NAVACELLE

Bastille Day

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In years of constant new lows and bad – when not catastrophic – news, it may seem trivial to put together a newsletter on newsworthy white collar, litigation & investigations unfolding in France over the last twelve month.

The drive for the Rule of law (under siege globally) should lead us to consider what it is that led us to where we are today; what imbalance have each one of us contributed to and what makes the law just.

Legal practitioners have a special duty as advisors people turn to when in doubt (or compelled). When all things are relative, we need to focus on shedding light on how things are, rather than we or others would like them to be. In doing so, we will be serving what is right.

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We look forward to seeing you in Paris or elsewhere soon!

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The past year was marked, in particular, by:

A.

A EUROPEAN IMPULSE ON FRENCH TEXTS

- Assessment of the first months of activity of the **European Public Prosecutor's Office**
- The **French duty of care** in the context of its Europe-wide application
- **Lobbying**: Declaration obligations of interest representatives in France

B.

A CERTAIN JURISPRUDENTIAL FOCUS ON TAX FRAUD

- Illegal banking solicitation and laundering of **aggravated tax fraud**: new step in the UBS file
- The **cumulation of criminal and administrative sanctions** in tax fraud
- **CumEx files**, from tax optimization to tax fraud?
- CJIP concluded between JPMorgan Chase Bank, National Association, and the Financial Public Prosecutor

C.

A STRONG ACTIVITY BY REGULATORY AUTHORITIES

- **CNIL** imposes the largest sanctions in its history on Facebook and Google
- The **right to silence** during investigations by the Autorité des Marchés Financiers
- The **Autorité de la concurrence** publishes an update of its framework document on competition compliance programs
- Several **practical guides** have been published by the French Anti-Corruption Agency, including:
  - to preventing conflicts of interests
  - to support small and medium-sized companies
  - on anti-corruption accounting controls
  - AFA and PNF Practical Guide on the internal anti-corruption investigation
- The **French DPA** ("Convention judiciaire d'intérêt public") on the way to simplification
- LVMH concludes a CJIP and escapes prosecution in the "Squarcini case"

D.

A SPECIAL FOCUS ON CORPORATE SOCIAL AND ENVIRONMENTAL RESPONSIBILITY

- The challenges of **environmental criminal law** in the light of the deferred prosecution agreement in environmental matters
- The **French duty of care** in the context of its Europe-wide application

E.

NEW ANTI-CORRUPTION ASSESSMENTS AND CLARIFICATIONS

- **OECD Convention** on Combating Bribery in France Phase 4
- The post-Sapin 2 law: merely modifications or a real revolution?
- When arbitration and compliance meet up: analysis of their first interplay
- Several **practical guides** have been published by the French Anti-Corruption Agency (cf. analyses above)

F.

AND USEFUL CLARIFICATIONS IN WHITE COLLAR CRIME

- **Attorney-client privilege**:
  - Impacts of the attorney-client privilege reform on white-collar practice
  - Attorney-client privilege: an **in concreto assessment of documents**, allowing to benefit from the protection of attorney-client privilege
- **Criminal liability of legal persons**: Transfer of criminal liability following a merger or acquisition
- **Homologation of a CRPC**: Homologation of a guilty-plea procedure: no appeal is possible against a decision of denied in the absence of a misuse of powers by the judge

A. A EUROPEAN IMPULSE ON FRENCH TEXTS

Assessment of the first months of activity of the European Public Prosecutor's Office

The European Public Prosecutor's Office ("EPPO"), created by Regulation 2017/1939 of the 12 October 2017, began its activities on 1 June 2021.[1] Although it is now well known to all, it is important to remember that it was established independently from the Member States and European organizations[2] and that, since its role is to improve the protection of the European Union's financial interests, it is competent to prosecute all offences affecting the European Union's financial interests.[3]

In its first annual report, the EPPO takes stock of its activities and internal organization for the second half of the year 2021. The report shows that the EPPO has had an active start at both operational and judicial levels (I), prosecuting numerous offences, mainly fraud (II) and recovering more than 100 million euros (III).

Given this record, it is not surprising that the EPPO is confident for the coming year and expresses that its two operational objectives will be to improve the number of cross-border investigations targeting organized criminal groups and to improve the recovery of illicit assets obtained via these offences .[4]

Plus, it announces that in its second year of activity, it will mainly continue to strengthen its capacity to carry out independent, impartial and high quality investigations and prosecutions, to develop its operational capacity shared between the central level and the European Delegated Prosecutors at national level, and to strive to establish strong relations with non-participating Member States and with the authorities of third countries that are relevant to its investigations and prosecutions.[5]

I. I. Since its inception and until the end of 2021, the European Public Prosecutor's Office has carried out hundreds of investigations and contributed to the pronouncement of one conviction

Concerning its operational activity, the EPPO states that since 1 June 2021, when it began operations, it has received 2,832 reports and opened 576 investigations, for which the amount of damage caused to the European Union's budget has been estimated at 5.4 billion euros.[6]

It also announces that at the end of 2021, it had 515 active investigations, of which 17.6% are related to VAT fraud for an estimated damage of 2.5 billion euros and 27.5% have a cross-border dimension (acts committed on the territory of several countries or damage caused to several countries).[7]

It appears that the three Member States for which the EPPO was most proactive and where it opened the most investigations in 2021 were Italy with 120 cases opened, of which 40 were cross-border, Bulgaria with 105 cases opened, of which 3 were cross-border, and Romania with 60 cases opened, of which 8 were cross-border.[8]

In France, the EPPO received 48 reports and opened 29 investigations for a total amount of damage to the European Union budget estimated at 46.1 million euros, of which 29.6 million euros were estimated for VAT fraud. These investigations mainly concerned non-procurement expenditure fraud and non-VAT revenue fraud, and involved cross-border investigations for 13 of them. It specifies that during the year 2021, no seizures were made on French territory by the EPPO.[9]

More generally, after seven months of activity, the EPPO notes that the level of detection of fraud affecting the financial interests of the European Union has varied significantly from one Member State to another, but that in any case[10], it has been able to provide a decisive advantage to law enforcement agencies in cross-border investigations because it is able to bypass the long and complex formalities of international mutual legal assistance and therefore to carry out operations much more quickly.[11]

Concerning its judicial activity, the EPPO emphasizes that it is involved in 5 ongoing cases in the trial phase and 3 cases in which simplified prosecution procedures have been applied, as well as having contributed to the pronouncement of 2 court decisions, including 1 conviction.[12]

II. The cases handled by the European Public Prosecutor's Office during 2021 mainly concerned non-procurement expenditure fraud and were of a cross-border nature

The EPPO lists the offences referred to it during the year 2021 and notes that 313 cases concerned non-procurement expenditure fraud, 110 concerned procurement expenditure fraud, 132 concerned non-VAT revenue fraud, 173 concerned VAT revenue fraud, 30 concerned participation in criminal organizations affecting the financial interests of the European Union, 40 concerned corruption, 34 concerned misappropriation, 47 concerned money laundering and 104 cases could not be linked to specific offences.[13]

Of these cases, the EPPO notes that 142 cases involved cross-border investigation.[14]

Concerning non-procurement expenditure fraud, the EPPO states that it accounted for approximately 31.8% of its investigations in 2021, and that in most cases the perpetrators used or presented false statements or documents resulting in the misappropriation or illicit retention of funds or assets from the Union's budget or from budgets managed by or on behalf of the Union.[15]

It appears that the agricultural sector has been one of the fields most affected by this type of fraud, as have rural development, maritime and fisheries development programs. A significant number of procedures have also been initiated in connection with the recovery funds related to Covid 19.[16]

The most frequent *modus operandi* for this type of infraction were the submission of false information regarding eligibility criteria, the intentional manipulation of financial statements, the inflation of additional costs, or false statements regarding the payment of experts or subcontractors, but also requests for refund of services that were not or not fully provided and the proposal of false projects.[17]

Regarding VAT fraud, one of the other major crime the EPPO dealt with in 2021, about 17.6% of the investigations concerned the so-called most serious forms of VAT fraud, in particular "carousel" fraud and VAT fraud committed within a criminal organization.[18]

This type of fraud has been most frequently encountered in the automotive, electronic devices and clothes sectors and may have involved dozens or even hundreds of companies.[19]

Finally, concerning corruption cases, the EPPO emphasizes that this represented about 4% of its investigations in 2021,[20] and that most often they involved active and passive corruption of public officials, including project officials in exchange for the allocation of European funds to specific companies or the approval of ineligible or inflated costs, and public officials allocating European Union funds to specific companies and approving the payment of an inflated price, significantly higher than the real value of the system.[21]

III. The European Public Prosecutor's Office has implemented procedures to recover the proceeds of criminal activities and has recovered more than 100 million euros in 2021

After seven months of activity, the EPPO notes that it has carried out approximately 81 fund recovery operations in 12 member states (Italy, Belgium, Germany, Romania, Czech Republic, Croatia, Finland, Latvia, Luxembourg, Spain, Lithuania, and Portugal). [22]

In total, the EPPO announces that it has ordered the seizure of more than 154 million euros, of which 147 million euros have been granted, which represents more than three times the budget of the EPPO for the year 2021.[23]

Bank accounts, real estate properties, vehicles, motorboats, as well as shares, cash and luxury items accounted for most assets seized by the EPPO in 2021.[24] Criminal items, such as contraband tobacco and food, were also seized in order to remove them from the market and deprive the perpetrators of illegal trade of the benefits of their illicit activities.[25]

[1] Annual Report 2021, European Public Prosecutor's Office, p.10 ("The EPPO started operations on 1 June 2021").
[2] Annual Report 2021, European Public Prosecutor's Office, p.8 ("We are independent from national governments, the European Commission, and other European institutions, bodies, and agencies. Together with the European Court of Justice, the EPPO represents the justice pillar of the EU. We speak and act on behalf of the European public interest.").
[3] Annual Report 2021, European Public Prosecutor's Office, p.8 ("The role of the European Public Prosecutor's Office (EPPO) is to improve the level of protection of the financial interests of the European Union (EU). We investigate fraud involving EU funds of over €10 000 and cross-border Value Added Tax (VAT) fraud involving damages above €10 million. Any such fraud committed in the participating Member States after November 2017 falls within our jurisdiction").
[4] Annual Report 2021, European Public Prosecutor's Office, p.5 ("Our operational objectives remain: – Improved overall investigation rates of offences affecting the EU's financial interests, especially in cross-border investigations targeting organised criminal groups; – Improved recovery of illicit assets obtained via offences affecting the EU's financial interests").
[5] Annual Report 2021, European Public Prosecutor's Office, p.5 ("The EPPO will continue to strengthen its capacity to carry out independent, impartial, high-quality investigations and prosecutions with the aim of achieving high rates of success in court, while respecting all the fundamental rights enshrined in the Charter. The EPPO will continue to develop an adequate operational capacity at the central level, in order to assist and complement asset recovery measures and financial investigations carried out by the European Delegated Prosecutors at national level. The EPPO will continue its efforts to establish strong relationships with non-participating Member States, and also with the relevant authorities of third countries of particular interest in the investigation and prosecution of cross-border cases falling within its competence, as well as in damage recovery").
[6] Annual Report 2021, European Public Prosecutor's Office, p.10 ("In total, we have received 2832 reports and opened 576 investigations, in which the damage caused to the EU budget was estimated at €5.4 billion").
[7] Annual Report 2021, European Public Prosecutor's Office, p.10 ("By 31 December 2021 we had 515 active investigations: – 17.6% of them were into VAT fraud, for estimated damages of €2.5 billion. – 27.5% of them had a cross-border dimension (acts either committed on the territory of several countries, or which caused damage to several countries)").

[8] Annual Report 2021, European Public Prosecutor's Office, p.11
[9] Annual Report 2021, European Public Prosecutor's Office, p.30
[10] Annual Report 2021, European Public Prosecutor's Office, p.10 ("After seven months of operations, it has become clear that the level of detection of fraud affecting the financial interests of the EU is suboptimal and varies significantly from Member State to Member State. This is particularly visible on the revenue side of the EU budget, with several Member States failing to detect any serious VAT fraud, as well as surprisingly low numbers of reports concerning customs fraud.").
[11] Annual Report 2021, European Public Prosecutor's Office, p.10 ("Finally, the first seven months of operations also amply demonstrated that the EPPO brings a decisive advantage to law enforcement in cross-border investigations. Without cumbersome mutual legal assistance formalities, organizing coordinated searches or arrests across borders has been a matter of weeks, instead of months.").
[12] Annual Report 2021, European Public Prosecutor's Office, p.13
[13] Annual Report 2021, European Public Prosecutor's Office, p.13
[14] Annual Report 2021, European Public Prosecutor's Office, p.13
[15] Annual Report 2021, European Public Prosecutor's Office, p.59 ("31.8% of the EPPO investigations concern suspected non-procurement fraud in the form of the use or presentation of false, incorrect or incomplete statements or documents, which has, as its effect, the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf").
[16] Annual Report 2021, European Public Prosecutor's Office, p.59 ("This type of fraud is to be found mainly in agricultural subsidies and direct payment, rural development, maritime and fisheries development programmes, infrastructure, human resources development programmes, Covid-19 related recovery funds, training services, construction, research and innovation, local infrastructure development, care services, youth and unemployed integration into the labour market, water infrastructure and support for small to medium-sized enterprises (SMEs)").
[17] Annual Report 2021, European Public Prosecutor's Office, p.59 ("Modus operandi related to this type of crime: – Submission of false information regarding eligibility criteria, intentional manipulation of financial statements, inflated additional costs, false statements regarding the payment of experts or subcontractors; – Requesting reimbursement for services that were not or not fully delivered, specifically in the education sector and care services; – Proposals for fake projects, including incorrect information about the execution and specific requirements of projects").
[18]Annual Report 2021, European Public Prosecutor's Office, p.60 ("17.6% of the EPPO investigations concern the most serious forms of VAT fraud, in particular carousel fraud, VAT fraud through missing traders, and VAT fraud committed within a criminal organisation").
[19] Annual Report 2021, European Public Prosecutor's Office, p.60 ("This type of fraud is to be found mainly in the automotive sector, electronic devices sector, clothes and merchandise. These types of schemes may involve tens or hundreds of companies acting in several countries, either as buffer traders, brokers or as missing traders").
[20] Annual Report 2021, European Public Prosecutor's Office, p.61 ("4% of the EPPO investigations concern active and passive corruption of public officials").
[21] Annual Report 2021, European Public Prosecutor's Office, p.61 ("Modus operandi related to this type of crime: – Bribery of project officials in exchange for either awarding EU funds to specific companies, or for approving ineligible and inflated additional costs in the execution of the projects; – Public officials awarding EU funds to specific companies and approving the payment of an inflated price, significantly higher than the real value of the contracted IT system; – High-level public officials in charge of managing the anti-fraud division within an agency managing EU funds in the field of agriculture requesting and receiving bribes for failure to fulfil duties ").
[22] Annual Report 2021, European Public Prosecutor's Office, p.62 ("In the first seven months of operations, 81 recovery actions took place in 12 of the participating Member States (Italy, Belgium, Germany, Romania, Czechia, Croatia, Finland, Latvia, Luxembourg, Spain, Lithuania, Portugal)").
[23] Annual Report 2021, European Public Prosecutor's Office, p.62 ("In total, the EPPO requested more than €154 million to be seized, and the seizure of more than €147 million was granted. This represents over three times the budget of the EPPO in 2021").
[24] Annual Report 2021, European Public Prosecutor's Office, p.64 ("The main assets seized were bank accounts, followed by real estate properties, vehicles, motor-boats as well as shares, cash and luxury items").
[25] Annual Report 2021, European Public Prosecutor's Office, p.64 ("Criminal merchandise has been seized and removed from the market, effectively depriving the criminals of the benefit of their illicit activities. This includes illicit tobacco for an estimated market value of €17 million, and food products for an estimated market value of €12 million").

The French duty of care in the context of its Europe-wide application

On February 23, the European Commission unveiled its proposal for a Directive on the Duty of Vigilance, which aims to promote sustainable and responsible behavior by companies along global value chains.

As a pioneer in this area along with Germany, France has adopted a requirement for large French companies or groups to establish a vigilance plan to identify and prevent serious violations committed by their subsidiaries and subcontractors in France or abroad against human rights and fundamental freedoms, human health and safety, and the environment, through the law on the duty of vigilance of parent companies and ordering companies of May 27, 2017.[1]

This vigilance plan must include specific measures, namely (i) a risk map, (ii) procedures to regularly assess the situation of subsidiaries, subcontractors or suppliers involved in a business relationship, (iii) appropriate actions to mitigate risks or prevent serious violations, (iv) a mechanism for alerting and collecting reports on the existence or occurrence of risks, and (v) a system for monitoring and evaluating the measures implemented.

Where damages are directly incurred as a result of the non-execution or failure to execute the due diligence plan, the French legislator has opted for the general rules of civil liability. Thus, a defaulting enterprise will have to compensate the damage suffered by the victims if they can prove that the company has failed to carry out its obligations or has failed to do it properly, and that there is a causal link with this fault.

In the event of a breach, French law provides for a preliminary stage before incurring liability, consisting in the possibility to give a formal notice to the defaulting company to implement such a vigilance plan within three months. If the company fails to do so, and at the request of any person having an interest in the matter, the legislation allows the competent court to enjoin the company, if necessary under penalty, to implement such a plan.[2]

I. Litigation on the French duty of vigilance has been slow to take hold

In the absence of a precise indication of what court should be seized, there was a debate in the case law as to whether the "competent court" referred to in the legislation was the judicial court or the commercial court. Indeed, in the context of the Total case, several associations had, in June 2019, given formal notice to the company to comply with its new duty of care. Regarding the lack of what they considered to be sufficient compliance with this obligation, the associations brought an action against Total before the courts, seeking an injunction to require the company to implement a due diligence plan in accordance with the legal requirements. Total argued that the latter judge was not competent to hear the case but rather the commercial judge, a position that was confirmed by the court, which, in an order dated January 30, 2020, recognized the "exclusive jurisdiction of the consular courts" and referred the case to the commercial court. This debate was most certainly a focal point for the application of the 2017 law, leaving associations and companies awaiting a clear position on this procedural issue. Through a decision of December 15, 2021, the Court of Cassation has recognized the competence of the judicial court. Then, the legislator itself, through

a law n° 2021-1729 of December 22, 2021, specified that the jurisdiction of the judicial court of Paris was exclusive. This procedural debate is now closed, and one would have thought that other litigation in this area would prosper. However, expectations in terms of duty of care are once again driven by the ongoing European debates regarding a duty of care at the European level.

A proposal for a directive on "corporate sustainability due diligence" was adopted by the European Commission on 23 February 2022. This proposal intends to impose on companies an obligation of means to ensure that their activities mitigate the impact on human rights or the environment.

The directive, which is only a proposal at this point, includes some important elements compared to the duty of care as it is currently provided for in France.

II. A duty of care affecting a larger number of operators

The proposed directive unveiled by the European Commission is intended to mitigate the negative impact of economic activities carried out by companies on human rights and the environment.[3] It thus requires companies to adopt a due diligence and risk mapping strategy.[4]

In contrast to the duty of care established by France, the European Union intends to apply this duty of care to a greater number of economic actors than those covered by French law.[5] Thus, all companies with limited liability legal regime with at least 500 employees and a worldwide turnover of at least 150 million euros would be concerned by the European duty of care.[6] It should be noted that unlike the French duty of care, which applies to companies with at least 5,000 or 10,000 employees, the proposed directive provides for two cumulative criteria concerning the number of employees and turnover.[7]

In addition to this category, limited liability companies operating in a high-risk sector of activity will be added within two years if they employ 250 people and have a worldwide turnover of at least 40 million euros.[8] For the purpose of being exhaustive, the proposal lists high-risk sectors, which include, for example, textiles or resource extraction.[9]

Moreover, companies from third countries operating in the European Union whose turnover threshold is aligned with the above thresholds and which are located in the European Union could also be subject to this European duty of care.[10]

Regarding the material scope of the obligations, the proposal is also intended to be broader than French law, since it requires companies to integrate the duty of vigilance into their own operations as well as into the entire value chain of the ordering companies as soon as a commercial relationship is established, i.e., commercial relationships upstream and downstream of the intervention of the concerned companies (suppliers, service providers, subcontractors, partners, customers, etc.).[11] Therefore, the European duty of care would have a wider application than only to targeted companies, all contractual relationships, whether direct or indirect, would *de facto* have to be apprehended in order to determine whether each company trading with the targeted companies complies with the duty of care imposed. As a result, companies will have to include an infinite number of stakeholders in their due diligence plan, which will necessarily make prevention more complex.[12] The enactment of the directive would, depending on the transposition in the different member states, lead to significant upstream work to ensure the probity of business

partners and therefore significant costs for companies to improve their due diligence strategies. Thus, a control of third parties, following the example of the Sapin II law on anti-corruption, could be required.

III. An obligation of means that could restrain potential liability exposure

The proposed directive provides that the companies concerned will be required to take appropriate measures to avoid any negative impact on human rights or on the environment of its activities. As in French law,[13] a legal claim, by any person with an interest in the matter, is therefore possible in the event of a breach.

The European text specifies, however, that the companies concerned will only have a simple obligation of means.[14] Some criticisms have been raised as to the non-binding nature of this duty of care, since the obligation of means does not imply that the author guarantees the performance of his obligation but only that he makes every possible effort to achieve it.[15] As a result, it has been pointed out that there is a risk that in practice these obligations may amount to the mere adoption of codes of conduct and the insertion of contractual clauses in contracts with business partners.[16]

Indeed, the negligence can only be characterized against the company in the event of a clear breach of its obligation,[17] however, a presumption of liability is imposed on the legal person in case of prejudice due to this obligation of means.[18]

Therefore, as in French law, it is not necessary to prove the existence of a fault, a prejudice, and a causal link between them, but it will be up to the company subject to the duty of vigilance to demonstrate that it took all the precautionary measures required to avoid the prejudice.

However, the European text provides for a specific responsibility that should be held by directors who could be liable for the implementation and monitoring of due diligence measures as well as "the adoption of the company's due diligence policy, the taking into account of contributions from stakeholders and civil society organizations and the integration of due diligence into the company's management systems".[19]

IV. Effective monitoring of the reality of vigilance measures and the possibility of sanctions in case of infringement

Concerning the control imposed on the companies concerned, the proposed directive suggests the creation of independent administrative authorities, designated by the Member States themselves.[20] The authorities would be competent to investigate and impose financial penalties in the event of non-compliance,[21] and could refer itself or be referred to by third parties in the event of sufficient information indicating a breach.[22]

In addition, the proposal provides for the discretion of Member States to take the necessary measures to put an end to violations of the duty of care.[23] In addition, it provides that the amount of the penalty must refer to the company's turnover,[24] without precision. In this regard, to ensure that the penalty mechanism is dissuasive and binding, the proposal could have been more explicit, as for example the European Regulation on the protection of personal data, which states that the fine may amount to up to 4% of the annual worldwide turnover.[25]

The text proposed by the European Commission is intended to be effective, efficient and innovative in order to harmonize the legislation at the European level and to draw from the most efficient measures. Its implementation should therefore undoubtedly impact French law. However, the text remains unclear on certain points and the scope and binding nature of the duty of care will depend on the transposition in each Member State. A pending period is starting again regarding the duty of care, its scope, its consequences, and its sanctions. Let's hope that the European process and its transposition will not lead to a wait-and-see attitude of the different actors and that a genuine implementation will be given to the existing text in France, where the duty of vigilance still has its place to make. ■

[1] Article 1 of Law No. 2017-399 of March 27, 2017 on the duty of care of parent companies and ordering companies ("After Article L. 225-102-3 of the French Commercial Code, an Article L. 225-102-4 is inserted as follows "Art. L. 225-102-4.-I.-Any company that employs, at the close of two consecutive fiscal years, at least five thousand employees within its own company and in its direct or indirect subsidiaries whose registered office is located in France, or at least ten thousand employees within its own company and in its direct or indirect subsidiaries whose registered office is located in France or abroad, shall draw up and effectively implement a due diligence plan. "Subsidiaries or controlled companies that exceed the thresholds mentioned in the first paragraph are deemed to meet the obligations set out in this article if the company that controls them, within the meaning of article L. 233-3, draws up and implements a due diligence plan relating to the activity of the company and all the subsidiaries or companies it controls. The plan includes 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 (...)").

[2] Article 1 of Law No. 2017-399 of March 27, 2017 on the duty of care of parent companies and ordering companies ("II.- Where a company given formal notice to comply with the obligations provided for in I fails to do so within a period of three months from the date of the formal notice, the competent court may, at the request of any person having an interest in the matter, enjoin it, where appropriate under a fine, to comply with them. The president of the court, ruling in summary proceedings, may be seized for the same purposes").

[3] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF.

[4] "A fair and sustainable economy: Commission sets rules for business respect for human rights and the environment in global value chains", European Commission press release, February 23, 2022 ("In order to comply with the sustainability duty of care, companies should: – Integrate the duty of care into policies; – Identify actual or potential negative impacts on human rights and the environment; – Prevent or mitigate potential impacts; – Stop or minimize actual impacts; – Establish and maintain a grievance procedure; – Monitor the effectiveness of the due diligence policy and measures; – and publicly communicate about the duty of care").

[5] "European duty of care: the National Assembly's European Affairs Committee calls for ambitious and effective legislation", Julia Thibord et Emmanuel Daoud, Dalloz actualité, January 18, 2022 ("The limited scope of the duty of care is one of the weaknesses of the French law. Only French companies with more than 5,000 employees in France or more than 10,000 employees worldwide (in both cases, including employees of their subsidiaries").

[6] "A fair and sustainable economy: the Commission establishes rules on the respect of human rights and the environment by companies in global value chains", Press release of the European Commission, February 23, 2022 ("Group 1: all large EU limited liability companies with significant economic power (employing more than 500 people and with a net turnover of more than EUR 150 million worldwide)").

[7] "Directive on due diligence: between satisfaction and points of attention", Miren Lartigue, Dalloz actualité, March 4, 2022 ("The deputy nevertheless noted several "points of attention" that do not satisfy him. Starting with the fact that the scope of the directive could be extended to "companies that combine the two criteria of workforce and turnover and not to those that meet one or the other", the first option being more restrictive than the second").

[8] "A fair and sustainable economy: the Commission establishes rules on the respect of human rights and the environment by companies in global value chains", Press release of the European Commission, February 23, 2022 ("Group 2: Other limited liability companies operating in defined high-impact sectors that do not meet both Group 1 thresholds, but employ more than 250 people and have a net turnover of €40 million or more worldwide. For these companies, the rules will begin to apply two years later than for Group 1").

[9] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF, ("In order to reflect priority areas for international action to address human rights and environmental issues, the selection of high-impact sectors for the purposes of this guidance should be based on existing OECD sectoral guidance on due diligence. The following sectors should be considered as high impact sectors for the purposes of this directive: Manufacturing of textiles, leather and related products (including footwear), and wholesale of textiles, clothing and footwear; Agriculture, forestry, fisheries (including aquaculture), food manufacturing, and wholesale of agricultural raw materials, live animals, timber, food and beverages; extraction of mineral resources, wherever extracted (including crude oil, natural gas, coal, lignite, metals and metal ores, and all other non-metallic minerals and quarry products), manufacturing of basic metal products other non-metallic mineral products and metal products (except machinery and equipment), and wholesale of metal products, and wholesale of mineral resources, basic and intermediate mineral products (including metals and metal ores), building materials, fuels, chemicals and other intermediate products").

[10] "A fair and sustainable economy: the Commission establishes rules on the respect of human rights and the environment by companies in global value chains", Press release of the European Commission, February 23, 2022 ("Non-EU companies operating in the EU with a turnover threshold aligned with that of groups 1 and 2 and with turnover in the EU").

[11] "A fair and sustainable economy: the Commission establishes rules on the respect of human rights and the environment by companies in global value chains", Press release of the European Commission, February 23, 2022 ("This proposal applies to the operations of companies, their subsidiaries and their value chains (direct and indirect business relationships)").

[12] "Directive on due diligence: between satisfaction and points of attention", Miren Lartigue, Dalloz actualité, March 4, 2022 ("This is another major point of tension in the draft directive. A number of companies are lobbying to limit the European duty of care to the value chain. That is to say, to limit the obligations of vigilance of companies to their direct suppliers and subcontractors – arguing that it is difficult or impossible for them to control their indirect suppliers and subcontractors").

[13] Article L.225-102-5 of the French Commercial Code ("The action in responsibility is introduced before the competent jurisdiction by any person justifying an interest to act for this purpose").
[14] "A fair and sustainable economy: the Commission establishes rules on the respect of human rights and the environment by companies in global value chains", Press release of the European Commission, February 23, 2022 ("The companies concerned will have to take appropriate measures ("obligation of means"), depending on the seriousness and likelihood of the various impacts, the measures available to them in the particular circumstances and the need to set priorities").
[15] "Contractual liability", Orientation sheet, Dalloz, January 2022 ("Where the party owes an obligation of means (e.g., the obligation of a doctor, who must provide his patient with care that is attentive, conscientious and in accordance with scientific knowledge), his liability will only be engaged if the creditor proves that he did not use all the means (hence the terms used) that would enable him to perform. In other words, the breach of an obligation of means must be culpable in order to engage the liability of the debtor. On the other hand, when the party owes an obligation of result (e.g., the obligation of safety incumbent on the carrier of persons), it is sufficient to prove that the result to which it was committed has not been achieved for it to be held liable. Thus, contractual liability is not always based on fault, because in the presence of an obligation of result, not only is proof of fault not necessary, but proof of the absence of fault on the part of the debtor of the obligation is inoperative. In fact, he can only be exonerated by force majeure, that is, if he can prove that the event which prevented him from performing his obligation was unforeseeable, irresistible and external to him").
[16] "Directive on due diligence: between satisfaction and points of attention", Miren Lartigue, Dalloz actualité, March 4, 2022 ("In particular, the proposal relies heavily on the adoption of codes of conduct by companies, the inclusion of clauses in contracts with their suppliers and the use of private audits and sectoral initiatives. Yet it is precisely the ineffectiveness of these measures that led our organizations, more than ten years ago, to advocate for a binding duty of care").
[17] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF, ("Therefore, the main obligations of this directive should be "obligations of means". The company must take appropriate measures that can reasonably be expected to result in the prevention or reduction of the negative impact in the circumstances of the particular case. Account should be taken of the specifics of the company's value chain, the sector or geographic area in which its value chain partners operate, the company's power to influence its direct and indirect business relationships, and the potential for the company to increase its power to influence").
[18] "Duty of care: from the vigilance law to a European directive?", Quentin Chatelier, Dalloz actualité, April 1, 2021 ("A presumption of liability in case of prejudice: due to the "means" nature of the duty of vigilance, the associated civil liability is necessarily personal. The issue is to determine whether the dominant company's failure to comply with its duty of care is causally related to the harm suffered by a third party").
[19] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF, ("Responsibility for due diligence should rest with the company's directors, in line with international due diligence frameworks. Directors should therefore be held responsible for implementing and monitoring the due diligence measures set out in this Directive, as well as for adopting the company's due diligence policy, taking into account the input of stakeholders and civil society organizations, and integrating due diligence into corporate management systems. Directors should also adapt the company's strategy to the actual and potential impacts identified, as well as to any vigilance measures taken").
[20] "A fair and sustainable economy: the Commission establishes rules on the respect of human rights and the environment by companies in global value chains", Press release of the European Commission, February 23, 2022 ("The national administrative authorities designated by the Member States will be responsible for monitoring compliance with these new rules").
[21] "A fair and sustainable economy: the Commission establishes rules on the respect of human rights and the environment by companies in global value chains", Press release of the European Commission, February 23, 2022 ("[National administrative authorities] could impose fines for violations").
[22] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF, ("The supervisory authority may initiate an investigation on its own initiative or because of justified concerns communicated to it in accordance with Article 19, where it considers that it has sufficient information indicating a possible failure by a company to comply with the obligations laid down in the national provisions adopted pursuant to this Directive").
[23] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF, ("The Commission shall establish a European Network of Supervisory Authorities, composed of representatives of the supervisory authorities. The Network shall facilitate supervisory cooperation and the coordination and alignment of regulatory, investigative, enforcement and supervisory practices of supervisory authorities and, where appropriate, the sharing of information between them").
[24] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF, ("Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive").
[25] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF, ("When monetary penalties are imposed, they are based on the company's turnover").

Lobbying: Declaration obligations of interest representatives in France

I. 2013-907 of October 11, 2013, defines what constitutes an interest representative in France

The law of October 11, 2013, amended by law n°2016-1691 of December 9, 2016, defines the status of interest representative and grants legal recognition to his activity.

Are considered as interest representatives, the private legal entities, the public establishments or public groups exercising an industrial and commercial activity, the chambers of commerce and industry, the chambers of trades and crafts and the chambers of agriculture of which a director, an employee or a member has, as a principal or regular activity, to influence the public decision.[1]

The influence on the public decision can be exercised in particular on the content of a law or a regulatory act and through contact with several persons listed by the law, such as members of the government, deputies or senators or the President of the Republic's staff.[2]

II. Law no. 2013-907 of October 11, 2013 and Decree no. 2017-867 of May 9, 2017 specify the obligations applicable to interest representatives as well as the penalties for failure to comply

Interest representatives must register and declare their activities in a public register available online on the HATVP website[3]. This public register allows any person to obtain the list of interest representatives free of charge.[4]

This registration must be made within two months of the date on which they meet the conditions to be considered as interest representatives.[5] Interest representatives must provide much information about their activity, such as their identity, or the actions carried out in the framework of their activities.[6]

In addition, any change in this information must be communicated to the HATVP within one month.[7]

Moreover, the text specifies that any person who acts as an interest representative on behalf of a third party must also communicate his or her activity to the HATVP.[8]

Finally, interest representatives must also send the HATVP, within three months of the end of their fiscal year, details of the actions they carry out, the expenses related to their activity or the number of people they employ in the exercise of their activities.[9]

To encourage interest representatives to declare themselves to the HATVP, the law provides that failure to comply with the declaration obligations exposes the representative to a criminal penalty.[10]

The HATVP is the competent authority to establish breaches of the rules governing the declaration of interest representatives.[11] It may thus choose to send a formal notice to the interest

representatives concerned, which it may make public, to comply with their obligations in this area.[12]

[1] Article 18-2 of Law no. 2013-907 of October 11, 2013 on transparency in public life ("The following are interest representatives, within the meaning of this section: legal persons under private law, public establishments or public groupings carrying out an industrial or commercial activity, the organizations mentioned in Chapter I of Title I of Book VII of the Commercial Code, in Title II of the Crafts Code and in Title I of Book V of the Rural and Maritime Fishing Code, of which a manager, employee or member has as his or her main or regular activity to influence public decision").

[2] Article 18-2 of Law no. 2013-907 of October 11, 2013 ("The following are interest representatives, within the meaning of this section: legal persons under private law, public establishments or public groupings carrying out an industrial or commercial activity, the bodies mentioned in Chapter I of Title I of Book VII of the Commercial Code, Title II of the Code de l'artisanat and Title I of Book V of the Code rural et de la pêche maritime, of which a manager, employee or member has as his main or regular activity to influence public decision making, in particular the content of a law or a regulatory act by entering into communication with : 1° A member of the Government, or a member of a ministerial cabinet; 2° A deputy, a senator, a collaborator of the President of the National Assembly or of the President of the Senate, of a deputy, a senator or a parliamentary group, as well as with the agents of the services of the parliamentary assemblies; 3° A collaborator of the President of the Republic ; 4° The director general, the secretary general, or their deputy, or a member of the college or of a commission invested with a power of sanction of an independent administrative authority or of an independent public authority mentioned in 6° of I of article 11 of the present law; 5° A person holding a post or office mentioned in 7° of the same I; 6° A person holding a post or office mentioned in 2°, 3° or 8° of the said I, subject to a threshold of application set at more than 100,000 inhabitants for communes and public establishments of inter-communal cooperation with their own tax status. 7° A public servant occupying a post mentioned by the decree in Council of State provided for in I of article 25 quinquies of the law n° 83-634 of July 13, 1983 on the rights and obligations of public servants. Natural persons who are not employed by a legal person mentioned in the first paragraph of this article and who carry on a professional activity in their own right that meets the conditions set out in the same paragraph are also interest representatives within the meaning of this section. The following are not interest representatives within the meaning of this section: a) Elected representatives, in the exercise of their mandate; b) Political parties and groupings, in the context of their mission provided for in Article 4 of the Constitution; c) Trade union organizations of civil servants and, in the context of the negotiations provided for in Article L. 1 of the Labour Code, trade union organizations of employees and professional employers' organizations; d) Associations with a religious object; e) Associations representing elected representatives in the exercise of the missions provided for in their statutes").

[3] Article 18-1, of Law No. 2013-907 of October 11, 2013 ("A digital directory ensures that citizens are informed of the relations between interest representatives and the public authorities. This directory is made public by the High Authority for the Transparency of Public Life. This publication is made in an open format that can be freely used and exploited by an automated processing system, under the conditions provided for in Title II of Book III of the Code of relations between the public and the administration. This directory shall list, for each interest representative, the information communicated pursuant to article 18-3 of the present Act. It shall be common to the High Authority, for the implementation of the rules provided for in sub-section 2, and to the National Assembly and the Senate for the implementation of the rules determined on the basis of sub-section 1 of this section.").

[4] Ibid.

[5] Article 2 of Decree No. 2017-867 of May 9, 2017 ("Any interest representative shall communicate to the High Authority for the Transparency of Public Life, within a period of two months from the date on which one of the conditions set out in Article 1 is met, the information listed in 1°, 2° and 5° as well as in the seventh paragraph of Article 18-3 of the aforementioned Act of October 11, 2013").

[6] Article 18-3 of Law n° 2013-907 of 11 October 2013 ("Any interest representative shall communicate to the High Authority for the Transparency of Public Life, via a teleservice, the following information: 1° His or her identity, when he or she is a natural person, or that of his or her managers and of the natural persons in charge of interest representation activities within it, when he or she is a legal person; 2° The scope of his or her interest representation activities; 3° The actions falling within the scope of interest representation carried out with the persons mentioned in 1° to 7° of Article 18-2, specifying the amount of expenditure related to these actions during the previous year; 4° The number of people it employs in the performance of its interest representation mission and, if applicable, its turnover for the previous year; 5° The professional or trade union organizations or associations related to the interests represented to which it belongs").

[7] Article 2, of Decree No. 2017-867 of May 9, 2017 ("Any change in any of these elements shall give rise to an update of the information communicated to the High Authority within one month").

[8] Article 18-3 of Law No. 2013-907 of October 11, 2013 ("Any person carrying out, on behalf of third parties, an activity of interest representation within the meaning of the same Article 18-2 shall also communicate to the High Authority for the Transparency of Public Life the identity of these third parties").

[9] Article 3 of Decree No. 2017-867 of May 9, 2017 ("Pursuant to 3° of Article 18-3 of the aforementioned Act of October 11, 2013, any interest representative shall send to the High Authority within three months of the close of its accounting period the following information relating to the last period: 1° The type of public decisions on which the interest representation actions taken concerned, with regard to the list appearing in the appendix to this decree; 2° The type of interest representation actions taken, with regard to the list appearing in the appendix to this decree; 3° The issues on which these actions concerned, identified by their subject and their field of intervention; 4° The categories of public officials mentioned in 1° to 7° of Article 18-2 of the same law, with whom he or she has been in communication, the declarations relating to the categories mentioned in 1°, 4° and 6° of the same Article 18-2 being made with regard to the lists annexed to this decree; 6° Within the framework of a list of ranges established by order of the Minister for the Economy on the proposal of the High Authority for Transparency in Public Life, the amount of expenditure devoted to interest representation activities for the past year by the interest representative, as well as, where applicable, the amount of turnover for the previous year linked to the interest representation activity. All human, material and financial resources mobilized by the interest representative in order to influence the public decision, in particular the content of a law or a regulatory act, under the conditions provided for in the same article 18-2, constitute expenses devoted to interest representation activities within the meaning of the same article 18-2.").

[10] Article 18-9 of Law No. 2013-907 of October 11, 2013 ("The fact that an interest representative fails to communicate, on his or her own initiative or at the request of the High Authority for the Transparency of Public Life, the information that he or she is required to communicate to the latter pursuant to Article 18-3 is punishable by one year's imprisonment and a €15,000 fine.").

[11] Article 18-7 of Law n° 2013-907 of October 11, 2013 ("When the High Authority for the Transparency of Public Life notes, on its own initiative or following a report, a breach of the rules provided for in Articles 18-3 and 18-5, it: 1° Send a formal notice to the interest representative concerned, which it may make public, to comply with the obligations to which he or she is subject, after having given him or her the opportunity to present his or her observations; 2° Notify the person falling within the scope of 1° and 3° to 7° of Article 18-2 who would have responded favorably to a solicitation made by an interest representative mentioned in 1° of this Article and, if necessary, send him or her observations, without making them public.").

[12] Ibid.

B.

A CERTAIN JURISPRUDENTIAL FOCUS ON TAX FRAUD

Illegal banking solicitation and laundering of aggravated tax fraud: new step in the UBS file

The long-awaited judgment in the UBS case was delivered by the Paris Court of Appeal. The historic penalty of € 4.5 billion gives way to a more measured sanction, and the #laundering of aggravated tax fraud is discarded, ending (for how long?) the suspense of whether UBS did the right thing by refusing a CJIP (French DPA) and a negotiation with the PNF. Navacelle looks back at this case and analyzes the main points of this decision.

Swiss bank UBS, accused of having setup, between 2004 and 2012, an occult system to encourage French citizens to invest their money in Switzerland [1], appeared before the Paris Court of Appeal after being ordered to pay the unprecedented sum of € 4.5 billion in sanctions at first instance for illegal banking solicitation and laundering of aggravated tax fraud. This sum was eventually considerably reduced to € 1.8 billion.

It is rare for a stock price to rise after the announcement of a judicial conviction. However, following UBS's condemnation by the Paris Court of Appeal with sanctions totaling € 1.8 billion, the Swiss bank's stock price briefly surged by 2.7% [2]. This reaction illustrates a form of relief following this long-awaited judgement.

With a record-breaking penalty of € 4.5 billion, the judgment of first instance pronounced by the Paris Criminal Court was held up as an example of the severity and increasing criminalization of tax law [3]. Some saw this judgment as a message to companies facing prosecution in favor of a negotiated justice. Indeed, the first instance UBS's conviction followed its referral to court after negotiations for the possible conclusion of a Judicial Public Interest Agreement (CJIP) failed. During these negotiations, the prosecution proposed UBS a penalty closer to € 1 or € 2 billion [4]. The bank refused, probably considering it too high and preferring to present its arguments and defense during a trial.

I. A foreseeable reduction of the penalty

While the public prosecutor's office was initially followed at first instance in its demands amounting to € 3.7 billion (the remainder of the penalty representing the damage suffered by the State), the requisitions of the public prosecutor on appeal were lower, at € 2 billion. This change in the prosecution's position can probably be explained by a judgment dating back from 2019 [5] in which the Court of Cassation had the opportunity to clarify the basis for calculating the penalty. It is now based not on the object of the offence but on its proceeds, i.e., the amount evaded from taxation (and not the money concealed).

This method of calculation was probably also considered by the Paris Court of Appeal. Indeed, in addition to the € 800 million paid to the State as damages, a fine of € 3.75 million was ordered, compared to the € 3.7 billion initially imposed by the court of first instance, as well as the confiscation of € 1 billion. In total, UBS will have been fined € 1.8 billion. This amount must be put into perspective with the fines negotiated by UBS with the American ($ 230 million) and German (€ 302 million) justice [6][7].

As for the sentences pronounced against the natural persons, UBS executives, these were also slightly reduced. Four of these executives were sentenced, as opposed to five at first instance, to sentences of up to one year's suspended imprisonment and a fine of € 300 000 [8].

II. A partial success of UBS's strategy

The fine ordered at first instance made believe in the hardening of tone vis-à-vis the banking community. Conversely, the amount retained on appeal appears to be more in line with the range of sentences usually pronounced.

However, it is questionable whether UBS's strategy of refusing a negotiated outcome to defend itself before the criminal courts was appropriate as the appeal conviction is close to the amounts mentioned by the CJIP which was considered for a time.

It seems that UBS chose a more traditional and principled defense since it announced through its counsel that it would not exclude an appeal to the Cour de cassation (French Supreme Court) [9]. The refusal of negotiated justice may thus be more a willingness to defend its rights than a financial strategy.

The initial enthusiasm of the stock price was quickly erased by investors concerned about a possible appeal by the French State [10]. ■

[1] Tax fraud: UBS's fine largely reduced to €1.8 billion, Les Echos, 13 December 2021 ("in total, the conviction for illegal bank canvassing and laundering of aggravated tax fraud amounts to €1.803 billion. A huge drop compared to the first instance sanction, which had sentenced the bank to a record penalty of 4.5 billion euros. In detail, the court sentenced the Swiss bank to a fine of 3.75 million euros, to which is added an additional penalty of 1 billion euros of confiscations, and 800 million euros of damages that will have to be paid to the State").
[2] UBS Group AG share price on 13 December 2021
[3] UBS: record fine imposed on Swiss bank Dalloz Actualité, 1e March 2019 ("Undoubtedly, this judgment, delivered on February 20, 2019 by the Paris Criminal Court, will be a landmark within the French financial justice (...) in view of the pronouncement, against the banking institution, of particularly heavy sentences, both criminal and civil. The latter are nevertheless in line with legislation that is particularly hostile to any form of tax evasion.").
[4] The prosecutor's office demands one billion from the Swiss bank UBS, Le Journal du dimanche, 19 March 2017 (" [in the context of the negotiations for the CJIP,] the PNF claimed from the Swiss bank the amount of the guarantee already paid: i.e. 1.1 billion euros, after having envisaged 2.2 billion").
[5] Cass. crime., 11 Sep 2019, n°18-81.040 ("The basis of assessment of the proportional fine provided for in Article 324-3 of the Criminal Code is calculated on the basis of the amount of the direct or indirect proceeds of the original offence, to which the laundering related").
[6] The fine of 3.7 billion imposed on UBS is almost erased by the Paris Court of Appeal, Le Temps, 13 December 2021 ("Sentenced at first instance, in February 2019, for these two counts to a record fine of 3.7 billion euros + 800 million euros in damages (4.5 billion euros in total), the Swiss bank finally receives a fine divided by thousand: €3.7 million").
[7] Prosecutors demand a billion from Swiss bank UBS, Le Journal du dimanche, 19 March ("In the United States, it has obtained an agreement to the tune of 230 million dollars. Four thousand American customers were evading the tax authorities for "several tens of billions". With the German justice, a "deal" was concluded to the tune of 302 million euros. "For amounts at stake higher than those of the French file," he slips").
[8] Tax fraud: UBS sentenced on appeal to €1.8 billion in fines, confiscation and damages, Le Monde, 13 December 2021 ("Four of the six former executives prosecuted were also given suspended sentences of up to one year and a €300,000 fine, most of which were lighter than those imposed by the court, which had also sentenced five of them.").
[9] Tax fraud: UBS's fine largely reduced to €1.8 billion, Les Echos, 13 December 2021 ("« The decision is difficult to understand," said UBS lawyer Hervé Temime. No one, during the hearing, had asked for any confiscation. "This is a decision with a financial consequences that are 2.7 billion less [...] in relation to the court's decision". It remains that "in principle, there is a conviction, so we will think to see if we file an appeal in cassation"").
[10] UBS hopes to turn the page on tax fraud cases, Les Echos, 14 December 2021 ("After the judgment, the Swiss financial giant's share price jumped by more than 2% on the Zurich Stock Exchange. It finally closed down 0.4%, as investors feared an appeal by the French state.").

In this case, the defendant had filed an under-reported tax return for the 2015 fiscal year for a total amount of nearly 70,000 euros. He had recorded sums received as prepayments while they were actually collected in the month they were invoiced, with no corresponding income in the accounting statements.

On November 21, 2017, the tax authorities filed a criminal complaint for tax fraud after receiving the approval of the tax offences commission.[1] The criminal court ruled that the defendant was guilty of tax fraud and sentenced him to a fine of 5,000 euros. The defendant and the public prosecutor appealed this decision.

The defendant was then sentenced to a fine of 15,000 euros by the criminal Court of Appeal, while he had been sentenced to financial penalties of up to 40% of the VAT and income tax assessments by the administrative court.[2] The criminal Court of Appeal indeed ruled that it could impose such a fine because the two cumulative penalties did not exceed the limit of 500,000 euros specified in the French tax code.[3] An appeal to the Court of Cassation was then filed by the defendant claiming that the Court of Appeal breached the principle of offences and penalties being established in law. He argued that the judges of the Court of Appeal had not verified, with regard to the amount of the alleged tax fraud and to the nature of the acts or circumstances of the offence, whether the acts committed by the defendant were sufficiently serious to justify the cumulation of criminal and administrative penalties.

This decision is an opportunity to explain how the potential combination of criminal and administrative sanctions for tax fraud works. To do so, it is necessary to look at the context (I) and the scope (II) of this decision.

I. Case law allows for the combination of criminal and administrative penalties for tax fraud under certain conditions

The issue of the possible cumulation of criminal and administrative sanctions in cases of tax fraud has been discussed for a long time. Indeed, the cumulation of repressive procedures is subject to the *ne bis in idem* principle, which prohibits the cumulation of sanctions for the same acts.[4]

In French law, the Court of Cassation has ruled that criminal and tax proceedings are, by their nature and purpose, different and independent.[5] The Court has also established that, in cases involving tax fraud, a criminal court does not have to stay its proceedings in the event of an ongoing administrative procedure involving the same facts,[6] even if no penalty was imposed in the administrative procedure.[7]

The European Court of Human Rights was reluctant to enforce the *ne bis in idem* principle, before formally recognizing it in matters of financial offenses.[8] Nevertheless, the European Court of Human Rights has subsequently specified that a cumulation of criminal and administrative penalties is possible, particularly in tax matters, in accordance with the principle of complementarity of proceedings.[9]

To clarify the conditions of cumulation, the Constitutional Council has validated the possibility of cumulation by stating that the collection of taxes and the necessity to fight tax fraud justify in some cases the undertaking of complementary proceedings.[10] The Constitutional Council specified that the principle of cumulation applies only to the most severe cases of fraudulent dissimulation or omission of declarations. The seriousness may result from the amount of tax evaded, the nature of the actions of the person prosecuted or the circumstances of the offense.[11] The proportionality principle requires that the total amount of the sanctions cannot exceed the highest amount of one of the sanctions incurred.[12]

The Court of Cassation finally applied the same reasoning, ruling that when a defendant prosecuted for tax fraud has been subjected to an administrative penalty for the same facts, the criminal judge must, before imposing criminal sanctions, verify whether the facts of the case are serious enough to justify such additional sanctions. The Court emphasized that judges are required to justify their decision based on the seriousness of the facts, which may result from the amount of evaded taxes, the nature of the actions of the defendant or the circumstances of the facts, including those constituting aggravating circumstances. In the absence of such a showing of seriousness, the judges cannot sentence the defendant to criminal sanctions when administrative sanctions have already been imposed.[13]

II. The Court of Cassation insists on the obligation of judges to control the existence of a sufficient degree of seriousness in possible cumulation of criminal and administrative sanctions cases

In the case at hand, and in line with case law, the Court of Cassation confirms that the cumulation of criminal and fiscal sanctions is possible, based on articles 1729 and 1741 of the French tax code. The latter prescribes a criminal penalty, while the former provides for an administrative sanction in the form of a financial penalty.[14]

In this case, the main debate related to the rationale followed by the judges of the Court of Appeal to impose a criminal sanction to the defendant where the defendant had already been subject to an administrative sanction imposed by administrative courts. The defendant considered that the Court of Appeal had not sufficiently motivated its decision on this issue[15].

With this ruling, the Court of Cassation emphasises that criminal judges must establish two elements in order to allow for a cumulation of criminal and administrative sanctions in cases of tax fraud. First, they must demonstrate that a tax fraud offence has been committed. Then, they must give reasons for their decision based on the seriousness of the facts.[16]

The Court of Cassation notes that the absence of a showing of seriousness of the facts must lead to the acquittal of the defendant.[17] Following its precedents, the Court reiterates that the seriousness of the situation results from the amount of evaded taxes, the nature of the actions of the defendant or the circumstances of the facts.[18]

In this case, the Court of Cassation ruled that the Court of Appeal did not provide sufficient reasons for its decision, by not investigating, prior to the sentencing, whether the criminal sanction was justified in light of the seriousness of the acts committed. Thus, the judges of the Court of Appeal failed to comply with the rule established by the Constitutional Council.[19] ■

[1] Article 1741 of the French tax code ("Without prejudice to the special provisions referred to in this consolidation, any person who has fraudulently withdrawn or attempted to fraudulently withdraw from the establishment or payment in whole or in part of the taxes referred to in this consolidation, either he wilfully failed to file his return within the prescribed time limits, or he wilfully concealed a portion of the taxable amounts, or he arranged his insolvency or obstructed the collection of the tax by other means, or either by acting in any other fraudulent manner, is liable, irrespective of the applicable tax penalties, to imprisonment for five years and a fine of €500,000, the amount of which may be doubled by the proceeds of the offence. The penalties shall be increased to seven years' imprisonment and a fine of €3,000,000, the amount of which may be increased to double the proceeds of the offence, where the acts were committed in an organized band or carried out or facilitated by: 1) Either open accounts or contracts with bodies established abroad; 2) Or the interposition of natural or legal persons or any comparable body, trust or institution established abroad; 3. Either the use of a false identity or false documents, within the meaning of Article 441-1 of the Penal Code, or of any other falsification; 4. Or a fictitious or artificial tax domiciliation abroad; 5. Either a fictitious or artificial act or the interposition of a fictitious or artificial entity. However, this provision shall apply, in the case of concealment, only if it exceeds one-tenth of the taxable amount or the figure of €153. Any person convicted under the provisions of this Article may be deprived of civil, civil and family rights in accordance with the provisions of Articles 131-26 and 131-26-1 of the Penal Code. The imposition of the additional penalties of prohibition of civil, civil and family rights, mentioned in Article 131-26 of the Penal Code, shall be mandatory against any person guilty of the offence provided for in the second to eighth paragraphs of this Article, the possession of the crime or its laundering. However, the court may, by a specially reasoned decision, decide not to impose those additional penalties, having regard to the circumstances of the offence and the personality of the person responsible. The sentence of ineligibility is mentioned during its entire duration in the bulletin no. 2 of the criminal record provided for in article 775 of the code of criminal procedure. These prohibitions may not exceed ten years against a person holding a position of member of the Government or a public elected office at the time of the events, and five years for any other person. The court shall order the publication of the decision pronounced and its distribution under the conditions laid down in Articles 131-35 or 131-39 of the Penal Code. It may, however, by means of a specially reasoned decision, decide not to order the publication of the decision pronounced and the distribution thereof, having regard to the circumstances of the infringement and the personality of the person responsible. The duration of the custodial sentence incurred by the perpetrator or accomplice of one of the offences mentioned in this article shall be reduced by half if, having notified the administrative or judicial authority, it has made it possible to identify the other perpetrators or accomplices. Proceedings shall be instituted under the conditions laid down in Articles L. 229 to L. 231 of the Tax Procedures Book").

[2] Cass. crim., 23 February 2022, No. 21-81.366 ("The Court of Appeal found that Mr. [H] justified having been subject by the administrative judge to 40% penalties on VAT and income tax recalls charged by the service").

[3] Cass. crim., 23 February 2022, No. 21-81.366 ("The proposed penalty, consisting of an aggravated fine of €15,000, combined with the 40% penalties applied by the administration, did not exceed the ceiling of €500,000 provided for in Article 1741 of the General Tax Code").

[4] Article 4 of Protocole No. 7 ECHR ("No one shall be liable to be tried or punished in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State") ; Article 14§7, International Covenant on Civil and Political Rights ("No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country ") ; Article 50, EU Charter of Fundamental Rights ("No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law").

[5] Cass. crim., 5 July 1976, No. 75-93.347 ("Criminal proceedings instituted on the basis of Article 1741 of the French tax code for fraud in the drawing up and payment of tax and the administrative procedure for fixing the basis of assessment and the extent of taxation are, by their nature and object, different and independent from each other").

[6] Cass. crim., 24 May 1982 ("Since the decision of the tax court called upon to rule on the administrative procedure does not have the authority of res judicata in respect of the repressive court, the latter does not have to stay the proceedings until that decision has been taken").

[7] Cass. crim., 13 June 2012, No. 11-84.092 ("Whereas, if the Court of Appeal is wrong to state that this judgment is not final when it follows from the documents of procedure that the tax authorities have abandoned the right to appeal, the judgment does not, however, incur censure since, criminal proceedings instituted on the basis of Article 1741 of the General Tax Code and the administrative procedure for determining the basis and extent of taxation being, by their nature and purpose, different and independent of each other, the decision of the administrative court cannot have, in criminal law, the authority of res judicata").

[8] ECHR, "Grande Stevens and others v. Italy", 4 March 2014, No. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 ("Even assuming, for the sake of argument, that the principle of speciality did not apply, the fact is that the Italian system of doppio binario does not prohibit the commencement of criminal proceedings in idem after a final decision of conviction for administrative offences has been reached by the competent court of review. Article 2 of Protocol No. 7 also prohibits the "double prosecution" of the same idem. Hence, criminal proceedings may not be opened for the same idem where the administrative decision has been definitely confirmed by the courts and become res judicata. The Italian system does not provide in legislation, and did not provide in the applicants' concrete case, for such a guarantee").

[9] ECHR, "A and B v. Norway", 15 November 2016, No. 24130/11 ; 29758/11 ("In particular, for the Court to be satisfied that there is no duplication of trial or punishment (bis) as proscribed by Article 4 of Protocol No. 7, the respondent State must demonstrate convincingly that the dual proceedings in question have been "sufficiently closely connected in substance and in time". In other words, it must be shown that they have been combined in an integrated manner so as to form a coherent whole. This implies not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected").

[10] Decision No. 2016-546 QPC 24 June 2016 ("It follows from the foregoing that both the provisions of Article 1729 and the contested provisions of Article 1741 make it possible to ensure together the protection of the State's financial interests and equality before taxation by pursuing common purposes, both deterrent and repressive. The recovery of the necessary public contribution and the objective of combating tax fraud justify the initiation of additional procedures in the most serious cases of fraud") ; Decision No. 2018-745 QPC 23 November 2018 ("The recovery of the necessary public contribution and the objective of combating tax fraud justify the initiation of additional procedures in the most serious cases of fraud").

[11] Decision No. 2016-546 QPC 24 June 2016 ("The cumulation of the constitutional requirements arising from section 8 of the 1789 Declaration and those arising from section 13 of the 1789 Declaration allows that, under the conditions set out in paragraphs 20 to 21, taxpayers responsible for the most serious breaches may be subject to additional procedures and proportionate penalties pursuant to Article 1729 and the contested provisions of Article 1741") – ("This principle requires, however, that the provisions of Article 1741 apply only to the most serious cases of fraudulent concealment of taxable amounts") ; Decision No. 2018-745 QPC 23 November 2018 ("The provisions of section 1741 apply only to the most serious cases of fraudulent reportable omission. This seriousness may result from the amount of the defrauded rights, the nature of the accused person's actions or the circumstances of their intervention").

[12] Decision No. 2016-546 QPC of 24 June 2016 ("If the possibility of two proceedings may lead to a combination of sanctions, the principle of proportionality implies that in any event the total amount of any sanctions imposed does not exceed the highest amount of one of the sanctions incurred") ; Decision No. 2018-745 QPC of 23 November 2018 ("If the possibility of two proceedings may lead to a combination of sanctions, the principle of proportionality implies that in any event the total amount of any sanctions imposed does not exceed the highest amount of one of the sanctions incurred").

[13] Cass. crim., 11 September 2019 No. 18-81.067 ("The Constitutional Council considers, however, that the principle of necessity of offences and penalties requires that the criminal provisions apply only to the most serious cases of omission or voluntary declarative inadequacy. This seriousness may result from the amount of the defrauded fees, the nature of the accused person's actions or the circumstances of their intervention. He therefore reserved an interpretation of the combined application of the aforementioned provisions of Article 1741 of the General Tax Code with Article 1728, 1, a, and 1, b, or 1729 of the same Code providing for fiscal sanctions (décisions nos 2016-545 QPC et 2016-546 QPC du 24 juin 2016, n° 2016-556 QPC du 22 juillet 2016 et n° 2018-745 QPC du 23 novembre 2018) [...] From

the above considerations, the following principles can be established. Where the accused of tax evasion proves that he has been the subject, in his own right, of a tax penalty for the same acts, it is for the criminal court, having characterized the elements constituting that offence under Article 1741 of the General Tax Code, and, prior to the imposition of criminal sanctions, to verify that the facts selected are of such a serious nature as to justify the additional criminal punishment. The judge must give reasons for his decision, the seriousness of which may result from the amount of the defrauded fees, the nature of the accused person's actions or the circumstances of their intervention, including those constituting aggravating circumstances. In the absence of such gravity, the judge may not enter into a procedure of conviction").

[14] Article 1729 of the French tax code ("Inaccuracies or omissions in a declaration or an act indicating elements to be retained for the assessment or payment of tax and the repayment of a claim of a fiscal nature the payment of which has been improperly obtained from the State shall give rise to: the application of an increase of: a. 40% in case of wilful default").

[15] Cass. crim., 23 February 2022, No. 21-81.366 ("By ruling in this way, when it was for her to ascertain, as she was invited to do by Mr. [H], in the light of the criteria relating to the amount of rights evaded and the nature of the acts or the circumstances of their intervention, if the facts against the accused were sufficiently serious to justify a combination of criminal and tax sanctions, the Court of Appeal violated Article 1741 of the General Tax Code, together Article 50 of the Charter of Rights of the European Union and Article 4 of Additional Protocol No. 7 to the European Convention on Human Rights, and Articles 591 and 593 of the Code of Criminal Procedure.").

[16] Cass. crim., 23 February 2022, No. 21-81.366 ("It follows from this reserve of interpretation that where the accused of tax fraud proves that he has been personally subject to a tax penalty for the same acts, it is for the criminal court, after having characterized the elements constituting this infringement in the light of Article 1741 of the General Tax Code, and before imposing criminal sanctions, to verify that the facts selected are of the degree of gravity likely to justify the additional penal punishment").

[17] Cass. crim., 23 February 2022, No. 21-81.366 ("In the absence of such gravity, the judge may not enter into a procedure of conviction (Crim., 11 septembre 2019, pourvois n° 18-81.067, n° 18-81.040 et n° 18-84.144)").

[18] Cass. crim., 23 February 2022, No. 21-81.366 ("The judge must give reasons for his decision, the gravity of which may result from the amount of the defrauded fees, the nature of the accused person's actions or the circumstances of their intervention, including those constituting aggravating circumstances").

[19] Cass. crim., 23 February 2022, No. 21-81.366 ("In pronouncing itself thus, without seeking, prior to the pronouncement of any sentence likely to repress the facts committed, whether the penal repression was justified in view of the gravity of the facts withheld, while the accused argued that he had been subject to a tax penalty under Article 1729 of the General Tax Code, the Court of Appeal disregarded the scope of the Constitutional Council's reservation of interpretation.").

CumEx files, from tax optimization to tax fraud?

A look back at the revelations of the "CumEx files" and key take aways on these practices of tax optimization by dividend arbitrage that may soon be qualified as tax fraud.

Among the 50 most influential people of the year 2021, Bloomberg readers could discover a remarkable figure: Anne Brorhilker, Attorney General of Cologne. Her battle: fighting against the so-called "CumCum" and "CumEx" practices, dividend arbitrage strategies that allegedly enabled more than a hundred billion euros to be stolen from various European tax authorities.

These strategies aim to elude or evade taxes on dividends by means of quick transfers of company shares, or even to obtain refunds on taxes that were never paid.

Today, investigations are progressing across Europe, and some believe that these widespread practices may lead to numerous tax reassessments and criminal prosecutions.

I. "CumEx Files" Scandal

Dividend distributions are subject to taxes in most countries, in France a flat tax of 30%. Nevertheless, to attract foreign capital, many states, including France, allow for more favorable taxation of dividends distributed abroad. Depending on the country and the tax treaties in effect, a foreign shareholder may be taxed at only 15, 10 or even 0% on dividends received, as is the case in Qatar, for example [1].

Consequently, strategies have been put in place to reduce the tax impact on the perception of dividends.

Among these tactics, "CumCum" practices are the simplest and most widespread ones and refer to the transfer of securities "with" (*cum* in Latin) dividends. The strategies consist in briefly transferring the ownership of securities to a person residing in a country benefiting from an advantageous tax regime on dividends, while waiting for the payment of dividends. Once the payment is made, the securities and dividends are returned to the "beneficial" owner. The beneficial owner then receives tax-free dividends in return for a commission paid to the intermediary. The owner of the securities has thus avoided paying taxes on dividends.

Alongside these "CumCum" strategies, the "CumEx" practices have also emerged. Invented by the German tax lawyer Hanno Berger, now residing in Switzerland and subject to a pending extradition request by the German authorities, these practices consist in passing securities from one person to another very quickly, so that several people appear to be the owners of these securities. Each of these individuals then claims a tax credit on the profits attached to the dividends or a refund on the dividend withholding tax. This, even though they did not or will not pay that tax [2].

These "CumCum" and "CumEx" practices were brought to light by the investigative work of a group of international media (the so-called "CumEx Files") and raised a scandal in several European countries.

II. Potential criminal repression of dividend arbitrage practices in France

It appears that the use of of such "CumEx" practices in France has been limited because of existing French tax rules, and in particular due to the abolition of the tax asset method (*méthode des avoirs)*. However, several large banks were reportedly, as early as 2017, suspected by the French tax authorities of having used "CumCum" strategies [3]. These practices are said to have cost France 33 billion euros over more than a decade [4].

In a context of tightening European control over these practices, many believe that "CumCum" strategies, like "CumEx" practices, could lead to criminal proceedings in France in a near future.

The facts are often well established, albeit complex. It is therefore on the legal qualification of the facts that the proceedings will focus, and in particular as to whether such practices constitute tax fraud. The natural and legal persons having benefited from such practices could be prosecuted as principal perpetrators, while the banks and financial advisors and institutions having provided aid or assistance to such practices could be prosecuted as accomplices.

In any case, the criticism of "CumCum" practices is part of a more global movement of increasing penalization of tax law. With the end of the monopoly of the French tax administration on initiating tax enforcement proceedings, tax fraud prosecutions have increased significantly, and have thus doubled between 2018 and 2019 [5]. Hence, a penalization of these practices seems to be a realistic possibility in the future. ■

[1] « CumEx Files » : 140 billion tax plunder, four French banks in the tax authorities' eye, Le Monde, October 21, 2021 ("These are based on the tax advantages granted by France to nationals of countries such as the United Arab Emirates, Saudi Arabia or Qatar. The tax treaties with these countries, signed to develop bilateral economic exchanges, have opened up a tremendous opportunity by taxing dividends at 0%").
[2] CumEx/CumCum practices: towards a penalization of dividend arbitrage strategies? Salomé Lemasson and Mathieu Valeteau, Dalloz Actualité, November 23, 2021 ("In the context of the CumEx arrangement, this dividend arbitrage, combined with short sale transactions of shares with (Cum) and without (Ex) dividend rights between different intermediaries, allows not only to escape tax but also to obtain several unpaid withholding tax refunds through tax credit claims").
[3] CumEx files: four French banks targeted for tens of billions of euros in "fraud", BFMTV, November 21, 2021 ("four French banks were targeted by the tax authorities, as early as 2017, even before the first revelations: BNP Paribas, Société générale, Natixis and Crédit agricole")
[4] "CumEx Files": a 140 billion euro tax plunder, four French banks in the taxman's sights, Le Monde, October 21, 2021 ("The importance of its financial markets has made France the first victim of this tax plunder. Thus, in twenty years, it has lost at least 33 billion euros in tax revenue because of this practice").
[5] Premier bilan de la loi relative à la lutte contre la fraude, Ministère de l'économie, des finances et de la relance, November 23, 2019 ("587 tax files were the subject of a mandatory denunciation from January 1 to September 30, 2019. As the administration also filed 481 complaints after the opinion of the tax offenses commission and 38 complaints for presumed tax fraud, a total of 1,106 cases were referred to the judicial authority, a doubling compared to the same date in 2018").

CJIP concluded between JPMorgan Chase Bank, National Association, and the Financial Public Prosecutor

A new example of the use of negotiated justice in criminal tax law in France. On 26 August 2021, a fourth Convention Judiciaire d'Intérêt Public ("CJIP") was concluded in France in the field of tax fraud for a period of approximately two years.

The CJIP, which at the time of its creation was only permitted in matters of corruption, influence peddling, offences related to corruption and influence peddling, and laundering of tax fraud and other similar offences set out in Articles 1741 and 1743 of the French General Tax Code[1], was subsequently extended to tax fraud, similar offences, and their related offences, as well as to the laundering of corruption and influence peddling offences[2].

As a result, tax CJIP's were promptly concluded. Indeed, in addition to those already concluded for laundering of tax fraud[3], the Financial Public Prosecutor concluded on 28 June 2019, a CJIP with the company Carmignac Gestion for tax fraud and aggravated tax fraud[4], which was followed on 12 September 2019, by a CJIP concluded with the companies Google France and Google Ireland Ltd for tax fraud, aggravated tax fraud, money laundering and complicity in these offences[5]. Finally, on 11 May 2020, a CJIP was concluded with the company Swiru Holding AG for complicity in tax fraud [6].

Thus, the latest CJIP between JPMorgan Chase Bank, National Association ("JPMorgan") and the Financial Public Prosecutor demonstrates once again the French authorities' interest in negotiated justice in the area of criminal tax law.

I. Facts underlying the CJIP between JPMorgan Chase Bank, National Association, and the Financial Public Prosecutor

This procedure against JPMorgan stems from acts committed within the investment company Wendel, and more specifically by fourteen of its executives, against whom the French General Directorate of Public Finances filed a complaint for under-reporting of their income tax returns due for the year 2007[7].

Through a complex operation called "Solfur", the executives abused the system of tax suspension which aims to prevent *"the taxpayer who realizes a capital gain at the time of a contribution to companies being immediately taxed on it while he did not receive cash that allows to pay the tax"* [8].

More specifically, when the Wendel group was restructured, they contributed shares of one of the group's entities, the Compagnie de l'Audon ("CDA"), to several non-trading companies subject to corporate income tax, all of which were controlled by the executives, alone or in conjunction with their families. These shares, subscribed by the directors for a nominal value of 0.10 euros per share, were contributed on the basis of a real unit value of 19.17 euros.

Subsequently, this transfer was followed by the repurchase by the CDA of the said shares for a unit price of 19.17 euros which was identical to the value of the contribution, allowing the

executives to avoid immediate taxation of their capital gains, of 19.07 euros per share, in respect of their income for the year 2007 as a result of the tax suspension [9]. The total amount of taxes evaded was estimated to be 78,414,973 euros [10].

JPMorgan as involved in this operation not because it provided tax or legal advice, but because it provided financing by granting loans to some of the executives of the Wendel group so that they could carry out this operation and ultimately benefit from the tax suspension [11].

Although it was acknowledged that "JP Morgans role" was minimal within the operation as it was only consulted in the final phase of the discussions and was not involved in most of the discussions in relation to the development of the latter, the Financial Public Prosecutor still considered that JPMorgan had been aware of the tax suspension sought by the executives of the Wendel group and the existence of a risk that the authorities would challenge this scheme as an abuse of rights[12]. The Financial Public Prosecutor therefore considered that those facts were equivalent to providing means and thus constituted an act of complicity in tax fraud [13].

II. JPMorgan's sanctions and consequences for Wendel Group's executives

For the facts described above, JPMorgan agreed to pay a public interest fine of 25 million euros. Several minor factors were considered in deciding the amount, such as: the limited nature of JPMorgan's involvement, the long-standing and isolated nature of the facts and the cooperation provided to the judicial authorities in the context of the investigations, which counterbalanced a major factor that was the complexity of the tax scheme [14].

It should be noted that the basis for calculating the public interest fine was the sum of the benefits derived by the executives of the Wendel group, i.e., 78,414,973 euros equivalent to the sum of the taxes evaded, and not the benefits obtained by JPMorgan since it is specified that it did not receive any tax benefits from such operation [15].

There have been doctrinal debates as to the interpretation of Article 41-1-2 of the French Criminal Procedure Code, which states that the amount of the public interest fine *"shall be fixed in proportion to the benefits obtained from the breaches observed, within the limit of 30% of the average annual turnover calculated on the last three annual turnovers known at the time of the finding of these breaches*". Some consider that the argument of the Financial Public Prosecutor does not contravene the text, which does not specify that a link is to be established between the person sanctioned and the beneficiary of the benefits obtained from the breaches committed, but, on the contrary, that it corresponds to the spirit of the text and therefore does not prevent the application of the 30% limit [16]. Others, on the other hand, consider that such an interpretation is contrary to both the letter and spirit of the text and that it is particularly severe since it uses the profits of one party to calculate the sanction of another [17].

In any event, although such an interpretation seems opportunistic in the present case in light of the amount of the fine imposed, which is almost equivalent to the theoretical maximum amount of the fine (25 million as opposed to 26.405 million) [18], the Latin adage "*ubi lex non distinguit, nec nos distinguere debemus*", according to which it is not appropriate to distinguish where the law does not distinguish, allows for this interpretation.

Also, it should be mentioned that in the context of CJIPs regarding tax fraud, including the one concluded by JPMorgan, the compliance obligation provided for in Article 41-1-2 of the French Criminal Procedure Code, implemented under the control of the French Anti-Corruption Agency, specific to corruption and influence peddling, has never been mentioned [19]. In addition, as the tax authorities have never claimed any damages in the context of a CJIP regarding tax fraud, the same applies to the obligation to compensate victims for their damages, also provided for in Article 41-1-2 of the French Criminal Procedure Code [20].

It should also be noted that in this case, the fate of fourteen executives of the Wendel group is still pending [21]. Although they are not representatives of JPMorgan, the CJIP concluded by the latter could have an impact on the legal proceedings that could be opened against them.

Indeed, as the CJIP is only applicable to legal entities under Article 41-1-2 of the French Criminal Procedure Code, physical persons remain liable and may be subject to parallel legal proceedings or a *procédure sur reconnaissance préalable de culpabilité* ("*CRPC*"). However, as recently reported in the Information Report on the impact of the Sapin 2 law and given that cooperation is expected from the legal entity during a CJIP, as well as the public nature of the agreement and the multitude of information shared in the context of the procedure, this situation presents a real risk of infringement of the rights of the defence for these persons [22].

As this issue is clearly identified in the said Report, a proposal for the creation of a CRPC specific to acts of corruption [23] (which should nevertheless be extended to acts of tax fraud) was made to improve the framework applicable to physical persons, more specifically regarding the articulation between the CJIP and a possible CRPC. This point, which reflects a real difficulty in the defence of physical persons in the context of negotiated justice with a legal entity, could therefore be addressed in future reforms and should be the subject of particular vigilance. ■

[1] French Criminal Procedure Code, Article 41-1-2, version in force from 11 December 2016 to 25 October 2018 ("I. – 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 articles 433-1, 433-2, 435-3, 435-4, 435-9, 435-10, 445-1, 445-1-1, 445-2 and 445-2-1, in the penultimate paragraph of the article 434-9 and the second paragraph of the article 434-9-1 of the Criminal Code, for the laundering of the offences provided for in the articles 1741 and 1743 of the General Tax Code, as well as for related offences, excluding those provided for in articles 1741 and 1743, to conclude a Convention judiciaire d'intérêt public)".

[2] Law No. 2018-898 of 23 October 2018, on the fight against fraud, Article 25; Law n°2020-1672 of 24 December 2020, on the European Public Prosecutor's Office, environmental justice and specialized criminal justice, Article 14; French Criminal Procedure Code, Article 41-1-2, version in force since December 27th, 2020 ("I. – 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 articles 433-1,433-2,435-3,435-4,435-9,435-10,445-1,445-1-1,445-2 and 445-2-1, in the penultimate paragraph of the article 434-9 and the second paragraph of the article 434-9-1 of the Criminal Code and their laundering, for the offences provided for in Articles 1741 and 1743 of the General Tax Code and their laundering, as well as for related offences)".

[3] Convention judiciaire d'intérêt public between the Financial Public Prosecutor at the Paris Tribunal de Grande Instance and HSBC Private Bank (Switzerland) SA, 30 October 2017, available at: https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/CJIP_HSBC.pdf ; Convention judiciaire d'intérêt public between the Financial Public Prosecutor at the Paris tribunal judiciaire and Bank of China, 10 January 2020, available at: https://www.agence-francaise-anticorruption.gouv.fr/files/files/CJIP%20BOC.PDF.

[4] President of the Paris Tribunal de Grande Instance, Order validating a Convention judiciaire d'intérêt public, 28 June 2019 available at : https://www.agence-francaise-anticorruption.gouv.fr/files/files/carmingnac%20gestion%20Ordonnance_%20validation_CJIP.pdf.

[5] President of the Paris Tribunal de Grande Instance, Order validating a Convention judiciaire d'intérêt public, 12 September 2019 available at: https://www.agence-Francaise-anticorruption.gouv.fr/files/files/190912_Ordo_validation_sign%C3%A9e%20(2).pdf.

[6] President of the Nice tribunal judiciaire, Order validating a Convention judiciaire d'intérêt public, 11 May 2020 available at: https://www.agence-francaise-anticorruption.gouv.fr/files/files/ordonnace%20de%20validation%20affaire%20SWIRU%20HOLDING%20AG.pdf.

[7] Convention judiciaire d'intérêt public between the Financial Public Prosecutor and JPMorgan Chase Bank, National Association, 26 August 2021, §5 ("On June 22nd, 2012, the General Directorate for Public Finances filed, after receiving a favorable opinion from the Tax Offences Commission, filed complaints on tax fraud charges against fourteen senior executives of WENDEL underestimating their income tax returns due for 2007.").

[8] Convention judiciaire d'intérêt public between the Financial Public Prosecutor and JPMorgan Chase Bank, National Association, 26 August 2021, §20 ("The tax authorities have challenged the above arrangement described on the basis of the abuse of rights, in accordance with the provisions of Article L. 64 of the Book of Tax Procedures. The purpose of the system of tax suspension is to prevent the taxpayer who realizes a capital gain at the time of a contribution to companies being immediately taxed on it while he did not receive cash that allows to pay the tax. The tax authorities consider that the validity of the arrangement is subject

to various conditions, in particular the absence of cash in exchange for the contribution and the reinvestment of the proceeds of the sale of shares in an economic activity within a short period of time").

[9] Convention judiciaire d'intérêt public between the Financial Public Prosecutor and JPMorgan Chase Bank, National Association, 26 August 2021, §17 ("If CDA's shares had been held directly by WENDEL's senior executives, CDA's repurchase of its own shares would have resulted in the apprehension of the unrealized gain and its immediate taxation in respect of 2007 income. The unwinding of the operation through the intermediary non-trading companies subject to corporate income tax, created mainly for the occasion, allowed the senior executives to acquire WENDEL INVESTISSEMENT shares by benefiting from the tax suspension regime provided for in Articles 150-0 B and 150-0 D of the General Tax Code") ; Convention judiciaire d'intérêt public between the Financial Public Prosecutor and JPMorgan Chase Bank, National Association, 26 August 26 2021, §21 ("In the present case, the tax authorities considered that the sole purpose of the operation to contribute the CDA shares followed by their repurchase and cancellation by CDA, as described above, had been to enable WENDEL's senior executives, by interposing companies subject to corporate income tax, to effectively dispose of the cash obtained from the sale of CDA's shares while remaining holders of the company's shares received in exchange for the contribution. It therefore constituted an abuse of rights") ; Frédérique Perrotin, "Wendel case: the Conseil d'Etat rules in favor of the abuse of rights", 16 March 2020 ("At a general meeting held on May 3rd, 2007, Compagnie de l'Audon authorized the transfer of its shares in non-trading companies held by the ten executives or so executives who requested this transfer. This operation is done by the contributions made by the main interested parties, directly or via an intermediary partnership, to the non-trading companies subject to corporate income tax which they had formed shortly before and which they held alone or with their spouses. [...] On 29 May 2007, Compagnie de l'Audon bought its own shares from the non-trading companies formed by the group's directors and senior executives, giving them in return shares of Wendel Investissement and shares in money market SICAVs. The redemption is made at the value of the securities. [...] The tax authorities challenged the benefit of the tax suspension by resorting to the procedure for the repression of abuses of rights, codified in Article L. 64 of the Book of Tax Procedures. It considered that the sole purpose of contributing the company's shares to a non-trading company company set up by each of the directors, prior to the repurchase of its own shares by the company, had been to avoid the taxation of the gain corresponding to the capital gain recorded on the contribution of the company's shares, which the interested parties would have had to bear if, in the absence of the interposition of the non-trading companies they created, they had themselves sold directly the shares of the company").

[10] Convention judiciaire d'intérêt public between the Financial Public Prosecutor and JPMorgan Chase Bank, National Association, 26 August 2021, §29 ("On the basis of the decisions of the administrative courts and the transactions concluded by the tax authorities with the taxpayers involved, the total amount of taxes evaded in respect of the thirteen senior executives who obtained a loan from the JPMORGAN bank is established at the sum of € 78,414,973").

[11] Convention judiciaire d'intérêt public between the Financial Public Prosecutor and JPMorgan Chase Bank, National Association, 26 August 2021, §26 ("JPMORGAN's role as lender also consisted in granting loans to several of the WENDEL Group's senior executives, which allowed them to benefit from the tax suspension while apprehending the cash corresponding to their share in CDA's repurchase of its shares.").

[12] Convention judiciaire d'intérêt public between the Financial Public Prosecutor and JPMorgan Chase Bank, National Association, 26 August 2021, §27 ("The investigations showed that JPMORGAN, although not involved in most of the discussions relating to the developments of the scheme, was aware of the tax suspension sought by the senior executives of the WENDEL group and the existence of a risk of challenge by tax authorities on the basis of abuse of rights").

[13] Convention judiciaire d'intérêt public between the Financial Public Prosecutor and JPMorgan Chase Bank, National Association, 26 August 2021, §30 ("The facts described above are analyzed by the Public Prosecutor's Office as likely to receive the criminal classification of complicity in tax fraud by providing means, facts provided for and punishable by Articles 121-7 of the Criminal Code and 1741 of the General Tax Code in the version resulting from Ordinance No. 2005-1512 of December 7th, 2005").

[14] Convention judiciaire d'intérêt public between the Financial Public Prosecutor and JPMorgan Chase Bank, National Association, 26 August 2021, §35 and 36 ("JPMORGAN's involvement must be assessed by taking into account the existence of three factors that may reduce its liability: the limited nature of its involvement in the disputed transaction, its liability being sought only on the basis of complicity in the provision of means of the offence of fraud tax; the long-standing and isolated nature of the facts; its cooperation with the judicial authorities in the investigations. The complexity of the tax arrangement justifies taking into account a factor aggravating its liability").

[15] Convention judiciaire d'intérêt public between the Financial Public Prosecutor and JPMorgan Chase Bank, National Association, 26 August 26 2021, §29 and 34 ("JPMORGAN did not benefit from this transaction. (...) The benefits derived from those breaches are therefore constituted by the sum of the taxes evaded by those taxpayers and therefore amount to the sum of C 78 414 973. They form the basis for calculating the public interest fine").

[16] Guillaume Daïeff, Gazette du Palais, n°35, p.22, "CJIP: a tool adapted to the banker complicit in tax fraud", 12 October 2021 ("However, as regards its letter, it must be stated that Article 41-1-2 of the Code of Criminal Procedure does not state that the fine must be proportionate to the advantages derived by the company prosecuted from the infringements found, but only "to the benefits derived from the breaches observed", without further clarification. With regard to the spirit, it can be observed that the illicit advantages that a legal or accounting professional of the figure or the law or a banking institution benefits his client, by his complicity, necessarily generate a counterpart for this professional, direct (fees, direct turnover), but also indirect (loyalty of a former customer, gain of a new prestigious client, associated turnover, etc.). This consideration is precisely due to the advantage derived by the company. However, in the context of negotiation, a fairly simple way to calculate it is to start from another advantage, easier to evaluate, which is that of the customers. (...) The proportionality of the penalty remains guaranteed by the ceiling of 30% of turnover set by Article 41-1-2 of the Code of Criminal Procedure, which is a ceiling – however high it may be – which is well linked to the personality and activity of the legal person sued, and not to that of its customers").

[17] Marie-Anne Frison-Roche, " Convention judiciaire d'intérêt public "Morgan Stanley": ten years to finally open nothing", 10 September 2021 ("It goes beyond the text, both in its letter and spirit, which was probably only aimed at the benefits derived by the person party to the Convention. This results in ae fine of 25 million, close to the maximum of 31 million incurred. This is certainly in line with the definition of complicity since the accomplice incurs the same penalty as the main perpetrator. It is particularly severe to use this mechanism which will seek in the profits of another the calculation of the penalty thus borne and the principle of proportionality is of a different spirit than this one").

[18] Convention judiciaire d'intérêt public between the Financial Public Prosecutor and JPMorgan Chase Bank, National Association, 26 August 2021, §33 ("The theoretical maximum amount of the public interest fine incurred is therefore $31.025 million, being €26.405 million.").

[19] President of the Paris Tribunal de Grande Instance, Order validating a Convention judiciaire d'intérêt public, 28 June 2019 available at : https://www.agence-francaise-anticorruption.gouv.fr/files/files/carmingnac%20gestion%20Ordonnance_%20validation_CJIP.pdf.

President of the Paris Tribunal de Grande Instance, Order validating a Convention judiciaire d'intérêt public, 12 September 2019 available at: https://www.agence-Francaise-anticorruption.gouv.fr/files/files/190912_Ordo_validation_sign%C3%A9e%20(2).pdf.

President of the Nice tribunal judiciaire, Order validating a Convention judiciaire d'intérêt public, 11 May 11 2020, available at: https://www.agence-francaise-anticorruption.gouv.fr/files/files/ordonnace%20de%20validation%20affaire%20SWIRU%20HOLDING%20AG.pdf.

[20] President of the Paris Tribunal de Grande Instance, Order validating a Convention judiciaire d'intérêt public, 28 June 2019 available at : https://www.agence-francaise-anticorruption.gouv.fr/files/files/carmingnac%20gestion%20Ordonnance_%20validation_CJIP.pdf.

President of the Paris Tribunal de Grande Instance, Order validating a Convention judiciaire d'intérêt public, 12 September 2019 available at: https://www.agence-Francaise-anticorruption.gouv.fr/files/files/190912_Ordo_validation_sign%C3%A9e%20(2).pdf.

President of the Nice tribunal judiciaire, Order validating a Convention judiciaire d'intérêt public, 11 May 2020 available at: https://www.agence-francaise-anticorruption.gouv.fr/files/files/ordonnace%20de%20validation%20affaire%20SWIRU%20HOLDING%20AG.pdf

[21] Convention judiciaire d'intérêt public between the Financial Public Prosecutor and JPMorgan Chase Bank, National Association, 26 August 2021, §7 ("A judicial investigation was opened on 27 June 2012, by the Paris Public Prosecutor's Office. It resulted in the indictment and referral to the Criminal Court, by order

of November 29th, 2016, of thirteen WENDEL executives on the charge of tax fraud, a senior executive on charges of tax fraud and complicity in tax fraud, and a lawyer on the charge of complicity in tax fraud.") ; Le Monde, "Tax fraud: JPMorgan Chase agrees to pay €25 million fine to end prosecution", 2 September 2021 ("If the bank escapes prosecution by this CJIP, which concludes long procedural disputes, a trial remains scheduled for the physical persons implicated. It will be held from January 17th to February 3rd, 2022, while a hearing on procedural exceptions is scheduled from September 6th").

[22] Raphaël Gauvain, Olivier Marleix, "Information report on the evaluation of the impact of Law No. 2016-1691 of 9 December 2016 on transparency, fight against corruption and modernization of economic life, known as the "Sapin 2 law"", 7 July 2021 ("It appears that companies are encouraged to implicate the physical persons involved, in the context of their internal investigation, and then during the criminal investigation or negotiation, by making available to the public prosecutor's office the information concerning them. Such a situation would thus be likely to undermine respect for the rights of defence of physical persons. Practitioners also note that while the conclusion of an agreement does not imply an admission of guilt and does not bind physical persons, these agreements contain in practice "very exhaustive factual notes and criminal qualifications so that the question of the choice offered to the physical person seems a priori compromise once the agreement is signed"").

[23] Raphaël Gauvain, Olivier Marleix, "Information report on the evaluation of the impact of Law No. 2016-1691 of 9 December 2016 on transparency, fight against corruption and modernization of economic life, known as the "Sapin 2 law"", 7 July 2021 ("A second approach lies in improving the articulation between the CJIP and the CRPC. In particular, your Rapporteurs stress the importance of giving greater assurance to the parties that the compromise reached following the negotiation phase will be homologated by the judge. (...) In order to secure the system, while being consistent with case law, your Rapporteurs suggest creating a specific CRPC system, the scope of which would be limited to acts of corruption and other offences of breach of probity. (...) Proposal n° 26: Create a CRPC procedure specific to acts of corruption, which could only be proposed in the event of spontaneous disclosure of the facts and full cooperation of the physical person in the investigations, and whose modalities of homologation would be more regulated: the assessment of the homologation judge would focus essentially on the legal qualification of the facts, on the spontaneous nature of their disclosure, as well as on the reality of the physical person's cooperation in the investigations").

A STRONG ACTIVITY BY REGULATORY AUTHORITIES

CNIL imposes the largest sanctions in its history on Facebook and Google

On 31 December 2021, in two high-profile decisions, the "*Commission Nationale de l'Informatique et des Libertés*" ("*CNIL*")[1], after considering that it had jurisdiction to "*verify and sanction operations related to cookies deposited by the company on the terminals of Internet users located in France[2]*", issued the largest fines in its history: 60 million euros against Facebook[3], 60 million euros against Google Ireland Limited[4] and 90 million euros against Google LLC[5] ("*Google*").

It warned the web giants of the consequences if they failed to comply with their obligations under Article 82 of the French Data Protection Act concerning the procedure for accepting and refusing cookies[6], a cookie being defined as a "*small computer file, a tracer, deposited and read, for example, when consulting a website, reading an e-mail, installing or using software or a mobile application, regardless of the type of terminal used (computer, smartphone, digital reader, video game console connected to the Internet, etc.)*"[7].

These two decisions, which were handed down on the same day, provide an opportunity to review the failings of Facebook, which was accused of setting up an overly complex and discouraging cookie handling process for its users, pushing them to accept them, and Google for failing to respect its users' consent to cookies, shortly after being warned by the CNIL. Finally, with these two decisions, the CNIL points out the methods used, and the criteria retained for the calculation of fines.

I. The CNIL criticized Facebook for having set up a complex and discouraging process for users wishing to refuse cookies

Since the implementation of Regulation (EU) 2016/679 of the European Parliament and of the Council called the General Data Protection Regulation, consent means "*any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action signifies agreement to the processing of personal data relating to him or her*" [8]. Thus, "*consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment*" *[9]*.

Consequently, the CNIL's restricted committee considered that both the method of collecting consent proposed to users by Facebook and the obvious lack of clarity of the information [10] were a clear violation of Article 82 of the French Data Protection Act [11].

Indeed, the CNIL criticized Facebook for having set up a complex and discouraging process for the user wishing to refuse the cookies [12]. Thus, the CNIL noted that "*while it offers a button to immediately accept cookies, it does not offer an equivalent solution (button or other) enabling the user to refuse the deposit of cookies as easily [13]*". In practice, if a user wished to refuse the cookies, a single click was not enough, he had to refuse them one by one [14]. According to the CNIL, this procedure for refusing cookies, considered to be complex and time-consuming, dissuades the user from refusing them [15] and "*affects the freedom of consent of Internet users* [16]".

Facebook was also criticized for the information path explaining to the user how to refuse cookies. This was considered confusing and unclear as the user, in order to refuse the deposit of cookies, had to click on a button entitled "*Accept cookies*" [17]. Specifically, once the user arrived on the "*com*" website, he had to "*refuse the deposit of advertising cookies, first click on the "Manage data settings" button in the first window, scroll through the entire second window that appears, leaving the two sliding buttons deactivated so as not to accept cookies, and then click on the "Accept cookies" button at the bottom of the second window* [18]". The CNIL considered that such a process necessarily led to confusion in the mind of the user, who could imagine that it was not possible to refuse the deposit of cookies and that he had no control over this [19].

II. The CNIL criticized Google for not allowing users to refuse cookies as easily as to accept them

Concerning the websites "*fr*" and "*youtube.fr*" of the Google companies, the latter were accused of having only provided the acceptance of cookies when opening a web page [20], whereas to refuse them it was necessary to go to the browser settings [21] and to have set up a single action to consent to cookies but no less than five actions to refuse them[22].

In response, Google argued that "*neither the "ePrivacy" Directive, nor the GDPR, nor Article 82 of the French Data Protection Act provided that the action of refusing cookies should be as simple as accepting them* [23]". Google added that "*the fact of not proposing, at the first level of information, a "Refuse all" button is not contrary to the principle of freedom of consent insofar as users have the possibility of refusing cookies by clicking on the "Personalise" button [24].*"

Nevertheless, the CNIL specified in its decision of 31 December 2021 that in its recommendation of 17 September 2020, it had already advised data controllers to set up a mechanism allowing the user to choose at the same time, on the same page and through the same window, whether to refuse cookies or accept them [25].

The CNIL also reminded Google that "*the companies were recently sanctioned for breaches of Article 82 of the French Data Protection Act regarding the information and gathering of consent from individuals before the deposit of cookies on their terminal. Although this sanction is not final since it is being appealed to the Council of State, the restricted committee nevertheless notes that the companies' attention had been explicitly drawn by the CNIL services to the methods for refusing cookies [26]*". In this regard, after an unsuccessful appeal to the Council of State on 7 March 2021 in order to invalidate the injunction made to the Google companies to comply with the decisions [27], the latter once again pleaded before the same jurisdiction in early January 2022 in order to obtain the cancellation of the fine imposed by the CNIL in December 2020[28].

The CNIL therefore considered that Google had not been aware of the consequences of such successive breaches.

III. An illustration of the criteria used by the CNIL to determine the fines and its assessment of the need to impose a penalty payment

In order to determine the amount of the fines imposed on Facebook, the CNIL applied certain criteria provided for in Article 83(2) of the GDPR. It took into account the "*gravity of the infringement taking into account the nature scope or purpose of the processing concerned as well as the number of data subjects affected [29]*" but also the financial benefits gained as a result of the infringement [30] and the financial capacity of Facebook [31].

In assessing the amount of the fines imposed on Google, the restricted committee considered that the violation was committed deliberately [32]. Indeed, the two Google companies had already been sanctioned recently for infringements of Article 82 of the French Data Protection Act concerning the information and gathering of consent from individuals prior to the gathering of cookies on their terminal [33].

Finally, for both Facebook and Google, the CNIL relied on their influence and prominence online [34], their revenue from advertising [35] and the number of visitors over the past twelve months.

In addition, considering that the compagnies had already been alerted to the necessity of changing their practices and in order to ensure that the required steps would be taken in the future, the CNIL imposed injunction under penalty to modify the modalities of the gathering of users' consent to cookies. ■

[1] The CNIL is an independent administrative authority created in 1978 by the Law No 78-17 of 6 January 1978 on information technology, files and freedoms, known as the French "Data Protection Act".
[2] "Cookies: Facebook Ireland Limited fined 60 million euros", CNIL, 6 January 2022 ("The CNIL is materially competent to verify and sanction operations related to cookies deposited by the company on the terminals of Internet users located in France. The cooperation mechanism provided for by the GDPR (the "one-stop shop" procedure) is not intended to apply in these procedures insofar as the operations related to the use of cookies fall with the scope of the "ePrivacy" directive, transposed in Article 82 of the French Data Protection Act").
[3] Deliberation of the restricted committee No SAN-2021-024 of 31 December 2021, page 13 ("The CNIL's restricted committee, after deliberation, decides to [...] impose an administrative fine on Facebook Ireland Limited in the amount of sixty million euros (60,000,000 euros) in respect of the infringement of Article 82 of the French Data Protection Act").
[4] Deliberation of the restricted committee No n°SAN-2021-023 of 31 December 2021, page 18 ("The CNIL's restricted committee, after having deliberated, decides to [...] impose an administrative fine of 60,000,000 euros (sixty million euros) on Google Ireland Limited for failure to comply with Article 82 of the French Data Protection Act").
[5] Deliberation of the restricted committee No n°SAN-2021-023 of 31 December, page 18 ("The CNIL's restricted committee, after deliberation, decides to [...] imposes an administrative fine of 90,000,000 euros (ninety million) on the company Google LLC for failure to comply with Article 82 of the French Data Protection Act").
[6] Article 82 of the French Data Protection Act of 6 January 1978 ("Any subscriber or user of an electronic communications services must be informed in a clear and comprehensive manner [...]: 1° Of the purpose of any action intended to access, by electronic transmission, information already stored in his electronic communication terminal equipment, or to enter information in that equipment; 2° Of the methods available to him to oppose such action. Such access or recording may only take place on condition that the subscriber or user has expressed, after having received this information, his consent, which may result from the appropriate parameters of his connection device or any other device under his control. These provisions shall not apply if access to information stored in the user's terminal equipment or the recording of information in the user's terminal equipment: 1° Either for the sole purpose of enabling or facilitating communication by electronic means; 2° Or is strictly necessary for the provision of an online communication service at the express request of the user").
[7] CNIL website, Definition, A cookie: what is it? | Need help | CNIL ("A cookie is a small computer file, a tracer, deposited and read, for example, when consulting a website, reading an e-mail, installing, or using software or a mobile application, regardless of the type of terminal used (computer, smartphone, digital reader, video game console connected to the Internet, etc.").
[8] Article 4, §11 of the Regulation EU 2016/679 of the European Parliament and of the Council of 27 April 2016 ("'Consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or a clear affirmative action, signifies agreement to the processing of personal data relating to him or her").
[9] Recital 42 of the Regulation EU (2016/679 of the European Parliament and of the Council of 27 April 2016 ("Where processing is based on the data subject's consent, the controller should be able to demonstrate that the data subject has given consent to the processing operation. In particular in the context of a written declaration on another matter, safeguards should ensure that the data subject is aware of the fact that and the extent to which consent is given. In accordance with Council Directive 93/13/ECC (1) a declaration of consent preformulated by the controller should be provided in an intelligible and easily accessible form, using clear and plain language and it should not contain unfair terms. For consent to be informed, the data subject should be aware at least of the identity of the controller and the purposes of the processing for which the personal data are intended. Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.")

[10] "Cookies: Facebook Ireland Limited fined 60 million euros", CNIL, 6 January 2022 ("The restricted committee judged that the methods of collecting consent proposed to users, as well as the lack of clarity of information provided to them, constitute violations of Article 82 of the French Data Protection Act"), Deliberation of the restricted committee No SAN-2021-024 of 31 December 2021, §115 ("The restricted committee considers that these methods rather encourage the user to think that it is not possible to continue browsing after having refused the deposit of advertising cookies, since the entire cookie refusal procedure is based on information referring to the acceptance of cookies").

[11] Article 82 of the French Data Protection Act of 6 January 1978 ("Any subscriber or user of an electronic communications services must be informed in a clear and comprehensive manner [...]: 1° Of the purpose of any action intended to access, by electronic transmission, information already stored in his electronic communication terminal equipment, or to enter information in that equipment; 2° Of the methods available to him to oppose such action. Such access or recording may only take place on condition that the subscriber or user has expressed, after having received this information, his consent, which may result from the appropriate parameters of his connection device or any other device under his control").

[12] Deliberation of the restricted committee No SAN-2021-024 of 31 December 2021, §90 ("In the light of these findings, the rapporteur considers that the company has failed to comply with Article 82 of the French Data Protection Act, as clarified by the stricter consent requirements laid down by the RGPD, insofar as it does not provide users residing in France, on the "facebook.com" website, with a way of freely consenting by refusing to read and/or write information on their terminal that is as simple as that provided for accepting its use").

[13] "Cookies: Facebook Ireland Limited fined 60 million euros", CNIL, 6 January 2022 ("In April 2021, the CNIL conducted an online investigation on this website found that, while it offers a button to immediately accept cookies, it does not offer an equivalent solution (button or other) enabling the user to refuse the deposit of cookies as easily. Several clicks are required to refuse all cookies, as opposed to a single one to accept them").

[14] "Cookies: Facebook Ireland Limited fined 60 million euros", CNIL, 6 January 2022 ("Several clicks are required to refuse all cookies, as opposed to a single one to accept them").

[15] "Cookies: Facebook Ireland Limited fined 60 million euros", CNIL, 6 January 2022 ("The restricted committee, the CNIL body responsible for issuing sanctions, noted that making the refusal mechanism more complex actually discourages users from refusing cookies and encourages them to opt for the ease of the consent button for cookies in the first window").

[16] "Cookies: Facebook Ireland Limited fined 60 million euros", CNIL, 6 January 2022 ("The restricted committee, the CNIL body responsible for issuing sanctions, noted that making the refusal mechanism more complex actually discourages users from refusing cookies and encourages them to opt for the ease of the consent button for cookies in the first window. It considered that such a process affects the freedom of consent of Internet users").

[17] "Cookies: Facebook Ireland Limited fined 60 million euros", CNIL, 6 January 2022 ("The restricted committee also considered that the information given by the company is not clear since, in order to refuse the deposit of cookies, Internet users must click on a button entitled "Accept cookies" displayed in the second window").

[18] Deliberation of the restricted committee No SAN-2021-024 of 31 December 2021, §113 ("In this case, it reminds that, according to the online check of 8 April 2021, once on the website "facebook.com", the user must, in order to refuse the deposit of advertising cookies, first click on the "Manage data settings" button in the first window, scroll through the entire second window that appears, leaving the two sliding buttons deactivated so as not to accept cookies, and then click on the "Accept cookies" button at the bottom of the second window").

[19] "Cookies: Facebook Ireland Limited fined 60 million euros", CNIL, 6 January 2022 ("It considered that such a title necessarily generates confusion and that the user may have the feeling that it is not possible to refuse the deposit of cookies and that they have no way to manage it").

[20] Deliberation of the restricted committee No SAN-2021-023 of 31 December 2021, §120 ("In this case, in the context of the online inspection of 1 June 2021, the delegation noted that, in order to give their consent to the reading and/or writing of information on their terminal, users visiting the home page of the "google.fr" and "youtube.fr" sites only had to click on the "I accept" button on the pop-up window, which made the window disappear and allowed them to continue browsing. On the other hand, the user visiting these same home pages and wishing to refuse cookies must click on the "Personalise" button in this first window, which takes him to an interface offering the choice of activating or deactivating cookies, on which he can carry out various actions").

***[21]** Deliberation of the restricted committee No SAN-2021-023 of 31 December 2021, §123 ("On the basis of the findings of the online inspection, the rapporteur observes that, while the banner displayed on the "google.fr" and "youtube.com" sites contains a button allowing users to accept cookies immediately, no similar possibility is offered to the user to refuse, as easily, the deposit of these cookies. To refuse cookies, he must perform at least five actions [...] against only one to accept them").*

[22] Deliberation of the restricted committee No SAN-2021-023 of 31 December 2021, §123 ("To refuse cookies, he must perform at least five actions (the first click on the "Personalise" button, then a click on each of the three buttons to select "Disabled" – each button corresponding to "search personalization", "Youtube History" and "ads personalization" – and finally a click on "Confirm")").

[23] Deliberation of the restricted committee No SAN-2021-023 of 31 December 2021, §124 ("The companies consider that neither the "ePrivacy" Directive, nor the GDPR, nor Article 82 of the French Data Protection Act provided that the action of refusing cookies should be as simple as accepting them. They add that for many years, the CNIL itself had not deduced this principle even though the regulations in question remained unchanged since the GDPR came into force").

[24] Deliberation of the restricted committee No SAN-2021-023 of 31 December 2021, §124 ("In this respect, the companies consider that the mechanism for gathering consent set up on the "google.fr" and "youtube.fr" sites already complies with the provisions of Article 82 of the French Data Protection Act. The companies consider that the fact of not proposing, at the first level of information, a "Refuse all" button is not contrary to the principle of freedom of consent insofar as users have the possibility of refusing cookies by clicking on the "Personalized" button").

[25] Deliberation of the restricted committee No n°SAN-2021-023 of 31 December 2021 §128 ("With regard to the modalities of possible refusal, in the same recommendation, the Commission "strongly recommended that the mechanism for expressing refusal to consent to read and/or write operations should be accessible on the same screen and with the same ease as the mechanism for expressing consent"").

[26] Deliberation of the restricted committee No n°SAN-2021-023 of 31 December 2021 §147 ("The restricted committee reminds that the companies were recently sanctioned for breaches of Article 82 of the French Data Protection Act regarding the information and gathering of consent from individuals before the deposit of cookies on their terminal. Although this sanction is not final since it is being appealed to the Council of State, the restricted committee nevertheless notes that the companies' attention had been explicitly drawn by the CNIL services to the methods for refusing cookies").

[27] Council of State, 4 March 2021, n°449212

[28] "Cookies: The Council of State rejects the request filed by Google", Gérard Haas and Eléonore Hakim ("On 12 January 2022, Google pleaded before the Council of State to have the fine imposed on it in December 2020 annulled").

[29] Article 83(2) of the Regulation EU (2016/679 of the European Parliament and of the Council of 27 April 2016 ("2. Administrative fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in points (a) to (h) and (j) of Article 58(2). When deciding whether to impose an administrative fine and deciding on the amount of the administrative fine in each individual case due regard shall be given to the following: a) the nature, gravity and duration of the infringement taking into account the nature scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them").

[30] Alinea K of Article 83(2) of the Regulation EU (2016/679 of the European Parliament and of the Council of 27 April 2016 ("2. Administrative fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in points (a) to (h) and (j) of Article 58(2). When deciding whether to impose an administrative fine and deciding on the amount of the administrative fine in each individual case due regard shall be given

to the following: […] k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement").

[31] Deliberation of the restricted committee No SAN-2021-024 of 31 December 2021, §136 ("Therefore, in view of the company's liability, its financial capacity and the relevant criteria of Article 83(2) of the Regulation referred to above, the restricted committee considers that a fine of 60 million euros against the company appears justified").

[32] Deliberation of the restricted committee No n°SAN-2021-023 of 31 December 2021, §147 ("The restricted committee reminds that the companies were recently sanctioned for breaches of Article 82 of the French Data Protection Act with regarding the information and gathering of consent from individuals before the deposit of cookies on their terminal. Although this sanction is not final since it is being appealed to the Council of State, the restricted committee nevertheless notes that the companies' attention had been explicitly drawn by the CNIL services to the methods for refusing cookies. As part of the follow-up to the injunction issued by the restricted panel, on 18 December 2020, the companies, through their counsels, sent the CNIL a document in which they presented the changes that Google intended to deploy on the "google.fr" web page in response to the injunction issued. On 17 February 2021, the Secretary-General of CNIL sent a reply to Google LLC and GIL top help the companies to comply. This letter went "beyond the scope of the injunction" and also mentioned the "modalities for refusing cookies". The Secretary-General of CNIL reminded companies that it must be easy to give consent as it is to refuse to give it or to withdraw it and indicated that it would be up to them to insert an "I refuse" button next to the "I accept" button, while specifying that they could "of course change the titles of theses buttons as long as they allow the user to understand clearly and directly the consequences of his or her choices". It was also stated that: "While different ways of complying with the legal requirements are possible, it appears to me that the proposal in your letter, where there is only an "I accept" button and a "Set" button, which has to be clicked on to understand how it is possible to refuse cookies, does not comply with the legal requirements of freedom of consent". The Secretary-General of CNIL had therefore indicated to companies, as early as February 2021, the expected actions in view of complying with the law at the end of the adaptation period left by the CNIL to the parties involved, which ended on 1 April 2021".)

[33] Deliberation of the restricted committee No n°SAN-2021-023 of 31 December 2021, §147 ("The restricted committee reminds that the companies were recently sanctioned for breaches of Article 82 of the French Data Protection Act with regarding the information and gathering of consent from individuals before the deposit of cookies on their terminal. Although this sanction is not final since it is being appealed to the Council of State, the restricted committee nevertheless notes that the companies' attention had been explicitly drawn by the CNIL services to the methods for refusing cookies").

[34] Deliberation of the restricted committee No SAN-2021-024 of 31 December 2021, §125 ("The restricted committee underlines the scope of the social network Facebook and the unavoidable place it occupies in France, since it dominates the social network market by far, as noted by the French competition authority in its opinion No 18-A-03 of 6 March 2018. It also notes the "network effects" generated by this dominant position, highlighted by the German competition authority in a decision of 6 February"). Deliberation of the restricted committee No n°SAN-2021-023 of 31 December 2021 §149 ("In this context, the restricted committee considers that the fact that the companies Google LLC and GIL, which are among the major and unavoidable global stakeholders on the Internet and manage some of the most visited sites, refuse to put in place a system for easy refusal of cookies at the very moment when they were the subject of a follow-up procedure to an injunction clearly alerting them to this very subject, reveals a clear desire on the part of these companies not to change their practices. It considers that the companies did not intend to comply with the processing consisting of accessing or recording information in the terminal of users residing in France when using the "google.fr" and "youtube.fr" sites, nor did they take advantage of the CNIL's recommendations to do so").

[35] Deliberation of the restricted committee No n°SAN-2021-023 of 31 December 2021 §145 ("As the restricted committee reminded in its deliberation No SAN-2020-012 of 7 December 2020, the "Autorité de la Concurrence" noted that, on the French market for online search advertising, Google holds a dominant position that has, in many respects, "extraordinary" characteristics. Its search engine now accounts for more than 90% of the searches carried out in France and its markets share in the online search advertising market is likely to be more than 90% (ADLC, 19. Dec. 2019, dec.2019, No 19-D-26). The Google search engine therefore has a considerable reach in France").

The right to silence during investigations by the Autorité des Marchés Financiers

The Autorité des Marchés Financiers ("AMF") has effective methods for achieving preferable results, particularly in the context of investigations, but also for imposing sanctions.[1]

On the basis of this investigative prerogative, the AMF monitors the regularity of offers and transactions on financial markets and the compliance of regulated persons with their professional obligations.[2] In order to do so, it may request the disclosure of any document or conduct hearings and home visits.[3]

The French lawmaker has established a framework to address the obstruction of AMF inspections and investigations, by a person under inspections, and has provided a penalty for such obstruction. The latter means obstructing an inspection or investigation or providing false information to the AMF.[4] Therefore, this sanction for obstruction raises concerns regarding the right of a person subject to such an investigation to remain silent before the administration.

I. The duty to cooperate and the right to silence

The Conseil Constitutionnel has recognized that the right to remain silent and the right not to incriminate oneself derive directly from article 9 of the DDHC.[5] Thus, the Conseil found the articles of the code of criminal procedure relating to police custody to be unconstitutional because of the lack of notification to the person's right to remain silent.[6]

If international law does not contain an explicit statement of this principle, the case law has extensively affirmed that the right to remain silent derives directly from Article 6 of the ECHR[7]. Furthermore, the ECHR stated that the right against self-incrimination in police custody is intended to protect the accused from abusive coercion by the authorities and to avoid judicial mistakes[8]. Likewise, many other international laws recognize this principle and make it a mainstay of criminal procedure [9].

In order for the AMF to successfully exercise its investigative powers, the legislator has established a framework relating to potential obstruction of AMF controls by the supervised person. This means obstructing an inspection or investigation or failing to provide information[10].

This obstruction of investigations is sanctioned by a criminal[11] and an administrative sentence.[12] The administrative sanction was recently ruled unconstitutional due to a violation of the *ne bis in idem* principle concerning this accumulation of sanctions.[13]

Nevertheless, the punishment for obstruction remains and doesn't seems to be contested as it provides significant leverage for AMF agents.[14]

The sanction of the supervised person who refuses to cooperate could be analysed as an infringement of the right to remain silent, since the person would be effectively coerced to cooperate to avoid the sentence.[15] Obstruction is also used in a very broad sense because third parties in the proceedings may be subject to a sanction.[16] Furthermore, this would constitute a violation of the right against self-incrimination.[17]

Moreover, the lack of cooperation is also a criteria use to determine the amount of the fine for non-cooperate, which is based on the principle of personality[18] and confers to the judge the power to assess the penalty.[19]

II. The applicability of the right to remain silent to financial issues

The duty to cooperate is emphasized in the financial sector, even more as there is no textual basis for the right to remain silent before AMF agents.[20]

The AMF Enforcement Committee has therefore considered the issue of the right to remain silent with respect to obstructing its inspections and investigations prerogatives if the respondent were to refuse to respond to its requests.

According to the AMF Commission, if the interviewee refused to cooperate with its agents, then the Commission members would be allowed to infer from this attitude all the consequences that are useful in forming their judgment.[21]

Furthermore, the Commission considers that if the sanction has been reminded to the individuals heard, then the right is not violated, even if they have not been reminded of the right to remain silent.[22]

The Conseil d'État was also required to consider this issue. The applicants argued that the lack of notification of the right to remain silent during a hearing by AMF officials constituted a violation of article 6 of the ECHR. However, the Conseil d'État explicitly stated that this right could not be guaranteed. As it applies only to criminal matters, it is not applicable to the administrative investigation procedure before the AMF.[23]

More recently, the Paris Court of Appeal ruled that the right to remain silent and not to incriminate oneself applies only if the sanction procedure was initiated by the notification of grievances.[24]

However, this decision is inconsistent with the jurisprudence of the ECHR, which considers that the right to remain silent is applicable to administrative procedures that may result in the application of sanctions in criminal matters.[25] Furthermore, the Enforcement Committee had ruled that the right to remain silent must be respected in the procedure preceding the referral to the Commission.[26]

The Court of cassation distinguishes the hypothesis, on the one hand, when the AMF investigators were instructed to collect the person's confession, or in the other hand, when they wanted to obtain documents necessary for the investigation. Thus, it is only if the control is intended towards a confession that it is infringing the right not to incriminate oneself.[27]

The Court of cassation therefore strictly applied the fundamental right by limiting it to non-incrimination when it leads to a confession in order to promote the efficiency and speed of the investigation by the AMF agents[28].

As a result, the various decisions raised questions about their conformity with the Convention on Human Rights.[29] In addition, a recent decision of the Court of Justice of the European Union ("CJEU") has considerably affected the landscape.

III. The impact of the European Court of Justice's decision of February 2, 2021

Recently, in a ruling of February 2, 2021, the CJEU established the right to silence for natural persons in market abuse investigations.[30]

More specifically, the CJEU explicitly recognizes the right to silence for the person interviewed during an insider trading investigation. Moreover, this decision recognizes the right to silence for administrative sanctions of a criminal nature.[31]

In addition, the CJEU holds that an interviewee may rely on the right to remain silent in order to avoid giving answers that might result in liability,[32] without incurring criminal sanctions for obstructing investigations.[33]

Consequently, this decision marks a rupture with the above-mentioned national decisions because it recognizes the right to silence as a fundamental value by raising it to the level of a general principle.[34]

Consequently, the guarantees of a fair trial in matters of market abuse no longer raise uncertainty concerning the "quasi-criminal" field,[35] which recognizes that certain administrative sanctions have a criminal nature due to their seriousness.[36]

The lack of distinction between the right to remain silent during a hearing and the right to refuse to disclose incriminating documents is a matter of debate in the literature. Some believe that this omission extends the scope of the right to remain silent,[37] but others point out that this omission contributes to the uncertainty in this area.[38]

On the other hand, this decision limits the scope of the right to remain silent in the context of "quasi-criminal" authorities, since it cannot justify any lack of cooperation with the competent authorities in the case of their investigations.[39]

On the strength of this decision, the AMF has amended its investigation charter by citing the CJEU's decision. The charter explicitly states, with regard to the guarantees of the person interviewed, that the right to silence cannot justify any failure to cooperate.[40]

As a result, while the AMF amended its investigation charter, it did not proclaim the right to remain silent or require agents to notify the public of this right during hearings.[41]

Therefore, even if the right to remain silent is now the principle, the practice still does not provide the same rights to criminal and "quasi-criminal" proceedings, as shown by this reform of the AMF's investigation charter.

[1] "Le rôle du ministère public au regard du pouvoir de sanction des autorités indépendantes", Cahiers de droit de l'entreprise n° 5, Septembre 2015, dossier 41, 1er September 2015 ("The AMF is now perfectly equipped to carry out ongoing market surveillance, to conduct rapid investigations with relevant results, and also to impose sanctions, if only because of the special skills of its Enforcement Committee members").

[2] Article L. 621-9 du Code monétaire et financier ("I.- In order to ensure the execution of its mission, the AMF carries out controls and investigations. It ensures the regularity of the following offers and operations: 1° Operations on financial instruments [...] 2° Public offers of shares [...] 3° Transactions carried out on commercial contracts relating to commodities, linked to one or more financial instruments or units mentioned in Article L. 229-7 of the Environmental Code. [...] II. – The AMF also ensures that the following entities or persons, as well as individuals under their authority or acting on their behalf, comply with their professional obligations under the law and regulations").

[3] Article L. 621-12 of the monetary and financial Code ("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 AMF, authorize by order the AMF's investigators to carry out visits to any premises and to seize documents and obtain, under the conditions and in accordance with the procedures mentioned in Articles L. 621-10 and L. 621-11, the explanations of the persons solicited on the spot").

[4] Article L. 642-2 of the monetary and financial Code ("It is punishable by two years' imprisonment and a fine of 300,000 euros for any person to obstruct an inspection or investigation by the Autorité des marchés financiers carried out under the conditions provided for in Articles L. 621-9 to L. 621-9-2 or to provide it with inaccurate information") ; Article L. 621-15 of the monetary and financial Code ("Any person who, in the context of an investigation or control carried out pursuant to I of Article L. 621-9, at the request of the investigators or controllers and subject to the preservation of a legally protected secret enforceable against the AMF, refuses to give access to a document, regardless of the medium, and to provide a copy, refuses to communicate information or to respond to a summons, or refuses to give access to professional premises").

[5] Article 9 of the Déclaration des Droits de l'Homme et du Citoyen ("Every person being presumed innocent until proven guilty, if it is deemed necessary to arrest him, any rigor that is not necessary to secure his person must be severely repressed by law").

[6] Cons. constit., 30 July 2010, No. 2010-14/22 QPC ("Whereas, on the other hand, the combined provisions of articles 62 and 63 of the same code authorize the interrogation of a person in police custody; whereas article 63-4 does not allow the person thus interrogated, while being held against his will, to benefit from the effective assistance of a lawyer; that such a restriction on the rights of the defense is imposed in a general manner, without consideration of the particular circumstances that may justify it in order to gather or preserve evidence or to ensure the protection of individuals; that, moreover, the person in custody is not notified of his right to remain silent").

[7] ECHR, 25 February 1993, No. 10828/84, Case Funke v. France, para. 41 ("In the applicant's submission, his conviction for refusing to disclose the documents asked for by the customs (see paragraphs 9-14 above) had infringed his right to a fair trial as secured in Article 6 para. 1 (art. 6-1). He claimed that the authorities had violated the right not to give evidence against oneself, a general principle enshrined both in the legal orders of the Contracting States and in the European Convention and the International Covenant on Civil and Political Rights, as although they had not lodged a complaint alleging an offence against the regulations governing financial dealings with foreign countries, they had brought criminal proceedings calculated to compel Mr Funke to co-operate in a prosecution mounted against him. Such a method of proceeding was, he said, all the more unacceptable as nothing prevented the French authorities from seeking international assistance and themselves obtaining the necessary evidence from the foreign States").

[8] ECHR, 14 October 2010, No. 1466/07, Case Brusco v. France, para. 44 ("The Court reminds that the right not to contribute to one's own incrimination and the right to remain silent are generally recognized international standards that are at the heart of the concept of a fair trial. Their purpose is, inter alia, to protect the accused against undue coercion by the authorities and thus to avoid miscarriages of justice and to achieve the aims of Article 6 of the Convention").

[9] Article 3 of Directive 2012/13/EU of the European parliament and of the council of 22 May 2012 on the right to information in criminal proceedings ("1. Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively: (a) the right of access to a lawyer; (b) any entitlement to free legal advice and the conditions for obtaining such advice; (c) the right to be informed of the accusation, in accordance with Article 6; (d) the right to interpretation and translation; (e) the right to remain silent").

[10] Article L. 642-2 of the monetary and financial Code ("It is punishable by two years' imprisonment and a fine of 300,000 euros for any person to obstruct an inspection or investigation by the Autorité des marchés financiers carried out under the conditions provided for in Articles L. 621-9 to L. 621-9-2 or to provide it with incorrect information").

[11] Article L. 642-2 of the monetary and financial Code ("It is punishable by two years' imprisonment and a fine of 300,000 euros for any person to obstruct an inspection or investigation by the Autorité des marchés financiers carried out under the conditions provided for in Articles L. 621-9 to L. 621-9-2 or to provide it with incorrect information").

[12] Article L. 621-15, II, f. of the monetary and financial Code ("Any person who, in the context of an investigation or control carried out pursuant to I of Article L. 621-9, at the request of the investigators or controllers and subject to the preservation of a legally protected secret enforceable against the AMF, refuses to give access to a document, regardless of the medium, and to provide a copy, refuses to communicate information or to respond to a summons, or refuses to give access to professional premises").

[13] Cons. Constit., Decision of 28 January 2022, No. 2021-965 QPC ("It follows from the foregoing that, under these conditions, the provisions of paragraph II f of article L. 621-15 of the Monetary and Financial Code, which allow for the prosecution of refusals of requests by investigators and auditors of the AMF, violate the principle of the necessity of offenses and penalties and must be declared contrary to the Constitution").

[14] "Abus de marché et droit de garder le silence", La Semaine Juridique Entreprise et Affaires n° 16-17, 22 April 2021, 1226 ("It must be said that the threat of prosecution for obstruction in the event of refusal to answer constitutes a powerful pressure tool in the hands of investigators (V. not. H. de Vauplane et R. Jouaneton, Les pouvoirs autonomes de communication de l'AMF au regard des droits de la défense : Rev. Droit et aff. nov. 2017, p. 65, spéc. p. 68 et s.), especially since there is no provision requiring them to inform the person being interviewed of his or her right to remain silent (AMF, comm. sanct., 6 août 2012, SAN-2012-12).").

[15] SAN-2019-15 – Décision de la Commission des sanctions du 19 novembre 2019 à l'égard des sociétés Novaxia Investissement, Novaxia Développement, Novaxia Gestion, Novaxia et de M. Joachim Azan ("In these circumstances, the persistent refusal of the Novaxia Entities to provide the auditors with all of their ledgers for the years 2014, 2015 and 2016 constitutes an obstacle to the audit within the meaning of Article L. 621-15 II f) of the Monetary and Financial Code").

[16] "La Commission des sanctions de l'AMF sanctionne une société de gestion et son président pour des manquements à leurs obligations professionnelles, ainsi que trois sociétés du même groupe, pour avoir entravé le contrôle de l'AMF", Communiqué de presse de l'AMF, 21 November 2019 ("For the first time, the Commission found that the audited entity was guilty of obstructing third parties, based on the refusal of Novaxia Développement, Novaxia Gestion and Novaxia (formerly known as Novaxia Finance) to provide the auditors with their ledgers for the three years under audit").

[17] "Entrave" Droit des sociétés n° 3, March 2020, comm. 39 ("This argument, however, refers to a recurrent criticism of the failure or offence of obstruction, which would undermine the right of every person not to incriminate himself or herself").

[18] SAN-2009-32 – Décision de la Commission des sanctions du 21 septembre 2009 à l'égard de MM. A, B, C, D, E ("Whereas a person being prosecuted before the Enforcement Committee may refuse to answer when he or she considers that this attitude is more in keeping with the interests of his or her defense, this right does not prevent the members of the Committee from drawing any conclusions from this attitude of silence and, even more so, from deliberately inaccurate assertions, that may be useful in forming their judgment").

[19] "Abus de marché et droit de garder le silence", La Semaine Juridique Entreprise et Affaires n° 16-17, 22 April 2021, 1226 ("When the facts are established, the respondent's lack of cooperation during the investigation is one of the criteria used to determine the amount of the fine imposed by the Enforcement Committee (C. mon. fin., art. L. 621-15, III, ter. – PE et Cons. UE, règl. n° 596/2014, 16 avr. 2014, art. 31, § 1, e).").

[20] "Abus de marché et droit de garder le silence" La Semaine Juridique Entreprise et Affaires n° 16-17, 22 April 2021, 1226 ("The AMF Investigation Charter is an incentive and information document, without any normative value (AMF, comm. sanct., 25 juin 2013, SAN-2013-15 : Banque et droit sept. 2013, p. 28, obs. A.-C. Rouaud), intended to remind the rights and obligations of investigators and of the persons solicited. It specifies that the persons concerned are expected to cooperate with the investigators, in particular by answering their questions, and reminds them of the obligation not to hinder the investigations under penalty of sanctions. The duty to cooperate is thus emphasized, without however specifying its contours or mentioning the existence of the right to remain silent, which has long been recognized by the AMF Enforcement Committee").

[21] SAN-2009-32 – Décision de la Commission des sanctions du 21 septembre 2009 à l'égard de MM. A, B, C, D, E ("Whereas a person being prosecuted before the Enforcement Committee may refuse to answer when he or she considers that this attitude is more in keeping with the interests of his or her defense, this right does not prevent the members of the Committee from drawing any conclusions from this attitude of silence and, even more so, from deliberately inaccurate assertions, that may be useful in forming their judgment").

[22] SAN-2012-02 – Décision de la Commission des sanctions du 24 novembre 2011 à l'égard d'Allianz Global Investors France, de BNP Paribas, de la Société Générale et de M. Y et Mme X ("Considering that Article L. 642-2 of the Monetary and Financial Code sets out the penalties incurred by any person who obstructs an AMF inspection or investigation or provides it with inaccurate information; that these provisions do not contradict the right to remain silent during the hearing and the right not to contribute to one's own incrimination; that the mere reading of a legal provision in force, not associated with an explicit reminder of these other rights, is not such as to characterize an infringement of the preservation of the interests of the persons questioned; that the plea must therefore be rejected").

[23] CE, 6e / 1re ss-sect. réunies, 12 June 2013, No. 359245, cons. 8 ("Considering, secondly, that BNP Paribas cannot usefully rely, in support of its challenge to the legality of the AMF's investigation, on a breach of the provisions of article 6 § 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of article 14 § 3 of the International Covenant on Civil and Political Rights, by maintaining that the investigators did not notify their employees of their right to remain silent, since these stipulations are not applicable to the administrative investigation procedure").

[24] Cour of Appeal of Paris, 9 July 2020, No. 18/28497, cons. 97 ("It should also be remembered that, if the Enforcement Committee is seized of conduct that may give rise to sanctions under the Monetary and Financial Code, it must be considered as deciding on the merits of criminal charges, within the meaning of Article 6 of the CSDH, However, the requirements of this article, including the right to remain silent and not to contribute to one's own incrimination, apply only to the sanction proceedings initiated by the notification of grievances, and not to the preliminary phase of the investigation, during which the hearings in question were held. This principle, which results from the case law of the European Court of Human Rights (see, in particular, the judgment of December 17, 1996, Saunders v. United Kingdom, cited above, § 67 and 71), has given rise to well-established national case law (voir, notamment, CA Paris, 15 décembre 2016, RG no 16/05249, et CE., 12 juin 2013, req. no 349185, no359245 et no 359477, et 20 janvier 2016, no 374950.").

[25] ECHR, 17 December 1996, No. 19187/91 ("This is not a question of whether the inspectors had the power to decide on a criminal charge. The question of the applicability of article 6(1) (art. 6-1) in the criminal branch arises in a different way from the civil branch examined in Fayed: it is not necessary for the inspectors to have decision-making powers, it is sufficient that they have investigative powers in relation to a criminal charge").

[26] SAN-2012-02 – Décision de la Commission des sanctions du 24 novembre 2011 à l'égard d'Allianz Global Investors France, de BNP Paribas, de la Société Générale et de M. Y et Mme X ("Considering that the right not to be compelled to contribute to one's own incrimination must be respected during the investigation that precedes the referral to the Enforcement Committee").

[27] Cass. com., 9 January 2019, No. 17-23.223 ("The right granted to investigators and auditors to obtain all documents, regardless of the medium, provided for in Article L. 621-10 of the Monetary and Financial Code, is intended to obtain not the admission of the person being audited, but documents necessary for the conduct of the AMF investigation. 621-10 of the Monetary and Financial Code, is intended to obtain not the admission of the person being audited, but documents necessary for the conduct of the AMF's investigation; having noted that the two visits had been limited to the handing over of electronic documents and had not given rise to any hearings, the Court of Appeal correctly deduced that the right of the director and the company not to contribute to their own incrimination had not been infringed").

[28] "Entrave" Droit des sociétés n° 3, March 2020, comm. 39 ("It thus favors the effectiveness of the investigation and cooperation over the strict application of fundamental rights, which is the position adopted by the Enforcement Committee in this case").

[29] "Abus de marché et droit de garder le silence" La Semaine Juridique Entreprise et Affaires n° 16-17, 22 April 2021, 1226 ("Therefore, how can we not agree with the solution found by the AMF Enforcement Committee, which itself admitted that "the right not to be forced to contribute to one's own incrimination must be respected in the context of the investigation that precedes the referral to the Enforcement Committee").

[30] "2211 - Délit d'obstacle et droit au silence et de ne pas s'auto-incriminer" Le Lamy droit pénal des affaires, 8 November 2021 ("This ruling clearly established the right to silence for natural persons, on the basis of Articles 47 and 48 of the Charter of Fundamental Rights, in the context of investigations into market abuse. More specifically, the Court of Justice of the European Union has recognized the right of a person interviewed during an investigation into an insider trading offence to remain silent without exposing himself to criminal sanctions for the offence of obstructing the investigation").

[31] CJEU, 2 February 2021, Case DB contre Commissione Nazionale per le Società e la Borsa (Consob), No. C-481/19, cons. 42 ("As to the question of the conditions under which this right must also be respected in the context of proceedings for the establishment of administrative offences, it should be emphasized that this same right is intended to apply in the context of proceedings that may lead to the imposition of administrative sanctions of a criminal nature. Three criteria are relevant for assessing this character. The first is the legal classification of the offence in domestic law, the second concerns the nature of the offence itself and the third relates to the degree of severity of the sanction that the person concerned may suffer (arrêt du 20 mars 2018, Garlsson Real Estate e.a., C-537/16, EU:C:2018:193, point 28)").

[32] CJEU, 2 February 2021, Case DB contre Commissione Nazionale per le Società e la Borsa (Consob), No. C-481/19, cons. 45 ("In the light of the considerations set out in paragraphs 35 to 44 above, it must be held that the safeguards afforded by the second paragraph of Article 47 and Article 48 of the Charter, with which EU institutions as well as Member States must comply when they implement EU law, include, inter alia, the right to silence of natural persons who are 'charged' within the meaning of the second of those provisions. That right precludes, inter alia, penalties being imposed on such persons for refusing to provide the competent authority under Directive 2003/6 or Regulation No 596/2014 with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability").

[33] CJEU, 2 February 2021, Case DB contre Commissione Nazionale per le Società e la Borsa (Consob), No. C-481/19, cons. 57 ("Finally, it must be borne in mind, in that context, that Member States must use the discretion afforded to them by an instrument of secondary EU legislation in a manner that is consistent with fundamental rights (see, to that effect, judgment of 13 March 2019, E., C-635/17, EU:C:2019:192, paragraphs 53 and 54). In the context of the implementation of obligations stemming from Directive 2003/6 or Regulation No 596/2014, it is therefore for them to ensure, as has been pointed out in paragraph 45 above, that, in accordance with the right to silence guaranteed by Articles 47 and 48 of the Charter, the competent authority cannot impose penalties on natural persons for refusing to provide that authority with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability").

[34] CJEU, 2 February 2021, Case DB contre Commissione Nazionale per le Società e la Borsa (Consob), No. C-481/19, cons. 36 ("Furthermore, while the questions referred mention Articles 47 and 48 of the Charter, which enshrine, inter alia, the right to a fair trial and the presumption of innocence, the request for a preliminary ruling also refers to the rights guaranteed in Article 6 of the ECHR. Whilst the ECHR does not constitute, for as long as the European Union has not

acceded to it, a legal instrument which has been formally incorporated into the EU legal order, it must nevertheless be recalled that, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of EU law").

[35] "La Cour de justice de l'Union européenne consacre le droit au silence de la personne physique poursuivie" Revue de Droit bancaire et financier n° 2, March 2021, comm. 42 ("The application of fair trial guarantees in matters of market abuse no longer gives rise to uncertainty, as this is a matter that falls within the "quasi-criminal" domain by virtue of the now classic criteria developed by the Court of Justice in the Bonda (CJEU, 5 juin 2012, aff. C-489/10, Bonda, pt 37 et s. : JurisData n° 2012-013479), on the model of those identified by the European Court in the Engel judgment of 8 June 1976 (ECHR, 8 June 1976, n° 5100/71, Engel et a. v. Netherlands, § 80 à 92 : Rec. ECHR1976, série A, n° 22).") ; CJEU, 2 February 2021, Case DB contre Commissione Nazionale per le Società e la Borsa (Consob), No. C-481/19, cons. 44 ("Furthermore, even if, in the present case, the penalties imposed on DB by the supervisory authority at issue in the main proceedings were not to be criminal in nature, the need to respect the right to silence in an investigation procedure conducted by that authority could also stem from the fact, noted by the referring court, that, in accordance with national legislation, the evidence obtained in those proceedings may be used in criminal proceedings against that person in order to establish that a criminal offence was committed").

[36] ECHR, 4 March 2014, Case Grande Stevens v. Italie, No. 18640/10, cons. 99 ("In the light of the above, and taking account of the severity of the fines imposed and of those to which the applicants were liable, the Court considers that the penalties in question, though their severity, were criminal in nature (see, mutatis mutandis, Öztürk, cited above, § 54, and, a contrario, Inocêncio v. Portugal (dec.), no. 43862/98, ECHR 2001-I)").

[37] " L'application du droit au silence aux enquêtes administratives à caractère pénal" La Semaine Juridique Edition Générale n° 14, 6 April 2021, 389 ("Such a distinction cannot, under any circumstances, be based on the decision under discussion here, since the Court of Justice explicitly recognizes the right of a natural person to refuse to provide an authority with answers likely to reveal his or her responsibility for an offence, without distinguishing between answers given orally and those contained in a document, regardless of the medium. Respect for the right to remain silent and not to incriminate oneself requires investigators not to demand the communication of all documents useful for the conduct of an investigation, but only those that the regulated entity is required to prepare in accordance with the regulations in force (V. en ce sens, P.-H. Conac : Rev. sociétés 2020, spéc. p. 447).").

[38] "Abus de marché et droit de garder le silence", La Semaine Juridique Entreprise et Affaires n° 16-17, 22 April 2021, 1226 ("Finally, the right enshrined by the Court of Justice is limited to the right to remain silent during a hearing and does not enshrine a broader right not to incriminate oneself involving the possibility of refusing to communicate incriminating documents").

[39] CJEU, 2 February 2021, Case DB contre Commissione Nazionale per le Società e la Borsa (Consob), No. C-481/19, cons. 41 ("Finally, the right enshrined by the Court of Justice is limited to the right to remain silent during a hearing and does not enshrine a broader right not to incriminate oneself involving the possibility of refusing to communicate incriminating documents").

[40] La charte de l'enquête (version in force on September 27, 2021) de l'AMF, I., A., 1., a), iv., ("As reminded by the CJEU in a ruling of February 2, 2021 (C 481/19 DB v. CONSOB), the right to silence cannot justify any failure to cooperate with the competent authorities, such as a refusal to attend a hearing scheduled by them or delaying tactics aimed at postponing the hearing").

[41] "Abus de marché et droit de garder le silence" La Semaine Juridique Entreprise et Affaires n° 16-17, 22 April 2021, 1226 ("The amendment of the AMF's Investigations Charter, taking into account the contribution of the DB v. Consob decision, would be a first step in this direction, even if this amendment would probably not be sufficient to ensure that the existence of the right to remain silent was effectively brought to the attention of the persons concerned. In this respect, formal notification of the right to remain silent during hearings, either by prior summons or on the spot, would ensure better protection of the rights of the defence during investigations").

The Autorité de la concurrence publishes an update of its framework document on competition compliance programs

On the 11 October 2021, almost ten years after its first publication on the subject[1], the *Autorité de la concurrence* has released for comments a new draft framework document on competition compliance programs[2] restating and enriching the five essential pillars to develop and implement such programs. Interested parties had until 10 December 2021 to participate through the proposed public consultation[3]. On 25 May 2022, the *Autorité de la Concurrence* published the final document, which included the main provisions of the initial draft.

This update of the framework document, which serves as a reference text for developing a compliance program[4], is an opportunity for the *Autorité de la concurrence* to reiterate the necessity for all economic structures to implement such programs as a safeguard against numerous risks (I), as well as to set forth the essential pillars for the development of an efficient and relevant compliance program (II). Finally, the publication of this framework document also enables the Competition Authority to insist on the crucial role played by compliance agents, including lawyers, who can intervene both in the preparation of the compliance program and in its implementation (III).

I. In order to protect themselves from the risk of competition law violations, it is now in the interest of companies to integrate compliance with these rules into their compliance program or to put in a place a dedicated compliance program

In this new framework document, the *Autorité de la concurrence* lists the reasons why companies should implement a competition compliance program, and the various risks to which they are exposed in the event of a violation of such rules.

While the reputational risk[5] remains significant, it is the financial risks that is the most dissuasive. The fines are often substantial. Indeed, the Apple group was fined 1.1 billion euros, as were the wholesalers Tech Data and Ingram Micro, to the tune of 76.1 million euros and 62.9 million euros respectively, after being found guilty of cartels within their distribution network and abuse of economic dependence.[6]

In fact, "*the violation of competition rules, as provided for by French and EU law, may expose legal persons to significant financial penalties, up to 10%[7] of their worldwide turnover*".[8] Penalties up to 5% of the average daily turnover per day of delay may also be imposed in order to compel the offending companies to cease the infringement of which they are accused or to put in place interim remedial measures.[9]

Article L420-6 of the Commercial Code also provides for penalties of up to four years' imprisonment and €75,000 in fines "*for natural persons who have fraudulently taken a personal and decisive part in the conception, organisation or implementation of anti-competitive practices*".[10]

Initially, the draft framework document emphasised that the implementation of an adequate compliance program could ultimately reduce the impact of sanctions imposed by the *Autorité de la*

Concurrence. The latter recalled in this sense that by allowing the early detection of potential anti-competitive practices, the compliance program offered the possibility for companies to benefit from favourable treatment in the framework of the leniency procedure provided for by IV of Article L464-2 and R464-5 et seq. of the Commercial Code.[11]

In fact, companies and associations of companies could apply for a total or partial exemption from financial penalties by informing the *Autorité de la concurrence* of the existence of illegal agreements and by cooperating with the latter to put an end to them.[12]

However, in the version published on 25 May 2022, the *Autorité de la concurrence* is considerably more concise regarding this opportunity. It simply recalls that settlement and leniency procedures are means for the company to comply.[13] Any reference to possible procedural gains has been removed.

Similarly, while in the draft the *Autorité de la concurrence* emphasized that following the transposition of the ENC+ Directive[14], companies' incentive to uncover possible secret cartels was strengthened by the fact that immunity or reduction of criminal penalties may also be obtained by natural persons[15], this passage has been entirely deleted in the final version of the document.

While the *Autorité de la concurrence* had, in a 2017 decision[16], considered that compliance programs were not generally intended to justify a mitigation of sanctions[17], it however, considers that the development and implementation of compliance programs, which are *"intended to be part of the day-to-day management of companies, particularly when they are large"* [18], prevents financial risks and offers the possibility of lower penalties.

Compliance programs are therefore an essential preventive tool, in line with the proactive approach adopted by companies and encouraged by *Autorité de la concurrence*.

II. The *Autorité de la concurrence* identifies five essential pillars for an effective and useful competition compliance program

The *Autorité de la concurrence* recalls that a competition compliance program should be included in an overall compliance program. The latter must include all the preventive measures put in place by the company, whether in anti-money laundering and corruption, personal data protection or social, societal and environmental responsibility.[19]

According to the *Autorité de la concurrence*, a compliance program is only useful and effective if it prevents the risk of infringement and provides the means to detect and deal with infringements should they occur.[20] It therefore advocates for a *"tailor-made program, which must be adapted to the markets, the activities and products, the internal organisation and culture, as well as the decision-making chain and the governance mode"*. To elaborate such a program, the company must carry out an analysis of all its risks, leading to the establishment of a cartography of these risks.[21]

The compliance program should enable the company to anticipate new risks[22] and thus, it must regularly monitor the legislative and case law framework, as well as the decision-making practices

of the competition authorities, while taking care to adapt this vigilance to the specific characteristics of the company, as well as the market in which it operates.[23]

To achieve such goal, the compliance program should be built around five pillars:

- A public commitment by the company through *"a clear, firm and public statement by the management bodies, and more generally by all executives and corporate officers, on the need to respect competition rules and to support the company's compliance program"*.[24] The objective being that all its bodies act collectively. All must be aware of the existence of the compliance program and their obligation to apply it strictly and rigorously.[25].
- Where the structure and organisation of the company allows it, the *Autorité de la concurrence* strongly recommends that the management bodies appoint people internally responsible for management and implementation of the compliance program.[26] These responsible persons must have the clear authority and skills to carry out such a mission, but also the necessary time and resources, as well as the ability to have direct access to the company's management bodies.[27] The final version of the framework document adds that they should have the necessary autonomy and independence to carry out their mission.[28]
- All staff and management should be provided with information, training, and awareness-raising measures[29], to ensure that they are all aware of the existence of the compliance program, its usefulness, its content, and the meaning and practical scope of the competition rules[30] as well as internal warning mechanisms.[31] Regarding training and awareness-raising on competition rules, it is necessary that "*these exercises be adapted to each internal target audience, according to the professions and responsibilities exercised*"*.[32].*
- The establishment of effective monitoring and alert mechanisms is also key to the effectiveness of a compliance program. Indeed, while control mechanisms *"must ensure compliance with the compliance program at all levels of the company"*[33], the whistleblowing mechanism allows *"employees of the company or members of the trade association to communicate appropriately with the designated compliance officers, whether to seek their advice or to alert them of actual or potential violations."*[34]
- Finally, the compliance program must have a monitoring system which must "*include the establishment of a procedure for dealing with requests for advice and alerts (what examination is made of them and what response is given), and a procedure for sanctions in the event of non-compliance with the compliance program*".[35]

III. Among the compliance actors, the *Autorité de la concurrence* recognises the lawyer's role as a valuable asset to the compliance function of the company

The *Autorité de la concurrence* recalls that the lawyer brings "*additional expertise*" to the compliance policy that may be useful to the company.[36] In fact, it can *"advise the company in the design of the overall compliance policy* [37], *and "assist in the practical implementation of compliance programs"*[38] explaining the programs and making all staff aware of its objectives, particularly through the training provided[39].It may also "*regularly evaluate companies' compliance program and behaviour through legal audits to identify and correct possible malfunctions in their programs or infringements of competition law*".[40].

Finally, for medium-sized companies and small and medium-sized companies without compliance officers, the lawyer, subject to professional secrecy *"can enable the outsourcing of the compliance*

function and related services".[41] In fact, medium-sized companies and small and medium-sized companies are equally concerned by the challenges of competition law and compliance. Although the costs of such measures can be significant, they are offset not only by the reduced risk of prosecution, but also by the competitive advantage that a strong and effective compliance program brings to the relation with customers as well as with large companies and financial actors.

[1] *Framework document of the 10 February 2022 on competition compliance programs, Autorité de la concurrence,* https://cuadernosdederechoparaingenieros.com/wp-content/uploads/03_document_cadre_conformite_10_fevrier_2012.pdf.

[2] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence,* https://www.autoritedelaconcurrence.fr/sites/default/files/conformite_nouveau%20doc_cadre_0.pdf.

[3] *The Autorité de la concurrence opens a public consultation with a view to publishing a new framework document on competition compliance programs, Press release of the Autorité de la concurrence, 11 October 2021 ("*The public consultation, in which all stakeholders can participate, is open until the 10 December 2021*"),* https://www.autoritedelaconcurrence.fr/fr/press-release/lautorite-de-la-concurrence-ouvre-une-consultation-publique-en-vue-de-publier-un.

[4] *The autorité de la concurrence publishes new guide to setting up compliance programs in companies, Le Monde du Droit, 17 November 2021 ("*The work of the group revealed the desire of market participants to have a reference text on competition law compliance programs [...] It is in this context that the draft framework document has been published, which will serve as a guide for companies to prepare or revise their own competition law compliance program*"),* https://www.lemondedudroit.fr/decryptages/78393-l-autorite-de-la-concurrence-publie-un-nouveau-guide-pour-la-mise-en-place-de-programmes-de-conformite-dans-les-entreprises.html.

[5] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.3, §9 ("*Non-compliance with competition rules not only entails significant financial risks, but also a risk of damage to the reputation of the companies and associations of companies involved, which a compliance program should help to avoid*").*

[6] *Apple, Tech Data and Ingram Micro sanctioned, press release of the Autorité de la concurrence, 16 March 2020 ("*The Autorité de la concurrence has fined Apple €1.1 billion for cartels within its distribution network and abuse of economic dependence on its independent premium resellers. The two wholesalers, Tech Data and Ingram Micro, were also fined €76.1 million and €62.9 million respectively for one of the cartel practices*"),* https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/apple-tech-data-et-ingram-micro-sanctionnes.

*[7] Article 23 of Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("*For each company and association of companies participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year*").*

[8] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.3, §11 ("*From a financial point of view, the violation of competition rules, as provided for by French and EU law, can expose legal persons to significant financial penalties, up to 10% of their worldwide turnover*").*

*[9] Article 24 of Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("*The Commission may, by decision, impose on companies and associations of companies periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year for each day of delay from the date fixed by the Commission in its decision, in order to compel them: (a) to bring to an end an infringement of Article 81 or Article 82 of the Treaty in accordance with a decision taken pursuant to Article 7; (b) to comply with a decision ordering interim measures taken pursuant to Article 8*").*

[10] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.4, §12 ("*It should also be noted that Article L.420-6 of the French Commercial Code provides for penalties of up to four years' imprisonment and a fine of €75,000 for individuals who fraudulently take a personal and determined part in the design, organisation or implementation of anti-competitive practices*").*

[11] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.4, §13 ("*By allowing the early detection of potential anti-competitive practices, the compliance program also offers the possibility for undertakings to benefit from favourable treatment under the leniency procedure provided for in point IV of Article L.464-2 and Articles R.464-5 et seq. of the French Commercial Code, as well as the provisions of the leniency program's procedural notice*").*

[12] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.4, §13 (*"Companies and associations of companies may thus be granted a total or partial exemption from financial penalties when they inform the Authority of the existence of illegal agreements and cooperate with it in order to put an end to them*").*

[13] Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.4, §16 ("The competition rules offer companies and associations of companies a choice, depending on the circumstances of the case, between different options for compliance. The use of settlement and leniency procedures, which have already been mentioned, are examples of possible responses*").*

[14] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to provide the competition authorities of the Member States with the means to implement the competition rules more effectively and to ensure the proper functioning of the internal market; Order No. 2021-649 of 26 May 2021 on the transposition of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to provide the competition authorities of the Member States with the means to implement the competition rules more effectively and to ensure the proper functioning of the internal market

[15] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.4, §13 (*"Moreover, since the transposition of the ENC+ Directive, the incentive for companies to uncover possible secret cartels has been further strengthened as immunity from, or a reduction in, criminal penalties may also be obtained, subject to conditions, by natural persons belonging to the staff of the company that first applied for leniency*").*

[16] *Decision 17-D-20 of the Autorité de la concurrence on practices implemented in the resilient coating sector, Autorité de la concurrence, 18 October 2017 (*"Finally, while account may be taken, in general, in the context of the implementation of the settlement procedure, of the commitments proposed by the companies to modify their behaviour in the future, in the present case, the settlement protocols signed by the Reporter General and the parties did not take into account the proposals to set up or improve compliance programs submitted by the undertakings*").*

[17] *Decision 17-D-20 of the Autorité de la concurrence on practices implemented in the resilient coating sector, Autorité de la concurrence, 18 October 2017, p.71, §464 (*"The Authority points out, moreover, that the development and implementation of compliance programs are intended to be part of the day-to-day management of companies, particularly when they are large. Commitments to implement such compliance programs are not, therefore, generally intended to justify a reduction in the penalties incurred for competition law infringements, especially in the case of particularly serious infringements such as arrangement and exchanges of information on future prices and commercial policy*").*

[18] *Decision 17-D-20 of the Autorité de la concurrence on practices implemented in the resilient coating sector, Autorité de la concurrence, 18 October 2017, p.71, §71 (*"The Authority points out, moreover, that the development and implementation of compliance programs should be part of the day-to-day management of companies, particularly when they are large*").*

[19] Framework document of the 24 May 2022 on competition compliance programs, Autorité de la concurrence, p.5, §24 ("A competition compliance program is intended to be part of an overall compliance program that brings together all the preventive measures put in place by the company (in terms of anti-money laundering and corruption, personal data protection, social, societal, and environmental responsibility, etc...)*").*

[20] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.4, §16 (*"In order for compliance programs to be effective, the Authority considers that they should focus on two objectives: preventing the risk of infringement, on the one hand, and providing the means to detect and deal with cases of infringement that could not be prevented, on the other*").*

[21] Framework document of the 24 May 2022 on competition compliance programs, Autorité de la concurrence, p.5, §25 ("This work requires a risk analysis, which leads to a cartography of the identified risks"*).*

[22] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.5, §22 (*"It is also essential for the company to anticipate new risks that may arise*").*

[23] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.5, §22 (*"It is therefore advisable to be proactive, by conducting regular monitoring, which will make it possible to identify and take into account the major issues in terms of competition compliance, which may, moreover, fluctuate over time, depending on changes in the legislative framework, case law or the decision-making practice of the competition authorities, but also on the company's own situation and the markets in which it operates*").*

[24] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.6, §24 (*"a clear, firm and public statement by the management bodies, and more generally by all executives and corporate officers, on the need to respect competition rules and to support the company's compliance program*").*

[25] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.6, §25 (*"All levels of the company must be involved: general management, technical departments (legal and information technology in particular), sales teams in the field*").*

[26] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.6, §26 (*"A key to success is the designation by the management bodies, where the structure of the company permits, of persons responsible internally for managing the compliance program*").*

[27] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.6, §27 (*"These persons should: be appointed by the management bodies and have unquestionable authority and competence within the company or association of companies; have the necessary time and power, as well as sufficient human and financial resources, to ensure the effective implementation of the compliance program; have the ability to have direct access to the management bodies of the company or association of companies (e.g. in the event of the discovery of a breach"*).*

[28] Framework document of the 24 May 2022 on competition compliance programs, Autorité de la concurrence, p.7, §32 ("Compliance officers should [...] have the necessary autonomy and independence to carry out their duties (e.g., not being dependent on a business unit)"*).*

[29] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.6, §28 (*"The implementation of information, training and awareness-raising measures for all company employees or members of business associations is the third pillar of an effective compliance program"*).*

[30] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.6, §29 (*"It is necessary to inform about [...] the meaning and practical scope of competition rules"*).*

[31] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.6, §29 (*"It is necessary to provide information on [...] internal mechanisms for obtaining advice or alerting to the existence of actual or potential breaches of these rules"*).*

[32] Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.7, §30 ("It is important that these exercises are adapted to each internal target audience, according to the professions and responsibilities exercised"*).*

[33] Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.7, §31 ("Control mechanisms should ensure that the compliance program is followed at all levels of the organisation"*).*

[34] Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.7, §32 ("Whistleblowing mechanisms should provide the necessary conditions for employees or members of the business association to communicate appropriately with the designated compliance officers, whether to seek advice or to alert them to actual or potential violations"*).*

[35] Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.7, §35 ("Such a system should include the establishment of a procedure for handling requests for advice and alerts (what consideration is given to them and what response is given); a procedure for sanctions in the event of non-compliance with the compliance program"*).*

[36] Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.8, §38 ("The company's unique knowledge of the product, service, market or sector can be reinforced by the advice of external experts, such as lawyers, who bring additional know-how to the compliance process"*).*

[37] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.8, §39 (*"This may include advising the company or business association on the design of its overall compliance policy"*).*

[38] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.8, §39 (*"assist in the practical implementation of compliance program"*).*

[39] Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.8, §39 ("explain the compliance programs, explain these programs and make all staff aware of their objectives through training"*).*

[40] *Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.8, §39 (*"Regularly evaluating companies' compliance programs and behaviour through legal audits in order to identify and correct possible program failures or competition law violations"*).*

[41] Framework document of the 11 October 2021 on competition compliance programs, Autorité de la concurrence, p.8, §40 ("In addition, for smaller companies that cannot appoint full-time or part-time compliance officers, the use of lawyers can allow the compliance function and related services to be outsourced"*).*

The French Anti-corruption Agency's practical guide to preventing conflicts of interests

On 18 November 2021, the French Anti-Corruption Agency ("AFA" or "the Agency") published its definitive guidelines to preventing conflicts of interests. These guidelines aim at assisting private companies, industrial and commercial public establishments as well their representatives and compliance actors in identifying and addressing situations where conflicts of interests may arise. The guidelines are illustrated with examples of good practices observed by the Agency since its creation, in 2016.

Traditionally, the notion of "*conflict of interests*" is associated with the duty of probity and implies a contradiction between the personal interest of a public agent and the public interest that he or she must defend with independence, impartiality and objectivity.[1] Thus, the only legal definitions of conflict of interests are limited to the public sphere, such as those given by the Organization for Economic Co-operation and Development (OECD)[2] or by the Law on transparency in public life, which are almost identical.[3] There was no formal definition of conflict of interest in the private sector.

I. A welcome definition of conflict of interests in the private sector

Situations of a conflict of interests within companies can lead to criminal consequences for both the legal entity and its executives. Although breach of probity offenses solely relate to the public sector, the complicity, the laundering and the concealment of such offenses may relate to conflict of interests within the private sector.[4] Additionally, the *actus reus* of the offence of breach of trust or misappropriation of corporate assets correlate to situations of conflict of interests.[5] Therefore, it is necessary to define what constitute a conflict of interests within the private sector to minimize the occurrence of criminal acts which can be significantly prejudicial to companies' interests or image.

The Agency's guidelines define conflicts of private interests as an "*existing personal interest whose interference with the activities carried out within the organization is such as to influence or appears to influence the impartial, objective and independent execution of the activity on behalf of that entity*".[6] For there to be a situation of conflict of interests, the ascertained or apparent interference[7] of the personal interest over the corporate interest has to be sufficiently serious[8], as a personal interest is not in itself incompatible with the pursuit of the company's interests.

The guidelines recommend that detection measures and preventive measures extend beyond situations of conflict of interests that are proven to exist and that such measures take into consideration those that are apparent and likely to damage the company's image.[9]

II. Identifying situations of conflict of interests within the private sector through risk-mapping

The Agency stresses that it is impossible to exhaustively detect all risks of conflict of interests as personal interests and corporate interests are numerous and diverse, and do not necessarily clash.[10] The company must identify individuals who, due to their positions within the company, can make decisions that may create obligations for the company, as well as individuals who can exercise significant influence over the company's decisions, and whose personal interests, because of their nature or importance, may be detrimental to corporate interests.[11]

The AFA's guidelines provide companies with multiple options in identifying risks of conflicts of interests. The Agency recommends the creation of a risk-mapping specific to conflict of interests, to identify such risks as part of the corruption risk-mapping pursuant to the Law "*Sapin II*" or even to include the detection process in the operational risk-mapping.[12]

The guidelines also recommend identifying sensitive positions, processes (purchases, sales, financial investments, HR management), and operations (prospecting, searching for new markets, operations with the public sector, external growth).[13] Additionally, the entity can hold a registry with all recurring situations of conflict of interests.[14]

III. Preventing and addressing conflicts of interests

The AFA points out that preventive measures and risk management measures pertaining to conflict of interests depend on the entity's specific characteristics.[15] While the legislator may set some measures for specific fields of activity, it is commonly up to the entities to define and create their own conflict of interests policies, which may be contained in their anti-corruption policy, or in a dedicated procedure, or in any other document. Among these measures, a clear and precise policy on gifts and invitations is recommended to be able to keep track of goods received from third parties. Proper dissemination of the policies should follow.[16]

The Agency also states that it is possible to adapt employment contracts by inserting specific incompatibility clauses for certain positions or staff rotation procedures for positions identified as presenting risks of conflict of interests.[17] Similarly, the inclusion of contractual clauses creating an obligation for counterparties to declare and address potential conflicts of interests is recommended.[18]

The AFA further reminds entities to provide themselves with the means to detect potential or actual conflicts of interests. The implementation of a disclosure mechanism for such conflicts, together with training and awareness programs for employees and third-party contractors, are necessary to create an environment favorable to the detection of conflicts of interest.[19]

Finally, the guidelines provide several practical examples of remedial measures, such as adjusting the rights and obligations of an individual in a situation of conflict of interest (abstention from voting or participating at board of directors' meetings) [20] or, in the most sensitive cases, putting an end to the situation of conflict by withdrawing oneself from a specific procedure or action. [21]

[1] Code of Ethics II, High Authority for Transparency of the Public Life, 1 February 2021, p.16 ("All individuals enter into relationships, whether personal or professional, which give rise to ties of interest. However, such relationships only become problematic for the public official or public agent when they are likely to interfere with the "independent, impartial and objective exercise" of the public service performed").
[2] Council Recommendation on guidelines for handling conflicts of interest in the public service, Organization for Economic Co-operation and Development, June 2013, p. 4 ("A "conflict of interest" involves a conflict between the public duty and the private interests of a public official, in which the public official has private interests that could unduly influence the way in which he or she discharges duties and responsibilities").
[3] Article 2 I°, Law on Transparency of the Public Life, no 2013-907, 11 October 2013 ("For the purposes of this law, a conflict of interest is any situation of interference between a public interest and public or private interests which is likely to influence or appear to influence the independent, impartial and objective exercise of a function").
[4] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 14 ("While the offences of illegal taking, receiving or keeping of interest, "pantouflage" and, in some cases, favoritism described above do correspond to situations of conflict of interest in the public sector (or in a company entrusted with a public service mission), they do not a priori target companies, their managers or their employees. However, it should be noted that these persons may be prosecuted for concealing or handling or laundering these offences, each of which is punishable by 5 years' imprisonment and a fine of €375,000, but also for complicity").
[5] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 15 ("Finally, the criminal judge also punishes economic and financial offences that do not fall into the category of breaches of probity but which may constitute the beginnings of such breaches and whose elements of offence correspond to situations of conflict of interest, such as the offences of misappropriation of corporate assets or breach of trust.").
[6] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 7 ("It is therefore relevant to consider as a conflict of interest any situation of interference between the function performed within an organization and a personal interest, so that this interference influences or appears to influence the independent, impartial and objective performance of the function on behalf of that organization").
[7] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 8 ("The existence of personal interests is not in itself incompatible with the pursuit of the interests of the organization. It is only in the case of an interference, proven or apparent, between these interests that a conflict of interest arises and the risk for the person concerned of having his or her personal interests prevail over that of the organization").
[8] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 9 ("The interference must be significant enough to influence or appear to influence the person responsible for defending the organization's interests").
[9] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 9 ("To effectively guard against the risk, the prevention of conflicts of interest should not be limited to established conflicts of interest but should be extended to apparent conflicts of interest, which can also damage the image of the organization and the trust it inspires").
[10] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 17 ("The identification of a conflict-of-interests situations is not an easy task insofar as all managers and employees have links of interests and it is not possible to anticipate, in a systematic way, the cases in which these will conflict with those of the organization. Consequently, the identification of conflict-of-interest risks cannot claim to be exhaustive").
[11] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 17 ("It is therefore necessary to identify the managers and employees exposed to the risk of conflict of interest as part of a proportionate approach. These are persons who, in the course of their duties, have the capacity to make decisions that create obligations for the organization vis-à-vis third parties, or persons likely to have a significant influence on these decisions, and whose potential conflicts of interest could be detrimental to the interests of the organization because of their nature and importance").
[12] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 18 ("In order to formalize this identification phase, the organization can draw up a specific map, or if it is subject to Article 17 II of the Sapin 2 law, identify the risks related to the existence of conflicts of interest when drawing up or updating its corruption risk map. This exercise may also be integrated into a broader mapping exercise such as an operational risk mapping exercise").
[13] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 18 ("Identifying conflict of interest situations requires paying particular attention to [...] processes where the existence of a conflict of interests would be detrimental to the interests of the organization, [...] processes where the existence of a conflict of interest would harm the interests of the organization, [...] sensitive functions within the organization and then investigating how the people in charge of these functions might further their personal interests, [...] [and] transactions inherent in the life of an organization [that] increase the likelihood of exposure to the risk of corruption").
[14] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 18 ("As a matter of good practice, the organization may keep a register of recurring conflict of interest situations, based on voluntary declarations of conflicts of interest or ties of interest. This register may be useful when updating the corruption risk map").
[15] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 24 ("The measures to prevent and manage conflicts of interest are determined by the organization in the light of its risk profile, taking into account criteria relating to its sector of activity, its geographical location, its corporate form, its size and the type of third parties with which it interacts. These preventive measures may be combined and modulated according to the level of risk and the specificities of the organization").
[16] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 26 ("The rules on managing conflicts of interest are enforceable against employees because they are included in the anti-corruption code of conduct, which is itself incorporated into the internal regulations, including for organizations not subject to Article 17 II of the Sapin 2 Act. The management body should ensure that this policy is adequately disseminated to employees (for example, at the time of hiring or during awareness-raising and training activities). The granting or acceptance of a gift, invitation or benefit may constitute a conflict of interest. In order to prevent the risk of conflict of interest, the organization should define a policy with clear rules to enhance the transparency and traceability of gifts and invitations received or offered (e.g., setting up an authorization system or a dedicated register).").
[17] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 27 ("The incompatibility of conflicts of interest with the position held may be the subject of a specific clause in the employment contract. In order to be enforceable, this clause must be sufficiently precise as to the definition of the prohibited ties. [...] The organization may also put in place procedures for the rotation of employees in positions that it has identified as sensitive and ensure the physical and organizational separation of decision-making (principle of separation of duties, reinforced visa, etc.).").
[18] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 31 ("The organization may choose to include in its contractual arrangements a clause requiring third parties to declare potential conflicts of interest and politically exposed persons among their beneficial owners.").
[19] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 31 ("In addition to defining a formalized policy for the prevention and management of conflicts of interest, the organization provides itself with the means to detect risky situations by creating a favorable climate for their disclosure. To do this, it provides employees with the keys to reacting to a conflict of interest situation through awareness-raising and training, as well as resources and tools.") ; Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 31 ("The organization may raise awareness of the need to declare and manage potential conflicts of interest among third parties with whom it has a contractual relationship through appropriate training, including the practicalities of reporting such conflicts.")
[20] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 32 ("a director should refrain from voting or participating in board deliberations on a matter in which he or she has a conflict of interest [...] an employee should ensure in writing that he or

she has the approval of his or her superiors before entering into a transaction with an organization of which he or she or a person close to him or her is a beneficial owner.").

[21] Practical Guidelines to Preventing Conflicts of Interest in Enterprises, French Anti-Corruption Agency, 18 November 2021, p. 32 ("In the most sensitive cases, to require the person concerned to put an end to the conflict of interests situation in order to avoid any risk of his or her responsibility being engaged by a decision or action likely to be considered as favoring his or her personal interests, for example: withdrawing from a procedure; withdrawing from a candidate or service provider selection committee; selling his or her shares or entrusting their management to a third party ("guided management")").

AFA's anti-corruption guide for small and medium-sized companies

On 16th of December 2021, AFA has published the final version of its guide on anti-corruption measures for small and medium-sized companies.

In theory, the Sapin II law imposes strong anti-corruption obligations only on companies *"employing 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 is greater than 100 million euros* "[1].

However, this does not mean that small and medium-sized companies are not affected by anti-corruption issues. Indeed, corruption and influence peddling are an issue for all companies regardless of their size and can have serious economic, reputational, and legal consequences.

In addition, the Sapin II law's obligations indirectly affect smaller companies as the duty of prevention to which large companies are bound leads them to carry out prior integrity checks on their business partners, which may be small and medium-sized companies [2]. Therefore, having an anti-corruption policy is an advantage for these companies over their competitors, especially since it promotes healthy management practices. Similarly, banks and investors are more likely to finance companies with an anti-corruption program [3].

These reasons have already convinced 50% of companies not affected by the obligations of the Sapin II law to deploy anti-corruption measures [4].

The French Anti-Corruption Agency (AFA) promotes this deployment of measures to all sizes of companies by publishing this *"practical anti-corruption guide for small and medium-sized companies"*, developed in consultation with the *Confédération des Petites et Moyennes Entreprises* (CPME) and the *Mouvement des Entreprises de Taille Intermédiaire* (METI). The AFA aims to be educational, offering illustrations of dangerous situations and practices to avoid, as well as concrete examples of remediation measures that can be considered.

It is undeniable that a small or mid-sized company may encounter difficulties in setting up some of the standards applied within larger groups. It may be too costly for such structures to specifically assign someone to anti-corruption issues, or to exhaustively check the integrity of each trading partner. Yet gifts issued or received by an employee [5], or a contract offered in exchange of personal favors[6], are risks that affect small and medium-sized companies just as much as large groups.

Through 13 sheets, this practical guide covers concrete ways to prevent risks of corruption within small and mid-sized companies, taking up the points already developed in its previous recommendations, namely the role of the manager, that of a possible person specifically in charge of corruption issues, the implementation of risk mapping, an anti-corruption code of conduct, training and awareness-raising actions for employees, the assessment of business partners' integrity, an internal alert system, internal control mechanisms, accounting controls and finally disciplinary sanctions[7].

The AFA recalls that it is important for the head of a company to adopt an active role in the prevention of all forms of corruption and influence peddling [8]. It must adopt an exemplary attitude, remind that the company does not tolerate such practices under any circumstances (through internal regulations, the website, etc.) and take concrete preventive measures.

Risk-mapping is also essential to identify the methods, practices and activities that are most exposed within the company (exports, use of commercial intermediaries, submission to public contracts, administrative authorization processes, etc.). The AFA also specifies that these points of attention must be updated at each major event: acquisition of a competitor, launch of a new product, etc [9]. Depending on the results of the mapping, the implementation of specific instructions and actions may be considered, to better frame relations with business partners, especially regarding gifts and invitations, conflicts of interest, sponsorships [10].

The AFA also recalls that raising awareness and training employees on corruption prevention, signaling to them that they can express their doubts about a given situation in complete confidentiality, creates a healthy corporate culture. Furthermore, it is essential to identify the business partners that are most at risk, for instance in exposed sectors or from countries with lower anti-corruption requirements [11] (commercial agents and other intermediaries are for example a significant source of risk). In addition, an anti-corruption code of conduct [12], subject to internal communication [13] or even adoption by certain business partners such as suppliers [14], is also a useful measure to be considered.

The AFA also mentions that internal reporting channels can be set up[15], especially since whistleblowers will soon be able to report a behavior they deem suspicious directly to the authorities if the company's internal procedures are insufficient. As such, the development and adaptation of internal procedures both at organizational[16] and accounting levels[17], can reduce the exposure of the decision-making process to corruption. For instance, splitting decision-making processes can be considered to allow control by multiple stakeholders over the same operation [18]. The application of anti-corruption prevention measures must also be regularly monitored, especially in sectors identified as being at risk. Rigorous accounting checks on the services materially rendered can also avoid the risks of fictitious invoicing [19]. Finally, the AFA considers that it is imperative for the company that any violation of internal rules be effectively sanctioned internally [20].

Of course, the AFA is aware that the implementation of all these practices is casuistry and is specific to each company. The proportionality of the measures remains at the heart of the process (size, sector of activity, geographical location, etc. are all to be considered) [21]. However, the AFA recalls that it must be borne in mind that the costs of such measures are offset not only by the reduction in the risk of prosecution, but also by the competitive advantage such preventive policies provide in the relationship with large companies and financial actors. ■

[1] Article 17 of the Law No 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, known as the Sapin II Law ("Presidents, managing directors and managers of a company employing 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 euros are required to take measures to prevent and detect the commission, in France or abroad, of acts of corruption or influence peddling in accordance with the procedures laid down in II").
[2] Practical anti-corruption guide for small and mid-sized companies, p.13 ("the law requires large companies to assess the integrity of their partners. These major contractors are therefore questioning their partners of all sizes, in particular on the implementation of anti-corruption measures.").
[3] Practical anti-corruption guide for small and mid-sized companies, p.13 ("banks also assess the integrity of their customers, and a company is more likely to obtain financing or a loan if it has anti-corruption measures in place").
[4] Practical anti-corruption guide for small and mid-sized companies, p.13 ("50% of companies not affected by the obligations of the Sapin II law have deployed anti-corruption measures").
[5] Practical anti-corruption guide for small and mid-sized companies, p.48 ("Example: Company X has existed for many years, its accounting procedures are formalized and it prepares its accounts in compliance with the standards in force. The company launched a new and very successful product in early January and hired an additional sales team. One of the new sales representatives asked several times for advances on fees to cover his prospecting costs. The accounting officer made the said advances without difficulty (...) For several months, the salesperson uses these sums to bribe the buyer of a large customer and unjustly obtain contracts that allow him to reach his targets and receive a high premium.").
[6] Practical anti-corruption guide for small and mid-sized companies, p.33 ("Example: The French company Engrains produces agricultural fertilizers. Due to high tensions on certain raw materials, deliveries to customers require long delays. The company often concludes sales contracts with companies located abroad. As part of the conclusion of a fertilizer sales contract with a foreign company, Mr. Azote, an employee of engrains, travels to the country to finalize the terms of the contract. During his trip, the director of the client, Mr. Phosphate, offers to take on a fixed-term contract the son of Mr. Azote who wishes to work abroad, on the condition that he be delivered by Mr. Azote before the other customers of the company Engrains").
[7] Practical anti-corruption guide for small and mid-sized companies, p.9.
[8] Practical anti-corruption guide for small and mid-sized companies, p.17 ("The manager is the major player in the prevention of corruption in his company. It initiates and carries anti-corruption measures and ensures their implementation and compliance").
[9] Practical anti-corruption guide for small and mid-sized companies, p.48 ("The manager could have protected his company by identifying in his risk mapping that the launch of a major new product could be a risky situation").
[10] Practical anti-corruption guide for SMEs and small mid-caps, p.5 ("Set up instructions to frame gifts and invitations (offered and received) and the sponsoring").
[11] Practical anti-corruption guide for small and mid-sized companies, p.37 ("It is recommended that the company classify its partners into homogeneous groups according to their risk profile (no or low risk / somewhat risky / very risky) based on the risk mapping. This estimate can be based, for example, on: the degree of risk of the activity (...), the nature of the partner: for example, commercial intermediaries are considered a risky category (...), the country of exercise of the activity").
[12] Practical anti-corruption guide for small and mid-sized companies, p.30 ("The anti-corruption code of conduct must allow employees to adopt the right behavior and thus avoid situations that would be harmful to the company").
[13] Practical anti-corruption guide for small and mid-sized companies, p.45 ("Best practices → Use all staff-wide communication opportunities to recall the principles of the Code of Conduct").
[14] Practical anti-corruption guide for small and mid-sized companies, p.30 ("These gifts were prohibited by the large group's code of conduct, signed by all its suppliers.").
[15] Practical anti-corruption guide for small and mid-sized companies, p.42 ("The internal alert system allows the company to collect reports of behavior in breach of the anti-corruption code of conduct and that could be indicative of corruption. This system is essential because it is a source of information for the manager on risky situations. It can thus put an end to them and improve anti-corruption measures.").
[16] Practical anti-corruption guide for small and mid-sized companies, p. 45 ("Internal control is the set of mechanisms implemented in a company to ensure that the activities it carries out to achieve the operational objectives set by the manager are conducted in compliance with internal procedures. A weak internal control exposes the company to risks of corruption").
[17] Practical anti-corruption guide for small and mid-sized companies, p. 48 ("Rigorous accounting is an essential prerequisite for the prevention of corruption").
[18] Practical anti-corruption guide for small and mid-sized companies, p. 45 ("Effective internal control respects the following principles: → Separation of duties").
[19] Practical anti-corruption guide for small and mid-sized companies, p. 50 ("Best practices: Favor accounting controls that are based on a verification of the material reality of the operations").
[20] Practical anti-corruption guide for small and mid-sized companies, p. 5 ("Regularly check the application of the instructions and more often in the activities identified as at risk. Sanction if the instructions are not applied").
[21] Practical anti-corruption guide for small and mid-sized companies, p. 16 ("Principle of proportionality: Each of these measures must be adapted to the specificities of the company: its activity, its size, its sector of activity, its geographical location, etc..").

AFA submits a draft practical guide on anti-corruption accounting controls

On 26 November 2021, the French anti-corruption agency ("AFA") submitted for public consultation, a draft practical guide on anti-corruption accounting controls in companies.

This guide, which is presented as an educational collection of best practices and illustrations[1], aims to assist companies subject to the obligation provided for in Article 17 of the Sapin 2 Law in the implementation of "*internal or external accounting control procedures intended to ensure that books, registers and accounts are not used to conceal acts of corruption or influence peddling*"[2].

It sets out general accounting concepts (I) before defining anti-corruption accounting controls (II) and specifying their implementation (III).

I. Keeping accounts is a legal obligation that helps reduce corruption risks

The guide notes that an accounting that complies with legal and regulatory requirements effectively contributes to the prevention and detection of corruption[3].

As a preliminary point, the AFA reminds the legal obligation for all companies to keep accounts that comply with the standards set by the French accounting standards authority ("*Autorité des normes comptables*") and that meet five key principles: true and fair presentation, comparability and continuity of operations, regularity and fairness, caution and consistency of methods [4].

Then, the AFA details some of the accounting rules to be implemented (non-offsetting rule, recording of assets at historical cost, keeping of accrual accounts, information retention and prohibition of parallel accounting) as well as the requirements for proper recording of entries, which implies particularly clear objectives and scope of responsibilities between individuals involved in an operation, standardized accounting procedures, and a quality reporting system [5].

II. Anti-corruption accounting controls are complementary to general accounting controls and incorporate internal control based on risk mapping

According to the guide, the concept of "anti-corruption accounting controls" refers to the accounting controls mentioned in Article 17 of the Sapin 2 Law [6] and is precisely so called because these controls must be based on corruption risks mapping as it determines where it is necessary to complement corruption-related risks management measures, which include accounting controls, with anticorruption accounting controls [7].

Thus, it appears that anticorruption accounting controls are simply meant to complement or deepen existing accounting controls [8]. For instance, they may be implemented where the risks of corruption are insufficiently covered by existing controls [9], in case of accounting processes (e.g., manual accounting registration or non-existing third-party accounting controls [10]) and accounting transactions (e.g., human resources management scheme, expenditure processes

without controls and exceptional transactions [11]) that warrant increased caution, or sensitive accounts such as 'miscellaneous' accounts [12].

III. The implementation of anti-corruption accounting controls is similar to that of general accounting controls

The AFA explains that anti-corruption accounting control methods differ from general accounting methods only in the way they are applied, depending on the risk situations identified by the corruption risks mapping [13]. Thus, the AFA suggests following existing control methods, namely the accounting review method, the analytical review method, the sampling control method, or the comparison with physical reality method [14]. It further suggests that these methods be carried out on standard accounting documents such as the balance sheet, the income statement, the notes to financial statements, the general ledger, the journal, legal registers of the company and the accounting analytical presentation documents [15].

Additionally, the guide states that, similarly to general internal controls, the anticorruption accounting controls are carried out at three levels [16]:

- A first level of control generally carried out by the person responsible for entering and validating accounting entries;
- A second level of control that is carried out throughout the year by a person independent of the one who carried out the first-level control, whose purpose is to ensure the proper execution of the first-level anti-corruption accounting controls; and
- A third level of control (accounting audits) assessing the relevance, effectiveness, and compliance with corporate requirements of anti-corruption accounting controls, and specifically the governance and resources allocated to anti-corruption accounting control procedures and the method of development and application of the first two levels of controls.

The guide further adds that anti-corruption accounting controls must follow a specific and standardized procedure, the purpose of which is to primarily determine the scope of the controls, their durations, and modalities, including a precise definition of the roles and responsibilities of the various parties involved [17]. This procedure itself should be subject to a control system to ensure its adequacy and effectiveness [18].

Finally, the AFA concludes that the results of anti-corruption accounting controls must give rise to a real response from the company, which must, for example, implement corrective measures, update its risk mapping, or conduct an internal investigation[19].

The guide, which should be published in the first term of 2022, will probably be enriched as it is opened for public consultation until 7 January 2022.

[1] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §3 ("It takes the form of an educational collection of best practices and illustrations that is not intended to be exhaustive").
[2] Sapin II Law on transparency, fight against corruption and modernization of economic life, No. 2016-1691, 9 December 2016, Article 17. II. 5 ° ("Accounting control procedures, internal or external, intended to ensure that books, registers and accounts are not used to conceal acts of corruption or influence peddling. These controls may be carried out either by the accounting and financial control services specific to the company, or by using an external auditor when carrying out the audits of certification of accounts provided for in Article L. 823-9 of the Commercial Code").
[3] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §4 ("It recalls that rigorous and organized accounting, established according to the standards in force, contributes strongly to the prevention and detection of acts of corruption."); §53 (" If a rigorous accounting according to the principles in force contributes greatly to the prevention and detection of acts of corruption").
[4] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §6 to 21.
[5] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §22 to 44.
[6] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §3 ("This guide is intended for large companies in all sectors of activity subject to the obligations of II of Article 17 of the Sapin 2 law which provides in its 5 ° the obligation for their management bodies to set up, under the anti-corruption system, "internal or external accounting control procedures to ensure that books, registers and accounts are not used to mask acts of corruption or influence peddling", hereinafter referred to as "anti-corruption accounting controls").
[7] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §54 ("On the basis of this mapping, the company will determine whether processes seem insufficiently controlled by the measures and procedures in force. Some of these processes may need to complement measures to control corruption risks and, among these measures, strengthen existing accounting controls or create new ones in order to better control risks. These controls are called anti-corruption accounting controls because of their link to corruption risk mapping. They complement the already existing accounting controls and are part of the company's internal control system"); §62 ("Faced with the risk scenarios identified in the corruption risk mapping, existing internal control procedures and measures (including accounting controls) that contribute to reducing the risk detected will be identified. All or part of the accounting controls, thus identified as risk control measures, will be considered and identified as anti-corruption accounting controls with regard to the risk mapping").
[8] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §54 ("These controls are called anti-corruption accounting controls because of their link with the mapping of corruption risks. They complement the already existing accounting controls and are part of the company's internal control system"); §59 ("Additional risk control measures put in place in step 5 may also include "anti-corruption accounting controls". They may consist either of existing in-depth control measures (increased frequency of control, level of hierarchical validation added, extensive sampling, etc.) or of additional control measures").
[9] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §63 ("On risk scenarios that the company deems insufficiently controlled, the company may implement additional measures including reinforced internal control measures and anti-corruption accounting controls").
[10] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §66 ("When analyzing risk scenarios on accounting processes, the following situations can, for example, be identified: insufficiently supervised accounting processes such as those operating on the basis of manual records or integrating little computer system; accounting processes focused on a limited number of people who obstruct the principle of segregation of duties; accounting processes that are poorly controlled by external third parties (auditors, customs, regulators, accountants, etc.); accounting processes newly integrated into the scope of the company (such as that of a recently acquired subsidiary or as during the implementation of accounting processes, under the anti-corruption accounting controls French Anti-Corruption Agency of a new information system); accounts kept locally, in particular when the country of establishment applies accounting standards that are less demanding than French standards; accounting processes for shared service centers located in sensitive countries; accounting processes of subsidiaries without activity or dormant, if any unconsolidated").
[11] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §67 to 73 ("When analyzing risk scenarios on the company's operational processes, particular attention should be paid to the following situations: 68. promotional processes or in connection with gifts or invitations [...]; 70. specific human resources management processes ...; 71. exceptional or high-stakes operations [...]").
[12] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §79 ("All accounts not specifically named or assigned may facilitate movements masking acts of corruption such as accounts with termination 8 (for example: miscellaneous (tips, current donations, etc.), accounts of third parties (various expenses to pay or proceeds to receive)").
[13] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §80 ("Anti-corruption accounting control methods do not differ from general accounting control methods. They differ from them by their methods of application (frequency, perimeter, sampling, etc.) which will be reinforced in the event of risks highlighted by the risk mapping").
[14] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §83-95. ("3.1.1. The accounting review (...) 3.1.2. The analytical review (...) 3.1.3. The sampling control (...) 3.1.4. The analysis of the accounts by comparison with physical reality").
[15] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §81 ("These controls relate to the accounting documents mentioned above (balance sheet, income statement, notes to financial statements, general ledger and journal book) and to the other legal registers of the company (company registers, securities registers, etc.) as well as to the the accounting analytical presentation documents").
[16] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §46 to 52; §104 to 106 ("Like general internal controls, anti-corruption accounting controls are organized into three levels: · First-level anti-corruption accounting controls are usually carried out by the persons in charge of entering and validating accounting entries. These people ensure that the entries are properly justified and documented (in particular, manual entries). Cross-validation between employees is satisfactory for entries below a defined threshold. Entries above this threshold may require validation by the hierarchy. · Second-level anti-corruption accounting controls, carried out by persons independent of those who carried out the first-level controls, shall be carried out throughout the year. They aim to ensure the proper execution of first-level anti-corruption accounting controls. Thus, during the sampling control, the sample selected must be representative of the risks inherent in the operations processed (manual entries, level of authorization and segregation of duties in particular). The methods of sampling are defined according to a prior analysis of the various entries and risks concerned to allow their representativeness. In the event that first-level anti-corruption accounting controls are automated, second-level controls are correspondingly adapted. · The effectiveness of anti-corruption accounting control procedures is regularly assessed in the context of third-level accounting controls. These accounting audits cover all accounting arrangements to ensure that anti-corruption accounting controls comply with business requirements, are effectively implemented, and kept up to date. In this context, third-level accounting controls will assess the relevance and effectiveness of: o governance and resources allocated to anti-corruption accounting control procedures; o the methodology for the preparation (including the consideration of corruption risk mapping) and the application of first and second level anti-corruption accounting controls").
[17] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §115 to 130.
[18] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §110 and 113 ("The modalities of anti-corruption accounting controls are formalized within a procedure [...] As with the other measures and procedures of the anti-corruption prevention system, the anti-corruption accounting control procedure is subject to an internal control and audit system to ensure its adequacy and effectiveness").
[19] "Draft practical guide on anti-corruption accounting controls in companies", French Anti-Corruption Agency, 16 November 2021, §131 to 135 ("Any finding of an anomaly at the end of anti-corruption accounting controls must be considered by the company. The results of the second-level anti-corruption accounting

controls give rise to a conclusive summary including, in the event of anomalies, the definition of corrective actions within the framework of an action plan. The results of the third-level controls shall give rise to the issue of a report, the main conclusions of which shall be presented to the governing body. The company may thus have to complete certain existing accounting procedures to remedy the anomalies found. Cases of anomalies also feed into an update of the corruption risk mapping and can be further illustrated in the Code of Conduct and training materials dedicated to the prevention of corruption in coordination with the Compliance Officer. If the anomaly reveals suspicions or acts of corruption, it must be brought to the attention of the compliance officer and the governing body which may decide to conduct an internal investigation").

AFA and PNF Practical Guide on the internal anti-corruption investigation

Under the cooperation protocol in force since March 28, 2018 between the French Anti-Corruption Agency ("AFA") and the Parquet National Financier ("PNF"), the two entities are jointly participating in the construction of a French anti-corruption reference framework. Thus, the elaboration of guides and guidelines intended for the different actors of the economic life, makes it possible to communicate the expectations of the authorities in terms of prevention and detection of corruption.

Therefore, in this process of strengthening the culture of integrity, regardless of the size of the structure concerned, and in a similar way to the dissemination of the guide on anti-corruption accounting controls, the authorities have submitted the first version of the *Practical Guide to Internal Anti-Corruption Investigations* to the public, and in particular to companies. This text is subject to consultation of the various economic actors, who may send their comments to the e-mail address consultation.afa@afa.gouv.fr until the 8 April 2022.

While reaffirming the spirit of collaboration between these two authorities, this draft guide proposes some means for companies to design and deploy their own internal anti-corruption investigation system. [1] In addition, this guide aims to clarify several key concepts and to present the issues in this area with a view to assisting companies in making decisions on internal anti-corruption investigations.[2]

In accordance with the structure of the draft guide, it is appropriate to begin by addressing facts that give rise to an anti-corruption investigation (I) and then to discuss points of vigilance in conducting an internal anti-corruption investigation (II). This will enable us to present the proposed elements concerning the follow-up to be given to an internal anti-corruption investigation (III).

I. The events that give rise to internal anti-corruption investigations are both internal and external to the company

Before discussing the circumstances in which an internal investigation is relevant, the draft guide first specifies the facts that give rise to internal anti-corruption investigations. The starting point for the AFA is to consider that the internal investigation, which is already well known in employment law, is a reflex of sound management of an organisation, when it is aware of a violation of the anti-corruption code of conduct, or of situations potentially constituting an offence.[3] According to the concept proposed in the draft guide, an internal investigation is defined as all investigations carried out within an organisation, on its own initiative, in order to objectify facts that may constitute violations of the anti-corruption code of conduct, behaviour that does not comply with the company's procedures or the commission of acts that could be qualified as corruption.[4]

The guide refers firstly to events triggering an investigation occurring in the internal sphere of the company. These are, on the one hand, reports made through the anti-corruption alert system

provided in Article 17 of Law 2016-1691 of 9 December 2016 on transparency, combating corruption and modernising economic life, known as the Sapin II Law,[5] and on the other hand, alerts received through a system for collecting alerts adopted by the company under Article 8 of the same law.[6] Likewise, the company's knowledge of facts may result from an internal audit procedure in the context of a third-level control.[7]

The draft guide goes on to mention events outside the company, such as external alerts collected by opening up the system for collecting alerts to suppliers, subcontractors, external employees or other third parties.[8] It is also specified that in the event of disclosure of information by the press, the announcement of the carrying out of an internal investigation as a direct consequence may reveal an awareness on the part of the company of the seriousness of the facts reproached.[9]

Likewise, the company may become aware of the existence of an abnormal situation through the notification of proceedings by the French or foreign prosecuting authorities. In the first case, it is possible for the company to conduct an internal investigation in a spirit of cooperation to establish the truth, in coordination with the authority concerned, provided that it does not interfere with judicial investigations.[10]

However, for the second case, it is noted that if the company decides to carry out an investigation, it should contact the French authority, which is the only interlocutor for requests for international mutual assistance and should take advice in order to avoid joining the cases covered by the law No. 68-678 of 26 July 1968 *on the communication of documents and information of an economic, commercial, industrial, financial or technical nature to foreign natural or legal persons*, known as the "blocking law".[11]

The draft Guide also refers to external audits as triggers for an internal investigation. This would be the case, for example, for acquisition or certification audits[12], controls and administrative investigations carried out by regulatory authorities or an administration [13], and controls carried out at AFA's initiative .[14]

Finally, it should be noted that the decision to initiate an investigation is a power of the organisation's top management, which is the first to be approached with regard to the prevention and detection of corruption within the company.

II. The guide proposes that certain guidelines be followed when conducting internal anti-corruption investigations

After mentioning the different cases that may trigger an internal anti-corruption investigation, the draft guide proposes some points of attention to be considered when conducting such investigations. For example, the document recommends formalising the procedure before initiating it. It is relevant to include a detailed description of the elements necessary to trigger the investigation, the way in which the investigation should be conducted and its potential consequences.[15]

The aim of this formalisation is to organise the procedures for collecting reports, guaranteeing employees' rights, optimising deadlines and guaranteeing a quality standard.[16] Moreover, the

project suggests as a good practice to formalise guidelines or even a charter for internal investigations.[17]

In addition to specifying that the decision to conduct an internal investigation is attributed ***prima facie*** to the company's top management, as the person primarily responsible for the implementation of the anti-bribery system, the guide provides the possibility of creating a committee of qualified persons with decision-making powers on these matters.[18] As for the actors of the internal anti-corruption investigation, the draft refers to the possibility for the company to choose whether to carry it out itself or to use a third party. In all circumstances, the guide recalls that the person in charge of the investigation must act independently and objectively while aiming to preserve the confidentiality of the process and the rights of employees.[19]

As regards the conduct of the investigation procedure, the draft guide stipulates that in the absence of a specific regulatory framework, certain general principles derived from criminal law and social law must be applied. Thus, the guiding principles of the internal investigation include the **fairness** and **lawfulness** of actions aimed at obtaining evidence, the **proportionality** of the measures with regard to the aim sought[20] and the **protection of employees' privacy**.[21] Similarly, the text refers to the principles of **presumption of innocence** [22] and **discretion**, in addition to the provisions and guarantees arising from the regulations on the **protection of personal data** .[23]

Similarly, the draft Guide refers to procedural guarantees for persons subject to an internal anti-corruption investigation. In application of the above-mentioned principles, internal investigations include a prior obligation to inform the employee.[24] However, by analogy with the rules for harassment, the authorities consider that this principle does not apply in cases where the employee is directly suspected of having participated in the commission of an act of corruption.[25]

Moreover, while this obligation to inform is not absolute when the investigation is carried out directly by the company, this obligation would be more marked in the context of an investigation carried out externally.[26] In any case, the employee must always be informed about the processing of his/her personal data.[27]

As for the conduct of interviews in the framework of the internal anti-corruption investigation, the draft states that the employee must attend the interviews and answer the questions, otherwise his or her disciplinary responsibility will be compromised.[28] Plus, it is specified that, as a matter of principle, the employee does not have the right to be assisted by a representative during interviews. However, in cases where the investigation is conducted by a lawyer appointed by the company, Article 8 of ***Annex XXIV of the Vademecum for lawyers conducting an internal investigation***[29] referred to in the draft allows the employee to be assisted by another lawyer.[30]

As regards the issues related to investigation methods and respect for employees' privacy, some clarifications are given in order to distinguish employees' personal information from professional data. In this respect, the employer may look at documents held by the employee in his office[31] or USB sticks connected to the work computer[32] and access digital files not marked "personal".[33] However, the information collected relating to the private life of the employee, is private and cannot be used to impose a sanction.[34]

Finally, the project mentions the relevance of drawing up a written report containing the method followed, the acts of investigation carried out, the facts established, and the elements collected.[35] It is further clarified that if the internal investigation takes place at the same time as a preliminary investigation, the report must be communicated to the judicial authorities and may determine the conclusion of a Judicial Public Interest Agreement (CJIP). Indeed, the conduct of an internal investigation and the transmission of the report could serve to demonstrate the soundness and effectiveness of the compliance system to the Public Prosecutor and the AFA. [36]

III. The guide proposes elements to be considered downstream at the end of internal anti-corruption investigations

Finally, the draft guide proposes some elements to be considered at the end of the internal anti-corruption investigation. In this respect, if the investigation carried out does not confirm the suspicions of corruption or influence peddling, it can be closed and archived after anonymisation, and the data collected will have to be destroyed within two months.[37] However, when the triggering event of the internal investigation is an alert, it is necessary to inform the subject of the investigation, as well as the author of the alert, of its closure.[38] Similarly, the report should be retained if further action is taken by the company based on the results of the survey.[39]

Conversely, when the investigation confirms the suspicions of corruption or influence peddling and the facts are attributable to a natural person, the company should impose disciplinary sanctions.[40] She may also report the facts to the authorities, although this decision does not affect the possibility of her being held criminally liable. [41]

On this last point, the draft guide specifies that in the event of the legal person being held liable, timely and truthful reporting, as well as the transmission of the report, may reduce the penalties following the conclusion of a CJIP.[42] Similarly, the draft guide warns of a possible increase in fines for unjustified delay or lack of information.[43]

The draft also specifies that, regardless of the judicial or administrative consequences, the results of an internal investigation should be used to update the anti-corruption system. Thus, the measures and procedures that make up the anti-bribery compliance program should be reviewed accordingly, and internal controls or audits should be carried out in order to strengthen the points of vulnerability identified.[44]

Finally, the draft proposes a balanced policy of internal communication in that companies remain free in terms of dissemination to employees and the confidentiality of the survey and the follow-up it intends to give.[45]

[1] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 2 ("This guide, which can be consulted on the AFA and PNF websites, aims to assist companies in implementing an internal investigation while respecting individual rights and freedoms. It describes the facts justifying its launch, the conditions for its implementation and the consequences to be drawn from it").

[2] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 4 – 5 ("This practical guide has the following objectives – to better assist organisations in the design and deployment of their internal investigation system, given its novelty and its rapid development, particularly as a result of anti-corruption alerts and the development of public interest judicial agreements (CJIP); – to draw the attention of economic actors to the most structuring and sensitive points of the internal anti-corruption investigation, while respecting individual rights and freedoms").

[3] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 4 ("When facts likely to constitute violations of the anti-corruption code of conduct or to be qualified as corruption or influence peddling (hereafter "corruption") are brought to the attention of the company and its managers, an internal investigation is a sound management reflex. Its purpose is to objectify these facts to enable the managers to draw the consequences and take the most appropriate decisions in the company's interest. The internal investigation is thus one of the consequences of the internal alert provided for in Article 17 of Law No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, known as the Sapin II Law, and is therefore an integral part of the anti-corruption system.").

[4] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 4 ("Internal anti-corruption investigation refers to all investigations carried out within an organisation, on its own initiative, in order to objectify facts that may constitute violations of the anti-corruption code of conduct, behaviour that does not comply with company procedures or the commission of acts that may be qualified as corruption").

[5] Article 17-II, Law No. 2016-1691 of the 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life ("II. – The persons mentioned in I shall implement the following measures and procedures: […] 2° An internal alert system designed to enable the collection of reports from employees concerning the existence of conduct or situations contrary to the company's code of conduct […].").

[6] Article 8, Law No. 2016-1691 of the 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life ("I. – The report of an alert shall be brought to the attention of the employer's direct or indirect superior or of a person designated by the latter. If the person to whom the alert referred to in the first paragraph of this, I is addressed fails to verify the admissibility of the alert within a reasonable time, it shall be sent to the judicial authority, the administrative authority or the professional bodies. As a last resort, if one of the bodies mentioned in the second paragraph of this, it does not deal with the alert within three months, it may be made public. II. – In the event of serious and imminent danger or where there is a risk of irreversible damage, the alert may be brought directly to the attention of the bodies mentioned in the second paragraph of I. It may be made public. III. – Appropriate procedures for collecting alerts issued by members of their staff or by external and occasional collaborators shall be established by legal persons governed by public or private law with at least fifty employees, State administrations, municipalities with more than 10,000 inhabitants and public establishments for inter-communal cooperation with their own tax status of which they are members, departments and regions, under conditions laid down by decree in the Council of State. IV. – Any person may send a report to the Defender of Rights in order to be directed to the appropriate body for receiving the alert").

[7]Recommendations intended to help legal persons under public and private law to prevent and detect corruption, influence peddling, misappropriation of public funds and favouritism, French Anti-Corruption Agency, 4 December 2020, p. 42 ("[§317] In order to ensure the adequacy and effectiveness of the measures and procedures referred to in II of Article 17 of the law, the undertaking shall develop an internal control and evaluation system, which may be included in its general internal control and audit system. [§318] This system has four objectives: – to monitor the implementation of anti-corruption measures and test their effectiveness; – to identify and understand failures in the implementation of procedures; – to define recommendations or other corrective measures, if necessary, with a view to improving the effectiveness of the anti-corruption system; – to detect, if necessary, acts of corruption. [§319] These controls can be structured around the three levels of control mentioned above [§320] The compliance officer develops a second-level control plan covering the entire anti-corruption system. [§321] For each control, the purpose and scope, the person(s) in charge of the control, the control method (type of measurement, supporting documents, analysis, and evaluation) and, where applicable, the sampling procedures based on a risk analysis are specified. Similarly, the plan provides for the frequency of the control, the expected formalisation, the communication of the results of the control and of the corrective measures that may be put in place, and the arrangements for keeping the documents relating to the controls. [§322]. Breaches identified in the context of second-level controls are the subject of a report approved by the compliance officer, a summary of which may usefully be communicated to the management body and the internal audit department [§323] The adequacy and effectiveness of the measures and procedures that make up the anti-corruption system are regularly assessed through third-level audits. These internal audits aim to ensure that the anti-corruption system complies with the company's requirements, is effectively implemented, and kept up to date. The internal auditor is also asked to ensure that the risk situations identified by the corruption risk map are covered by effective preventive measures [§324] The audits carried out are formalised, documented, and retained. They result in a detailed and documented report, detailing the corrective measures and recommendations made. This report is communicated to the governing body").

[8] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 7 ("If the company wishes to set up a single technical system for collecting alerts in accordance with the AFA's recommendations, it is obliged to open the possibility of reporting, not only to its staff, but also to external and occasional employees. An internal investigation can therefore be based on an external alert, especially as some companies choose to open their internal alert system to third parties (customers, suppliers, tenderers, former employees, etc.)").

[9] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 7 ("In the event of a press disclosure, the company may wish to adopt an external communication strategy to preserve its reputation. A communication on the opening of an internal investigation may make it clear that the company is fully aware of the seriousness of the allegations made against it, its management, or its employees").

[10] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 8 ("When a company learns that it is the subject of a judicial investigation, it can directly or through its lawyers, contact the judicial authority in charge of the procedure – the National Financial Prosecutor's Office (PNF) in the vast majority of cases – and make known its wish to cooperate with the judicial investigations, in particular by having an internal investigation carried out […] In this case, an early exchange makes it possible to ensure the proper coordination of any internal investigation with the investigations carried out within the framework of a judicial enquiry, since private initiative can contribute substantially to strengthening the effectiveness of the judicial authority's action by revealing concealed situations or by preserving evidence that is essential for establishing all responsibilities").

[11] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, pp. 8 – 9 ("Several hypotheses are likely to arise: – the request comes from a foreign judicial authority: the company must quickly contact the French judicial authority, as only the latter is likely to be its contact for the execution of a request for international mutual assistance in criminal matters on national territory. – the request is made by any other foreign authority (administrative, regulatory, etc.). It is likely to be covered by law No. 68-678 of 26 July 1968 relating to the communication

of documents and information of an economic, commercial, industrial, financial or technical nature to foreign natural or legal persons, known as the "blocking law". It is then up to the legal entity to inform the competent minister without delay. The latter may directly or via its lawyer turn to the Strategic Information and Economic Security Service (SISSE) for support and assistance").

[12] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 9 ("An internal investigation may be initiated because of the discovery of misstatements during an external audit. For example, this could be an acquisition audit, the audit of a partner or the annual certification of accounts for companies subject to this obligation, or those that voluntarily submit to it. In the case of the certification of accounts, the professional practice standards (including NEP-240) require the auditor to consider the possibility of fraud in his work. The auditor must identify and assess the risk of material misstatement of the accounts, defined as one or more inaccurate, inadequate, or omitted accounting or financial disclosures that could influence the judgement of the user of the information. Such material misstatements may result from error or fraud, which is distinguished from error by its intentional nature. If the due diligence performed by the auditor in the context of the certification of the accounts is not aimed at detecting corruption, his work may incidentally reveal the procedures for concealing the accounts of such acts (unjustified or unwarranted transactions), provided that these anomalies are substantial").

[13] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 9 ("The opening of an internal investigation may also be motivated by the revelation of anomalies during an audit carried out by a regulatory authority (AMF, ACPR, ANC14, etc.), an administration (tax, customs, etc.) or a private body entrusted with a public service mission (URSSAF, for example). Some of these authorities are subject to the provisions of Article 40 of the Code of Criminal Procedure, which requires them to notify the public prosecutor without delay of any crimes or offences that come to their attention in the course of their duties. Although the controls carried out by these entities are not primarily aimed at detecting corruption, they sometimes focus on measures to prevent and detect offences that are the beginnings of corruption (forgery, breach of trust, misuse of corporate assets) or its consequences (handling stolen goods, money laundering, etc.), and which reveal attempts to conceal criminal activities").

[14] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 10 ("Finally, the decision to open an internal investigation may be justified by the existence of anomalies revealed by an own-initiative control of the AFA. The nature of this audit may indeed bring to light procedural weaknesses likely to encourage the commission of corruption or incidentally lead to the discovery of anomalies likely to be considered as constitutive elements of an offence").

[15] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, pp. 11 – 12 ("It is recommended that the internal investigation procedure be formalised before it is carried out [...] This formalisation should be as complete as possible and may usefully describe:18 – the criteria necessary to trigger an internal investigation; – the various stages of the internal investigation procedure; – the quality and role of the actors called upon to intervene at each stage (management body, statutory or ad hoc steering committee, company departments, investigation team, etc.); – the format and composition of the investigation team (see II. 2); – the investigation methods and means that may be used (see II. 3); – the measures to guarantee the confidentiality of the investigation (see II. 4). the format and composition of the investigation team (see II. 2); – the investigation methods and means that can be used (see II. 3); – the measures for guaranteeing confidentiality and the methods for keeping and storing data; – the criteria for determining the follow-up to the internal investigation").

[16] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 10 ("This formalisation enables the company to achieve several key objectives: – to organise the procedures for collecting and storing evidence in order to guarantee its admissibility and protect it from any alteration, particularly with a view to disciplinary and legal proceedings; – to guarantee the conditions for an investigation that respects the rights of the employees implicated, particularly the presumption of innocence and the right to privacy. In this respect, it is recalled that the employer is obliged to inform the social and economic committee[17] (CSE) of all the means of investigation/monitoring of employees' activities that may be implemented in the context of an internal investigation; – optimise the time taken to implement the investigation by taking advantage of a procedure that defines in advance the objectives, the players, the governance, the means of investigation available, the methods of determining the follow-up to be given to the investigation, and the methods of conservation and archiving. Optimising the duration of the internal investigation is even more important as it is constrained by the limitation periods in disciplinary and judicial matters (see III. 1), the need to preserve evidence and the sincerity of testimonies, and the possible negative consequences of disclosing confidential information; – guarantee a quality standard for all internal investigations in order to avoid the risk of distortion in the way they are handled from one investigation to another, by ensuring in particular that investigations can be traced in order to be in a position to respond to the controls carried out by the AFA pursuant to III of Article 17 of the Sapin II Law").

[17] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, pp. 11 – 12 ("Finally, it may be a good practice to formalise the guiding principles followed by the investigators, the rights of employees in this context and the behaviour expected of them by the employer in an easily accessible "Internal Investigation Charter" for employees").

[18] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 12 ("The strategic decision to launch an internal investigation is the responsibility of the company's management or of qualified persons appointed by it. An ad hoc committee of such persons may usefully be set up to decide collectively on the action to be taken on an internal alert and on whether or not to open an investigation in order to confirm or refute the suspicions of corruption").

[19] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 12 ("Depending on the resources and skills available within the company, the company may carry out the internal investigation itself. If necessary, but also when there is an internal conflict of interest, the investigation can be entrusted to a third party, mandated for this purpose, or to a mixed team. In the latter two cases, it is appropriate to designate a contact person within the company who is responsible for conducting the investigation and monitoring it. When appointing the members of the investigation team, the governing body should be vigilant as to their training and expertise, the independence of their action (in particular the management of possible conflicts of interest) and their objectivity [...]").

[20] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 15 ("The means of investigation specific to the company, as employer or co-contractor, and which aim to collect and preserve the means of proof necessary to establish the facts, are more limited legally and are not of the same nature as those available to the prosecuting authorities. As the principle of freedom of evidence is not absolute in either social or civil law, the company must therefore respect the following guiding principles: not to collect evidence by means of illegal or unfair procedures or procedures that disproportionately infringe the rights of individuals and individual and collective freedoms").

[21] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 15 ("Respect for this principle is particularly important with regard to the right to privacy of employees. The Court of Cassation has consistently held that "the right to evidence can only justify the production of elements that infringe on privacy if this production is essential to the exercise of this right and the infringement is proportionate to the aim pursued". The Court was followed on this point by the Conseil d'État which, in a judgment of March 2, 2020, concluded that "investigations

carried out in the context of an internal enquiry must be justified and proportionate in relation to the facts that gave rise to the enquiry and must not excessively interfere with the employee's right to privacy»").

[22] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 15 ("[…] A fortiori in the case of an internal anti-corruption investigation, which by definition is likely to lead to criminal proceedings, the principle of the presumption of innocence must be respected in full").

[23] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 16 ("Furthermore, the principle of discretion, which consists in not unnecessarily harming the persons concerned by the investigation, derives both from the right to privacy and from respect for the presumption of innocence. Finally, the use of a certain number of technological means of investigation allowing the massive processing of digitised documents ("eDiscovery") implies the collection and processing of personal data which must therefore comply with the processing rules in force, in particular the General Data Protection Regulation (GDPR) in the European Union and Law No. 78-17 of 6 January 1978, known as the "Informatique et Libertés" law in France, which is based on a few key principles").

[24] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 15 ("[…] A fortiori in the case of an internal anti-corruption investigation, which by definition is likely to lead to criminal proceedings, the principle of the presumption of innocence must be respected in full").

[25] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 18 ("Under French labour law, the employee who is the subject of an internal survey must in principle be informed. Any personal information concerning an employee cannot be collected by a device that has not been brought to his or her attention beforehand. This obligation of loyalty concerns not only the system implemented but also its purpose and scope. In the context of an internal anti-corruption investigation, this obligation may constitute a risk of altering or destroying legal evidence. In this case, care should be taken to ensure that actions taken in the context of the internal investigation do not contribute to the tampering of such evidence").

[26] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 18 ("However, case law has very recently specified that "an investigation carried out within a company [without informing the employee concerned], following the denunciation of acts of moral harassment is not subject to the provisions of Art. L.1222-4 of the Labour Code and does not constitute unfair evidence as the result of a clandestine procedure for monitoring the employee's activity ".Thus, when an internal investigation is conducted following harassment, the alleged perpetrator does not have to be informed. By analogy, the seriousness of the facts covered by an internal anti-corruption investigation could justify the latter not being subject to the employer's obligation to inform the employee, subject in particular to the proportionality and fairness of the means implemented").

[27] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 18 ("However, this obligation to inform varies according to whether the investigation is conducted internally or externally. Indeed, in the context of an internal investigation, case law more readily accepts that the employee concerned is not informed, without this failure rendering the evidence resulting from the investigation inadmissible, subject to the fairness of the means implemented for the investigation. On the other hand, in the context of an investigation carried out by an external body, the employee must always be informed in advance, failing which he or she must not have been kept out of the investigation or the investigation report must have responded to all his or her objections. Employees must also be informed about the processing of their personal data. The RGPD requires the information of any person whose personal data is collected and processed […]").

[28] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 19 ("In application of the principle of loyal performance of the employment contract set out in Article L.1222-1 of the Labour Code, the employee must attend the interviews organised during his working time, unless there is a legitimate reason for his absence, answer his employer's questions concerning the tasks carried out for the employer and report on his activity. If the employee does not attend the interview without a legitimate reason, the employer is entitled to draw all the consequences, including disciplinary ones").

[29]Article 8, Annex XXIV to the Internal Rules of the Paris Bar, Vademecum of the lawyer in charge of an internal investigation ("[The investigating lawyer] shall inform the person interviewed that he or she may be assisted or advised by a lawyer when it appears, before or during the interview, that he or she may be accused of an act at the end of the internal investigation").

[30] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, pp. 19 – 20 ("At this stage, there is no right to be assisted by a staff representative during the interviews [… If the company has decided to entrust the internal investigation to a lawyer, the Guide of the Conseil National des Barreaux (CNB), based on the Rules of Procedure of the Paris Bar Association, specifies that the lawyer must indicate to the person interviewed that he or she may be assisted or advised by a lawyer if it appears, before or during the interview, that he or she may be reproached for an action following the internal investigation. The lawyer in charge of conducting the internal investigation must also specify that he or she is not the lawyer of the employee interviewed and that the elements emerging from the interview may be used in disciplinary, civil or even criminal proceedings").

[31] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 22 ("Thus, the employer has the right to inspect documents held by an employee in his office, even when he is not present, provided that there is no indication that they are personal and that their filing or storage is not obviously personal. The employer may also search an employee's safe which is reserved for exclusively professional use").

[32] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 22 ("[…] a USB key connected to a professional computer is presumed to be professional, even if it belongs personally to an employee, as long as it is connected to a computer tool made available to the employee by his employer for the performance of his employment contract […]").

[33] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 22 ("In principle, the employer can access all employees' work-related material and its contents. Files stored by the employee on the computer's hard drive and the contents of his or her work e-mail are presumed to be professional. However, if the word "personal" is written on these files or in the subject line of e-mails, this presumption is reversed, and the employer is not allowed to access the files.").

[34] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 22 ("If it turns out that files or e-mails from the professional e-mail system that have not been identified as personal are in fact part of the employee's private life, the employer cannot use them to punish the employee, even if the employee has made unauthorised use of the professional material entrusted to him").

[35] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 23 ("The drafting of an internal investigation report is strongly recommended. As indicated in the AFA's recommendations, this involves recording, at the very least,

the investigation method followed, all the investigative acts carried out, and all the facts established, and elements gathered that may support or remove the suspicion. The report also includes a description of the facts at the origin of the investigation. It includes an appendix containing all the elements collected").

[36] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 23 ("If the internal investigation takes place at the same time as a preliminary investigation or a judicial inquiry, the report should be transmitted to the judicial authorities and may constitute a token of willingness to cooperate, making it possible to consider the conclusion of a CJIP for legal persons and of an appropriate judicial measure for natural persons. In this respect, the production of an internal investigation report is also an indication of the soundness of the legal entity's anti-corruption compliance system, which the public prosecutor's office should assess with the support of the AFA.").

[37] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 26 ("If the investigation is not followed up, only the personal data in the file containing the alert that could allow the identification of the author of the alert and the persons concerned must be archived, after anonymisation, or destroyed within 2 months of the end of the investigation").

[38] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 26 ("If the event giving rise to the investigation is an alert, if the alert system so provides, the author and the person concerned are informed that the investigation has not made it possible to corroborate the elements reported, in accordance with the recommendations of the AFA").

[39] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 26 ("The report is retained once the investigation is followed up. Follow-up means any decision taken to address the consequences of the internal alert. Follow-up is not limited to disciplinary or judicial action and extends, for example, to the adoption or modification of internal rules and procedures, or to organisational changes").

[40] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 27 ("The demonstration, through the internal investigation, of acts of corruption by a person belonging to the organisation must give rise to the application of the disciplinary sanctions provided for by the organisation's internal regulations or any other mechanism enforceable against the employee according to the applicable legislative and regulatory framework, in accordance with the AFA's recommendations. The application of these sanctions is decided by the governing bodies. They are proportionate to the seriousness of the behaviour in question and fall within the range of sanctions provided for by the disciplinary system").

[41] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 27 ("The company may decide to report the facts to the judicial authority, which is not bound by the conclusions of the internal investigation. Therefore, whatever the conclusions, the criminal liability of the legal person may also be sought").

[42] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 28 ("Early and truthful reporting by the company to the judicial authority of the criminal acts of which it is aware, and the communication of the internal investigation carried out will be likely to constitute elements reducing the possible CJIP fine").

[43] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 28 ("Conversely, any delay in transmitting the information resulting from the internal investigation or any partial communication of the elements gathered by the company may be considered as an aggravating factor when calculating a possible CJIP fine").

[44] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 30 ("The points of vulnerability identified during the internal investigation and the follow-up of the remedial measures taken to prevent the commission of similar acts in the future should be the subject of particular vigilance during subsequent internal control campaigns or internal audit missions").

[45] Draft practical guide – internal anti-corruption investigations, French Anti-Corruption Agency and Parquet National Financier, Version 1, March 2021, p. 31 ("The company is free to decide whether to disseminate the investigation, its results, and the action it intends to take to its employees or to keep it confidential. However, in the event that no sanctions are taken by management following serious facts established by the internal investigation, the message transmitted within the company may be similar to a validation of the criminal acts and thus encourage the repetition of these facts").

The French DPA ("Convention judiciaire d'intérêt public") on the way to simplification

On 4 August 2021, a new Decree was promulgated aiming to simplify formalities required for the conclusion of the CJIP between Public Prosecutors Office and the legal person concerned.

Since the Sapin II law on transparency, fighting corruption and modernisation of the economy published on 10 December 2016, the Judicial Public Interest Agreement (hereinafter "CJIP") is an alternative to prosecution offered by a French Public Prosecutor to a legal entity targeted by criminal inquiries or investigations regarding a limited type of offenses which allows the latter to enter into an agreement and avoid criminal charges in exchange of a fine and the implementation of a compliance program[1].

Initially, it was intended to apply to a certain number of offenses such as corruption and influence peddling. However, since 2016, two additional laws[2] and a decree[3] had extended the scope of application of the CJIP to a certain number of tax and environmental offenses.

Yet, on 4 August 2021 and after some years of practice, a new Decree[4] was promulgated aiming to simplify the formalities required for the conclusion of the CJIP between the Public Prosecutor's Office and the legal person concerned.

The previous procedural framework made it mandatory for the French Public Prosecutor to address the offer of a CJIP *via* a registered letter with acknowledgement of receipt[5] and to grant the legal entity with a time frame for its consideration. The legal representatives of the legal entity then had to inform the Public Prosecutor of the acceptance or refusal of the CJIP by letter or through a statement made by the latter to the Public Prosecutor, who would draw up a formal report [6].

The 2021 Decree repeals all of the above and instead provides that "*the offer for a CJIP is signed by the public prosecutor and, if accepted, by the representatives or lawyers of the legal entity*"[7]. In that sense, the Decree implements the rights for the legal entity to be assisted by a counsel[8].

In the same vein, the obligation to pay the fine provided for in the CJIP with a certified cheque no longer applies [9].

[1] Article 22 of the Law No 2016-1691 on Transparency, Fight Against Corruption and Modernisation of Economic Life, "Sapin II Act", 9 December 2016.
[2] Articles 14 of the Law No 2018-898 on the Fight Against Fraud, 23 October 2018; Article 15 of the Law No 2020-1672 on the European Prosecutor's Office, Environmental justice and Specialised Criminal Justice, 24 December 2020.
[3] Decree No 2017-660 on the Judicial Public Interest Agreement and on Judicial Bond, 27 April 2017.
[4] Decree No 2021-1045 on Adapting and Simplifying the Procedure Applicable to the Judicial Public Interest Agreement and on Assigning Specialised Assistants, 4 August 2021.
[5] Article 15-33-60-2 para. 1 of the French Code of criminal procedure, as it stood before the Decree No 2021-1045 of 4 August 2021 ("the offer of the agreement is addressed to the inquired legal entity's representatives by means of a registered letter with acknowledgement of receipt").
[6] Article 15-33-60-2 last para. of the French Code of criminal procedure, as it stood before the Decree No 2021-1045 of 4 August 2021 ("The public prosecutor shall set the time period within which the legal entity addresses its acceptance or refusal of the agreement offer via signed letter by its legal representatives or by declaration made by them before the public prosecutor who shall draw up a statement report").
[7] Article R.15-33-60-2 last para. of the French Code of criminal procedure ("The offer for the agreement shall be signed by the public prosecutor and, if accepted, by the legal representatives of the legal entity assisted, if appropriate, by its lawyer").

[8] Article R.15-33-60-2 para. 1 of the French Code of criminal procedure ("Should he wants to offer a Judicial Public Interest Agreement; the public prosecutor shall inform the inquired legal entity of its right to be assisted by a lawyer").
[9] Article 15-33-60-6 of the French Code of criminal procedure, as it stood before the Decree No 2021-1045 of 4 August 2021 ("Should the agreement provide for the payment of a fine of public interest, the payment shall be made to an accountant of the General Directorate of Public Finance and exclusively [...] by certified cheque [...]").

LVMH concludes a CJIP and escapes prosecution in the "Squarcini case"

The President of the Paris Judicial Tribunal validated on Friday, December 17th, the Judicial Public Interest Agreement ("*CJIP*") between the Public Prosecutor and LVMH Moët Henessy – Louis Vuitton ("*LVMH*") for acts originating from a former LVMH consultant, Mr. Bernard Squarcini, and ordered LVMH to pay a public interest fine of 10 million euros.

This fifteenth *CJIP* concluded in four years, only a few months after the one concluded by JPMorgan Chase Bank, National Association, is further evidence of the practice of negotiated justice in white collar crime. This transaction bears witness to renewed criticisms of this mechanism, especially regarding the victims and regarding the natural persons being investigated.

I. The CJIP concluded between the Public Prosecutor and LVMH allowed the latter to avoid admitting guilt for the actions undertaken by its former consultant, Mr. Bernard Squarcini

The facts behind this *CJIP* would have all been committed by Mr. Bernard Squarcini, former head of the French Domestic Intelligence Agency ("*DGSI*") from 2008 to 2012, who later became a private consultant for LVMH in 2013 through his consulting company, KYRNOS CONSEIL. He was hired to consult and assist in various fields such as the fight against counterfeiting, parasitism, or protection against industrial espionage [1].

On the one hand, several actions during his consulting mission for LVMH are being held against him, namely:

- Influence peddling, disclosure of information covered by professional secrecy and confidentiality of investigations and concealment of such disclosure, for having used his influence over public authorities (judiciary police, magistrates, the *DGSI* and authorities at Le Bourget airport) in order to obtain information on proceedings involving LVMH and to facilitate administrative procedures [2].
- Complicity in the fraudulent collection of personal data, illegal exercise of regulated professions (private security and private research agents) and invasion of privacy, for having, together with Mr. Pierre Godé, former Vice President, and director of LVMH, spied on FAKIR association using the company 12F, which had contracted with the company JCB CONSULTING that had informants within FAKIR association. This occurred during the production of the satirical documentary "*Merci Patron!* ", which covered the dismissal of a couple by a LVMH subcontractor for relocating abroad [3].

On the other hand, Mr. Squarcini is also accused of breach of trust committed in 2008, while being the head of the of the French Domestic Intelligence Agency, for having mobilized his units to investigate allegations of blackmail regarding LVMH [4].

It must be noted that all of the facts and qualifications laid down by the Public Prosecutor in the *CJIP* are described exclusively through the actions of Mr. Bernard Squarcini, and that it is clearly stated: "*the facts in the matter* [...] *are likely to concern LVMH*".

At no point does the wording of the *CJIP* describe and legally qualify the facts for which the legal person is being investigated, even though it is a party and signatory. Although the *CJIP* mechanism only applies to a limited number of offenses [5], the exact qualification can only be found in the validation decision: "*LVMH -Moët Henessy – Louis Vuitton (...)* [is being] *investigated for influence peddling* "[6].

The *CJIP* also states that the *"agreement covers all the facts, including related facts, that may be imputed to LVMH for the period 2008-2016, which have been brought to the attention of the Public Prosecutor's Office and the investigating magistrates during the judicial investigation"* [7]. Thus, it appears that this agreement covers facts over a period of eight years, for which no details are provided, and simply refers to the judicial investigation.

II. The CJIP concluded between the Public Prosecutor and LVMH sanctioned the latter to pay a public interest fine of 10 million euros

Pursuant to the *CJIP*, LVMH was only fined 10 million euros, as some of the victims did not claim any damages or made claim over damages that could not be compensated [8]. The theoretical maximum amount of the public interest fine was estimated at more than 14 billion euros [9].

Such decrease from the theoretical amount is explained by the uncertainty of the benefits that LVMH drawn from the breaches observed [10], coupled with the long-standing nature of the facts at hand, the overhaul of the group's legal, ethics and public affairs organization, and the strengthening of the ethics and compliance framework, especially with the recruitment of a director in charge of these issues who has significant material and financial resources [11].

In its validation decision, the President of the Paris Judicial Tribunal highlighted the company's cooperation and the means implemented to prevent the reiteration of similar acts. She noted that LVMH had produced exhibits related to its organization, to the creation of the Ethics and Compliance department, and to the measures and procedures set up [12], thus showing once again the importance of a governance approach that is concerned about breaches of probity, as well as the importance of setting up compliance programs within companies.

The amount of the public interest fine imposed on LVMH has nevertheless been criticized by some as it only represented "*02% of LVMH's turnover* "[13], despite the legal limit for this fine is 30% of the average annual turnover calculated on the basis of the last three known annual turnovers [14]. Others welcome such amount as it was much higher than the one that could have been imposed on LVMH in the event of a criminal conviction [15]. Indeed, influence peddling is punished under Article 433-12 of the French Criminal Code by a fine of 500,000 euros, which can be increased to twice the amount of the proceeds of the offence [16] and five times higher when the offence is committed by legal entities[17].

III. The conclusion of this CJIP once again questions the scope of the victims' rights and the possible consequences for physical persons implicated in the facts recognized by the legal person

This *CJIP* is the result of the development of negotiated justice in criminal matters in recent years. It has been the subject of many criticisms as it has apparently been misunderstood by the victims, which can indeed assert their prejudice [18], but never have a direct impact on the conclusion of such a negotiated agreement as their consent is not legally required for the conclusion and as they may not appeal the Judicial Tribunal validation decision [19].

Specifically, two victims objected to the *CJIP* validation and challenged its validity [20]. The lawyer for one of them reportedly stated that the agreement appeared to have been "*written by LVMH*" and that "*this case* deserve[d] *a true public and adversarial debate* "[21].

In response, a magistrate was quoted admitting that the *CJIP* could be "*frustrating*" but "*Justice* [did] *not let its guard down*" by resorting to this mechanism [22]. The President of the Paris Judicial Tribunal justified the use of this procedure by "*the involvement of the legal entity in the facts referred to; the duration of the investigations* (…) *the date of the facts, assessed in the light of the need for a speedy and efficient handling of proceedings over offences against probity*" [23].

In any event, this *CJIP* puts an end to the proceedings against LVMH in the "Squarcini case". Nevertheless, conflicts may still arise between the parties involved as the fate of several individuals under investigation, including Mr. Bernard Squarcini [24], is still pending. All the more so as LVMH, during the validation hearing, clearly accepted "*through the voice of its representative, the dysfunctions observed* "[25]. ■

[1] Judicial Public Interest Agreement between the Public Prosecutor at the Paris Judicial Tribunal and LVMH Moët Hennessy – Louis Vuitton, December 15, 2021, §3 ("Bernard SQUARCINI was the Central Director of Internal Intelligence (DCRI) from 2008 to May 2012. After ceasing his duties as Central Director of Internal Intelligence in May 2012, he became a private consultant through his consulting company KYRNOS CONSEIL (…) A consulting contract was signed on March 1, 2013, for the purpose of providing consulting and assistance services to LVMH in the following areas: combating counterfeiting, parasitism and the illegal parallel market; protection against industrial espionage and preventive hacking and management of crisis situations").
[2] Judicial Public Interest Agreement between the Public Prosecutor at the Paris Judicial Tribunal and LVMH Moët Hennessy – Louis Vuitton, December 15, 2021, §5 ("Bernard SQUARCINI was then the subject of new investigations (…) which seemed to show that he had used his influence while a consultant for LVMH to "unlock situations in the public sphere" and to obtain classified information or information covered by secrecy (professional secrecy, confidentiality of investigations or secrecy within the meaning of Article 226-13 of the French Criminal Code). (…) The Public Prosecutor's Office considers that these facts are likely to be qualified as influence peddling, compromise and concealment of a violation of professional or investigation secrecy, which Bernard SQUARCINI contests").
[3] Judicial Public Interest Agreement between the Public Prosecutor at the Paris Judicial Tribunal and LVMH Moët Hennessy – Louis Vuitton, December 15, 2021, §6 ("Bernard SQUARCINI was also criticized for the conditions under which he intervened in relation to the actions of the FAKIR association. (…) Pierre GODÉ had charged Bernard SQUARCINI with investigating this association and preserving the holding and security of the general assembly. It appeared that Bernard SQUARCINI, in connection with Pierre GODÉ and Laurent MARCADIER, had then called upon the company 12F directed by Hervé SEVENO, which had for its part concluded a contract with the company KB CONSULTING directed by Jean-Charles BRISARD, which would have had, without approval, informers within FAKIR")
[4] Judicial Public Interest Agreement between the Public Prosecutor at the Paris Judicial Tribunal and LVMH Moët Hennessy – Louis Vuitton, December 15, 2021, §7 ("Finally, Bernard SQUARCINI was accused of using the resources of the State by having his services carry out an investigation in 2008, when he was the Central Director of Internal Intelligence (DCRI), in order to identify the author of a blackmail received on an LVMH email account. Bernard SQUARCINI considered that the intervention of the DCRI was in accordance with the mission of this service. The Public Prosecutor's Office considers that, in view of the circumstances, and in the absence of an attack on national security and an attack on the country's economic assets, the DCRI did not have the authority to intervene, so that its referral to and intervention in the case are likely to be qualified as a breach of trust, which Bernard SQUARCINI contests").
[5] Article 41-1-2 of the French Criminal Procedure Code ("I. – As long as the public prosecution has not been initiated, the Public Prosecutor may propose to a legal entity accused of one or more of the offenses provided for in Articles 433-1, 433-2, 435-3, 435-4, 435-9, 435-10, 445-1, 445-1-1, 445-2 and 445-2-1, the penultimate paragraph of Article 434-9 and the second paragraph of Article 434-9-1 of the Criminal Code and money laundering, for the offenses provided for in Articles 1741 and 1743 of the General Tax Code and money laundering, as well as for related offenses").
[6] Validation decision of a Judicial Public Interest Agreement, Paris Judicial Tribunal, December 17, 2021 ("In view of the proceedings against: LVMH-Moët Hennessy-Louis Vuitton (…) investigated for influence peddling").
[7] Judicial Public Interest Agreement between the Public Prosecutor at the Paris Judicial Tribunal and LVMH Moët Hennessy – Louis Vuitton, December 15, 2021, §8 ("This agreement covers all the facts, including related facts, that may be imputed to LVMH for the period 2008-2016, which have been brought to the attention of the Public Prosecutor's Office and the investigating magistrates during the judicial investigation No. JI819 11000002").

[8] Judicial Public Interest Agreement between the Public Prosecutor at the Paris Judicial Tribunal and LVMH Moët Hennessy – Louis Vuitton, December 15, 2021, §14 and 15 ("In a letter from its counsel dated December 9, 2021, HERMES INTERNATIONAL did not assert any prejudice likely to be compensated under the present agreement. Counsel for Mr François RUFFIN and the FAKIR association has allowed the ten-day period to expire, after which his clients could formulate their claim for compensation under the present agreement").

[9] Judicial Public Interest Agreement between the Public Prosecutor at the Paris Judicial Tribunal and LVMH Moët Hennessy – Louis Vuitton, December 15, 2021, §9 ("The theoretical maximum amount of the public interest fine is therefore €14,514,700,000"); §12 ("The total amount of the public interest fine is therefore set at 10 (ten) million euros").

[10] Judicial Public Interest Agreement between the Public Prosecutor at the Paris Judicial Tribunal and LVMH Moët Hennessy – Louis Vuitton, December 15, 2021, §10 ("The benefits that LVMH has derived from these breaches are very difficult to evaluate on an accounting basis or objectively by means of profits, so that the agreement of the parties must prevail").

[11] Judicial Public Interest Agreement between the Public Prosecutor at the Paris Judicial Tribunal and LVMH Moët Hennessy – Louis Vuitton, December 15, 2021, §11 ("But the long-standing nature of the facts in hand (20082016), the overhaul of LVMH's legal, ethics and public affairs organization the strengthening of the Group's ethics and compliance system since 2015 with, in particular, the recruitment of a director in charge of ethics and compliance with a team present in Europe, the United States and Asia and with a substantial budget, are also taken into account as factors in assessing the amount of the public interest fine").

[12] Validation decision for a Judicial Public Interest Agreement, Paris Judicial Tribunal, 17 December 2021 ("The degree of cooperation of the legal person with the judicial authority and the means implemented to prevent the repetition of similar facts should also be considered. (…) It has produced a number of documents relating to its organization, the creation of the ethics and compliance department, the measures and procedures implemented since 2015 and the termination of the contracts linking it with the protagonists of the judicial investigation file").

[13] "In the Squarcini case, the courts ratify an agreement with LVMH, which does not satisfy François Ruffin", Le Monde, December 18, 2021 ("If we make them pay, let's get them pay dearly since the law provides for a fine of up to 30% of turnover! Ten million euros is 0.02% of LVMH's turnover." At the validation hearing of the CJIP on Friday, Mr. Ruffin, a journalist who became a deputy for the Somme ("La France insoumise"), vituperated against this convention (…)").

[14] French Criminal Procedure Code, Article 41-1-2 1° ("1° Pay a public interest fine to the Treasury. The amount of this fine shall be set in proportion to the benefits derived from the breaches observed, up to a limit of 30% of the average annual turnover calculated on the last three annual turnovers known on the date on which the breaches were observed. Payment may be staggered, according to a schedule set by the public prosecutor, over a period of no more than one year, as specified in the agreement; (…)").

[15] "Espionage on François Ruffin: LVMH pays 10 million euros in fines and avoids prosecution", Le Monde, December 17, 2021 ("[Jacqueline Laffont] also emphasized the fact that with this CJIP the fine now due by LVMH to the Treasury is "five times greater" than the maximum fine incurred in the event of a criminal trial.").

[16] French Criminal Code, Article 433-12 ("Is punished by five years' imprisonment and a fine of €500,000, the amount of which may be increased to twice the proceeds of the offense, the fact, by anyone, of soliciting or agreeing, at any time, directly or indirectly, offers, promises, gifts, presents or advantages of any kind, for himself or for others, to abuse or have abused his real or supposed influence in order to obtain from a public authority or administration distinctions, jobs, contracts or any other favorable decision").

[17] French Criminal Code, Article 131-38 ("The maximum fine applicable to legal persons is equal to five times that provided for physical persons by the law that punishes the offense").

[18] French Criminal Procedure Code, Article 41-1-2 ("(…) The victim is informed of the decision of the Public Prosecutor to propose the conclusion of a judicial public interest agreement to the accused legal entity. The victim shall provide the Public Prosecutor with any information that may help to establish the reality and extent of his prejudice. (…)").

[19] French Criminal Procedure Code, Article 41-1-2 ("The decision of the president of the tribunal, which is notified to the accused legal person and, where applicable, to the victim, is not subject to appeal").

[20] Validation decision of a Judicial Public Interest Agreement, Paris Judicial Tribunal, December 17, 2021 ("François RUFFIN, assisted by his counsel, and the FAKIR association, duly represented, were heard and opposed the validation of the said agreement, considering that this procedure was not well founded").

[21] "In the Squarcini case, the courts ratify an agreement with LVMH, which does not satisfy François Ruffin", Le Monde, December 18, 2021 ("This agreement gives the impression that it was written by LVMH, denounced Me Alexandre Merdassi in the name of Mr. Ruffin and Fakir. This case deserves a real public and adversarial debate").

[22] "In the Squarcini case, the courts ratify an agreement with LVMH, which does not satisfy François Ruffin", Le Monde, December 18, 2021 ("The use of transactional justice to extinguish a public action can "frustrate" conceded the Paris Public Prosecutor, Eric Serfass. "Justice does not let its guard down with this CJIP, it passes," he assured").

[23] Validation Order of a Judicial Public Interest Agreement, Paris Judicial Tribunal, December 17, 2021 ("In this case, the use of this procedure is based on : the involvement of the legal entity in the facts referred; the duration of the investigations, i.e. the opening of an investigation on February 17, 2011; the date of the facts as referred to in the judicial public interest agreement (taking place – including related offenses – between 2008 and 2016), assessed in light of the need for speedy and efficient handling of the proceedings over breach of probity").

[24] Validation Order of a Judicial Public Interest Agreement, Paris Judicial Tribunal, December 17, 2021 ("On December 2, 2021, one of the investigating judges of this court – seized of an investigation concerning a number of defendants including Bernard SQUARCINI, under investigation for various charges, including influence peddling, compromising, concealment of violation of professional secrecy, complicity by instigation of fraudulent collection of personal data, illegal exercise of regulated professions, illegal exercise of private research agent, invasion of privacy, or breach of trust").

[25] Validation Order of a Judicial Public Interest Agreement, Paris Judicial Tribunal, December 17, 2021 ("The company is represented at the hearing today. It has stated that it assumes, through the voice of its representative, the dysfunctions observed").

D.

A SPECIAL FOCUS ON CORPORATE SOCIAL AND ENVIRONMENTAL RESPONSIBILITY

The challenges of environmental criminal law in the light of the deferred prosecution agreement in environmental matters

On September 26, 2019, the French automotive lubricants production site of the company Lubrizol caught fire near the city of Rouen. During that fire, "*nearly 10,000 tonnes of chemicals were burnt, while a huge cloud of black smoke 22 km long was formed*[1]". Consequently, Lubrizol was prosecuted and investigated for charges of "*spilling harmful substances into water and discharging into freshwater harmful substances for fishes*[2]".

This ecological catastrophe has brought environmental protection back to the heart of French legislator's concerns. Indeed, in August 2021, the French environmental code was expanded with several new articles, one of which provides for the creation of an offence of ecocide.

This willingness to fight against environmental damage, to prosecute, and punish legal entities guilty of such acts has also been materialised by the introduction into the French criminal arsenal of a new deferred prosecution agreement (hereinafter "CJIP"), this time in environmental matters. This CJIP, largely inspired by the pre-existing model for the fight against corruption implemented by the "Sapin II" law, was used for the first time at the end of 2021.

I. The introduction of the environmental CJIP into the French criminal law landscape

In 2016, the CJIP was introduced into French law within the area of breach of probity by the "Sapin II" law [3]. It allows the public prosecutor to propose to a legal person accused of corruption, influence peddling or laundering certain tax fraud offences. The particularity of this alternative criminal procedure is that it can be set up before the public prosecution[4] is initiated or even when a judicial procedure has already been opened[5].

The CJIP creation is a reaction to the numerous financial scandals that have shaken up France in recent years, particularly the Cahuzac affair. The introduction of the environmental CJIP follows the same logic. Indeed, in view of the growing debate on the protection and preservation of the environment and the growing awareness of individuals and groups, even the Constitutional Council was keen to point out that "*the environment protection, the common heritage of human beings, is an objective of constitutional value* [6]".

Although environmental regulations already exist, the public authorities must now ensure better punishment of environmental offences. The Ministry of Justice recently reminded the public prosecutor's offices that "*they must define a criminal policy adapted to local environmental issues and ensure coordinated judicial treatment of environmental offences*[7]".

In addition to the lack of an appropriate criminal policy, the Minister of Justice assessed the problems encountered in the area of environmental litigation. According to him, environmental offences are not prosecuted enough. Indeed, "*about 20,000 cases are handled each year by the public prosecutor's office, 75% of the judicial response is made up of alternatives to prosecution, and this area of litigation represents barely 1% of all the sentences handed down each year by the courts*[8]".

On the basis of these various observations, French criminal law finally welcomed the environmental CIJP thanks to Articles 15 to 25 of the 24 December 2020 Law on the European Public Prosecutor's Office, environmental justice and specialised criminal justice, within the Code of Criminal Procedure[9].

The Ministry of Justice intends, through the CJIP, to "*compensate for the lack of a transactional mechanism for efficient and rapid processing of proceedings initiated for serious environmental offences*[10]".

As regards its practical implementation, the public prosecutor may base his decision to propose a CJIP on several criteria, in particular on the background of the accused legal entity, the spontaneous nature of the facts' disclosure, the degree of cooperation in order to regularise the situation as well as the reparation of the ecological damage[11].

As with the pre-existing model resulting from the "Sapin II" law, this new CJIP necessarily involves negotiation with the public prosecutor, particularly on the quantum of the public interest fine. The amount of the fine is calculated proportionally, in accordance with the benefits derived from the offending breaches, *"up to a limit of 30% of the average annual turnover calculated on the last three known annual turnovers at the time of the breaches*[12]".

The text also provides, as in financial matters, for a potential obligation for the sanctioned company to regularise its situation through a compliance programme. This programme, which has a maximum duration of three years, is monitored by the competent department of the Minister for the Environment and the French Biodiversity[13].

Finally, the text places an obligation on the company to repair the ecological damage resulting from the infringements identified, within a period of three years, always under the control of the above-mentioned services[14].

As the CJIP is a public sanction, its validation order, the amount of the public interest fine, but also the text of the agreement itself, are made public. At national level, the publicity is made available on the websites of the Ministry of Justice and the Ministry of the Environment[15].

At local level, this information will also be published on the website of the municipality in whose territory the offence was committed or, in its absence, of the public establishment of inter-municipal cooperation to which the municipality belongs[16].

II. New environmental CJIP sanctions a company with a 60,000 Euros fine

Shortly after the first environmental CJIP, which resulted in a public interest fine of EUR 5,000 and the implementation of a compliance programme for a period of 30 months, the authorities validated a new environmental CJIP[17].

On 17 May 2022, a new environmental CJIP was validated by the Marseille judicial court. Prior to its validation, this agreement was the subject of a first agreement, on April 15, 2022, between the public prosecutor of Marseille and the company TUI CRUISES GMBH[18].

In this case, the public prosecutor accused TUI CRUISES GMBH of using fuel with a sulphur content higher than that required by European and French law[19]. The TUI CRUISES GMBH ship had fuel with a sulphur content of approximately 3.6%, which is above the legal maximum of 1.5%[20].

Consequently, the terms of this CJIP require the company to pay a public interest fine of EUR 60,000 to the Treasury within one month [21], which seems very low in view of the maximum potential amount of EUR 322,473,000[22]. Also, unlike other CJIPs, TUI CRUISES GMBH did not have to implement a compliance programme to prevent environmental disasters.

Indeed, this leniency seems to be explained by the company's cooperation, which has already taken steps to ensure that its ships comply with environmental legislation [23]. In addition, the authorities have been lenient here as, since 2019, the company has paid out almost EUR 194,820 for environmental projects[24].

This alternative procedure by which legal persons can escape criminal prosecution allows for a transactional solution to the dispute under certain conditions. Therefore, in theory, if the company has already made good the damage caused and taken steps to prevent bad behaviour, then the penalties will not be excessive in order to encourage polluting companies to adopt new behaviour.

III. Although the environmental CJIP seems to be an interesting way of punishing environmental offences, the implementation of such a mechanism raises questions

While the CJIP seems to be an effective means of holding companies accountable for their environmental protection responsibilities, doubts remain as to its effectiveness in practice. Indeed, while the model initiated by the "Sapin II" law for corruption or tax fraud laundering seems relevant, it would seem delicate to make the same observation for environmental crime. In fact, for the moment, "*there is nothing to say that what works for the fight against corruption and tax fraud will work for environmental criminal law*[25]".

And for good reason, financial offences are very different from environmental offences, since the latter are much more difficult to characterise. Indeed, "the factual elements are rarely established with precision, the penal qualification of the offence is often difficult because the matter is very standardised and, above all, the amount of the fines incurred and, even more so, those imposed is rarely high[26]". For example, the fine of the first company sanctioned for environmental pollution amounts to 5,000 euros. It is worth considering the dissuasive effect of such penalties on companies committing environmental offences, especially as the CJIP does not entail a criminal conviction.

However, prior to the adoption of the "Sapin II" law, French law was considered insufficiently effective in the fight against corruption [27]. It should be recalled that "*the CJIP was introduced in France in the field of anti-corruption at a time when there were hardly any proceedings opened in our country against this type of offence, particularly when the facts concerned several states. They were replaced by US extraterritorial procedures imposed on France*[28]".

In addition, environmental regulations are constantly being developed. Indeed, Law No. 2021-1104 of 22 August 2021 on fighting climate change and strengthening resilience to its effects[29]

tightened criminal penalties for environmental offences, in particular by creating three new offences.

The law of August 22, 2021, inserts a new article L.173-3-1 into the Environmental Code, creating an offence of endangering the environment when fauna, flora or water quality have been exposed to an immediate risk of serious and long-lasting damage[30]. Damage considered long-lasting is that which is likely to last for at least seven years[31]. This new regulation provides for a penalty of three years' imprisonment and a fine of EUR 250 000[32]. This amount may be increased up to three times the benefit derived from the commission of the offence[33].

The text also incorporates a new general offence of environmental pollution which concerns the intentional violation of a particular duty of care or safety to release into the air or water substances which have serious and lasting harmful effects on health, flora or fauna[34].The text punishes these acts with five years' imprisonment and a fine of one million euros, which may also be increased to five times the benefit derived from the commission of the offence[35].

The text also includes an offence of ecocide for the most serious cases, which is inserted in Article L.231-3 of the Environmental Code. The latter is characterised when the offences provided for in Article L.231-1 (relating to the general offence of environmental pollution) and L.231-2 (relating to the management and abandonment of waste) of the Environmental Code are committed intentionally[36]. The penalties are relatively substantial, since the text punishes these acts with ten years' imprisonment and a fine of 4.5 million euros, which can, indeed, be increased up to ten times the benefit derived from the commission of the offence[37].

The CJIP is potentially a real advantage for legal entities accountable for environmental offences, provided that the enforcement of environmental offences is sufficiently dissuasive to make the implementation of the CJIP attractive for companies.

It appears that the CJIP and the possibility it gives to legal persons to cooperate and negotiate with the public prosecutor while allowing the establishment of environmental compliance systems, will eventually become an effective tool for the preservation and protection of the environment.

[1] "Fire in Rouen in 2019: Lubrizol again indicted for environmental violations", Le Monde, 16 September 2021 ("During this gigantic fire, which occurred on September 26, 2019, at Lubrizol's Seveso-classified high-threshold automotive lubricants site, nearly 10,000 tonnes of chemicals had burned, while a huge cloud of black smoke 22 km long had formed ").
[2] " Fire in Rouen in 2019: Lubrizol again indicted for environmental violations", Le Monde, 16 September 2021 ("Lubrizol was prosecuted for charges of «spilling harmful substances into water and discharging into freshwater harmful substances for fishes»").
[3]Law n° 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life.
[4] 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 entity accused of one or more offences provided in the Environmental Code as well as related offences, excluding crimes and offences against persons provided for in Book II of the Criminal Code, to conclude a judicial public interest agreement").
[5] Article 180-3 of the Code of Criminal Procedure ("The provisions of Article 180-2 are applicable to the offences mentioned in Article 41-1-3 for the purposes of implementing the procedure provided for in the same Article 41-1-3"); Article 180-2 of the Code of Criminal Procedure ("The request or agreement of the public prosecutor in order to implement the procedure provided for in the aforementioned Article 41-1-2 may be expressed or obtained during the investigation or on the occasion of the settlement procedure provided under Article 175. The legal representatives of the accused legal entity shall be informed, as from the proposal of the public prosecutor, that they may be assisted by a lawyer before giving their accordance to the agreement").
[6] Decision n°2019-823 QPC of 31 January 2020, Constitutional Council ("4°. Under the terms of the Charter of the Environment preamble: "the future and very existence of humanity are inseparable from its natural environment... the environment is the common heritage of human beings... the preservation of the environment must be sought in the same way as the other fundamental interests of the Nation... in order to ensure sustainable development, the choices intended to meet the needs of the present must not compromise the ability of future generations and other peoples to meet their own needs."It follows that the protection of the environment, the common heritage of human beings, constitutes an objective of constitutional value".)
[7]Circular CRIM 2021-02/G3-11/05/2021 aimed at consolidating the role of justice in environmental matters, 11 May 2021 ("The Ministry of Justice's circular of 21 April 2015 on criminal policy guidelines for environmental offences also called on public prosecutors' offices to define a criminal policy adapted to local

environmental issues and to ensure coordinated judicial treatment of environmental offences. The increased sensitivity of magistrates to this issue has resulted in local initiatives that make it possible to achieve better coordination of criminal and administrative responses and to develop the judicial culture of specialised administrations").

[8] Circular CRIM 2021-02/G3-11/05/2021 aimed at consolidating the role of justice in environmental matters, 11 May 2021 ("However, despite these positive developments, environmental criminal litigation continues to suffer from a low level of judicialization. Approximately 20,000 cases are handled each year by the public prosecutor's office, 75% of the judicial response is made up of alternatives to prosecution, and this area of litigation represents barely 1% of all convictions handed down each year by the courts").

[9] Article 41-1-3 of the Code of Criminal Procedure.

[10] Circular CRIM 2021-02/G3-11/05/2021 aimed at consolidating the role of justice in environmental matters, 11 May 2021 ("The deferred prosecution agreement (CJIP) in environmental matters, as provided for in Article 41-1-3 of the Criminal Procedure Code (CPP), makes up for the absence of a transactional mechanism allowing for the efficient and rapid handling of proceedings opened for serious environmental offences").

[11] Circular CRIM 2021-02/G3-11/05/2021 aimed at consolidating the role of justice in environmental matters, 11 May 2021 ("The opportunity to implement a CJIP in environmental matters may be assessed on the basis of several criteria: the legal entity's past record; the spontaneous nature of the facts disclosure; the degree of cooperation in order to rectify the situation and/or repairing the environmental damage").

[12] Article 41-1-3 of the Code of Criminal Procedure ("1° [...] The amount of this fine shall be set in a proportionate manner, where appropriate in relation to the benefits derived from the breaches observed, within the limit of 30% of the average annual turnover calculated on the basis of the last three known turnovers on the date on which these breaches were observed. It may be paid in instalments, according to a schedule set by the public prosecutor, over a period of not more than one year, which shall be specified in the agreement").

[13] Article 41-1-3 of the Code of Criminal Procedure ("2° Regularise its situation with regard to the law or regulations within the framework of a compliance programme lasting a maximum of three years, under the supervision of the competent services of the ministry responsible for the environment and the services of the French Biodiversity Office").

[14] Article 41-1-3 of the Code of Criminal Procedure ("3° To ensure, within a maximum period of three years and under the control of the same services, the reparation of ecological damage resulting from committed offences").

[15] Article 41-1-3 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 in whose territory the offence was committed or, failing that, the public establishment for inter-municipal cooperation to which the municipality belongs").

[16] Article 41-1-3 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 in whose territory the offence was committed or, failing that, the public establishment for inter-municipal cooperation to which the municipality belongs").

[17] Press release, Public Prosecutor's Office, Court of Appeal of Rion, 4 January 2022 ("Under the terms of the CJIP, SYMPAE undertakes to pay to the Public Treasury, within a period of 6 months, a public interest fine of €5,000 [...] Under the terms of the CJIP, SYMPAE undertakes [...] to implement a compliance programme lasting 30 months").

[18] Order to validate a judicial public interest agreement, No. 2022-00063, 17 May 2022 ("ORDER the validation of the CJIP of 15 April 2022 between the Public Prosecutor at the Marseilles Judicial Court and the company TUI CRUISES GMBH").

[19] Order to validate a CJIP, No. 2022-00063, 17 May 2022 ("Pursuant to Directive EC 2016/802, France required all cruise ships to comply with a maximum rate of sulphur content by mass for their circulation in its sovereign waters, including the French Exclusive Economic Zone (EEZ) in the Mediterranean. Under the provisions of Article L. 218-2 of the Environmental Code, applicable at the time of the events, this maximum rate was set at 1.5%").

[20] Order to validate a CJIP, No. 2022-00063, 17 May 2022 ("Under the provisions of Article L. 218-2 of the Environmental Code, applicable at the time of the events, this maximum rate was set at 1.5%.[...]

The fuel samples taken were subject to two analyses. The first revealed a sulphur content of 3.61% by mass and the second 3.64%. By using fuel with a sulphur content of more than 1.5% by mass in the French EEZ in the Mediterranean, the vessel Mein Schiff 2 had therefore failed to comply with the applicable regulations").

[21] Order to validate a judicial public interest agreement, No. 2022-00063, 17 May 2022 ("VALIDATE the public interest fine set at the total sum of €60,000 (sixty thousand euros) to be paid by the company TUI CRUISES GMBH.

PROVIDE that the payment of this public interest fine will be made to the public accountant under the conditions provided for in Article R15-33-60-6 of the Code of Criminal Procedure within a period of 1 month from the date on which the present agreement becomes final in application of the tenth paragraph of Article 41-1-2 of the Code of Criminal Procedure").

[22]Order to validate a CJIP, No. 2022-00063, 17 May 2022 ("Over the period, the average annual turnover was € 1,074,912,000.

The maximum limit of the public interest fine can therefore be set at €322,473,000.").

[23] Order to validate a CJIP, No. 2022-00063, 17 May 2022 ("However, since these facts, TUI CRUISES GMBH has taken concrete measures to ensure that its ships will in future sail in compliance with the regulations, in particular by installing catalytic converters allowing a significant reduction in the level of noxious gases emitted").

[24] Order to validate a CJIP, No. 2022-00063, 17 May 2022 ("In addition, the company has developed a policy of donations, made in 2019 to the amount of €194,820, to support environmental projects").

[25] "What place for the new environmental CJIP? (1)", Editions législatives, Xavier Delassault ("There is no reason to say that what works for the fight against corruption and for tax fraud will work for environmental criminal law").

[26] "What place for the new environmental CJIP? (1)", Editions législatives, Xavier Delassault ("In many cases, the facts of corruption that lead to prosecution are established. This is even more true for tax fraud. Moreover, for these two offences the amount of the sanctions can be high. It may therefore be in the interest of companies to avoid a trial with a predictable outcome by regularising a CJIP. In environmental matters, the situation is different. The factual elements are rarely established with precision, the criminal characterisation of the offence is often delicate because the matter is very standardised and, above all, the amount of the fines incurred and, even more so, the amount of the fines imposed is rarely high").

[27] "What place for the new environmental CJIP? " Dalloz, Actualité, 2 March 2021 ("Before the adoption of the Sapin II law, French law was not sufficiently effective in terms of anti-corruption").

[28] "What place for the new environmental CJIP? " Dalloz, Actualité, 2 March 2021 ("The CJIP was introduced in France in the field of anti-corruption at a time when there were hardly any proceedings opened in our country against this type of offence, particularly when the facts concerned several states. They were replaced by US extraterritorial procedures imposed on France").

[29] Law n°2021-1104 of 22 August 2021 on fighting climate change and strengthening resilience to its effects.

[30] Article 279 of Law no. 2021-1104 of 22 August 2021 on fighting climate change and strengthening resilience to its effects ("I. After Article L.173-3 of the Environment Code, an Article L.173-3-1 is inserted as follows: "Art. L. 173-3-1. – When they directly expose fauna, flora or water quality to an immediate risk of serious and long-lasting damage [...]").

[31] Article 279 of Act n°2021-1104 of 22 August 2021 on fighting climate change and strengthening resilience to its effects ("I. After Article L.173-3 of the Environment Code, an Article L.173-3-1 is inserted as follows: "Art. L. 173-3-1. -"[...] For the purposes of this article, damage likely to last for at least seven years is considered to be long lasting").

[32] Article 279 of Law no. 2021-1104 of 22 August 2021 on fighting climate change and strengthening resilience to its effects ("I. After Article L.173-3 of the Environment Code, an Article L.173-3-1 is inserted as follows: "Art. L. 173-3-1. – When they directly expose fauna, flora or water quality to an immediate risk of serious and long-lasting damage, the acts provided for in Articles L.173-1 and L.173-2 are punishable by three years' imprisonment and a fine of 250,000 euros [...]").

[33] Article 279 of Act n°2021-1104 of 22 August 2021 on fighting climate change and strengthening resilience to its effects ("I. After Article L.173-3 of the Environment Code, an Article L.173-3-1 is inserted as follows: "Art. L. 173-3-1. – When they directly expose fauna, flora or water quality to an immediate risk of serious and long-lasting damage, the acts provided for in Articles L.173-1 and L.173-2 are punishable by three years' imprisonment and a fine of 250,000 euros, which may be increased up to three times the benefit derived from the commission of the offence").

[34] Article 280 of Law n°2021-1104 of 22 August 2021 on fighting climate change and strengthening resilience to its effects ("Article L.231-1. – The fact, in a manifestly intentional violation of a particular duty of care or safety provided for by law or regulation, of releasing into the air, throwing, dumping or allowing to flow into surface or underground waters or into 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 long-lasting harmful effects on health, flora, fauna, with the exception of the damage referred to in Articles L.218-73 and L.432-2, or serious modifications to the normal water supply system [...]").

[35] Article 280 of Law n°2021-1104 of 22 August 2021 on fighting climate change and strengthening resilience to its effects ("Article L.231-1. – The fact, in a manifestly intentional violation of a particular obligation of prudence or safety provided for by law or regulation, of emitting into the air, throwing, spilling or allowing to flow into surface or underground waters or into 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 long-lasting harmful effects on health, flora, fauna, with the exception of the damage mentioned in Articles L.218-73 and L.432-2, or serious modifications to the normal water supply system is 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").

[36] Article 280 of Law n°2021-1104 of 22 August 2021 on fighting climate change and building resilience to its effects ("Article L.231-3. – The offence provided for in Article L.231-1 constitutes ecocide when committed intentionally").

[37] Article 280 of Act No. 2021-1104 of 22 August 2021 on fighting climate change and strengthening resilience to its effects ("Article L.231-3. – The prison sentence provided for in Articles L.231-1 and L.231-2 is increased to ten years' imprisonment. The fine provided for in the same Articles L.231-1 and L.231-2 is increased to 4.5 million euros, which may be increased up to ten times the benefit derived from the commission of the offence").

On February 23, the European Commission unveiled its proposal for a Directive on the Duty of Vigilance, which aims to promote sustainable and responsible behavior by companies along global value chains.

As a pioneer in this area along with Germany, France has adopted a requirement for large French companies or groups to establish a vigilance plan to identify and prevent serious violations committed by their subsidiaries and subcontractors in France or abroad against human rights and fundamental freedoms, human health and safety, and the environment, through the law on the duty of vigilance of parent companies and ordering companies of May 27, 2017.[1]

This vigilance plan must include specific measures, namely (i) a risk map, (ii) procedures to regularly assess the situation of subsidiaries, subcontractors or suppliers involved in a business relationship, (iii) appropriate actions to mitigate risks or prevent serious violations, (iv) a mechanism for alerting and collecting reports on the existence or occurrence of risks, and (v) a system for monitoring and evaluating the measures implemented.

Where damages are directly incurred as a result of the non-execution or failure to execute the due diligence plan, the French legislator has opted for the general rules of civil liability. Thus, a defaulting enterprise will have to compensate the damage suffered by the victims if they can prove that the company has failed to carry out its obligations or has failed to do it properly, and that there is a causal link with this fault.

In the event of a breach, French law provides for a preliminary stage before incurring liability, consisting in the possibility to give a formal notice to the defaulting company to implement such a vigilance plan within three months. If the company fails to do so, and at the request of any person having an interest in the matter, the legislation allows the competent court to enjoin the company, if necessary under penalty, to implement such a plan.[2]

IV. Litigation on the French duty of vigilance has been slow to take hold

In the absence of a precise indication of what court should be seized, there was a debate in the case law as to whether the "competent court" referred to in the legislation was the judicial court or the commercial court. Indeed, in the context of the Total case, several associations had, in June 2019, given formal notice to the company to comply with its new duty of care. Regarding the lack of what they considered to be sufficient compliance with this obligation, the associations brought an action against Total before the courts, seeking an injunction to require the company to implement a due diligence plan in accordance with the legal requirements. Total argued that the latter judge was not competent to hear the case but rather the commercial judge, a position that was confirmed by the court, which, in an order dated January 30, 2020, recognized the "exclusive jurisdiction of the consular courts" and referred the case to the commercial court. This debate was most certainly a focal point for the application of the 2017 law, leaving associations and companies awaiting a clear position on this procedural issue. Through a decision of December 15, 2021, the Court of Cassation has recognized the competence of the judicial court. Then, the legislator itself, through

a law n° 2021-1729 of December 22, 2021, specified that the jurisdiction of the judicial court of Paris was exclusive. This procedural debate is now closed, and one would have thought that other litigation in this area would prosper. However, expectations in terms of duty of care are once again driven by the ongoing European debates regarding a duty of care at the European level.

A proposal for a directive on "corporate sustainability due diligence" was adopted by the European Commission on 23 February 2022. This proposal intends to impose on companies an obligation of means to ensure that their activities mitigate the impact on human rights or the environment.

The directive, which is only a proposal at this point, includes some important elements compared to the duty of care as it is currently provided for in France.

V. A duty of care affecting a larger number of operators

The proposed directive unveiled by the European Commission is intended to mitigate the negative impact of economic activities carried out by companies on human rights and the environment.[3] It thus requires companies to adopt a due diligence and risk mapping strategy.[4]

In contrast to the duty of care established by France, the European Union intends to apply this duty of care to a greater number of economic actors than those covered by French law.[5] Thus, all companies with limited liability legal regime with at least 500 employees and a worldwide turnover of at least 150 million euros would be concerned by the European duty of care.[6] It should be noted that unlike the French duty of care, which applies to companies with at least 5,000 or 10,000 employees, the proposed directive provides for two cumulative criteria concerning the number of employees and turnover.[7]

In addition to this category, limited liability companies operating in a high-risk sector of activity will be added within two years if they employ 250 people and have a worldwide turnover of at least 40 million euros.[8] For the purpose of being exhaustive, the proposal lists high-risk sectors, which include, for example, textiles or resource extraction.[9]

Moreover, companies from third countries operating in the European Union whose turnover threshold is aligned with the above thresholds and which are located in the European Union could also be subject to this European duty of care.[10]

Regarding the material scope of the obligations, the proposal is also intended to be broader than French law, since it requires companies to integrate the duty of vigilance into their own operations as well as into the entire value chain of the ordering companies as soon as a commercial relationship is established, i.e., commercial relationships upstream and downstream of the intervention of the concerned companies (suppliers, service providers, subcontractors, partners, customers, etc.).[11] Therefore, the European duty of care would have a wider application than only to targeted companies, all contractual relationships, whether direct or indirect, would *de facto* have to be apprehended in order to determine whether each company trading with the targeted companies complies with the duty of care imposed. As a result, companies will have to include an infinite number of stakeholders in their due diligence plan, which will necessarily make prevention more complex.[12] The enactment of the directive would, depending on the transposition in the different member states, lead to significant upstream work to ensure the probity of business

partners and therefore significant costs for companies to improve their due diligence strategies. Thus, a control of third parties, following the example of the Sapin II law on anti-corruption, could be required.

VI. An obligation of means that could restrain potential liability exposure

The proposed directive provides that the companies concerned will be required to take appropriate measures to avoid any negative impact on human rights or on the environment of its activities. As in French law,[13] a legal claim, by any person with an interest in the matter, is therefore possible in the event of a breach.

The European text specifies, however, that the companies concerned will only have a simple obligation of means.[14] Some criticisms have been raised as to the non-binding nature of this duty of care, since the obligation of means does not imply that the author guarantees the performance of his obligation but only that he makes every possible effort to achieve it.[15] As a result, it has been pointed out that there is a risk that in practice these obligations may amount to the mere adoption of codes of conduct and the insertion of contractual clauses in contracts with business partners.[16]

Indeed, the negligence can only be characterized against the company in the event of a clear breach of its obligation,[17] however, a presumption of liability is imposed on the legal person in case of prejudice due to this obligation of means.[18]

Therefore, as in French law, it is not necessary to prove the existence of a fault, a prejudice, and a causal link between them, but it will be up to the company subject to the duty of vigilance to demonstrate that it took all the precautionary measures required to avoid the prejudice.

However, the European text provides for a specific responsibility that should be held by directors who could be liable for the implementation and monitoring of due diligence measures as well as "the adoption of the company's due diligence policy, the taking into account of contributions from stakeholders and civil society organizations and the integration of due diligence into the company's management systems".[19]

VII. Effective monitoring of the reality of vigilance measures and the possibility of sanctions in case of infringement

Concerning the control imposed on the companies concerned, the proposed directive suggests the creation of independent administrative authorities, designated by the Member States themselves.[20] The authorities would be competent to investigate and impose financial penalties in the event of non-compliance,[21] and could refer itself or be referred to by third parties in the event of sufficient information indicating a breach.[22]

In addition, the proposal provides for the discretion of Member States to take the necessary measures to put an end to violations of the duty of care.[23] In addition, it provides that the amount of the penalty must refer to the company's turnover,[24] without precision. In this regard, to ensure that the penalty mechanism is dissuasive and binding, the proposal could have been more explicit, as for example the European Regulation on the protection of personal data, which states that the fine may amount to up to 4% of the annual worldwide turnover.[25]

The text proposed by the European Commission is intended to be effective, efficient and innovative in order to harmonize the legislation at the European level and to draw from the most efficient measures. Its implementation should therefore undoubtedly impact French law. However, the text remains unclear on certain points and the scope and binding nature of the duty of care will depend on the transposition in each Member State. A pending period is starting again regarding the duty of care, its scope, its consequences, and its sanctions. Let's hope that the European process and its transposition will not lead to a wait-and-see attitude of the different actors and that a genuine implementation will be given to the existing text in France, where the duty of vigilance still has its place to make. ■

[1] Article 1 of Law No. 2017-399 of March 27, 2017 on the duty of care of parent companies and ordering companies ("After Article L. 225-102-3 of the French Commercial Code, an Article L. 225-102-4 is inserted as follows "Art. L. 225-102-4.-I.-Any company that employs, at the close of two consecutive fiscal years, at least five thousand employees within its own company and in its direct or indirect subsidiaries whose registered office is located in France, or at least ten thousand employees within its own company and in its direct or indirect subsidiaries whose registered office is located in France or abroad, shall draw up and effectively implement a due diligence plan. "Subsidiaries or controlled companies that exceed the thresholds mentioned in the first paragraph are deemed to meet the obligations set out in this article if the company that controls them, within the meaning of article L. 233-3, draws up and implements a due diligence plan relating to the activity of the company and all the subsidiaries or companies it controls. The plan includes 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 (...)").

[2] Article 1 of Law No. 2017-399 of March 27, 2017 on the duty of care of parent companies and ordering companies ("II.- Where a company given formal notice to comply with the obligations provided for in I fails to do so within a period of three months from the date of the formal notice, the competent court may, at the request of any person having an interest in the matter, enjoin it, where appropriate under a fine, to comply with them. The president of the court, ruling in summary proceedings, may be seized for the same purposes").

[3] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF.

[4] "A fair and sustainable economy: Commission sets rules for business respect for human rights and the environment in global value chains", European Commission press release, February 23, 2022 ("In order to comply with the sustainability duty of care, companies should: – Integrate the duty of care into policies; – Identify actual or potential negative impacts on human rights and the environment; – Prevent or mitigate potential impacts; – Stop or minimize actual impacts; – Establish and maintain a grievance procedure; – Monitor the effectiveness of the due diligence policy and measures; – and publicly communicate about the duty of care").

[5] "European duty of care: the National Assembly's European Affairs Committee calls for ambitious and effective legislation", Julia Thibord et Emmanuel Daoud, Dalloz actualité, January 18, 2022 ("The limited scope of the duty of care is one of the weaknesses of the French law. Only French companies with more than 5,000 employees in France or more than 10,000 employees worldwide (in both cases, including employees of their subsidiaries").

[6] "A fair and sustainable economy: the Commission establishes rules on the respect of human rights and the environment by companies in global value chains", Press release of the European Commission, February 23, 2022 ("Group 1: all large EU limited liability companies with significant economic power (employing more than 500 people and with a net turnover of more than EUR 150 million worldwide)").

[7] "Directive on due diligence: between satisfaction and points of attention", Miren Lartigue, Dalloz actualité, March 4, 2022 ("The deputy nevertheless noted several "points of attention" that do not satisfy him. Starting with the fact that the scope of the directive could be extended to "companies that combine the two criteria of workforce and turnover and not to those that meet one or the other", the first option being more restrictive than the second").

[8] "A fair and sustainable economy: the Commission establishes rules on the respect of human rights and the environment by companies in global value chains", Press release of the European Commission, February 23, 2022 ("Group 2: Other limited liability companies operating in defined high-impact sectors that do not meet both Group 1 thresholds, but employ more than 250 people and have a net turnover of €40 million or more worldwide. For these companies, the rules will begin to apply two years later than for Group 1").

[9] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF, ("In order to reflect priority areas for international action to address human rights and environmental issues, the selection of high-impact sectors for the purposes of this guidance should be based on existing OECD sectoral guidance on due diligence. The following sectors should be considered as high impact sectors for the purposes of this directive: Manufacturing of textiles, leather and related products (including footwear), and wholesale of textiles, clothing and footwear; Agriculture, forestry, fisheries (including aquaculture), food manufacturing, and wholesale of agricultural raw materials, live animals, timber, food and beverages; extraction of mineral resources, wherever extracted (including crude oil, natural gas, coal, lignite, metals and metal ores, and all other non-metallic minerals and quarry products), manufacturing of basic metal products other non-metallic mineral products and metal products (except machinery and equipment), and wholesale of metal products, and wholesale of mineral resources, basic and intermediate mineral products (including metals and metal ores), building materials, fuels, chemicals and other intermediate products").

[10] "A fair and sustainable economy: the Commission establishes rules on the respect of human rights and the environment by companies in global value chains", Press release of the European Commission, February 23, 2022 ("Non-EU companies operating in the EU with a turnover threshold aligned with that of groups 1 and 2 and with turnover in the EU").

[11] "A fair and sustainable economy: the Commission establishes rules on the respect of human rights and the environment by companies in global value chains", Press release of the European Commission, February 23, 2022 ("This proposal applies to the operations of companies, their subsidiaries and their value chains (direct and indirect business relationships)").

[12] "Directive on due diligence: between satisfaction and points of attention", Miren Lartigue, Dalloz actualité, March 4, 2022 ("This is another major point of tension in the draft directive. A number of companies are lobbying to limit the European duty of care to the value chain. That is to say, to limit the obligations of vigilance of companies to their direct suppliers and subcontractors – arguing that it is difficult or impossible for them to control their indirect suppliers and subcontractors").

[13] Article L.225-102-5 of the French Commercial Code ("The action in responsibility is introduced before the competent jurisdiction by any person justifying an interest to act for this purpose").
[14] "A fair and sustainable economy: the Commission establishes rules on the respect of human rights and the environment by companies in global value chains", Press release of the European Commission, February 23, 2022 ("The companies concerned will have to take appropriate measures ("obligation of means"), depending on the seriousness and likelihood of the various impacts, the measures available to them in the particular circumstances and the need to set priorities").
[15] "Contractual liability", Orientation sheet, Dalloz, January 2022 ("Where the party owes an obligation of means (e.g., the obligation of a doctor, who must provide his patient with care that is attentive, conscientious and in accordance with scientific knowledge), his liability will only be engaged if the creditor proves that he did not use all the means (hence the terms used) that would enable him to perform. In other words, the breach of an obligation of means must be culpable in order to engage the liability of the debtor. On the other hand, when the party owes an obligation of result (e.g., the obligation of safety incumbent on the carrier of persons), it is sufficient to prove that the result to which it was committed has not been achieved for it to be held liable. Thus, contractual liability is not always based on fault, because in the presence of an obligation of result, not only is proof of fault not necessary, but proof of the absence of fault on the part of the debtor of the obligation is inoperative. In fact, he can only be exonerated by force majeure, that is, if he can prove that the event which prevented him from performing his obligation was unforeseeable, irresistible and external to him").
[16] "Directive on due diligence: between satisfaction and points of attention", Miren Lartigue, Dalloz actualité, March 4, 2022 ("In particular, the proposal relies heavily on the adoption of codes of conduct by companies, the inclusion of clauses in contracts with their suppliers and the use of private audits and sectoral initiatives. Yet it is precisely the ineffectiveness of these measures that led our organizations, more than ten years ago, to advocate for a binding duty of care").
[17] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF, ("Therefore, the main obligations of this directive should be "obligations of means". The company must take appropriate measures that can reasonably be expected to result in the prevention or reduction of the negative impact in the circumstances of the particular case. Account should be taken of the specifics of the company's value chain, the sector or geographic area in which its value chain partners operate, the company's power to influence its direct and indirect business relationships, and the potential for the company to increase its power to influence").
[18] "Duty of care: from the vigilance law to a European directive?", Quentin Chatelier, Dalloz actualité, April 1, 2021 ("A presumption of liability in case of prejudice: due to the "means" nature of the duty of vigilance, the associated civil liability is necessarily personal. The issue is to determine whether the dominant company's failure to comply with its duty of care is causally related to the harm suffered by a third party").
[19] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF, ("Responsibility for due diligence should rest with the company's directors, in line with international due diligence frameworks. Directors should therefore be held responsible for implementing and monitoring the due diligence measures set out in this Directive, as well as for adopting the company's due diligence policy, taking into account the input of stakeholders and civil society organizations, and integrating due diligence into corporate management systems. Directors should also adapt the company's strategy to the actual and potential impacts identified, as well as to any vigilance measures taken").
[20] "A fair and sustainable economy: the Commission establishes rules on the respect of human rights and the environment by companies in global value chains", Press release of the European Commission, February 23, 2022 ("The national administrative authorities designated by the Member States will be responsible for monitoring compliance with these new rules").
[21] "A fair and sustainable economy: the Commission establishes rules on the respect of human rights and the environment by companies in global value chains", Press release of the European Commission, February 23, 2022 ("[National administrative authorities] could impose fines for violations").
[22] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF, ("The supervisory authority may initiate an investigation on its own initiative or because of justified concerns communicated to it in accordance with Article 19, where it considers that it has sufficient information indicating a possible failure by a company to comply with the obligations laid down in the national provisions adopted pursuant to this Directive").
[23] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF, ("The Commission shall establish a European Network of Supervisory Authorities, composed of representatives of the supervisory authorities. The Network shall facilitate supervisory cooperation and the coordination and alignment of regulatory, investigative, enforcement and supervisory practices of supervisory authorities and, where appropriate, the sharing of information between them").
[24] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF, ("Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive").
[25] Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0002.02/DOC_1&format=PDF, ("When monetary penalties are imposed, they are based on the company's turnover").

NEW ANTI-CORRUPTION ASSESSMENTS AND CLARIFICATIONS

OECD Convention on Combating Bribery in France Phase 4

Adopted on 9 December 2021 by the OECD Working Group on Bribery pursuant to its fourth phase of monitoring, the Phase 4 Report[1] assesses France's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions [2] and of the 2009 Recommendation of the Council for Further Combating such bribery[3]. It also makes recommendations for the purpose of enhancing France's actions in this field [4].

The Report details France's achievements in its fight against bribery of foreign officials and the challenges it faced in detecting and sanctioning transnational bribery, before suggesting areas for improvement. The Reports also addresses corporate liability, international cooperation as well as issues raised during past evaluations which were left unanswered [5].

I. Significant achievements in law enforcement albeit a remaining insufficiency in prosecutions and convictions rate in comparison with the high exposure of French companies to bribery of foreign public officials

The Working Group applauds France for its achievements in sanctioning bribery of foreign officials since the third Phase (October 2012) [6]. In contrast to 2012, where only three simple cases resulted in the final conviction of four individuals [7], nine additional "*more complex* "[8] cases were identified between October 2012 and March 2021, in which nineteen individuals and eighteen legal entities were convicted for bribery of foreign public officials or complicity in this offence[9]. These statistics do not include the five cases which were resolved through Judicial Public Interest Agreements ("*CJIP*") for bribery of foreign public officials concluded with five legal entities [10], over the same timeframe.

Overall, the Report notes a drastic increase in the number of investigations initiated since Phase 3. A total of 108 cases on bribery of foreign officials have been investigated, for which fifty-two are still ongoing, thirty-five being handled by the National Financial Prosecutor's Office ("*PNF*")[11].

Nevertheless, the Working Group observes that, despite the fact that French companies are highly exposed to the risk of bribery [12], the proportion of cases solved as well as the number of investigations and convictions against legal entities remains low, as only 13% of the hundred and eight above-mentioned cases resulted in a final conviction or a *CJIP* [13]. It is thus stressed that certain facts relating to large companies have never been investigated [14], even though they were identified by the Working Group [15].

II. France's modern legal tools for combating bribery of foreign public officials is well received despite structural resource problems and upcoming reforms deemed worrying

The Report commends France's efforts for bringing new actors in the fight against international bribery through a series of legislative reforms since 2012. Indeed, the detection, the prevention as

well as the repression of bribery acts have been favored, on the one hand, by the creation of the *PNF* and the Central Office for the Fight against Bribery, Financial and Fiscal Offences ("*OCLCIFF*") in 2013[16], and on the other hand, by the creation of the French Anti-Corruption Agency ("*AFA*") introduced by the 2016 Sapin 2 law[17].

The Working Group also noticed that there has been an inflation of legislations to strengthen the punishment of international briberies. Indeed, legislations removed major obstacles to prosecuting bribery of foreign public officials, especially the requirement of reciprocity of incrimination[18], through a significant increase in the amount of penalties incurred by natural[19] and legal persons[20], by simplifying the procedural rules governing the initiation of prosecutions[21], by extending territorial jurisdiction of French courts in matters of international bribery[22], by reinforcing the means and techniques of investigation available[23], or even by introducing the possibility for authorized anti-bribery associations to become a civil party ("*partie civile*")[24].

However, the Working Group underlines resource-related problems affecting the majority of the above-mentioned institutions and the ongoing and future reforms which may hinder the observed progress [25]. The two-year cap on the duration of preliminary investigations provided for by the 2021 Law could entail a massive transfer of cases to investigating judges who would face difficulties in absorbing all of them [26]. In addition, the reorganization of the *AFA* as proposed in the bill of 21 October 2021, which calls for a merger with the HATVP[27], could weaken both institutions according to some commentators[28]. The OECD therefore recommends that *AFA*'s independence be preserved [29].

III. A needed improvement of negotiated justice for natural persons so as to increase CJIPs' attractiveness for legal entities

The OECD applauds France for having developed a criminal justice policy towards negotiated justice, specifically around the Plea Bargain ("*CRPC*") framework, as well as for its willingness to rely on such mechanism beyond the simplest of cases, as evidenced by the *PNF*'s change in strategy, which now considers the *CRPC* in certain complex cases[30].

Nevertheless, the Report deplores the limited use of the *CRPC*, especially when it is proposed with a *CJIP*. Since 2012, the *CRPC* has only been used once, in 2016, to convict an individual for bribery of foreign public officials. The *CRPC* has also been used once, in 2019, to convict three legal entities for organized laundering of illicit proceeds related to bribery of foreign public officials [31]. Indeed, the Working Group observes the low attractiveness of the *CRPC* when proposed in conjunction with a *CJIP* due to the admission of guilt on the individual's part which when coupled with the company's admission of the facts, makes the individual vulnerable in the event of criminal proceedings' resumption leading to trial [32].

The OECD therefore recommends that France strengthen the publicity and transparency of the *CRPC* procedures[33] and render negotiated justice more effective by including individuals in the *CJIP* procedure or by creating a new mechanism that would ensure better harmony between the alternatives to prosecution offered to natural and legal persons regarding international bribery[34].

IV. International cooperation ensured by dedicated but limited mutual legal assistance tools, and hampered by pieces of legislations

The Working Group notes the existence of actors dedicated to mutual legal assistance (the Bureau for International Mutual Assistance in Criminal Matter and the liaison magistrates) [35] as well as the dynamic and growing support from the *PNF* in this mutual assistance procedures[36]. However, the OECD regrets the slow processing of mutual assistance requests issued abroad and recommends that France takes measures to ensure a systematic follow-up of these requests when they remain unexecuted by foreign authorities [37].

The Report also raises issues around the 1968 blocking Statute and other grounds for non-execution of foreign requests, such as breach of public order or to the "*essential interests of the Nation*", or secrets that can be invoked against investigative authorities, generating delays in the processing of these requests [38] and representing an obstacle to mutual legal assistance in bribery matters. Therefore, the Group's recommendations stress for a greater clarification around the requirements for opposing the blocking Statute and article 694-4 of the Criminal Procedure Code in bribery cases [39].

V. Several recommendations from the OECD to rapidly strengthen the fight against bribery in France

Among the OECD's recommendations [40], the following are noteworthy: (i) increasing the means and resources available to investigators and magistrates within the Prosecutor's Office, investigating judges, and trial judges [41]; (ii) safeguarding the role of the *PNF* in handling bribery cases [42]; and (iii) preserving *AFA*'s role in defining and monitoring compliance measures and their application within companies [43].

The Working Group invites France to submit an oral report on measures taken in application of these recommendations within a year [44].

The Working Group also invites France to submit a written report on measures taken in application of all the recommendations and on its efforts to implement the Convention by December 2023[45].

Therefore, new anti-bribery measures may be taken shortly in France, strengthening, and complementing the latest key measures laid down by the 2016 Sapin 2 Law.

[1] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021.

[2] Convention on Combating Bribery of Foreign Officials in International Business Transactions and Related Documents, Organization for Economic Co-operation and Development (OECD), 21 November 1997.

[3] Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Organization for Economic Co-operation and Development (OECD), 26 November 2009.

[4] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 3 ("This Phase 4 Report on France by the OECD Working Group on Bribery evaluates and makes recommendations on France's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the 44 members of the OECD Working Group on Bribery on 9 December 2021.").

[5] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 3 ("The report is part of the OECD Working Group on Bribery's fourth phase of monitoring, launched in 2016. Phase 4 looks at the evaluated country's particular challenges and positive achievements. It also explores issues such as detection, enforcement, corporate liability and international co-operation, as well as covering unresolved issues from prior reports."); Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 4 ("The report details France's particular achievements and challenges in this regard, including in relation to the enforcement of its foreign bribery offence, as well as the progress France has made since its Phase 3 evaluation in October 2012").

[6] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 17 ("The lead examiners commend France for its notable progress in enforcing the foreign bribery offence since Phase 3. [...] The lead examiners welcome the much more proactive way in which the French authorities are opening foreign bribery cases brought to their attention, resulting in a 3.5-fold increase in the number of investigations since Phase 3").

[7] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 20 ("In Phase 3 (as of October 2012), only three cases had resulted in final convictions of four individuals in minor cases judged by direct summons. No legal person had been finally convicted.").

[8] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 20 ("The nine cases that resulted in final convictions, although relatively old, involved more complex foreign bribery schemes than the minor cases concluded in Phase 3").

[9] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 20 ("In Phase 3 (as of October 2012), only three cases had resulted in final convictions of four individuals in minor cases judged by direct summons. No legal person had been finally convicted. Since Phase 3, the number of cases resulting in final convictions for foreign bribery has increased significantly. Between October 2012 and March 2021, 9 additional cases resulted in the final conviction (i.e. not including a CJIP) of 19 individuals and 18 legal persons for foreign bribery or complicity in foreign bribery [...].").

[10] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 20 ("[...] and 5 legal persons were sanctioned using a CJIP in 5 cases.").

[11] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 21 ("Between France's Phase 3 evaluation and as of September 2021, a total of 108 foreign bribery cases were investigated. Of these 108 cases, 52 cases are still under investigation against at least some of the persons involved, 41 cases have been closed without a prosecution for foreign bribery, 13 cases have been tried and 6 cases were resolved, at least for certain persons involved, through non-trial resolutions. Of the 52 ongoing cases, 35 are under preliminary investigation by the PNF, 2 preliminary investigations are conducted by a different Public Prosecution Office, and 15 are under investigation by an investigative judge. In 7 of the 15 judicial inquiries under way, at least 17 individuals and 5 legal persons had been indicted, including for foreign bribery, at the time of writing this report.").

[12] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 24 ("However, the number of cases resolved remains low in relation to France's economic weight and the exposure of its companies to bribery risks.").

[13] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 24 ("Of the 108 investigations opened or still ongoing since Phase 3, only 14 of them (13%) have resulted in sanctions through final convictions or settlement by way of a CJIP").

[14] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 17 ("However, the lead examiners note that the number of cases resolved and the number of legal persons convicted of foreign bribery to date remain low in regard of France's economic situation and its companies' exposure to risks of bribery. Investigations and prosecutions still result in a limited number of persons sanctioned, particularly with regard to legal persons. Moreover, these proceedings progress slowly and the proportion of investigations that do not progress to prosecution remains high. Finally, the lead examiners are disappointed to note that a significant number of allegations, some of which are long-standing and concern large French companies, have not been investigated to date.").

[15] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 25 ("A significant number of foreign bribery allegations involving French companies have not been investigated. As of March 2021, 85 cases involving French companies identified by the Working Group on Bribery had not led to the opening of a preliminary investigation in France, [...]."); Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 317 ("It should be noted that a small number of legal persons have been convicted of foreign bribery since Phase 3.").

[16] Law on Combating Tax Fraud and Major Economic and Financial Crimes, 6 December 2013, No. 2013-117; Decree creating a Central Office to Fight Corruption and Financial and Tax Offenses, 25 October 2013, No. 2013-960.

[17] Law on Transparency, the Fight Against Corruption and the Modernization of Economic Life, 9 December 2016, No. 2016-1691; [17] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 11 ("In 2013, the Act on combating tax evasion and serious economic and financial crime18 created the PNF, which relies on the Central Office for Combating Corruption and Financial and Fiscal Offences (Office central de lutte contre la corruption et les infractions financières et fiscales – OCLCIFF), also created in 2013, for its investigations.19 By centralizing the handling of foreign bribery cases within these two organizations, France has usefully clarified its institutional framework for law enforcement in this area").

[18] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 104 ("The Working Group therefore recommended that France eliminate, as soon as possible, the dual criminality requirement in relation to the bribery of foreign public officials (recommendation 1.b.). In 2016, the Sapin 2 Act (article 21) removed the requirement of dual criminality as a precondition for establishing foreign bribery offences".).

[19] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 126 ("An individual who commits the offence of foreign bribery now faces a fine of EUR 1 million (previously EUR 150 000). Judges can also now increase the fine to twice the proceeds of the offence").

[20] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 348-349 ("The Act of 6 December 2013 have significantly enhanced the sanctions incurred by legal persons in the context of litigation. This recommendation was deemed partially implemented during the Phase 3 follow-up. Since the Act of 6 December 2013, legal persons are subject to a maximum fine of EUR 5 million for foreign bribery, which may be increased to ten times the proceeds of the offence (articles 435-3 and 131-38 CC). In case of recidivism, the maximum fine is doubled, i.e., EUR 10 million or 20 times the proceeds of the offence (articles 132-12 to 14 CC).").

[21] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 219 ("The Phase 2 and 3 reports expressed doubts about the effectiveness of personal jurisdiction over the offence of bribery of foreign public officials because of the condition of a prior complaint from the victim or an official complaint in order to prosecute (recommendation 4.b.). Since the entry into force of article 21 of the Sapin 2 Act,230 the Public Prosecutor's Office no longer enjoys a monopoly on prosecution, and there is no longer a requirement for either the victim or the foreign jurisdiction to make a formal a complaint before a prosecution can commence in foreign bribery cases, by way of exception from the provisions of articles 113-6 and 113-8 CC.").

[22] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 220 & 224 ("Article 113-2 CC provides that French criminal law is applicable not only to an offence committed in France but also to an offence deemed to have been committed in France when one of its "constituent acts" is committed on the territory. […] 224. By means of the new article 435-11-2 CC, the Sapin 2 Act also extended the application of French criminal law to foreign bribery and trading in influence directed towards foreign public officials offences committed abroad by individuals "habitually residing or carrying out all or part of [their] economic activity on French territory.").

[23] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 208 ("Since Phase 3, various measures have strengthened the investigative techniques and resources available for foreign bribery cases. The availability of so-called "special" investigative techniques in these cases has been increased211 (e.g. the use of international mobile subscriber identity-catchers or "IMSI-catchers", surveillance devices to intercept mobile communications traffic and track users' movements). In addition, several measures have increased investigating and prosecuting authorities' access to financial information, including the expanded scope of information in the FICOBA (bank account database),212 the introduction of an obligation for banks in particular to respond to requests in digital form,213 which speeds up response times and facilitates processing, and the strengthening of communication between TRACFIN and the judicial authorities.214 In addition, the Act of 23 October 2018 on the fight against fraud215 lifted tax secrecy with respect to the public prosecutor in matters of tax evasion, regardless of the existence of a complaint or ongoing legal proceedings".).

[24] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 203 ("In this regard, the Belloubet circular invited public prosecutors to pay particular attention to complaints and reports from accredited associations"); Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 77 ("The lead examiners congratulate France on the full implementation of recommendation 4.b. by ending the public prosecutor's monopoly on initiating public action, thanks to the possibility for the victim(s) of foreign bribery offences, including accredited anti-corruption NGOs, to lodge a complaint seeking status as a civil party […].").

[25] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 6 ("However, these recent achievements are undermined by structural resource problems affecting all stages of the criminal justice process as well as by further reforms").

[26] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 153 ("The limitation of the duration of preliminary investigations to two or three years, approved by Parliament on 18 November 2021, 3 weeks before finalising this report,139 could result in the further transfer of a significant number of economic and financial cases to investigative judges, and thus further exacerbate this situation. The investigative judges met during the visit expressed their concern about this, believing that such a reform would make their work "impossible"").

[27] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 415 ("Published after the visit, their report indeed proposes to "transfer the AFA's support and oversight missions to the HATVP, in order to create a major authority with jurisdiction in matters of public ethics and preventing corruption, the High Authority for Integrity" (Proposal No. 11).").

[28] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 414 ("The Club des Juristes committee also does not recommend a change of status in the short term on the grounds that "such a merger could weaken the AFA and the HATVP, which have only recently been created"").

[29] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 136 ("The lead examiners are concerned about the uncertainties surrounding the AFA's future in terms of promoting and monitoring the development of compliance measures by companies subject to the obligations of article 17 of the Sapin 2 Act, particularly in the context of a potential merger with the High Authority for Transparency in Public Life (HATVP).").

[30] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 241 ("The criterion noted in Phase 3 that the CPRC should be reserved for the simplest cases is not reiterated in the circular, and the PNF representatives met during the visit indicated that they systematically take into account the possibility of resolving a foreign bribery case through CPRC at the end of the preliminary investigation, when the defendant admits their guilt.") ; Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 251 ("[…] the PNF has gradually begun to use the CPRC for individuals alongside the CJIP for legal persons, despite the differences in the nature and consequences of the two types of resolution (unlike the CJIP, the CPRC entails an admission of guilt)").

[31] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 244 ("Since 2012, a CPRC has only been used once, in 2016, to convict one natural person for foreign bribery (and for misuse of company funds unrelated to foreign bribery). A CPRC was also used once, in 2019, to convict three legal persons on charges of money laundering foreign bribes as a criminal group").

[32] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 257 ("The admission of guilt under a CPRC, combined with the disclosure of the facts under a CJIP with the legal person, places the individuals under investigation in a particularly vulnerable situation in the event that the trial process resumes.").

[33] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 90 ("They therefore reiterate their recommendation that France take the necessary steps as soon as possible to make public certain elements of the CRPC, such as the terms of the agreement and, in particular, the sanction or sanctions approved.").

[34] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 90 ("The lead examiners therefore recommend that France continue its efforts to develop effective non-trial resolution mechanisms and in particular, reconsider, as soon as possible, the possibility of permitting individuals to be covered by CJIPs or other appropriate non-trial mechanisms and, to take the necessary measures to ensure better co-ordination between non-trial resolution mechanisms respectively applicable to natural and legal persons in foreign bribery cases.").

[35] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 264 ("Abroad, France deploys an extensive network of 18 justice attachés, including one seconded to Eurojust, to facilitate MLA.").

[36] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 263 ("Within the PNF, a group of three judges is now dedicated to international co-operation and responsible for the execution of all MLA requests and

European investigation decisions in the field of foreign bribery"); Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 269 ("Since Phase 3, the PNF has received a total of 86 MLA requests in foreign bribery cases involving French companies or citizens between 2014 and 2021"); Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, para. 269 ("Since Phase 3, the PNF has taken a more proactive approach to MLA requests. During Phase 3, France only issued 13 requests. In contrast, the PNF reported that between 2014 and 2021, 78 mutual assistance requests were issued to other countries as part of its preliminary investigations into foreign bribery cases, with 46 issued to Parties to the Convention and 32 to non-Parties to the Convention. A significant proportion of these requests are in progress").

[37] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 93 ("However, many of these requests are still in progress and some have remained unanswered after several years. They therefore recommend that France take steps to ensure more systematic follow-up of its outgoing MLA requests when foreign authorities fail to respond.").

[38] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 100 ("[Examiners] note, however, that various actors involved in combating bribery, both domestically and internationally, continue to deplore the slowness of the mutual assistance process caused, in their view, by the blocking statute and the implementation of article 694-4 CCP."). [...] The lead examiners also express serious concerns about the lack of clear criteria for applying these mechanisms in investigations by other Parties to the Convention.").

[39] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 100 ("The lead examiners therefore recommend that France: (i) clarify the scope and consequences of the blocking statute; (ii) clarify the criteria under which the French authorities select, produce, withhold or request companies to withhold certain information about companies involved in foreign bribery cases under the blocking statute or article 694-4 CCP; (iii) expedite the execution of formal mutual assistance, including when the blocking statute or article 694-4 CCP is are applicable").

[40] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 153-159.

[41] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 155 ("Regarding the means and resources, expertise and training of investigators, prosecutors, investigative judges and trial judges, the Working Group urges France to promptly take the necessary measures to: a. Ensure that (i) Sufficient resources are allocated to specialised investigative units, in particular to the OCLCIFF and the BNLCCF; and (ii) These units can recruit and retain the necessary officers with financial and economic expertise, including taking into account cost-of-living constraints in the most important economic centres [...]; b. (i) Strengthen the resources allocated to the PNF in terms of personnel and specialized expertise to enable it to deal effectively with foreign bribery cases; and (ii) Train a sufficient number of specialized prosecutors to provide the means, in the short and long term, to consolidate the progress that France made by creating this prosecution authority [...]; c. Ensure that investigative judges and trial judges dealing with foreign bribery cases have: (i) The necessary resources, including specialist experts, to deal with them effectively and in a timely manner; and (ii) The necessary training for this purpose").

[42] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 156 ("Regarding the PNF's role in foreign bribery cases, the Working Group urges France to: a. Take urgent steps to preserve the PNF's role in the investigation, prosecution and resolution of foreign bribery cases by restoring an appropriate environment for the investigation and prosecution of its cases").

[43] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 158 ("With regard to the AFA's role in the development of corporate compliance measures, the Working Group recommends that France: a. (i) Preserve, including in the context of the reforms currently envisaged, the role, the mandates, and – at a minimum – the funding currently allocated to the AFA for developing and monitoring compliance measures by the companies subject to the obligations of article 17b of the Sapin 2 Act; and (ii) Provide the AFA with sufficient resources to promote and monitor companies' development of compliance measures in the context of its advisory and audit functions for entities subject to the compliance obligation, including in the context of the possible overhaul of the AFA's mandates or the potential transfer of its mandates to another institution").

[44] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 7 ("The Working Group invites France to submit, within one year, an oral report on the measures taken to implement recommendations 7.a(i); b(i); and c(i) (on increasing the means and resources available to investigators, prosecutors and trial judges), 10.a (on preserving the role of the PNF in resolving foreign bribery cases); and 18.a (on preserving the role of the AFA in developing and monitoring compliance measures by companies)").

[45] Phase 4 Report France, Implementing the OECD Anti-Bribery Convention, Organization for Economic Co-operation and Development (OECD), 9 December 2021, p. 7 ("In two years' time (December 2023), France will submit a written report to the Working Group on the implementation of all recommendations and on its efforts to implement the Convention.").

The post-Sapin 2 law: merely modifications or a real revolution?

The law of 9 December 2016, known as the Sapin 2 law, opened a new era in the fight against corruption in France[1]. Five years after its entry into force, assesments and proposals for new legislation in this area have been published. A bill "aimed at reinforcing the fight against corruption" presented on 19 October 2021 by Mr Raphaël Gauvain, then announced as the "Sapin 3 law", does not seem to fit into the legislative debate in view of the busy parliamentary calendar between now and the presidential elections. This Sapin 3 law, which is not expected to be discussed any time soon, nevertheless raises the question of whether the changes considered by these various assessments and proposas herald a revolution or merely practical modifications.

After several years of application of the Sapin 2 law, France, subject in 2021 to two new evaluations of its anti-bribery regime by the OECD[1] and the Group of States against Corruption (GRECO)[2], has also undertaken a parliamentary information mission on the evaluation of the impact of the Sapin 2 law. This evaluation concluded with an information report presented on 7 July 2021 by Mr Raphaël Gauvain and Mr Olivier Marleix, containing fifty proposals aimed at "giving a new start to France's anti-corruption policy"[3]. It directly inspired the bill "aimed at reinforcing the fight against corruption" presented on 19 October 2021 by Mr Raphaël Gauvain, respectively on 3 and 9 December 2021 [4].

This superposition of analyses, recommendations and proposals has shown the need for complementary measures to those enacted by the Sapin 2 law, but are these simple adjustments or a revolution in anti-corruption legislation?

I. The adjustments made to the provisions of the Sapin 2 law in the name of a better fight against corruption

A. Extending the scope of anti-corruption compliance obligations to subsidiaries of foreign groups of companies established in France and to public actors

Article 17 of the Sapin 2 law obliges the managers of companies having their registered office in France or belonging to a group of companies whose parent company has its registered office in France, which employ at least 500 employees and generate an annual turnover of more than €100 million, to take measures to prevent and detect corruption committed in France or abroad[5].

Both the information mission on the evaluation of the impact of the Sapin 2 law[6] and the bill "aimed at reinforcing the fight against corruption" suggested removing the requirement that the parent company's headquarters be located in France [7].

Such a proposal makes it possible to re-establish equality for economic operators acting on French soil – provided that their parent company meets the thresholds of 500 employees and €100 million in turnover – which had previously been altered by the difference in treatment between French companies and subsidiaries of foreign groups established in France[8].

In addition to the obligations imposed on private operators, the analyses, evaluations and proposals made have focused on public actors, who are highly exposed to probity violations because of their functions and decision-making capacities.

The information mission on the assessment of the impact of the Sapin 2 law[9] and the draft law thus suggested that the measures provided for in Article 17 of the Sapin 2 law should apply to public institutions and that the obligation should be placed on the managers of these public players[10].Going even further than the text of the Sapin 2 law and following the recommendations of the French Anticorruption Agency [11]. it was suggested to add the implementation of internal controls and audits in addition to anti-corruption accounting controls and the development of awareness-raising actions in addition to those for the training of managers and other personnel most exposed to corruption risks[12].

B. The extension of the Public Interest Judicial Agreement (CJIP) to the offence of favouritism and the modification of its regime

The proposed law, in line with the recommendations made by the information mission on the assessment of the impact of the Sapin 2 law, provides for a series of changes to improve the CJIP regime.

In order to avoid any trivialisation of the CJIP, the draft law envisages an extension of the scope of application to the offence of favouritism [13].It also envisages an increase in the time allowed for legal persons to execute a compliance sanction from three to five years ordered under a CJIP[14], as well as the possibility for the public prosecutor's office to request an extension of the duration of the CJIP with the agreement of the legal person and the validation of the judge [15] in order to allow for the full execution of the CJIP and to ensure the success of the system [16].

Above all, it is planned to give the legal person access to the case file from the moment it is informed of the public prosecutor's proposal to initiate a CJIP, and to extend the protection of the documents and information exchanged in the event of a waiver during the negotiations or a refusal of the public prosecutor's proposal [17].This moment also marks the new possibility for the public prosecutor, with the agreement of the legal person, to appoint a third person to represent the company in the negotiations of the agreement [18].

For the OECD, such measures would "help to increase the use of this instrument for non-trial resolution of [foreign bribery] cases"[19].

C. The new cooperation between enforcement authorities in the implementation of anti-corruption compliance obligations.

The information mission on the evaluation of the impact of the Sapin 2 law initially intended to create a new authority, called the High Authority for Probity, competent to control the respect of compliance obligations of private and public actors [20].

The bill "aimed at strengthening the fight against corruption" envisages instead a review of the division of tasks between the French Anticorruption Agency and the High Authority for Transparency in Public Life (HATVP). The French Anticorruption Agency would see its missions

of administrative coordination and strategic planning, advice and control of economic actors, as well as monitoring and control of the blocking law confirmed [21].The HATVP would be entrusted with the tasks of advising and controlling public actors, as well as drawing up recommendations and controlling the quality and effectiveness of measures to prevent and detect corruption implemented by public actors [22].In this respect, the HATVP would be endowed with a power of control, a right of communication and a power to impose sanctions through the creation of a sanctions committee [23].

The HATVP's new mission of advising and controlling public actors, which necessarily implies ensuring consistency with the French Anticorruption Agency's mission of advising and controlling economic actors, responds to Group of States against Corruption's (GRECO) concern, which recommended strengthening cooperation between the French Anticorruption Agency and the HATVP in the implementation of their competences with regard to persons holding senior executive positions[24].

D. Improving the use of negotiated justice for natural and legal persons through a better articulation between the CJIP and the CRPC.

The OECD report highlights the criticism of the use of CRPC in parallel with CJIP negotiations, especially when these are not approved as in the Bolloré case. It is concerned about the consequences of such a situation on the possibility for prosecutors and investigating judges to conclude CRPC's and on a blocking of the level of cooperation necessary to conclude a CJIP[25].The OECD then recommended that France include natural persons in the PIC procedure or ensure further coordination between the "non-trial resolution mechanisms applicable to natural and legal persons respectively" [26].

The information mission on the evaluation of the impact of the Sapin 2 law is not in favour of extending the CJIP to natural persons, as this would lead to a lack of conviction for an offence as serious as corruption[27]. It has therefore proposed to improve the link between these two procedures by creating a procedure of CRPC specific to corruption and other offences against probity where the risks of refusal of approval would be limited [28].

E. The reinforcement of the obligations linked to the register of interest representatives as a guarantee of the transparency of public decisions.

The bill suggests modifying the definition of interest representatives to reduce them to legal persons under private law, public establishments or public groupings carrying out an industrial or commercial activity, and the bodies mentioned in Chapter I of Title I of Book VII of the "Code de commerce" and in Title II of the "Code de l'artisanat", whose main or regular activity is to influence the public decision [29].

The draft law also calls for an increase in the frequency of declarations and the information to be transmitted, except for actions carried out on low-stake decisions for public decision-makers belonging to local authorities or inter-municipalities [30].

It also provides, if the HATVP's sanctions commission were to be set up, for the administrative sanctioning of interest representatives who do not comply with their obligations by a penalty

payment in the event of non-compliance with a prior formal notice, possibly followed by a fine of up to 4% of annual worldwide turnover or 50% of the expenses incurred in implementing the interest representation actions concerned, and for the publication of either of these decisions [31].

II. Potential revolutions in the debate

A. The possibility of modulating the anti-bribery compliance measures provided for by the Sapin 2 law according to the level of risk exposure.

Unlike what is foreseen for private actors, the proposed law "aimed at reinforcing the fight against corruption" foresees the possibility for public officials to implement only some of these measures "depending on the nature of the entity and the level of exposure of the entity to the risk of corruption or breach of probity to which it is exposed"[32], according to a decree of the Council of State.

This gives rise to the new idea of a "flexible" regime with measures to be implemented to varying degrees depending on the sector of activity, size or any other relevant criterion applied to private actors, which could be a means of obliging small and medium-sized enterprises to put in place measures to prevent and detect corruption by avoiding an "all or nothing" policy.

B. The possibility of criminal liability of the legal person in case of failure to comply with the anti-corruption compliance obligations provided for by the Sapin 2 law.

The proposed law "aimed at reinforcing the fight against corruption" provides for a relaxation of the conditions for the criminal liability of legal persons by allowing them to be held criminally liable in case of failure to supervise the behaviour of their employees, which would have allowed the commission of one or several offences [33].

The OECD indicates that it would have liked the text to go beyond the lack of supervision and that a link be made between the liability of legal persons and the establishment or failure to establish a compliance program [34].

C. The entry of the internal investigation in the law

The practice of internal investigation has been taken into account in the joint guidelines of the PNF and the French Anticorruption Agency, which state that it is "expected that the legal person wishing to benefit from a CJIP" has carried out such an investigation [35]. However, the latter is not yet standardised, with the exception of the dedicated ethical rules issued by the Paris Bar Association, and in practice borrows from other laws, such as legislation on the protection of personal data and case law on social matters.

The proposed law "aimed at strengthening the fight against corruption" provides for its inclusion in the code of criminal procedure when it is initiated by a legal person accused of one or more offences. The law would then provide for a real internal investigation regime with a reasonable time limit for the summons, notification of rights when the person is summoned, the drafting of a report, read over and signed by the person interviewed, and access to the file [36].

In conclusion, most of the measures identified demonstrate the desire for a future text to complete, correct, formalize and clarify the meaning given to the French fight against corruption by the Sapin 2 law. Some of them, however, carry the seeds of a revolution, such as the possibility of modulating the anti-corruption measures to be taken, facilitating the criminal liability of the legal person or providing a legislative framework for the internal investigation. It remains to be seen what a potential Sapin 3 law will contain. ■

[1] Phase 4 report on France's implementation of the OECD Anti-Bribery Convention, 9 December 2021.
[2] Fifth Evaluation Round – Preventing Corruption and Promoting Integrity in Central Government (Senior Executive) and Law Enforcement – Compliance Report – France, GRECO, 3 December 2021.
[3] Information report on the evaluation of the impact of Law No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, known as the "Sapin 2 Law", No. 4325, Raphaël Gauvain and Olivier Marleix, 7 July 2021, p.9 ("It is these provisions that have been evaluated in detail in the context of this mission, which comes at a time when France's anti-corruption policy is seeking a second wind"); Proposition de loi visant à renforcer la lutte contre la corruption, n°4586, Raphaël Gauvain, 19 October 2021, p.2 ("As part of the Law Commission's information mission on the evaluation of the Sapin 2 law, which delivered its conclusions on Wednesday 7 July 2021, Mr Raphaël Gauvain and Mr Olivier Marleix have formulated fifty proposals to breathe new life into France's anti-corruption policy").
[4] Fifth Evaluation Round – Preventing Corruption and Promoting Integrity in Central Government (Senior Executive) and Law Enforcement – Compliance Report – France, GRECO, 3 December 2021; Phase 4 Report on France's Implementation of the OECD Anti-Bribery Convention, 9 December 2021.
[5] Article 17 of Law No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life ("I. – The chairmen, chief executive officers and managers of a company employing 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 is more than €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 set out in II").
[6] Information report on the assessment of the impact of Law 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, known as the "Sapin 2 Law", No. 4325, Raphaël Gauvain and Olivier Marleix, 7 July 2021, p.53 ("Proposal No. 1: Remove the condition that the parent company's registered office be located in France, in order to subject the small subsidiaries of large foreign groups established in France to the obligations set out in Article 17, as soon as the parent company exceeds the thresholds provided for by law").
[7] Article 1.5° of the bill to strengthen the fight against corruption, No. 4586, Raphaël Gauvain, 19 October 2021 ("In the first paragraph of I of Article 17, the words "whose parent company has its registered office in France and" are deleted").
[8] Gauvain-Marleix report: is a Sapin III law inevitable? ", La Tribune, 13 October 2021 ("The objective of this extension of the mechanism is to mitigate any distortion of competition between French companies subject to these obligations and those subsidiaries that are not currently subject to them"); "Proposition de loi visant à renforcer la lutte contre la corruption: un législateur en mode impressionniste", Lexbase Pénal n°43, Jean-Marie Brigant, 25 November 2021 ("But the condition of establishing the head office of the parent company in France has the perverse effect of excluding from the perimeter of Article 17 foreign groups that nevertheless have subsidiaries in France. In order to re-establish equal treatment and reinforce the effectiveness of the system, the text provides, in a salutary manner, for the removal of the condition relating to the location in France of the parent company's registered office").
[9] Information report on the assessment of the impact of Law No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, known as the "Sapin 2 Law", No. 4325, Raphaël Gauvain and Olivier Marleix, 7 July 2021, p.90 ("Proposal No. 12: Create compliance obligations adapted to public administrations, which would be modulated according to their size and the risks to which they are exposed").
[10] Article 2 of the Proposition de loi visant à renforcer la lutte contre la corruption, n°4586, Raphaël Gauvain, 19 October 2021 ("After Section 3 bis of Law No. 2013-907 of 11 October 2013 on the transparency of public life, a Section 3 ter is inserted as follows: "Section 3 ter "Measures and procedures for the prevention and detection of corruption – Art. 18-11. – I. – The following officials of public administrations, local authorities and establishments are required to take and implement the measures provided for in II (...) "II. – The persons mentioned in I shall implement, each in the entity that they manage or jointly, one or more of the following measures and procedures intended to prevent and detect the commission, in France or abroad, of acts of corruption or other breaches of probity: 1° A code of conduct (...) 2° An internal whistleblowing system (...) 3° Risk mapping (...) 4° Procedures for assessing the integrity of third parties with whom the entity concerned has a relationship (...) 5° The integration, (...)) of the control of corruption risks or other breaches of integrity in the accounting control, internal control and internal audit system (...) 6° An awareness and training plan (...) 7° Sanctions adapted to breaches (...) 8° An internal system for evaluating and controlling the measures implemented").
[11] Opinion on the recommendations of the French Anti-Corruption Agency intended to help public and private legal entities prevent and detect corruption, influence peddling, misappropriation of public funds and favouritism, French Anticorruption Agency, 4 December 2020, p.60 ("As a vector of the culture of integrity within the public actor, an effective and appropriate awareness-raising and training system promotes the wide dissemination of commitments in terms of the fight against breaches of probity by the management body, their appropriation by employees and the constitution of a common knowledge base for the various personnel. 439. An awareness-raising action enables participants to be better informed and receptive to the subjects presented to them. 440. A training action consists of providing the knowledge and skills necessary for the exercise of an activity or profession. It is part of the public actor's general training plan"); p.72 and 73 ("2. The AFA recommends that public bodies complete their internal control procedures on the basis of the mapping of risks of breaches of probity, so that they take these risks into account in a relevant manner. (...) – Accounting controls (...) Among the internal control and audit procedures, the authorising officer's internal control and accounting audit procedures, which contribute to the control of organisational risks, are a key instrument for preventing and detecting breaches of probity").
[12] Article 2, paragraphs 15 and 16, of the "Proposition de loi visant à renforcer la lutte contre la corruption" No. 4586, Raphaël Gauvain, 19 October 2021 ("5° The integration, both by the authorising officer and his departments and by the accounting officer and his departments, in particular the internal controllers and auditors and the inspection services, of the control of corruption risks or other breaches of probity in the accounting control, internal control and internal audit system of the entity concerned, as well as in the certification of its accounts if necessary; "6° A plan for raising awareness and training managers and other staff most exposed to the risk of corruption or other breaches of integrity in the entity concerned.)
[13] Information report on the evaluation of the impact of Law 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, known as the "Sapin 2 Law", No. 4325, Raphaël Gauvain and Olivier Marleix, 7 July 2021, p.105 ("Your Rapporteurs note that the material scope of the CJIP is not therefore limited to offences against probity alone, and could therefore be extended to other offences. They note, however, that while such developments are worth considering, they need to be assessed with precision. The CJIP is an effective tool, but extending it too quickly could lead to its trivialisation and risk undermining its acceptability at a time when practice has not yet fully stabilised. The rapporteurs consider that the mechanism should be extended to other probity offences, and in particular to the offence of favouritism, but that a more extensive extension does not seem fully justified and would risk changing

the nature of the mechanism'); Proposition de loi visant à renforcer la lutte contre la corruption, No. 4586, Raphaël Gauvain, 19 October 2021, p.3 ('[Paragraph 3 of Article 6] extends the scope of offences concerned to favouritism').

[14] "Proposition de loi visant à renforcer la lutte contre la corruption", No. 4586, Raphaël Gauvain, 19 October 2021, p.6 ("Paragraph 4 increases to five years the maximum duration of the compliance programme (the "monitoring") provided for by the CJIP, and thus aligns it with the maximum duration of the compliance programme sentence provided for in Articles 131-39-2 of the Criminal Code and 764-44 of the Code of Criminal Procedure").

[15] Proposition de loi visant à renforcer la lutte contre la corruption", No. 4586, Raphaël Gauvain, 19 October 2021, p.7 ("Paragraphs 16 to 19 provide for the public prosecutor's office to be able to request an extension of the duration of the compliance programme, and to modify the ceiling of associated costs, with the agreement of the legal person, in order to allow for the complete execution of the obligations of the compliance programme. Such an application would be subject to validation by the judge").

[16] Information report on the assessment of the impact of Law 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, known as the "Sapin 2 Law", No. 4325, Raphaël Gauvain and Olivier Marleix, 7 July 2021, p.111 ("The determination of an adequate duration for the compliance programme therefore seems essential to ensure the success of the mechanism: it must be sufficient to allow the complete execution of the agreement, but must not be too long either, because of the potentially significant costs for companies. The correct determination of this period may prove delicate when the CJIP is signed").

[17] "Proposition de loi visant à renforcer la lutte contre la corruption", No. 4586, Raphaël Gauvain, 19 October 2021, p.6 ("Paragraphs 5 to 8 create, during the process that may lead to the conclusion of a CJIP, an intermediary phase that allows the legal person to have access to the procedure file. The opening of this phase is marked by the fact that the public prosecutor informs the legal person that he or she is considering proposing to conclude a CJIP (...) Paragraphs 13 to 15 strengthen the protections applicable to documents and information transmitted by the legal person during the CJIP negotiation period. They extend this protection to cases where the legal person renounces the conclusion of the agreement during the negotiation period or refuses the proposal made to it by the public prosecutor").

[18] "Proposition de loi visant à renforcer la lutte contre la corruption", No. 4586, Raphaël Gauvain, 19 October 2021, p.6 ("Paragraphs 9 to 12 allow the public prosecutor to request, with the agreement of the legal person, the appointment of an ad hoc agent or a special committee, depending on the size of the company, to represent the company during the negotiation of the agreement")

[19] Phase 4 Report on France's implementation of the OECD Anti-Bribery Convention, 9 December 2021, p.119, §347 ("Several recommendations of the Gauvain and Marleix parliamentary report (mentioned above) are included in the Gauvain bill, tabled on 21 October in the National Assembly. They could, if adopted and implemented, contribute to intensify the use of this instrument for non-trial resolution of CAPE cases").

[20] Information report on the evaluation of the impact of Law No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, known as the "Sapin 2 Law", No. 4325, Raphaël Gauvain and Olivier Marleix, 7 July 2021, p.87 ("Proposal No. 11: Transfer to the High Authority for the Transparency of Public Life the support and control missions of the French Anti-Corruption Agency, in order to create a major authority competent in matters of public ethics and corruption prevention, the High Authority for Probity").

[21] "Proposition de loi visant à renforcer la lutte contre la corruption", No. 4586, Raphaël Gauvain, 19 October 2021, p.3 ("Article 1 clarifies the distribution of roles between governmental and supervisory functions. It affirms the role of the French Anti-Corruption Agency (AFA) in terms of administrative coordination and strategic planning (...) The AFA would thus remain competent in terms of advising and monitoring economic actors. (...) Paragraphs 7 to 14 update the Agency's functions. Its role in administrative coordination is reaffirmed: the AFA draws up the multiannual national anti-corruption plan and assists the French authorities in international organisations. (...) The AFA's other missions (monitoring, control of the application of the blocking law) are not modified.)

[22] "Proposition de loi visant à renforcer la lutte contre la corruption", No. 4586, Raphaël Gauvain, 19 October 2021, p.3 ("Article 1 clarifies the distribution of roles between governmental and supervisory functions. It (...) transfers to the High Authority for the Transparency of Public Life (HATVP) the functions of advice and control of public actors currently performed by the Agency'); p.4 ('Paragraphs 28 to 38 extend the competences of the High Authority by entrusting it with certain missions hitherto performed by the AFA. From now on, it is the High Authority that will draw up recommendations and control the quality and effectiveness of the mechanisms for preventing and detecting corruption within public actors (public administrations, local authorities and public establishments)").

[23] "Proposition de loi visant à renforcer la lutte contre la corruption", No.4586, Raphaël Gauvain, 19 October 2021, p.3 ('Paragraphs 17 to 27 create a sanctions commission within the High Authority for the Transparency of Public Life, on the model of that of the AF'); p.5 ('Article 4 gives the High Authority powers of control and sanction and to this end creates three articles 25 to 25-2 in Law n° 2013-907 of 11 October 2013. Paragraphs 1 to 8 create an article 25, which takes up the provisions relating to the right of communication of AFA agents, currently provided for in article 4 of the Sapin 2 Act, and adapts them to the HATVP (...) Paragraphs 15 to 18 create an article 25-2 relating to controls on measures and procedures for the prevention and detection of corruption, relating to public actors and provided for in article 18-11 of the 2013 Act (these measures are created by article 2 of the present bill). I thus takes over the provisions contained in III of the current Article 17 and in 3° of Article 3 of the Sapin 2 Act, and inserts them into the 2013 Act, with the control function of public actors now being performed by the High Authority. II introduces the possibility for the High Authority to publish reports concerning public actors, or their conclusions. In the absence of a financial penalty, this measure is likely to reinforce the scope of the controls").

[24] Fifth Evaluation Round – Preventing Corruption and Promoting Integrity in Central Government (High Executive Offices) and Law Enforcement Agencies – Compliance Report – France, GRECO, 3 December 2021, p.4, §19 ("GRECO had recommended that the French Anti-Corruption Agency and the High Authority on Transparency in Public Life strengthen their cooperation in the implementation of their competences with respect to persons holding high executive offices").

[25] Phase 4 Report on France's implementation of the OECD Anti-Bribery Convention, 9 December 2021, p.94 and 95 ("They are also concerned about the consequences that the refusal to approve the CRPCs proposed in conjunction with a CJIP in a high-profile case could have on the ability of PNF and investigating magistrates to conclude CRPCs with individuals in particular. They also fear the possible effects of this blockage on the level of cooperation required to conclude PICCs and more generally fear that the progress made by France in recent years to strengthen its capacity to resolve CAPE cases and to take part in the resolution of multi-jurisdictional cases will be called into question.)

[26] Phase 4 Report on France's implementation of the OECD Anti-Bribery Convention, 9 December 2021, p.95 ("The examiners therefore recommend that France continue its efforts to develop an effective negotiated criminal justice system and in particular to reconsider as soon as possible the possibility of including natural persons in the scope of application of the CJIP or another suitable non-trial resolution mechanism, and to take the necessary measures to ensure better coordination between the non-trial resolution mechanisms applicable to natural and legal persons respectively in CAPE cases").

[27] Information report on the evaluation of the impact of Law 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, known as the "Sapin 2 Law", No. 4325, Raphaël Gauvain and Olivier Marleix, 7 July 2021, p.123 ("A first approach could be to open up the CJIP to natural persons in matters of corruption. (...) Your rapporteurs are not in favour of such a solution. Such an extension would make it possible to exempt the perpetrators of corruption offences from conviction, and would thus make offences against probity a separate category of offences, even though the offences concerned are particularly serious").

[28] Information report on the evaluation of the impact of Law 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, known as the "Sapin 2 Law", No. 4325, Raphaël Gauvain and Olivier Marleix, 7 July 2021, p.125 ("In order to secure the system, while complying with this case law, your Rapporteurs suggest creating a specific CRPC system, the scope of which would be restricted to acts of corruption and other offences against probity. (...) Proposal 26: Create a specific CRPC procedure for corruption offences, which could only be proposed in the event of spontaneous disclosure of the offences and full cooperation of the individual in the investigations, and whose approval procedures would be more controlled: the approval judge's assessment would essentially focus on the legal classification of the offences, the spontaneous nature of their disclosure, and the reality of the individual's cooperation in the investigations")

[29] "Proposition de loi visant à renforcer la lutte contre la corruption", No. 4586, Raphaël Gauvain, 19 October 2021, p.8 ("Paragraph 2 bases the definition of the interest representative on the activity of the legal person and not on that of the natural persons who make it up. This measure aims to clarify the scope of persons subject to the obligation to declare and to facilitate the controls of the High Authority").

[30]"Proposition de loi visant à renforcer la lutte contre la corruption", No. 4586, Raphaël Gauvain, 19 October 2021, p.8 ("Paragraph 4 increases the frequency of declarations, which are defined by decree, by requiring that they be made at least twice a year in order to reduce the time between the action and its transcription into the register. Paragraphs 5 to 7 specify the information that must be declared in order to better reflect the normative impact of the interest representative. In accordance with the decree of 9 May 2017, the declarant must indicate the type, meaning and amount of the action taken. They must also specify the function of the decision-maker concerned, the decision in question and declare actions carried out at the initiative of a public decision-maker. Since the register is not only intended to monitor the ethics of interest representatives, but also to ensure transparency in public decision-making, it must also contain this information. Paragraphs 8 and 9 adapt the obligations of interest representatives for actions carried out towards public decision-makers belonging to territorial authorities or inter-municipalities. It limits the obligation to declare to actions involving decisions with a financial stake of at least EUR 50 000.)

[31] "Proposition de loi visant à renforcer la lutte contre la corruption", No. 4586, Raphaël Gauvain, 19 October 2021, p.5 ("Paragraphs 9 to 14 create an article 25-1 which provides for administrative sanctions when an interest representative does not comply with his or her obligations. It provides for a penalty payment if the formal notice provided for in Article 18-7 of the 2013 Act has not been followed up after two months. Six months after the notice is served, the matter may be referred to the Sanctions Committee, which may impose a fine of up to 4% of turnover or 50% of the expenses incurred in implementing the interest representation measures concerned.)

[32] Article 2 of the "Proposition de loi visant à renforcer la lutte contre la corruption", No. 4586, Raphaël Gauvain, 19 October 2021 ("After Section 3 bis of Law n° 2013-907 of 11 October 2013 on the transparency of public life, a Section 3 ter is inserted as follows: "Section 3 ter "Measures and procedures for the prevention and detection of corruption – Art. 18-11 (...) II. – The persons mentioned in I shall implement, each in the entity that they direct or jointly, one or more of the following measures and procedures intended to prevent and detect the commission, in France or abroad, of acts of corruption or other breaches of probity (...)) A decree in the Council of State shall determine, among the measures and procedures provided for in 1° to 8° of this II, those to be implemented by each category of administration, local authority or institution, depending on the nature of the entity and the level of exposure of the entity to the risk of corruption or breach of probity to which it is exposed").

[33]"Proposition de loi visant à renforcer la lutte contre la corruption", No. 4586, Raphaël Gauvain, 19 October 2021, p.8 ("Article 8 proposes to make the conditions for the criminal liability of legal persons more flexible by extending this liability to the case where the failure of the legal person to supervise has led to the commission of one or more offences by an employee"); Article 8 ("After the first paragraph of Article 121-2 of the Penal Code, a paragraph is inserted as follows "Legal persons shall also be criminally liable where their failure to supervise has led to the commission of one or more offences by one of their employees").

[34] Phase 4 Report on France's implementation of the OECD Anti-Bribery Convention, 9 December 2021, p.108, §308 ("As pointed out by panellists during the visit, particularly among private sector representatives, the articulation of the liability of legal persons for CAPE and the establishment (or failure to establish) a compliance programme as promoted or required by the Sapin 2 law is not clear. No conviction, dismissal or acquittal in this area seems to have referred to these programmes. Although the proposed law, tabled on 21 October 2021 by MP Gauvain, proposes to extend the criminal liability of legal persons for failure to monitor, it does not provide any clarification as to whether the existence (or lack thereof) of internal compliance measures should be taken into account").

[35] "Guidelines on the implementation of the judicial public interest agreement", PNF, AFA, 26 June 2019 ("The public prosecutor's office expects the legal person wishing to benefit from a CJIP to have itself actively participated in the establishment of the truth by means of an internal investigation or a thorough audit of the facts and the dysfunctions of the compliance system that fostered their commission").

[36] Article 7 of the "Proposition de loi visant à renforcer la lutte contre la corruption", No. 4586, Raphaël Gauvain, 19 October 2021 ("Art. 706-183. – When a legal person accused of one or more offences conducts an internal investigation into the same facts, the rules and obligations set out in this Title shall apply to the said investigation. "The legal person shall inform the public prosecutor or investigating judge of the opening of an internal investigation. "Art. 706-184. – Any person summoned in the context of an internal investigation may only be freely heard if he or she has been notified of the summons within a reasonable time. "At the time of notification, the person must be informed of: " 1° The right to end the hearing if he or she so wishes; " 2° The right to make statements, to answer questions put to him or her or to remain silent; " 3° The right to be accompanied by a lawyer of his or her choice; " 4° If necessary, the right to be assisted by an interpreter. "The notification must also indicate the maximum duration of the hearing. "Art. 706-185. – Any hearing shall give rise to the drafting of a report, which shall be reread and signed by the person being heard, at the end of the hearing. "(b) The court may, in accordance with the law of the country in which the hearing took place, order that the person being heard be given the opportunity to present his or her case to the court of his or her choice. This period may not exceed the number of days of the hearing. "The person interviewed may make written observations which shall be appended to the minutes of the hearing. "Art. 706-186. – Where there are plausible grounds for suspecting that the person has participated in the acts to which the internal investigation relates, he or she may request to consult the elements of the file concerning him or her directly, as soon as he or she receives the summons, and at least three working days before the hearing is held. "Art. 706-187. – The persons for whom there are plausible grounds for suspecting that they have participated in the acts concerned shall be informed of the closure of the investigation. "Art. 706-188. – The president of the judicial court may, at the request of the public prosecutor and with the agreement of the legal person concerned, appoint an ad hoc agent or a special committee to conduct the internal investigation. "The legal person may propose the name of an ad hoc agent, or of one or more of the members of the special committee. "The ad hoc trustee or the special committee appointed pursuant to this Article may be the same as the one mentioned in Article 41-1-2 ter").

When arbitration and compliance meet up: analysis of their first interplay

The interaction between arbitration and compliance deserves to be examined. Indeed, more and more questions are being asked as to the place of compliance in arbitration. In particular, the growing importance of compliance raises questions as to the arbitrability of compliance, its impact on arbitral practice itself, and the potential role of arbitrators in implementing and enforcing applicable standards.

Arbitration, which is defined as a private and binding form of dispute resolution forum, in which parties agree to have their dispute settled by independent, non-governmental decision-makers (hereinafter 'arbitrators'), selected by or for the parties, applying neutral adjudicative procedures,[1] has become the preferred method of resolving cross-border disputes.[2]

Across the world, companies are required to set up internal compliance programs to guarantee, amongst other things, the fight against corruption, the observance of international sanctions, the respect of human rights and the protection of the environment and personal data.

Compliance, whose scope of application is constantly expanding, has become a strategic tool for companies to prevent the realization of a risk regardless of their field of activity. Compliance rules are often burdensome, sometimes straying from legal notions and often including severe enforcement actions and penalties. This is particularly true with respect to international trade, when companies having to comply with external mandatory rules and regulations to maintain contractual relationships, protect their data, and prevent financial crimes.

As a result, questions have more than ever arisen as to the impact of growing compliance requirements on the practice of arbitration, allowing compliance to find its place in the field of arbitration. This growing importance first raises the question of the arbitrability of compliance law, then of the impact of compliance on the arbitration activity itself, and finally demonstrates that arbitrators have become actors in implementing and respecting compliance requirements. It is these different interplays that are worth examining in greater detail.

I. The increasing arbitrability of compliance matters

Arbitrability is a condition for the lawfulness of the arbitration agreement which refers to the type of dispute that can or cannot be settled by arbitration. It answers the question of whether national laws or judicial authorities have barred certain disputes from being arbitrated and reserved these matters to national courts.[3]

Under French law, the criterions to determine arbitrability are set out in Articles 2059 and 2060 of the French Civil code. Article 2059 of the French Civil code states positively that: "All persons may make arbitration agreements relating to rights of which they have the free disposal".[4] Article 2060 then defines arbitrability negatively by providing that: "One may not enter into arbitration agreements in matters of status and capacity of persons, in those relating to divorce or to judicial separation or disputes relating to public bodies and institutions, and, more generally, in all matters

in which public policy is concerned. However, categories of public institutions of an industrial or commercial character may be authorized by decree to enter into arbitration agreements".[5]

According to Article 2060 of the French Civil code, arbitration is prohibited in all matters in which public policy is concerned. In theory, this provision gave the French legislator the power to limit the matters which may be arbitrated by enacting public policy laws. The objective was to protect certain areas of law deemed fundamental where arbitral jurisdiction should be excluded. Today, however, Article 2060 of the French Civil code has been somewhat cleared of its substance by specific legislative provisions and French case law [6] which progressively allowed arbitrators to apply principles of public policy to the merits of the dispute,[7] and even to sanction a party for violating a rule of public policy.[8]

Although arbitration fits into the "world of contracts", a world where the consent of parties is paramount, compliance is rather an obligation imposed on the parties.[9] It was therefore not obvious that these two fields would meet. However, the question of the arbitrability of compliance is one of the issues which arose.[10]

This question must nevertheless be understood broadly as there is no general law on compliance but rather compliance is present in a vast category of fields.

The fight against corruption is a clear example of an initially rejected [11] but now widely accepted [12] issue in arbitration, materialized by an international consensus.[13] Such matter is the prime example in which arbitration must consider compliance. In addition, in other regulated matters such as the financial and banking sector,[14] or in antitrust law,[15] the arbitrability of these disputes is also now widely accepted.

Most probably in the future, disputes arising from the application of different compliance programs may be referred to an arbitration tribunal.

II. Adjustment of arbitration to the burden of compliance

Arbitration has been also strongly influenced by the trend towards compliance and has had to adapt thus affecting different key arbitration principles.

This is notably the case of the confidentiality principle,[16] considered as one of most important characteristics of arbitration.[17] This principle allows both the protection of business interest (e.g., protection of one's reputation, protection of trade secrets etc.) and the efficiency of the arbitral process.[18] Yet, there has been calls for transparency in international commercial arbitration as it has been argued that increased transparency is necessary to assure that arbitration continues to succeed as an efficient and reliable method of dispute resolution. This need for transparency can be demonstrated by the growth of certain disclosure obligations. As an example, publicly listed companies have seen the advantage of confidentiality diminished by laws and regulations requiring disclosure of financial and extra-financial information directed at the market.[19] Compliance with such requirements is necessary to avoid any financial sanctions imposed by national rules and regulation. Greater transparency is likely to apply to the world of arbitration, as it applies to the world of compliance, but these notions are not necessarily adverse.

A right balance between the interests of parties seeking confidentiality in arbitration and the need for greater transparency needs to be found.[20]

In addition, arbitral institutions themselves have had to adapt to different compliance requirements imposed on them by relevant regulatory authorities. For example, data protection and cybersecurity concerns during the arbitration proceeding are new arbitration hazards those arbitral institutions will have to deal with in the future. More specifically, the ICC, one of the biggest arbitral institutions worldwide, has published a Note to Parties and arbitral tribunals [21] to provide them with all the relevant information regarding compliance obligations imposed by some regulatory authorities during arbitral proceedings (e.g., sanction regulations[22]). In this note, it is provided that the ICC itself may be required to comply with obligations imposed by French and US authorities, should they request information.[23] It also has had to adapt to certain compliance requirements, notably in terms of payments.[24]

All actors of the arbitral world have been adapting to give some space to compliance requirements and thus avoid any sanctions.

III. The role of arbitrators in dealing with compliance matters

As arbitrators have become the common "judges" of international trade and commerce, it is not surprising that they come across compliance issues and requirements when handling arbitral cases.

In recent years, arbitration has seen an increasing number of corruption allegations. It consequently raised different questions such as the impact of compliance on the arbitrator's treatment of corruption or even the importance of the arbitrator's knowledge of the many technical issues related to compliance law. Arbitrators have thus taken a major role in taking into consideration compliance regulations with respect to corruption.

Traditionally, arbitrators refused jurisdiction over disputes involving corruption issues. The ICC Case No. 1110 is a brazen example in which the sole arbitrator declined jurisdiction when a contract had been obtained through corruption.[25] This however seems to be a challenge of the past, as there is a consensus that arbitral tribunals must no longer decline jurisdiction over corruption issues.[26]

To do so, arbitrators have had to comply with the internal and international rules and recommendations on the subject. For instance, arbitrators are now using the "red flag" methodology, inspired by the OECD Convention and the American Foreign Corrupt Practice Act (FCPA) of 1977 which allows arbitrators to determine the existence of a corrupt situation [27] relying on different indicators, circumstantial evidence or "red flags" that could indicate the existence of a corrupt situation. Such indicators do not form an exhaustive and limited list but include : the fact that a contract was awarded without a call for tender even though it is required by the country's regulations, the payment of intermediaries on a commission basis, the high amount of commissions, or the circumstances surrounding their payment, the intermediary's lack of experience or qualification, the refusal to provide some documents (e.g., bank statements) etc.[28] Yet, if such elements are with no doubt useful elements to assess the existence of illicit activities (such as corruption, money laundering etc.), arbitrators need to keep in mind that the existence of such elements should not become an irrefutable presumption of corruption.

In addition, arbitrators who initially lacked investigative powers are now actively taking a part in the fight against corruption by making document requests to obtain specific information.[29] Arbitrators also increasingly tend to ask questions directly to the parties to clarify their doubts.

In practice, arbitrators were at first very timid regarding the annulment of contracts tainted by corruption. The first case known in arbitration in which a contract tainted by corruption was set aside by an arbitral tribunal was the ICC Case No. 12990 dated December 2005.[30]

Yet, arbitrators will now become more and more active in the fight against corruption. Therefore, when asked either to enforce an arbitral award or to set it aside, national courts are also playing a crucial role to avoid endorsing corruption practices.[31] The control exercised by the national judges will push the arbitrators to be careful to render enforceable awards that do not endorse an illegal enterprise and become a real actor in the fight against corruption. With regards to the control operated by French on the violation of international public policy – the *Belokon*,[32] the *Alstom*[33] and the *Sorelec*[34] cases are good illustrations of the red flags techniques used by French judges to identify "serious, precise and concordant indications" of corruption and to prevent the enforcement in France of an award rendered abroad but judged to be in "manifest, effective and concrete" violation of the French conception of international public policy.

Besides the corruption example, it is likely that arbitrators will have to deal with an increasing number of matters dealing with compliance and verify the correct application of laws and regulation. Thus, we are still at the beginning of the interactions between arbitration and compliance. Only time will allow us to assess the real role of the different arbitral actors, and most precisely of arbitrators, in implementing and respecting compliance requirements. ■

[1]"International Commercial Arbitration", G. Born, Wolters Kluwer, Third Edition, January 2021, p. 67 ("In contemporary legal systems, international commercial arbitration is a means by which international business disputes can be definitively resolved, pursuant to the parties' agreement, by independent, non-governmental decision-makers, selected by or for the parties, applying neutral adjudicative procedures that provide the parties an opportunity to be heard").

[2]"2018-International Arbitration Survey: The Evolution of International Arbitration", White & Case, 2018, p. 2 ("97% of respondents indicate that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48%) or in conjunction with ADR (49%)"), available here: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf.

[3]"The impact of Corruption on 'Gateway Issues' of Arbitrability, Jurisdiction, Admissibility and Procedural Issues", Y. Banifatemi, Dossier of the ICC Institute of World Business Law: Addressing Issues of Corruption In Commercial and Investment Arbitration, 2015, para. 11 ("Arbitrability concerns the question whether national legislation or judicial authority has barred a specific class of disputes from being arbitrated, typically because the legal system in question has arrogated the power to resolve certain disputes and because parties cannot autonomously dispose of certain legal relations (e.g., patents, securities, competition law, criminal law, family law, inheritance rights etc.)").

[4]Article 2059 of the French Civil code.

[5]Article 2060 of the French Civil code.

[6]Cass. Com., 29 November 1950, Tissot, D, 1951, p. 170 ("nullity of a submission agreement does not follow from the fact that the dispute involves matters of public policy, but only if the public policy has been infringed").

[7]Paris Court of Appeal, 16 February 1989, Rev. Arb., 1989, p. 711.

[8]Paris Court of Appeal, 20 March 2008, Rev. Arb., 2008, p. 341 ("the arbitrator assesses his or her own competence as to the arbitrability of the dispute with regard to public policy and has the power to apply the principles and rules of public policy as well as to sanction any disregard thereof").

[9]"Compliance et Arbitrage: un adossement (Rapport de synthèse in "Compliance et Arbitrage")", M.-A. Frison-Roche, Mafr, 31 March 2021 ("Indeed, it has been well recalled that arbitration is part of the "world of contracts", a singular and bilateral world. Whereas Compliance Law is deployed in the "world of unilaterality": the unilaterality of States, but also the unilaterality of the commitments of companies and, more generally, of crucial operators. Thus, the Law of Compliance consists of an "union" between these two blocks of unilaterality, which are on the one hand the public authorities and on the other hand the crucial economic operators"), available here: https://mafr.fr/fr/article/compliance-et-arbitrage/.

[10] "La synthèse du Colloque Arbitrage & Compliance", M. Danis, M. Valentini, B. Cazeneuve, August Debouzy, 27 July 2019 ("Marie Danis (August Debouzy) first raised the issue of the arbitrability of compliance disputes. The arbitrability of a dispute depends on the persons involved, or on the subject matter submitted to arbitration; the difficulty lies in the fact that compliance regulations are of a very different nature, some of which are covered by domestic criminal law, others by international treaties, or even constitute rules of good conduct that have no binding effect. Case law does not consider that compliance disputes are by nature inarbitrable: the arbitrator has the power to decide whether he can sanction breaches of rules of international public policy"), available here: https://www.august-debouzy.com/fr/blog/1354-la-synthese-du-colloque-arbitrage-compliance.

[11]"Dealing with Corruption in Arbitration: A Review of ICC Experience", Ch. Albanesi and E. Jolivet, Special Supplement 2013: Tackling Corruption in Arbitration, 2013, citing ICC Award No. 8891, Clunet, 2000, p. 1076 ("the defendant's failure to pay the claimant the commission that had been agreed upon, the arbitral tribunal relied on the testimony of several witnesses to find that part of the commission was used to influence public officials in an attempt to obtain a higher price under two public contracts. As a result, the arbitral tribunal decided that the consulting contract was void and dismissed all claims").

[12]Paris Court of Appeal, Belokon v. Kyrgyzstan, 21 February 2017, No. 15/01650, ("Considering that the recognition or enforcement of the award, which would have the effect of giving Mr. BELOKON the benefit of the proceeds of illegal activities, clearly, effectively and concretely violates international public policy; that the annulment sought should therefore be granted"), Paris Court of Appeal, Alstom,10 April 2018, No.16/1182, ("recognition or the execution of the award which orders Alstom to pay sums intended for funding"), "Addressing Corruption in Commercial Arbitration: How Do Tribunals Evaluate and Adjudicate Contractual Relationships Tainted in Corruption?", G J. Horvath, K. Khan in J. Risse, G. Pickrahn, et al. SchiedsVZ, German Arbitration Journal, Volume 15, Issue 3, 2017, p. 130 ("Corruption has plagued the international economic and business arena for many decades with no indication of relenting. There is an almost universal consensus that corruption is not only immoral and an "international evil", but also detrimental to the global economy and society as a whole"), " La corruption saisie par les arbitres du commerce international ", E. Gaillard, Rev. Arb., 2017, p. 806 ("International condemnation encompasses not only the payment of "bribes" to foreign public officials, which is corruption in the strict sense, but also influence peddling, which consists of a party, public or private, being paid to abuse his or her influence, real or supposed, with a public authority or administration in order to obtain an undue advantage, whether or not the influence produces the desired result").

[13]United Nations Convention against Corruption ("UNCAC" or "Convention of Merida"), 9 December 2003, available here: https://www.unodc.org/unodc/en/treaties/CAC/index.html.

[14]"Part II Substantive Rules on Arbitrability, Chapter 15 – Arbitrability in Finance and Banking", I. Bantekas in L. A. Mistelis and S. Brekoulakis (eds), in Arbitrability: International and Comparative Perspectives, International Arbitration Law Library, Vol. 19, 2009, pp. 293-316, spec. p. 295 ("Despite their semantic differences, the language in all of these statutes clearly demonstrates the existence of a presumption that is in favour of arbitration in all matters reflecting an economic or financial interest (…)"), see also, "Financial Institutions and International Arbitration", ICC Commission, 2016, para. 94, available here: https://iccwbo.org/content/uploads/sites/3/2016/11/icc-financial-institutions-and-international-arbitration-icc-arbitration-adr-commission-report.pdf.

[15]"Chapter 1 Arbitrability of Antitrust Law from the European and US Perspectives", in EU and US Antitrust Arbitration: A Handbook for Practitioners", A. Mourre, Kluwer Law International, 2011 ("Arbitrability of competition law is no longer an issue (…) another reason for the general admission of the arbitrability of antitrust rules is that competition law has become the driving force of modern market economies and that it is in the best interest of the public that arbitrators apply it rather than shy away because of arbitrability concerns").

[16]"Confidentiality in International Commercial Arbitration", Arbitration International, L. E. Trakman, William W. Park edition, 2002, pp. 1 – 18 ("The issue of confidentiality is key to the successful practice of international commercial arbitration. The confidentiality of arbitration proceedings is a reason for resorting to arbitration, as distinct from litigation").

[17]"2018-International Arbitration Survey: The Evolution of International Arbitration", White & Case, 2018, p. 6 – p. 28 ("87% of respondents believe that confidentiality in international commercial arbitration is of importance. Most respondents think that confidentiality should be an opt-out, rather than an opt-in, feature"), available here: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf.

[18]"Transparency and Confidentiality in International Commercial Arbitration", S. Kumar, R. Pratap Singh, in Stavros Brekoulakis (ed), Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Kluwer Law International, 2020, p. 470 ("[…] it can be safely concluded that there is a need to maintain a certain degree of confidentiality to protect business interests as well as the sanctity of the arbitral process").

[19]"Nouvelles tendances de l'arbitrage international", J.-G. Betto, J. Fry, M. Henry, E. Kleiman et P. Pinsolle, RDAI/International Business Law Journal, No. 3, 2006, pp. 377-379, see Article L. 225-100-1 of the French Code of Commerce for financial information and Article L. 225-102-1 of the French Code of Commerce for extra-financial information.

[20]"Transparency and Confidentiality in International Commercial Arbitration", S. Kumar, R. Pratap Singh, in Stavros Brekoulakis (ed), Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Kluwer Law International, 2020, p. 481 ("There is a need to bring about a balance between the concepts of confidentiality and transparency since the former is responsible for bringing commercial parties to arbitration, whereas the latter is necessary for ensuring justice in the process").

[21]"Note to Parties and Arbitral Tribunals on ICC Compliance", International Chamber of Commerce, September 29, 2017.

[22]"Note to Parties and Arbitral Tribunals on ICC Compliance", International Chamber of Commerce, September 29, 2017, p. 2, para. 2 ("Sanction regulations may be applicable to DRS activities. (…) to the sanction regimes of the United Nations ("UN"), the European Union ("EU") and the US Office of Foreign Assets Control ("OFAC")").

[23]"Note to Parties and Arbitral Tribunals on ICC Compliance", International Chamber of Commerce, 29 September 2017, p. 3, para. 12 ("Should the administration of a case, including any payment, trigger a requirement to notify French and/or US authorities under international sanctions regulations, ICC will give them the necessary notice(s). Although ICC considers confidentiality to be a key principle in ICC arbitration proceedings, it may be required to comply with obligations imposed by the French and US authorities, should they request information. In such a situation, ICC will communicate the information pursuant to its obligations").

[24]"Note to Parties and Arbitral Tribunals on ICC Compliance", International Chamber of Commerce, 29 September 2017, p. 3-4, paras. 14-19 ("Under their internal policies, ICC's bank(s) may be precluded from receiving payments from, and making payments to, the parties (and other players such as arbitrators), and to ICC itself, failing formal clearance to their satisfaction from the relevant authorities. Accordingly, ICC is not in a position to guarantee payments, unless and until such formal clearance has been obtained. Among other factors, the bank(s) will have regard to the nature of the transaction, the currency used and the scope of the activities that they are required to perform").

[25]ICC Award No. 1110, 1963, Arb. Int'l, 1994, p. 282 ("contracts which seriously violate bonos mores or international public policy […] cannot be sanctioned by courts or arbitrators" and "[p]arties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for the assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes").

[26]ICC Case No. 4145, Yearbook Commercial Arbitration, 1987, p. 97, ICC Case No. 7047, 1994 Award, Yearbook Commercial Arbitration, 1996, p. 79., ICC Case No. 5622, Rev. Arb., 199, p. 327, § 169, ICC Case No. 5943, JDI, 1991, p. 1014, n. D. Hascher, "La corruption saisie par les arbitres du commerce international", E. Gaillard, Rev. Arb., 2017, para. 18 ("The first, on which there is complete unanimity today, both in state case law and in the case law of the Court of arbitral jurisprudence, is that the arbitrator who finds that the contract covers a corrupt activity should not infer from it the non-arbitrability of the matter and its own absence of jurisdiction but retain its jurisdiction and declare it null and void or ineffective for disturbance of international public order").

[27]"Addressing Corruption in Commercial Arbitration: How Do Tribunals Evaluate and Adjudicate Contractual Relationships Tainted in Corruption?", G J. Horvath, K. Khan in J. Risse, G. Pickrahn, et al. SchiedsVZ, German Arbitration Journal, Volume 15, Issue 3, 2017, p. 130.

[28]"La corruption saisie par les arbitres du commerce international", E. Gaillard, Rev. Arb., 2017, p. 805, spéc. p. 819.

[29]"La corruption saisie par les arbitres du commerce international", E. Gaillard, Rev. Arb., 2017, p. 836 ("Les arbitres, libres de soulever d'office les questions de corruption si les circonstances de la conclusion d'un contrat leur paraissent suspectes, possèdent en effet de vastes pouvoirs d'investigation (…) [s]ous la seule réserve du respect du contradictoire").

[30]ICC Case No. 12990, JDI, 2010, p. 1406, n. F. Mantilla Serrano; also published in "Tackling Corruption in Arbitration", ICC Supplement, 2013 ("it is generally recognized under French law […] that corrupt pacts [or contracts entered into because of corrupt practices] are unlawful"), World Duty Free Company Limited c/ République du Kenya, ICSID. Case No. ARB/00/7, 4 October 2006, para. 157 ("In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal").

[31]Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958; entered into force June 7, 1959, Art. V(2)(b); Model Law on International Arbitration, 1985, Arts. 34(2)(b)(ii) & 36(1)(b)(ii).

[32]Paris Court of Appeal, Belokon v. Kyrgyzstan, 21 February 2017, No. 15/01650.

[33]Paris Court of Appeal, Alstom, 10 April 2018, No.16/1182.

[34]Paris Court of Appeal, Libyan State v. Sorelec, 17 November 2020, No. 18-02568.

F.

AND USEFUL CLARIFICATIONS IN WHITE COLLAR CRIME

Impacts of the attorney-client privilege reform on white-collar practice

On 22 December 2021, Law n° 2021-1729 for confidence in the judicial institution was enacted. Following the initiative of the Minister of Justice, this Law has been the subject of several controversies concerning the attorney-client privilege.

Although it reaffirms the principle of protection of this privilege, both in matters of defense and counsel, the final version that was adopted integrates exceptions regarding some white-collar offences. If these exceptions are limited to certain specific situations, the distinction made between defense and counsel activities leads to some questions that will certainly be discussed and will have to be clarified, probably in court.

I. Consecration of the attorney-client privilege's protection for both counsel and defense activities

The attorney-client privilege is one of the fundamental guarantees for the defense of any individual [1]. As a fundamental principle of the profession's practice enshrined in Law n°71 – 1130 of 31 December 1971 reforming certain judicial and legal professions, this attorney-privilege provides that "[i]*n all matters, whether in the field of counsel or defense, consultations addressed by an attorney to his client or intended for the latter, correspondence exchanged between the client and his attorney, between the attorney and his fellows with the exception of those marked as "official", interview notes and, more generally, all documents in the case are covered by attorney-client privilege*".

The attorney-client privilege covers all information that the attorney may have received by virtue of his position. This includes confidences received from the client and information received from third parties in the context of the case, as well as any element that attorney may have observed, discovered, or deduced from his professional [2] The National Internal Regulations ("RIN") of the attorney profession specify in article 2.1 that this attorney-client privilege is of public order, general, absolute, and unlimited [3]. Thus, except in the context of his own defense or in cases of declarations or disclosures provided for or authorized by Law, the attorney is bound by this privilege and cannot be released from it, not even by his client [4].

In recent years, the *Cour de cassation* criminal chamber's case law has tended to limit the scope of this legally conferred protection. For example, it has been asserted that ascertaining the truth in the context of an investigation prevails over the protection of the attorney-client privilege [5]. Similarly, it has also been held that the scope of the protection was limited to defense activities [6]. This case law trend, qualified by some as *contra legem*[7], contradicts the letter of 31 December 1971 Law, which protects every element that the client is led to entrust to the attorney, in any form whatsoever, with a view to being counseled or defended.

As introduced in April 2021, the Law's bill for confidence in the judicial institution initially sought to reverse these valuable gains by inserting a paragraph in the criminal procedure code stating that "*respect of the attorney-client privilege in matters of defense is guaranteed during the proceedings under the*

conditions provided for in this code", thereby excluding from the privilege's perimeter the counseling activities [8].

In its promulgated version, the text rectified the case law's positions regarding the counseling activity and reaffirmed the overall protection conferred by the attorney-client privilege. The Law enshrines in the criminal procedure code that "*the respect of the attorney-client privilege, both in matters of defense and counsel, as prescribed by the article 66-5 of the Law n° 71-1130 of 31 December 1971 reforming certain judicial and legal professions, is guaranteed during the criminal procedure under the conditions provided for in this code*" [9].

II. The non-opposability of the attorney-client privilege in matters of counsel activities when the information or documents usually protected make it possible to establish proof of certain white collar crime offenses

On 16 and 18 November 2021, the National Assembly and the Senate voted on an amendment proposed by the government modifying article 3 of the Law's bill. The observations of certain public authorities, considering that the protection of the attorney-client privilege as it stands could interfere with their activities, were apparently heard by the Parliament, which finally opted for a relative and limited effectiveness of the overall protection of this privilege [10].

By this amendment, an article 56-1-2 was included in the criminal procedure code stating that the counsel attorney-client privilege is not opposable to the measures of investigation or inquiry when these relate to the offences of tax fraud, corruption or laundering of these offences, as well as to the offence of financing terrorism, provided that the consultations, correspondence or documents, held or transmitted by the attorney or his client, establish proof of their use for the purposes of committing or facilitating the commission of these offences[11]. This amendment, although controversial, was finally retained in the Law that was promulgated.

The second exception proposed by the *Commission Mixte Paritaire* consisting in the non-opposability of the attorney-client privilege to the measures of investigation or inquiry when the attorney has been subject of maneuvers or actions with the aim of allowing, in an unintentional way, the commission, the pursuit or the concealment of an offence [12] was finally removed in the final text. This exception had given rise to numerous complaints from the profession due to the inclusion of the term "offence", which was considered too general [13], making it too imprecise and too broad [14].

Consequently, although it is true that this Law confirms the existence of an attorney-client privilege both in matters of counsel and defense, the limit inserted by article 56-1-2 of the criminal procedure code, and which will come into force as from March 1er, 2022, has, for sure, an incidence on the absolute nature of this privilege since it reduces its scope.

III. The relative impact of this legislative exception to the attorney-client privilege in view of this evidence requirement and the possibility of the liberty and custody judge's review

The actual relativity of this exception lies in the wording of article 56-1-2, which specifies that certain conditions must be fulfill for this exclusion of the attorney-client privilege to operate. The attorney-client privilege would be non-opposable only in cases where consultations, correspondence, or documents, held or transmitted by the attorney or his client, establish proof of their use for the purposes of committing or facilitating the commission of the said offences [15].

To guarantee this limitation to the breach of the attorney-client privilege regarding these restrictively enumerated assumptions, there is a possibility to contest the seizure of a document and to submit it to the liberty and custody judge's control, the latter occupying the role of regularity's guarantor [16]. The Law states in this regard that article 56-1-2 applies without prejudice to the possibility given to the President of the Bar or his representative or to the person at whose premises the search is taking place, to object to the seizure of a document, and consequently, to require that this objection be examined by the liberty and custody judge [17].

However, there are limits to this protection, as to determine whether this condition for exclusion is met, the content of the document will likely be revealed for verification, at least to the liberty and custody judge, thus rendering the attorney-client privilege *de facto* inoperative [18].

IV. Questions raised by this legislative exception to the attorney-client privilege, especially regarding internal investigations

The terms of the criminal procedure code's article 56-1-2 referring to "*counsel attorney-client privilege*" raise questions, since a distinction is now made in the preliminary article of the criminal procedure code between "*the respect of the attorney-client privilege, both in matters of defense and counsel*". Should it be understood, as it is written in French, that the non-opposability of the counsel attorney-client privilege to measures of investigation or inquiry, when these relate to certain white-collar offences, is limited to the field of counseling activities? Or *a contrario*, is it a question of using the word "counsel" as "attorney" without any distinction being made between the defense or counsel activities?

If we were to accept a meaning of this expression that includes a reference to counseling activities only, this would reopen the debate of what falls within the field of counsel or defense activities, and in particular regarding internal investigations.

White-collar practice has been turned upside down over the last few years by the practice of internal investigations, transforming the defense's traditional approach since it is now possible, in the context of criminal litigation, to conduct its own investigation and to transmit certain elements to the prosecution authorities in the context of cooperation towards a negotiated sanction.

However, although it is part of a general mission of counsel and assistance, the Paris Bar Order asserted that the internal investigation contributes to the defense rights [19], as it aims to determine whether violations of the Law or regulations have been committed and, consequently,

to allow the preparation of a defense strategy. Thus, and since it concerns the field of defense and not that of counsel, the legislative exception provided for by article 56-1-2 of the criminal procedure code would not apply. Hence, although it is true that the new legislation has a theoretical impact on white-collar practice and creates uncertainties regarding the protection of individuals, it would not mean that attorney-client privilege would be completely annihilated in this field, as the practice of internal investigations is now established as the reference tool in this discipline.

However, this position has been challenged by some authorities which believe that "[n]*ot all elements contained in the report of the internal investigation are necessarily covered by attorney-client privilege*"[20].

As regards to internal investigations, it is therefore likely that in addition to a jurisdictional debate on whether the assumptions referred to in article 56-1-2 of the criminal procedure code allowing the non-opposability of the attorney client privilege are actually met, there will be a debate on whether the text only refers to counseling activities and, if applicable, whether the practice of internal investigations is an attorney's counseling or defense mission.

Debates on the attorney-client privilege in the white-collar practice are therefore not at all over with the promulgation of this Law n° 2021-1729 of 22 December 2021 for confidence in the judicial institution. On the contrary, it seems that certain questions could even rekindle them, especially regarding internal investigations. ■

[1] Le secret professionnel de l'avocat, force ou alibi ?, Yves Avril, Recueil Dalloz, n°43, 8 December 2011, p. 2979 ("The attorney-client privilege is one of the three great secrets protected by the liberal society of the Western world. It is placed next to medical secrecy and the secrecy of the confession").
[2] French Attorney's Guide and Internal Investigations, Conseil National des Barreaux-Centre de recherche et d'étude des avocats, General Assembly of June 12, 2020, p. 30 ("Attorney-client privilege covers all confidences that the attorney may have received by virtue of his status or profession, whether in the field of counsel or defense. This includes not only the client's confidences, but also information received from third parties in the context of the case concerning the said client, as well as anything that he may have observed, discovered or deduced from his professional activity").
[3] Article 2 of the National Internal Regulations of the Attorney profession ("The attorney is the necessary confidant of the client. The attorney-client privilege is of public order. It is general, absolute and unlimited in time").
[4] Article 4 of the Decree n° 2005-790 relating to the rules of deontology of the legal profession of 12 July 2005 ("Subject to the strict requirements of his own defense before any jurisdiction and the cases of declaration or disclosure provided for or authorized by Law, the attorney shall not, in any matter, make any disclosure contrary to the attorney-client privilege").
[5] Cass. Crim., 30 June 1999, 97-86.318 ("It follows from articles 97 and 99 of the Criminal Procedure Code and article 8 of the European Convention for the Protection of Human Rights that the investigating judge may oppose the return of documents seized in an attorney's office and covered by the attorney-client privilege, as long as their retention in the hands of the judiciary with a view to determining the existence of criminal offences is necessary for the determination of the truth and does not infringe on the rights of the defense").
[6] Cass. Crim, 22 March 2016, 15-83.205 ("That, on the other hand, there is no legal or conventional provision that prevents the capture, recording and transcription of the words of an attorney intervening on the telephone line of a third party regularly placed under surveillance, when, as in the present case, in the first place, this attorney is not defending the person placed under surveillance, who is neither an accused or an assisted witness nor has he been placed in police custody in the proceedings in question, and, secondly, his comments, even if exchanged with a regular client, the content of which is alien to any exercise of the rights of the defense in the said proceedings or in any other proceedings, reveal indications of his participation in facts likely to be classified as criminal, as analyzed, in this case, without insufficiency or contradiction, by the investigating chamber"), see also on the validity of seizures of correspondence with an attorney during visits and seizures by the economic regulation authorities: Cass. Crim, 25 November 2020, No. 19-84.304, Bull. crim., No. 102 ("Although [...] correspondence exchanged between a client and his attorney is, in all matters, covered by the attorney-client privilege, it remains that it may be seized in the context of the planned visit operations [...] as long as they do not concern the exercise of the rights of the defense. It follows [...] that the first president, ruling on the legality of these operations, can only order the return of correspondence between the occupant of the premises visited and an attorney because of their privilege if they are related to the exercise of the rights of the defense").
[7] See for example, En matière de conseil, le secret de l'avocat n'existe plus !, Vincent Nioré, Gazette du Palais, 16 May 2017, No. 19 ("We must face the facts, in matters of counsel, the attorney-client privilege no longer exists. This is the consequence of a constant jurisprudence of the criminal chamber of the Court of Cassation directly contrary to the provisions of article 66-5 of the 1971 Law (L. n° 71-1130, 31 Dec. 1971, reforming certain judicial and legal professions, art. 66-5)").
[8] Article 3 of Law's bill n°4091 for confidence in the judicial institution ("The criminal procedure code is amended as follows: 1° A paragraph is added to the preliminary article of the criminal procedure code: "the respect of the attorney-client privilege in matters of defense is guaranteed during the proceedings under the conditions provided for in this code").
[9] Article 3 of Law no. 2021-1729 of 22 December 2021 for confidence in the judicial institution ("The criminal procedure code is amended as follows: 1° A paragraph is added to Article III of the Preliminary Article as follows: the respect of the attorney-client privilege, both in matters of defense and counsel, as prescribed by the

article 66-5 of the Law n° 71-1130 of 31 December 1971 reforming certain judicial and legal professions, is guaranteed during the criminal procedure under the conditions provided for in this code").

[10] La bataille sur le secret professionnel a affaibli les représentants des avocats, Le Monde, 24 November 2021 ("A campaign by the CNB among the many deputies from this profession has made it possible to push for amendments extending privilege to attorneys' counseling activities. Faced with a Minister of Justice who opted for neutrality, the Assembly voted unanimously in May for this new guarantee. This was enough to make Bercy's tax services and the National Financial Prosecutor's Office, responsible for major financial crime, howl. They saw it as an obstacle to their investigations. The senators will amend the text in September, specifying that attorney-client privilege would not be enforceable in matters of tax fraud, influence peddling, corruption or laundering of the proceeds of these offenses").

[11] Text No. 38 (2021-2022) adopted by the Senate on 18 November 2021, art. 3 ("Art. 56-1-2. – In the cases provided for in articles 56-1 and 56-1-1, without prejudice to the prerogatives of the President of the Bar or his representative provided for in article 56-1 and to the rights person at whose premises the search is taking place provided for in article 56-1-1, the counsel attorney-client privilege is not opposable to the measures of investigation or inquiry when these relate to the offences mentioned in articles 1741 and 1743 of the General Tax Code and in articles 421-2-2, 433-1, 433-2 and 435-1 to 435-10 of the Criminal Code, as well as the laundering of these offences, provided that the consultations, correspondence or documents held or transmitted by the attorney or his client establish proof of their use for the purposes of committing or facilitating the commission of these offences"). This text has been fully included in the promulgated version of the Law n° 2021-1729 of 22 December 2021 for confidence in the judicial institution.

[12] Law 4604, text drawn up by the Commission Mixte Paritaire, art. 3 ("Art. 562-1. In the cases provided for in articles 561 and 561-1, the attorney-client privilege of counsel may not be invoked against the measures of investigation or inquiry: […] "2° Or when the attorney has been subject of maneuvers or actions with the aim of unintentionally allowing, in an unintentional way, the commission, the pursuit or the concealment of an offence ").

[13] Les avocats livrent un ultime combat pour défendre leur secret professionnel, Les Echos, 8 November 2021 ("But it is especially a paragraph added without prior debate that makes the profession jump: the privilege will be erased "when the attorney has been the object of maneuvers or actions in order to allow, in an unintentional way, the commission, the pursuit or the concealment of an offence" is written. The term "offence" is very general", points out Julien Vernet, criminal attorney of the BG2V firm. "With this paragraph, which is therefore intended to apply to any offence, attorney-client privilege is quite simply denied" ").

[14] Amendment presented by the government to the Law of confidence in the judiciary, n°2, 17 November 2021 ("The second is that in which the attorney has been the object of maneuvers or actions for the purpose of allowing, in an unintentional way, the commission, the pursuit or the concealment of an offense. This exception, however, appears too imprecise and too broad").

[15] Article 3 of Law n° 2021-1729 of 22 December 2021 for confidence in the judicial institution (" […the attorney-client privilege of counsel is not opposable to the measures of investigation or inquiry when these relate to the offences mentioned in articles 1741 and 1743 of the general tax code and articles 421-2-2, 433-1, 433-2 and 435-1 to 435-10 of the criminal code as well as to the laundering of these offences, provided that the consultations, correspondence or documents held or transmitted by the attorney or his client establish proof of their use for the purposes of committing or facilitating the commission of the said offences").

[16] Explanatory document from the Ministry of Justice, Le Point sur le secret des Avocats, 12 November 2021 ("The President of the Bar will retain all his existing prerogatives and will also be able to : Make a suspensive appeal before the president of the investigating chamber against a decision of the JLD validating a seizure in an attorney's office; Intervene before the JLD when challenging the seizure of a document given or received by an attorney when this seizure was carried out in a place other than the attorney's office, and challenge before the president of the investigating chamber the decision of the JLD validating this seizure; Be notified of requisitions for connection data issued by an attorney").

[17] Article 3 of Law n° 2021-1729 of 22 December 2021 for confidence in the judiciary ("[…] Art. 56-1-2.-In the cases provided for in articles 56-1 and 56-1-1, without prejudice to the prerogatives of the President of the Bar or his representative provided for in article 56-1 and to the rights of the person at whose premises the search is taking place provided for in article 56-1-1[…]").

[18] Le billet: L'affaiblissement du secret professionnel des avocats, Mathias Latina, Dalloz Actualité Etudiant, 8 November 2021 ("Certainly, the members of the commission will pride themselves on having introduced safeguards. Only the documents establishing the proof of their use for the purpose of committing or facilitating the commission of the aforementioned offences" will be able to be seized. But it will still be necessary to seize them in order to know whether they establish such proof").

[19] Article 3 of Annex XXIV Vademecum of the attorney in charge of the internal investigation of the internal rules of the Paris Bar, December 10, 2019 ("as in all matters, the attorney in charge of an internal investigation is bound by attorney-client privilege with respect to his client only – no other person may request the benefit of it. In accordance with the rules of attorney-client privilege, when a report or any other document is drawn up by the attorney during his mission, it is given exclusively to his client, who remains free to transmit it to a third party").

[20] Guidelines on the implementation of the judicial public interest agreement of the Parquet National Financier and the French Anti-Corruption Agency, June 26, 2019, p.10.

Attorney-client privilege: an in concreto assessment of documents, allowing to benefit from the protection of attorney-client privilege

"*The communications between citizens and their lawyers are the basis of the rights of the defence. Without protecting the secrecy of these confidences, no citizen, elected official, company or individual is guaranteed that he or she will be given the freedom to consult a lawyer to protect his or her rights*".[1]

Attorney-client privilege is at the forefront of the rights of defence and is one of its strongest guarantees. An article enshrining lawyers' professional secrecy for all of their defence and advisory missions[2] was recently introduced into the preliminary article of the French Code of Criminal Procedure as a result of the adoption by the French National Assembly of the bill for trust in the judicial institution[3].

In this sense, the Court of Cassation recently had the opportunity, in a judgement of 26 January 2022, to revisit the notion of the attorney-client privilege and to further refine its contours.

I. From the 1971 Act to the Internal and National Regulations, the scope of attorney-client privilege has been extended

Attorney-client privilege was enshrined in Article 66-5 of the Law of 31 December 1971[4]. This article stipulates that in all matters, both in advice and in defence, consultations and correspondence sent by an attorney to his client or intended for the latter are covered by professional secrecy*[5]*. This professional secrecy also applies to correspondence between an attorney and his colleague, except for correspondence marked as "official"[6]. The article specifies that interview notes and more generally all documents in the record are covered by professional secrecy[7].

On this basis, Article 2 of the National Internal Rules of the Legal Profession ("NIR") takes up this general principle of professional secrecy of attorneys while detailing its application and scope. This article states that if the attorney is the necessary confidant of the client, it is mainly because he is bound by general, absolute and unlimited professional secrecy[8].

The NIR specifies, in relation to the Law of 31 December 1971, hat all forms of exchange, correspondence and advice between the lawyer and his client or between the lawyer and his colleagues are concerned (paper, fax, electronic)[9].

It also adds that all information and confidential information received by the lawyer in the exercise of the profession[10], but also the names of his clients and his agenda[11], as well as "*pecuniary settlements and all handling of funds carried out in application of Article 27 paragraph 2 of the Law of 31 December 1971 [12]*" and "*information requested by the auditors or any third party (information that can only be communicated by the attorney to his client[13]*" are covered by this professional secrecy.

Any breach of the attorney's professional secrecy is punishable by one year's imprisonment and a 15,000 euros fine[14].

However, there are some exceptions provided for in Article 226-14 of the French Penal Code allowing for the lifting of professional secrecy[15]. For example, an attorney has the right to inform the judicial, medical or administrative authorities of deprivation or abuse (including sexual assault or mutilation), of which he has knowledge, inflicted on a minor or on a person who is unable to protect himself by reason of age or physical or mental incapacity[16].

However, although the scope and limits of attorney-client privilege in France seem precise and established, a recent decision by the Criminal Division of the Court of Cassation may extend it further.

II. The Court of Cassation assesses *in concreto* documents and exhibits in order to allow them to benefit the attorney-client privilege

The judgment in question was issued by the Criminal Division of the Court of Cassation on 26 January 2022[17].

In this case, several companies were investigated for a system of prohibited cartels between manufacturers, wholesalers and major retailers in the distribution of household appliances[18].

On 21 May 2014, for the purposes of the investigation, a liberty and detention judge of the Paris Court of First Instance authorised by order, in accordance with Article L450-1 of the French Commercial Code[19], visits and seizures at the premises of one of these companies[20].

During these investigations, the investigators seized e-mails exchanged between the company's attorneys, the content of which detailed a defence strategy drawn up by the company's attorneys.

On 5 June 2014, the company subject of these visits and seizures filed an appeal with the First President of the Paris Court of Appeal to have them annulled[21]. By order dated 8 November 2017, the First President dismissed this appeal while also deciding to cancel the seizures of certain documents and correspondence, with regard to respect for professional secrecy and confidentiality of exchanges between an attorney and his client, with a prohibition for the Competition Authority to keep a copy and make any use of it[22].

In the judgment of 26 January 2022, the Criminal Division of the Court of Cassation had to ensure the legality of such decision, even though the e-mails were sent by the company's in-house counsel.

The applicant argued these e-mails were not from or addressed to an attorney and therefore should not benefit from the confidentiality of exchanges attached to attorney-client privilege[23]. It recalled that secrecy applies only to "*strict exchanges between an attorney and his client, and that the defence rights do not preclude the seizure of documents falling within the scope of judicial authorization even if they refer to statements made or written by an attorney[24]*". In his view, the First President of the Paris Court of Appeal had therefore "*wrongly extended the confidentiality of documents that were not covered by it[25]*".

The Court of Cassation dismissed the appeal, confirming the reasoning adopted by the First President of the Court of Appeal. In the end, it did not matter that the documents did not originate from or were not intended for an attorney, since the mere fact that they contained a

defence strategy established by attorneys was sufficient for them to be protected by professional secrecy[26].

Finally, it recalled that Article L450-4 of the French Commercial Code, which authorizes agents to seize documents and computer media on a company's business premises, does so, under the guide of respecting the defence rights[27].

Consequently, the Court of Cassation validated the reasoning of the First President, who considered that "*the confidential data covered by the secrecy of correspondence exchanged with an attorney and contained in the seized documents constituted the essential object[28]*".

According to the doctrine, the Criminal Chamber, through this decision, affirmed that "*the content could prevail over the quality of the persons between whom the information was exchanged, validating an analysis in concreto of the exchanges rather than an exclusively in personam approach*[29]". ■

*[1] "Attorney-client privilege cannot be the adjustment variable for effectively combating financial crime", Le Monde, 20 October 2021 ("*The confidences that citizens make to their attorneys constitute the basis of the defence rights. Without protecting the secrecy of these confidences, no citizen, elected official, company or individual is guaranteed the freedom to consult an attorney to protect his rights*").*

*[2] Article 3 of the bill No 4091 for confidence in the judiciary ("*The French Code of Criminal Procedure is hereby amended as follows: 1° A paragraph shall be added to the preliminary Article of the Code of Criminal Procedure as follows "Respect for the professional secrecy of the defence shall be guaranteed during the proceedings under the conditions laid down in this Code*").*

*[3] "MEPs adopt the Confidence Bill and amend Article 3 on professional secrecy", Gazette du Palais, 17 November 2021 ("*On 16 November 2021, the National Assembly adopted overnight the draft organic law and the draft ordinary law for confidence in the judiciary resulting from the joint committee (CMP)*").*

[4] Law No. 71-1130 of 31 December 1971 on the reform of certain judicial and legal professions.

*[5] Article 66-5 of Law No. 71-1130 of 31 December 1971 on the reform of certain judicial and legal professions ("*In all matters, whether in the field of advice or in that of defence, consultations addressed by an attorney to his client or intended for the latter, correspondence exchanged between the client and his attorney [...] are covered by professional secrecy").

*[6] Law No. 71-1130 of 31 December 1971 on the reform of certain judicial and legal professions ("*In all matters, whether in the field of advice or in that of defence [...], correspondence exchanged between [...] the attorney and his colleagues, with the exception of correspondence marked "official" [...] is covered by professional secrecy").

[7] Law No. 71-1130 of 31 December 1971 on the reform of certain judicial and legal professions ("In all matters, whether in the field of advice or in that of defence [...], correspondence exchanged between [...] the attorney and his colleagues, with the exception of correspondence marked "official", the interview notes and, more generally, all the documents in the file are covered by professional secrecy").

*[8] Article 2.1 of the National Internal Rules of the Legal Profession ("*The attorney is the necessary confidant of the client. The attorney's professional secrecy is of public order. It is general, absolute and unlimited in time*").*

*[9] Article 2.2 of the National Internal Rules of the Legal Profession ("*Professional secrecy covers all matters, in the field of advice or defence, and whatever the medium, material or immaterial (paper, fax, electronic...) *[...]").*

*[10] Article 2.2. of the National Internal Rules of the Legal Profession ("*Professional secrecy covers all matters, in the field of advice or defence, and whatever the medium, material or immaterial (paper, fax, electronic...): *[...]* the interview notes and more generally all the documents in the file, all the information and confidences received by the attorney in the exercise of the profession *[...]").*

*[11] Article 2.2. of the National Internal Rules of the Legal Profession ("*Professional secrecy covers all matters, in the field of advice or defence, and whatever the medium, material or immaterial (paper, fax, electronic...): *[...]* the names of clients and the attorney's agenda *[...]").*

*[12] Article 2.2. of the National Internal Rules of the Legal Profession ("*Professional secrecy covers all matters, in the field of advice or defence, and whatever the medium, material or immaterial (paper, fax, electronic...): *[...]* pecuniary settlements and all handling of funds carried out in application of Article 27 paragraph 2 of the law of 31 December 1971 *[...]").*

*[13] Article 2.2. of the National Internal Rules of the Legal Profession ("*Professional secrecy covers all matters, in the field of advice or defence, and whatever the medium, material or immaterial (paper, fax, electronic…): *[…]* information requested by the auditors or any third party (information that can only be communicated by the attorney to his client)*").*

*[14] Article 226-13 of the French Penal Code ("*The disclosure of secret information by a person who is in possession of it either by virtue of his or her status or profession, or by virtue of an office or temporary assignment, is punishable by one year's imprisonment and a fine of 15,000 euros*").*

*[15] Article 226-14 of the French Penal Code ("*Article 226-13 is not applicable in cases where the law requires or authorises the disclosure of the secret. In addition, it is not applicable to 1° To a person who informs the judicial, medical or administrative authorities of deprivation or abuse, including sexual assault or mutilation, of which he or she has knowledge and which has been inflicted on a minor or a person who is unable to protect him or herself because of his or her age or physical or mental incapacity ; 2° To the doctor or any other health professional who, with the victim's agreement, informs the public prosecutor or the unit for the collection, processing and evaluation of information of concern relating to minors in danger or at risk of being in danger, mentioned in the second paragraph of Article L. 226-3 of the Social Action and Family Code, the abuse or deprivation that he or she has observed, on a physical or psychological level, in the exercise of his or her profession and which allows him or her to presume that physical, sexual or psychological violence of any kind has been committed. When the victim is a minor or a person who is unable to protect himself or herself due to age or physical or mental incapacity, his or her consent is not required; 3° To the doctor or any other health professional who informs the public prosecutor of violence within a couple covered by Article 132-80 of this Code, when he or she consciously believes that this violence puts the life of the adult victim in immediate danger and that the victim is unable to protect him or herself due to the moral constraint resulting from the hold exercised by the perpetrator of the violence The doctor or health professional must endeavour to obtain the agreement of the adult victim; if this agreement cannot be obtained, he or she must inform the victim of the report made to the public prosecutor; 4° To health or social action professionals who inform the prefect and, in Paris, the police prefect of the dangerous nature for themselves or others of the persons who consult them and whom they know to be in possession of a weapon or who have expressed their intention to acquire one; 5° A veterinarian who informs the public prosecutor of any information relating to serious abuse, an act of cruelty or sexual assault on an animal mentioned in Articles 521-1 and 521-1-1 and any information relating to the mistreatment of an animal, observed in the course of his or her professional practice. This information does not lift the obligation of the health veterinarian provided for in Article L. 203-6 of the Rural and Maritime Fishing Code. Reporting to the competent authorities under the conditions provided for in this article shall not engage the civil, criminal or disciplinary liability of its author, unless it is established that he did not act in good faith*").*

*[16] Article 226-14 of the French Penal Code ("*Article 226-13 is not applicable in cases where the law requires or authorises the disclosure of confidentiality. Furthermore, it is not applicable to: 1° A person who informs the judicial, medical or administrative authorities of deprivation or abuse, including sexual assault or mutilation, of which he or she has knowledge and which has been inflicted on a minor or on a person who is unable to protect himself or herself because of his or her age or physical or mental incapacity*").*

[17] Cass Crim., 26 January 2022, No 17-87.359.

*[18] Cass Crim., 26 January 2022, No 17-87.359 ("*2. Ruling on a request from the Rapporteur General of the [1] in the context of an investigation into a system of prohibited agreements between manufacturers, wholesalers and major retailers in the distribution of electrical household appliances *[…]*").

*[19] Article L.450-1 of the French Commercial Code ("*I. The agents of the investigating departments of the Competition Authority authorised for this purpose by the rapporteur general may carry out any investigation necessary for the application of the provisions of Titles II and III of this Book. They may also, for the application of Title VI of this Book, implement the powers of investigation defined in Article L. 450-3. In the event that investigations are carried out in the name of or on behalf of a competition authority of another Member State, pursuant to Article 22(1) of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union, the rapporteur-general of the Competition Authority shall authorise officials of the competition authority of the other Member State to actively assist the officials mentioned in the previous paragraph in their investigations, under the supervision of the latter. The details of this assistance are laid down by decree in the Council of State. II – Officials authorised for this purpose by the Minister for the Economy may carry out the investigations necessary for the application of the provisions of this Book. II bis. – Category A civil servants specially authorised for this purpose by the Minister of Justice, on the proposal of the Minister of the Economy or the general rapporteur of the Competition Authority, as the case may be, may receive letters rogatory from investigating judges. III – The agents mentioned

in I and II may exercise the powers they have under this article and the following articles throughout the national territory").

*[20] Cass Crim., 26 January 2022, No 17-87.359 ("*2. Ruling on a request from the general rapporteur of the [1] in the context of an investigation into a system of prohibited agreements between manufacturers, wholesalers and major retailers in the distribution of household electrical appliances, the liberties and detention judge of the Paris high court authorised, by order of 21 May 2014, pursuant to the provisions of Article L.450-4 of the Commercial Code, inspection and seizure operations on the premises of the company [5] France, in Suresnes (92)"). .

*[21] Cass Crim., 26 January 2022, No 17-87.359 ("*4. On 5 June 2014, [5] France appealed to the First President of the Paris Court of Appeal against the conduct of the visit and seizure operations, and requested the annulment of the latter").

[22] Cass Crim., 26 January 2022, No 17-87.359 ("7. The plea criticises the contested order in that it dismissed the appeals lodged by [5] France against the OVS of 27 and 28 May 2014, with the exception of documents No 10, 6, 7 (and appended documents), 8 and 9, as well as the seizure of correspondence No 1, 5, 6, 7, 8, 9 and 15 listed on page 23 of the written pleadings of [5] France, which were declared void, with a prohibition on the ADLC retaining a copy of them and making any use of them *[...]").*

[23] " Professional secrecy: when the bottom rises to the surface", Dalloz Actualité, Hugues Diaz, 9 February 2022, Secret professionnel : lorsque le fond remonte à la surface – Avocat | Dalloz Actualité (dalloz-actualite.fr) *("*In the judgment under review, the Criminal Division was therefore asked to rule on the legality of this decision: between the two branches, the ground of cassation maintained that e-mails could not benefit from the confidentiality of exchanges between an attorney and his or her client once it had been established that these communications did not originate from or were not addressed to an attorney").

[24] Cass Crim., 26 January 2022, No 17-87.359 ("2°/ that in order to annul the seizure of exhibits 8 and 9, the First President held that they 'repeated a defence strategy put in place' by an attorney and thus 'infringed the rights of the defence' (ibid.); he stated that the "same reasoning [could] be adopted with regard to document no. 10"; in so ruling, while apart from the confidentiality of strict exchanges between an attorney and his client, the defence rights do not preclude the seizure of documents falling within the scope of judicial authorisation even if they refer to statements made or written by an attorney").

*[25] Cass Crim., 26 January 2022, No 17-87.359 ("*2°/ [...] the First president ruled on irrelevant grounds and wrongly extended the confidentiality of documents that were not covered by it").

*[26] Cass Crim., 26 January 2022, No 17-87.359 ("*19. In order to annul the seizure of documents 8, 9, 10, and 7 (as well as all the documents attached), the contested decision states that even if the e-mail in exhibit 8 does not originate from or is not addressed to an attorney, it repeats a defence strategy put in place by the law firm [H] [Z], it is also common ground that although these documents do not originate from or are not addressed to an attorney, they reflect a defence strategy put in place (the attorney having studied the possibility of applying for leniency and then excluding it) by the law firm [H] [Z], and the same reasoning can be adopted with regard to Exhibit 10 grouping together the three emails seized from Ms [N] and Ms [E]'s email accounts").

*[27] Cass Crim., 26 January 2022, No 17-87.359 ("*18. It follows from this text that the power granted to the agents of the [1] by Article L.450-4 of the Commercial Code to seize documents and computer media is limited by the principle of free defence, which requires respect for the confidentiality of correspondence exchanged between an attorney and his client and linked to the exercise of the rights of the defence").

*[28] Cass Crim., 26 January 2022, No 17-87.359 ("*21. In the light of these statements, the First President, who, in an assessment which falls within his sovereign power, found that the confidential data covered by the secrecy of correspondence exchanged with an attorney and contained in the seized documents constituted the essential object of the documents, justified his decision").

[29] "Professional secrecy: when the bottom rises to surface", Dalloz Actualité, Hugues Diaz, 9 February 2022, Secret professionnel : lorsque le fond remonte à la surface – Avocat | Dalloz Actualité (dalloz-actualite.fr) *("*The Court of Cassation then considered that the judge, in an assessment that fell within his sovereign power, had rightly found that confidential data, covered by the secrecy of correspondence with an attorney, constituted the essential object of the documents seized. In fact, the Criminal Division thus confirmed that the content could prevail over the quality of the persons between whom the information was exchanged, validating an analysis in concreto of the exchanges rather than an exclusively in personam approach").

Transfer of criminal liability following a merger or acquisition

I. The Court of Cassation departed from previous case law in the decision of November 25, 2020

In a decision rendered on November 25, 2020,[1] the Court of Cassation adopted a novel approach to the transfer of criminal liability of corporate entities in the context of merger transaction.

A. Previous case law

Under the previous case law, the Court of Cassation had consistently held that an acquiring company could not be prosecuted for acts committed by the acquired company before the merger transaction.[2]

The rule was based on article 121-1 of the penal code, which provides that a person is liable for his own wrongful acts,[3] as interpreted by the European Court of Human Rights ("ECHR") in the light of Article 6 of the European Convention on Human Rights.[4]

Indeed, the Court of Cassation considered that the dissolution of the acquired company under the terms of the merger-takeover operation entailed the end of the existence of the absorbed company.[5]

Just like the extinction of the public action by the death of a natural person,[6] the dissolution of the legal personality of the absorbed company would very often lead to the termination of the prosecution.[7]

B. Grounds for the change in the Court of Cassation's case law

National courts must interpret national law in a manner consistent with the directives of the European Union.[8]

The Court of Justice of the European Union ("CJEU") held that the obligation to pay a fine resulting from acts committed and for which a final judgment has been issued, prior to a merger-absorption operation, could be transferred to the acquiring company as part of the assets and liabilities of the absorbed company.[9]

However, the Court of Cassation would not allow criminal proceedings to be brought against an acquiring company for acts committed by an absorbed company before the latter lost its legal existence.[10] As a result, there was a significant risk that companies would attempt to merge to avoid possible prosecution and criminal penalties.

Subsequently, the European Court of Human Rights ("ECHR") has refined its appreciation of the rule according to which a person is only liable for his own wrongful acts when applied to companies,[11] allowing the French Court of Cassation to change its case law relating to the transfer of criminal liability of companies in the context of mergers operations.

Indeed, the ECHR has ruled that "*the absorbed company is not really a third party with regard to the absorbing company*" because of the economic continuity that exists between the companies during a merger-acquisition[12]. Thus, the ECHR considers that the conviction of the acquiring company to a civil fine, for antitrust offenses committed by the absorbed company, is compatible with the principle of the personality of penalties.[13]

C. Transfer of criminal liability of the absorbed company

The Court of Cassation, based on the same reasons as those raised the ECHR in the above-mentioned decision, changed its case law in a landmark decision in 2020.[14]

The Court ruled that in the event of a merger involving companies falling within the scope of European Council Directive 78/855/EEC of October 9, 1978, the acquiring company may be sentenced to a fine or confiscation penalty for offences committed by the absorbed company prior to the merger operation.[15]

Nevertheless, the transfer of criminal liability from the absorbed company to the acquiring company is only applicable to merger operations subsequent to the decision of November 25, 2020, in view of the principle of legal certainty,[16] as interpreted by the ECHR.[17] The scope of application of that new rule is restricted because it only applies to a certain type of limited companies (*sociétés anonymes*).[18]

Moreover, only fines and confiscation penalties may be imposed on the acquiring company, which may invoke the same rights and legal defenses as the absorbed company would have had against the accusation.[19]

Finally, the Court of Cassation pointed out that merger-absorption operations, regardless of the date and the nature of the companies involved, concluded solely for the purpose of exempting the absorbed company from its criminal liability, and to obstruct the prosecution of the company, constitute fraud. Consequently, where the merger operation has been conducted for this fraudulent purpose, a criminal court can declare an absorbing company guilty of the facts committed by the absorbed company.[20]

II. Clarifications of the Court of cassation in the ruling of April 13, 2022

The Court of Cassation clarified the scope of the new case law regarding the transfer of criminal liability of absorbed companies in a decision dated April 13, 2022.[21]

A. Practical application of the new case law

The case began in 2014 when a criminal complaint was filed for concealment of misuse of corporate assets committed by a company operating in the real estate market.[22]

However, several years before the complaint was filed, in 2005, the sole shareholder of the company had proceeded to the dissolution of the company and had transmitted all of its assets to another company over which he also had control.[23]

Since the merger-absorption occurred prior to November 25, 2020,[24] the judges had simply decided to dismiss the case. [25] This solution was consistent with the previous rule which prohibited imposing a sentence to the acquiring company for acts committed by the absorbed company.

Nevertheless, the Court of Cassation noted that, in any event, including for mergers carried out before November 25, 2020, acquiring companies may still be held criminally liable in the case where the merger-absorption operation is aimed at avoiding criminal liability.[26]

Therefore, the Court quashed the dismissal decision, considering that the Court of appeal had failed to assess whether the conditions for prosecuting the absorbing company, such as the existence of a fraudulent merger to escape criminal liability, had been met, prior to pronouncing a decision to dismiss the case.[27]

B. Judges' duty to search for fraud in merger transactions completed before November 25, 2020

The Court of Cassation held that investigating magistrates are required to assess, before issuing an order of dismissal, whether the defendant company, having been the subject of a merger-absorption operation concluded before November 25, 2020, had carried out such operation to avoid criminal liability.[28]

The Court stated that the investigating magistrates, who will have to carry out the necessary investigations to ensure that a merger is based on legitimate grounds, rather than on the desire to avoid criminal prosecution, can carry out the verifications *ex officio* or at the request of a party.[29]

In order to determine whether there has been fraud, the investigating judge is entitled to request additional investigative acts.[30]

As for the victims of the offences committed by the absorbed company, they may directly request the magistrates to proceed with various investigative acts in order to discover the real motivations of the merger-absorption operation.[31] ■

[1] Cass. crim., 25 November 2020, No. 18-86.955.

[2] Cass. crim., 20 June 2000, No. 99-86.742 ("Whereas, in order to declare the company Pilkington Sud, which had in the meantime absorbed the company Miroiterie Vauclusienne, guilty of the offences reproached, the Court of Appeal holds that the latter, although struck off the trade register following a merger-absorption, was not liquidated and did not disappear, the absorbing company having substituted itself for it, with universal transmission of its rights, goods and obligations; But whereas by pronouncing itself thus, whereas the absorption had caused the absorbed company to lose its legal existence, the court of the second degree disregarded the text and principle recalled above"); Cass. crim., 14 October 2003, No. 02-86.376 ("Whereas, to declare the company Acetex Chimie, guilty of involuntary manslaughter, after having noted that it had absorbed the company Pardis Acétiques after the accident, the court of appeal states that it "thus continued its legal personality"; But whereas by pronouncing itself thus, whereas the absorption had caused the absorbed company to lose its legal existence, the court of the second degree disregarded the aforementioned text and the above mentioned principle"); Cass. crim., 18 February 2014, No. 12-85.807 ("Whereas it follows from the additional observations and the attachments filed, on behalf of the company DB Autozug and the company DB Fernverkehr, intervening voluntarily, that the first of these companies was the subject of a merger-absorption on the part of the second, by notarial counterpart of July 19, 2013, registered at the commercial register of Frankfurt on September 27, 2013, and, in respect of the dissolution of the company absorbed by the merger-absorption, at the commercial register of Dortmund on September 18, 2013 ; Whereas it can be deduced from article 6 of the code of criminal procedure that the merger-absorption causes the absorbed company to lose its legal existence, the public action is extinguished with regard to it").

[3] Article 121-1 of the Penal Code ("No one is criminally responsible except for his own act").

[4] CEDH, 29 August 1997, E.L., R.L. et J.O.-L. c. Switzerland, No. 20919/92 ("The fundamental rule of criminal law is that criminal responsibility does not survive the perpetrator of the criminal act – a rule also required by the presumption of innocence enshrined in Article 6 § 2 [of the European Convention on Human Rights]").

[5] Cass. crim., 20 June 2000, No. 99-86.742 ("Having regard to article 121-1 of the Criminal Code [...] But whereas in so ruling, when the absorption had caused the absorbed company to lose its legal existence, the court of the second degree disregarded the text and principle mentioned above").

[6] Article 6 of the Code of Criminal Procedure ("The public action for the application of the penalty is extinguished by the death of the accused, prescription, amnesty, abrogation of the penal law and res judicata").

[7] Article 133-1 of the Penal Code ("The death of the convicted person or the dissolution of the legal entity, except in cases where the dissolution is pronounced by the criminal court, pardon and amnesty, prevent or stop the execution of the sentence").

[8] CJCE, 26 September 1993, Arcaro, C-168/95, cons. 21 ("It follows that, in applying national law, the national court called upon to interpret it must do so as far as possible in the light of the wording and purpose of the directive in order to achieve the result sought by it and thus comply with the third paragraph of Article 189 of the Treaty"); CJCE, 3 May 2005, Berlusconi e.a., C-387/02, C-391/02 et C-403/02.

[9] CJUE, 5 March 2015, Modelo Continente Hipermercados SA c/ Autoridade para as Condiçoes de Trabalho, C-343/13 ("Article 19(1) of Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies, as amended by Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009, must be interpreted as meaning that a merger by acquisition, within the meaning of Article 3(1) of that directive, entails the transfer to the acquiring company of the obligation to pay a fine imposed by a final decision prior to that merger").

[10] Cass. crim., 25 October 2016, n° 16-80.366 ("But whereas in so determining, whereas, on the one hand, the Third Council Directive 78/ 855/ EEC of October 9, 1978 concerning mergers of public limited companies, which was codified by Directive 2011/ 35/ EU of the European Parliament and of the Council of April 5, 2011, as interpreted in its Article 19 paragraph 1 by the Court of Justice of the European Union in the above-mentioned judgment of March 5, 2015, is devoid of direct effect against individuals, and secondly, Article 121-1 of the Criminal Code can only be interpreted as prohibiting criminal proceedings to be brought against the acquiring company for acts committed by the acquired company before the latter lost its legal existence, the investigating chamber misinterpreted the meaning and scope of the aforementioned text and the principle recalled above").

[11] CEDH, 24 October 2019, Carrefour France c. France, No. 37858/14.

[12] CEDH, 24 October 2019, Carrefour France c. France, No. 37858/14 ("It observes that in the event of a merger of one company with another, there is a universal transfer of assets and liabilities and the shareholders of the former become shareholders of the latter (see paragraph 18 above), and the economic activity carried out within the framework of the absorbed company, which was the very essence of its existence, continues within the framework of the company that benefited from this operation. Because of this continuity from one company to another, the absorbed company is not really a "third party" with respect to the absorbing company. Thus, convicting the latter for acts restrictive of competition committed before the merger only apparently contravenes the principle of the personality of the penalties, whereas this principle is violated when a natural person is convicted for an act committed by another natural person").

[13]Ibid.

[14] Cass. crim., 25 November 2020, No. 18-86.955.

[15] Court of Cassation, Explanatory note on the ruling No. 2333 of 25 November 2020 (criminal chamber), p.2 ("The Court of Cassation, in a reversal of case law, holds that in the event of a merger of a company into another company falling within the scope of Council Directive 78/855/EEC of October 9, 1978 on the merger of public limited liability companies, as last codified by Directive (EU) 2017/1132 of the European Parliament and of the Council of June 14, 2017, the acquiring company may be sentenced to a fine or confiscation for acts constituting an offence committed by the acquired company prior to the transaction").

[16] Article 7 of the European Convention on Human Rights ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute an offence under national or international law at the time when it was committed").

[17] CEDH, 21 October 2013, Del Rio Prada c. Spain, No. 42750/09 ("The Court cannot accept the Government's contention that the Supreme Court's interpretation was foreseeable in that it was more in keeping with the letter of the 1973 Criminal Code. The Court recalls that its task is not to determine the correct interpretation of those provisions in domestic law, but to establish whether the new interpretation given to them was reasonably foreseeable by the applicant in the light of the "law" applicable at the relevant time. This "law" in the substantive sense of the term in the Convention, which also includes unwritten law or case law, had been consistently applied by the prison and judicial authorities for many years, until the reversal of the case law").

[18] Article 1 of the Council Directive 78/855/EEC, 9 October 1978, based on Article 54 (3) (g) of the Treaty and concerning mergers of public limited companies ("The coordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to the following types of company [...] – in France: the limited company").

[19] Court of Cassation, Explanatory note on the ruling No. 2333 of 25 November 2020 (criminal chamber), p.7 ("Only fines and confiscation may be imposed on the acquiring company [...] It is specified that, since the legal entity being acquired is continued by the acquiring company, the latter, which has the same rights as the acquired company, may rely on any defense that the latter may have raised. This could be the case, for example, of any exception of nullity, including those for which only the absorbed company had standing to act").

[20] Cass. crim., 23 April 1970, No. 68-91.333 ("It is incumbent upon the correctional judges, seized in this respect of regular submissions by a civil party, to investigate whether the substitution of one commercial company for another did not conceal the continuation of the same business and whether the change of legal form made to this business was not used, in fraud of the law, to prevent the free designation of staff delegates and members of the works council") ; Cass. crim., 25 November 2020, No. 18-86.955. ("40. However, since the purpose of the additional information criticized by the pleas in law is, inter alia, to uncover a possible fraud, it appears necessary to determine whether a special regime applies in such a case. 41. In this respect, it must be considered that the existence of a fraudulent act allows the Court to impose a criminal penalty on the acquiring company where the purpose of the merger-takeover transaction was to shield the acquired company from criminal liability. This possibility is independent of the implementation of the Directive of October 9, 1978, cited above. 42. The Court of Cassation has not had occasion to rule on this point, but its doctrine, which cannot therefore constitute a reversal of case law, was not unforeseen. It is therefore applicable

to mergers and acquisitions concluded before the present judgment. 43. It follows that, in ordering additional information for the purpose, inter alia, of determining whether the transaction was tainted by fraud, the court of appeal did not disregard the law applicable at the time it gave its decision").

[21] Cass. crim., 13 April 2022, No. 21-80.653.

[22] Cass. crim., 13 April 2022, No. 21-80.653 ("On November 6, 2014, Mr. D filed a complaint as a civil party for the offence of concealment of misappropriation of corporate assets, allegedly committed by Company 1 in connection with a real estate development operation that took place from 1991 onwards").

[23] Cass. crim., 13 April 2022, No. 21-80.653 ("On November 30, 2005, company 2, then sole shareholder of company 1, decided to dissolve the latter in advance and to transfer all its assets and liabilities to its own benefit").

[24] Cass. crim., 25 November 2020, No. 18-86.955.

[25] Cass. crim., 13 April 2022, No. 21-80.653 ("On May 27, 2020, the investigating judge ordered a dismissal").

[26] Cass. crim., 13 April 2022, No. 21-80.653 ("The Court of Cassation rules (Crim, November 25, 2020, appeal no. 18-86.955) that in the event of a merger of one company with another, the absorbing company may be convicted of criminal acts constituting an offence committed by the absorbed company prior to the transaction in two cases: [...] – when the transaction, regardless of its date and regardless of the nature of the companies involved, was intended to avoid the absorbed company's criminal liability and thus constitutes a fraud against the law. In this case, any penalty incurred may be pronounced").

[27] Cass. crim., 13 April 2022, No. 21-80.653 ("It follows that the investigating courts may not dismiss a case based on the dissolution of the absorbed company against which they find sufficient charges of having committed the acts referred to them, without verifying, either of their own motion or at the request of a party who invokes it, if necessary by an order supplementing the information, whether the conditions for prosecution of the absorbing company are not likely to be met").

[28] Cass. crim., 13 April 2022, No. 21-80.653 ("It follows that the investigating courts may not dismiss a case based on the dissolution of the absorbed company against which they find sufficient charges of having committed the acts referred to them, without verifying, either of their own motion or at the request of a party who invokes it, if necessary by an order supplementing the information, whether the conditions for prosecution of the absorbing company are not likely to be met").

[29] Cass. crim., 13 April 2022, No. 21-80.653 ("to verify, either on its own initiative or at the request of a party who invokes it, if necessary, by means of an order for additional information, whether the conditions for taking legal action against the acquiring company are not likely to be fulfilled").

[30] Cass. crim., 13 April 2022, No. 21-80.653 ("to verify, either on its own initiative or at the request of a party who invokes it, if necessary, by means of an order for additional information, whether the conditions for taking legal action against the acquiring company are not likely to be fulfilled").

[31] "Fraud, by Rémi Lorrain, former secretary of the Conference – Firm Darrois Villey Maillot Brochier", The lawyers' club, 9 May 2022 ("Victims of offences committed by the merged entity, who fear impunity on the part of the merging entity, may usefully initiate this work of justifying the opportunistic nature of the merger, if necessary by requesting that magistrates carry out various investigative acts at all stages of the criminal proceedings (submission of observations on the need to carry out new investigative acts (article 77-2 of the French Criminal Procedure Code); request for investigative acts; request for acts or request for supplementary information at the judgement stage)").

Homologation of a guilty-plea procedure: no appeal is possible against a decision of denied in the absence of a misuse of powers by the judge

A person prosecuted for money laundering accepted a sentencing proposal from the Financial Prosecutor's Office in the context of a guilty-plea

As a reminder, this procedure known as "the French guilty plea", under which a prosecuted person acknowledges his/her involvement in the alleged offense, was introduced by the law of March 9, 2004[1]. This procedure is based on the idea that the participation of the person prosecuted in the judicial process through his/her admission of guilt allows for a better efficiency of justice.

The Public Prosecutor proposes a sentence which can be accepted or refused by the person who admitted his/her participation in the alleged offense. To abide by the principles of separation between the prosecuting authority and the judgment authority, the sentence proposal, if accepted by the prosecuted person, is then submitted to a judge who can either decide to approve the sentence or refuse to do so based on the ground for refusal listed in article 495-11-1 of the Code of criminal procedure.[2]

In this case, the judge decided not to approve the sentence proposed by the Public Prosecutor on July 6 of 2021.

The Financial Prosecutor then submitted a new sentence proposal to the judge.

On October 12 of 2021, the judge ruled that the new proposal was not admissible. The Financial Prosecutor's office lodged an appeal before the court of cassation.

I. The judge's refusal to approve a guilty-plea procedure prevents the implementation of a second sentence proposal

In this decision of May 17, 2022, the Criminal division of the court of cassation held that article 495-12 of the Code of criminal procedure[3] does not provide for the possibility to submit a second sentence proposal as part of the guilty-plea procedure when the first proposal of the Public Prosecutor was refused by the judge.

The Code of criminal procedure provides that when the sentence proposal is refused, the Public Prosecutor may refer the case to the Correctional court according to the procedures provided for in article 388 of the Code of criminal procedure (voluntary or immediate appearance, summons) or require the opening of a judicial investigation.[4]

To reach that conclusion, the Court relied on the parliamentary work done in the context of the Perben I law of March 9, 2004 and the of the law of October 23, 2018. The Court found that the legislator did not wish to broaden the scope of article 495-12 of the Code of criminal procedure by

allowing the Public Prosecutor, faced with a sentence that had not been approved by the judge, to propose a new sentence via this same procedure.

II. The impossibility of lodging an appeal against a ruling refusing to approve a guilty-plea procedure

In this case, the judges of the Court of Cassation confirmed that the law does not provide for the possibility of lodging an appeal against a ruling refusing to approve a guilty-plea

On this matter, the Constitutional Court had already ruled that the non-appealability of a ruling by which the judge denies the sentence proposed during a guilty-plea procedure does not breach of the Constitution. The rational is that in case of refusal of the guilty-plea procedure, the case is referred to the Correctional court, where the failed guilty-plea procedure is not disclosed, and that therefore the prosecuted person is not deprived from the right to an effective remedy.[5]

However, the Court expresses a reservation by clarifying that an appeal is however possible when the judge has exceeded his/her powers.

The Court of cassation ruled that by refusing to approve a second sentence proposal, since there is no specific provision of the law which allows him/her to approve such a proposal, the judge did not exceed his powers. Therefore, the Court ruled that the appeal in cassation was inadmissible.

The Court has once again limited the scope of the notion of excess of power after having recently considered that the fact that a judge does not give reasons for his decision to refuse a guilty plea procedure does not constitute an excess of power, since by doing so, the judge does not disregard his/her duty or the scope of his/her powers.[6]

[1] Law n°2004-204 of March 9, 2004, adapting the justice system to changes in crime.
[2] Article 495-11-1 of the Code of criminal procedure ("Without prejudice to cases in which the conditions provided for in the first paragraph of article 495-11 are not met, the president may refuse homologation if he or she considers that the nature of the facts, the personality of the person concerned, the situation of the victim or the interests of society justify an ordinary correctional hearing, or when the statements of the victim heard pursuant to article 495-13 shed new light on the conditions under which the offense was committed or on the personality of the offender.").
[3] Paragraph 1, article 495-12 of the Code of criminal procedure ("When the person declares that he or she does not accept the proposed sentence or sentences, or when the president of the judicial court or his or her delegate issues an order refusing homologation, the public prosecutor shall, in the absence of any new information, refer the matter to the criminal court in accordance with one of the procedures provided for in article 388, or request that a judicial investigation be opened.").
[4] Article 388 of the Code of criminal procedure ("The correctional court is seized of offenses under its jurisdiction either by the voluntary appearance of the parties, or by the summons, or by the summons by means of a written report, or by the immediate appearance, or finally by the transfer ordered by the investigating court".).
[5] Conseil Constitutionnel, decision n°2021-918 QPC of June 18, 2021 ("7. Firstly, the procedure of appearance on prior recognition of guilt is a particular procedure for the trial of certain offenses which can be freely implemented by the public prosecutor as soon as 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 case to the criminal court under the conditions of ordinary law or requests that a judicial investigation be opened. 8. Consequently, the absence of a remedy to challenge the decision to refuse homologation does not infringe the right to an effective judicial remedy").
[6] Cass. crim., Sept. 1, 2020, n° 19-83.658 ("5. It does not constitute an excess of power for the judge delegated by the president of the court to refrain from giving reasons for the decision to refuse to approve the sentences proposed by the public prosecutor with regard to the requirements of articles 130-1, 132-1 and 132-20 of the Criminal Code, which relate to the pronouncement of sentences. 6. Consequently, the appeal of Mr. M... must be declared inadmissible.").

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