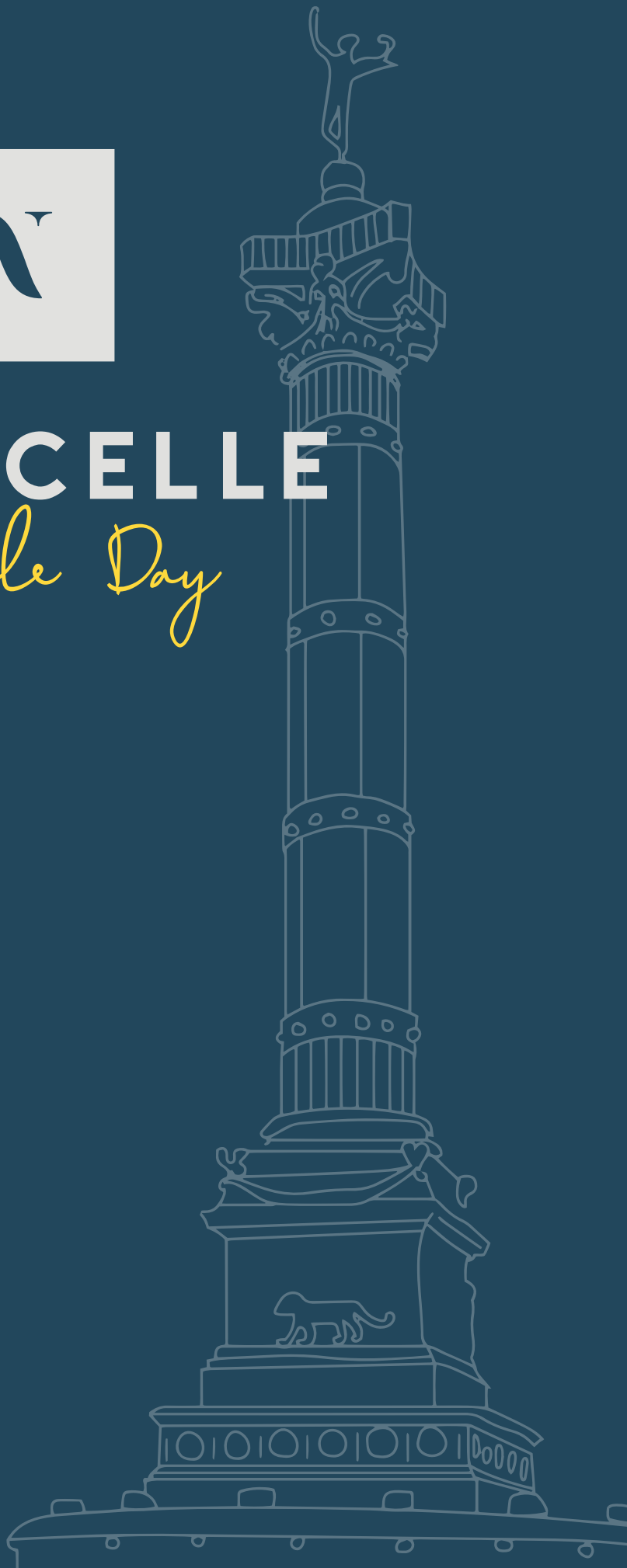
NAVACELLE

Bastille Day



14 July 2023

Happy Bastille Day! As every year on Bastille Day, Navacelle is delighted to present you with an overview of the year's key legal events in France.

The latest developments in arbitration, negotiated criminal justice, internal investigations and compliance are just some of the subjects that the firm's lawyers have been focusing on, and which they are keen address in practical terms.

In white collar defense, negotiated justice continued to gain momentum, due in particular to the increase of DPAs and the framework for their implementation. This argues in favor of ever closer cooperation with the enforcement authorities and regulators, in particular through internal investigations – the practice of which continues to expand.

Litigation before French regulators also continued to expand, and the past year was unquestionably one of record sanctions, targeting both French and foreign companies.

In terms of compliance programs, the year can be seen as one of an ever more extensive framework, with the concrete implementation of the duty of vigilance (supply chain) and the more sustained repression of greenwashing.

Lastly, arbitration continued to address contemporary issues, notably with regard to the freezing of funds held abroad, and the courts provided new clarifications as to the scope of their review of awards rendered.

Thus, in a complex, constantly evolving legal environment, where extraterritorial and international issues are omnipresent, the firm continues to adapt and reflect on its practice and the best way to serve its clients, always seeking to engage and share experiences on these themes with its community.

Enjoy your reading, and let's stay in touch to discuss these and other topics!

Julie Zorrilla, Roxane Castro, Stéphane de Navacelle

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White Collar Crime

Negotiated justice continues to grow in importance, notably due to the proliferation of public interest judicial agreements and the framework for their implementation. In traditional litigation, jurisprudence has provided some interesting clarifications on the cumulation of criminal and fiscal sanctions, and the impact of excessively lengthy criminal proceedings.

Internal Investigations

Internal investigation has become the spearhead of dialogue with the authorities and other stakeholders (e.g. unions, NGOs, finance actors).

Compliance

An ever more extensive framework, with concrete implementation of the duty of vigilance, stronger protection for whistleblowers and more sustained repression of greenwashing.

Dispute resolution & regulatory investigations

A record year in terms of sanctions for both French and foreign companies.

Arbitration

Arbitration continues to address contemporary issues, particularly with regard to the freezing of funds held abroad, and the courts are clarifying the scope of their review of awards.

White Collar Crime

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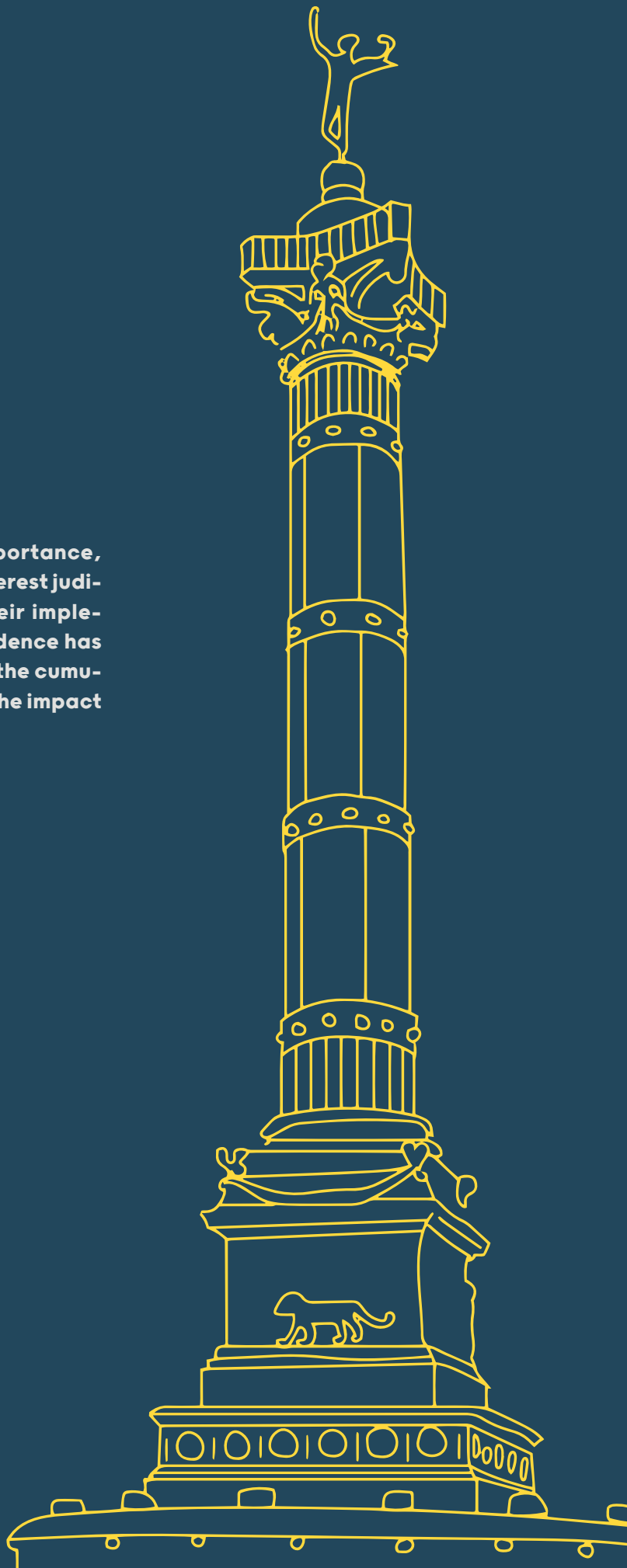


NAVACELLE

Bastille Day

Review of the French National Financial Prosecutor's Office activity

The French National Financial Prosecutor's Office published its key figures for the year, in the 2022 annual report of its activities. The report includes a development on the increase in the number of procedures handled and in the number of the French equivalent of Deferred Prosecution Agreement ("CJIP") approved by the President of the Paris Judicial Court.

On 24 January 2023, the French National Financial Prosecutor's Office ("PNF") published its annual report for 2022. This document was an opportunity for the PNF to review its activities.

An introductory speech by the Financial Public Prosecutor, Jean-François Bonhert, highlighted the growth and diversification of the PNF's activities. He noted an increase of more than 10% in the number of pending proceedings, an increase in criminal prosecutions and in the signing of public interest judicial agreements ("CJIPs"), the French equivalent of Deferred Prosecution Agreements, and the growing number of cases involving competition and public finance offences in addition to probity offences.

This overview also mentioned the report of the Financial Action Task Force, which had noted excellent results in the fight against money laundering and terrorist financing in France.

The Financial Public Prosecutor also highlighted the fact that the PNF had been praised for its work by the Organization for Economic Cooperation and Development ("OECD"), and the fact that two of its magistrates had been reassured by the fact that the Conseil Supérieur de la Magistrature had not found any disciplinary conduct against them, as part of the administrative investigation into the "fadettes" case, involving Éric Dupond-Moretti, the current French Minister of Justice.

The PNF presented its busy year, including:

- 217 opened investigations;
- 18 magistrates working in tandem, with an average of 45 cases each, for a total of 66 convictions and 1.780 billion euros in sums awarded in favor of the Treasury regarding proceedings completed in 2022;
- Six judicial public interest agreements signed and approved by the President of the Paris Judicial Court in 2022;
- A total of 685.4 million euros in fines.

Most of the cases examined by the PNF in 2022 concerned probity offences (44.3%), but also public finances offences (46.75%).

The Public Prosecutor's Office noted an increase in the number of cases involving offences against public finances (nearly a third of which concern the concealment of assets abroad), which rose from 38% of cases in 2015 to 46.75%. Most of these cases were forwarded by tax authorities.
The report also included a recap of significant hearings and rulings, including the agreement signed with McDonalds for 1.245 billion euros on suspicion of tax fraud. The hearing of a former minister for embezzling public funds for his family was also mentioned.

The PNF also commented on interventions and training courses held with various organizations, and in particular on its participation in the parliamentary report on tax fraud - which led to a speech by Gabriel Attal, Minister Delegate for Public Accounts, during which he announced a plan to combat fraud.

The PNF addressed the new guidelines for public interest judicial agreements, and set three objectives:

"Strengthen stakeholder support for the mechanism, enhance the effectiveness of the criminal response to offences, and strengthen the process' predictability in order to encourage self-disclosure by companies".

For 2023, the PNF mentioned a number of challenges, firstly procedural, at the end of 2023, with the first preliminary investigations affected by the two-year timeframe applicable to all proceedings initiated after 24 December 2021. Operational challenges were also mentioned, in view of the increase in activity, for which an increase in staff was planned, with the arrival of two additional magistrates and two specialized assistants.

Lastly, the PNF endorsed the proposals put forward in the OECD report, including extending the duration of investigations, preserving the role and expertise of the PNF, and allocating sufficient resources to the functioning of the justice system.

Judicial public interest agreement (CJIP)

Since its creation by the Sapin II law of 9 December 2016, the Judicial Public Interest Agreement ("Convention Judiciaire d'Intérêt Public" or "CJIP") has demonstrated its flexibility in handling various types of cases, both in terms of geographical location and the breadth of offenses covered. Initially, the CJIP underwent testing by the National Financial Prosecutor's ("PNF") Office in cross-border cases involving multiple prosecuting authorities. Subsequently, regional prosecutor's offices started using CJIPs more modest cases. Moreover, the CJIP has expanded its coverage to encompass a wide range of offenses, including breaches of probity, tax fraud, and environmental violations. Over the past 12 months, a total of 16 CJIPs have been signed, and new guidelines regarding their implementation have been published.

Offenses and fines

Offenses	Over the past 12 months	Related fines
regarding **environmental** matters	56% of CJIP	from €3,000 to €140,000 *CJIP SCEA Maison de la Mirabelle, (Campbell Shipping Company Ltd)*
regarding **breach of probity** (i.e., influence peddling, corruption)	25% of CJIP	from €3,800,000 to €123,000,000 *CJIP Abanca Corporacion Bancaria, GIE UNILABS France, Crédit Suisse AG*
regarding **aggravated tax fraud** and/or tax fraud laundering	19% of CJIP	from €7,964,000 to €154,792,000 *CJIP Bouygues and Linkcity, CJIP Airbus II, Technip Energies France and Technip UK*

Dissuasive fines

- €123,000,000 Crédit Suisse AG
- €15,856,044 Airbus II
- €13,816,000 GIE UNILABS France

New guidelines for the implementation of a CJIP issued by the National Financial Prosecutor's Office in January 2023

Good faith by the company is required during negotiations

There are several criteria for good faith:

- **Conducting an internal investigation**
  so that the company can participate fully in revealing the truth
- **Spontaneous disclosure of facts**
  within a reasonable period of time
- **Adaptation of a compliance program**
  ie. spontaneous implementation by companies not subject to the Sapin II law, rapid adoption of corrective measures to strengthen its quality and effectiveness, adaptation of the group's strategy to the risks identified
- **Prior compensation for victims**

Confidentiality of communication

The public prosecutor and the company agree on the date from which the CJIP proposal is formalized in order to preserve the confidentiality of information and exchanges

Transparency in fine calculation

Setting up a system comparable to the cooperation credits used by the US Department of justice (Doj)

- **Aggravating and mitigation factors of the fines capped based on the severity of the observed violations and the company's cooperation level**

Example: 50% cap the aggravating criterion relating to repeated acts
Example: 20% cap for the mitigating criterion relating to the relevance of internal investigations

- **Details of the calculation method published in each CJIP**

Example: CJIP Guy Dauphin Environnement: maximum fine: €1,135.6 million / fine imposed: €1,230 million

Key takeaways

First CJIP concluded in favoritism case
CJIP Bouygues and Linkcity for acts of concealment of favoritism

2 **For the first time, one company was the subject of two CJIPs: Airbus**
Second CJIP at the end of 2022, covering new facts but complementary to the first of January 2020. The second fine takes into account the first as well as Airbus' cooperation in the investigation phase and its compliance with the monitoring scheduled for 2020.

Cooperation in good faith is required and is one of the reducing factors in the calculation of the fine
First applications: 17 May 2023 CJIP Guy Dauphin environnement and CJIP Bouygues Bat Sud-Est and Linkcity Sud-Est

PNF updates its guidelines for judicial public interest agreements

The National Financial Prosecutor published new guidelines for judicial public interest agreements, replacing those initially published jointly with the French Anti-Corruption Agency in June 2019. These new guidelines are intended to provide legal entities with greater visibility, predictability, legal certainty and transparency regarding the expectations and mechanism of the agreement. They specify several aspects, such as the need for legal entities to cooperate in good faith, the confidentiality of exchanges and the calculation of the public interest fine.

On 16 January 2023, the French National Financial Prosecutor («PNF») provided further details in its new guidelines on the implementation and conduct of the judicial public interest agreement («CJIP»). These clarifications are intended to provide greater visibility, legal certainty, predictability, and transparency for legal entities wishing to enter CJIP negotiations. Based on the experience acquired by the PNF, these new guidelines should allow legal entities and their counsel to better understand the balance of the negotiations in which they are involved.

The guidelines specify the conditions for access to the CJIP mechanism and strengthen them by requiring legal entities to cooperate in good faith (I). In this respect, the PNF intends to consider several factors, such as spontaneous disclosure of the facts, unequivocal acknowledgement of the facts, active participation by the legal entity in uncovering the truth, and implementation of a compliance program.

The guidelines also highlight the issue of the confidential nature of the exchanges between legal entities and prosecution authorities (II). The PNF intends to distinguish the negotiation period initiated by the formal proposal of a CJIP from the investigation period of informal talks, creating an uncertain sequencing for legal entities in terms of confidentiality of exchanges. Finally, the new guidelines provide a little more transparency as to how the public interest fine is calculated (III).

1 The conditions under which legal entities may access the judicial public interest agreement mechanism are specified, in particular regarding the essential requirement of cooperation in good faith

The French criminal procedure code provides that it is up to the public prosecutor to propose to the legal entity the conclusion of a CJIP. Thus codified, French law intends to give the initiative to the public prosecutor. However, in 2019, when the joint guidelines for the implementation of the CJIP were published by the Financial Public Prosecutor («PRF») and the French Anti-Corruption Agency («AFA»), the authorities already allowed the legal entity or its counsel to inform the PNF of its wish to benefit from this transactional mechanism. The new guidelines provide some clarifications in this respect. Although the PNF had already been willing to conduct informal talks since 2019, the new guidelines exclude this possibility in cases of serious bodily harm.

There are also other limits. The legal person must cooperate in good faith to benefit from the CJIP mechanism.

In this respect, the PNF gives some examples of good faith, such as the spontaneous disclosure of facts to the public prosecutor's office by the legal entity when this occurs within a reasonable period of time, especially when the facts were not yet known to the public prosecutor's office. The PNF assesses it in the light of the time elapsed between the legal entity's knowledge of the facts and its disclosure to the public prosecutor's office.

The PNF also considers that an unequivocal acknowledgement of the facts by the legal entity is also an indication of cooperation. In this respect, it points out that a systematic denial of the facts demonstrates a lack of cooperation with the CJIP and is therefore likely to prevent the PNF from using this mechanism.

Legal persons are therefore expected to take an active part, or to be willing to take an active part, in uncovering the truth by means of an internal investigation into the facts, the persons involved and, where appropriate, the deficiencies in the compliance system which facilitated their occurrence. The conduct of an investigation and its reporting within a timeframe compatible with the requirements of the judicial investigation is, for the authorities, considered to be an indication of a willingness to cooperate. Legal entities

must ensure that all internal investigations (and reports of interviews of persons implicated in the facts, together with all the documents on which they are based) carried out in the course of legal proceedings are properly brought to the attention of the public prosecutor's office in order to ensure that there is no interference with the legal investigation.

The quality of the preservation of evidence is another indication of good faith.

Other indicators are also taken into account in order to demonstrate the good faith of legal persons, such as the spontaneous implementation of a compliance programme concerning legal persons outside the scope the Law of 9 December 2016's article 17 («Sapin II Law»), the rapid adoption of corrective measures designed to strengthen the quality and effectiveness of the compliance programme, the adaptation of the legal person's strategy to the risks identified, any changes to its management team or even the prior compensation of victims.

In addition to this condition of cooperation in good faith, the new guidelines specify that the failure to implement a compliance programme and the absence of corrective measures following observed breaches, regarding legal persons falling within the scope of the Sapin II Act, may be assessed as a situation hindering the initiation of a CJIP. Legal entities subject to the Sapin II Law are therefore strongly advised to strengthen their compliance programme and implement any necessary corrective measures.

The 2019 guidelines stated that previous sanctions for offences that could be described as breaches of probity with regard to a legal entity or even one of its directors could constitute an obstacle to the implementation of a CJIP. The same was true when the legal entity had already benefited from a CJIP, or a settlement agreement concluded with a foreign authority for breach of probity. It should be noted that this limitation of the CJIP mechanism was not included in the new 2023 guidelines. As for CJIPs proposed for tax fraud, the new guidelines specify that it is necessary for the legal entity to have remediated its situation with the tax authorities (i.e., recovery of duties evaded, late interest and penalties imposed by the tax authorities) before any negotiations with the PNF.

2 Confidentiality of exchanges with legal entities is clarified

The new guidelines provide an opportunity for the PNF to clarify the rules governing the confidentiality of documents and information transmitted by legal entities, as well as their enforceability and their use by the authorities.

First, the PNF formalizes the informal talks phase, which allows the legal entity to have prior discussions with the PNF for the purpose of considering the use of a CJIP. It specifies that no written document is required and that these discussions are confidential as they are covered by the foi du palais ("faith of the court").

The PNF then reaffirms the legal confidentiality rule for the negotiation period set out in Article 41-1-2 of the criminal procedure code. Under this provision, if the president of the court refuses to validate the CJIP or if the legal entity withdraws from the agreement, the public prosecutor may not disclose to the investigating or trial jurisdiction any statements made or documents handed over by the legal entity during the negotiations. Thus, all documents submitted during the negotiation phase (e-mails, accounting documents, extracts of digital data, presentations, and lawyers' notes, etc.) are not included in the proceedings, unless the legal entity agrees.

However, according to the authorities, a distinction should be made with regard to the investigation period. As reiterated by the PNF in the first guidelines of 2019, exchanges that took place during the investigation phase, and which therefore necessarily preceded the formalization of a CJIP proposal, are not confidential. In practice, this sequencing is more uncertain for legal entities in that a CJIP proposal may be formalized at a late stage in the proceedings, while embryonic negotiations may already have taken place during informal talks with the public prosecutor. Consequently, legal entities should bear in mind that if negotiations prior to the CJIP's formal proposal (these negotiations taking necessarily place during the investigation phase) fail, all documents and information disclosed during this phase will not be confidential and may be used against them.

In this respect, the new guidelines have enshrined the sequencing of this legal confidentiality rule by clearly stating that it does not apply to documents submitted to the procedure with the consent of the legal person during the negotiations prior to the formal CJIP proposal (i.e., in other words, all documents submitted during the investigation phase). It should also be noted that this legal confidentiality rule does not affect the possibility for the public prosecutor's office to use documents and information obtained through judicial investigation acts. In practice, it will therefore be essential, as specified in the guidelines, for legal entities to be able to quickly reach agreement with the public prosecutor's office on a date from which the CJIP proposal will be formalized. In addition, it will be essential to check precisely with the PNF the confidentiality and enforceability rules that will be applied prior to each transmission of documents and information to the authorities.

3 The methods for calculating the public interest fine and the aggravating or reducing factors are more transparent

The new guidelines provide a little more transparency on how the public interest fine is calculated.

Firstly, the PNF clarified its interpretation on the calculation of the maximum fine applicable in the context of a CJIP for a group of companies. In this case, the criminal procedure code provides that the amount of the fine may not exceed 30% of the average turnover calculated based on the last three known annual turnover figures at the time the infringements were detected. In this respect, the PNF indicates that if the accounts of legal entities are consolidated, the turnover considered will be the one reported in the consolidated accounts of the group to which they belong. According to Jean-François Bohnert, who was appointed head of the PNF, this reference to the consolidated perimeter prevents groups from concentrating criminal liability on one of their subsidiaries whose revenues are too low. This position increases the penalties for legal entities.

The modalities for setting the public interest fine have also been reviewed and clarified. There are still two aspects: the first, known as restitutive, is equal to the amount of the benefits derived from the infringements observed, and the second, known as afflictive or punitive, is calculated on the basis of the amount of the benefits derived from the infringements observed, to which increasing and decreasing factors are applied.

As for the restitutive dimension of the fine, the PNF gives numerous indications as to the advantages deriving from the breaches considered by the public prosecutor's office when conducting this assessment. Some of the benefits listed by the public prosecutor appear to be more repressive, while leaving many grey areas to the detriment of legal entities. This is the case for direct and indirect benefits linked to expected future profits, the benefit derived from a criminal attempt including the chance of reaching the expected outcome by the attempt, or indirect benefits including other benefits potentially obtained such as gains in market share, know-how or visibility, even if they are not recorded in the legal entity's financial statements, or the cash flow benefit associated with the cash flows obtained from the breaches. In addition, the PNF specifies that if the legal entity does not provide supporting information for this assessment, or if this information is incomplete or insufficiently reliable, the public prosecutor may rely on the data at its disposal.

As for the afflictive dimension of the fine, the PNF indicates that the seriousness of the breaches observed, and the quality of the accused legal entity cooperation are assessed according to a set of criteria likely to increase or decrease the amount of the fine. The PNF also clarifies the 2019 guidelines by structuring the various increasing and decreasing factors used in percentage terms.

Furthermore, although a reduction of the fine in the event of financial difficulties may exceptionally be granted, the PNF reserves the right, in the event of a significant difference between the evaluation of the benefits derived from the breaches at the date of the CJIP and their forecast evaluation at the date of the breaches, to calculate the afflictive dimension of the fine on the basis of their forecast evaluation. The PNF also allows for the possibility of increasing the amount of the fine in the event of the systemic nature of the acts being prosecuted, and even exceeding the 50% threshold for repeated acts.. In this respect, the guidelines specify that this increase would necessarily be greater than the reducing factors resulting from the cooperation of the legal entity.

Finally, in addition to the payment of a public interest fine, the new guidelines have reaffirmed the already well-known principle of unilateral commitments by legal entities. This tool, which is not prescribed by law, is in no way restricted by the PNF, and could lead to its application being extended to many areas.

Airbus signs a second CJIP for corruption

The PNF and Airbus entered into a new CJIP on November 30, 2022 for acts of bribery of public officials and foreign public officials. This new agreement follows on from the first CJIP of January 31, 2020, and covers facts that had not previously been included. Airbus has agreed to pay a total fine of 15.8 million euros, which takes into account its previous public interest fine of 2.1 billion euros.

On November 30 of 2022, the Paris Judicial Court approved a public interest judicial agreement ("CJIP") between the Parquet National Financier ("PNF") and the European company, Airbus SE ("Airbus"). This is the fourteenth CJIP signed by the PNF, and the second with Airbus.

This agreement provides for the payment by Airbus to the French Treasury of a public interest fine of 15,856,044 euros for a series of acts that may be qualified as bribery of public officials and corruption of foreign public officials. These facts relate to contracts concluded between 2006 and 2011 by Airbus group subsidiaries for sales of commercial aircraft, helicopters and satellites in Libya and Kazakhstan, involving commercial intermediaries or business introducers.

This new CJIP, which «follows on from the first CJIP», ends three judicial inquiries that were conducted in parallel with the preliminary investigation and negotiations that led to the CJIP of January 31, 2020, which had been signed for a series of acts of corruption committed between 2004 and 2016.

It is clear from the information provided in this second agreement that, for procedural reasons, the facts disclosed as part of these judicial investigations could not be included in the facts covered by the first 2020 agreement.

However, in view of the payment of a fine for similar acts under the first CJIP and the implementation of corrective measures by Airbus, this second fine was lowered.

1 Corruption-related facts

This agreement relates to the facts covered by three judicial investigations, which have highlighted mechanisms for bribery of public officials and foreign public officials.

The first judicial investigation concerned a contract for the sale of twelve commercial aircraft to the Libyan state-owned airline Afriqiyah Airways by a subsidiary of Airbus (then EADS) in November 2006. It was revealed that the signing of this contract was only permitted through the involvement of two intermediaries, influential facilitators for Libyan government officials, who received commissions of 2 and 4 million euros respectively.

The second judicial investigation, opened in 2013, concerned the sales campaign structures of two Airbus subsidiaries in Kazakhstan. Nearly 9.8 million euros were allegedly paid by Astrium to a person close to the Kazakh president, to secure a contract with Airbus for the sale of two satellites for the Kazakh space program.

This information also revealed that the signing of cooperation contracts for the manufacture, marketing and maintenance of helicopters between the Airbus subsidiary Eurocopter and a Kazakh company, and of a memorandum of understanding for the sale of helicopters to the Kazakh government, had been obtained with the support of a French parliamentarian. The latter organized meetings between the various parties, the expenses of which were covered by Eurocopter. The conclusion of these contracts would also appear to be linked to the conclusion of a penal transaction between the Belgian authorities and a person close to the President of Kazakhstan.

Finally, the third judicial investigation revealed the existence of commission payments by the Airbus group to an intermediary, the manager of a private company, and his son, a former officer in the Ministry of Defense, to facilitate the negotiation and signing of six contracts in the Czech Republic, Kuwait, Croatia and Turkmenistan, concluded between 2003 and 2009. However, investigations failed to identify the actual beneficiaries of the commissions.

The PNF considered that a certain number of these facts were likely to be classified as bribery of a foreign public official under article 435-3 of the French Criminal Code and bribery of a public official under article 433-1 of the French Criminal Code.

2 A reduced public interest fine

Under this agreement, which does not entail a declaration of guilt and does not have the effect of a judgment of conviction, Airbus has committed to pay a public interest fine of 15,856,044 euros, a relatively low amount compared with the fine resulting from the January 31, 2020 CJIP.

Under article 41-1-2 of the French Code of Criminal Procedure, the public interest fine is set in proportion to the benefit obtained from the offence, and can be up to 30% of average annual turnover calculated over the last three years – in the case of Airbus, 57.513 billion euros (2019-2021) - i.e. a maximum of almost 17 billion euros.

The amount of the fine agreed for this second agreement corresponds to the sums paid by Airbus for the remuneration and commissions of the facilitators in the contracts concluded in Libya and Kazakhstan. As such, it is not intended to be punitive.

This fine, which appears to be reduced, «takes into account the substantial fine already paid in 2020», which covered the overall behavior of the Airbus group, ended in 2015.

The ordinance validating the CJIP also confirmed the payment of damages to the associations acting as civil parties: 25,000 euros to Anticor, including 5,000 euros in legal costs, and 1 euro to Sherpa.

The settlement enables Airbus to avoid being declared guilty, and the risk of being fined up to ten times the proceeds of the offence, in addition to the penalties set out in articles 433-25, 433-26 and 435-15 of the French Criminal Code, and will terminate the public prosecution against Airbus once its obligations have been fulfilled.

Clarification of the ne bis in idem principle under European Union law with regard to the cumulation of criminal and tax sanctions

On 22 March 2023, the criminal division of the French Court of Cassation has issued a ruling by which it confirms the compliance of the cumulation of criminal and tax sanctions with the ne bis in idem principle, guaranteed by the Charter of Fundamental Rights of the European Union, subject to its proportionality and predictability for the litigants.

On 22 March 2023, the criminal division of the French Court of Cassation has quashed and cancelled the ruling of the Appeal Court of Chambery rendered on 13 February 2019, which had sentenced the defendant to eighteen months' imprisonment, six months of which suspended on probation, and had issued a publication measure, for tax fraud and omission of bookkeeping entries.

This ruling provides consequent clarifications on the conditions for the cumulation of criminal and tax sanctions, which confronts the ne bis in idem principle prohibiting the cumulation of proceedings and sanctions regarding identical facts.

As a reminder, the European Court of Human Rights has applied the ne bis in idem principle to financial breaches and crimes from 2014, before specifying that a cumulation of sanction was possible, notably in tax matters, in the name of the complementarity of proceedings.

In 2016 and 2018, the Constitutional Council has established the possibility of cumulating repressive proceedings with complementary administrative proceedings, considering that the collection of tax and the need to fight tax fraud could justify it in some cases. The Constitutional Council has however specified that the principle of cumulation could only apply to the most serious tax cases, the criterion of seriousness being based on the amount of tax defrauded, the nature of the acts committed by the defendant or the circumstances of their commission. $ The principle of proportionality then requires that the global amount of the sanctions imposed does not exceed the highest amount of one of the incurred sanctions.

Applying the reasoning of the Constitutional Council, the Court of Cassation then held, in a ruling of 11 September 2019, that when a person prosecuted for tax fraud proves having been subject to a tax sanction for the same facts, criminal courts, after having characterized the constituent elements of this crime and prior to the pronouncement of criminal penalties, must verify that the facts are serious enough to justify a complementary criminal penalty. The Court of Cassation also underlined that the courts must justify their decisions, since the seriousness of the case may depend on the amount of tax defrauded, the nature of the actions of the person prosecuted or the circumstances of their intervention, including those constituting aggravating circumstances. Without demonstrating such seriousness, the courts may not issue a conviction.

More recently, on 5 May 2022, the Court of Justice of the European Union, hearing two questions for preliminary rulings, ruled that articles 50 and 52 paragraph 1 of the Charter of Fundamental Rights of the European Union ("the Charter") do not preclude a situation whereby the limitation of the duplication of proceedings and penalties of a criminal nature in the event of fraudulent concealment or omissions from a return relating to value added tax provided for by national legislation to the most serious cases is based only on settled case-law interpreting restrictively the legal provisions laying down the conditions for the application of that duplication, provided that it is reasonably foreseeable, at the time when the offence is committed, that that offence is liable to be the subject of a duplication of proceedings and penalties of a criminal nature.

In the same decision, the Court of Justice of the European Union also ruled that these provisions preclude national legislation which does not ensure, in cases of the combination of a financial penalty and a custodial sentence, by means of clear and precise rules, where necessary as interpreted by the national courts, that all of the penalties imposed do not exceed the seriousness of the offence identified.

Under French law, article 1741, paragraph 1 of the French Tax Code allows a cumulation of administrative and criminal sanctions, stating that anyone who has fraudulently evaded or attempted to evade the assessment or payment of taxes may be prosecuted, independently of the administrative tax penalties applicable under article 1729 of the same Code.

In the present case, the appellant had required his acquittal on appeal on the grounds that his conviction breached the ne bis in idem principle guaranteed by the Charter and the principles of necessity and proportionality of crimes and sanctions. In this regard, he claimed he had already been sentenced, for the same facts, to tax penalties by an administrative court on 6 July 2015. The appellant argued that the ne bis in idem principle and articles 50 of the Charter, 1729, 1741 and 1743 of the French Tax Code and 591 and 593 of the Code of Criminal Procedure had been violated. In its ruling of 22 March 2023, the Court of Cassation confirms its past decisions in this field, and in application of the precedent of the Court of Justice of the European Union, rules that the cumulation of tax and criminal sanctions is possible on the twofold condition that it is predictable (I) and that the burden resulting from a double conviction is proportionate to the seriousness of the facts committed (II), which in this case had not been verified by the Court of Appeal.

1 The cumulation of criminal and tax sanctions is possible if it is predictable

In its judgment of 5 May 2022, the Court of Justice of the European Union ruled that national regulations restricting the rights and freedoms guaranteed by the Charter are acceptable only if they are provided for by rules that make the law predictable for those subject to it. Thus, European Union law does not preclude Member States from limiting the fundamental right stated in Article 50 of the Charter, which provides that "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", in order to allow a cumulation of sanctions, provided that this limitation is reasonably predictable at the time the offence is committed.

The Court of Justice of the European Union has specified that the criterion of predictability of the law does not preclude the use of professional advice in assessing the potential consequences of a given act.

In its ruling of 22 March 2023, the Court of Cassation ruled that the provisions of the French Tax Code do not conflict with the requirements of clarity and precision imposed by the principle of predictability resulting from the combined application of articles 50 and 52 of the Charter. Hence, the criminal court must, when trying an accused tax evader who can prove that he or she has already been convicted of the same crime, verify that it was reasonably predictable for the accused, at the time of the commission of the crime, that he or she was likely to be the subject of multiple criminal proceedings and sanctions, taking into account the accused's profession and the legal advice he or she may have sought.

In the present case, the Court of Cassation points out that the Appeal Court had not checked if it was reasonably predictable for the accused that the offense committed could be subject to a cumulation of criminal and tax sanctions. However, The Court of Cassation does not censor the Court of Appeal's ruling on this ground since, at the moment of the facts, articles 1729 and 1741 of the French Tax Code allowed for the cumulation of sanctions, no matter the facts causing it, the concealment exceeding the tenth of the taxable amount, in such way that the Court of Cassation was able to control the predictability of the cumulation for the accused.

2 The cumulation of criminal and tax sanctions is possible if the burden of the two cumulated sanctions is proportionate to the seriousness of the facts

Relying on the aforementioned precedent of the Constitutional Council and on its own case law , the Court of Cassation reiterates that when a person accused of tax fraud can prove that he or she has been personally sanctioned for the same facts, the criminal court must, after having characterized the constituent elements of this crime under article 1741 of the French Tax Code, and prior to pronouncing criminal sanctions, verify that the facts in question present a degree of seriousness such as to justify additional criminal sanctions. The court must give reasons for its decision, and the seriousness of the offence may depend on the amount of tax evaded, the nature of the actions of the person prosecuted, or the circumstances in which they were committed, including those constituting aggravating circumstances. In the absence of such seriousness, the court cannot issue a conviction.

The Court of Cassation also points out that in case of a cumulation of sanctions, the principle of proportionality implies that the global amount of the sanctions imposed cannot exceed the highest amount of one of the sanctions incurred, the criminal court being responsible for controlling the respect of the proportionality only when it imposes a sentence of a similar nature.

By this ruling and in application of the most recent precedent of the Court of Justice of the European Union, the Court of Cassation further rules that criminal courts must ensure that the burden resulting from the cumulated sanctions, no matter their nature, is not excessive with regards to the seriousness of the crime, and must justify their decision based on these elements.

In the present case, the Court of Cassation underlines that, prior to imposing a sentence, the appeal court had not examined whether the criminal sanction was justified in view of the seriousness of the facts in question, while the defendant had argued that he had been subject to a tax sanction based on article 1729 of the French Tax Code. Furthermore, the appeal court had not motivated its decision on the proportionality of the criminal sanction based on the tax sanction already imposed and on the concrete seriousness of the facts committed. These elements have led the Court of Cassation to censor the court of appeal's decision.

The French Supreme Court confirms in its decision "La Chaufferie de La Défense" that the excessive duration of criminal proceedings does not automatically lead to their cancellation

In a decision dated 9 November 2022, the criminal chamber of the French Supreme Court confirmed its case law on the disregard of the reasonable time limit and its potential consequences on the rights of the defense, reasserting that it has no impact on the validity of the proceedings. However, it stated that the criminal court, when determining the excessive duration of the proceedings, must nonetheless examine the merits of the case.

"La Chaufferie de La Défense" case began in 2002 with a report from the direction départementale de la concurrence, de la consommation et de la répression des fraudes of Hauts-de-Seine département regarding the conditions for renewing the public service delegation for the production and distribution of heating in La Défense neighborhood. The mayor of the locality, who was also the president of the delegating intermunicipal syndicate, was suspected of having approved, through the syndicate, the decision to enter into negotiations only with a specific company in exchange for the payment of hidden cash commissions between June 2001 and January 2002.

A judicial investigation was then opened for charges of corruption and influence peddling. Several additional requisitions were issued between 2004 and 2005 for offenses such as concealment, misuse of corporate assets and complicity in this offense, favoritism, collusion, and concealment of these offenses, as well as forgery and use of forged documents.

During this investigation, six individuals, one of whom passed away in 2019, were placed under an investigation procedure. On 7 November 2019, the investigating judge ordered the referral of several of them to the criminal court. However, on 11 January 2021, the criminal court cancelled the entire procedure due to the violation of the right to be tried within a reasonable time caused by the excessive duration of the investigations. The public prosecutor and the plaintiffs then filed an appeal.

The Versailles court of appeal, upheld the cancellation of the prosecution on 15 September 2021, noting the unreasonable nature of the proceedings. The court emphasized the resulting infringement on the right to a fair trial, the principle of adversarial proceedings, the balance of the parties' rights, as well as the rights of the defense.

Challenging the cancellation of these prosecutions, the Procureur de la République ("public prosecutor") filed an appeal before the Cour de Cassation ("French Supreme Court"), alleging, among other things, the violation of preliminary articles, 427, 591, 593, and 802 of the criminal procedure code. The public prosecutor argued, firstly, that the disregard for the reasonable time limit to decide on a person's accusation does not necessarily undermine the principles of the criminal justice and the rights of the defense, nor irreparably compromise the fairness of the trial and the balance of the parties' rights, and in any case, has no direct impact on the validity of the proceedings. Secondly, the public prosecutor emphasized that the inability to personally question incriminating witnesses or co-defendants, or allow the parties to question them or have them questioned, does not automatically lead to the invalidation of the procedure and does not necessarily violate the rights of the defense.

Referring to article 6§1 of the European Convention on Human Rights, which relates to the right to a fair trial, as well as the preliminary articles and article 802 of the criminal procedure code, the French Supreme Court quashed and cancelled the judgment rendered by the court of appeal. The French Supreme Court found that the court of appeal had erroneously deduced from article 6§1 and the preliminary article of the criminal procedure code that it should cancel the prosecutions, and had not ruled on the merits of the charges based on the evidence presented in accordance with article 417 of the criminal procedure code.

With this decision, the French Supreme Court reaffirmed its consistent case law according to which the disregard of the reasonable time limit and its potential consequences on the rights of the defense have no impact on the validity of the proceedings (I). It also stated that these rules do not violate any conventional international principle (II). Finally, it emphasized that the criminal court, when determining the excessive duration of the proceedings, cannot refrain from examining the case on its merits to take this situation into account (III).

1 The disregard of the reasonable time limit and its potential consequences on the rights of the defense have no impact on the validity of the proceedings

While the French Supreme Court had consistently affirmed since 1993 that exceeding the reasonable time limit had no impact on the validity of the procedure, the criminal court and the Versailles court of appeal, in this particular case, invalidated the entire procedure after determining that it violated the standard of a reasonable time limit, thereby precluding consideration of the case merits.

Applying its consistent case law, the French Supreme Court, in La Chaufferie de La Défense case, held that exceeding the reasonable time limit could not lead to the cancellation of the proceedings or constitute a ground for extinguishing public prosecution.

In this respect, the French Supreme Court stated that failure to respect the right to be tried within a reasonable time does not constitute a violation of a public order rule, nor a violation of a procedural rule prescribed by law under penalty of nullity, nor even a failure to comply with a substantial formality within the meaning of article 802 of the criminal procedure code.

It also recalled that when the court is seized by the investigating judge's order for referral to the criminal court, the parties are not allowed to raise objections of nullity arising from previous proceedings, provided that the said order remedies all procedural defects.

Finally, the French Supreme Court stated that the excessive duration of a procedure cannot result in its complete invalidation, when each of the acts constituting it is intrinsically regular.

By deciding to cancel the trial on the grounds that it was unfair, without ruling on its merits, the court of appeal thus disregarded the applicable law and the principle that disregard of a reasonable time limit and its possible consequences on rights of the defense have no impact on the validity of the proceedings.

2 Compliance of the French Supreme Court decision with international law

The French Supreme Court took care to specify that its position is in line with international law, as the European Court of Human Rights never considered that disregard of the right to be tried within a reasonable time constituted an infringement of the rights of the defense. In this regard, it referred to the Hiernaux v. Belgium case of 24 January 2017, in which the European Court of Human Rights held that domestic remedies available to individuals to complain about the length of proceedings are effective within the meaning of article 13 of the European Convention on Human Rights, as long as that they make it possible either to provide an earlier decision by the courts seized or adequate remedy for the delays already suffered by the litigant.

The French Supreme Court then listed the remedies available under domestic law, stating firstly that, at the investigation stage, the parties may, subject to certain conditions in the criminal procedure code, refer the matter to the investigating chamber, which may itself proceed with the investigation, close it or entrust it to another investigating judge. Additionally, a party may also ask the investigating judge to close the investigation in accordance with the criminal procedure code. Finally, the judicial organization code provides the possibility for the party to hold the French State liable in case of defective functioning of justice service, especially when the reasonable time limit is exceeded.

3 The merits of the case require assessment by trial judges when the proceedings are excessively lengthy

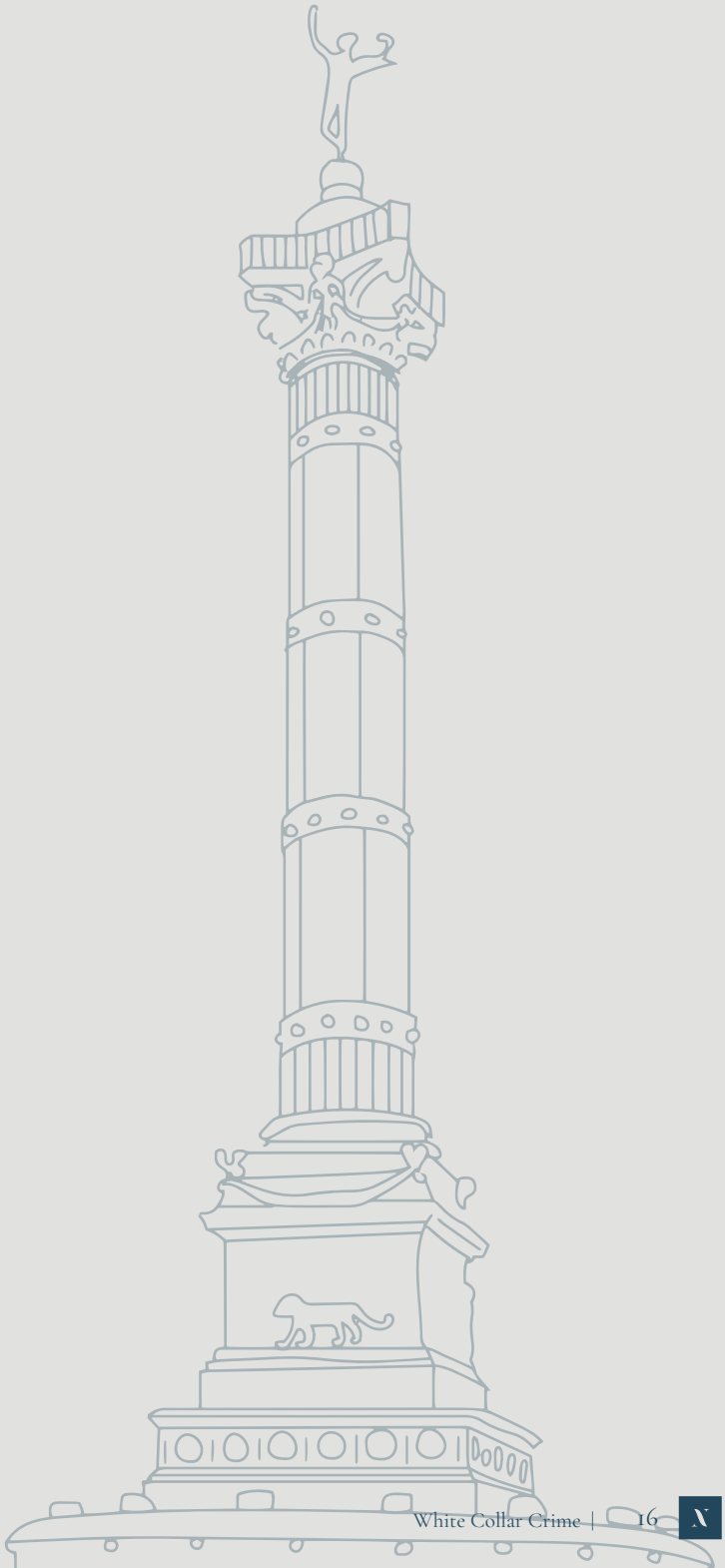
The French Supreme Court stated that although failure to observe the reasonable time limit does not compromise the rights of the defense, the possible consequences of such disregard must be considered at the stage of the judgment on the merits.

In this regard, the French Supreme Court discussed the legal means available to the trial judges to consider the excessive duration of a procedure. Firstly, the judgment referred to article 427 of the criminal procedure code, which enounces that it is the role of the trial judge to assess the probative value of the evidence submitted and discussed before them in an adversarial manner. In doing so, the judge must consider the potential deterioration of evidence due to the passage of time, and the resulting impossibility for the parties to discuss its value and significance. The Court de Cassation stated that the deterioration of evidence may, where appropriate, lead to a decision to acquit.

Furthermore, it stated that according to article 10 of the criminal procedure code, in the presence of plaintiffs, where the judge finds that the mental or physical state of the defendant makes it permanently impossible for them to appear in person in conditions allowing them to defend themselves, the judge may, on their own initiative or at the parties' request, decide, after having ordered an expert report to establish this impossibility, that a hearing will be held to rule solely on the civil action, after having noted the suspension of the public prosecution and postponed its decision.

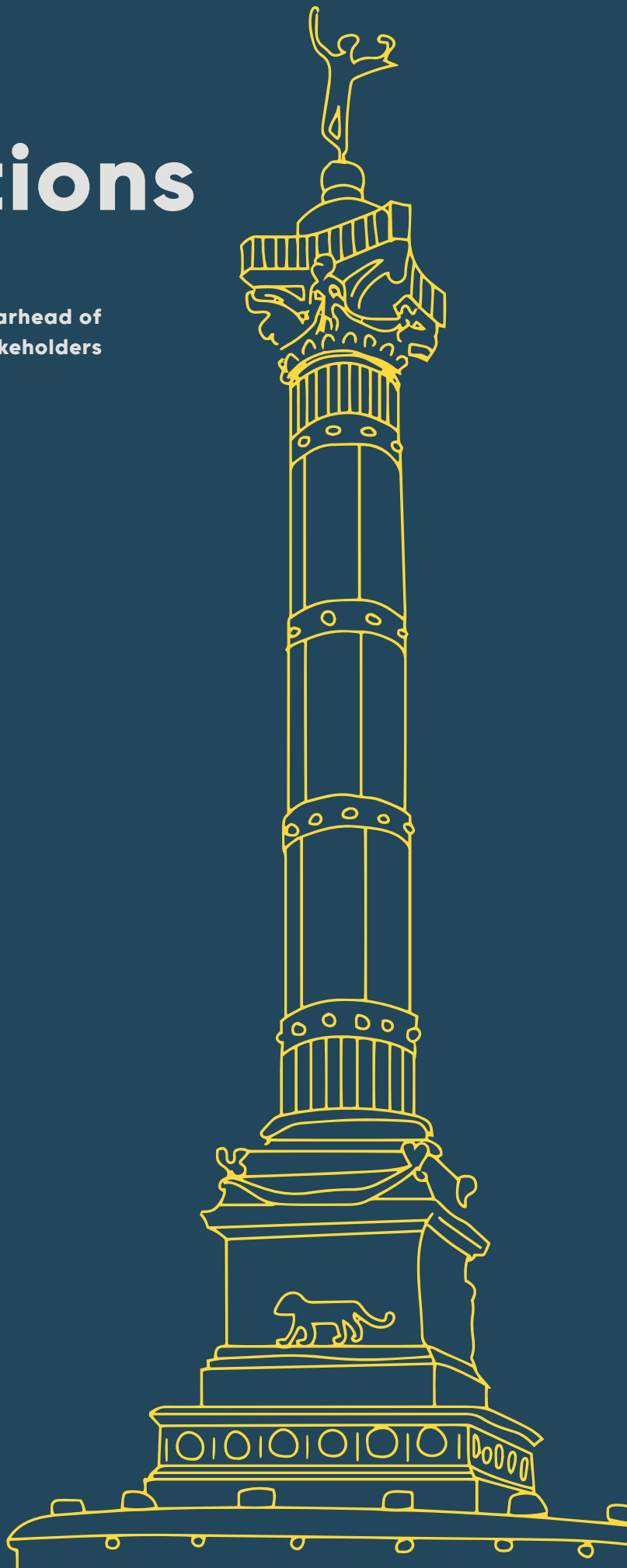
Lastly, the French Supreme Court stated that in applying the criteria for individualizing sentences set out in article 132-1 of the criminal code, the court may determine the nature, quantum, and conditions of the penalties imposed, considering the potential consequences of the excessive delay and, where appropriate, exempt the defendant from punishment.

The French Supreme Court, while agreeing with the finding of the lower courts regarding the excessive length of these proceedings, censured the consequences they drew from it, for not having ruled on the merits of the prosecution. Consequently, it referred the case and the parties back to the Versailles court of appeal, differently composed.



Internal Investigations

Internal investigation has become the spearhead of dialogue with the authorities and other stakeholders (e.g. unions, NGOs, finance actors).



NAVACELLE

Bastille Day

AFA and PNF publish a guide to anti-corruption internal investigations

On 14 March 2023, the French Anti-Corruption Agency ("AFA") and the French National Financial Prosecutor's Office ("PNF") jointly published a guide to anticorruption internal investigations for companies. The guide outlines the situations in which an internal investigation into alleged breaches of the anti-corruption code of conduct should be carried out, lists the points to watch out for when conducting such an investigation, and details the possible follow-up action to be taken.

On 14 March 2023, the AFA and the PNF published a practical guide ("the Guide"») to help companies set up and deploy their own internal anti-corruption investigation system. The Guide, which has been put out to public consultation, is aimed at companies whether or not they are subject to Article 17 of the Sapin II law.

The Guide is particularly important in view both of the growing number of situations that could lead to an internal anti-corruption investigation since the entry into force of the Sapin II Law and the Law 2022-401 of 21 March 2022 to improve the protection of whistleblowers, known as the Waserman Law, and of the development of negotiated justice under the judicial public interest agreement («CJIP»).

The Guide deals with the facts that give rise to an anticorruption internal investigation, the points to watch out for when conducting an anticorruption internal investigation and the follow-up to be given to such an investigation.

Internal investigations are an essential tool in the detection of corruption and influence peddling, and are fundamental to the prevention and management of criminal risk for those involved in economic activities. The aim of the Guide proposed by the AFA and the PNF is therefore to provide companies with an overview of best practices for conducting anticorruption internal investigations, enabling them to act within an effective framework that respects individual rights and freedoms.

1 The events prompting an anticorruption internal investigation

The Guide stresses that the events giving rise to an internal anti-corruption investigation may be internal (internal alert by an employee, result of an internal audit), or external (external alert by a third party, initiation of proceedings by a French prosecuting authority, request for information by a foreign authority, external audit or control).

In the event of an internal control or an internal audit leading to a report revealing suspicions of corruption, it is up to the governing body or the qualified persons it has appointed to decide whether to open an internal investigation.

However, if the internal control or audit has revealed criminal offences, the Guide recommends, even before an internal investigation is launched, that the management body should immediately inform the judicial authorities and preserve the evidence.

With regard to third-party alerts, the Guide also recommends, subject to the appropriateness of immediate referral to the judicial authorities, that an internal investigation be carried out as soon as possible to establish the facts. According to the Guide, conducting an internal investigation and, where appropriate, reporting the facts to the judicial authorities, are in the company's interest, as it has no control over the disclosure of information by the third party. The Guide also points out that, in the case of a report made by a customer or supplier, conducting an internal investigation can prevent possible negative consequences, up to and including termination of the contract if it provides for this possibility, which could be decided by the third party who made the report.

Similarly, in the event of disclosure by the press, the Guide notes that conducting an internal investigation may be part of an external communication strategy aimed at preserving the company's reputation, demonstrating that the company is up to date with the facts concerning it.

In the context of an investigation by a French prosecuting authority, the Guide considers the internal investigation as a tool for cooperation with the authorities, whereby the company, directly or through its lawyers, contacts the judicial authority in charge of the proceedings and makes known its wish to cooperate as far upstream as possible, in order to enable the judicial authority to evaluate and assess the risks of interference or the benefits to be gained from carrying out an internal investigation with regard to the progress of the judicial investigations.

The Guide indicates that an early exchange of information helps to ensure that the internal investigation is properly coordinated with the investigations carried out by the judicial authorities. According to the Guide, this contact should take place as soon as the elements known to the company make it possible to establish the existence of an offence and waiting for the conclusions of the internal investigation could prove detrimental to the gathering of evidence for the judicial investigation, if there is a risk of evidence dissipation or pressure on witnesses.

The Guide also considers the possibility of an internal investigation to contextualize the facts behind a request for information from a foreign authority, whether the request is made in a judicial, administrative or negotiated justice context. In this context, the Guide, which recommends cooperation with the foreign authority, invites companies to be extremely vigilant, and notably to approach the Strategic Information and Economic Security Department ("Service de l'information stratégique et de la sécurité économique", "SISSE"), to ensure compliance with their obligations under the so-called «blocking statute» of 26 July 1968.

Finally, the Guide emphasizes that an internal investigation may be carried out as part of the detection of criminal acts following an external audit or control, carried out by third parties to the company, some of whom are subject to the provisions of article 40 paragraph 2 of the Code of Criminal Procedure (such as the company's statutory auditors, the financial market authority or the AFA), which require them to notify the public prosecutor without delay of any crimes or offences of which they become aware in the course of their duties.

In practice, as soon as the question of carrying out an internal investigation arises for a company, the assistance of a lawyer is strongly recommended, particularly insofar as he or she is able to advise the company effectively on the opportunity of taking any steps to report the facts to an authority, whether French or foreign.

2 The key aspects of an anticorruption internal investigation

According to the Guide, companies conducting anticorruption internal investigations must define and formalize the internal investigation procedure in advance, paying particular attention to the choice of those involved in the internal investigation and to the conditions under which it is conducted, in order to ensure the legal robustness of the investigation and to be in a position to draw the appropriate legal and disciplinary consequences if necessary.

Establishing an internal investigation procedure upstream enables companies to achieve a number of key objectives, including organizing the procedures for collecting and storing evidence, guaranteeing compliance with confidentiality obligations and employee rights, optimizing investigation implementation times and ensuring the quality of investigations, in particular through traceability.

Among the elements that can be formalized, the Guide highlights the following:

- the criteria required to trigger an internal investigation, and any exemptions that may be contemplated
- the various stages of the internal investigation process
- the quality and role of those involved at each stage
- a description of the objectives and scope of the investigation
- the format and composition of the investigation team
- the investigation methods and resources available
- measures to guarantee the absence of reprisals, the confidentiality of the the identity of those involved and the information gathered, as well as the procedures for protecting, preserving and storing data, particularly personal data
- criteria for determining the follow-up to be given to internal investigations.

In addition, the Guide suggests providing employees with an easily accessible document explaining the guiding principles followed by investigators, the rights of employees in this context (witnesses, experts, persons targeted) and the behavior expected of them by the employer.

With regard to the decision to launch an internal investigation, the Guide points out that this can be taken by the management body, or by a special or ad hoc committee. The management body must be informed of the opening of the investigation, except in cases where it is implicated. In that case, the Guide recommends setting up a procedure for referring the matter to a body such as the audit committee or the ethics committee.

Concerning the people in charge of the investigation, the Guide indicates that the composition of the investigation team and the resources to be mobilized will be decided in accordance with the previously established internal investigation procedure, by the management body or the qualified persons it has appointed to sit on the special or ad hoc committee. These must be proportionate to the facts reported and their potential impact on the company.

Those involved in the internal investigation, who may be company employees, third parties or a mixed team, must have sufficient independence and expertise to carry out the investigation, particularly with regard to compliance with the procedural guarantees provided for under French labor law.

It is important to point out that the Guide recommends that if a lawyer is used to carry out the internal investigation, he or she should be different from the lawyer handling the criminal defense of the company or the employees concerned by the investigation, and indicates that in any event, the document drawn up at the end of the internal investigation is not be protected by any professional secrecy.

With regard to the first recommendation, it should be noted that there is in fact nothing to prevent a lawyer from carrying out an internal investigation on behalf of a company for which he is acting as criminal defense counsel, provided that he complies with the best practices in this area, as set out by the National Bar Council ("Conseil National des Barreaux") and the Paris Bar Association, according to which he must only refrain from acting against a person interviewed during the internal investigation.

The second recommendation also appears to be unfounded. Under articles 56-1-1 and 56-1-2 of the French Code of Criminal Procedure, it is possible to oppose the seizure of documents relating to the exercise of the rights of the defense and covered by professional secrecy, except in the case of certain offences (notably corruption, influence peddling, tax fraud and money laundering) when the consultations, correspondence or documents held or transmitted by the lawyer or his client provide evidence of their use to commit or facilitate the commission of the said offences. The application regulations relating to the law from which these articles derive (known as the "Loi Confiance"), also specify that the absolute protection of lawyer-client confidentiality concerns not only the confidentiality of the defense, which exists as soon as a lawyer is appointed by an accused person, but also the confidentiality of advice when it relates to the exercise of the rights of the defense, in the case, for example, of a person seeking advice from a lawyer after the potential commission of an offence and prior to any criminal proceedings. Insofar as they are fully in line with the company's rights of defense, in that they constitute the tools needed to establish the veracity of the facts useful in devising its criminal strategy, the lawyer's working documents produced as part of the internal investigation, the communications with his client in the course of the investigation, and the investigation report necessarily benefit from the protection of attorney-client privilege.

In addition, to ensure that the internal investigation runs smoothly, the Guide points out that it must be conducted in compliance with certain case law principles, which may vary from one jurisdiction to another, relating to the guiding principles of the internal investigation, the procedural guarantees afforded to individuals, the means of investigation that may be used and the drafting of the internal investigation report recording the facts and setting out the elements that establish them.

3 The follow-up to the anticorruption internal investigation

Finally, the Guide addresses the immediate consequences of an internal anti-corruption investigation, as well as the longer-term consequences for the company.

In the event that the investigation does not confirm suspicions, the Guide recommends that the report be archived in such a way as to ensure that access is strictly limited to those authorized to know about it, while respecting obligations relating to the protection of personal data.

In addition, the Guide underlines the obligation to inform the author of the alert when the event giving rise to the investigation is an alert falling within the scope of the Sapin II Law.

Should the investigation confirm the suspicions, the Guide recommends that sanctions be taken against the individuals to whom the facts are attributable, in a manner proportionate to the seriousness of the behavior and according to the scale of sanctions provided for by the company's disciplinary system.

In the event of the legal entity's criminal liability being brought into play, the Guide, in line with the PNF guidelines, recommends that the company report the facts to the judicial authorities, since such a report may constitute a factor reducing the fine imposed under a CJIP. Here again, the lawyer's role appears to be particularly important, to enable the company to assess the appropriateness of such a denunciation.

Finally, the Guide underlines that the follow-up to be carried out following an internal investigation must take into account any vulnerabilities discovered during the course of the investigation, so as to enable the implementation of corrective measures, such as the updating of anticorruption procedures, in order to avoid any repetition of similar facts. The vulnerabilities identified, and the corrective measures put in place, should be the subject of closer attention during subsequent internal control and audits.

Lastly, the Guide refers to the possibility, regardless of the outcome of the investigation, of issuing an internal communication at the end of it, and stresses that while it may be appropriate to reiterate the company's "zero tolerance" policy on corruption in the event of an investigation having corroborated an alert in this area, any communication must be made in a format that guarantees the anonymity of personal data relating to the facts reported and to any disciplinary sanctions imposed, in compliance with the principles of presumption of innocence and the right to privacy.

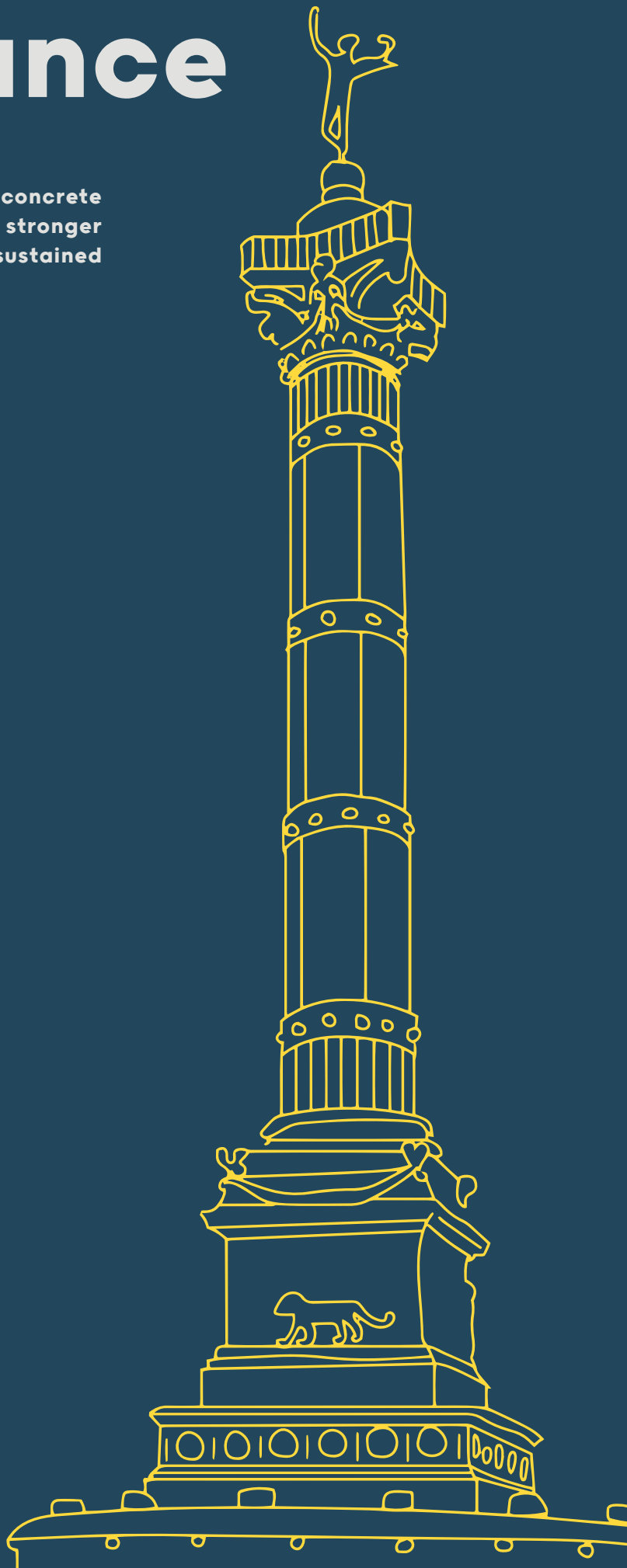
The battle for Airbus : the benefits of internal investigations for companies concerned by international lawsuits

In 2023, the aeronautic giant was prosecuted by US, French and UK authorities for suspected corrupt payments. Arte presents a documentary in which Stéphane de Navacelle provides insight on the interest for companies of carrying out internal investigations. Beyond, the documentary provides an example of how internal investigations can be of use for companies having to deal with growingly complex cross-border corruption prosecutions as well as CSR, supply chain liability, environmental law and compliance issues.

Watch documentary (in French)

Compliance

An ever more extensive framework, with concrete implementation of the duty of vigilance, stronger protection for whistleblowers and more sustained repression of greenwashing.



NAVACELLE

Bastille Day

TotalEnergie and Suez Group's decisions clarify the companies' duty of care obligations and the procedural framework applicable in related cases

The decisions rendered on 28 February 2023 and 1 June 2023 by the Paris Judicial Tribunal, which has exclusive jurisdiction over duty of care cases, provide a good indication of the scope of this concept and of the companies' obligations in this area. They also foreshadow the role of judges in this field.

The law of 27 March 2017 on the duty of care of parent companies and sourcing companies introduced the obligation for limited companies employing a certain number of employees, including subsidiaries, to set up a vigilance plan ("plan de vigilance").

This plan must include reasonable duty of care measures to identify risks and prevent serious infringements of human rights and fundamental rights, the health and safety of individuals and the environment, resulting from the activities of the company and those of the companies it controls. It is part of the development of corporate social responsibility, or ("CSR"). CSR is a broad notion which includes the need for the company, and its partners, to be involved in the society in which it operates, notably by taking into account its environmental impact.

Compliance with these obligations is guaranteed in the Law of 17 March 2017 through two successive mechanisms. Firstly, the company may be requested to implement its obligations by a formal notice ("mise en demeure") mechanism, and secondly by a mechanism of injunction if the company fails to take the necessary measures after the formal notice. It should be remembered that the French Commercial Code gives the plaintiff the choice of bringing his or her action before the judge hearing the case on the merits, or before the interim relief judge ("juge des référés").

Failure to comply with duty of care obligations may give rise to liability on the part of the company breaching its obligations, which may be required to pay compensation for the damage that could have been avoided if these obligations had been fulfilled.

These provisions have served as a legal basis for various environmental associations in their attempts to get major companies to update and apply their due diligence plans. These actions resulted in two decisions dated 28 February 2023 in the TotalEnergie case and a decision dated 1 June 2023 in the Suez case.

These decisions rendered by the Paris Judicial Tribunal, which has exclusive jurisdiction in this area since the law of 22 December 2021, are of particular interest in that they set out the legal and procedural framework for actions for breach of duty of care in environmental matters (I), while at the same time clearly establishing the limits of the jurisdiction of the interim relief judge in this area (II).

It is thus possible to think that the tone has been set for future litigation concerning the duty of vigilance.

1 The three decisions rendered by the Paris Judicial Tribunal set out the procedural steps to be followed in order to analyze the merits of the dispute

The first procedural clarifications concern the notions of standing to sue and standing to defend. In the rulings of 28 February 2023, the interim relief judge did not contradict the plaintiffs' arguments concerning standing to sue, according to which it is sufficient for the plaintiff association to stipulate in its articles of association a corporate purpose linked to the fight against the harm caused by the defendant's projects.

On the other hand, in his decision of 1 June 2023, the pre-trial judge of the Paris court sided with the defendants, who argued that they lacked standing to defend, which meant that the plaintiff associations' action was inadmissible. The vigilance plan did not specify which company had drafted it. The plaintiff associations argued that Vigie Groupe, as successor in title to Suez Groupe, was not entitled to defend the action on the basis of the estoppel principle, on the grounds that Suez Groupe had acknowledged before the pre-trial judge of the Nanterre court that it was the author of the vigilance plan.

They claimed that Vigie Group was necessarily the author of the plan, since one of its managing directors had responded to their formal notice. The defendant argued that it had no standing to defend, as it was not the author of the vigilance plan, which had been drawn up by Suez SA, the parent company of the Suez group. Finally, the court noted that the vigilance plan in question did not mention which Suez group company had drawn it up, so that it was not possible to know whether it was drawn up by Suez Groupe or Suez SA. The court ruled that the fact that someone from Suez Groupe, now Vigie Groupe, had responded to the formal notice did not necessarily mean that it was that company that had issued it. Consequently, Vigie Group's standing to defend was not established and the action was inadmissible.

The main contribution of the decisions lies in the clarification of the requirements concerning formal notice prior to litigation ("mise en demeure") in the area of duty of care, rather than in the questions of standing.

In one of the two decisions of 28 February 2023, the interim relief judge noted that the plaintiff associations' claims concerned a vigilance plan drawn up in 2021, whereas the formal notice, dated 2019, predated it, and that the claims were based on more than 200 new exhibits compared with those appended to the formal notice, so that there were grounds for considering that the misconducts formulated by the plaintiff associations had not been notified to the defendant by a formal notice prior to referral to the judge, resulting in the inadmissibility of the claims.

Similarly, in the decision of 1 June 2023, the judge noted that the French Commercial Code does not expressly provide that the formal notice and the summons ("assignation") must refer to the same vigilance plan. However, the court pointed out that this can be deduced from the fact that the obligations in question are based on a plan whose content is likely to evolve according to the activity of the company drawing it up, the realities on the ground and the discussions it may have with the people concerned. The court also pointed out that if the formal notice did not relate to the plan in question, the summons would have been issued without any prior discussion between the parties concerning the plan in question, in contradiction with the legislator's intention to ensure that vigilance plans are drawn up in a spirit of consultation.

These new case law requirements greatly complicate the task of associations. Indeed, legal scholars have pointed out that, since vigilance procedures are necessarily lengthy, associations will be forced to develop and refine their demands as the due diligence plan changes. The requirement to reiterate the formal notice in the event of changes to the due diligence plan creates a situation in which the defendant company will be able to demand a new formal notice with each iteration of the plan, which is likely to delay the procedure for a long time.

2 The Paris Judicial Tribunal clarifies the role of the interim relief judge in matters of duty of care

While the decisions of 28 February and 1 June 2023 were disappointing for many in that they did not address the merits of the dispute, they have also provided some interesting clarifications as to the scope of the interim relief judge's powers in this type of dispute.

In fact, the court underlines that the interim relief procedure ("procédure de référé") is a judicial mechanism enabling a rapid examination of a dispute. The interim relief judge is tasked with providing an urgent response to a dispute, by ordering interim measures to preserve the rights of the parties before they are assessed by the judge on the merits.

Accordingly, the judges noted that while the law provides for the possibility of an interim action to enforce compliance with duty of care obligations, it is up to the trial judge alone to decide whether the company's alleged misconducts are well-founded, or whether it has provided proof of compliance with its duty of care obligations. The interim relief judge, on the other hand, is only competent to issue an injunction when the company subject to the vigilance regime has not drawn up a vigilance plan, or when the brief content of the sections leads to the non-existence of the plan, or when a manifest unlawfulness is characterized with the obviousness required in interim proceedings. It is therefore important to understand that the bulk of future litigation is likely to take place before the judge on the merits, who alone is competent to examine the case in all its complexity.

AFA's national diagnosis survey of anti-corruption systems in businesses

On 30 September 2022, the AFA published its second national diagnosis survey of anti-corruption systems in businesses. It shows a rather positive assessment of the progress made by businesses in terms of understanding and implementing anti-corruption measures.

Following the 2020-2022 national multi-year anti-corruption plan, the French Anti-Corruption Agency (hereinafter "AFA") published on 30 September 2022 its second national diagnosis survey of anti-corruption systems in businesses. The aim of this new report is to assess changes made by businesses regarding the appropriation of anti-corruption prevention and detection systems since the diagnosis published in 2020, and to better understand the difficulties that companies may face.

The AFA has drawn up a rather positive assessment of this survey, which was conducted among various companies according to a specific methodology (I). The diagnosis highlights a "real progress of companies, both in the understanding and in the implementation of anti-corruption measures" (II). However, the AFA believes that certain improvements are still necessary (III).

1 The methodology used by the AFA and the responding companies' typology

As part of its survey, the AFA sent a list of 25 questions to several companies and received more than 330 responses. On the basis of this questionnaire, it evaluated the knowledge of corruption and influence peddling offences by the responding companies and the prevention of these offences within them.

Law No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and modernization of economic life, (hereinafter the "Sapin II Law") sets out obligations in this area. Article 17 requires companies with at least 500 employees or belonging to a group of companies whose parent company has its registered office in France and whose workforce includes at least 500 employees, and whose revenues or consolidated revenues exceed €100 million, to take measures to prevent and to detect acts of bribery or influence peddling committed in France or abroad.

Amongst the companies responding to the questionnaire sent by the AFA, 54% belong to a group headquartered in France, 27% belong to a group headquartered abroad and 19% do not belong to any group. More than half of the responding companies were subject to Article 17 of the Sapin II law. Furthermore, the AFA outlined in its diagnosis that, the main reason given by the responding companies that did not adopt anti-corruption measures, which are mostly small companies not subject to Article 17 of the Sapin II Law, was their lack of means and resources.

While nearly 75% of the responding companies have international activities, no company from the textile, plastics, machinery and equipment, automotive or luxury sectors responded to the survey.

2 The evolution in the appropriation of anti-corruption measures since 2020

The appropriation assessment of anti-corruption measures conducted by the AFA in this questionnaire focused on two aspects. The first concerns the understanding of corruption and influence peddling. The second concerns the prevention and detection of corruption and influence peddling.

The understanding of corruption and influence peddling

A real improvement since the 2020 diagnosis is highlighted. Indeed, on average, 96% of responding companies considered they knew the definition of corruption and influence peddling, compared to 86% in 2020. This improvement can be explained by the fact that 87% of responding companies in 2022 claim to have received recent training on the topic of corruption, compared to 70% in 2020.

Furthermore, 25% of the companies have faced at least one case of corruption or influence peddling in the last five years. Out of these, 89% have initiated an internal investigation and 70% have imposed a disciplinary sanction.

In comparison, in 2020, only 22% of the companies surveyed had been confronted with cases of corruption, and 51% of them had initiated a disciplinary procedure for these facts that resulted in a disciplinary sanction.

Prevention and detection of corruption and influence peddling

This second component is also the subject of clear progress. In 2022, 92% of responding companies declared having implemented measures to prevent and detect corruption and influence peddling. In 2020, only 70% of companies had done so.

There are several reasons for this improvement. First, 82% of the responding companies indicated that they have implemented anti-corruption measures due to legal or regulatory obligations such as the Sapin II law, European directives on the fight against money laundering, or the law on the duty of care. The organization's values are also a reason for implementing these measures for 64% of companies. Finally, for a small minority of them, these measures have been implemented at the request of their clients. The measures mainly implemented are a code of conduct (88%), an internal whistleblowing system (86%), and anti-corruption training (85%).

Those considered the most difficult to implement are (i) third-party integrity assessment/due diligence (due to the lack of human and financial resources), (ii) anti-corruption risk mapping (due to the complexity of its establishment) and (iii) anti-corruption accounting controls (due to the difficulty of determining the scope of controls to be carried out).

Even if the risk of corruption is mainly taken into account in the "purchasing", "accounting and finance", or "sales" procedures, more than 66% of companies indicate that they alert their employees as to corruption risks in their daily activities.

3 Areas for improvement

Although positive overall, the diagnosis nevertheless identifies a few areas for improvement.

Firstly, the diagnosis raises an inadequacy in the understanding of exposure to the risk of corruption and influence peddling. Indeed, half of the companies consider that they are slightly exposed to these risks, and only 6%, exclusively companies subject to Article 17 of the Sapin II law, consider that they are highly exposed to them.

Secondly, only 45% of companies declared that they had implemented all of the measures expected by the Sapin II law, while companies that have implemented all of these measures do not update them annually. Such an update is recommended to allow a better adaptation to the company's situation.

Moreover, among companies that have been confronted with at least one case of corruption or influence peddling in the last five years (which corresponds to 24% of the companies surveyed), only 32% have filed a complaint or referred the case to the courts.

Also, among the companies with international activity that reported having been confronted with one or more solicitations for facilitation payments, only 60% reported having been confronted with a case of corruption or influence peddling. This figure reflects a misunderstanding of corruption under French law since facilitation payments are considered corruption actions. It is therefore necessary to raise the awareness of companies on this subject.

The AFA also suggests continuing to train and raise awareness among employees about the risk of corruption in their daily activities.

Therefore, the AFA is rather positive about the understanding of the offences of corruption and influence peddling and the implementation of detection and prevention measures. The diagnosis has a clear educational goal, which reinforces its practical interest for companies.

Thales case: the French Supreme Court strengthens whistleblowers' protection against employer's retaliations

In this decision, the Cour de cassation ruled that the juge des référés must take all necessary measures to put an end to the manifestly unlawful disturbance resulting from the dismissal of a whistleblower and, in particular, determine whether the employer can prove that its decision to dismiss is duly justified under Article L.1132-3-3 of the French Labor Code.

The adoption in France of the Law n°2016-1691 of 9 December 2016, on transparency, the fight against corruption and the modernization of economic life, known as the "Sapin II Law", has led to the recognition of the status of whistleblowers and the creation of a framework providing numerous rights. However, some considered this framework inadequate when dealing with the practical difficulties whistleblowers encounter, particularly regarding protection and support. Thus, to address these issues and to transpose the European Parliament and Council's Directive (EU) 2019/1937 of October 23, 2019, on the Protection of persons who report breaches of European Union law, the French Parliament adopted Law n°2022-401 of 21 March 2022, known as the "Waserman Law", to improve the protection of whistleblowers.

While legislators have developed the law, French judges have also worked to provide the details and clarifications needed to define precise regulations governing whistleblowers. In this regard, on 1 February 2023, the French Supreme Court (hereinafter "Cour de cassation") issued a decision strengthening whistleblower's protection in case of retaliatory dismissal by their employer, in the context of a case involving the company Thales SIX GTS France (hereinafter «Thales») and one of its employees.

The Cour de cassation's decision dated 1 February 2023 revisits the jurisdiction of the juge des référés to rule on the substance of a whistleblower's dismissal following the reporting of an alert (I), and the lightened burden of proof that whistleblowers benefit in the context of an appeal against such dismissal (II).

1 The Cour de cassation considered that the juge des référés had jurisdiction to rule on the substance of a dismissal following the reporting of an alert

In line with the Waserman Law, which reminds and reinforces the prohibition of retaliatory measures against whistleblowers, the Cour de cassation issued a decision on 1 February 2023, in a case in which an employee allegedly suffered numerous retaliatory measures before finally being dismissed, following a denunciation she made of facts likely to be qualified as corruption and influence peddling.

Based on article 12 of the Sapin II law, the employee referred the case to the juge des référés for recognition of her status as a whistleblower and for the annulment of her dismissal, as she considered it to be a retaliatory measure taken after her alert. She wanted to be reinstated within Thales and paid the salaries she had been deprived of.

The Emergency Procedure of the Labor Court (hereinafter "formation des référés du conseil des prud'hommes") and the Versailles' Court of Appeal, considered that it was not possible to establish a clear and unequivocal link between the whistleblower's alert and the dismissal of the employee, nor was it possible to establish retaliation measures taken in violation of her whistleblower status, and therefore referred the assessment of the dismissal reason to the trial judges.

The whistleblower brought an appeal before the Cour de Cassation, in which she argued that such a decision violated articles R1455-6, L1132-3-3, and L1132-4 of the French Labor Code, in that the the juge des référés should have reviewed the just cause of the dismissal, and, more specifically, all the evidence provided by Thales to prove that its decision to dismiss was justified by objective factors unrelated to its alert.

Indeed, her lawyers insisted on the fact that Article 12 of the Sapin 2 law gave an exceptional and derogatory jurisdiction to the juge des référés to rule on the substance of a dismissal following the reporting of an alert and not simply to determine whether the existence of a clear link between the dismissal and the alert constituted a manifestly unlawful disturbance. Moreover, they emphasized that the said Article, referring directly to Article R1455-6 of the French Labor Code, could only imply that the juge des référés had the capacity to order the reinstatement of an employee. They consider that this is a necessary protection for whistleblowers in view of the procedures on the substance's length, which take place too late to effectively protect whistleblowers.

Finally, the Cour de cassation followed the same approach, ruling that the juge des référés, even in the presence of a serious dispute, had to put an end to the manifestly unlawful disturbance resulting from the dismissal pronounced in retaliation for the whistleblower's alert, by assessing whether the elements submitted were sufficient to presume the employee's status as a whistleblower and, if so, by determining whether the employer could prove that the dismissal pronounced was justified by objective factors unrelated to the employee's alert.

2 The Cour de cassation confirmed the existence of a lighter burden of proof for whistleblowers in the event of disputes regarding retaliatory measures taken by their employer

The lighter burden of proof for whistleblowers in the event of disputes regarding retaliatory measures taken by their employer is based primarily on article L1132-3-3 of the French Labor Code. In its Sapin 2 law version, in force when the facts subject of the Cour de cassation's decision occurred, this article provided that, in the event of a dispute regarding retaliatory measures taken against a whistleblower (i) the latter was only required to provide factual evidence allowing the presumption that he/she had reported or testified in good faith facts constituting an offence or a crime, or that he/she had reported an alert in compliance with Articles 6 to 8 of the Sapin 2 law, and (ii) the employer had to prove that its decision was justified by objective factors unrelated to the whistleblower's alert.

The Waserman Law amended this article, which now refers to Article 10-1 of the Sapin II law, which provides that, in the event of an appeal against a retaliatory measure, the whistleblower must provide factual evidence allowing the presumption that he/she reported or disclosed information in compliance with Articles 6 and 8, and that the employer, for its part, must now only prove that its decision is duly justified and no longer "justified by objective factors unrelated to the whistleblower's alert.

The decision of the Cour de cassation, although rendered under the former applicable Article L1132-3-3 of the French Labor Code, came as a timely reminder of the Cour's commitment to this principle. Indeed, the Cour de cassation considered that the juge des référés should not only note that the employee had provided evidence allowing the presumption that she had reported an alert in compliance with Articles 6 to 8 of the Sapin 2 law, but should also determine whether the employer had provided proof that its decision to dismiss was justified by objective factors unrelated to the whistleblower's alert.

This decision, which protects whistleblowers, gives reason to hope that future case law will interpret the new Article 10-1 of the Sapin 2 law restrictively, so as not to exempt employers from proving that their decision to dismiss a whistleblower was not a retaliation to the whistleblowing.

The Defender of Rights publishes its new guide regarding whistleblowers protection

On 30 March 2023, one year after the law of 21 March 2022 aimed at improving the protection of whistleblowers, the Defender of Rights ("Défenseur des droits") published an updated guide regarding whistleblowers. Build around practical questions, its aims to assist and advice anyone wishing to raise an alert.

The law of 9 December 2016, known as "Sapin II", led to the consecration of the status of whistleblowers and the development of legal protection for them. However, as this status was insufficiently defined, it remained uncertain and the related procedure was the subject of much criticism, often considered incomplete or unclear on some aspects. The law of 21 March 2022 aimed at improving the protection of whistleblowers, has attempted to clarify this status and strengthen the guarantees offered to whistleblowers. In this context, it has given the Defender of Rights a leading role in supporting, guiding and protecting whistleblowers.

Against this backdrop, the independent administrative authority updated and published its new whistleblower guide on 30 March 2023. Through eight general questions, the Defender of Rights outlines the status and protection of whistleblowers. These questions are structured around reminders of the applicable texts and practical answers adapted to each individual's situation. Readers, whether experts or laymen, are also provided with contact details for useful interlocutors, depending on the issue at stake.

1 The guide published by the Defender of Rights summarizes the applicable legislation to whistleblowers

The new definition of whistleblower set out in the law of 21 March 2022 now requires several cumulative conditions to be met before an individual can claim the protective status of whistleblower. The guide published by the Defender of Rights takes care to detail them.

First of all, as it was previously the case, this status is only available to natural persons. In addition, they must not receive any direct or indirect financial compensation for their reporting. This condition replaces the former uncertain notion of "disinterestedness". Secondly, the whistleblower must have personal knowledge of the information to which the alert relates if it was obtained outside any professional context. Finally, the whistleblower must act in good faith.

In addition, the information reported must also meet certain conditions, i.e., it must concern (i) facts constituting an offence, whether the offence be of a delictual or criminal nature, or (ii) a violation or attempted dissimulation of a violation of a text or commitment.

The law of 21 March 2022 also broadened the scope of information excluded from the whistleblower regime. Any disclosure of information or document relating to a secret protected by specific legal provisions (i.e., national security, professional secrecy, secrecy of deliberations etc.) is prohibited.

Lastly, the role of whistleblowers' third parties and facilitators was enshrined in the law of 21 March 2022. In his guide, the Defender of Rights recalls that facilitators, whether private not-for-profit legal entities or individuals, as well as third parties in contact with the whistleblower, can also benefit from the protection regime. While the facilitator must demonstrate that he has helped the whistleblower to comply with the reporting rules, the third party must prove that he is at risk of reprisals.

In addition of these clarifications regarding the definition, the 21 March 2022 law also strengthens the protection of whistleblowers. This is evidenced, for example, by the extension to the civil sphere of the criminal liability provisions of article 122-9 of the French Criminal Code, through the addition of an article 10-1 to the Sapin II law.

The guide published by the Defender or Rights also points out that whistleblowers can choose between two reporting procedures, which have coexisted since decree 2022-1284 of 3 October 2022. The first is an internal reporting procedure, while the second is an external reporting procedure.

The internal whistleblowing procedure enables the whistleblower to act within the professional structure in which he obtained the information subject of the alert. This information must have been obtained during the whistleblower's professional activities. Then, he must ensure that his professional organization has set up a procedure for collecting and handling reports. If necessary, he should contact his direct or indirect superior, his employer or a representative designated by the latter.

However, a distinction must be made according to the size of the organization. For those with fewer than fifty employees, there is no specific procedure, and the alert can be addressed to the hierarchical superior, the employer or a referent. For larger structures, the decree requires the implementation of a specific procedure.

The whistleblower may also make an external report. Decree 2022-1284 of 3 October 2022 sets out a list of authorities who may receive whistleblowers' reports, in accordance with their respective powers. (i) The Defender of Rights, the judicial authority, and in particular the public prosecutor in the event of a report of a crime or offence, as well as (ii) an institution, body or organization of the European Union, may also be the addressee of an alert.

The guide goes on to explain how the whistleblower's alert will be handled, and the deadlines for the recipients of the alert to respond. Thus, for example, the authorities mentioned in the decree of 3 October 2022 (i.e., French Anti-Corruption Agency, French Competition Authority, French Financial Markets Authority) are required to provide an initial response within three months. The guide specifies that the authority is not obliged to deal with the alert within this timeframe, but only to inform the whistleblower of the actions planned or already taken to assess the reality of the alert and remedy the situation reported. This three-month period may be extended to six months in view of the complexity of the case. In this case, the authority is required to inform the whistleblower of the extension, providing reasons for it.

On the contrary, no time limit is set by the texts concerning the Defender of Rights, the judicial authority or the European Union institutions. However, the guide specifies that the Law of 9 December 2016 authorizes the whistleblower to publicly disclose his alert without losing the protection he benefits due to his status as a whistleblower as long as no appropriate action has been taken by one of these authorities, and within a period of six months.

If the whistleblower considers that the response to the alert does not seem appropriate or that no response has been provided, he may "consider making public" the alert. However, he must respect the obligation of confidentiality protecting the person implicated. Failure to comply with this obligation constitutes a criminal offence punishable by two years' imprisonment and a fine of 30,000 euros.

2 The guide published by the Defender of Rights strengthens his role in protecting whistleblowers

The guide published by the Defender of Rights also recalls that it is his duty to inform whistleblowers of the rules and protection applicable to them, while dealing with the reports for which he is responsible.

Throughout the guide, the Defender of Rights explains his role in providing guidance and support to whistleblowers and people close to them. He also clarifies the scope of protection to which those concerned are entitled. He also uses his guide to provide several practical tips for whistleblowers, to help them report allegations appropriately.

On this last point, he indicates the need for the whistleblower to gather concrete evidence before making his report. It also specifies that when sending a paper report, it should be sent by registered letter with acknowledgment of receipt, using the double envelope system. This means that the envelope contained in the first envelope must be marked as "report of an alert".

The Defender of Rights also sets out the specific rules applicable to certain professions, such as civil servants or employees or social and medico-social establishments or services. Distinctions are also made according to the subject of the alert. For example, the Defender of Rights distinguishes between alerts concerning financial matters and alerts concerning an employer's products or manufacturing processes that present health or environmental risks. The aim is to provide the whistleblower with the best possible guidance and to inform him of the specific rules that may apply to his situation.

In addition, the Defender of Rights has a key role in protecting whistleblowers, in that he can certify a person as a whistleblower. However, this certification can only be granted after the report has been filed. In this context, the whistleblower requests that the authority issue an opinion stating that he meets the conditions laid down by law for protection as a whistleblower. However, this certification does not constitute a blank check for the judicial authority, which is not bound by the opinion of the Defender of Rights.

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Boosting the fight against greenwashing in France

In the recent years, French rulemakers, regulators and the judicial system have contributed to strengthen the fight against greenwashing.

Since 1 January 2023 in France, advertising that a product or service is "carbon neutral" becomes subject to the presentation of an assessment of greenhouse gas emissions over the entire life cycle of the product or service. This is a result of the coming into force of French law n°2021-1104 of 22 August 2021, known as the "climate and resilience" law.

Pursuant to other provisions against greenwashing included in this law, the French government created an online platform listing the companies subject to environmental display obligations. Such platform also mentions companies which voluntary subscribed to a "climate contract for commercial communications and ecological transition". Such contracts aim at reducing marketing communications relating to products or services that have a negative impact on environment. The French Audiovisual and Digital Communication Regulatory Authority (ARCOM) is in charge of promoting these contracts and the Government will submit a report assessing this system's efficiency by mid-2023.
French regulators are also active against greenwashing. For example, the French Financial Markets Authority (AMF) and the Prudential and Resolution Supervisory Authority (ACPR), the two French National Competent Authorities for banking and insurance and capital markets respectively, publish yearly joint reports on the commitments of French financial institutions to combating climate change and achieving carbon neutrality. The third report was published on 25 October 2022 and underlines for instance that several financial institutions have involved internal control departments in the governance of environmental commitments.

Moreover, in 2021, greenwashing has been expressly included within the definition of misleading marketing practices (pratiques commerciales trompeuses), since Article L. 121-2 of the French consumer code provides that false or misleading presentation of goods or services as to their substantial qualities, compositions, properties and the results expected from their use, in particular their environment impact, are prohibited. In addition, the "climate and resilience" law also increased the penalties incurred for such misleading practices to up to 2 years of imprisonment and a fine of 300.000 euros, or 1.5 million euros for legal entities, as well as 10% of the average annual turnover or to 50% of the expenses incurred in carrying the misleading practice and 80% thereof where the misleading practices are based on environmental claims.

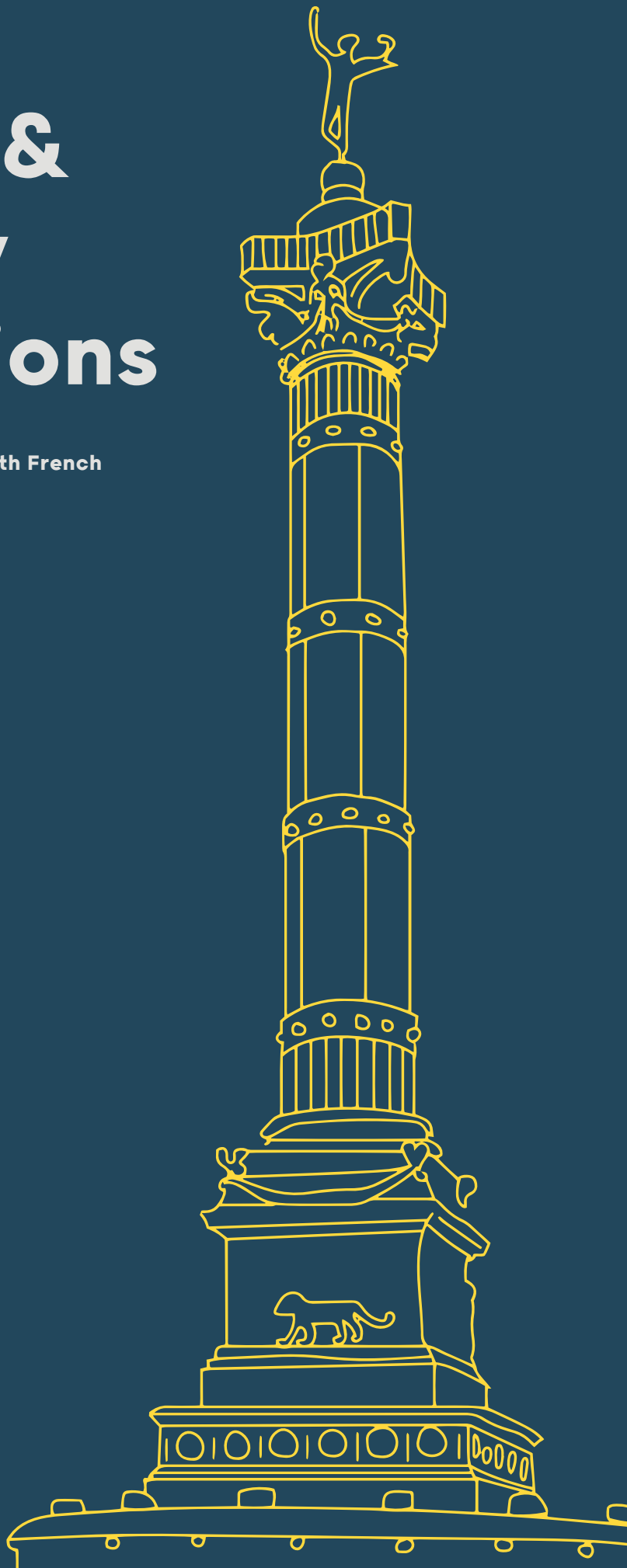
Finally, the French judicial system is also involved in the fight against greenwashing. Indeed, several complaints were filed, by various NGOs in 2021 and 2022, against TotalEnergies, on the grounds of environmental-related misleading practices, greenwashing in the context of a project in Uganda and on other practices leading to an ecocide. In this context, TotalEnergies was accused by, among others, Greenpeace France, of minimizing information on its carbon emissions by more than four times what was calculated by this NGO, which also reported these facts to the AMF. However, TotalEnergies publicly challenged the methodology used by the NGO in such calculation.

Finally, at the end of 2022, on the eve of Climate Finance Day, several associations including Oxfam France announced that they expect the French bank BNP Paribas to respond to their allegations of failure to respect its duty of care regarding to climate change within three months, otherwise they will bring the matter before the courts. While the time allotted just expired, no action has been publicly taken yet on either side.

Therefore, greenwashing now constitute a material risk for French companies and companies operating in France.

Dispute resolution & regulatory investigations

A record year in terms of sanctions for both French and foreign companies.



NAVACELLE

Bastille Day

The Paris Criminal Court (32nd Chamber) issues its first decision on a market manipulation case

On 25 May 2023, the Paris Criminal Court (32nd Chamber) ruled for the first time on the offence of market manipulation. This decision followed a referral procedure ("procédure d'aiguillage") between the National Financial Prosecutor's Office ("PNF") and the French Financial Markets Authority ("AMF"), pursuant to which the PNF was empowered to conduct the investigation and prosecute the defendant, while the AMF joined as a civil party.

On 25 May 2023, the Paris Criminal Court (32nd Chamber), which rules on the cases brought by the French National Financial Prosecutor's Office ("PNF"), handed down its first ruling on market manipulation. Thierry Boutin, already sanctioned on three occasions by the Enforcement Committee of the French Financial Markets Authority ("AMF") for market abuse, was found guilty of the offence of market manipulation and of the laundering of this offence.

This decision follows the application of the referral procedure ("procédure d'aiguillage") between the PNF and the AMF. This procedure enabled the criminal court to investigate and prosecute the case in compliance with the non bis in idem principle, prohibiting double jeopardy.

1 Judgment of the Paris Criminal Court on the "pump and dump" technique recognized as criminal market manipulation

In October 2018, the AMF's Investigations Department reported to the PNF the actions of Thierry Boutin, uncovered during an administrative investigation relating to the stock of the Dolphin Integration and "any related financial instruments" from 1 January 2016 onwards.

The actions identified were likely to involve the use of the "pump and dump" technique. the defendant was alleged to have approached investors, suggesting that they invest in high-potential shares, while instructing them to act quickly to take the opportunity. The purchase made in this way created a false rise in the share price of the company concerned, encouraging investors to continue investing in these stocks.

In a press release, the AMF points out that, in principle, the perpetrator of this type of manipulation does not mention that he holds a large number of shares or that he is acting at the request of a third party wishing to sell its own shares. However, as soon as the sale is completed, the aggressive canvassing stops and the share price slumps, causing significant harm to investors who see their shares devalued.

The AMF investigation identified four manipulative phases between April 2017 and January 2018 attributable to Thierry Boutin. The use of the "pump and dump" technique enabled him to sell his entire stake in Dolphin Integration.

The AMF's report enabled the PNF to request the opening of a preliminary investigation ("enquête préliminaire") on 14 November 2018 with the Paris Police Prefecture's Financial Brigade ("Brigade financière"), followed by the opening of a judicial investigation ("information judiciaire") on 30 January 2020, at which point Thierry Boutin was indicted and remanded in pre-trial custody ("détention provisoire"). He was subsequently released and placed under judicial supervision ("contrôle judiciaire") as of 16 March 2020.

The investigation carried out by the PNF confirmed that in 2016 and 2017, Thierry Boutin has indeed engaged in market manipulation, an offence prohibited by Article L464-3-1 of the French Monetary and Financial Code, as set out in the European Market Abuse Regulation ("MAR"). The investigations showed that Thierry Boutin had manipulated Dolphin Integration's share price by communicating false or misleading information which had the effect of setting the price at an "abnormal or artificial level" and by using "fictious procedures".

The inquiry also established that Thierry Boutin had laundered part of the proceeds of the above-mentioned offence, estimated at 2,662,276 euros . This sum was also seized during the investigation, from a securities account he held in the United Kingdom.

The Paris Criminal Court therefore sentenced Thierry Boutin to two years' imprisonment, the total revocation of a previous 18-months suspended prison sentence for fraud, the payment of a fine of 2,662,276 euros, and the confiscation of the sum seized from his UK securities account. In addition, the Court declared him ineligible for a period of five years.

These penalties reflect the seriousness of the offences committed and the defendant previous convictions. Not only has he previously been convicted of criminal offences, but he has also been sentenced by the AMF Enforcement Committee on three occasions on market abuse cases, for a total of 2.2 million euros.

2 The PNF investigated the case and referred it for trial following a referral procedure between the PNF and the AMF, which joined the proceedings as a civil party for the first time

In 2015, the French Constitutional Court ("Conseil constitutionnel") formally prevented double jeopardy, on the basis of the non bis in idem principle, in cases of proceedings brought by the judicial authorities in criminal matters and by the AMF in administrative matters.

The law of 21 June 2016 reforming the market abuse system and completed by the decree of 11 August 2016 has, as a consequence of the decision of the Constitutional Court, instituted a so-called referral procedure. This procedure provides for consultation between the judicial authorities and the AMF to avoid duplication of proceedings. In the event of persistent disagreement, arbitration is referred to the Public Prosecutor of the Paris Court of Appeal.

In this case, the facts came to light during investigation carried out the AMF, which were reported to the PNF. A referral procedure was then initiated. The PNF thus informed the regulator that it intended to pursue the matter and request the opening of a judicial investigation.

Moreover, the referral procedure did not exclude the AMF from the action against Thierry Boutin. For the first time, the regulator was able to join the proceedings as a civil party. As a result, it was awarded a symbolic 1 euro for non-material damages, as well as reimbursement of 99,064 euros to compensate the costs incurred during the investigation. On these costs, the court underlined that they had been duly justified, although there were no further details in the ruling.

However, the outcome of this case is not yet definitive. An appeal has been lodged against this decision and Thierry Boutin faces an arrest warrant due to his absence at the time of the verdict.

The activity of the French financial markets authority (AMF)

The French Financial Markets Authority ("AMF") intensive enforcement activity again demonstrates the regulator's ambition to continuously strengthen market surveillance, through processing more and more data and international cooperation leading to numerous investigations carried out in coordination with foreign regulators. Inspections were also very active and the AMF Enforcement Committee recently issued record-breaking sanctions for professional misconducts. Finally, the AMF announced that sustainable finance and AML-FT obligations will be among its next priorities, including for enforcement.

Market surveillance

Steep increase in the amount of processed data

(ICY platform, reporting of investment services providers' (ISP) suspicious transactions, information shared on forums and social media)

1390 reports of suspicious transactions received in 2022

Investigations

(insider dealing, dissemination of false information, market manipulation)

36 investigations opened in 2022

including 29 through international cooperation

Strong cooperation with close to 50 foreign regulators

Strong cooperation with the National Financial Prosecutor's office and implementation of the referral procedure

Inspections

(professional misconducts of ISP, asset management companies, financial investment advisors)

- 13 inspections referred to the Enforcement Committee in 2022
- 41 inspections ended through follow-up letters in 2022
- SPOT inspections on AML-FT management systems in asset management companies

Transactions and sanctions

10 transactions in 2022

(market abuse and professional misconducts)

A decrease of decisions but an exponential increase in the amount of sanctions

- 12 decisions handed down in 2022
- Close to 100 million euros of financial penalties in 2022 (companies sanctioned from 20,000 euros to 75 million euros)

Spotlight : the latest landmark decision

H20 case - 30 December 2022 - Sanction of a British asset management company and two executives

- Total of sanctions: 93 million euros
- Enforcement Committee confirmed its jurisdiction towards the British company as the facts occurred before Brexit

AMF procedures: what to expect in the coming years ?

Continued ramp-up of surveillance

(Modernization of the tools and investment in data processing)

Continuing use of investigation and inspection tools

(ie. Reinforcing the legal framework of home searches, Securing data conservation and connexion data processing)

Special focus on AML-FT compliance

Thematic investigations and inspections on sustainable finance issues

Discussions on secrecy in law enforcement proceedings and on AML/FT regulation

On October 5th, 2022, the annual conference of the AMF Enforcement Committee was held. During this event, members of regulatory authorities, magistrates, professors and attorneys discussed the issues of secrecy in law enforcement proceedings as well as regulatory developments in the fight against money laundering and terrorist financing.

Following an opening speech by the Chairman of the Enforcement Committee who reviewed the past year's case law, the French Supreme Court (Cour de cassation) General Attorney emphasized on the importance as well as the challenges resulting from the articulation of the constraints imposed by the gathering of evidence with the necessary respect for privacy and the protection of secrets required from judicial or administrative authorities. He then recalled that evidentiary mechanisms aiming at lifting secrecy or at encouraging its revelation have proliferated in the past few years, referring to the recent decisions restricting the protection of banking secrecy, while he also highlighted that the control of the collection of evidence had been strengthened based in particular on the principle of proportionality.

Regarding the fight against money laundering and terrorism financing (AML/FT), the Cour de cassation General Attorney explained that, as a judicial actor in the field, he considers that the fight against terrorism should necessarily rely on the collection of financial intelligence. He illustrated his statement by a short introduction on the so-called "Syrian Wallet" case which involved several European countries such as France, with the support of Europol, and allowed to uncover services organized by the Islamic State (ISIS) to financially support foreign fighters in Syria, Iraq and Libya.

1 Secrecy in the context of law enforcement proceedings

On the first panel, a member of the AMF Enforcement Committee, the Head of the AMF's investigation department, the General Rapporteur of the French Competition Authority (Autorité de la concurrence) and an attorney discussed the way secrets are handled in the criminal, administrative or judicial proceedings, particularly with regard to the objective of operational efficiency when collecting evidence.

Among the various types of secrecy mentioned, the most thorough discussions focused on the secrecy covering the communications between an attorney and his client, as well as on the access to connection data. It was also recalled that other types of secrecy such as banking secrecy or business secrecy, may not be invoked before public authorities.

On the first topic, while the AMF and the French Competition Authority's representatives both acknowledged that the secrecy of communications between a lawyer and his client was guaranteed by their respective procedures in the context of document seizures and especially seizures of electronic messages, the scope of such secrecy did not, however, appear to be consistent.

Indeed, although AMF investigators exclude from their seizures all attorney-client communications, regardless of their purpose, the French Competition Authority's practice is different. As explained by its General Rapporteur, when carrying competition investigations, only the communications related to a defense strategy are considered privileged, while communications relating to the provision of advice are not. While this practice has not been yet sanctioned by the French Cour de cassation, it appears to be contrary to the law No. 2021-1729 of 22 December 2021 for trust in the judiciary system which guarantees in its article 3 "the respect of the professional secrecy of the legal defense and advice" as well as to the recent European case law.

The AMF and the French Competition Authority's representatives have also noted that the screening of electronic messages, a necessary step to exclude privileged communications from the procedure, was carried out under the authority of the investigators who ensured that their exclusion is legitimate. Such process implies that privileged communications are consulted, even briefly. This practice, whether it results from an ad hoc procedure in AMF investigations or from the implementation of a temporary closed seal (scellé fermé provisoire) in competition investigations, has been strongly criticized as it carries the risk of introducing a bias among investigators who have had access to the confidential documents.

On the second topic related to connection data, it was stressed that their access has been regulated by several recent rulings and decisions. As such, rulings of the European Union Court of Justice handed down on 20 September 2022 were mentioned, stating that the general and indiscriminate retention of traffic and location data was not authorized, particularly in the context of investigations on market abuse offences, unless in case of serious threat to national security. Although requests for access to connection data are now supervised by a connection data controller, it remains that, according to the AMF General Secretary, the decisions of the European Union Court of Justice shed legal uncertainties on AMF proceedings.

2 Regulation and AML/FT

The second panel brought together the Deputy Director of TRACFIN (a unit of the French Ministry of Finances for the treatment of information and action against illicit financial circuits), the Chairman of the Enforcement Committee of the French Prudential Supervision and Resolution Authority (Autorité de contrôle prudentiel et de resolution, "ACPR"), a senior university lecturer, the AMF Deputy General Secretary in charge of asset management, as well as an asset management attorney, and was moderated by the Chair of the second section of the AMF Enforcement Committee on the topic of the regulation of AML/FT.

The speakers recalled the historical evolution of this regulation, both at European and national levels, and presented the latest findings – very positive for France – of the Financial Action Task Force (FATF), an inter-governmental body in charge of setting international standards and promoting the effective implementation of anti-money laundering and terrorism financing legislative, regulatory and operational measures.

In this respect, it was noted that banking and financial services are core to the AML/FT regime, and account for nearly 80% of the suspicious transaction reports received by TRACFIN.

Although the ACPR and the AMF both have jurisdiction over AML/FT issues, the ACPR, as it oversees supervising banking activities, is most directly involved in activities exposed to money laundering risks. The AMF, in charge of supervising investment services providers, asset management companies and financial investment advisors comes second on this topic. However, the AMF Enforcement Committee's decisions are increasingly identifying breaches of AML/FT regulations regarding issues in governance, procedures, proof of due diligences or updates thereof.

Finally, the AMF General Secretary gave a closing speech emphasizing on the AMF's determination to "carry out complex investigations and to sanction any breach that seriously undermines market integrity and investors' protection".

The CJEU limits generalized data retention in surveillance

On 20 September 2022, the Court of Justice of the European Union issued two rulings concerning the conditions under which member states are allowed to retain traffic data for surveillance purposes. These rulings challenge the national systems of France and Germany in this area.

On 20 September 2022, the Court of Justice of the European Union (hereinafter "CJEU") ruled on the conditions under which Member States are allowed to retain traffic and location data for surveillance purposes.

Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (hereinafter referred to as the "Directive on privacy and electronic communications") provides a European-wide framework for the storage and processing of such data.

Within the meaning of this Directive, traffic data are "any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof". As for the location data, it concerns "any data processed in an electronic communications network, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service".

This regulation enshrines the principle of confidentiality of electronic communications and related traffic data. Thus, it is forbidden to any person other than the users to keep, without their consent, these communication and data.

In addition, Article 6 of the Directive provides rules for suppressing, anonymizing and processing data to prevent abuses.

Furthermore, the Charter of Fundamental Rights of the European Union guarantees the right to respect for private and family life, home and correspondence, the right to protection of personal data, and the right to freedom of expression and information.

However, Member States are allowed to adopt legislative measures to "restrict the scope" of the rights and obligations above-mentioned. The measures adopted must, however, be necessary, appropriate and proportionate, and pursue the objective of safeguarding national security as defined by Article 15 of the Directive, in compliance with the general principles of Union law and fundamental rights guaranteed by the Charter.

In its two rulings handed down on 20 September 2022, the CJEU had to assess the conformity of French (joined cases C 339/20 and C 397/20) and German (joined cases C 793/19 and C 794/19) laws with the European legal framework on data protection.

1 The French and German courts have addressed several questions to the CJEU for a preliminary ruling on the interpretation of their data retention laws

On the one hand, in the context of an investigation initiated by the French Financial Market Authority ("AMF") in France, the AMF provided the investigating judge with personal data from phone calls made by two individuals. Subsequently, criminal proceedings were initiated against them on charges of insider trading, concealment of insider trading, complicity, bribery and money laundering.

The latter challenged the validity of the collection of their data before the French Supreme Court (Cour de cassation), in that it was based on national provisions that do not comply with EU law and do not set any limits on the power of AMF investigators to obtain access to the data stored. The French provisions at stake were article L.34-1 of the French Post and Electronic Communications Code (hereinafter "CPCE"), and article 6 of the French Law on Confidence in the Digital Economy (hereinafter "LCEN").

The French government submitted observations to the CJEU pursuant to which European law would allow the national legislature to institute "a general and indiscriminate obligation on operators providing electronic communications services to retain date, in order to allow the competent financial authority to detect and impose sanctions for insider dealing". According to the French government, these recordings would be essential for the detection and demonstration of the existence of an infringement. They would ensure the effectiveness of investigations and prosecutions carried out by the AMF and guarantee the integrity of the Union's financial markets.

On the other hand, the German case involved SpaceNet and Telekom Deutschland were German Internet service providers. They were required by the German Telecommunications Act (TKG) to retain traffic and location data relating to their customers' telecommunications. German service providers questioned this retention obligation.

The French and German laws provided for generalized and undifferentiated retention of traffic data. The objective of French law was to prevent market abuse offences whereas German law was aimed at fighting particularly serious offences and preventing a material risk to the physical integrity, life or freedom of a person or to the existence of the Federal State or a Land.

The data retained allowed the identification of the user and the recipient of the communication. The data included telephone numbers, date and time of the start and end of the conversation, details of the service used, and IP addresses in the case of Internet telephony services.

In addition, in France the LCEN authorized online service providers to keep data that would allow the identification of anyone who contributed to the creation of any of the content for which they are providers.

The French data were to be kept for one year, while the German traffic and location data were to be kept for ten and four weeks respectively.

In both cases, these data could be transmitted to the competent law enforcement authorities at their request.

In both cases, the Court was asked whether a national provision requiring operators and providers of electronic communications services to retain traffic and location data of end-users in a temporary, generalized, and undifferentiated manner for the purpose of prosecuting serious criminal offences or preventing a concrete risk to national security was contrary to Union law.

2 The CJEU confirms its previous case law on traffic and location data retention

In its two decisions of 20 September 2022, the CJEU confirmed its previous case law resulting from the "La quadrature du net" and "Tele2 Sverig and Watson" decisions, in which it had held that European law precludes national regulations from providing for the generalized and undifferentiated retention of all traffic and location data of all subscribers and users of electronic means of communication for the purpose of fighting crime.

To that extent, the CJEU notes that neither the Directive 2006/3 nor the Regulation No. 596/2014, by allowing Member States to take the necessary measures to provide the competent authorities with a set of "effective tools, powers and resources, as well as the necessary supervisory and investigative powers to ensure the effectiveness of their duties", did intend to allow Member States to impose a generalized and undifferentiated obligation to retain traffic data on electronic communication services operators.

In addition, the data stored under French and German law was necessary to trace the source of a communication and its destination, the date, time, duration, type of communication and the communication equipment. This data included the name, the address of the user and the telephone numbers of the caller and the called party.

The CJEU noted that such data would then allow access to very precise information concerning the private life of individuals, including daily habits, permanent or temporary places of residence and the social relationships of the person to whom the data belong. Consequently, they violate the right to protection of privacy, correspondence, and freedom of expression.

Furthermore, the Court found that the violation persists regardless of the length of time the data is kept. Indeed, such retention is of a serious nature, since all the data is likely to allow very precise conclusions to be drawn concerning the private lives of the persons at stake.

Consequently, the Court held that the French and German laws requiring operators of electronic communications services to carry out, as a preventive measure, a generalized and undifferentiated retention of the traffic data of all users of electronic communications media, without differentiation or exception, exceed the limits of what is strictly necessary and are not justified in a democratic society.

On the other hand, the Court considered that the Directive 2002/58/EC does not preclude generalized and undifferentiated retention under certain conditions in the event of a serious and current threat to national security. To that matter, Member States have the possibility of imposing on operators and service providers the rapid retention of data, under certain conditions, and in particular in the event of a crime considered "serious". Finally, the Court outlined that access to retained data must be authorized by a court or an independent administrative authority.

In any case, these measures must ensure by "clear and precise rules, that the storage of the data in question is subject to compliance with the relevant material and procedural conditions and that the persons concerned have effective guarantees against the risks of abuse".

While it is too early to quantify the impact of this decision on the French provisions, the Secretary General of the AMF considered that it created a "situation of legal uncertainty as to some of [the AMF's] means of action".

The activity of the Commission Nationale de l'Informatique et des Libertés (CNIL)

Over the past months, the French Commission Nationale de l'Informatique et des Libertés ("CNIL"), regulator of personal data, imposed tremendous financial sanctions on GAFAM, especially for the use of cookies, and for data protection breaches which still is core for the CNIL. It also created a fast-track simplified procedure for less complex cases which should enable it to strengthen its enforcement action in the future.

The sanctions

Increase in the number of sanctions issued by the CNIL

21 sanctions in 2022

following 345 controls (including 17 issued by the CNIL's restricted formation – body in charge of imposing sanctions)

500 millions euros

in fines (in total) since 2018

Personal data security

1/3 of sanctions involving a violation of personal data security

Cooperation with european counterparts

3 decisions adopted in cooperation with european counterparts of the CNIL in 2022 in the context of the one-stop shop established by the GDPR

Spotlight: the latest landmark decisions

Procedures regarding the use of cookies

- **150 million euros Google**
- **60 million euros Microsoft**
- **60 million euros Facebook**
- **8 million euros Apple**

35 million euros

Affirmation by the French administrative Supreme Court (Conseil d'Etat) on 27 June 2022 of the CNIL decision issuing a 35 million euros fine against an Amazon group subsidiary thus validating the CNIL extraterritorial reach and the proportionality of sanctions in consideration of the profits generated by the violations.

Evolution of the procedure

Implementation of a simplified enforcement procedure in 2022

Target

Cases of lower complexity or gravity

Cap

20,000 euros

Fast-track procedure

Decisions issued by the CNIL Chairman

Adoption in May 2023 of a new set of guidelines by the European Data Protection Board (EDPB)

Transparent calculation of administrative fines

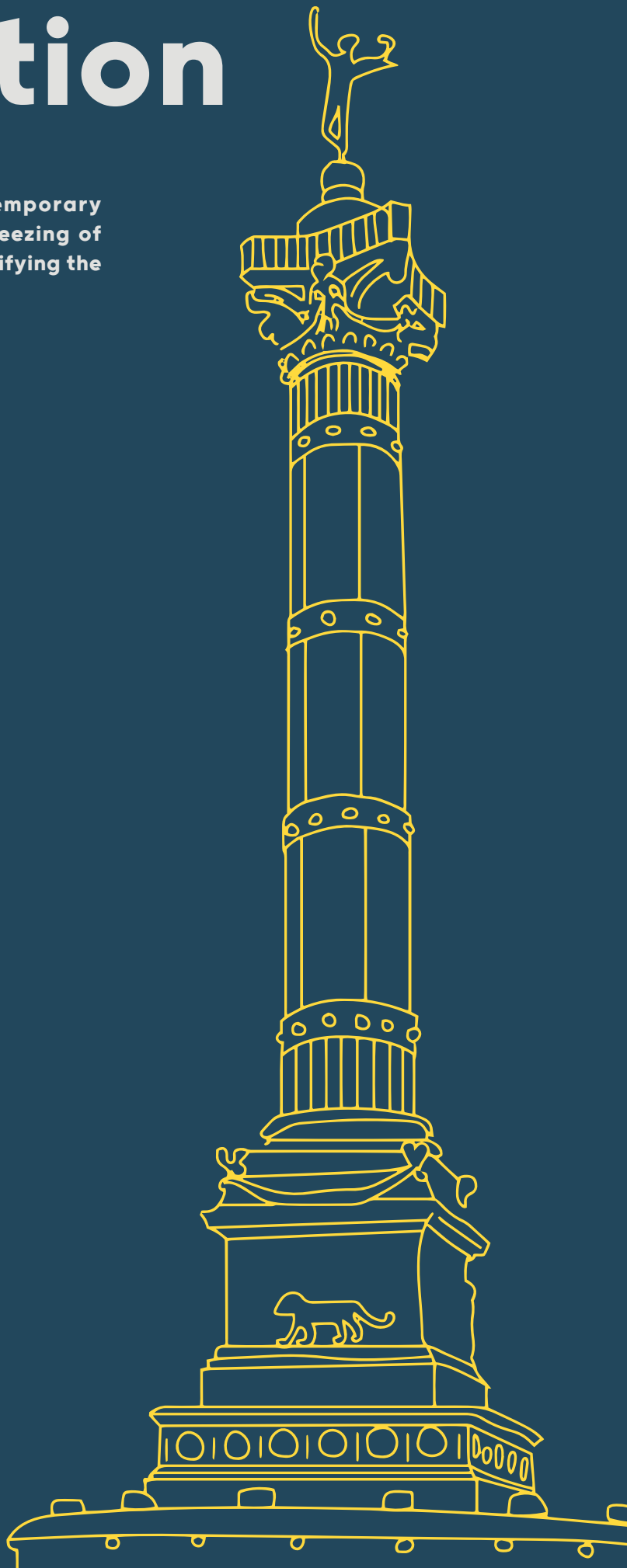
- Reference table summarizing the methodology for the calculation of fines
- Taking into account the gravity of a violation and the company's revenues

Guidelines in the context of dispute resolution between authorities

Guidelines on the procedure for adoption of legally binding decisions in the context of dispute resolution between data protection authorities

Arbitration

Arbitration continues to address contemporary issues, particularly with regard to the freezing of funds held abroad, and the courts are clarifying the scope of their review of awards.



NAVACELLE

Bastille Day

Overview of arbitration case law

French case law rendered this past year has notably addressed the enforcement regime against assets frozen because of international sanctions, as well as the nature of the control of the compliance of awards with international public policy, notably in matter of corruption, overriding mandatory rules and independence or impartiality of arbitrators.

Cases rendered by French courts in the past year, involve a string of decisions related to enforcement on frozen assets in the context of international sanctions (I) and the treatment of corruption allegations before or after the introduction of arbitral proceedings (II). Courts have also addressed issues related to public policy in the context of overriding mandatory rules (III) and lack of independence and impartiality of arbitrators (IV).

1 Attachments of frozen assets are subject to prior authorization

A string of decisions has been rendered by the Cour de cassation (the French Supreme Court) and the Court of Appeal of Paris in cases involving Council Regulation (EU) No. 2016/44 of 18 January 2016 concerning restrictive measures in view of the situation in Libya, which notably froze funds held abroad by the Libyan Investment Authority ("LIA"), the Libyan sovereign fund.

These decisions have been rendered further to the decision of the Court of Justice of the European Union ("CJEU") dated 11 November 2021 on a question referred for a preliminary ruling related to Council Regulation (EC) No. 423/2007 concerning restrictive measures against Iran which provided freezing measures similar to the ones taken against Libya. In this decision, the CJEU ruled that the notion of freezing assets arising out of Regulation No. 423/2007 prevented taking interim measures granting the creditor priority over certain assets of the debtor without prior authorization.

In several decisions dated 7 September 2022, the Cour de cassation adopted this case law of the CJEU, ruling that the solution taken on the grounds of the Iranian sanctions was applicable to the Libyan sanctions.

These cases related to attachments taken by company Mohamed Abdel Mohsen Al-Karafi & Sons ("Al-Kharafi") on assets of the LIA and its subsidiary, the Libyan Arab Foreign Investment Company ("LAFICO"), on the basis of an arbitral award that found the Libyan State liable.

In two decisions dated 6 June 2019, the Court of Appeal of Versailles ruled that the attachments taken on financial products held by the LIA were invalid as these assets were used or destined to be used for public purposes. The Court of Appeal of Paris, in a decision dated 5 September 2019, had itself ruled that the LIA was an emanation of the State and that its assets could be attached as they were not specifically used or destined to be used for non-commercial public purposes. The parties filed appeals against these decisions. The LIA filed a recourse against the decision of the Court of Appeal of Paris dated 5 September 2019, and Al-Kharafi filed an recourse against the decisions of the Court of Appeal of Versailles dated 6 June 2019.

The grounds for appeal also related to issues of sovereign immunity and renunciation thereof and the notion of emanation of State. However, the Cour de cassation, in its decisions, ruled on a ground raised ex officio related to Regulation (EU) No. 2016/44 abovementioned and in relation to which the Court had stayed the proceedings in waiting for the decision of the CJEU of 11 November 2021.

Adopting the rational of the CJEU, the Cour de cassation rejected the recourse against the decisions of the Court of Appeal of Versailles, with the effect of lifting the attachments taken by Al-Kharafi. It also quashed the decision of the Court of Appeal of Paris and, in doing so, it adopted the motivation of the CJEU ruling that "no enforcement measure with the effect of removing from the estate of the debtor, or of conferring to the pursuing creditor a simple preferential right, can be carried out on frozen funds or economic resource with our prior authorization of the directory of the Treasury". The Court stated that this solution was "necessary to ensure the efficiency of restrictive measures", which have a preventive reach and aim at ending the menace that the targeted entities represent for the stability and the security of Libya and its safe political transition. The Cour de cassation, noting that the assets held in France by the LIA which had been attached were frozen in application of Regulation (EU) No. 2016/44, and that no prior authorization for unfreezing these assets had been obtained from the General Directorate of the Treasury, therefore ruling in favor of the LIA and respectively ordered, and confirmed, lifting the attachments.

In the same case, the Court of Appeal of Paris also rendered a new decision dated 2 February 2023, adopting the ruling of the abovementioned decisions of the Cour de cassation. In this decision, it ruled that the authorization to unfreeze the funds must be obtained prior to the enforcement measure, that in the absence of such authorization, enforcement measures are invalid, and that the authorization from the General Directorate of the Treasury must be obtained prior to requesting the authorization of the enforcement judge in application of Article L. 111-1-1 of the Code of the Enforcement Civil Procedures, because of the primacy of European Union law over national law.

A similar solution has been adopted by the Court of Appeal of Paris in a decision rendered on 26 January 2023 between company SASU Financière CER ("Financière CER") and SASU Compagnie des exploitations réunies ("CER"), as appellants, and Tunisian law company Siba Plast, as respondent, related to the enforcement of an arbitral award rendered on 28 November 2014 in favor of the latter against the Libyan State. In enforcing the award, Siba Plast had seized shares and securities' rights held by CER, rents owed by company FNAC Paris to CER and assets of CER and Financière CER in the accounts of bank BIA. Before the Court of Appeal, the appellants argued that the enforcement measures were invalid because the arbitral award was not rendered against them but rather against the Libyan National Transitional Council, and because the assets attached were frozen.

In its decision, the Court first ruled that although the arbitral award had been rendered against the Libyan National Transitional Council, this entity was an internal organ of the Libyan State, which it represented. Accordingly, the Court deemed that the arbitral award had been rendered against the Libyan State.

The Court then examined whether the assets of Financière CER and CER, as emanations of the Libyan State, could be seized. For that purpose, the Court found that CER was held entirely by Financière CER, itself held entirely by LAFICO, in turn held entirely by LIA, the Libyan sovereign fund. The Court also noted that it previously found in its 5 September 2019 decision that LAFICO and LIA were emanations of the Libyan State. Finally, the Court noted that the Libyan State exercised indirect control of the appellants, via LIA and LAFICO which it supervised. The Court also noted that the chain of ownership was proof of an "interconnection of the assets" and that the sole purpose of CER and Financière CER's activity was to pay dividends to LAFICO.

However, concerning the issue of the asset freeze and the effect of Regulation (EU) No. 2016/44 of 18 January 2016, the Court applied the case law resulting from the ruling of the CJEU dated 11 November 2021. In the present case, although the Court noted that neither CER nor Financière CER were listed in the Regulation, LIA, which they are dependent of, was listed, such that the assets seized were frozen for the purposes of the Regulation. As a consequence, because the enforcement measures were taken without the prior authorization of the General Directorate of the Treasury, the seizures must be lifted.

These cases confirm the primacy of the diplomatic and political objectives of international sanctions, with its economic consequences set aside, as enforcement measures become harder to take. The Court of Appeal, in its decision dated 26 January 2023, adopts the motivation of the CJEU as it results from its decision of 11 November 2021 according to which the "measures freezing funds or economic resources aim at avoiding the relevant asset from being used for improper purposes, and that it is legitimate and even mandatory that this notion of freezing be interpreted widely, even if this can have negative consequences, even considerable ones, for operators, even those that are not responsible for the situation that has led to those measures being taken", while, in its decision dated 2 February 2023, the Court confirmed that freezing measures did not disproportionately affect the rights of creditors, ruling that "the imperatives related to peace, stability and security in Libya, and for the success of its political transition, justify the considerable negative consequences for third-parties affected in their property rights".

2 Allegations of corruption before and after arbitral proceedings

On 7 September 2022, the Cour de cassation rendered a decision in the Sorelec case related to the control of the compliance of the arbitral award with international public policy in the context of corruption allegations and provided clarifications on the nature of this control.

This case involved a dispute a between French company Société orléanaise d'électricité et de chauffage électrique ("Sorelec") and the Libyan government over the performance of a construction contract. This dispute was resolved through a settlement agreement between the parties, ratified by an arbitral tribunal in a partial award. Because of Libya's failure to comply with the partial award, the arbitral tribunal then rendered a final award finding Libya liable for damages in the amount of the settlement agreement. Libya brought a challenge against the partial award before the Court of Appeal of Paris arguing that it violated international public policy because the settlement agreement had been obtained through corruption. In a decision dated 17 November 2020, the Court of Appeal of Paris had annulled the partial award finding that there was sufficiently serious, precise and consistent evidence that the settlement agreement had only been concluded because of corruption of the Minister of Justice by Sorelec. Sorelec filed an appeal before the Cour de cassation.

In relation to the first ground raised by Sorelec, whereby Sorelec argued that Libya had breached its duty of loyalty by having only raised the corruption allegations before the annulment judge and not the arbitral tribunal, the Cour de cassation ruled that "substantive international public policy cannot be conditioned by the attitude of a party before the arbitrator", such that the alleged disloyalty of Libya was inoperative. The Court therefore confirmed that grounds related to substantive international public policy, which are out of the parties' control, can be raised at any stage of the proceedings.

In its second ground, Sorelec criticized the appellate decision for having performed a review of the award on the merits by examining again certain factual and legal elements and even relying on elements not submitted to the arbitral tribunal. The Cour de cassation, adopting a broad wording which raises doubt as to the reach of its solution, confirmed the decision of the Court of Appeal and ruled that the annulment judge is not limited in its review of any factual or legal element related to the grounds of annulment listed in Article 1520 of the Code of Civil Procedure. The Cour de cassation therefore ruled that the appellate judges were entitled to examine the entire set of evidence in relation to the corruption allegation, whether they were submitted to the arbitrators or not.

This decision reinforces previous case law of the Cour de cassation and of the Court of Appeal of Paris concerning the extensive control of compliance of awards with international public order, especially in the context of corruption allegations. Such a control has also been applied by the Court of Appeal of Versailles in its decision dated 14 March 2023 in the Alstom v. ABL case. However, in this case, as in the Alstom case, the reviewing judges have allowed for an unlimited review to the detriment of procedural loyalty, leading some authors to criticize a position leading to a genuine review on the merits of awards.

The Cour de cassation has also rendered a decision in a case involving a breach of contract in the context of corruption allegations. In a decision dated 11 January 2023, the First Chamber quashed a decision of the Cour of Appeal of Aix-en-Provence dated 11 June 2021 which ordered Airbus Helicopters to pay a provisional amount allegedly due to Alelk Company for General Trading Ltd ("Alelk").

After the French Parquet national financier, the British Serious Fraud Office and the U.S. Department of Justice opened investigations for alleged corruption within the Airbus group, Airbus Helicopters had suspended its payments to Alelk, with which it had concluded consultancy contracts for the negotiation of sales of helicopters with the Iraqi government, pending the results of an internal audit of its professional relationships in light of anti-corruption legislation. Despite the existence of an arbitration agreement, but before any arbitration proceedings were introduced, Alelk seized the interim relief judge on the basis of Article 873 of Code of civil procedure to request an order for provisional payment of the amount Alelk argued was due to it under the consultancy contracts. The Court of Appeal held that Alelk was entitled to request interim relief on the basis of Article 1449 of the Code of Civil Procedure and ordered Airbus Helicopters to pay a provisional amount, because its obligation to pay was not seriously questionable, notably because the "reality of the commercial exchanges between the parties is attested, although most often under an elliptic form from both parties".

In quashing the decision of the Court of Appeal for lacking a legal basis, the Cour de cassation held that the Court of Appeal did not take into account Alelk's failure to provide written activity reports, which were a condition of its payments. This decision ensures that anti-corruption provisions are not avoided through interim measure requests by relying on a contractual compliance duty which serves to justify suspension of payments.

3 Failure to take into account overriding mandatory rules does not necessarily lead to a breach of international public policy

On 17 May 2023, the Cour de cassation rendered a decision involving the failure by an arbitral tribunal to take into account a French overriding mandatory rule, quashing a decision of the Court of Appeal of 19 October 2021 which has denied recognition of an award on that basis. The dispute opposed American company Monster Energy Company ("Monster Energy") to company Sainte Claire over the termination by the former of a distribution contract governed by Californian law of its products in French Guiana. In its award rendered on 31 May 2017, the arbitral tribunal had ruled that this termination was valid and had found Sainte Claire liable to pay arbitration costs and lawyers' fees. In refusing recognition of the award, the Court of Appeal had notably held that failure by the arbitral tribunal to take into account a French overriding mandatory rule, Article L. 420-2-1 of the Code of Commerce, which prohibits contracts that are aimed at, or have the effect of, awarding exclusive import rights in overseas territories.

The Cour de cassation held that review of awards focus only on the "solution given to the dispute and not the reasoning applied by the arbitrators" and that awards are refused recognition when this solution "violates in a concrete and significant manner international public order". The Cour de cassation confirms that only the result matters, such that to establish a concrete and significant violation of international public policy, it is insufficient to simply allege that an overriding mandatory rule has not been taken into account, if the applicant cannot show that applying this rule would have led to a different result.

4 Lack of independence or impartiality interpreted under the prism of international public policy

The Cour de cassation rendered an original decision on 7 June 2023 in relation to a complaint for lack of independence or impartiality of an arbitrator. Companies CNAN Group SPA ("CNAN") and International Bulk Carrier SPA ("IBC") had sought to set aside an arbitral award rendered 16 April 2013 before the French courts alleging an arbitrator lacked independence or impartiality. The Cour de cassation rejected the appeal related to the irregularity of the constitution of the arbitral tribunal, on the basis of Article 1520, 2° of the Code of Civil Procedure, finding it to be inadmissible because the applicants were deemed to have waived this irregularity because they did not raise this objection before the arbitral tribunal, although they sought to have the arbitrator recused before the arbitration center.

In addition to this interesting clarification related to the irregular constitution of an arbitral tribunal, the Court has ruled on a criticism related to the violation of international public policy. The Court held that the "enforcement of an award in France can be refused when this award, rendered by an arbitrator whose lack of independence or impartiality has been established, could lead to a breach of the principle of equality between the parties and due process rights and could violate international public policy". Accordingly, the Court examined again the elements related to the alleged lack of independence or impartiality of the arbitrator, which it had previously deemed inadmissible under the irregular constitution of the arbitral tribunal complaint, ruling that these elements were not sufficient to raise, in the parties' mind, a reasonable doubt on the independence or impartiality of the arbitrator. This original decision raises questions in relation to the interpretation of the violation of international public policy, the nature of the control and the interaction between lack of independence and impartiality and a violation of the principle of equality and due process rights, which form part of international public policy.

The Versailles Court of Appeal confirms the exequatur on arbitral award in the case Alstom & ABL

Following a lengthy legal battle between Alstom and ABL, the Versailles Court of Appeal approved the 30 March 2016, order, which validated the arbtiral award dated 29 January 2016, and required Alstom to pay the legal fees and costs.

On 14 March 2023, the Versailles Court of Appeal confirmed the Paris Tribunal's (le Tribunal de Grande Instance de Paris, now Tribunal Judiciaire) 30 March 2016 order, which granted exequatur to the Arbitral award rendered on 29 January 2016, in a case opposing the French company Alstom Transport SA, the English company Alstom Network UK Ltd. (hereinafter "ALSTOM"), and the Hong Kong base company Alexander Brothers Ltd.

This decision, which is the conclusion of a lengthy judicial process throughout which Alstom had the exequatur of such award in France would be contrary to public policy on the basis of allegations of corruption (I), dismisses Alstom's arguments based on international public policy (II).

1 The Versailles Court of Appeal issued its decision following referral from the Court of Cassation, ending a lengthy legal battle

The ABL v. Alstom case, concerned three consultancy agreements (hereinafter "the Contracts") entered into by two Alstom subsidiaries (hereinafter "ALSTOM") and a Chinese company Alexander Brothers (hereinafter "ABL") pursuant to which ABL had to assist ALSTOM in tendering for railroad equipment in China.

On 20 December 2013, ABL initiated an arbitration proceedings against ALSTOM as they failed to pay the full amount due under these Contracts even though ALSTOM won all the tenders for which the consultant agreements had been signed. To refuse to pay the outstanding sums due, ALSTOM alleged that there a criminal risk as these payments may have been used to bribe public officials.

By an arbitral award rendered on 29 January 2016 (hereinafter "the award"), the arbitral tribunal rejected Alstom's defense in which it argued that it had grounds to suspect corruption by ABL and ordered ALSTOM to pay EUR 1,700,521.68 to ABL under the first two consultancy contracts. The arbitral tribunal found that ALSTOM failed to provide sufficient evidence to support its corruption allegation and that mere suspicions were not enough to release them from their contractual obligations.

ALSTOM subsequently tried to set aside the award, but on 3 November 2016, the Swiss Federal Court approved it.

Meanwhile, ABL initiated judicial enforcement of the award in the United Kingdom and France. Both the UK and France granted the order for enforcement. However, ALSTOM challenged the decision (in France appeal was brough on 18 May 2016) claiming that the arbitral award violated international public policy due to corruption allegations against ABL and did not respect the principle of adversarial proceedings.

The High Court of London rejected ALSTOM's appeal and confirmed the enforcement order, however in France in a judgment rendered on 28 May 2019, the Paris Court of Appeal upheld ALSTOM's appeal and rejected ABL's motion to enforce the award, as it found that ALSTOM had brought serious, precise, and consistent evidence of corruption in the performance of the underlying contracts and that the sums paid under the award might be used to finance bribery and thus, enforcement of such award in France would be contrary to public policy.

ABL petitioned the French Supreme Court (hereinafter "Cour de cassation") which ruled on 29 September 2021 that the Paris Court of Appeal erred in its analysis of the proof necessary to establish corruption as it distorted the evidence submitted to it by misinterpreting the transcripts of the arbitral hearing. Therefore, the Cour de cassation referred the case to the Versailles Court of Appeal.

2 The Versailles Court of Appeal's dismissal of ALSTOM's arguments put forward to overturn the enforcement order

The Versailles Court of Appeal, after carefully studying the parties' arguments, rejected ALSTOM's request to set aside the enforcement order of the arbitral award. The Court of Appeal found that the arbitral award did not violate international public policy as ALSTOM did not provide sufficient evidence to support its corruption claim, that the award is not contrary to international public policy insofar as they are inconsistent with ALSTOM's internal rules and that there is no violation of the principle of adversarial proceedings.

The lack of a material violation ("violation caractérisée") of international public policy due to the absence of corruption evidence

ALSTOM challenged the enforcement order of the award by arguing that there was circumstantial evidence of corruption in the performance of the underlying contracts and that the sums paid under the award might be used to finance bribery and thus, the exequatur of such award in France would be contrary to public policy. In contrast, ABL requested the Appeal Court confirm the enforcement order considering the absence of a serious breach of international public policy in case of enforcement and as according to ABL, ALSTOM failed to establish sufficient serious, precise, and consistent evidence of corruption. The Versailles Court of Appeal carefully analyzed one by one, the eight indicia presented by ALSTOM to support its corruption claim.

First, regarding the argument that there was a lack of sufficient proof of services provided by ABL, the Versailles Court of Appeal found that the evidence of services provided for two of the contracts was enough to demonstrate that ABL provided actual services to ALSTOM under both contracts. Its decision was in line with the arbitral tribunals position which had found that evidence was not enough for the third contract in dispute. However, the Versailles Court of Appeal held that the lack of proof of service under contract. No. 3 was not sufficient to be considered as a corruption red flag ("indice de corruption").

Secondly, regarding ALSTOM's claim that ABL's holding of allegedly sensitive or confidential documents and information regarding tenders constitutes evidence of corruption, the Court of Appeal held that ALSTOM did not have evidence to suggest that ABL obtained these documents in exchange for bribes, advantages, or unfair practices. In addition, the Court found that ABL provided sufficient evidence and explanations for the origin of all the documents (except for one evaluation report). In addition, the Versailles Court of Appeal stated that ABL had up until the start of the arbitral proceedings always accepted to explain the origin of the different documents it possessed.

As a third corruption indicia, ALSTOM argued that the payments made for the tenders at issue, in 2006 and 2009 of EUR 280 589.20 by ALB to Sitico, an import agent for the Chinese state-owned company (that is also a client of ALSTOM), constitutes evidence of corruption. ALSTOM alleged that ALB made these payments without its knowledge and that it discovered them in 2013 during an audit, while ABL explained that it made these payments hat these payments were made under a service contract signed by ABL and Sitico that is unrelated to the present dispute. After reviewing the evidence, the Versailles Court of Appeal these payments were made in execution of a third-party contract between ABL and Sitico providing for consultancy services of which Alstom was fully aware and that Alstom was therefore ill-founded to consider these payments as evidence of corruption.

ALSTOM also put forward as a potential evidence of corruption that the attribution of the contract for line 2 of the Shanghai metro to Alstom its technical bid was less well-rated. In this respect, and considering the evidence provided, the Versailles Court of Appeal found no evidence that ABL had used corrupt methods to convince the public buyer of attributing such contract to ALSTOM.

Moreover, ALSTOM argued that there were irregularities and deficiencies in ABL's accounting system, making it impossible to verify the nature and destination of the financial flows and mitigate and prevent illicit payments. However, after considering the audits and the various evidence provided (in particular he testimony of the accountant and the report of ABL's CAC), the Versailles Court of Appeal found that ABL's accounts did not contain any irregularities or shortcomings which would constitute evidence of corruption.

Regarding the sixth corruptive evidence alleged by Alstom, the Versailles Court of Appeal concluded that the supposed insufficient material and human resources alleged by Alstom had not been established.

In addition, ALSTOM also argued that there was a disproportion between ABL's services, and the compensation claimed under the consultancy agreements. However, the Versailles Court of Appeal considered that the percentages in relation to the very high contract value and the time it took to complete the contract were in line with international standards. Therefore, ALSTOM's disproportion claim was unsupported.

Finally, ALSTOM alleged the Chinese corruptive context and the heavy convictions of public officials in office during the period of award and execution of the contracts to support its corruption claim. The Versailles Court of Appeal recalled that the government of the People's Republic of China had been conducting an anti-corruption campaign since 2013 and did not convict ABL or any of its members for corruption or any other breach of probity. The Versailles Court of Appeal added that the conviction of public officials in China unrelated to ABL is insufficient to constitute a serious and specific corruption red flag.

Thus, the Versailles Court of Appeal found that none of ALSTOM's eight red flags put forward to support its corruption claim, even taken together, could qualify as sufficiently serious, precise, and consistent evidence of corruption. Therefore, the Versailles Court of Appeal concluded that the execution of the arbitral award in France was unlikely to result in corrupt payment and consequently would not infringe the French public policy.

On the violation of ALSTOMS's internal rules, the Versailles Court of Appeal rejected ALSTOM's claim

To overrule the exequatur order, ALSTOM alleged that enforcing the arbitral award violated its internal anti-corruption rules, by which it must abide by, and thus would be contrary to the French conception of international public policy.

However, with regard to this argument, the Versailles Court of Appeal specified that it would only examine the admissibility of the enforcement of an arbitral award with respect to the French concept of international public policy on the basis of the applicable international legal, legislative and regulatory standards, and not on the basis of the internal rules of compliance unilaterally set by a company. Consequently, the argument raised by Alstom was rejected.

The Versailles Court of Appel did not find any violation of the principle of adversarial proceedings ("principe du contradictoire")

Finally, in its last claim, ALSTOM maintained that the arbitral award violated the principle of adversarial proceedings as the arbitral tribunal relied on the "real and common intention of the Parties" in its decision. The Versailles Court of Appeal rejected ALSTOM's argument, founding that it failed to demonstrate that the arbitral tribunal issued the arbitral award in violation of the adversarial principle.

Accordingly, the Versailles Court of Appeal affirmed the lower court's judgment of 30 March 2016, granting the enforcement of the arbitral award of 29 January 2016, between the parties and dismissing ALSTOM's claims.

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