition or access did not constitute a self-standing criminal offence. In the event of the acquisition or access constituting a self-standing criminal offence, criminal liability shall continue to be governed by applicable national law. 4. Any other possible liability of reporting persons arising from acts or omissions which are unrelated to the reporting or public disclosure or which are not necessary for revealing a breach pursuant to this Directive shall continue to be governed by applicable Union or national law. 5. In proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds. 6. Persons referred to in Article 4 shall have access to remedial measures against retaliation as appropriate, including interim relief pending the resolution of legal proceedings, in accordance with national law. 7. In legal proceedings, including for defamation, breach of copyright, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or for compensation claims based on private, public, or on collective labour law, persons referred to in Article 4 shall not incur liability of any kind as a result of reports or public disclosures under this Directive. Those persons shall have the right to rely on that reporting or public disclosure to seek dismissal of the case, provided that they had reasonable grounds to believe that the reporting or public disclosure was necessary for revealing a breach, pursuant to this Directive. Where a person reports or publicly discloses information on breaches falling within the scope of this Directive, and that information includes trade secrets, and where that person meets the conditions of this Directive, such reporting or public disclosure shall be considered lawful under the conditions of Article 3(2) of the Directive (EU) 2016/943. 8. Member States shall take the necessary measures to ensure that remedies and full compensation are provided for damage suffered by persons referred to in Article 4 in accordance with national law").

[v] Title I of the Law no. 2016-1691 on transparency, the fight against corruption and the modernization of the economy ("*Sapin II*") on 9 December 2016, ("*Title ONE: THE FIGHT AGAINST BREACHES OF PROBITY (Articles 1 to 24)*").

[vi] Article 2 of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019, ("*1. This Directive lays down common minimum standards for the protection of persons reporting the following breaches of Union law: (a) breaches falling within the scope of the Union acts set out in the Annex that concern the following areas: (i) public procurement; (ii) financial services, products and markets, and prevention of money laundering and terrorist financing; (iii) product safety and compliance; (iv) transport safety (v) protection of the environment; (vi) radiation protection and nuclear safety; (vii) food and feed safety, animal health and welfare; (viii) public health; (ix) consumer protection; (x) protection of privacy and personal data, and security of network and information systems; (b) breaches affecting the financial interests of the Union as referred to in Article 325 TFEU and as further specified in relevant Union measures; (c) breaches relating to the internal market, as referred to in Article 26(2) TFEU, including breaches of Union competition and State aid rules, as well as breaches relating to the internal market in relation to acts which breach the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law. 2. This Directive is without prejudice to the power of Member States to extend protection under national law as regards areas or acts not covered by paragraph 1*").

[vii] Article 5(2) of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019 ("'*information on breaches' means information, including reasonable suspicions, about actual or potential breaches, which occurred or are very likely to occur in the organization in which the reporting person works or has worked or in another organization with which the reporting person is or was in contact through his or her work, and about attempts to conceal such breaches*").

[viii] Article 4.1 to 4.3 of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019 ("*1. This Directive shall apply to reporting persons working in the private or public sector who acquired information on breaches in a work-related context including, at least, the following: (a) persons having the status of worker, within the meaning of Article 45(1) TFEU, including civil servants; (b) persons having self-employed status, within the meaning of Article 49 TFEU; (c) shareholders and persons belonging to the administrative, management or supervisory body of an undertaking, including non-executive members, as well as volunteers and paid or unpaid trainees; (d) any persons working under the supervision and direction of contractors, subcontractors and suppliers. 2. This Directive shall also apply to reporting persons where they report or publicly disclose information on breaches acquired in a work-based relationship which has since ended. This Directive shall also apply to reporting persons whose work-based relationship is yet to begin in cases where information on breaches has been acquired during the recruitment process or other pre-contractual negotiations*").

[ix] Article 4.4 of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019 ("*4. The measures for the protection of reporting persons set out in Chapter VI shall also apply, where relevant, to: (a) facilitators; (b) third persons who are connected with the reporting persons and who could suffer retaliation in a work-related context, such as colleagues or relatives of the reporting persons; and (c) legal entities that the reporting persons own, work for or are otherwise connected with in a work-related context*").

[x] Article 8.III of the Law no. 2016-1691 on transparency, the fight against corruption and the modernization of the economy ("*Sapin II*") on 9 December 2016 ("*III. Appropriate procedures for collecting reports issued by members of their staff or by external and occasional collaborators shall be established by legal entities governed by public or private law with at least fifty employees, State administrations, municipalities with more than 10,000 inhabitants, as well as public establishments for inter-municipal cooperation with their own tax status of which they are members, departments and regions, in accordance with the conditions laid down by decree of the Conseil d'Etat*"); Article 8.1 of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019 ("*1. Member States shall ensure that legal entities in the private and public sector establish channels and procedures for internal reporting and for follow-up, following consultation and in agreement with the social partners where provided for by national law*").

[xi] Article 9.I of the Law no. 2016-1691 on transparency, the fight against corruption and the modernization of the economy ("*Sapin II*") on 9 December 2016 ("*I. - The procedures implemented to collect alerts, under the conditions mentioned in Article 8, guarantee strict confidentiality of the identity of the authors of the alert, of the persons concerned by it and of the information collected by all the recipients of the alert. Information that could identify the whistleblower may only be disclosed, except to the judicial authority, with the whistleblower's consent. Information that could identify the person concerned by an alert may only be disclosed, except to the judicial authority, once the validity of the alert has been established*"); Article 9.1 of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019 ("*1. The procedures for internal reporting and for follow-up as referred to in Article 8 shall include the following: (a) channels for receiving the reports which are designed, established and operated in a secure manner that ensures that the confidentiality of the identity of the reporting person and any third party mentioned in the report is protected, and prevents access thereto by non-authorized staff members*").

[xii] Article 8.3 of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019 ("*3. Paragraph 1 shall apply to legal entities in the private sector with 50 or more workers*").

[xiii] Article 8.6 of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019 ("*6. Legal entities in the private sector with 50 to 249 workers may share resources as regards the receipt of reports and any investigation to be carried out. This shall be without prejudice to the obligations imposed upon such entities by this Directive to maintain confidentiality, to give feedback, and to address the reported breach*").

[xiv] Article 8.7 of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019 ("*7. Following an appropriate risk assessment taking into account the nature of the activities of the entities and the ensuing level of risk for, in particular, the environment and public health, Member States may require legal entities in the private sector with fewer than 50 workers to establish internal reporting channels and procedures in accordance with Chapter II*").

[xv] Article 8.9 of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019 ("*9. Paragraph 1 shall apply to all legal entities in the public sector, including any entity owned or controlled by such entities. Member States may exempt from the obligation referred to in paragraph 1 municipalities with fewer than 10 000 inhabitants or fewer than 50 workers, or other entities referred to in the first subparagraph of this paragraph with fewer than 50 workers. Member States may provide that internal reporting channels can be shared between municipalities or operated by joint municipal authorities in accordance with national law, provided that the shared internal reporting channels are distinct from and autonomous in relation to the relevant external reporting channels*").
[xvi] Article 8.I. of the Law no. 2016-1691 on transparency, the fight against corruption and the modernization of the economy ("*Sapin II*") on 9 December 2016 ("*I. - The report of an alert shall be brought to the attention of the employer's direct or indirect superior or of a contact person designated by the latter. In the absence of diligence on the part of the person to whom the alert referred to in the first paragraph of this I is addressed to verify, within a reasonable time, the admissibility of the alert, it shall be sent to the judicial authority, the administrative authority or the professional orders. As a last resort, if one of the bodies mentioned in the second paragraph of this I fails to deal with the alert within three months, it may be made public*").
[xvii] Article 8.II. of the Law no. 2016-1691 on transparency, the fight against corruption and the modernization of the economy ("*Sapin II*") on 9 December 2016 ("*II. - In case of serious and imminent danger or in the presence of a risk of damage*").
[xviii] Paragraph 33 of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019 ("*(33) Reporting persons normally feel more at ease reporting internally, unless they have reasons to report externally. Empirical studies show that the majority of whistleblowers tend to report internally, within the organization in which they work. Internal reporting is also the best way to get information to the persons who can contribute to the early and effective resolution of risks to the public interest. At the same time, the reporting person should be able to choose the most appropriate reporting channel depending on the individual circumstances of the case. Moreover, it is necessary to protect public disclosures, taking into account democratic principles such as transparency and accountability, and fundamental rights such as freedom of expression and the freedom and pluralism of the media, whilst balancing the interest of employers to manage their organizations and to protect their interests, on the one hand, with the interest of the public to be protected from harm, on the other, in line with the criteria developed in the case law of the ECHR*").
[xix] Article 10 of the Directive (UE) 2019/1937 on the protection of persons who report breaches of Union law, 23 October 2019 ("*Without prejudice to point (b) of Article 15(1), reporting persons shall report information on breaches using the channels and procedures referred to in Articles 11 and 12, after having first reported through internal reporting channels, or by directly reporting through external reporting channels*").
[xx] Will a common foundation for whistleblower protection be established in the near future?, Leslie Brassac, *in* Dalloz Actualité, 17 June 2021.

AFA updated its recommendations regarding anticorruption programs

Pursuant to the provisions of the French Sapin II Law[i], the French Anticorruption Agency ("AFA") issued recommendations aimed at assisting public and private legal entities – whether subject or not to the obligation to implement preventive and detective measures against corruption[ii] – in their initiatives to prevent and detect integrity violations within their entities.

After issuing initial recommendations in 2017, AFA updated them on 4 December 2020. Similarly, to the national diagnosis launched by AFA to assess the effectiveness of corruption prevention and detection systems implemented within companies[iii], the recommendations' update is part of the first steps of the multi-year national anti-corruption plan 2020-2022 carried out by AFA and approved by the government in early 2020[iv].

The AFA recommendations which were initially organized around the 8 pillars of Article 17 of the Sapin II law and are now centered around three main pillars: the top management's commitment, the risk mapping and the risk management.

This new organization is a reminder that while all anti-corruption measures provided for by Sapin II must be implemented, the involvement of the management body is essential and risk mapping is the cornerstone of the anti-corruption system.

As a result, the scope of the risk mapping is extended to the risks of influence peddling[v]. AFA further recommends the extension of the third-party category submitted to due diligence to include third parties with whom the company would like to enter into a relationship for the purpose of an acquisition or for sponsorship.[vi] In addition, beyond the training initiatives intended for managers and the most exposed employees, AFA urges to raise all employees' awareness regarding the fight against corruption.[vii] With regard to the internal control and audit system, AFA recommends the establishment of a specific procedure setting out "*the processes and situations involving identified risks, the frequency of controls and their procedures, the persons in charge of these controls and the rules for transmitting the results to the management body*" [viii].

Furthermore, AFA strengthens the authority of its recommendations. Despite not being legislative in nature, the recommendations are now "*opposable*" against AFA as part of itin the context of its controls[ix]. Accordingly, in the context of an AFA inspection, companies henceforth benefit from a presumption of compliance when they indicate having designed their compliance program in accordance with AFA's recommendations. It then falls to AFA to demonstrate that this application has been "*ineffective, incorrect or incomplete*" [x].

These amendments are not a surprise since they are in line with the decision of the Sanction Commission issued on 4 July 2019, which states that when a company indicates having complied with the methodology recommended by the AFA, "*it must be deemed to have provided sufficient information, unless the Agency proves that it failed, in reality, to follow the recommendations*" [xi].

[i] Article 3, 2° of the law no2016-1691 of 9 December 2016, regarding the fight against corruption, transparency and the modernization of the economy, para. 1 ("[the French Anti-Corruption Agency] *elaborates recommendations to help public and private legal persons prevent and detect corruption, influence peddling, embezzlement, illegal interest taking, misappropriation of public funds and favoritism*").

[ii] Article 17 of the law no2016-1691 of 9 December 2016, regarding the fight against corruption, transparency and the modernization of the economy ("*company with at least five hundred employees, or belonging to a group of companies whose parent company is headquartered in France and whose employees includes at least five hundred employees, and whose revenue or consolidated revenue exceeds 100 million euros* [is required] *to take measures to prevent and detect the incurring, in France or abroad, of acts of corruption or influence peddling, in accordance with the procedures laid down in II*").
[iii] Multiannual National Anticorruption Plan, French Anticorruption Agency ("*Part 1 – Taking action – 2 – Support the deployment of anticorruption programs in local authorities and their establishments by 2022 (...) Tools: a survey by the AFA on the status of anticorruption mechanisms in local authorities, similar to the one conducted in 2018. It might be conducted in 2021 (i.e. after a full year of implementation of the plan) and then in 2022 (when the plan expires)*"), accessible at: https://www.agence-francaise-anticorruption.gouv.fr/files/files/Plan national pluriannuel 2020-2022.pdf; National Diagnosis on Anticorruption Programs within Companies, Results of the 2020 investigation, French Anticorruption Agency, accessible at : https://www.agence-francaise-anticorruption.gouv.fr/files/files/Diagnostic%20national%20sur%20les%20dispositifs%20anticorruption%20dans%20les%20entreprises.pdf.
[iv] Multiannual National Anticorruption Plan, French Anticorruption Agency ("*Part 1 – Taking action – 1 – Support the deployment of anticorruption programs in all government ministries by 2022 (...) Tools: - educational actions carried out by AFA to assist administrations (awareness-raising and training actions, distribution of guides); 2 – Support the deployment of anticorruption programs in local authorities and their establishments by 2022 (...) Tools: - educational actions carried out by the AFA: support for local authorities, awareness-raising and training actions, distribution of guides*"), accessible at : https://www.agence-francaise-anticorruption.gouv.fr/files/files/Plan national pluriannuel 2020-2022.pdf; National Diagnosis on Anticorruption Programs within Companies, Results of the 2020 investigation, French Anticorruption Agency, accessible at : https://www.agence-francaise-anticorruption.gouv.fr/files/files/Diagnostic%20national%20sur%20les%20dispositifs%20anticorruption%20dans%20les%20entreprises.pdf.
[v] Notice published in the *Journal officiel de la République française* regarding AFA recommendations intended to assist public and private legal entities to prevent and detect corruption, influence peddling, embezzlement, misappropriation, misappropriation of public funds and favoritism, 12 January 2021, II.2.117 ("*The combined interpretation of the different provisions of Article 17 and in particular of its I, implies that the companies submitted to this article must establish a risk mapping covering not only the risks of corruption as specified in the text, but also those of influence peddling*").
[vi] Notice published in the *Journal officiel de la République française* regarding AFA recommendations intended to assist public and private legal entities to prevent and detect corruption, influence peddling, embezzlement, misappropriation, misappropriation of public funds and favoritism, 12 January 2021, II.1.A.3.203 ("*It is also recommended to include in the evaluation systems other categories of third parties with which the company may be in relation or wish to enter into relation, in particular: its acquisition targets, its sponsorship beneficiaries or sponsorship actions*").
[vii] Notice published in the *Journal officiel de la République française* regarding AFA recommendations intended to assist public and private legal entities to prevent and detect corruption, influence peddling, embezzlement, misappropriation, misappropriation of public funds and favoritism, 12 January 2021, II.3.A.2.181 ("*An effective and appropriate training program is a key factor in promoting the values and culture of integrity within the company, and promotes the broad dissemination of the governing body's anti-corruption commitments, as well as their adoption by the employees affected. It can usefully be included in the broader effort to raise awareness for all employees*").
[viii] Notice published in the *Journal officiel de la République française* regarding AFA recommendations intended to assist public and private legal entities to prevent and detect corruption, influence peddling, embezzlement, misappropriation, misappropriation of public funds and favoritism, 12 January 2021, II.3.B.2.291 ("*The controls thus defined are described in a procedure that specifies the processes and risk situations identified, the frequency of controls and their procedures, the persons responsible for these controls and the conditions for reporting their results to the management body*").
[ix] Notice published in the *Journal officiel de la République française* regarding AFA recommendations intended to assist public and private legal entities to prevent and detect corruption, influence peddling, embezzlement, misappropriation, misappropriation of public funds and favoritism, 12 January 2021, I.I.3 8. and following ("*8. These recommendations do not create legal obligations to the persons to whom they are addressed. The organizations mentioned in paragraph 7 are free to adopt other methods, provided that their implementation allows compliance with the law. 9. AFA refers to the recommendations as part of its advisory and monitoring missions. It will only refer to the present document for inspections after sixth month into force. 10. These recommendations are binding AFA in the context of its inspection's activities, i.e. that entities mentioned in paragraph 7 may rely on them if they have decided to comply with them*").
[x] Notice published in the *Journal officiel de la République française* regarding AFA recommendations intended to assist public and private legal entities to prevent and detect corruption, influence peddling, embezzlement, misappropriation, misappropriation of public funds and favoritism, 12 January 2021, I-I.3 11 ("*11. Thus, an entity as referred to in paragraph 7, that indicates during an AFA inspection having complied with these recommendations, benefits from a simple presumption. Such presumption can only be reversed if the AFA demonstrates an ineffective, incorrect or incomplete application of the recommendations*").
[xi] French Anticorruption Agency, Sanctions Commission, 4 July 2019, decision no. 19-01, *Société S SAS et Mme C.*

An illustration of the employer's disciplinary power in case of non-compliance with internal company rules

On 11 March 2021, the Court of Appeal of Angers issued an interesting decision on the consequences of a non-compliance with internal company procedures by an employee, ruling that did not constitute a serious misconduct but that such misconduct likely to give grounds for a real and serious cause for dismissal under French labor law[i].

I. The employee committed by not following the internal policies a fault of such a nature as to give a real and serious cause to his dismissal

In France, an employer can only dismiss an employee if he can prove a real and serious cause for such dismissal[ii], i.e., an objective cause which is sufficiently important to justify the termination of the employment contract[iii].

Serious cause for dismissal should not be confused with the notion of serious misconduct, which is defined by case law as facts constituting a breach of obligations resulting from the employment contract of such importance that they make it impossible for the employee to remain in the company[iv].

In the case at hand, a company dismissed its sales and marketing manager of an armament company for serious misconduct, on the grounds he had arranged a meeting to sign an international contract with a distributor based in the United Arab Emirates, without respecting the internal control procedure in force, which provided for an obligation to alert the management and due to the fact that the contract was not validated either in form or in substance, thus exposing the company and its managers to particularly high risks[v].

Whereas in the first instance, the court had considered that the dismissal was devoid of real and serious cause, the Court of Appeal of Angers, on the contrary, judged that the sales and marketing manager, with regard to his level of responsibility and the particular nature of the activity of the company, had committed by not going through the validation process, a fault of such a nature as to give a real and serious cause to the dismissal[vi].

But, on the other hand, the Court of Appeal considered that there was no reason to qualify the dismissal of serious misconduct since, even if the breach committed was a faulty abstention in view of the context, it did not reflect any bad faith or disloyalty on the part of the sales and marketing director and did not have the effect of putting the company in a situation of serious and immediate danger so that it was impossible to maintain his employment contract[vii].

II. An illustration of the exercise of the employer's disciplinary power in case of breaches of internal policies

Beyond the employment law aspect of this decision, this decision has great consequences regarding the enforcement and execution of compliance requirements resulting from the law n°2016-1691 of 9 December 2016 on transparency, fight against corruption and modernization of

economic life (called “Sapin 2” law) and it makes it an interesting decision for the fight against corruption.

Indeed, article 17 of this law requires, mainly companies with more than 500 employees and revenues of more than 100 million euros, to take measures to prevent and detect the commission of acts of corruption or influence peddling among which the establishment of a disciplinary system allowing the company's employees to be sanctioned in the event of a violation of the company's code of conduct[viii].

This decision is thus an illustration of the exercise of the employer’s disciplinary power in case of breaches of internal anti-corruption and influence peddling procedures. It is a reminder of the importance of the prevention system and the zero tolerance that should be applied in view of the risks incurred by companies, as the Court of Appeal underlines by specifying that the sales and marketing director committed “*a clumsiness revealing a poor appreciation of the extent of his responsibilities which could have had unfortunate consequences for the company*”[ix].

While some may regret that the judges did not find serious misconduct in the failure to comply with internal compliance procedures, the fact remains that the decision reflects an important consideration of the latter. In any event, this is the illustration that compliance requirements take an ever more important place.

[i] Court of Appeal of Angers, 11 March 2021, n0900128 (“*Contrary to what Mr. F seems to maintain in his submissions, the claim does not relate to the omission of verifications that were not his responsibility, but rather to the fact that he did not worry about the validation process by the International Development Department before transmitting to the General Manager the request to sign the contract with ADD. Mr. Hébert thus made a mistake that revealed a poor appreciation of his responsibilities, which could have had unfortunate consequences for the company, particularly given the fact that it operates in a sensitive sector. In view of Mr. F's level of responsibility and the nature of the company's activity, this is a fault likely to give real and serious cause to the dismissal. On the other hand, there is no reason to qualify it as serious misconduct insofar as the breach committed can be analyzed as an abstention which is certainly culpable in view of the context, but which does not reflect bad faith or any disloyalty on the part of Mr. F and which did not have the effect of placing the company in a situation of serious and immediate danger, so that it did not make it impossible to maintain the employment contract*”).
[ii] Article L.1232-1 of the French Employment Code (“*Any dismissal for personal reasons must be justified under the conditions defined in this chapter. It shall be justified by a real and serious reason*”).
[iii] Official Journal of the French Republic, Parliamentary Debates, National Assembly, Second Ordinary Session of 1972-1973, Minutes of Proceedings - 26th Session, 1st Session of Tuesday, 22 May 1973, p. 1445 (“*The cause is real if it is objective, thereby excluding prejudice and personal convenience. The real and, therefore, legitimate cause for dismissal may be, for example, a fault, professional unfitness, or a reorganization of the company. For the dismissal to be valid, the cause must also be serious; it must therefore present a certain degree of seriousness that disturbs the relationship between the employee and the employer*”).
[iv] Court of Appeal of Angers, 11 March 2021, n0900128 (“*Serious misconduct for which the employee is deprived of the right to severance pay, should be proven by the employer. It corresponds to a fact or a set of facts which, if attributable to the employee, constitute a violation of the obligations resulting from the employment contract of such importance as to make it impossible for the employee to remain in the company*”); *Cour de Cassation*, Soc., 27 September 2007, n°06-43.867 (“*But whereas serious misconduct, which alone can justify a temporary layoff, is that which makes it impossible for the employee to remain in the company*”).
[v] Court of Appeal of Angers, 11 March 2021, n0900128 (“*After having been laid off on a precautionary basis by letter dated 4 December 2017, which also contained a request for an interview prior to an eventual dismissal, which took place on the following 14 December, Mr. F was dismissed for serious misconduct by registered letter dated 21 December 2017, which states: 'You were hired on 1 July 2014 by Alsetex as sales manager and, in this capacity, you are responsible for growing the company's business in accordance with the applicable directives and internal procedures. However, we have been presented with particularly serious breaches of essential professional obligations from your part. On Thursday, 23 November 2017, you requested our senior management to make an appointment in Abu Dhabi, before 12 December 2017, to sign an exclusive contract for the distribution of law enforcement products with a company based in the Middle East, on behalf of Alsetex. Following your request, the signing appointment was scheduled for Wednesday of the following week on 29 November 2017. Your professional experience in dealing with intermediaries in international business operations should have alerted you to the necessity of being extremely cautious in the conduct of this matter, and of ensuring a very rigorous supervision. However, it appeared that you initiated this signature appointment by intentionally not respecting, upstream, the internal control procedure in force, i.e. the business instruction 'Management of export business partners' drafted by the international development department (D.D.I.). However, this procedure requires, before signing a contract, the validation of different departments (such as the international development department, the legal department...) in order to ensure the legality and regularity of the contract concluded, which were not carried out in the present case: * Absence of qualification of the partner within the framework of the I.D.D. process,*Absence of contract finalization by the D.D.I. and validation by the legal department, * Absence of the 'distribution contract signature' form including the signature of the Alsetex sales manager, i.e. yourself. It thus appears that you did not hesitate to incite the general management to go to the Middle East to sign a distribution contract without ever having alerted it to the fact that the latter was validated neither in form nor in substance, thus exposing the company and its managers to particularly significant risks.*

It was the Director of International Development who, after being informed of the trip you had initiated, alerted our General Manager on Monday evening, 27 November 2017, i.e. the day before the scheduled trip to Abu Dhabi, of the absence of a approved contract. The meeting could not be cancelled which was not without consequences for the image and reputation of the company, the group and its leaders with eminent personalities in the Middle East. Your disorganized action in this case seriously taints the reputation of the company Alsetex of which you are the commercial director and consequently also that of the group. These various facts were exposed to you during the interview of December 14, 2017.Given the seriousness of these, your retention in the company is impossible, and this including during the notice period. We therefore regret to hereby notify you of your dismissal for serious misconduct").

[vi] Court of Appeal of Angers, 11 March 2021, n0900128 ("Mr. *F therefore took the risk of inviting the company's general manager to respond to Mr. M's wish without first verifying that the file was in order or that it was about to become so. Contrary to what Mr. F seems to claim in his documents, the complaint does not concern the omission of verifications that were not his responsibility, but the fact that he did not ask about the validation process by the International Development Department before transmitting to the General Manager the request to sign the contract with ADD. Mr. Hébert thus committed a mistake that revealed a poor appreciation of the extent of his responsibilities, which could have had unfortunate consequences for the company, particularly given the fact that it operates in a sensitive sector. In view of Mr. F's level of responsibility and the particular nature of the company's activity, this is a fault likely to give real and serious cause to the dismissal*").

[vii] Court of Appeal of Angers, 11 March 2021, n0900128 ("*On the other hand, there is no reason to classify the breach as serious misconduct insofar as the failure thus committed can be analyzed as an omission which is certainly wrongful given the context, but which does not reflect bad faith or any disloyalty whatsoever on the part of Mr. F and which did not have the effect of placing the company in a situation of serious and immediate danger, so that it did not make it impossible to maintain the employment contrac*t").

[viii] Article 17 of Law 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of economic life ("*I. - The presidents, chief executive officers and managers of a company with at least five hundred employees, or belonging to a group of companies whose parent company has its registered office in France and whose workforce includes at least five hundred employees, and whose turnover or consolidated turnover exceeds €100 million, are required to take measures to prevent and detect the commission, in France or abroad, of acts of bribery or influence peddling in accordance with the terms and conditions provided for in II. (...) II. - The persons mentioned in I shall implement the following measures and procedures: (...) 7° A disciplinary system allowing the company's employees to be sanctioned in the event of a breach of the company's code of conduct (...)*").

[ix] Court of Appeal of Angers, 11 March 2021, n0900128.

Paris Court of Appeal highlights the growing importance of compliance in arbitration

O n 17 November 2020, the Paris Court of Appeal (*Cour d'appel de Paris*) sets aside two awards[i] rendered in a dispute opposing the French private company Sorelec and the State of Libya after recalling the stance of the French courts[ii] which consider that corruption is a violation of the "international public *policy*" [iii].

I. Competence of the French judge to appreciate allegation of corruption not previously alleged by a party before the Arbitral Tribuna

As part of the arbitration proceedings related to contracts entered by *Sorelec* and the State of Libya for the construction of schools and housing units, the Arbitral Tribunal rendered a Partial Award on 20 December 2017, in which it validated and recognized the Settlement Agreement entered into by the parties.

Since the State of Libya failed to perform the Settlement Agreement within the required time, the Arbitral Tribunal issued a Final Award on 10 April 2018 ordering it to pay millions of euros to *Sorelec*.

In response, the State of Libya initiated an action to set aside both awards before the French courts claiming that the Settlement Agreement was obtained by means of corruption and thus violated international public policy under Article 1520 (5) of the French Code of Civil Procedure.

According to the Court, the prohibition of corruption of public officials is one of the principles of the French legal system. Therefore, and pursuant to article 1520 of the French Civil Procedure Code which provides that "*recourse for setting aside is valid only if:* (...) *the recognition or enforcement of the award is contrary to international public policy*", corruption is a ground for setting aside awards.

In addition, the Paris Court of Appeal reiterates its long-standing case law[iv] whereby "*the French concept of international public policy implies that the State judge is entitled to assess the ground for the violation of international public policy even though it was not raised before the Arbitral Tribunal*". As reaffirmed by the Court, the State judge's scrutiny has a specific and separate purpose from that of the Arbitral Tribunal[v]. It is up to the judge to assess whether "*the recognition or enforcement of the award manifestly, effectively and concretely violates international public policy*".

II. Application of a circumstantial evidence methodology in the appreciation of corruption by the Paris Court of Appeal

Moreover, looking at corruption issues, the Paris Court of Appeal adopts once again, as it has in the *Alstom Alexander Brothers* decision of 28 May 2019 and *Sécuriport* decision of 27 October 2020, the definition of corruption provided by article 16 of the United Nations Convention against Corruption of 2003 and refers to the definition provided by article 1 of the OECD Convention on Combating Bribery of 1997. This demonstrates the clear willingness of French Courts to harmonize worldwide the approach to corruption in arbitration.

Consistently with its previous rulings, the Paris Court of Appeal applies in this instance the so-called red flags test. According to this method, the Courts retain corruption by relying on circumstantial evidence provided that it is serious, precise and consistent, without requiring direct evidence[vi].

In the present decision, the Court applied this *circumstantial evidence* methodology stating that the different circumstantial evidence submitted by the State of Libya were sufficiently "*serious, precise and consistent*". Relying, *inter alia*, on the general context of corruption in Libya, it concludes that the Settlement Agreement had concealed a corrupt scheme. The Paris Court of Appeal notes a set of red flags relying on the Libyan political situation and its unclear government structure, the abnormal government procedure followed for concluding the Protocol, the lack of precision or the brevity of the duration of the negotiations regarding the Protocol, and conditions of the Protocol exclusively in favour of one party.

The decision adopted by the Paris Court of Appeal is in line with its recent case-law which intends to reinforce the importance of compliance in arbitration[vii]. Corruption issues should therefore be carefully considered as a major risk by those involved in arbitration proceedings and should thoroughly be taken into consideration by arbitrators who are increasingly seeing their awards set aside when giving effect to corruption-tainted contracts. The fight against corruption and in favor of business ethics is henceforth becoming an essential issue in arbitration.

[i] ICC Partial Award, 20 December 2017, no. 19329/MCP/DDA; ICC Final Award, 10 April 2018, No. 19329/MCP/DDA.
[ii] Paris Court of Appeal, 28 May 2019, no. 16/11182, *Alstom Transport SA V. Alexander Brothers Ltd*; Paris Court of Appeal, 27 October 2020, no. 19/04177, *Benin v. Sécuriport*, para. 26.
[iii] Paris Court of Appeal, 17 November 2020, no. 18-02568, *Libyan State v. Sorelec*.
[iv] Paris Court of Appeal, 14 June 2001, no. 1999/23454, *Tradigrain* ; *Cour de cassation*, 1ère civ., 13 September 2017, no. 16-25657 and no. 16-26445, *Société Indagro v. Société Ancienne Maison Marcel Blauche*.
[v] J. Jourdan-Marques, Arbitration Chronicles: Jurisdiction and Corruption – the setting aside under severe strain, Dalloz Actualités, 24 December 2020.
[vi] Paris Court of Appeal, 10 April 2018, no. 16/11182, *Alstom Transport SA V. Alexander Brothers Ltd*, para. 11-22; Paris Court of Appeal, 15 September 2020, no. 19/09058, *Samwell International Holdings Ltd v. Airbus Helicopters SAS*, para. 35-39.
[vii] Paris Court of Appeal, 28 May 2019, no. 16/11182, *Alstom Transport SA V. Alexander Brothers Ltd*; Paris Court of Appeal, 21 February 2017, no. 15/01650, *Republic of Kyrgyzstan v. Belokon*.

Preserving the primacy of due process and fair trial rights in the special context of the Coronavirus pandemic

The Coronavirus crisis has confronted judges, lawyers, clerks, and litigants with unprecedented difficulties, which have sometimes led to an acceleration of the digitalization of justice and in particular of criminal justice[i]. This can notably be witnessed with the issue of "video-hearings" in criminal proceedings.

To face the peculiar situations generated by the crisis, several texts were adopted aiming at adapting the rules of criminal procedure and those applicable to the criminal courts, including Order no.2020-303 of 25 March 2020[ii] and Order no.2020-1401 of 18 November 2020[iii] which have proved to be quite controversial.

Article 5 of Order no.2020-303 provides for the possibility to use audiovisual means of telecommunication before all criminal courts, except for those dealing with crime cases, without needing to obtain the parties' consent[iv]. Article 2 of Order no.2020-1401 provides for the very same possibility before all criminal courts, no distinction being made[v].

On 12 February 2021, the summary proceedings judge of the Council of State ("Conseil d'État"), highest French administrative court, judged that Article 2 of Order no.2020-1401, insofar as it allows the use of videoconferencing in criminal courts, without the parties' consent and without subjecting this option to any legal condition or any precise criterion, seriously infringed the rights of defense[vi].

This decision is in line with that of 27 November 2020, in which the Council of State also suspended the possibility for the Assize Court, criminal court solely responsible for judging crimes, to impose videoconferencing under the same conditions[vii]. In view of the oral nature of criminal proceedings, the Council of State emphasized the fundamental need for the parties to the trial to be physically present during the closing arguments, particularly because the accused has a right to speak last[viii].

However, the decision only applied to the hearing of severe criminal cases, due to their complexity. To the contrary, the Council of State considered that for criminal matters involving a lesser category of crimes, the increased use of videoconferencing was "made necessary by the great practical difficulties encountered by prison administration in extracting prisoners, given the particularly heavy burden imposed by the current health situation, and by the fight against the spread of the pandemic within prisons and judicial courts"[ix].

Furthermore, the Council of State reminded that judges were supposed to assess whether such difficulties justify the use of videoconferencing considering the inmate's health and the stakes of the hearing, and to ensure that the means of telecommunication chosen enable certification of the inmate's identity and guarantee the quality of the transmission and the confidentiality of communication, especially when it comes to attorney-client privilege[x].

Finally, the Council of State indicated that using videoconferencing could help avoid postponing hearings, thus contributing to the respect of the right of litigants to have their cases heard within a reasonable time[xi].

And yet, a month later, the Council of State censored Article 5 of Order no.2020-303, providing for the possibility of video-hearings before all kinds of criminal courts, for its "*unconventionality*"[xii]. In this decision of 5 March 2021, it stated that, given the importance of the guarantee attached to the physical presentation of the accused before the court, the fight against the Covid-19 pandemic could not justify any infringement to the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights[xiii].

It must also be noted that the Constitutional Council, in charge of analyzing the conformity of the legislation to the French Constitution, had already ruled on the unconstitutionality of Article 5 of Order no.2020-303. While recognizing that such a provision pursued "*the objective of constitutional value of health protection*" and satisfied the "*constitutional principle of continuity of justice functioning*"[xiv], the Constitutional Council ruled that Article 5 of Order no. 2020-303 is unconstitutional because the judges' decision to use audiovisual means of communication in criminal cases is not subjected to any legal condition or bound by any precise specific criteria[xv].

It stems from these various decisions that the question of whether imposing video-hearings complies with the respect of defense rights is a sensitive one, certainly still subject to differing views. Besides, the Covid 19 crisis has raised not only videoconferencing issues, but also issues related to the public's access to hearings (Article 4 of Order no. 2020-1401)[xvi] and the extension of pre-trial custody periods (articles 15, 16 and 17 of Order no. 2020-303)[xvii].

The challenge lies in deciding whether the restrictions imposed on the normal functioning of justice sufficiently guarantee due process and fair trial rights and are justified and proportionate to the sanitary situation at the time of the hearing[xviii].

[i] Procédure pénale et numérique : Panorama 2019-2020, Anaïs Danet, Dalloz, AJ Pénal 2021, p. 142.
[ii] Order no.2020-303 adapting the rules of criminal procedure based on Law no. 2020-290 of 23 March 2020 on the emergency response to the covid-19 epidemic.
[iii] Order no.2020-1401 adapting the rules applicable to the courts of the judicial order ruling in criminal matters.
[iv] Article 5 of Order no.2020-303 adapting the rules of criminal procedure on the basis of Law no. 2020-290 of 23 March 2020 on the emergency response to the covid-19 epidemic ("*Notwithstanding article 706-71 of the Code of Criminal Procedure, audiovisual means of communication may be used before all criminal courts, other than courts handling crimes, without the need to obtain the agreement of the parties. If it is technically or materially impossible to use such a means, the judge may decide to use any other means of electronic communication, including telephone communication, that ensures the quality of the transmission, the identity of the persons and guarantees the confidentiality of the exchanges between the parties and their lawyers. The judge shall always ensure that the proceedings are conducted properly, and the court clerk's office shall draw up the minutes of the operations carried out. In the cases provided for in this article, the judge organizes and conducts the proceedings while ensuring that the rights of the defense are respected and that the debates are adversarial*").
[v] Article 2 of Order no.2020-1401 adapting the rules applicable to the courts of the judicial order ruling in criminal matters ("*Notwithstanding any contrary provision, audiovisual means of telecommunication may be used before all criminal courts and for presentations before the public prosecutor or the public prosecutor, without the need to obtain the parties' agreement. The means of telecommunication used must make it possible to certify the identity of the persons and guarantee the quality of the transmission as well as the confidentiality of the exchanges. The judge shall ensure that the proceedings are always conducted properly and a record shall be made of the operations carried out. The judge organizes and conducts the proceedings while ensuring respect for the rights of the defense and guaranteeing the adversarial nature of the proceedings. The provisions of the sixth paragraph of Article 706-71 of the Code of Criminal Procedure are applicable. The provisions of this article shall only apply before the criminal courts once the investigation has been completed at the hearing referred to in Article 346 of the Code of Criminal Procedure*").
[vi] *Conseil d'Etat*, *Juge des référés*, Order no.448972, 12 February 2021, para. 13 ("*The provisions of Article 2 of the contested order, insofar as they authorize the use of videoconferencing, without the agreement of the parties, before criminal courts other than criminal courts, without subjecting this option to legal conditions or framing it by any criterion, seriously and manifestly infringe the rights of the defense*").
[vii] *Conseil d'Etat*, *Juge des référés*, Order no.446712, 446724, 446728, 446736 and 446816, 27 November 2020, para. 14-15 ("*14. However, the situation differs for hearings before the assize court or the criminal court. The seriousness of the penalties incurred and the role given to the intimate conviction of the judges and jurors give a specific place to the oral proceedings. During the closing arguments, the physical presence of the civil parties and the accused is essential, and even more so when the accused speaks last, before the closing of the proceedings. In the balance of the interests at stake, given the conditions under which these means of telecommunication are used, the elements mentioned in point 12 concerning the requirements of the proper functioning of justice are not sufficient to justify the infringement of the contested provisions on the founding principles of the criminal trial and on the rights of the natural persons who are parties to the trial, whether they are defendants or victims. 15. It follows from the foregoing that the provisions of article 2 of the contested order seriously and manifestly infringe the rights of the defense and the right to a fair trial only insofar as they authorize the use of videoconferencing after the end of the investigation at the hearing before the criminal courts. Consequently, since the Minister of Justice does not seriously contest that the condition of urgency is met, the applicants are entitled to request, to this extent, the suspension of the execution of the contested provisions*").

[viii] Criminal courts (health crisis): suspension of the use of video-conferencing, Dalloz, 2020. 2400, para. 3.
[ix] *Conseil d'Etat*, *Juge des référés*, Order no.446712, 446724, 446728, 446736 and 446816, 27 November 2020, para. 12 ("*12. It follows from the investigation, in particular from the information provided by the Minister of Justice, and from the debates at the hearing, that this increased use of videoconferencing is made necessary by the major practical difficulties encountered by the prison administration in extracting prisoners, given the particularly severe constraints imposed by the current health situation, and by the fight against the spread of the epidemic within prisons and judicial courts. Moreover, the contested provisions merely offer a possibility to the judges, who are responsible, in each case, for assessing whether these difficulties justify the use of videoconferencing, particularly with regard to the state of health of the detainee and the importance of the hearing in question. It is also their responsibility, as provided for in the provisions at issue, to ensure that the means of telecommunication used allows the identity of the persons to be certified and guarantees the quality of the transmission as well as the confidentiality of the exchanges, in particular between the lawyer and his client. Finally, the use of videoconferencing can avoid postponing hearings and thus contribute to the respect of the right of litigants to have their case heard within a reasonable time*").
[x] *Conseil d'Etat*, *Juge des référés*, Order no.446712, 446724, 446728, 446736 and 446816, 27 November 2020, para. 12.
[xi] *Conseil d'Etat*, *Juge des référés*, Order no.446712, 446724, 446728, 446736 and 446816, 27 November 2020, para. 12.
[xii] Inconventionality of the criminal video hearing during the covid-19 epidemic, Jean-Marc Pastor, Dalloz Actualité, 10 March 2021, para 1.
[xiii] *Conseil d'Etat*, 5th and 6th Chambers, nos.440037 and 440165, 5 March 2021, para. 10 ("*Given the importance of the guarantee attached to the physical presentation of the accused before the criminal court, these provisions infringe on the right to a fair trial guaranteed by article 6 of the ECHR, which cannot be justified by the context of the fight against the covid-19 epidemic*").
[xiv] "QPC: JLD, health crisis and use of audiovisual means of communication", Victoria Morgante, Dalloz Actualité, 22 March 2021, para. 9.
[xv] Constitutional Council, decision no. 2020-872 QPC, 15 January 2021, para. 8-9, ("*8. However, in the first place, the scope of application of the contested provisions extends to all criminal courts, with the sole exception of criminal courts. They therefore make it possible to require the use of audiovisual means of communication in a large number of cases. This is the case, for example, when an accused person appears before the criminal court or the criminal appeals chamber, or when he or she appears before the specialized courts responsible for judging minors in criminal matters. The use of an audiovisual means of communication may also be required during the adversarial debate prior to the placement of a person in pretrial detention or the extension of pretrial detention, regardless of the length of time during which the person has been deprived of the possibility of physically appearing before the judge called upon to rule on the pretrial detention. 9. Secondly, if the use of audiovisual means of telecommunication is only an option for the judge, the contested provisions do not make its exercise subject to any legal condition and, whether in the situations mentioned in the previous paragraph or in all the others, do not set any criteria for it*").
[xvi] No Video Hearing for Criminal and Assize Courts, Jean-Marc Pastor, Dalloz Actualité, 1 December 2020, para. 3.
[xvii] Inconventionality of the criminal video hearing during the covid-19 epidemic, Jean-Marc Pastor, Dalloz Actualité, 10 March 2021, para 4.
[xviii] No Video Hearing for Criminal and Assize Courts, Jean-Marc Pastor, Dalloz Actualité, 1 December 2020, para. 3 in fine ("*It is incumbent upon the magistrates to ensure that they are justified and proportionate to the health situation at the time of the hearing*").

The professional secrecy threatened by recent case law on seizure

Professional secrecy, provided for in Article 66-5 of French Law dated 31 December 1971[i] and incl uded in Article 2 of the National Rules of Procedure for the Legal Profession ("RIN")[ii], guarantees the confidentiality of communications between the lawyer and his client, and thus constitutes an essential condition for establishing a trusting relationship with the client and to ensure the best execution of a lawyer's mission, e., the exercise of the rights of defense, a democratic guarantee[iii].

Nevertheless, professional secrecy has recently been threatened by case law regarding seizures by supervisory authorities and in particular with two specific decisions of the French Supreme Court ("Cour de cassation") dated 4 November 2020[iv] and 25 November 2020[v].

In the first decision, the appeal concerned a decision of the Delegate of the first president of a Court of Appeal to annul the seizure of attorney-client correspondences by the French financial markets' authority (hereinafter "AMF"), on the basis of article L.621-12 of the Monetary and Financial Code[vi], in the offices of a company and in directors' homes, suspected of offences of insider trading[vii].

To cancel the seizure of these correspondences, the Delegate examined the list transmitted by the Defendants which listed several correspondences seized and excluded the exchanges between them and their counsel[viii].

Nevertheless, the *Cour de cassation* censured the contested order, stating that the Delegate should have precisely identified the correspondences involved and precisely identify the content of such correspondence in order to accurately know whether these letters were protected by the professional secrecy[ix].

This first decision raises the question of the extent of the analysis expected analysis expected by the *Cour de cassation*. Indeed, the judge involved must obviously ensure that the documents seized correspond to attorney-client correspondences, yet once this verification has been carried out, it seems difficult to proceed with a more precise analysis of the content of the correspondences, without hindering the confidentiality guaranteed by the above-mentioned law[x].

Yet, the second decision seems to clarify the scope of the expected verification. In this case, the appeal also concerned the annulment of seizures of attorney-client correspondences, seized in the offices of a company by the French regional directorate for companies, competition, consumption, labor and employment ("DIRECCTE")[xi], on the basis of article L.450-4 I of the Commercial Code[xii].

A table had been produced by the Company which contested the seizure, identifying the correspondences that it considered to be covered by legal privilege. The judge, in granting their request, based its decision on this table, which specified the file reference for each message, the identity of the lawyer and the recipient[xiii].

However, this was also insufficient for the *Cour de cassation*. After recalling that correspondence between lawyers and clients are covered by professional secrecy, it specified that this only concerns the correspondences relating to the exercise of the rights of the defense[xiv]. Thus, the *Cour*

de cassation, states that the judge was required to verify that the correspondences which has been identified by the Company were indeed related to defense activity[xv].

While this decision clarifies the scope of the verification, which must therefore be related to the exercise of the rights of the defense, it should be noted that that these cases are contrary to the letters of the Law, which expressly states that exchanges between a lawyer and his client are protected inn all matters, whether in the field of advice or of defense[xvi].

The extent of what is qualified as related to the rights of defense in an attorney-client correspondence is questionable. Consequently, it is up to French lawyers to firmly defend their professional secrecy.

[i] Article 66-5 §1 of the Law no71-1130 of 31 December 1971 ("*In all matters, whether in the field of advice or defense, consultations addressed by a lawyer to his client or intended for the latter, correspondence exchanged between the client and his lawyer, between the lawyer and his colleagues, with the exception of those marked "official", interview notes and, more generally, all documents in the file are covered by professional secrecy*").
[ii] Article 2.2 du RIN ("*Professional secrecy covers in all matters, in the field of advice or defense, and whatever the medium, material or immaterial (paper, fax, electronic means ...) : consultations addressed by a lawyer to his client or intended for the latter; correspondence exchanged between the client and his lawyer, between the lawyer and his colleagues, with the exception of those bearing the official mention; interview notes and more generally all the documents in the file, all information and confidences received by the lawyer in the exercise of the profession* (...)").
[iii] On the seizure of correspondence with a lawyer, Lucile Priout Albert, Dalloz actualité, December 23, 2020 ("*It goes without saying that professional secrecy is a sine qua non of the relationship of trust between the client and his counsel and thus contributes to the effectiveness of the rights of the defense*").
[iv] *Cour de Cassation*. Com., 4 November 2020, no 19-17.911.
[v] *Cour de Cassation*. Crim., 25 November 2020, no 19-84.304.
[vi] Article L.621-12 of the Monetary and Financial Code ("*For the investigation of offences defined in articles L. 465-1 to L. 465-3-3 and of acts likely to be qualified as property offences and to be sanctioned by the Enforcement Committee of the Autorité des marchés financiers pursuant to article L. 621-15, the liberty and custody judge of the judicial court in whose jurisdiction the premises to be visited are located may, at the reasoned request of the secretary general of the Autorité des marchés financiers, authorize by order the investigators of the authority to visit any premises and to seize documents and collect, under the conditions and according to the methods mentioned in articles L. 621-10 and L. 621-11, the explanations of the persons solicited on the spot*").
[vii] *Cour de Cassation*. Com., 4 November 2020, no 19-17.911 ("*a judge of freedoms and detention has, on the basis of articles L. 465-1, L. 465-3 and L. 621-12 of the monetary and financial code, authorized investigators of the Autorité des marchés financiers (AMF) to carry out visits and seizures in premises likely to be occupied by the companies AB science (the company AB) and AMY located* [...], *in premises and outbuildings located [...] likely to be occupied by Mr. K... ... likely to be occupied by Mr. K..., in premises and outbuildings located [...] likely to be occupied by Mr. L..., in premises and outbuildings located* [...] *likely to be occupied by Mr. F..., as well as in premises and outbuildings located* [...] *likely to be occupied by Mrs. Q..., with a view to seeking evidence of insider misconduct or insider trading*").
[viii] *Cour de Cassation*. Com., 4 November 2020, no 19-17.911 ("("*In order to annul the seizure of the correspondence constituting the appellants' Exhibit No. 16, the first president, after having indicated that he had examined them concretely, noted that only the e-mails exchanged between the directors and employees of the companies visited and their lawyers were covered by secrecy, that the exchanges between two correspondents for which a lawyer was a copy could not benefit from the legal protection, that only the exchanges in which a lawyer was the sender or the recipient of the e-mail could benefit from this protection, and that the fact that the companies divulged to third parties correspondences that were covered by professional secrecy caused them to forfeit their protection*").
[ix] *Cour de Cassation*. Com., 4 November 2020, no 19-17.911 '("*In so ruling, without precisely identifying the correspondence in question and without indicating what the result of their concrete examination was, when the AMF contested the list of messages produced by the appellants, arguing that it did not make it possible to identify precisely who the authors or recipients of the e-mails in question were and, since it did not allow for a concrete examination, could not replace their production, the first president deprived his decision of a legal basis*").
[x] AB Science case: validation of searches and seizures made by AMF investigators, Nicolas Ida, Labase Lextenso, January 2021 ("*But it is still necessary to agree on the scope of the concrete analysis that the judge must make. Without doubt, he must verify that the e-mails whose seizure is being challenged are indeed lawyer-client exchanges covered by professional secrecy. But once this verification has been carried out, it does not seem useful to proceed with an analysis of the content of the messages in question, since their confidentiality is ensured by the law in the field of advice as in that of the defense*").
[xi] *Cour de Cassation*. crim., 25 November 2020, no 19-84.304 ("*By order of April 4, 2018, the liberty and custody judge authorized the Auvergne Rhône-Alpes regional directorate for companies, competition, consumption, labor and employment (DIRECCTE) to carry out visit and seizure operations, in particular at the premises of the company Au vieux campeur Paris de Rorthays et Cie*").
[xii] Article L. 450-4 al. 1 of the Commercial Code ("*The agents mentioned in article L. 450-1 may only conduct visits to any premises and seize documents and any information media in the context of investigations requested by the European Commission, the Minister for the Economy or the General Rapporteur of the French Competition Authority, upon the proposal of the Rapporteur, and upon judicial authorization given by an order of the liberties and detention judge of the judicial court in whose jurisdiction the premises to be visited are located. They may also, under the same conditions, proceed with the sealing of any business premises, documents and information media within the limit of the duration of the visit of these premises*").
[xiii] *Cour de Cassation*. crim., 25 November 2020, no 19-84.304 ("*In order to grant the request of the company Au vieux campeur that the correspondence with its lawyers be removed from the seized files, the contested order held that the applicant produced a summary table of the documents for which protection was requested, specifying the computer concerned, the reference of the outlook files in which the correspondence was stored, the identity of the lawyer and the addressee of the message as well as the date of the message*").

[xiv] *Cour de Cassation*. crim., 25 November 2020, no 19-84.304 ("*Having regard to articles 66-5 of the law of December 31, 1971 and L. 450-4 of the commercial code: 6. If, according to the principles recalled by the first of these texts, the correspondence exchanged between the client and his lawyer are, in all*

matters, covered by professional secrecy, it remains that they can in particular be seized within the framework of the operations of visit envisaged by the second one as soon as they do not relate to the exercise of the rights of the defense").

[xv] *Cour de Cassation*. crim., 25 November 2020, no 19-84.304 ("*In so determining, the First President did not justify his decision. 11. It is clear from the statements in the order under appeal that the applicant, who merely identified the letters concerned, did not provide any evidence that those letters were connected with the exercise of the rights of the defense*").

[xvi] AB Science case: validation of searches and seizures made by AMF investigators, Nicolas Ida, Labase Lextenso, January 2021 ("*While this distinction reflects the search for a certain balance between the protection of attorney-client privilege and the requirement of repressive effectiveness, it is nonetheless contrary to the letter of the law. Indeed, we know that this solution was condemned by the legislator, who twice modified the law to expressly provide that exchanges between a lawyer and his client are protected "in all matters, whether in the field of advice or in that of the defense*"); Article 66-5 §1 of the French Law n°71-1130 of 31 December 1971 ("*In all matters, whether in the field of advice or defense, consultations addressed by a lawyer to his client or intended for the latter, correspondence exchanged between the client and his lawyer, between the lawyer and his colleagues, with the exception of those marked "official", interview notes and, more generally, all documents in the file are covered by professional secrecy*").

The time limits for consideration of the request for release of a person subject to an extradition request were not extended during the Covid-19 crisis

Extradition is a mechanism for international cooperation whereby one State (the requesting State) may ask another State (the requested State) to surrender a person for trial or for sentencing sentence[i].

Under French law, after notification of the extradition request, the person claimed is, in most cases, arrested and placed under detention for the duration of the extradition process by the first president of the Appeal Court or, in case of urgency and a request for provisional arrested by the requesting State, by the public Prosecutor with territorial jurisdiction[ii].

In this regard, Article 696-19 of the French Criminal Procedure Code allows a foreigner who has been detained during the extradition proceedings to apply to the Investigating Chamber for release at any time during the process. The Court must decide within twenty days of receiving such request, otherwise the person will automatically be released if he or she is not detained for another reason[iii].

On 25 March 2020, due to the Covid-19 health crisis, an Ordinance was issued which provides in its Article 18 that "*the time limits for the investigating chamber* [...] *to rule on a request for release* [...] *are increased by one month*". Such new time limit is applicable to new cases as well as cases in progress during the state of health emergency[iv].

Therefore, a new kind of case law has arisen with regards to the application of such extension of time limits on the detention during extradition process, and more specifically regarding the request for release made by the foreigner.

In a decision of 19 August 2020, the Criminal Division of the French Supreme Court ("*Cour de Cassation*") censured the judges of the Investigation Division of the Douai Court of Appeals who had applied Article 18 to extend the time limit for the hearing of a request for release of a person placed in extradition detention.

In the case at hand, a foreigner had been placed under detention during an extradition process during which he had filed several requests for release. After the twenty-day time limit for ruling on a request for release was exceeded, the detainee asked the Investigating Chamber of the Douai Court of Appeals to order his automatic release[v].

The Investigation Division of the Douai Court of Appeals applied Article 18 to extend the time limit for the hearing of a request for release of a person placed in extradition detention. It thus refused to order the detainees release, considering that the requests related to the provisional detention ("*détention provisoire*") and therefore were included in the scope of appeals relating to this detention, for which Article 18 of the Order of 25 March 2020 provided for a one-month extension[vi].

The *Cour de cassation* censured such decision as it explained that Article 18 of the ordinance was limited to proceedings involving provisional detention. In the absence of an express provision

regarding hearing timeframes regarding matters of extradition, the Investigating Chamber of the Douai Court of Appeal was required to rule within the twenty-day period provided for in Article 696-19 of the Code of Criminal Procedure, despite the state of health emergency. As the Investigating Chamber did not respect this time limit in this case, the criminal chamber declared the judgment null and void and ordered the release of the detainee[vii].

By this decision, the *Cour de cassation* clarifies the scope of the applicability of Article 18 of the Ordinance of 25 March 2020 to the regime of detention during extradition process by strictly excluding its application and making a clear distinction between the regime of detention during extradition process and that provisional detention.

In this respect, the latest case law of 2021 confirms such position as it refuted, the argument of an applicant, who sought the application of articles 137-3 and 144 of the French Criminal Procedure Code relating to provisional detention dealing with the request for release submitted by a person placed in detention during the extradition process[viii].

[i] Lamy Business Criminal Law, Part 14 International Aspects of Business Criminal Law, Chapter 1 The Sphere of Criminal Law and International Judicial Cooperation, Section 3 Extradition ("*Extradition is the mechanism of international cooperation whereby one State (the requested State) hands over a person to another State (the requesting State) for the purpose of prosecuting that person and bringing him or her before a court of law or enforcing his or her sentence if the person has already been sentenced*").
[ii] Article 696-23 of the Code of Criminal Procedure ("*In case of urgency and at the direct request of the competent authorities of the requesting State, the territorially competent public prosecutor may order the provisional arrest of a person requested for extradition by the said State*").
[iii] Article 696-19 of the Code of Criminal Procedure ("*Release may be requested at any time from the Investigating Chamber in the manner provided for in Articles 148-6 and 148-7*").
[iv] Article 18 of Ordinance no.2020-303 of 25 March 2020 adapting rules of criminal procedure on the basis of Act no.2020-290 of 23 March 2020 on the emergency response to the covid-19 epidemic ("*NOTA: Pursuant to Article 5 I of Ordinance No. 2020-341 of March 27, 2020, these provisions shall apply to ongoing proceedings*"); Article 5 I of Ordinance no.2020-341 of 27 March 2020 adapting the rules relating to the difficulties of companies and agricultural holdings to the health emergency and amending certain provisions of criminal procedure ("*I. - This Ordinance shall apply to pending proceedings*"); This state of health emergency has been extended and then declared again by several laws (Law no.2020-290 of March 23, 2020 of emergency to deal with the covid-19 epidemic; Law no.2020-546 of 11 May 2020 extending the state of health emergency and supplementing its provisions; Decree no.2020-1257 of 14 October 2020 declaring the state of health emergency; Decree no.2020-1310 of 29 October 2020 prescribing the general measures necessary to deal with the covid-19 epidemic in the context of the state of health emergency; Law no.2020-1379 of 14 November 2020 authorizing the extension of the state of health emergency and providing for various measures to manage the health crisis; Law no.2021-160 of 15 February 2021 extending the state of health emergency).
[v]*Cour de Cassation*. Crim. 19 August 2020, no20-82858 ("*5. Mr. X... filed between May 4 and 20, 2020, ten requests for release which were joined.6. He has requested, as his main request, that the Investigating Chamber order his release ex officio for exceeding the twenty-day time limit for ruling on a request for release from detention during extradition process*").
[vi] *Cour de Cassation*. Crim. 19 August 2020, no20-82858 ("*12. To refuse to order the release of Mr. X... who invoked the expiration of the twenty-day period allowed to the Investigating Chamber to rule on his requests for release made between May 4 and 7, 2020, the judgment stated that these requests related to his provisional detention pending the decision of the French authorities on the extradition request of the Russian authorities and that they fell within the scope of appeals concerning provisional detention for which article 18 of the Ordinance of March 25, 2020 provided for an extension of the hearing period*").
[vii] *Cour de Cassation*. Crim. 19 August 2020 no20-82858 ("*13. In so ruling, while, on the one hand, Article 18 of the aforementioned ordinance, the scope of which is limited to litigation concerning provisional detention, is not applicable when the Investigating Chamber rules on detention during extradition process on the basis of article 696-19 of the code of criminal procedure, and on the other hand, no decision was taken before the expiry of the time limit set by the latter text on the applications for release made between 4 and 7 May 2020, the Investigating Chamber disregarded the aforementioned text and the principle set out above. (...) 15. The cassation will take place without referral, as the Court of Cassation is able to apply the rule of law directly and put an end to the dispute, as permitted by article L. 411-3 of the Code of Judicial Organization. It will result in the lifting of the extradition order and the release of Mr. A... X....*").
[viii] Detention during extradition process: details on the request for release, Margaux Dominati, Dalloz Actualité, 3 May 2021 ("*First, there was the question of the applicability of article 144 of the code of criminal procedure in the context of extradition. However, there is no longer any doubt that the Court of Cassation has already largely settled this question. To begin with, on a case-by-case basis, it rejected the arguments that referred to articles 144, 145-1 and 145-2 of the code of criminal procedure in the context of extradition proceedings (Crim. 5 Nov. 1996, no96-83.545; 27 March 2001, no00180.332). Then, in a succession of decisions of principle, it considered more generally that the rules relating to provisional detention are not applicable to extradition (Crim. 19 August 2020, no20-82.858, Dalloz actualité, 1 Oct. 2020, [...]). It is therefore entirely logical that the Court of Cassation refutes the plaintiff's argument that articles 137-3 and 144 of the Code of Criminal Procedure apply to the request for release of a foreigner placed under detention during extradition process, which is specifically provided for in article 696-19 of the same code (§ 13)*"); *Cour de Cassation*. Crim March 30, 2021, no21-80.339 ("*3. In the first place, article 696-19 of the Code of Criminal Procedure, which applies to the request for release submitted by a person detained in provisional custody pending an extradition decision, does not refer to articles 137-3 and 144 of the same code*").

LEGISLATIVE, REGULATORY AND POLICY UPDATES

The strengthening of environmental justice through the introduction of French Environmental *Convention judiciaire d'intérêt public*

In recent years, environmental considerations have been at the heart of current concerns and awareness has been raised, illustrated by legislative development relating to the environment such as the French Law dated 24 December 2020 on the European Public Prosecutor's Office, environmental justice, and specialized criminal justice[i].

This law, has put in place a new Deferred Prosecution Agreement ("CJIP")[ii], adjusted to environmental issues which was added into the Code of Criminal Procedure for entities charged with several offences under the Environmental Code[iii].

I. The insufficiency of the French repressive regime for environmental offences

The creation of an Environmental CJIP comes at a time when the existing repression of environmental offences was insufficient[iv] notably due to the complexity of environmental criminal law requiring a scientific expertise[v].

Thus, to bypass this technicality and to avoid the complex task of characterizing the offence[vi], alternatives measures are often the most fitted response[vii].

Notably, criminal transaction is available for offences punishable by less than two years' imprisonment and includes among its obligation a fine of one third of that normally incurred[viii]. Nevertheless, this criminal transaction has been described as insufficient in the sense that it is not applicable to environmental offences of a certain gravity[ix] and is unsuited to environmental issues[x].

The new Environmental CJIP was thus created to fill these gaps and strengthen the repression of serious environmental offences[xi].

II. The creation of Environmental CJIP as a new tool for the repression and protection of environmental damages

Possibilities of repression of environmental offences were made stronger with the introduction of the Environmental CJIP. Indeed, this tool can be used against entities who are accused of one or more offences and related offences mentioned in the Environmental Code. It for a fine up to 30% of the average annual turnover calculated on the basis of the last three known annual turnovers on the date of the finding of these breaches[xii].

Reparation and protection of the environment are also reinforced with the new CJIP which provides that the entity may be required to implement an environmental compliance program over a period of three years and under the supervision of the relevant departments of the Minister of the Environment. The entity may also be required, within a maximum of three years, to repair

the ecological damage resulting from the offences committed[xiii]. The environmental CJIP thus intends a faster and more effective remedy for environmental damage[xiv].

With regards to this procedure, the provisions refer to the modalities of the CJIP of the Sapin II Law. The agreement does not have to be made before the public prosecution is initiated, must be validated by the president of the judicial court, and be published[xv].

The Environmental CJIP therefore demonstrates the growing willingness of authorities to sanction environmental law violations committed by companies, forcing entities subject to these risks to strengthen their compliance programs in this area[xvi]. However, some questions regarding the application of this Convention may arise.

III. The remaining issues related to the Environmental CJIP

While the Environmental CJIP may be an advantage for companies in that it avoids legal proceedings costs and the legal uncertainty[xvii], it is questionable whether this mechanism will be considered by companies given the current low level of fines in the environmental area[xviii]. The current reforms may nevertheless change the situation in that they provide for an increase of fines up to several million euros[xix].

In addition, the large publicity reserved for an environmental CJIP (Ministry of Justice, Ministry of Environment, Municipalities)[xx] may create a fear of the economic operators, due to the greater visibility and potential increase in claims[xxi].

Finally, there are still questions regarding the scope of compliance programs. Indeed, unlike the Sapin II Law and the traditional CJIP, the December 2020 law and the accompanying reports provide, to this date, relatively few details on the nature of the compliance program and the way its implementation is assessed[xxii].

[I] French Law no. 2020-1672 of 24 December 2020 on the European Public Prosecutor's Office, environmental justice and specialized criminal justice.
[II] The traditional CJIP introduce by the French Law no 2016-1691 of 9 December 2016, known as "*Sapin II*" is a "*transactional procedure concluded between the public prosecutor and legal entities accused of certain offenses involving one or more of the following obligations: the payment of a fine in the public interest to the public treasury in an amount proportionate to the benefits derived from the observed breaches and/or the submission, for a period of three years and under the supervision of the French Anti-Corruption Agency, to a compliance program*".
[III] Article 41-1-3 of the Code of Criminal Procedure, introduced by Law no. 2020-1672 of 24 December 2020 ("*As long as the public prosecution has not been initiated, the public prosecutor may propose to a legal entity accused of one or more offenses provided for in the Environmental Code as well as related offenses, excluding crimes and offenses against persons provided for in Book II of the Penal Code, to enter into a judicial public interest agreement imposing one or more of the following obligations (...)*").
[IV] Written question n°03889 by M. Rachel Mazuir, published in the official journal of the Senate, 22 March 2018 - page 1325 ("*The Ministry of Justice indicates that in 2016 only 18% of reported offenses were prosecuted, compared to 46% for all offenses, and this even though the number of prosecutable perpetrators is the same as for other offenses*").
[V] General Inspectorate of Justice, A justice for the environment, Mission to evaluate the relationship between justice and the environment, October 2019, page 26 ("*The magistrates met by the mission all point out the highly technical nature of environmental law. They emphasize that the time required to deal with cases at the crossroads of life sciences, chemistry and physics is out of all proportion to the number of cases they have to handle*").
[VI] The law on the European Public Prosecutor's Office, environmental justice and specialized criminal justice, Mathilde Hautereau-Boutonnet, Professor of Law, Recueil Dalloz, 28 January 2021 ("*The vast majority of offences are dealt with by means of alternatives to prosecution (75%), essentially reminders of the law and dismissals with conditions for regularization. Among the explanations given, it is said that the public prosecutor's office is powerless to deal with the complexity of environmental cases and prefers to avoid referral to a hearing*").
[VII] General Inspectorate of Justice, A justice for the environment, Mission to evaluate the relationship between justice and the environment, October 2019, page 55 ("*The penal response is nevertheless mostly made up of alternatives to prosecution, which in 2017 amounted to 75%. These alternatives consisted mainly of reminders of the law and conditional dismissals after regularization at the request of the public prosecutor*").

[VIII] Article L. 173-12 of Environmental Code ("*I. The administrative authority may, as long as the public action has not been initiated, compromise with natural persons and legal entities on the prosecution of contraventions and offences provided for and punished by the present code, with the exception of offences punishable by more than two years of imprisonment (...) III. It specifies the transactional fine that the offender must pay, the amount of which may not exceed one third of the amount of the fine incurred*").
[IX] Specialization of environmental criminal justice: a look at the law of 24 December 2020, par Kami Haeri, Valérie Munoz-Pons et Malik Touanssa, Quinn Emanuel Urquhart & Sullivan, LLP, Dalloz actualité, 13 January 2021 ("*Although the Environmental Code already provides for a settlement mechanism in Article L. 17213 , it was not designed to deal with infractions of a certain seriousness*").
[X] General Inspectorate of Justice, A justice for the environment, Mission to evaluate the relationship between justice and the environment, October 2019, page 57 ("*According to a number of legal practitioners and associations, this measure is sometimes misused as a means of mass processing of litigation. The penal transaction is then ordered to the detriment of the victims who have not been consulted and is limited to a transactional fine, which is in any case rather low, without any reparation or restoration measure which can however be ordered in the framework of this measure. The lack of publicity surrounding the settlement is also often denounced by the associations*").
[XI] Specialization of environmental criminal justice: a look at the law of 24 December 2021, par Kami Haeri, Valérie Munoz-Pons et Malik Touanssa, Quinn Emanuel Urquhart & Sullivan, LLP, Dalloz actualité, 13 January 2021 ("*It is therefore with the threefold objective of providing a rapid and appropriate criminal response to the most serious environmental offences committed by legal persons and of better repairing the damage caused by the offence that the law inserts an article 41-1-3 into the code of criminal procedure creating a judicial public interest agreement (CJIP) in environmental matters*").
[XII] Article 41-1-3 of the Code of Criminal Procedure ("*As long as the public prosecution has not been initiated, the public prosecutor may propose to a legal person implicated for one or more offences provided for in the Environmental Code as well as for related offences, excluding crimes and offences against persons provided for in Book II of the Penal Code, to enter into a judicial public interest agreement imposing one or more of the following obligations: 1° To pay a public interest fine to the State Treasury. The amount of this fine is set in a proportionate manner, if necessary with regard to the benefits derived from the breaches observed, within the limit of 30% of the average annual turnover calculated on the last three annual turnovers known on the date of the observation of these breaches. Payment may be staggered, according to a schedule set by the public prosecutor, over a period that may not exceed one year and that is specified in the agreement*") ; The seed of the CJIP in environmental matters is planted, legislative editions, 10 January 2021 ("*The CJIP, like the penal transaction, is a tool for the benefit of legal persons accused of one or more offences - and related offences - provided for in the environmental code (except for crimes and offences against persons provided for in Book II of the penal code). However, the penal transaction cannot be concluded in the case of an offence punishable by more than 2 years of imprisonment. On the contrary, the CJIP will be able to conquer this field. And the amount of the fines generated by the two mechanisms varies. The penal transaction negotiated with the administrative authority and approved by the public prosecutor cannot exceed one third of the amount of the criminal fine incurred. Whereas the CJIP can rise to "up to 30% of the average annual turnover calculated on the last three known annual turnovers at the date of the finding of these breaches" (Article 41-1-3)*").
[XIII] Article 41-1-3 of the Code of Criminal Procedure ("*As long as the public prosecution has not been initiated, the public prosecutor may propose to a legal person implicated for one or more offences provided for in the Environmental Code as well as for related offences, excluding crimes and offences against persons provided for in Book II of the Penal Code, to enter into a judicial public interest agreement imposing one or more of the following obligations (...) 2° To regularize its situation with regard to the law or regulations within the framework of a compliance program lasting a maximum of three years, under the control of the competent services of the ministry in charge of the environment; 3° To ensure, within a maximum period of three years and under the control of the same services, the repair of the ecological damage resulting from the committed infringements*").
[XIV] Impact study of the bill on the European Public Prosecutor's Office and specialized criminal justice, page 151 ("*It is however necessary to bring a fast penal response in case of serious damage caused to the environment, both to ensure the effective repair of the damage caused and to reinforce the effectiveness of the repression*").
[XV] Article 41-1-3 3° of the Code of Criminal Procedure ("*The procedure applicable is that provided for in article 41-1-2 and the texts adopted for its application. The validation order, the amount of the public interest fine and the agreement are published on the websites of the Ministry of Justice, the Ministry of the Environment and the municipality on whose territory the offence was committed or, failing that, the public establishment for inter-municipal cooperation to which the municipality belongs*").
[XVI] Environment and compliance: new fertile ground in the EU?, International Bar Association, 4 March 2021 ("*In any event, the environmental CJIP is undoubtedly a signal of a greater willingness on the part of authorities to punish violations of environmental law committed by companies. The latter will de facto have to strengthen their compliance programs in this area, whether it is to avoid the commission of an infringement or to try to obtain a CJIP. Furthermore, it is certain that given the increasing concern over climate change and environmental harm in recent years, environmental compliance will become a field of law which will expand in the near future*").
[XVII] Specialization of environmental criminal justice: a look at the law of 24 December 2020, par Kami Haeri, Valérie Munoz-Pons et Malik Touanssa, Quinn Emanuel Urquhart & Sullivan, LLP, Dalloz actualité, 13 January 2021 ("*Compared to the uncertainty and length of some legal proceedings, the CJIP offers corporate defendants predictability through a speedy process as well as the opportunity to reduce the ultimate fine and potential reputational risk by adopting a cooperative approach with the judicial authorities*").
[XVIII] What place for the new environmental CJIP?, Sophie Bridier, Dalloz actualité, 8 March 2021 ("*Environmental criminal law would lack effectiveness. Above all, the amount of the penalties incurred would, in the vast majority of cases, be far from the bar of 30% of the turnover that the public prosecutor can target in the event of negotiation of a CJIP with a legal entity (according to art. 41-1-3 code of criminal procedure.). A context that would work against the development of the new tool introduced by the law on the European Public Prosecutor's Office, environmental justice and specialized criminal justice of December 24, 2020*").
[XIX] Title VI, Strengthening the judicial protection of the environment, French Draft Law to combat climate change and strengthen resilience to its effects resilience to its effects, registered at the Presidency of the National Assembly on 10 February 2021 ("*Article 67 II. - When they directly expose fauna, flora, or water quality to an immediate risk of serious and lasting damage, the acts provided for in I are punishable by three years' imprisonment and a fine of 300,000 euros, which may be increased to three times the benefit derived from the commission of the offence (...) Article 68 II. - When they result in serious and lasting damage to health, flora, fauna, or the quality of the air, soil or water, the acts provided for in Articles L. 173-1 and L. 173-2 are punishable by five years' imprisonment and a fine of one million euros, which may be increased to five times the benefit derived from the commission of the offence. L. 230-3. - The offence provided for in Article L. 230-1 constitutes ecocide when committed intentionally (...) The penalty of a fine of one million euros is increased to 4.5 million euros, and this amount may be increased to ten times the benefit derived from the commission of the offence*").
[XX] Article 41-1-3 3° of the Code of Criminal Procedure ("*The procedure applicable is that provided for in article 41-1-2 and the texts adopted for its application. The validation order, the amount of the public interest fine and the agreement are published on the websites of the Ministry of Justice, the Ministry of the Environment and the municipality on whose territory the offence was committed or, failing that, the public establishment for inter-municipal cooperation to which the municipality belongs*").
[XXI] What place for the new environmental CJIP?, Sophie Bridier, Dalloz actualité, 8 March 2021 ("*Better in environmental matters, this publicity is extended to the websites of the Ministry of the Environment and also of the municipality on whose territory the offence has been committed. Thus the information will be given to the residents, to the associations of the environment*").

[XXII] Specialization of environmental criminal justice: a look at the law of 24 December 2021, par Kami Haeri, Valérie Munoz-Pons et Malik Touanssa, Quinn Emanuel Urquhart & Sullivan, LLP, Dalloz actualité, 13 January 2021 ("*Indeed, the law and the accompanying reports provide relatively few details on this compliance program, whereas the Sapin II law and the CJIP in relation to breaches of probity entrusted the control of the implementation of the anti-corruption compliance program to a dedicated entity, the AFA, which has also produced recommendations to guide companies on the subject*").

The in-house attorney status in France: a bygone idea or an emerging one?

Less than two months after he submitted a draft bill for the creation of a French experimental status of in-house attorney ("*Avocat en entreprise*")[i], the Minister of Justice ultimately decided not to go through with the project, drawing the consequences of the absence of a consensus on the matter[ii]. In particular, the *Conseil National des Barreaux*, the national organization representing all French attorneys, opposed the project[iii].

The aim of this project was not only to unify the attorney and in-house lawyer professions, but also to modernize French legal practice to make it equivalent to that of other major democracies in terms of protection of the legal privilege[iv].

The project essentially pertained to the introduction, within the jurisdiction of several regional bar associations and for a 5-year experimentation period of in-house attorneys who would have been employed by a company and would have devoted their work to that company only[v]. However, such in-house attorneys would have been able to exercise the "conscience clause", relieving them of a task which they consider contrary to their conscience or independence[vi].

The rights and protections attached to the traditional status of attorneys, in particular the fact that the attorneys' correspondence with their colleagues or clients is privileged[vii], would have been extended to these in-house lawyers.

With the proposed in-house attorney status, legal advice and consultations drafted by an in-house attorney, exclusively intended for the management body of the company that employs him or her, would have been privileged if they were explicitly marked "confidential"[viii]. This prevents judicial and administrative authorities from freely seizing such documents without first asking for the permission of the judge and means that these documents could not have been communicated outside the company. In case of a search within the company's premises concerning documents likely to contain privileged material, it would have been mandatory to involve the in-house attorney, along with the company's legal representative, and to give him or her the opportunity to challenge the search and/or the seizure. The seized documents would then have been placed under seal and transmitted to the judge ("*juge des libertés et de la détention*") in order for him or her to rule on the challenge[ix].

The French legal world is nevertheless seriously divided on that topic[x]. Some attorneys fear that if the reform is introduced, French companies will not retain their services anymore, while investigating authorities fear that it could paralyze their investigations[xi].

To the contrary, Raphael Gauvin, former attorney and now member of the Law Commission of the French National Assembly, believes that the reform would benefit everyone. He argues that in-house attorneys will always call upon their colleagues working in traditional law firms to give them work. According to him, the proposed reform is only about providing French companies

with the same level of protection enjoyed by their main competitors abroad who manage to protect their privileged legal documents without preventing the gathering of evidence or the success of criminal investigations in any way[xii].

To this day France, unlike many other countries, does not protect to confidentiality of companies' in-house legal documents. As a result, such companies turn out to be particularly vulnerable in both civil and criminal extraterritorial proceedings. Some believe that this situation creates a risk that major French companies decide to relocate their legal departments in countries where in-house legal material is privileged, which could put the existence of thousands of jobs in danger[xiii].

It should be noted that this project has regularly resurfaced over the past twenty years. In 2015, the current French President Emmanuel Macron who was, at the time, head of the Ministry of Economy, had already tried to get the "Macron Law" to open up the legal profession to in-house attorneys, in vain. Both large companies and corporate lawyers are still calling for such a reform[xiv].

Given the frequent reappearance of this reform proposal, and since several of our European neighbors have already implemented it, it is likely that the abandonment of the reform by the Minister of Justice does not mark its complete disappearance.

[i] Draft bill on the creation of the status of in-house attorney, accessible at: http://web.lexisnexis.fr/LexisActu/2020-12-17-avocat-salarie-d-une-entreprise-17753-210124-1552.pdf.
[ii] Justice reform: the project of in-house attorney status abandoned, Jean-Baptiste Jacquin, *in* Le Monde, 5 March 2021, accessible at: https://www.lemonde.fr/societe/article/2021/03/05/reforme-de-la-justice-le-projet-de-statut-d-avocat-salarie-en-entreprise-abandonne_6072065_3224.html.
[iii] National Bar Council vote of January 22, 2021 ("*On January 22, the National Bar Council, gathered in a General Assembly, has voted by a 71.23% majority against the draft bill of the Ministry of Justice on in-house counsel*"), accessible at: https://www.cnb.avocat.fr/fr/communiques-de-presse/avocat-en-entreprise-vote-de-lag-du-cnb.
[iv] In-house attorney: Finally, a draft law, *in* Affiches Parisiennes, 15 January 2021, accessible at: https://www.affiches-parisiennes.com/l-avocat-dans-l-entreprise-enfin-un-pre-projet-de-loi-11666.html.
[v] In-house attorney, the comeback, *in* Gazette du Palais, 15 January 2021, accessible at: https://www.gazette-du-palais.fr/actualites-professionnelles/avocat-en-entreprise-le-retour/.
[vi] In-house attorney, the comeback, *in* Gazette du Palais, 15 January 2021, accessible at: https://www.gazette-du-palais.fr/actualites-professionnelles/avocat-en-entreprise-le-retour/.
[vii] Article 66-5 of Law no71-1130 reforming certain judicial and legal professions, 31 December 1971, para. 1 ("*In all matters, whether in the field of advice or defense, memorandum addressed by a lawyer to his client or intended for the latter, correspondence exchanged between the client and his lawyer, between the lawyer and his colleagues, with the exception of correspondence marked "official", interview notes and, more generally, all documents in the case file are covered by professional secrecy*").
[viii] The Chancellery moves forward on in-house attorney and legal privilege, 13 January 2021, Dalloz Actualité, accessible at: https://www.dalloz-actualite.fr/flash/chancellerie-avance-sur-l-avocat-en-entreprise-et-legal-privilege-0#.YNBey_Jxc2w.
[ix] The Chancellery moves forward on in-house attorney and legal privilege, 13 January 2021, Dalloz Actualité, accessible at: https://www.dalloz-actualite.fr/flash/chancellerie-avance-sur-l-avocat-en-entreprise-et-legal-privilege-0#.YNBey_Jxc2w.
[x] Experimentation of the in-house attorney, it is unanimously no!, Syndicat des avocats de France, Fédération nationale des unions de jeunes avocats, Avenir des barreaux français de France, Confédération nationale des avocats, News release of 15 January 2021, accessible at: https://www.gazette-du-palais.fr/wp-content/uploads/2021/01/CP_EXP%C3%89RIMENTATION_DE_LAVOCAT_SALARI%C3%89_EN_ENTREPRISE_CEST_UNANIMEMENT_NON_.pdf.
[xi] In-house attorney: 'Who could be against trying?' asks Raphael Gauvin, *in* Affiches Parisiennes, 15 January 2021, accessible at : https://www.affiches-parisiennes.com/avocat-en-entreprise-raphael-gauvain-qui-peut-etre-contre-le-fait-d-essayer-11662.html.
[xii] In-house attorney: 'Who could be against trying?' asks Raphael Gauvin, *in* Affiches Parisiennes, 15 January 2021, accessible at : https://www.affiches-parisiennes.com/avocat-en-entreprise-raphael-gauvain-qui-peut-etre-contre-le-fait-d-essayer-11662.html.
[xiii] In-house attorney: 'Who could be against trying?' asks Raphael Gauvin, *in* Affiches Parisiennes, 15 January 2021, accessible at : https://www.affiches-parisiennes.com/avocat-en-entreprise-raphael-gauvain-qui-peut-etre-contre-le-fait-d-essayer-11662.html.
[xiv] Justice reform: the project of in-house attorney status abandoned, Jean-Baptiste Jacquin, *in* Le Monde, 5 March 2021, accessible at : https://www.lemonde.fr/societe/article/2021/03/05/reforme-de-la-justice-le-projet-de-statut-d-avocat-salarie-en-entreprise-abandonne_6072065_3224.html.

The PNF looks back on a very unusual 2020 year

The French Financial Prosecutor Office ("PNF") was created in 2013 in the aftermath of a scandal where a former Budget Minister was accused of holding unreported bank accounts in offshore jurisdictions[i]. Operational since 1 February 2014, the PNF has national jurisdiction to prosecute and investigate on infringements to probity, tax, and the proper functioning of financial markets such as corruption, money laundering, tax fraud or market manipulation[ii]. The PNF was recently granted concurrent jurisdiction on anti-competition offences[iii].

In a criminal procedure circular of June 2020, the French Ministry of Justice consolidated the role of the PNF in the fight against corruption[iv]. The PNF is invited to consider any alert from authorities, whistleblowers, regulated professions, authorized NGOs or media investigations[v]. The circular also encourages the PNF to prosecute acts of corruption committed by companies carrying out part of their activity in France, even if they do not have their head office there[vi].

With 601 pending proceedings, 123 new investigations, respectively 27 and 64 requests for mutual assistance issued and received in 2020, the PNF had a busy year[vii]. 38 % of its cases originated from information transmitted by public authorities and 24% from complaints filed directly with the PNF. 53 % of cases are related to probity breach, 40 % to tax offenses and 7% to financial markets rules violation. The total of the fines imposed by the PNF amounted to €2.1 billion and the total amount of confiscations reached €121.9 million[viii].

2020 was also marked by significant cases including the Airbus CJIP led by the PNF in collaboration with the UK Serious Fraud Office and the US Department of Justice[ix]. Another important case was that of Rifaat Al-Assad, the uncle of the current Syrian head of state, who was convicted and had his assets in France confiscated[x]. Some cases brought strong media coverage such as the conviction of former French Prime Minister François Fillon and his wife for misappropriation of public funds[xi], and the conviction of Former French President Nicolas Sarkozy's for corruption and influence peddling[xii].

Statements by the former PNF Head Eliane Houlette has revived the debate on the independence of the French Prosecutor vis-à-vis the executive power. She declared that the independence of French prosecutors, in particular of the PNF, is hampered by a number of obstacles[xiii]. Moreover, in the case of Nicolas Sarkozy, the PNF carried out investigations on several lawyers' telephone records, known as *fadettes*. Eric Dupont-Moretti, a former defense attorney whose *fadettes* were investigated by the PNF in the context of this case and who has since become Minister of Justice, filed a complaint for breach of professional secrecy which he has later retracted[xiv].

The *fadettes* scandal led to an investigation into the functioning of the PNF by the General Inspection of Justice and the report of such investigation was published in September 2020[xv]. It noted that the access by investigators to a lawyer's phone records during a preliminary investigation does not, per se, violate his or her professional secrecy[xvi]. This analysis is in line with prevailing case law which had, in the last few years, jeopardized the absolute nature of the

Attorney's professional secrecy[xvii]. Indeed, it is possible for a client's conversation with his Attorney to be taped, reviewed and transcribed during a criminal investigation, if it appears during such conversation that the attorney may have participated in the offence[xviii].

Yet, the Report pinpoints 'a lack of rigour' in the handling of the PNF's work and underlines the fact that the preliminary investigation, in the Nicolas Sarkozy case, had lasted for more than five years[xix], which must be put into perspective with the fact that during that time, the defense had virtually no access to the case file[xx]. Indeed, during a preliminary investigation, the suspect may only request access to the case file after a year from the beginning of such investigation, and the request is subject to the discretionary decision of the prosecutor[xxi]. The Report also underlines that during the preliminary investigation, the parties cannot challenge the investigative acts decided by the prosecutor[xxii].

In response to these remarks, the PNF has decided to systemically grant access to the case file to persons under investigation when the prosecutor is considering referring them to criminal court[xxiii].

Besides these few observations on the preliminary investigation procedure, the report made 19 recommendations to improve the functioning and organization of the PNF[xxiv].

Between the Covid 19 pandemic, the high-profile cases and the controversies on defense rights, 2020 was definitely a busy year for the PNF.

[i] Law no.2013-1117 of 6 December 2013 on the fight against tax fraud and serious economic and financial crime.
[ii] Article 705 of the Code of criminal procedure.
[iii] Article 13 of the Law no.2020-1672 of 24 December 2020 on the European Public Prosecutor's Office, environmental justice and specialised criminal justice amending Article 705 of the Code of criminal procedure ("*After 8° of Article 705 of the Code of Criminal Procedure, a 9° is inserted as follows: 9° Offenses provided for in Article L. 420-6 of the Commercial Code*").
[iv] Criminal policy directive on the fight against corruption, 2 June 2020, accessible at https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2020/06/circulaire_corruption_internationale.pdf; See also : Synthèse 2020, National Financial Prosecutor Office, January 2021, p. 14 ("*This circular establishes the role and centrality of the PNF in order to allow France to assert, clearly and firmly, its judicial sovereignty vis-à-vis its foreign partners in the fight against the corruption of foreign public officials in international business transactions*"), accessible at: https://www.tribunal-de-paris.justice.fr/sites/default/files/2021-02/PNF-brochure_A5_2201.pdf.
[v] 2020 Synthesis, National Financial Prosecutor Office, January 2021, p. 14 ("*To this end, the circular invites the PNF to mobilize all existing channels for reporting international corruption: national administrative authorities, international organizations (such as the World Bank), whistleblowers, regulated professions (such as auditors), accredited NGOs (such as Transparency International) or even journalistic investigations carried out by French or foreign media*") ; Criminal policy directive on the fight against corruption, 2 June 2020, p. 6-7, accessible at: https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2020/06/circulaire_corruption_internationale.pdf.
[vi] 2020 Synthesis, National Financial Prosecutor Office, January 2021, p. 14 ("*Following the example of U.S. legislation, the law of December 9, 2016 extends the territorial jurisdiction of French courts to acts of corruption committed by companies conducting part of their activity in France, even if they are not headquartered there. The circular invites public prosecutors' offices to take advantage of this new prerogative*").
[vii] 2020 Synthesis, National Financial Prosecutor Office, January 2021, p. 9.
[viii] 2020 Synthesis, National Financial Prosecutor Office, January 2021 ("*Total criminal imposed fines amounted to 2.1 billion (including the AIRBUS CJIP in the amount of 2,083,134,455 euros and 8,417,300 euros in criminal fines). 121.9 million in confiscations (bank accounts, financial securities, vehicles, real estate) were ordered*").
[ix] CJIP PNF/Airbus, 29 January 2020, accessible at: https://www.agence-francaise-anticorruption.gouv.fr/files/files/20200129%20CJIP%20AIRBUS%20sign%C3%A9e.pdf.
[x] 2020 Synthesis, National Financial Prosecutor Office, January 2021, p. 12 ("*Involvement of the uncle of a foreign head of state, exiled in France, who was the owner of several buildings constituting the reinvestment of embezzlement of public funds made by his family in his country of origin. The properties, held through a network of offshore companies, were not declared for wealth tax purposes and were maintained by clandestinely employed staff. Sentenced to 4 years imprisonment and confiscation of nine real estate complexes with a total value of more than 106 million euros. (Appeal pending)*").
[xi] 2020 Synthesis, National Financial Prosecutor Office, January 2021, p. 13 ("*Indictment of a former Prime Minister, who, when he was a member of parliament, fictitiously employed his wife and children as parliamentary assistants and provided his wife with two other fictitious jobs for a total amount of €1,306,000 The main defendant was sentenced to five years in prison, three of which were suspended, and fined €375,000. He was also disqualified from being elected for 10 years. His wife and another parliamentarian were each sentenced to 3 years' imprisonment with a suspended sentence and a total of €395,000 in fines, as well as disqualification. (Appeal pending)*").

[xii] 2020 Synthesis, National Financial Prosecutor Office, January 2021, p. 6 ("*Trial of a former President of the Republic, a lawyer and a magistrate on charges of corruption and influence peddling. Under deliberation*"), Bismuth case : the wiretaps at the center of the judgment, Souchard Pierre-Antoine, Dalloz Actualité, 2 March 2021, accessible at: https://www.dalloz-actualite.fr/flash/affaire-bismuth-ecoutes-au-coeur-de-condamnation

[xiii] Houlette case or the hypocritical debate on the independence of the prosecutor's office revived, Mr. Barbonneau, Dalloz actualité, 22 June 2020 ("*All this seems to me as many obstacles to the independence of the authoritative, at least to that of the prosecutors, of the financial public prosecutor that I have been*"), https://www.dalloz-actualite.fr/flash/affaire-houlette-ou-l-hypocrite-debat-sur-l-independance-de-justice-relance#.XwSgfygzaUl.

[xiv] The investigation initiated against the PNF after a complaint by Eric Dupond-Moretti was dismissed, *in* Le Monde, 8 October 2020, available at: https://www.lemonde.fr/societe/article/2020/10/08/affaire-des-fadettes-l-enquete-ouverte-apres-la-plainte-de-dupond-moretti-classee-sans-suite_6055279_3224.html.

[xv] General Inspection of Justice, Operational inspection of an investigation conducted by the National Financial Prosecutor's Office, Final report, 15 September 2020.

[xvi] 5. General Inspection of Justice, Operational inspection of an investigation conducted by the National Financial Prosecutor's Office, Final report, 15 September 2020, p 5 and 53 (respectively "*The drafting of the minutes of reception and exploitation of the collected data shows the concern of the investigators not to expose excessively the private and professional life of the owners of the telephones lines operated*" and "*Unlike those relating to searches, interception of correspondence or real-time geolocation, the provisions of articles 60-1 and 77-1-1 of the CPP which govern telephone requisitions, do not contain any restriction related to the exercise of a profession of a profession whose professional secrecy is legally protected, with the exception of the general principle of proportionality provided for by article 39-3 of the same code*").

[xvii] *Cour de cassation*, Crim, no 15-83.205, Bull, 22 March 2016 ("*no legal or treaty provision prevents the capture, recording and transcription of the words of a lawyer speaking on the telephone line of a third party who has been regularly tapped, provided that, as in this case, firstly, this lawyer is not defending the person placed under surveillance, who is neither an accused person nor an assisted witness, nor has he been placed in police custody in the proceedings in question, and, secondly, his comments, even if they are exchanged with a regular client, the content of which is foreign to any exercise of the rights of the defense in the said proceedings or in any other proceedings, reveal indications of his participation in acts that may be classified as criminal*").

[xviii] *Cour de cassation*, Crim, no 15-83.205, Bull, 22 March 2016 ("[...] *no legal or treaty provision prevents the capture, recording and transcription of the words of a lawyer speaking on the telephone line of a third party who has been regularly tapped, provided that, as in this case, firstly, this lawyer is not defending the person placed under surveillance, who is neither an accused person nor an assisted witness, nor has he been placed in police custody in the proceedings in question, and, secondly, his comments, even if they are exchanged with a regular client, the content of which is foreign to any exercise of the rights of the defense in the said proceedings or in any other proceedings, reveal indications of his participation in acts that may be classified as criminal*"); See also, European Court on Human Rights, no. 49176/11, 16 June 2016, Versini-Campinchi et Crasnianski c. France, para. 79 ("*In the Court's view, this approach is compatible with the case law referred to above in that it amounts to holding that, by way of exception, the professional secrecy of lawyers, which is based on respect for the client's rights of defence, does not prevent the transcription of an exchange between a lawyer and his client in the context of the regular interception of the latter's line when the content of that exchange is such as to give rise to a presumption of the participation of the lawyer himself in an offence, and insofar as that transcription does not affect the client's rights of defence. In other words, the Court accepts that this exception to the principle of confidentiality of exchanges between lawyer and client, so restrictively stated, contains an adequate and sufficient guarantee against abuse*").

[xix] General Inspection of Justice, Operational inspection of an investigation conducted by the National Financial Prosecutor's Office, Final report, 15 September 2020, p. 59.

[xx] General Inspection of Justice, Operational inspection of an investigation conducted by the National Financial Prosecutor's Office, Final report, 15 September 2020, p 55 ("*Under article 77-2 I of the Code of Criminal Procedure, any person heard in the context of an unrestricted hearing or in police custody hearing or in police custody may ask to consult the file of the procedure in order to formulate his in order to formulate his observations, after a period of one year*").

[xxi] Article 77-2 of the Criminal Procedure Code ("*Any person against whom there are one or more plausible reasons to suspect that he has committed or attempted to commit an offence punishable by a custodial sentence and who has been the subject of one of the acts provided for in Articles 61-1 and 62-2 may, one year after the first of these acts has been carried out, request the public prosecutor, by registered letter with acknowledgement of receipt or by declaration to the clerk of the court's office against a receipt, to consult the file of the proceedings in order to formulate his observations*").

[xxii] General Inspection of Justice, Operational inspection of an investigation conducted by the National Financial Prosecutor's Office, Final report, 15 September 2020, p. 54 ("*there is no mechanism permitting an appeal in the event of a challenge to the regularity of the acts performed during the preliminary investigation*").

[xxiii] 2020 Synthesis, National Financial Prosecutor Office, January 2021, p. 11 ("*To this end, the PNF has decided to systematically open to the adversarial process, without prior request of the accused, the procedures for which a direct summons or a summons by a judicial police officer is or a summons by a judicial police officer is envisaged. In addition, the notice of opening to the adversary is accompanied by a summary note from the PNF containing a statement of the facts as well as the qualifications applicable to each of the persons of the persons against whom proceedings are envisaged*").

[xxiv] General Inspection of Justice, Operational inspection of an investigation conducted by the National Financial Prosecutor's Office, Final report, 15 September 2020, p. 11-12.

AMF's priority actions and supervision for 2021

The French Financial Markets Authority ("AMF") has published its action and supervisory priorities for 2021, which fit into broader strategic orientations defined in a five-year plan, currently the strategic plan for 2022 called #Supervision2022[i].

Among its implemented actions in 2020, despite a financial environment impacted by the Covid-19 crisis, the AMF deployed educational campaigns and supported European initiatives on Capital Markets Union – an economic policy plan designed by the European Commission to build a single market for capital, benefiting consumers, investors, and companies regardless of their location[ii] – and digital finance. It also began modernizing its information systems as part of its digital transformation[iii]. AMF's action priorities for 2021 now mainly focus on:

- Dealing with the Covid-19 crisis: The AMF emphasizes the importance of assisting issuers in their financial operations, especially distressed companies that have taken on massive amounts of debt to cope with the economic crisis[iv]. This involves supporting issuers in their transactions and financial disclosure to ensure proper information of investors and high-quality shareholder dialogue. The AMF also intends to contribute to regulatory developments to be made following the market crisis, notably to implement the European Recovery Prospectus[v], which was developed to prevent future economic upheavals[vi]. Furthermore, the AMF aims to work jointly with various economic regulators on liquidity risk management, for example with the European Securities and Markets Authority ("ESMA")[vii].

- Participating in financial regulatory reforms: The AMF will continue to contribute to the Capital Markets Union plan and to the legislative review with the aim to protect investors and the economy and to ensure European competitiveness in the context of Brexit[viii]. The AMF will closely monitor the actors of the financial markets to support them in developing new organizational schemes, which will depend largely on regulatory developments in the UK[ix]. The AMF will also keep promoting innovative European markets in digital finance[x]. In 2021, based on the European Commission's Digital Finance Package, it will adopt regulatory tools for the introduction of a single market for crypto assets in order to reinforce the fight against money laundering and terrorist financing[xi].

- Moving towards sustainable finance: The AMF will support the Paris financial center in the implementation of the regulatory framework while facilitating innovative approaches and ensuring a high-quality non-financial disclosure[xii]. This includes training customer-facing professionals on sustainability issues and on the importance of customers' environmental, social and governance preferences, as well as promoting financial innovation by taking the environment into account, while maintaining a high standard of investor protection[xiii].

In conjunction with these priorities for action, the AMF's goal is to highlight areas of risk and to make certain market participants aware of their professional obligations[xiv]. The AMF's supervisory priorities for 2021 are the following:

- Supervision of asset management companies in the implementation of their obligations of best selection and best execution under the Markets in Financial Instruments Directive ("MiFID II")[xv]. The AMF will also supervise such companies in the establishment of a system for the prevention of market abuse, in ensuring the transparency of costs and fees in collective investment management as well as the valuation and liquidity of real estate funds. The AMF will also supervise the monitoring and control of these companies by depositaries.[xvi] In this regard, the AMF will monitor related internal controls to prevent market abuse, including undue possession of insider information[xvii].

- Promotion of the security of market infrastructure information systems and the implementation of post-trade transparency requirements on bonds for market intermediaries and infrastructures[xviii]. It will also supervise the implementation of product government systems by financial instrument producers and plan to encourage these entities to apply European regulations, notably the so-called "STS" Regulation[xix] so as to ensure a simpler, transparent and standardized securitization. The AMF also intends to emphasize the importance for financial entities to deploy protection strategies against cybercrime, which has escalated with the crisis[xx].

- Supervision of Marketing and advisory services actors including financial investment advisors and investment services providers. The AMF will ensure that they comply with the MiFID II rules on marketing and selling financial instruments[xxi]. The AMF is therefore to publish a document identifying good and bad practices and outlining the rules applicable to investment services providers on this matter. The objective of the AMF is to ensure that investment service providers strictly apply such rules with a reinforcement of the controls and sanctions that could be imposed on those who have failed to meet their obligations[xxii].

- At the same time, internally, the AMF will act on improving its effectiveness by reducing the response time of its enforcement branch and strengthening its monitoring and supervisory roles through greater use of data[xxiii]. It will also join forces with the Prudential Control and Resolution Authority ("ACPR") to prevent scams and supervise the information disclosed to clients, especially when products are described as sustainable[xxiv].

[i] The AMF has published its action and supervisory priorities for 2021, Financial Markets Authority, 11 January 2021, accessible at: https://www.amf-france.org/fr/actualites-publications/communiques/communiques-de-lamf/lamf-publie-ses-priorites-daction-et-de-supervision-pour-lannee-2021.
[ii] What is the capital markets union?, European Commission, accessible at: https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/what-capital-markets-union_en.
[iii] The AMF has published its action and supervisory priorities for 2021, Financial Markets Authority, 11 January 2021, accessible at: https://www.amf-france.org/fr/actualites-publications/communiques/communiques-de-lamf/lamf-publie-ses-priorites-daction-et-de-supervision-pour-lannee-2021.
[iv] 2021 Action Priorities, Financial Markets Authority, January 2021, page 6, accessible at: https://www.amf-france.org/fr/sites/default/files/private/2021-01/priorites-daction-amf-2021_2.pdf.
[v] The Recovery Prospectus is financial information documents to be published when securities are offered to the public or admitted to trading on a regulated market; European Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, 14 June 2017, accessible at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017R1129&from=FR.
[vi] 2021 Action Priorities, Financial Markets Authority, January 2021, page 6, accessible at: https://www.amf-france.org/fr/sites/default/files/private/2021-01/priorites-daction-amf-2021_2.pdf.
[vii] 2021 Action Priorities, Financial Markets Authority, January 2021, page 7, accessible at: https://www.amf-france.org/fr/sites/default/files/private/2021-01/priorites-daction-amf-2021_2.pdf.

[viii] The AMF has published its action and supervisory priorities for 2021, Financial Markets Authority, 11 January 2021, accessible at: https://www.amf-france.org/fr/actualites-publications/communiques/communiques-de-lamf/lamf-publie-ses-priorites-daction-et-de-supervision-pour-lannee-2021.
[ix] 2021 Action Priorities, Financial Markets Authority, January 2021, page 9, accessible at: https://www.amf-france.org/fr/sites/default/files/private/2021-01/priorites-daction-amf-2021_2.pdf.
[x] The AMF has published its action and supervisory priorities for 2021, Financial Markets Authority, 11 January 2021, accessible at: https://www.amf-france.org/fr/actualites-publications/communiques/communiques-de-lamf/lamf-publie-ses-priorites-daction-et-de-supervision-pour-lannee-2021.
[xi] 2021 Action Priorities, Financial Markets Authority, January 2021, page 8, accessible at: https://www.amf-france.org/fr/sites/default/files/private/2021-01/priorites-daction-amf-2021_2.pdf.
[xii] The AMF has published its action and supervisory priorities for 2021, Financial Markets Authority, 11 January 2021, accessible at: https://www.amf-france.org/fr/actualites-publications/communiques/communiques-de-lamf/lamf-publie-ses-priorites-daction-et-de-supervision-pour-lannee-2021.
[xiii] 2021 Action Priorities, Financial Markets Authority, January 2021, page 10, accessible at: https://www.amf-france.org/fr/sites/default/files/private/2021-01/priorites-daction-amf-2021_2.pdf.
[xiv] 2021 Supervisory Priorities, Financial Markets Authority, January 2021, page 2, accessible at: https://www.amf-france.org/sites/default/files/private/2021-01/priorites-de-supervision-amf-2021.pdf.
[xv] European Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, 15 May 2014, accessible at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0065&from=FR.
[xvi] The AMF has published its action and supervisory priorities for 2021, Financial Markets Authority, 11 January 2021, accessible at: https://www.amf-france.org/fr/actualites-publications/communiques/communiques-de-lamf/lamf-publie-ses-priorites-daction-et-de-supervision-pour-lannee-2021.
[xvii] 2021 Supervisory Priorities, Financial Markets Authority, January 2021, page 6-7, accessible at: https://www.amf-france.org/sites/default/files/private/2021-01/priorites-de-supervision-amf-2021.pdf.
[xviii] The AMF has published its action and supervisory priorities for 2021, Financial Markets Authority, 11 January 2021, accessible at: https://www.amf-france.org/fr/actualites-publications/communiques/communiques-de-lamf/lamf-publie-ses-priorites-daction-et-de-supervision-pour-lannee-2021.
[xix] European Regulation (EU) 2017/2402 laying down a general framework for securitization and creating a specific framework for simple, transparent and standardized securitization, and amending Directives 009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) n01060/2009 and (EU) n0648/2012, 12 December 2017, accessible at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017R2402&from=FR.
[xx] 2021 Supervisory Priorities, Financial Markets Authority, January 2021, page 7, accessible at: https://www.amf-france.org/sites/default/files/private/2021-01/priorites-de-supervision-amf-2021.pdf.
[xxi] The AMF has published its action and supervisory priorities for 2021, Financial Markets Authority, 11 January 2021, accessible at: https://www.amf-france.org/fr/actualites-publications/communiques/communiques-de-lamf/lamf-publie-ses-priorites-daction-et-de-supervision-pour-lannee-2021.
[xxii] 2021 Supervisory Priorities, Financial Markets Authority, January 2021, page 9, accessible at: https://www.amf-france.org/sites/default/files/private/2021-01/priorites-de-supervision-amf-2021.pdf.
[xxiii] The AMF has published its action and supervisory priorities for 2021, Financial Markets Authority, 11 January 2021, accessible at: https://www.amf-france.org/fr/actualites-publications/communiques/communiques-de-lamf/lamf-publie-ses-priorites-daction-et-de-supervision-pour-lannee-2021.
[xxiv] The AMF has published its action and supervisory priorities for 2021, Financial Markets Authority, 11 January 2021, accessible at: https://www.amf-france.org/fr/actualites-publications/communiques/communiques-de-lamf/lamf-publie-ses-priorites-daction-et-de-supervision-pour-lannee-2021.

Compliance in the public sector: The Ministry of the Armed Forces issued its Code of prevention of breaches of probity

The year 2016 has marked a turning point for compliance in France in the private sector as well as in the public sector given that new obligations were imposed on them by the laws n°2016-483 of 20 April 2016 on ethics, rights and obligations of public officials and n°2016-1691 of 9 December 2016 on transparency, fight against corruption and modernization of economic life (known as the Sapin II law).

The Ministry of the Armed Forces has quickly become an example in this area. Indeed, it has since defined a triple objective policy - to prevent situations of exposure for its agents, to protect itself from accusations that would tarnish its image and to promote a culture of ethics that accompanies its transformation - implemented through five types of actions - the transition of military personnel in the private sector via the Commission of ethics of military personnel, the declaration obligations, the network of ethics referents, the procedure for collecting whistleblower reports and the system for preventing corruption and breaches of probity[i].

Concretely, in 2017[ii] and 2018[iii], the Ministry of the Armed Forces set up an ethics and whistleblowing system, which is an organization dedicated to ethics and whistleblowing built mainly around "ethics and whistleblowing referents"[iv]. Their missions are particularly to raise awareness of ethical issues among the Ministry's authorities, to provide training for the Ministry's executives and to help decision-makers concerning conflicts of interest[v].

At the end of 2020, wishing to take another step towards a compliant administration, the Ministry of the Armed Forces published a Code of Conduct in line with the objective of the Sapin II law to prevent and detect corruption in its various meanings (active and passive corruption, influence peddling, concussion, illegal taking of interest, etc.) and conflicts of interest[vi].

This code, which has been drawn up on the basis of a risks mapping of breaches of probity by the "ethics and whistleblowing ministerial referent", applies to all agents of the Ministry of the Armed Forces and of the public establishments under its supervision, and particularly to the agents involved in the prevention and detection of risks[vii].

The first part recalls the breaches of probity provided for in the criminal code and the notion of conflicts of interest, the second part explains how to adopt a "deontological attitude" and benefit from the development of probity culture, the third part details the way in which it is necessary to reinforce vigilance on the main activities at risk (public contracts, accounting, human resources), and finally, the fourth part lists the interlocutors who can be contacted for information or advice, to report forbidden behavior, or to secure a departure for the private sector[viii].

This code therefore demonstrates a clear commitment by the Ministry of the Armed Forces to the prevention of corruption and, more broadly, to compliance requirements. While it is true

that many ministries have already set up ethics referents (for example, Interior, Culture, Foreign Affairs[ix]) and that a "network of ethics referents" has even been launched on September 16, 2019[x], the fact remains that the Ministry of the Armed Forces is the first to adopt such a fundamental text[xi].

In the hope that the Ministry of the Armed Forces will serve as model for the rest of the Ministries and more generally for all public administrations, this anti-corruption initiative can only be commended.

[i] Principles and Policy - Ethics in the Ministry of the Armed Forces, Ministry of Armed Forces, 24 November 2020 ("*3 objectives: Since 2016, the Ministry of the Armed Forces has implemented a policy with a threefold objective: to prevent situations of exposure for our agents; to protect itself from accusations that would tarnish its image; to promote a culture of ethics to support its transformation. 5 actions : In this respect, five types of actions are carried out within the Ministry of the Armed Forces: The retraining of military personnel in the private sector (...) Declarative obligations (...) A network of military and civilian deontologists led by a ministerial referent, placed under the minister (...) The procedure for collecting whistleblower reports ("whistleblowers") required by the Sapin II law (...) Building a system for preventing corruption and breaches of probity in accordance with the requirements of the Sapin II law (...)*"), accessible at: : https://www.defense.gouv.fr/portail/enjeux2/deontologie-et-anticorruption/la-deontologie-au-ministere-des-armees2.
[ii] Decree of 9 October 2017 on the network of ethics referents provided for in Article L. 4122-10 of the Defense Code.
[iii] Decree of 19 February 2018 designating the referents who can collect alert reports for the armed forces and attached formations; Decree of 12 January 2018 amending the decree dated 12 February 2007 setting the powers of the inspectors attached to the secretary general for administration ; Decree of 23 August 2018 on the procedure for collecting alert reports in the Ministry of the Armed Forces, issued pursuant to III of Article 8 and I of Article 15 of Law no.2016-1691 of December 9, 2016 on transparency, the fight against corruption and the modernization of economic life.
[iv] The implementation of a deontology and whistleblowing process at the Ministry of the Armed Forces, Report of the Departmental Ethics Officer and Alert, Controller General of the Armed Forces, Jean Tenneroni, 2017-2019, p.7 ("*The laws of 2016, of April 20, for ethics in the public service, and of December 9 (known as the Sapin II law), concerning the fight against corruption, were the foundations on which an organization dedicated to ethics and alert collection was built around the concepts of "ethics referents" and "conflicts of interest", on the one hand, and the collection of alerts and the prevention and detection of corruption, on the other*").
[v] The implementation of a deontology and whistleblowing process at the Ministry of the Armed Forces, Report of the Departmental Ethics Officer and Alert, Controller General of the Armed Forces, Jean Tenneroni, 2017-2019, p.16 à 27.
[vi] Code on the prevention of probity violations, Ministry of Armed Forces, p.3 ("*The Ministry of the Armed Forces' code of conduct for the prevention of breaches of probity is fully in line with the objective set by the French legislator to prevent and detect corruption in its various meanings, as well as conflicts of interest that may lead to it*").
[vii] Code on the prevention of probity violations, Ministry of Armed Forces, p.3 ("*In an assignment letter dated 28 August 20186 , the Minister asked me to set up a plan for the prevention and detection of corruption, which would take the form of a code of conduct defining and illustrating the different types of behavior to be avoided, based on a mapping of the risks of corruption*") ; p.4 ("*It applies to all employees of the Ministry of the Armed Forces and of the public establishments under its supervision, whether military or civilian, regardless of the level of their position or field of activity, and regardless of the place where they carry out their missions (internal/external to the Ministry, national/international), while respecting the ethical provisions specific to the entity in which they serve. This code is also intended for all those involved in the prevention and detection of this type of risk (commanding officer and hierarchical authority, ethics officer and whistleblower, etc.)*").
[viii] Code on the prevention of probity violations, Ministry of Armed Forces, p.11 to 41.
[ix] Decree dated 16 November 2018 on the function of deontological referent within the Ministry of the Interior and the Ministry in charge of Overseas France; Decree dated 10 April 2018 on the creation, composition and powers of the deontological college of the Ministry of Culture; Decree dated 4 September 2017 on the deontological referent of the Ministry of Foreign Affairs.
[x] The launch of the ethics referents' network in the public service of the State, Ministry of Transformation and Civil Service ("*In the presence of Mr. Marc Guillaume, Secretary General of the Government, and Mr. Jean-Louis Nadal, President of the High Authority for the Transparency of Public Life, the DGAFP brought together for the first time on September 16 the ethics referents of the State's civil service in order to launch the network of ethics referents and to draw up an initial assessment of their activity*"), accessible at : : https://www.fonction-publique.gouv.fr/lancement-reseau-des-referents-deontologues-de-la-fonction-publique-detat; The ethics referents' network in the public service of the State is launched!, Vigie, no115, September 2019 ("*On September 16, under the aegis of the General Secretariat of the Government, the ethics referents of the ministries met to review their activities and to launch their network* ").
[xi] The Ministry of Armed forces approves the Military's Code of Conduct for the Prevention of probity breaches, Ministry of Armed Forces, 22 December 2020 ("*The Ministry of the Armed Forces is the first to adopt such a fundamental text, which is essential for the implementation of an anti-corruption mechanism that is part of the National Anti-Corruption Plan*"), accessible at: : https://www.defense.gouv.fr/actualites/articles/la-ministre-des-armees-approuve-le-code-de-prevention-des-atteintes-a-la-probite-du-ministere-des-armees#:~:text=Pratique%20et%20riche%20d'exemples,les%20plus%20expos%C3%A9es%20(commande%20publique%2C.

French initiatives in the fight against corruption for the period 2021-2030

Corruption is a global plague whose economic (e.g., total amount of kickbacks of several trillion dollars each year or illegal distortion of competition), social (e.g., reduction of the effectiveness of public policies or disruption of the optimal allocation of funds), political (e.g., loss of confidence of citizens in institutions and representatives of the State) and security (e.g., development of organized crime) costs are considerable and endanger democratic societies and the Rule of Law[i].

To eradicate corruption, or at least to reduce its effects, it is necessary that all countries in the world act together to fight against such a phenomenon. France is particularly committed to the fight against corruption in recent years. It has ratified several international conventions[ii] and has developed legal instruments to create a specific and effective system for fighting corruption (new incriminations, authorities, procedures, and means of investigation)[iii].

Recently, while the Group of States against Corruption (GRECO) pointed out some deficiencies in the French system in its latest evaluation report on France[iv], the French Anti-Corruption Agency (AFA) issued its National Multi-Year Plan to Fight Corruption 2020-2022[v] and, a few months later, the Minister of Justice adopted a Circular on Criminal Policy in the Fight against International Corruption for the attention of French magistrates[vi].

While it is now up to the OECD to evaluate the implementation of the OECD Anti-Bribery Convention in France (a report is expected in December 2021), French institutional actors involved in international cooperation and in the fight against corruption have published a Report on France's Anti-Bribery Strategy in its Cooperation Action 2021-2030[vii].

This report aims at ensuring the overall coherence of actions undertaken internationally by French actors in the field of anti-corruption cooperation, cooperation being understood as technical cooperation activities carried out by France abroad and those carried out in the framework of its official development assistance policy[viii].

Its overall objective is to contribute to the reduction of corruption in the partner countries of French cooperation. To do so, the report focuses on three areas of intervention, each one linked to specific objectives: reinforcing the French approach to combating corruption, promoting anti-corruption and better governance in international cooperation, and supporting the work of international organizations, non-state actors and local institutions[ix]. To achieve these objectives, specific actions must be implemented with precise targets within a determined time frame[x].

In concrete terms, France aims at reinforcing the effectiveness of French cooperation concerning anti-corruption and wishes to limit the risk that the work of French actors fuel corruption. To do so, France will adopt a flexible approach that will enable it to be proactive if a change of context in a partner country creates an opportunity to combat corruption. It also will take local

political will and the political economy (understood here to mean the benefit to the members of a political system) into account more systematically, to guide the selection, development, and implementation of anti-corruption cooperation projects that it funds[xi]. In this regard, it is expected that 60% of anti-corruption project documents will contain a paragraph on political will and political economy by the end of 2030[xii].

France aims at promoting transparency and accountability in the public sector, by advocating for a stronger culture of internal audit and risk management[xiii]. It also aims at reinforcing France's cooperation in priority areas to combat corruption particularly regarding the protection of whistleblowers, transparency in the extractive industries, public-private partnerships, and public procurement[xiv]. France also plans to encourage law enforcement cooperation with a view to raising the competency level of the actors dedicated to combating corruption, by working with countries that wish to reinforce their investigative procedures and judiciary with regard to economic and financial crime (specialized police and prosecution units). These activities will draw especially on the work of Expertise France and Civipol, the technical international cooperation agency at the French Ministry for the Interior[xv].

Finally, France plans to reinforce collaboration with international organizations, multilateral banks, and regional development banks by signing cooperation agreements to facilitate joint investigations and the sharing of information[xvi]. It also wishes to reinforce its collaboration with non-state actors and support projects that reinforce Supreme Audit Institutions[xvii].

An overall evaluation of the implementation of the strategy is planned for 2026 and 2030, and two bodies have been created to carry out annual technic and strategic monitoring[xviii]. All evaluations and periodic reports will be published, which will make it possible to assess France's improvements in its actions regarding fight against international corruption as early as next year.

[i] Circular on Criminal Policy in the Fight against International Corruption, Nicole Belloubet, Minister of Justice, 2 June 2020, p.2 ("*According to the IMF, the total amount of bribes paid each year worldwide can be estimated at between $1.5 trillion and $2 trillion, or nearly 2% of global GDP. According to the European Parliament, corruption alone costs the European economy at least 179 billion euros each year. In addition to these economic costs, there are unquantifiable costs in political, social and security terms. This massive, hidden and particularly complex form of financial crime represents a threat to the economic and social well-being of our citizens, to the confidence in the rule of law as well as to the security and democratic stability of our societies. On the economic and social level, corruption affects business commercial relations by distorting the market and creating illegal distortions of competition. On the political level, the corrupt phenomenon leads to the loss of confidence of citizens and economic operators in the legitimacy of public authorities. On the criminological level, corruption is the indispensable tool of organized crime in that it allows trafficking of all kinds to develop*"); Strategy Report, France's Anti-Bribery Strategy in its Cooperation Action 2021-2030, Ministry of Europe and Foreign Affairs, 2 June 2021, p.9 ("*Corruption is a global phenomenon, affecting all areas, all sectors, all actors. Difficult to quantify, the annual amount of bribes and embezzled money amount to 3,600 billion dollars (Bn$), or 5% of the world's gross domestic product (GDP) according to the World Bank and the World Economic Forum. Corruption is a major obstacle to development. Detour of wealth, discouragement of investors, confiscation of natural resources, corruption has multiple negative effects on economic activity and the legitimacy of the state. It distorts competition, promotes the informal economy, and reduces tax compliance. Corruption disrupts the optimal allocation of funds and reduces the effectiveness of public policies. By creating obstacles to the fair and efficient distribution of goods and services, it impairs the state's ability to provide quality public service, thus contributing to increased inequalities and the decrease in citizens' trust in institutions and representatives of the state. This trust is also undermined when corruption affects the electoral process, delegitimizing the democratic process. In general, corruption undermines the rule of law and is an obstacle to the realization of human rights. Corruption fosters the development of crime, especially organized crime, and even terrorism and armed groups when embezzled funds are used to fuel their networks or when these actors use corruption to pursue their goals. It is a factor of crisis and fragility and has a negative impact on security and stability at the national, regional and international levels*").
[ii] The United Nations Convention against Corruption (Mérida Convention), signed on 31 October 2003, and entered into force on 14 December 2005; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD), signed on 17 December 1997, and entered into force on 15 February 1999; the Council of Europe Criminal Law Convention on Corruption signed on 27 January 1999, and entered into force on 1 August 2008.
[iii] Law no.2000-595 of 30 June 2000, amending the Criminal Code and the Criminal Procedure Code on the fight against corruption; Law no.2007-1598 of 13 November 2007, on the fight against corruption; Law no.2010-930 of 9 August 2010, adapting criminal law to the institution

of the International Criminal Court; Law no.2016-1691 of 9 December 2016, on transparency, fight against corruption and modernization of economic life.

[iv] Fifth evaluation cycle, preventing corruption and promoting integrity in central government (senior executive positions) and law enforcement agencies, Evaluation Report, France, Group of States against Corruption (GRECO), 9 January, 2020, accessible at : https://rm.coe.int/fifth-evaluation-round-preventing-corruption-and-promoting-integrity-i/16809969fc.

[v] National Multi-Year Plan to Fight Corruption 2020-2022, French Anti-corruption Agency (AFA), 9 January 2020, accessible at: https://www.agence-francaise-anticorruption.gouv.fr/files/files/PlanVAnglais.pdf.

[vi] Circular on Criminal Policy in the Fight against International Corruption, Nicole Belloubet, Minister of Justice, 2 June 2020, accessible at: https://www.legifrance.gouv.fr/download/pdf/circ?id=44989.

[vii] Strategy Report, France's Anti-Bribery Strategy in its Cooperation Action 2021-2030, Ministry of Europe and Foreign Affairs, 2 June 2021, accessible at: https://www.diplomatie.gouv.fr/IMG/pdf/strategie_anticorruption_de_la_fce_ds_son_aciton_de_coop_en_cle81dc7d.pdf.

[viii] Strategy Report, France's Anti-Bribery Strategy in its Cooperation Action 2021-2030, Ministry of Europe and Foreign Affairs, 2 June 2021, p.11 ("*As national and international legislative frameworks evolve, there is a growing demand for technical assistance on this issue. This is the background for this French strategy, the aim of which is to ensure the overall coherence of all the anti-corruption activities undertaken abroad by French cooperation actors. Cooperation here is taken to mean the technical cooperation activities8 led by France and one or several other States and activities carried out under official development assistance (ODA) policy. This also includes international initiatives led by French institutions in this field*").

[ix] Strategy Report, France's Anti-Bribery Strategy in its Cooperation Action 2021-2030, Ministry of Europe and Foreign Affairs, 2 June 2021, p.13:

[x] Strategy Report, France's Anti-Bribery Strategy in its Cooperation Action 2021-2030, Ministry of Europe and Foreign Affairs, 2 June 2021, p.11.

[xi] Strategy Report, France's Anti-Bribery Strategy in its Cooperation Action 2021-2030, Ministry of Europe and Foreign Affairs, 2 June 2021, p.13.

[xii] Strategy Report, France's Anti-Bribery Strategy in its Cooperation Action 2021-2030, Ministry of Europe and Foreign Affairs, 2 June 2021, annex 2, p.21.

[xiii] Strategy Report, France's Anti-Bribery Strategy in its Cooperation Action 2021-2030, Ministry of Europe and Foreign Affairs, 2 June 2021, annex 2, p.14.

[xiv] Strategy Report, France's Anti-Bribery Strategy in its Cooperation Action 2021-2030, Ministry of Europe and Foreign Affairs, 2 June 2021, p.15 and 16.

[xv] Strategy Report, France's Anti-Bribery Strategy in its Cooperation Action 2021-2030, Ministry of Europe and Foreign Affairs, 2 June 2021, p.16.

[xvi] Strategy Report, France's Anti-Bribery Strategy in its Cooperation Action 2021-2030, Ministry of Europe and Foreign Affairs, 2 June 2021, p.18.

[xvii] Strategy Report, France's Anti-Bribery Strategy in its Cooperation Action 2021-2030, Ministry of Europe and Foreign Affairs, 2 June 2021, p.18.

[xviii] Strategy Report, France's Anti-Bribery Strategy in its Cooperation Action 2021-2030, Ministry of Europe and Foreign Affairs, 2 June 2021, p.11 ("*In addition, technical and strategic monitoring will be carried out separately by two bodies (…) The implementation of the strategy will be evaluated five years after its publication and again in 2030 (…). The first evaluation may lead to amending the strategy. The following documents will be published in a spirit of transparency and accountability of France's action: • evaluations of the strategy mentioned above;• periodic implementation reports*").

Future promulgation of a Law regarding the restitution of ill-gottens assets diverted by officials to the local population

The concept of asset recovery refers to the process by which assets misappropriated through certain offences are confiscated, recovered, and repatriated to the country from which they were wrongly removed[i].

The amount of confiscations executed in France reached 253.4 million euros in 2019[ii]. Nevertheless, the French system still does not provide, to date, for a mechanism allowing the restitution of assets derived from corruption to local populations, even though the United Nations Convention against Corruption, to which France is a signatory, declares a general principle of cooperation and assistance between States concerning the restitution of illicit assets to these populations[iii].

While the most privileged populations can compensate for their State's failure to fight corruption and the misappropriation of assets by public officials, the poorest populations suffer from the consequences of these misappropriations[iv].

This failure was highlighted by the Paris Criminal Court in October 2017 in the case of Mr. Obiang, Vice-President of Equatorial Guinea who was found guilty of money laundering, misappropriation of public funds and breach of trust[v] as well as by several NGOs, including Transparency International France, which has established recommendations for a responsible return of assets derived from corruption[vi].

After several unsuccessful attempts[vii], a new bill entitled “programming bill for solidarity development and fight against global inequalities” was submitted in December 2020, to create a mechanism for restitution to local populations[viii].

The bill establishes a principle of restitution to local population of the revenue derived from the sale of property confiscated following a final conviction[ix]. This conviction must relate to money laundering or concealment of a list of designated offences, e., breach of trust, offenses relating to breaches of the duty of probity (except for the offense of concussion), active bribery and influence peddling by individuals, the removal and misappropriation of goods contained in a public depository, passive and active corruption and influence peddling or the infringement of legal proceedings and obstruction of justice[x].

The original offence must have been committed by a person who is a public official of a foreign State, who holds a public office in a foreign State, or who performs a public service in a foreign State, in the exercise of his or her functions[xi].

It should be noted that the scope of this new project was envisaged by the drafters on the basis of emblematic cases of ill-gotten goods identified by the Ministry of Justice[xii] and in particular the aforementioned Obiang case involving the embezzlement of 150 million euros, which led to numerous confiscations in France[xiii] and for which the International Court of Justice in a decision rendered on 10 December 2020 accepted that the seizure by France of Mr. Obiang's illicit assets was not contrary to the provisions of the Vienna Convention on Diplomatic Relations of

18 April 1961[xiv] and that Mr. Obiang could not benefit from the principle of immunity of the offices of a diplomatic mission regarding these seized goods [xv].

Concerning the implementation modalities, the provisions of the draft specify that these sums give rise to the opening of budgetary credits within the "Official Development Assistance" mission, placed under the responsibility of the Ministry of Foreign Affairs[xvi]. The creation of a new budget program falls within the exclusive domain of the finance laws[xvii]. Therefore, a new provision will be inserted in the forthcoming 2022 Finance Act to track appropriations according to the principles of transparency, accountability and association of representative organizations as defined by Transparency International[xviii].

It should be noted that the accelerated legislative procedure was initiated by the government in order to allow for a rapid application to ongoing cases[xix]. The draft was unanimously adopted by the French National Assembly on 2 March 2021 and by the Senate on 17 May 2021[xx]. On 24 June 2021, deputies and senators, meeting in joint committee, found a compromise text. The promulgation of the text should therefore be finished shortly[xxi].

[i] What is asset recovery? UNAC Coalition, 2021 ("*Asset recovery – as outlined in the UN Convention against Corruption (UNCAC chapter V) – refers to the process by which the proceeds of corruption transferred abroad are recovered and repatriated to the country from which they were taken or to their rightful owners*"), accessible at: https://uncaccoalition.org/learn-more/asset-recovery/.
[ii] Annual report 2019 of the Agency for the management and recovery of seized and confiscated assets (AGRASC) ("*In 2019, 253.4 million euros were confiscated from offenders and criminals, an increase of 603.9% in one year.*"), accessible at: https://www.vie-publique.fr/sites/default/files/rapport/pdf/277310.pdf.
[iii] United Nations Convention against Corruption, 2004, Chapter V, Article 51 General Provisions ("*The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.*"), accessible at: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.
[iv] Good practices & recommendations for a responsible restitution of illicit assets, Transparency International France, 2019 ("*Grand corruption is the abuse of power at a high level, benefiting a few at the expense of the majority of the population, and causing serious and widespread harm to individuals and society. The primary victims of corruption are the most disadvantaged populations. Corruption deprives them of access to clean water, primary health care, basic education, passable roads and decent housing. While the better-off can compensate for this state failure, the poorest can only suffer the effects of corruption.*"), accessible at: https://transparency-france.org/actu/guide-pratique-pour-une-restitution-responsable-des-avoirs-detournes/#.YMhZg6gzaUk.
[v] Teodoro Obiang sentenced, a first in the "ill-gotten gains" case, Dalloz Actualité, 31 October 2017 ("*The court adds a penalty of confiscation of the seized assets. The court noted, however, that this sentence 'does not take into account the interests of the victims of corruption'. Indeed, the confiscated property, because it is not subject to restitution, is attributed to the French state. However, in the case of transnational corruption, 'it appears morally unjustified for the State pronouncing the confiscation to benefit from it without regard to the consequences of the offence'. This is why the Paris Criminal Court, in the last sentence of its judgment, appeals to the legislator: "In this context, it seems likely that the French confiscation penalty regime should evolve with a view to adopting a legislative framework adapted to the restitution of illicit assets*"), accessible at: https://www.dalloz-actualite.fr/flash/teodoro-obiang-condamne-une-premiere-dans-l-affaire-des-biens-mal-acquis#.YMhZvqgzaUk.
[vi] Good practices & recommendations for a responsible restitution of illicit assets, Transparency International France, 2019 ("*By studying past experiences with the return of misappropriated assets and drawing on internationally agreed principles, Transparency International France has identified five fundamental principles for responsible return of misappropriated assets. These are the principles of transparency, accountability, solidarity, efficiency and integrity*"); Good practices & recommendations for a responsible restitution of illicit assets, Transparency International France, 2019 ("*Transparency must be ensured at every stage of the restitution process. Transparency is the key to the other four principles in this practical guide. (...) To this end, the management mechanisms as well as the final allocation of assets must be publicly known. Host and source countries should ensure that the restitution process follows, at a minimum, internationally recognized best practices on transparency. Specifically, returned funds should be segregated from the general budget of the host state and should be subject to rigorous and segregated accounting treatment once transferred to the state of origin*"), accessible at: https://transparency-france.org/actu/guide-pratique-pour-une-restitution-responsable-des-avoirs-detournes/#.YMhZg6gzaUk.
[vii] Proposal for a law on the allocation of assets derived from transnational corruption, Mr. Jean-Pierre Sueur, May 2019, accessible at: https://www.senat.fr/espace_presse/actualites/201903/corruption_transnationale.html; Parliamentary report "*Invest to better seize, confiscate to better punish*", Mrs. Laurent Saint-Martin et Jean-Luc Warsmann, November 2019, accessible at: https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2019/11/rapport_agrasc.pdf.
[viii] Programming bill for solidarity development and fight against global inequalities, submitted on 16 December 2020.
[ix] Programming bill on solidarity development and fight against global inequalities, as adopted by the Senate on 17 May 2021, article 1, XI ("*XI. - As part of France's policy of solidarity-based development and the fight against global inequalities, and subject to Article 706-164 of the Code of Criminal Procedure, the proceeds from the transfer of confiscated property to persons definitively convicted of money laundering, handling stolen goods, money laundering or laundering of stolen goods of one of the offences provided for in Articles 314-1, 432-11 to 432-16, 433-1, 433-2, 433-4, 434-9, 434-9-1, 435-1 to 435-4 and 435-7 to 435-10 of the Criminal Code, where the judicial decision concerned establishes that the original offence was committed by a person holding public office in a foreign State, entrusted with a public elective office in a foreign State or with a public service mission in a foreign State, in the performance of his or her duties, excluding legal costs*"), accessible at: https://www.senat.fr/leg/tas20-106.html; Programming bill on solidarity development and fight against global

inequalities, B. The bill is a timely vehicle for moving forward on restitution, Legislative Report, finance commission of the Senate, April 2021, accessible at: http://www.senat.fr/rap/a20-529/a20-5299.html#toc93.

[x] Programming bill on solidarity development and fight against global inequalities, as adopted by the Senate on 17 May 2021, article 1, XI ("*XI. - As part of France's policy of solidarity-based development and the fight against global inequalities, and subject to Article 706-164 of the Code of Criminal Procedure, the proceeds from the transfer of confiscated property to persons definitively convicted of money laundering, handling stolen goods, money laundering or laundering of stolen goods of one of the offences provided for in Articles 314-1, 432-11 to 432-16, 433-1, 433-2, 433-4, 434-9, 434-9-1, 435-1 to 435-4 and 435-7 to 435-10 of the Criminal Code, where the judicial decision concerned establishes that the original offence was committed by a person holding public office in a foreign State, entrusted with a public elective office in a foreign State or with a public service mission in a foreign State, in the performance of his or her duties, excluding legal costs*"), accessible at: https://www.senat.fr/leg/tas20-106.html; Programming bill on solidarity development and fight against global inequalities, B. The bill is a timely vehicle for moving forward on restitution, Legislative Report, finance commission of the Senate, April 2021, accessible at: http://www.senat.fr/rap/a20-529/a20-5299.html#toc93.

[xi] Programming bill on solidarity development and fight against global inequalities, as adopted by the Senate on 17 May 2021, article 1, XI ("*XI. - As part of France's policy of solidarity-based development and the fight against global inequalities, and subject to Article 706-164 of the Code of Criminal Procedure, the proceeds from the transfer of confiscated property to persons definitively convicted of money laundering, handling stolen goods, money laundering or laundering of stolen goods of one of the offences provided for in Articles 314-1, 432-11 to 432-16, 433-1, 433-2, 433-4, 434-9, 434-9-1, 435-1 to 435-4 and 435-7 to 435-10 of the Criminal Code, where the judicial decision concerned establishes that the original offence was committed by a person holding public office in a foreign State, entrusted with a public elective office in a foreign State or with a public service mission in a foreign State, in the performance of his or her duties, excluding legal costs*"), accessible at: https://www.senat.fr/leg/tas20-106.html; Programming bill on solidarity development and fight against global inequalities, B. The bill is a timely vehicle for moving forward on restitution, Legislative Report, finance commission of the Senate, April 2021, accessible at: http://www.senat.fr/rap/a20-529/a20-5299.html#toc93.

[xii] Programming bill on solidarity development and fight against global inequalities, B. The bill is a timely vehicle for moving forward on restitution, Legislative Report, finance commission of the Senate, April 2021 ("*Moreover, this offence perimeter was built on the basis of a study of "emblematic" cases of ill-gotten gains identified by the Ministry. To date, 16 cases, including convictions already handed down, could correspond to the proposed scheme*"), accessible at: http://www.senat.fr/rap/a20-529/a20-5299.html#toc93.

[xiii] French MPs vote for the restitution of misappropriated asset to despoiled populations, *in* Le Monde, 20 February 2021, ("*This new law could be applied as early as 2021 in the Obiang case. The Court of Cassation is expected to make a final decision in the next few months in the case of the vice-president of Equatorial Guinea, Teodorin Obiang. Convicted of money laundering, having embezzled some 150 million euros between 1997 and 2011, he has seen his countless assets (including a private hotel on Avenue Foch and 17 luxury cars) confiscated*"), accessible at: https://www.lemonde.fr/societe/article/2021/02/20/les-deputes-francais-votent-pour-la-restitution-des-biens-mal-acquis-aux-populations-spoliees_6070656_3224.html.

[xiv] Vienna Convention on Diplomatic Relations of 18 April 1961, United Nations, Treaty Series, vol. 500, p. 95, accessible at: https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf.

[xv] International Court of Justice, 11 December 2020, Immunities and Criminal Proceedings (Equatorial Guinea v. France), para. 67, ("*In light of the foregoing, the Court considers that the Vienna Convention cannot be interpreted as authorizing a sending State to impose its choice of mission premises unilaterally on the receiving State where the latter has objected to that choice. If this were the case, the receiving State would be obliged to assume, against its will, the "special obligation" to protect the chosen premises which is set out in Article 22, paragraph 2, of the Convention. The unilateral imposition of the choice of premises by a sending State would therefore clearly not be compatible with the purpose of the Convention, which is to promote friendly relations between countries. Moreover, it would expose the receiving State to potential abuses of diplomatic privileges and immunities, which the drafters of the Vienna Convention intended to avoid by specifying in the preamble that the purpose of such privileges and immunities is not to benefit individuals*"), accessible at: https://www.icj-cij.org/public/files/case-related/163/163-20201211-JUD-01-00-FR.pdf.

[xvi] Programming bill on solidarity development and fight against global inequalities, B. The bill is a timely vehicle for moving forward on restitution, Legislative Report, Senate, April 2021 ("*The second paragraph of Article 1(XI) is the result of a sub-amendment adopted by the National Assembly on the initiative of the Government. It specifies that these sums give rise to the opening of budgetary credits within the "Official Development Assistance" mission, placed under the responsibility of the Ministry of Foreign Affairs. They finance cooperation and development actions in the countries concerned*"), accessible at: http://www.senat.fr/rap/a20-529/a20-5299.html#toc93.

[xvii] Programming bill on solidarity development and fight against global inequalities, B. The bill is a timely vehicle for moving forward on restitution, Legislative Report, Senate, April 2021 ("*Indeed, the Budget Directorate has specified that a new budgetary program will have to be created in the next finance bill to track these appropriations, as such a provision falls within the exclusive domain of finance laws. The definition of this new program should comply with specific constraints, derogating from ordinary budgetary law, making it possible, for example, not to apply the budgetary reserve rate to these assets, which are intended to be returned*"), accessible at: http://www.senat.fr/rap/a20-529/a20-5299.html#toc93

[xviii] Misappropriated assets: key dates, Examination of the Development Solidarity Bill in the Senate: step by step, France is getting closer to the effective restitution of misappropriated asset to despoiled populations, Transparency International France, 14 April 2021 ("*The 2022 Finance Bill (PLF) will create the mechanism for the restitution of assets resulting from the confiscation of ill-gotten gains introduced in the Solidarity Development Act. This is a decisive step as it is this PLF that will define the precise modalities of the future mechanism as well as the criteria for the implementation of the principles of transparency, accountability and the association of civil society organizations*"), accessible at: https://transparency-france.org/aider-victimes-de-corruption/biens-mal-acquis/dates-clefs/#.YMhetagzaUk.

[xix] Legislative files, Draft law "programming for solidarity development and the fight against global inequalities", National Assembly ("*The Government initiated the accelerated procedure on this text on December 16, 2020*"), accessible at: https://www.assemblee-nationale.fr/dyn/15/dossiers/programmation_inegalites_mondiales.

[xx] Programming bill on solidarity development and fight against global inequalities, Vie-publique.fr, 18 May 2021 ("*On 17 May 2021, the Senate adopted the bill on first reading with amendments. The text had been presented to the Council of Ministers on 16 December 2020 by Jean-Yves Le Drian, Minister for Europe and Foreign Affairs. It was adopted on first reading, with amendments, by the National Assembly on 2 March 2021*"), accessible at: https://www.vie-publique.fr/loi/277797-loi-programmation-aide-publique-developpement-solidaire-lutte-inegalites.

[xxi] Misappropriated assets: key dates, Examination of the Development Solidarity Bill in the Senate: step by step, France is getting closer to the effective restitution of misappropriated asset to despoiled populations, Transparency International France, 14 April 2021 ("*While the two versions of the Development Solidarity Law voted in the National Assembly and the Senate differ, a final version will have to be voted on by a committee of senators and deputies. Transparency International calls for the system to be based on principles of transparency and accountability so that civil society organizations can be effectively involved in the choice of the allocation of the returned funds and in monitoring their use*"), accessible at: https://transparency-france.org/aider-victimes-de-corruption/biens-mal-acquis/dates-clefs/#.YMhetagzaUk; Programming bill on solidarity development and fight against global inequalities, Vie-publique.fr, 12 July 2021 ("*On June 24, 2021, deputies and senators, meeting in joint committee, found a compromise text*"), accessible at: https://www.vie-publique.fr/loi/277797-loi-programmation-aide-publique-developpement-solidaire-lutte-inegalites.

Short overview of the French legal requirement for internal controls relating to the AML-CFT

On 16 January 2021, a new Order clarifying the requirements for internal controls relating to anti-money laundering and combating terrorist financing and assets freezing was published in the French Official Journal[i]. It came into force on 1 March 2021[ii] and describes the content of the AML-CFT system that entities subjected to AML-CFT obligations[iii] must put in place.

This text completes the Ordinance no.2020-115 of 12 February 2020[iv] transposing the fifth directive of the European Union on AML-CFT[v] and ensures France's compliance with the last recommendations of the Financial Action Task Force ("FATF", the intergovernmental AML-CFT body)[vi].

The entities subjected to AML-CFT obligations must identify, assess, and classify money laundering and terrorist financing risks, for existing products as well as when launching a new product, service or business practice[vii]. The level of risk must be assessed and updated according to the FATF, the European Commission and the OECD risk country lists[viii].

The internal control system must be formalized in writing with the necessary precision and has to be updated regularly to allow its implementation[ix].

Parent companies must establish and update a classification of risks identified and assessed at group level[x]. Procedures should be put in place to ensure the effectiveness of AML-CFT systems to reduce these risks[xi] and a group compliance officer must be appointed to this end[xii].

The Order also elaborates on the role of the AML-CFT Compliance Officer who is in charge of defining and monitoring the implementation of the AML-CFT system. In this capacity, that person must validate the risk classification, validate the AML-CFT internal procedures ensuring that information exchange and escalation procedures enable the effective and rapid transmission of the information required for the performance of their duties to the persons involved in the implementation of AML-CFT obligations. The Compliance Officer must also ensure that the subsidiaries and branches established abroad have mechanisms in place to monitor the compliance of their operations with local rules on the fight against money laundering and terrorist financing and the freezing of assets[xiii].

After informing the *Autorité de Contrôle Prudentiel et de Resolution* ("ACPR")[xiv], the reporting entity may choose to entrust AML-CFT prevention to an external service provider[xv]. The Order describes the compulsory terms and conditions of outsourcing contracts, such as the description of the service provider's tasks or its obligation to inform the reporting entity of any event affecting its mission[xvi]. Entities subjected to the Order must ensure that outsourcing contracts signed before March 2021 comply with the Order before 16 January 2022[xvii].

The Order reiterates the obligation to detect any transaction carried out for the benefit of persons subject to a freezing order, or any use of funds or resources held by persons subject to such an order[xviii]. Internal procedures must be put in place, particularly for the analysis of alerts relating to freezing orders and for the implementation of freezing measures and their lifting[xix].

Furthermore, the Order reaffirms the requirement to implement an internal control system for operations. The reporting entity must designate persons responsible for a specific permanent[xx] and periodic [xxi] Such persons must be independent from operational staff [xxii] and their identity must be communicated to the ACPR[xxiii].

Finally, the Order insists on the responsibility of the top management in the implementation of AML-CFT measures. To do so, they must have the necessary information[xxiv] to periodically monitor their effectiveness and take the necessary measures to remedy their inadequacy[xxv]. An annual report on the organization of the internal control mechanisms must be drafted by the board or any other managing or governing body of the entity[xxvi].

Through the Order, the French legislator clearly intends to intensify its fight against threats related to money laundering, terrorist financing and the freezing of assets.

[i] Order of 6 January 2021 on the system and internal controls to combat money laundering and terrorist financing money laundering and the freezing of assets and the prohibition on making funds or economic resources, no.ECOT2100415A.
[ii] Article 35 of Order of 6 January 2021 ("*Reporting entities shall have a period of one year from the publication of this Order to bring the outsourcing contracts mentioned in Article 10 and concluded before 1 March 2021 into compliance with the requirements of this Article. Subject to the preceding provisions, this Order shall enter into force on 1 March 2021*").
[iii] Article L. 561-2 of the Monetary and Financial Code.
[iv] Ordinance no.2020-115 of 12 February 2020 strengthening the national system for combating money laundering and terrorist financing.
[v] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.
[vi] Recommendations – International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, Financial Action Task Force, 16 February 2012, updated 23 October 2020.
[vii] Article 2 of Order of 6 January 2021 ("*Reporting entities shall document the identification, assessment and classification of risks referred to in Article L. 561-4-1 of the Monetary and Financial Code. Prior to the launch of new products, services or business practices, including the use of new distribution mechanisms and new or developing technologies, in connection with new or pre-existing products and services, reporting entities shall identify and assess, in particular, the money laundering and terrorist financing risks associated with them, in order to take appropriate measures to manage and mitigate these risks*").
[viii] Article 2 of Order of 6 January 2021 ("*To draw up the above-mentioned risk classification, reporting entities shall take into account, in particular, the information disseminated by the Minister for the Economy, the department mentioned in Article L. 561-23 of the Monetary and Financial Code, the Financial Action Task Force (FATF) and the publications of the Organization for Economic Cooperation and Development (OECD) and the European Union*").
[ix] Article 5 of Order of 6 January 2021 ("*The internal systems and procedures provided for by this Order shall be formalized in writing with the necessary precision to enable their operational implementation. They shall be regularly updated and made available to the staff concerned by the reporting entities and group parent undertakings mentioned in Article 21. They shall also be made available to managers and the supervisory body when they so request*").
[x] Article 21 of Order of 6 January 2021 ("*Parent companies of groups shall develop and update a risk classification appropriate to the size and nature of the group. This classification shall take account of all the risks identified and assessed at group level*").
[xi] Article 22 I° of Order of 6 January 2021 ("*The parent companies shall put in place an organization and procedures which make it possible, in particular, to ensure the effectiveness of the anti-money laundering and combating the financing of terrorism system of the whole group, to reduce the risks of money laundering and terrorist financing to which the group is exposed*").
[xii] Article 22 II° of Order of 6 January 2021 ("*The person in charge designated at group level mentioned in the fourth paragraph of I of Article L. 561-32 of the Monetary and Financial Code is responsible for defining and ensuring the implementation of the AML/CFT system at group level*").
[xiii] Article 3 of Order of 6 January 2021 ("*The person in charge mentioned in the fourth paragraph of Article L. 561-32 of the Monetary and Financial Code is responsible for defining and monitoring the implementation of the anti-money laundering and counter-terrorist financing system. In this capacity, it is responsible for the following tasks in particular : 1 It shall validate the risk classification mentioned in Article 2 and communicate it to the supervisory body, in particular after each update; 2 It shall validate the internal procedures mentioned in Article 6, ensuring that information exchange and escalation procedures make it possible to guarantee the effective and rapid transmission of the information necessary for the performance of their duties to the persons involved in the implementation of AML/CFT obligations; 3 It shall ensure that the subsidiaries and branches of the reporting entity established abroad have mechanisms in place to monitor the compliance of their operations with local rules on the fight against money laundering and terrorist financing and the freezing of assets, and to prohibit the provision or use of funds or economic resources*").
[xiv] The independent administrative authority which monitors the activities of banks and insurance companies in France.
[xv] Article 9 of Order of 6 January 2021 ("[…] *the internal procedures provide for information to be given to the Autorité de contrôle prudentiel et de résolution, which is kept informed of any significant developments concerning outsourced services*").
[xvi] Article 10 of Order of 6 January 2021 ("*When they use an external service provider under the conditions set out in Article R. 561-38-2 of the Monetary and Financial Code, reporting entities shall specify in their outsourcing contract: 1. The tasks that they have entrusted to the external service provider and the procedures that they have defined for implementing these tasks and that the service provider undertakes to comply with; 2. the obligation of the external service provider to inform them of any event that may have a significant impact on its ability to perform the outsourced tasks effectively and in accordance with applicable law; 3. their obligation to provide the service provider with the information necessary to perform the tasks entrusted to it; 4. The obligation for the external service provider to provide back-up mechanisms to ensure continuity of service when this is no longer ensured due to a serious incident or, when the outsourced service concerns the implementation of obligations relating to the freezing of assets and the prohibition on making funds or economic resources available or using them, any incident. In the absence of such an obligation in the contract, the reporting entities themselves have such back-up mechanisms; 5. The obligation for the external service provider to transmit to them any information necessary for the implementation of their obligations, in particular with regard to declarations and the freezing of assets and the prohibition on making funds or economic resources available or using them, as well as the procedures*

for such transmission; 6. The training requirements that the service provider undertakes to respect for the implementation of the tasks; 7. The arrangements for protecting confidential information, in particular that which is subject to professional secrecy; 8. The terms of the control they exercise over the external service provider, in particular the obligation for the external service provider to allow them access, as necessary, if necessary, on the spot and in compliance with the regulations relating to the communication of information, to any information relating to the outsourced services; 9. The prohibition on substantially modifying the outsourced service without the prior agreement of the reporting organisation; 10. The obligation for the external service provider to give the Autorité de contrôle prudentiel et de résolution, or any equivalent foreign authority within the meaning of Articles L. 632-7, L. 632-12 and L. 632-13 of the Monetary and Financial Code, access to the information on the outsourced activities necessary for the performance of its mission, including on site").

[xvii] Article 35 of Order of 6 January 2021 ("*Reporting entities shall have a period of one year from the publication of this Order to bring the outsourcing contracts mentioned in Article 10 and concluded before 1 March 2021 into compliance with the requirements of this Article. Subject to the preceding provisions, this Order shall enter into force on 1 March 2021*").

[xviii] Article 11 of Order of 6 January 2021 ("*The reporting entities shall have a system for detecting: 1. Any transaction carried out for the benefit of a person who is subject to a freezing order and a prohibition on making funds and economic resources available or using them pursuant to Articles L. 562-2, L. 562-3, L. 562-3-1, L. 562-5 and L. 713-16 of the Monetary and Financial Code or a European regulation on restrictive measures taken pursuant to Articles 75 or 215 of the Treaty on the Functioning of the European Union, or a regulation taken pursuant to the same Article 215 for other purposes; 2. Funds and economic resources held, owned, possessed or controlled by persons who are subject to the measures referred to in 1.*").

[xix] Article 12 of Order of 6 January 2021 ("*The internal procedures put in place by the reporting entities with regard to the freezing of assets and the prohibition on making funds or economic resources available or using them shall provide for: 1° The methods for analysing the alerts mentioned in Article 11, in particular the information to be collected and the methods for storing it, including when the alert has been closed without action; 2° The methods for implementing the measures for freezing assets and prohibiting the provision or use of funds or economic resources; 3° The methods for lifting these measures, in particular when the decrees or regulations providing for them are no longer in force or in the event of authorisation to release them as provided for in Article L. 4° The procedures for informing the Minister responsible for the economy when the measures provided for in Articles L. 562-4, L. 562-7 and R. 562-3 of the Monetary and Financial Code, as well as European regulations on restrictive measures taken pursuant to Articles 75 or 215 of the Treaty on the Functioning of the European Union and regulations taken pursuant to the same Article 215 for other purposes, are implemented, under the conditions set out in Chapter 2 of Title VI of Book V of the Monetary and Financial Code*").

[xx] Article 15 of Order of 6 January 2021 ("*The persons mentioned in Article R. 561-38-4 shall designate a person responsible for the permanent control of the AML/CFT system and the freezing of assets and the prohibition on making funds or economic resources available or using them, made by the persons dedicated to the control function mentioned in Article R. 561-38-4 of the Monetary and Financial Code*").

[xxi] Article 16 of Order of 6 January 2021 ("*Periodic monitoring of the arrangements for combating money laundering and terrorist financing and for assets freezing and prohibiting the making available or use of funds or economic resources, shall make it possible to verify, in addition to compliance with the provisions of Article 13, the effectiveness and appropriateness of the ongoing monitoring carried out in this area*").

[xxii] Article 14 of Order of 6 January 2021 ("*The reporting entities referred to in Article R. 561-38-4 shall ensure, through their organisation, strict independence between, on the one hand, persons carrying out operational activities and, on the other hand, persons dedicated solely to the function of controlling operations*").

[xxiii] Articles 15 and 17 of Order of 6 January 2021 ("*The supervisory body shall be informed by the management of the appointment of the head of permanent supervision, whose identity shall be communicated to the Autorité de contrôle prudentiel et de résolution*" and "*the supervisory body is informed by the management of the appointment of the person responsible for the periodic inspection, whose identity is communicated to the Autorité de contrôle prudentiel et de résolution*").

[xxiv] Article 25 of Order of 6 January 2021 ("*The responsibility for ensuring that the reporting entity or, where applicable, the parent company of a group complies with the obligations set out in II of Article L. 561-36-1 of the Monetary and Financial Code lies with the management and the supervisory body. They must have all the information they need for this purpose*").

[xxv] Article 26 of Order of 6 January 2021 ("*The Directors of the reporting entities and, where applicable, of the parent company of the group, shall periodically assess and monitor the effectiveness of the systems and procedures put in place to comply with the provisions of II of Article L. 561-36-1 of the Monetary and Financial Code*").

[xxvi] Article 27 of Order of 6 January 2021 ("*Reporting entities and parent company of groups shall draw up the report referred to in the third paragraph of Articles R. 561-38-6 and R. 561-38-7 of the Monetary and Financial Code in accordance with the provisions of the Order of 21 December 2018 on the report on the organisation of internal control systems to combat money laundering and terrorist financing and on the freezing of assets and the prohibition on making funds or economic resources available or using them for the entities referred to in Article 1 of this Order*").

The creation of the crime of ecocide in French law unleashes passions

The necessity to protect the environment is undeniable and it is essential to alert on the importance of environmental crime and its impact on our planet, since it is expanding considerably on an international scale and was already, in 2016, the fourth criminal activity in the world[i]. Nevertheless, despite the gravity of environmental crimes and the irreversible damage they cause to ecosystems, the criminal justice response in France is not as effective as it could be, and these crimes still go largely unpunished[ii].

Indeed, if French environmental criminal law has a wide range of offenses (approximately 2000), there is no generic offense for the most serious environmental violations. Environmental violations are thus only punished by sectoral and scattered provisions, which makes the repressive system difficult to read and a source of confusion both for practitioners and the citizens who are directly concerned by the provisions protecting their natural environment[iii].

Furthermore, despite the many existing environmental offenses, environmental litigation represents only a tiny proportion (0.5%) of the total number of cases involving all types of litigation and the criminal justice response for environmental code offenses is mostly in the form of alternative procedures to prosecution or relatively low penalties[iv].

Therefore, in order to significantly strengthen the protection of the environment through criminal law, it seems necessary to harmonize the existing provisions and to severely punish the most serious environmental offenses. In this sense, in January 2020, the "Citizens' Climate Convention"[v] has proposed the adoption of a law that protects ecosystems from degradation and destruction in placing legal and financial responsibility on the perpetrators of depredations by means of a new offense of Ecocide[vi].

After the modifications proposed by the Legislation Committee[vii] firstly[viii] and those made by the legislators secondly, in order for the proposed law to meet the principle of legality of offenses and penalties and the principle of proportionality of penalty, the “Bill to combat climate change and strengthen resilience to its effects” (hereinafter “the Bill”) finally proposed to introduce an offense of Ecocide in the environmental code in order to strengthen the existing rules and penalties and to contribute more effectively to the protection of the environment[ix].

Specifically, the proposed Ecocide offense is merely an aggravation of three new offenses created by the Bill, namely: the offense of air and water pollution when the facts are committed intentionally, the offenses provided for in articles L173-1 and L173-2 in the event of damage to health or the environment, and the offense of soil pollution when such offenses are committed with the knowledge of the serious and lasting nature of the damage to health, flora, fauna or fauna or the quality of the air, water, or soil, likely to be induced by the acts committed[x]. The proposed penalty for the three new offenses is 5 years' imprisonment and a fine of 1 million euros. When they are aggravated and become ecocide, these offences are punishable by 10 years' imprisonment and a fine of 4.5 million euros or an amount corresponding to ten times the benefit derived from the commission of the offense[xi].

The Conseil d'Etat, French Supreme court for administrative justice also acting as legal adviser to the legislative branch, issued a clear-cut opinion considering that the offense of Ecocide, as presented, violated the principle of equality before the criminal law and the principle of graduation and proportionality of the penalty[xii]. Moreover, a large part of civil society, the majority of political parties, environmentalists and environmental protection activists did not welcome the proposal of the offense of Ecocide.

For example, NGO such as "Notre Affaire à Tous" and "Wild Legal", which were behind the proposals to create a crime of Ecocide in the criminal code, considered that the proposed offense of Ecocide to be included in the environmental code is not sufficient as it is merely a mean of sanctioning acts of pollution already incriminated by other common offenses, whereas the offense of Ecocide should incriminate only the most serious damages to environment. They are also concerned that the offense of Ecocide, as presented in the Bill, would be against international progress and weaken the process of defining the crime of Ecocide at an international level[xiii].

On 4 May 2021, the National Assembly adopted the Bill without introducing any changes to the offense of Ecocide, and at the same time inserted a new article stating that within one year of the promulgation of the Bill, the Government should submit to Parliament a report on its action in favor of the recognition of Ecocide as a crime that can be tried by international criminal courts[xiv]. On 2 June 2021, the Commission on Land Use Planning and Sustainable Development of the Senate, in charge of reviewing the bill, proposed not to create an offense of Ecocide but instead to create two other offenses: the first would punish unintentional environmental damages with five years' imprisonment and a fine of one million euros and the second would punish intentional environmental damage with seven years' imprisonment and a fine of 4.5 million euros, the amount of the fine being increased to ten times the benefit derived from the commission of the offense[xv]. The parliamentary work and the debates on the adoption of the law are still ongoing as a consensus has yet to be reached.

[i] The rise of environmental crime – A growing threat to natural resources, peace, development and security, UNEP-Interpol rapid response assessment, 2016, p.4 ("*The growth rate of these crimes is astonishing. The report that follows reveals for the first time that this new area of criminality has diversified and skyrocketed to become the world's fourth largest crime sector in a few decades, growing at 2-3 times the pace of the global economy. INTERPOL and UNEP now estimate that natural resources worth as much as USD 91 billion to USD 258 billion annually are being stolen by criminals, depriving countries of future revenues and development opportunities*"); p.7 ("*The value makes environmental crimes the fourth largest crime in the world after drug trafficking (344 billion USD), counterfeit crimes (288 billion USD) and human trafficking (157 billion USD), by some estimates*").
[ii] Bill recognizing the crime of ecocide, no384, Senate, 19 March 2019, p.3 ("*Environmental crime is expanding dramatically on an international scale. After drug trafficking, counterfeiting and human trafficking, it is the fourth largest market for international illicit activities* (...)"); p.4 ("Despite the particular gravity of these environmental crimes, their intentionality and the irreversible damage to ecosystems and to the conditions of existence of populations, the criminal justice response remains non-existent. Noting the shortcomings of the law, the authors of this bill wish to lay the foundations for an environmental criminal law that will enable us to fight vigorously against the crimes that threaten the planet. For the most serious environmental crimes, they consider it necessary to introduce in our legal system the incrimination of ecocide") ; Bill recognizing the crime of ecocide, no2353, National Assembly, 22 October 2019, p.2 ("*However, it is clear that the environment is threatened by a growing environmental criminal activity that still goes largely unpunished* (...)"); p.3 ("*However, there is currently no criminal response adapted to the industrial crime of large companies that benefit from the principle of too big to fail (...) We have to face the fact that, as extensive as it is, our legal framework still suffers from shortcomings when it comes to completely discouraging the destruction of our environment. These are the gaps that citizens are pointing out today and that we are seeking to address in part through this proposed law. Rather than repairing the damage after the fact, it is time to prevent it*").
[iii] "*Impact study - Bill to combat climate change and strengthen resilience to its effects*", French Republic, 10 February 2021, p.625 ("*Environmental criminal law presents a vast range of offenses. It includes all offenses relating to the protection of nature, natural resources, sites and landscapes as well as those relating to the fight against pollution and nuisances, which are included in the criminal code as well as in the environmental code, the rural and maritime fishing code, the forestry code and the mining code. In total, there are 2,000 offenses in force*"); p.636 ("*First of all, there is no generic offense to punish serious environmental damage. These are punishable by specific and scattered provisions in the Environmental Code, which makes the repressive system difficult to read and confusing, both for practitioners and for citizens who are directly concerned by the provisions protecting their natural environment*").
[iv] "*Impact study - Bill to combat climate change and strengthen resilience to its effects*", French Republic, 10 February 2021, p.628 ("*Environmental litigation represents a small part of the activity of the courts. Over the last decade, the share of cases handled by the public prosecutor's office in environmental matters represented 0.5% of the total number of cases for all types of litigation combined*"); p.630 ("*The criminal response rate for environmental code violations is high, at 92.3% in 2018. More specifically, the criminal response is, in 78.6% of cases, alternative prosecution procedures. Under these alternatives to prosecution,*

the public prosecutor may, pursuant to Article 41-1 of the Code of Criminal Procedure, order the restoration of the site when the damage caused to the environment proves to be minor. As for convictions for environmental offenses, they amounted to 1,993 for natural persons in 2018 and 139 for legal persons in 2017. However, the sentences handed down by the criminal courts appear relatively low").

[v] Decided by the President of the Republic, Emmanuel Macron, the Citizens' Climate Convention is a panel of 150 citizens chosen by lot with the mandate to define a series of legislative and/or regulatory measures to achieve a reduction of at least 40% in greenhouse gas emissions by 2030 in a spirit of social justice.

[vi] "*The proposals of the Citizens' Climate Convention*", Citizens' Climate Convention, 29 January 2021, p.400 ("*To achieve these objectives we propose to adopt a law that protects ecosystems from degradation and destruction, placing legal and financial responsibility on the perpetrators of depredations. This law would include:* (...) → *The criminalization of the crime of ecocide* (...)") ; p.403 ("*Incorporate the concept of the crime of ecocide into the law: In order to sanction the violation of these planetary limits, it is necessary to recognize in criminal law the crime of ecocide, in order to allow the judge to prosecute cases of serious damage caused to all or part of the system of planetary commons or of an ecological system of the Earth. Proposed definition of the crime of ecocide: Constitutes a crime of ecocide, any action having caused a serious ecological damage by participating in the obvious and not negligible overstepping of the planetary limits, committed in the knowledge of the consequences which were going to result from it and which could not be ignored. In order for the possible sanction to be dissuasive, the penalty incurred must be, in the case of a violation by a company, in addition to a prison sentence and a fine for the company directors or persons directly responsible, a fine in the form of a significant percentage of the company's turnover and must include the obligation to make reparation*").

[vii] The Legislation Committee's mission is to carry out a legislative transcription of the measures prepared by the members of the Citizens' Climate Convention. It is mandated by the Governance Committee which has the task of advising the members of the Convention in the exploration of avenues of work and the development of proposed measures.

[viii] "*The proposals of the Citizens' Climate Convention*", Citizens' Climate Convention, 29 January 2021, p.406 ("*The proposal was submitted to the Legislation Committee in the form of a draft bill. The work of the Legislation Committee was therefore based on the proposal of the members of the Convention. It makes a number of changes to remove legal obstacles that have been identified* (...) *several amendments are proposed to reflect the intent of the members: - Include the incrimination in another book of the penal code related to environmental protection. - To modify the legal definition of the crime of ecocide. Indeed, the reference to the planetary limits to define the incrimination is not in conformity with the principle of legality of the offences and the penalties* (...) - In addition to this principle, there is the principle of proportionality of penalties *(...) In order for the global limits to constitute the basis of a criminal offence, it would be necessary to identify upstream and precisely the thresholds that would constitute an exceeding of the global limits attributable to the activity of a person. In the state of the work of the working group, the legislative committee did not find how to express such a threshold. However, it maintained the group's proposal, making the necessary adjustments to bring it into line with general criminal law, without succeeding in formulating it in a manner consistent with the principle of criminal legality* (...) *This is why, in an attempt to transcribe the will of the members, the Legislation Committee proposes other wordings of the crime of ecocide that seek to overcome the difficulties linked to the principle of criminal legality*").

[ix] Bill to combat climate change and strengthen resilience to its effects, article 68, I, 4° ("*4° A new Title III is added to Book II to read as follows TITLE III GENERAL DAMAGE TO THE PHYSICAL ENVIRONMENT* (...) "*Art. L. 231-3. - The offense provided for in article L. 231-1 constitutes ecocide when committed intentionally. The offenses provided for in II of article L. 173-3 and in article L. 231-2 also constitute ecocide when they are committed with knowledge of the serious and lasting nature of the damage to health, flora, fauna or the quality of the air, water or soil, likely to be caused by the acts committed. The penalty of five years' imprisonment provided for in II of Article L. 173-3 and in Articles L. 231-1 and L. 231-2 is increased to ten years' imprisonment. The penalty of a one million euro fine provided for in II of Article 173-3 and Articles L. 231-1 and L. 231-2 is increased to 4.5 million euros, and this amount may be increased up to ten times the benefit derived from the commission of the offense. The following are considered to be long-lasting: harmful effects on health or damage to flora, fauna, air, water or soil quality that are likely to last at least ten years. The period of limitation for prosecution of the offense of ecocide shall run from the time of discovery of the damage*""); Climate and resilience bill - Press kit - Presentation of the bill in the Council of Ministers, Ministry of Ecological Transition, 10 February 2021 ("*France is punishing environmental gangsterism more severely. This measure will : strengthen existing rules and sanctions*").

[x] Bill to combat climate change and strengthen resilience to its effects, article 68, I, 4° ("*4° A new Title III is added to Book II to read as follows TITLE III GENERAL DAMAGE TO THE PHYSICAL ENVIRONMENT* (...) "*Art. L. 231-3. - The offense provided for in article L. 231-1 constitutes ecocide when committed intentionally. The offenses provided for in II of article L. 173-3 and in article L. 231-2 also constitute ecocide when they are committed with knowledge of the serious and lasting nature of the damage to health, flora, fauna or the quality of the air, water or soil, likely to be caused by the acts committed. The penalty of five years' imprisonment provided for in II of Article L. 173-3 and in Articles L. 231-1 and L. 231-2 is increased to ten years' imprisonment. The penalty of a one million euro fine provided for in II of Article 173-3 and Articles L. 231-1 and L. 231-2 is increased to 4.5 million euros, and this amount may be increased up to ten times the benefit derived from the commission of the offense. The following are considered to be long-lasting: harmful effects on health or damage to flora, fauna, air, water or soil quality that are likely to last at least ten years. The period of limitation for prosecution of the offense of ecocide shall run from the time of discovery of the damage*""); Climate and resilience bill - Press kit - Presentation of the bill in the Council of Ministers, Ministry of Ecological Transition, 10 February 2021 ("*France is punishing environmental gangsterism more severely. This measure will : strengthen existing rules and sanctions*").

[xi] Bill to combat climate change and strengthen resilience to its effects, article 68, I, 4° ("*4° A new Title III is added to Book II to read as follows TITLE III GENERAL DAMAGE TO THE PHYSICAL ENVIRONMENT* (...) "*Art. L. 231-3. - The offense provided for in article L. 231-1 constitutes ecocide when committed intentionally. The offenses provided for in II of article L. 173-3 and in article L. 231-2 also constitute ecocide when they are committed with knowledge of the serious and lasting nature of the damage to health, flora, fauna or the quality of the air, water or soil, likely to be caused by the acts committed. The penalty of five years' imprisonment provided for in II of Article L. 173-3 and in Articles L. 231-1 and L. 231-2 is increased to ten years' imprisonment. The penalty of a one million euro fine provided for in II of Article 173-3 and Articles L. 231-1 and L. 231-2 is increased to 4.5 million euros, and this amount may be increased up to ten times the benefit derived from the commission of the offense. The following are considered to be long-lasting: harmful effects on health or damage to flora, fauna, air, water or soil quality that are likely to last at least ten years. The period of limitation for prosecution of the offense of ecocide shall run from the time of discovery of the damage*""); Climate and resilience bill - Press kit - Presentation of the bill in the Council of Ministers, Ministry of Ecological Transition, 10 February 2021 ("*France is punishing environmental gangsterism more severely. This measure will : strengthen existing rules and sanctions*").

[xii] Opinion on a bill to combat climate change and its effects its effects, *Conseil d'Etat*, 4 February 2021, p.39 ("*On the other hand, the bill aggravates, under the term of ecocide, the offenses provided for in II of article L. 173-3 of the Environmental Code and in article L. 230-2 when they are committed with the knowledge of the risks incurred of serious and lasting damage to health, flora, fauna or the quality of the air, water or soil. However, the offenses provided for in II of article L. 173-3 and in article L. 230-2 are, as has been said, intentional offenses, which punish the voluntary non-respect of legal or regulatory prescriptions intended to guarantee the protection of the environment. Consequently, knowledge of the risk of damage to the environment by reason of non-compliance with these regulations is already included in the constituent elements of these offenses, as mens rea. It is thus not possible to provide for the aggravation of these offenses by reason of an aggravating circumstance that is already one of their constitutive elements, the Constitutional Council censuring, in the name of the principle of equality before the criminal law, legislative provisions qualifying facts in an identical manner, while subjecting their perpetrator, according to the text of the criminal law on which the prosecuting authorities are based, to penalties of different kinds (decision no. 2013-328 QPC of 28 June 2013). The unintentional offense provided for in Article L. 230-1, qualified as ecocide when the acts are committed intentionally, becomes the only intentional offense resulting in*

serious and lasting damage to the environment punishable by ten years' imprisonment and a fine of 4.5 million euros, this amount being able to be increased up to tenfold of the benefit derived from the offense. The intentional offense of soil pollution, provided for in the new Article L. 230-2 of the Environmental Code, and the intentional offense provided for in the new Article L. 173-3, which both punish serious and lasting damage to the environment, are only punishable by five years' imprisonment and a fine of one million euros. The bill thus punishes in a significantly different and inconsistent manner intentional behavior causing serious and lasting damage to the environment. The Conseil d'Etat cannot retain these provisions as drafted by the third rectifying referral received on February 3, 2021").

[xiii] Analysis of "Notre Affaire à Tous" of Title VI provisions of the climate and resilience bill to strengthen judicial protection of the environment and proposals of amendments, accessible at: https://notreaffaireatous.org/wp-content/uploads/2021/02/PJL-LOI-CLIMAT-De%CC%81cryptage-e%CC%81cocide-V4.docx-1-1.pdf ; Ecocide, the government is stuck in an absurd position, Press release, Wild Legal, 19 March 2021, accessible at : https://www.wildlegal.eu/post/cp-ecocide-le-gouvernement-s-enlise-dans-une-position-absurde ;"Offense of ecocide", on the left as well as on the right, the Members of parliament point out the imposture, Press release, Wild Legal, 30 March 2021, accessible at : https://www.wildlegal.eu/post/delit-d-ecocide-a-gauche-comme-a-droite-les-deputes-pointent-l-imposture.

[xiv] Bill to combat climate change and strengthen resilience to its effects as adopted by the National Assemblée on 4 May 2021, article 74 ("*Article 74 (new) Within one year of the promulgation of this law, the Government shall submit to Parliament a report on its action in favour of the recognition of ecocide as a crime that can be tried by international criminal courts*").

[xv] Bill to combat climate change and strengthen resilience to its effects as proposed by the Commission on Land Use Planning and Sustainable Development of the Senate on 2 June 2021, article 68 I, 4° ("*4° A new Title III is added to Book II to read as follows "TITLE III "GENERAL DAMAGE TO THE PHYSICAL ENVIRONMENT* (...) *Art. L. 231-1. - Is punishable by five years imprisonment and a fine of one million euros, this amount being increased up to five times the benefit derived from the commission of the offence, the fact, in clear deliberate violation of a particular obligation of prudence or safety provided for by law or regulation: 1° To emit in the air one or more substances whose action or the reactions involve serious and durable harmful effects on health, the flora or the fauna ; 2° To throw, spill or let flow, in surface or underground waters or in the waters of the sea within the limits of territorial waters, directly or indirectly, one or more substances whose action or reactions lead to serious and lasting harmful effects on health, flora or fauna, with the exception of the damages mentioned in articles L. 218-73 and L. 432-2, or serious modifications of the normal water supply system; (3) (new) To deposit, discharge, or allow to flow into or onto the land any substance or substances whose action or reactions result in serious and lasting harmful effects on health, flora, fauna, or soil quality; Harmful effects on health or damage to flora or fauna that are likely to last for at least seven years shall be deemed to be lasting. The period of limitation of public action for the offence mentioned in the first paragraph of this article shall run from the discovery of the damage, without being able to exceed twelve completed years from the day on which the offence was committed. Art. L. 231-2. - The acts provided for in Article L. 231-1 are punishable by seven years' imprisonment and a fine of 4.5 million euros, which may be increased to ten times the benefit derived from the commission of the offence, when committed intentionally. Are considered lasting the harmful effects on health or damage to flora, fauna or soil quality that are likely to last at least seven years. The period of limitation of the public action of the offence mentioned in the first paragraph of this article runs from the discovery of the damage, without being able to exceed twelve completed years from the day when the offence was committed*").

The evaluation mission of the Sapin II law calls for a boost in France's anti-corruption policy

On 7 July 2021, French Members of Parliament ("MPs") Mr. Raphaël Gauvain and Mr. Olivier Marleix, submitted their information report on the evaluation of the "Sapin II" law[i]. About four years after the law came into force, the MPs have carried out in-depth assessment of the main contributions made by the "Sapin II" law and they formulated fifty proposals to improve the policy of fighting against corruption in France[ii].

These fifty proposals for improvement are in line with four main objectives:

Clarifying the institutional organization of anti-corruption policy in France[iii]. The MPs propose to strengthen the government's steering of anti-corruption policy by regularly convening a specialized committee composed of representatives of various ministries. The French Anticorruption Agency would provide to this specialized committee a permanent secretariat and transfer its support and control missions to the High Authority for the Transparency of Public Life ("HATVP"), in order to create a new single authority, the High Authority for Probity (proposals n° 10 and 11)[iv].

Promote the use of the judicial public interest agreement also known as "CJIP"[v]. To do so, it is recommended that the use of internal investigations be encouraged, by providing a better framework for their use and by offering more guarantees to individuals (proposal no. 27)[vi]. The MPs also suggest the creation a specific guilty plea procedure applicable to natural persons in cases of corruption and breach of probity offenses (proposal no. 26)[vii].

Strengthening the protection of whistleblowers and the quality of the processing of whistleblowers reports[viii]. The MPs suggest that the Defender of Rights (*Défenseur des Droits*) be given the role of directing whistleblower reports to the competent authorities and certifying the status of whistleblower. This certification, which could also be issued by the judge, would give the whistleblower a right to compensation by an indemnity fund (proposals n° 36 to 40)[ix].

Improving transparency in lobbying activities[x]. The PMs recommend that public decision-makers be made more accountable by asking them to forward to their ethics officer the list of lobbyists with whom they have come into contact (proposal no. 46)[xi]. Finally, they propose to grant the HATVP the power to impose administrative sanctions so that it can give formal notice to an interest representative who does not comply with his or her obligations and extend its investigative powers to make controls more effective (proposal n°42)[xii].

[i] Law no2016-1691, 9 December 2016, on transparency, the fight against corruption and the modernization of economic life; Report n°4325, 7 July 2021, Information report on the evaluation of the impact of law no2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of public life transparency, the fight against corruption and the modernization of economic life, known as the "Sapin 2 law", accessible at: https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b4325_rapport-information.pdf.

[ii] The evaluation mission of the Sapin 2 law wants to relaunch the anti-corruption policy in France, Le monde du droit, 8 July 2021, accessible at: https://www.lemondedudroit.fr/decryptages/76576-mission-evaluation-loi-sapin2-formule-50-propositions-relancer-politique-lutte-corruption-france.html.

[iii] Report no4325, 7 July 2021, Information report on the evaluation of the impact of law no2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of public life transparency, the fight against corruption and the modernization of economic life, known as the "Sapin 2 law", p. 82.

[iv] Report no4325, 7 July 2021, Information report on the evaluation of the impact of law no2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of public life transparency, the fight against corruption and the modernization of economic life, known as the "Sapin 2 law", p. 87.
[v] Report no4325, 7 July 2021, Information report on the evaluation of the impact of law no2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of public life transparency, the fight against corruption and the modernization of economic life, known as the "Sapin 2 law", p. 112.
[vi] Report no4325, 7 July 2021, Information report on the evaluation of the impact of law no2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of public life transparency, the fight against corruption and the modernization of economic life, known as the "Sapin 2 law", p. 127.
[vii] Report no4325, 7 July 2021, Information report on the evaluation of the impact of law no2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of public life transparency, the fight against corruption and the modernization of economic life, known as the "Sapin 2 law", p. 125.
[viii] Report no4325, 7 July 2021, Information report on the evaluation of the impact of law no2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of public life transparency, the fight against corruption and the modernization of economic life, known as the "Sapin 2 law", p. 139.
[ix] Report no4325, 7 July 2021, Information report on the evaluation of the impact of law no2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of public life transparency, the fight against corruption and the modernization of economic life, known as the "Sapin 2 law", pp. 148 - 152.
[x] Report no4325, 7 July 2021, Information report on the evaluation of the impact of law no2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of public life transparency, the fight against corruption and the modernization of economic life, known as the "Sapin 2 law", p. 159.
[xi] Report no4325, 7 July 2021, Information report on the evaluation of the impact of law no2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of public life transparency, the fight against corruption and the modernization of economic life, known as the "Sapin 2 law", p. 165.
[xii] Report no4325, 7 July 2021, Information report on the evaluation of the impact of law no2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of public life transparency, the fight against corruption and the modernization of economic life, known as the "Sapin 2 law", p. 161.

TRACFIN alerts on the emergence of electronic payment services as new vectors used by money laundering and terrorist financing networks

On 10 December 2020, TRACFIN published its "Money laundering and terrorist financing risks analysis and trends report" (hereinafter "the Report") for the year 2019-2020.

Indeed, each year, in addition to its activity report, TRACFIN[i] publishes a report which analyzes the risks of money laundering and terrorist financing (hereinafter "ML/FT"). The purpose of such report is to assess, identify, and understand the ML/FT risks set out in Recommendation No. 1 of the Financial Action Task Force (FATF) standards[ii] and in Article 7 of the fourth European anti-money laundering directive[iii].

The first part of the Report provides an overview of the main ML/FT risks, analyzing which economic sectors are associated with the greatest number of suspected offences and the main offence threats[iv]. In its second part, the Report analyzes in detail three sectors of activity which carry high risks of ML/FT: real estate, art and professional sports[v]. Finally, the third part of the Report, anticipates the risks of ML/FT related to new technologies in the financial sector, such as crypto assets[vi], and it also presents the development of new ML/FT channels generated by the digitalization of payment services[vii].

TRACFIN has been ringing alarm bells about the risks of crypto assets since 2015[viii], but this fear is now more than ever justified since the fraudulent use of crypto assets for money laundering has been accelerating in recent years[ix].

In this respect, the Report states that the use of payment and electronic money services, whether by using physical payment media (prepaid cards or coupons), online payment accounts or electronic money, combined with the use of crypto assets, is now a confirmed trend observed in most of the money laundering schemes processed by TRACFIN[x]. Very recently, the President of the European Central Bank, Christine Lagarde, confirmed that bitcoin was a highly speculative asset that enabled money laundering activities[xi].

In addition, the Report states that the association of electronic money and digital assets is becoming a new source for terrorist financing. TRACFIN notes that an important number of the payment and electronic money service providers operate in France[xii] under the European passport[xiii] which is causing difficulties due to the lack of harmonization at the European level[xiv]. Therefore, TRACFIN recommends: (1) systematizing the appointment of permanent representatives and controls on electronic money distributors and payment agents operating in France through the European passport, (2) encouraging the establishment of a single body of anti-money laundering and counter-terrorist financing rules and of a harmonized European supervision[xv].

TRACFIN also points out that, despite legislative and regulatory changes[xvi], the use of physical payment medium charged in electronic money still presents flaws since it allows anonymity in certain cases[xvii], and suggests: (1) identity checks from the first euro for any electronic money medium converted into crypto assets when loaded with cash and anonymous electronic money, (2) a ban on anonymous crypto asset accounts[xviii].

Finally, TRACFIN raises the new emerging ML/FT risks in the crypto assets sector, which are mainly fundraising in the form of Initial Coin Offering (ICO)[xix], the development of global stable coins[xx] and the extensive deployment of payment services by Big Tech[xxi].

Consequently, it appears that, given the risks of ML/FT raised by TRACFIN regarding the increased development of crypto assets, a specific legal regime must be put in place as soon as possible. At the national level, several texts have been adopted since the publication of the Report[xxii], but at the European level, there is currently no specific legislation for crypto currencies. However, as the European Commission is aware of the need to address the issue, it proposed, on 24 September 2020, a specific regulation to be expected in 2024, that has been discussed by the Council for the last time on 3 March 2021[xxiii].

[i] TRACFIN ("Intelligence Processing and Action against Clandestine Financial Circuits" which means "Intelligence Processing and Action against Clandestine Financial Circuits") is a French service placed under the authority of the Ministry of Action and Public Accounts, which contributes to the development of a healthy economy by fighting against clandestine financial circuits, money laundering and the financing of terrorism. TRACFIN is responsible for collecting, analyzing, and enhancing the reports of suspicions that only regulated professionals are required by law to report to it (the professionals subject to this obligation are those provided for in article L561-2 of the French commercial code).
[ii] "*International standards on combating money laundering and the financing of terrorism & proliferation - The FATF Recommendations*", FATF, February 2012, updated October 2020, Recommendation No 1 ("*Countries should identify, assess, and understand the money laundering and terrorist financing risks for the country, and should take action, including designating an authority or mechanism to coordinate action to assess risks, and apply resources, aimed at ensuring the risks are mitigated effectively*").
[iii] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, Article 7 ("*Each Member State shall take appropriate steps to identify, assess, understand and mitigate the risks of money laundering and terrorist financing affecting it, as well as any data protection concerns in that regard. It shall keep that risk assessment up to date*").
[iv] "*Money laundering and terrorist financing risks analysis and trends report*", TRACFIN, 10 December 2020, p.8 to p.31.
[v] "*Money laundering and terrorist financing risks analysis and trends report*", TRACFIN, 10 December 2020, p.32 to p.53.
[vi] Crypto assets are defined by article L54-10-1 2° of the French monetary and financial code "*any digital representation of value that is not issued or guaranteed by a central bank or public authority, that is not necessarily attached to legal tender and that does not have the legal status of money, but that is accepted by natural or legal persons as a medium of exchange and that can be transferred, stored or exchanged electronically*". The main crypto assets are Bitcoin, Ether or Ripple.
[vii] "*Money laundering and terrorist financing risks analysis and trends report*", TRACFIN, 10 December 2020, p.54 to p.74.
[viii] "*Money laundering and terrorist financing risks analysis and trends reports*" issued by TRACFIN in 2015, 2016-2017-2018 and 2018-2019.
[ix] "*Money laundering and terrorist financing risks analysis and trends report*", TRACFIN, 10 December 2020, p.57.
[x] "*Money laundering and terrorist financing risk analysis and trends report*", TRACFIN, 10 December 2020, p.57.
[xi] *" Bitcoin is a highly speculative asset that has enabled money laundering activities "*, La Libre Eco, 13 January 2021.
[xii] "*Money laundering and terrorist financing risk analysis and trends report*", TRACFIN, 10 December 2020, p.64, ("*As of June 30, 2020, there were 80 payment services providers established in France (...), and 38 electronic money providers (...)*").
[xiii] The European passport allows banks and payment and electronic money services providers to export their business offerings to all countries in the European Economic Area (EEA). They give customers the opportunity to combine and interweave multiple payment services to reduce the traceability of financial flows.
[xiv] "*Money laundering and terrorist financing risk analysis and trends report*", TRACFIN, 10 December 2020, p.58, 61 and 62.
[xv] "*Money laundering and terrorist financing risk analysis and trends report*", TRACFIN, 10 December 2020, p.61, 62 and 75.
[xvi] Law no. 2016-731 of 3 June 2016 strengthening the fight against organized crime, terrorism and their financing, and improving the efficiency and guarantees of criminal procedure, known as the "Urvoas" law and its implementing decree, defined limits on the use of prepaid cards; and the transpositions of the European anti-money laundering and counter-terrorism financing directives have substantially reduced anonymity by introducing thresholds for identity checks.
[xvii] "*Money laundering and terrorist financing risk analysis and trends report*", TRACFIN, 10 December 2020, p.59.
[xviii] "*Money laundering and terrorist financing risk analysis and trends report*", TRACFIN, 10 December 2020, p.75.
[xix] "*Money laundering and terrorist financing risk analysis and trends report*", TRACFIN, 10 December 2020, p.68.
[xx] *Money laundering and terrorist financing risk analysis and trends report*", TRACFIN, 10 December 2020, p.70 to p.72.
[xxi] "*Money laundering and terrorist financing risk analysis and trends report*", TRACFIN, 10 December 2020, p.73 and 74.
[xxii] Order of 6 January 2021 on the system and internal controls regarding to the fight against money laundering and terrorist financing and to the freezing of assets and the prohibition of making available or using funds or economic resources ; Decree n°2021-387 of 2 April 2021 relating to the fight against the anonymity of virtual assets and reinforcing the national system of fight against money laundering and terrorist financing; Ordinance No. 2020-1544 of 9 December 2020 strengthening the framework of fight against money laundering and terrorist financing applicable to digital assets.
[xxiii] "*Proposal for a regulation of the European parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937*", European Commission, 24 September 2020.

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