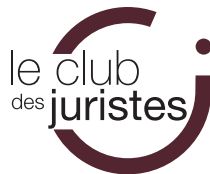


MARCH 2015

REPORT

ON ENHANCING THE FIGHT AGAINST TRANSNATIONAL BRIBERY



AD HOC COMMITTEE

ON ENHANCING THE FIGHT AGAINST TRANSNATIONAL BRIBERY

REPORT FROM THE CLUB DES JURISTES

Ad hoc Committee

MARCH 2015



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Introduction

Globalisation has opened markets to competition, thereby drawing attention to the bribery of foreign public officials, that is, to international or transnational bribery. In that respect, there was nothing fortuitous in the fact that one of the first international organisations which were concerned about it was the Organisation for Economic Cooperation and Development (OECD).

The latter made its first Recommendation on the subject on 11 July 1994³. OECD Member States were asked to punish the bribery of foreign public officials because it *'[raised] serious moral and political concerns and [distorted] international competitive conditions'*. It was followed by the Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials of 11 April 1996⁴ and the Recommendation on Combating Bribery in International Business Transactions of 23 May 1997,⁵ which were both motivated by the same reasons. On 21 November 1997, the OECD adopted a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions whose preamble similarly highlighted the distortion of *'international competitive conditions'*. The Recommendation of 26 November 2009, which aimed to further combat the bribery of foreign public officials, and which replaced the Recommendation of 23 May 1997, did the same.

The distortion of competition is not the only reason for the attention paid by the international community to the bribery of foreign public officials.⁶ It

(3) C(94)75/FINAL. As soon as 1976, the OECD adopted guidelines for multinational enterprises which recommended they refused to offer bribes to public officials or to yield to their solicitation of bribes.

(4) C(96)27/FINAL.

(5) C(97)123/FINAL.

(6) The OECD Convention also mentions other motives such as the good managing of public affairs and economic development. It is to be noted however that those other motives were not in the Recommendations of 11 July 1994 and 11 April 1996, which adopted a mainly commercial approach to corruption.

is even marginalised in the other international tools dedicated to it, which have rather highlighted the distortion of the stability of democratic institutions and the hindering of economic development it causes. This was the case of the Inter-American Convention on Corruption of 29 March 1996, which was the first convention on that issue, of the Council of Europe Criminal Law Convention on Corruption of 27 January 1999, and of the UN Convention against Corruption of 31 October 2003. Those conventions called bribery a threat to democracy, and asserted that since acts of bribery are usually committed at a transnational level and have effects at that level, this justifies their being the object of international conventions whose aim is to set up a uniform and cooperative reaction of the states against them.⁷

What those international instruments have mainly done is to remedy the deficiencies in the states' law enforcement of the bribery of public officials. Those deficiencies were actually one of the main reasons why such instruments were adopted. In the Recommendation of 11 July 1994, the OECD underlined the fact that only a few states at that time had passed a law criminalising the corruption of foreign public officials. Those conventions were intended to put an end to such a situation by establishing an obligation of criminalising the corruption of foreign public officials. This was especially the case of the Convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union signed in Brussels on 26 May 1997 and the OECD Convention of 21 November 1997 which both stated the obligation to criminalise corruption involving European public officials on the one hand,⁸ and foreign public officials on the other hand.⁹

(7) Fighting bribery is presented by the most important international organisations as one of their main priorities. Thus, the G20, the World Bank and of course the United Nations make it one of their primary goals. Such an international unanimity on the extreme seriousness of bribery may make one wonder if its nature has not in contemporary times changed into that of an international crime the punishment of which would consequently depart from certain rules of the common law such as, for example, the immunity of rulers.

(8) European Union Convention of 26 May 1997 (Art. 2 and 3) on the fight against corruption involving officials of the European Communities or officials of the Member States of the EU.

(9) OECD Convention of 21 November 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions (Art. 1).

Those conventions were ratified by France, which used not to punish those crimes and was therefore led to create offences of bribery of foreign public officials. It was indeed established that offences of bribery of public officials did not apply to foreign officials. Such a solution resulted from the nature of the offences of bribery which belonged to crimes and offences against public affairs and which, in this respect, only applied to French public officials, since a state should not be concerned with the good behaviour of foreign public officials.¹⁰

It was the Act 2000-595 on bribery (Articles 435-1 and following, Criminal Code) of 30 June 2000 which created the offences of bribery of foreign public officials. They were amended by the Act 2007-1598 of 13 November 2007 on fighting bribery. Those amendments were justified by the necessity of integrating the solutions produced by the Council of Europe Criminal Law Convention of 27 January 1999.¹¹ Those solutions resulted in particular in the creation of an offence of passive corruption of foreign public officials which did not exist before since the OECD Convention did not provide for it. Those repressive measures were reinforced by the Act 2013-1117 of 6 December 2013 on combating fiscal fraud and grand financial and economic crime, which increased the penalties imposed for the offences of bribery of foreign public officials.

Notwithstanding those dispositions, the French criminal law enforcement of international bribery is being severely criticised.

Criticisms come, first, from the organisations and institutions that are at the origin of the international conventions on bribery. The OECD Working Group on bribery, which is responsible for assessing the implementation of the Convention of 21 November 1997 and of the Recommendation of 2009, reproached France with '*not drawing the attention of law enforcement authorities to the importance of reacting to the full extent expected in foreign [international] bribery cases*'¹² in its Phase 3 Report. It repeated those reproaches in October 2014 in a Declaration in which it expressed 'serious concerns for France's limited efforts to comply with the OECD

(10) C. Lombois, *Droit pénal international*, Dalloz, 2^{ème} éd., 1979, no393 ; D. Rebut, *Droit pénal international*, Dalloz, 2^{ème} éd., 2014, no79.

(11) Report 243 from M. Hunault to the 13th National Assembly.

(12) Phase 3 Report on Implementing the OECD Anti-Bribery Convention in France, October 2012.

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.’ It especially wished France had launched reforms on the independence of public prosecutors, on the control of defence secrecy and of the blocking statute, and on the lengthening of the prescription period of transnational bribery and criminalisation of trading in influence. In its second Report on the Third Evaluation Round of 22 March 2013, the Group of States against Corruption (GRECO), which is in charge of monitoring the compliance of the forty-nine members to the anti-bribery instruments that have been elaborated by the Council of Europe, concluded that *‘France has greatly reduced its capacity to prosecute transnational cases, which is quite regrettable given the importance of that country in the global economy and of the weight of many of its commercial companies.’*¹³ The first EU Anti-Corruption report, which was published on 3 February 2014, asked for *‘strengthening the legislation on transnational acts of bribery’* and for *‘improving the efficiency of the investigations on and the prosecution of acts of bribery committed abroad’*.¹⁴

Secondly, criticisms have been offered by NGOs specialised in fight against bribery. TRANSPARENCY INTERNATIONAL FRANCE has recognised the improvements made by the law of 6 December 2013. It has nonetheless at the same time underlined *‘some deficiencies’* and called for *‘the Government to go further’*.¹⁵ France was ranked 22nd worldwide in terms of degree of perception of bribery in TRANSPARENCY INTERNATIONAL’s ranking for 2013, which places it 10th of the European Union countries. The SHERPA association deplored the *‘too modest ambition of the lawmaker to combat fraud and corruption’* in a press release of 6 November 2013. It recently intensified its criticisms in a press release, published with the ANTICOR association on 24 October 2014, which denounced *‘the chronic inaction of France in cases of bribery of foreign public officials (which) shows a real discrepancy between the political will to reform the judicial system and concrete action despite legal measures which have been recently consolidated.’*

(13) GRECO, Third Evaluation Round, Second Compliance Report on France, 22 March 2013.

(14) Annex France to the EU Anti-Corruption Report, COM (2014) 38 final.

(15) Transparency International France, press release of 5 November 2013.

Finally, criticisms also come from professionals, for whom the deficiencies of the French law enforcement expose the French companies to be prosecuted abroad when several states have anti-bribery laws that applies extra-territorially. They quote the US Foreign Corrupt Practices Act (FCPA) and the recent UK Bribery Act (UKBA) as examples.¹⁶ They argue that those laws give the courts jurisdiction on French companies and that such jurisdiction will be all the more likely to be exercised if France does not prosecute those companies. Several cases are mentioned which have resulted in heavy penalties for bribery being imposed abroad on French companies.¹⁷ Therefore they call for the French legal system to be amended for the French companies to implement internal anti-bribery mechanisms and for the French legal system to make it possible to prosecute and decide corruption cases.¹⁸

Those criticisms are largely echoed in the media where they fuel the image of the indifference, if not the tolerance, of public authorities regarding corruption.¹⁹ They also feed suspicion concerning the integrity of the politicians and the morality of the economic life at a moment when it may not have been greater.

It is that context which has led the Club des juristes to establish an *ad hoc* committee on that issue. The latter's objective is to assess the French system of law enforcement against transnational bribery and to offer propositions to reinforce it. The present report is the result of that work. Though it confirms that the law enforcement system may be improved (1st part), it also recommends to acknowledge the role played by companies in that fight (2nd part). The auditions that have been conducted as well as the documents that have been collected have indeed shown that many French companies have implemented internal anti-bribery programmes.

(16) See for example, É. Seassaud, 'La lutte contre la corruption en droit anglais, américain et français : une approche comparée', *Rev. jur. éco. pub.* 2013, étude 10, spéc. no 28 s.

(17) C. Dargham, 'La corruption dans tous ses états', *Le Figaro*, 20 August 2013.

(18) See Béglé, S. Bonifassi, 'Lutte contre la corruption internationale : le retard de la France menace ses entreprises', *Lemonde.fr*, 28 Oct. 2014.

(19) See, for example, 'Corruption. La France à l'index', *Libération*, 3 Dec. 2013 ; 'Corruption : la France doit encore progresser', *Lefigaro.fr*, 3 Dec. 2013 ; 'Lutte contre la corruption : l'OCDE épingle les efforts "limités" de la France', *Les Échos*, 23 Oct. 2014 ; 'La convention de l'OCDE sur la corruption largement ignorée', *L'Obs*, 23 Oct. 2014.

The latter are efficient instruments of prevention and processing of transnational bribery. It would however be better to supervise them so as to give them a uniformity that would make them meet the requirements in that domain and so they produce legal effects.

1ST PART

Improving the efficiency of anti-bribery law enforcement

This is the area at which most criticisms are levelled. The French law enforcement is accused of suffering from deficiencies that hinder the prosecution of acts of international bribery. Those deficiencies are deficiencies both of content and form. Their conjunction would be an explanation for the low number of sentences imposed by French courts. Undoubtedly, the content and form of the existing system may be improved. However, it is to be noted that such improvements cannot but be limited, for the French laws meet the international requirements to a great extent. This has all the more so been the case since the Act of 6 December 2013. It is nonetheless still possible to reinforce the French system on several points, though it would be excessive, and even sometimes unnecessary, to implement all the propositions suggested by international institutions and NGOs which often result from a reductive if not reduced analysis of the positive solutions.

I. On improving content

In its Phase 1 Report, the OECD Working Group on Bribery '*complimented the French authorities on the conscientious way in which they had implemented the Convention in domestic law*'. Its later reports did not repeat that opinion, but voiced several criticisms against French law. It repeated the main ones in its Declaration of 23 October 2014. They especially focused on:

- the condition of the reciprocity of incrimination to prosecute acts of bribery committed abroad,
- the absence of criminalisation of international trading in influence,
- the conditions in which criminal liability is attributed to moral persons,
- the amounts of the fines.

The Committee has examined those grievances, but has considered that amending the French law on the points they raise would not be appropriate.

A. On the condition of reciprocity of criminalisation for the prosecution of acts of bribery committed abroad

That accusation is regularly made by the OECD. It focuses on the fact that pursuant to Article 113-6 of the Criminal Code, the French jurisdiction is subject to a condition of double criminalisation for acts of bribery committed abroad. The OECD Working Group considers that that requirement hinders the prosecution of transnational bribery in France. That is why it recommends that it be repealed.²⁰

The French extra-territorial jurisdiction in bribery matters does not indeed contravene the general rules set in Articles 113-6 and following of the Criminal Code. Consequently, that jurisdiction is subject to the dual criminalisation of acts of bribery committed abroad by French companies or French natural persons. Such a condition is indeed set out in this article for offences, which offences of bribery of foreign public officials as provided for by Article 435-1 and following of the Criminal Code are.

However, that condition does not seem to be enough to substantially limit the French jurisdiction in that area.

It must also be noted that that condition only applies when acts of bribery have been entirely committed abroad by a French moral or natural

(20) Phase 3 Report on Implementing the OECD Anti-Bribery Convention in France, October 2012.

person. Consequently, it does not apply when the facts can be partly connected to the French territory. In that case, the French territorial jurisdiction applies to those facts under paragraph 2 of Article 113-2 of the Criminal Code which states that '*An offence is deemed to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory.*' The Cour de Cassation [France's highest appellate court] takes into account where the headquarters is located to situate the management decisions that characterise a criminal offence.²¹ It necessarily follows from that solution that bribes committed abroad by a French company are located in France, no matter whether the money was paid abroad or the resulting decision was made abroad. The implication of a French company in bribes is therefore enough for it to be connected to the French territory and to subject it to the French jurisdiction, which is obviously not itself subject to a condition of double criminalisation. It must also be noted that bribery is criminalised in most states, so that in any case the condition of double criminalisation will be met most of the time.

Payment made by a foreign subsidiary is no more an obstacle to French jurisdiction, since the Criminal Division (Chambre criminelle) of the Cour de Cassation considers that an offence committed by a subsidiary of a French company is attributable to the latter when it was committed at its suggestion.²² Admittedly, there remains the case in which the subsidiary has acted on its own initiative without including its parent company. However, there is no reason then for the latter to be exposed to criminal liability. That an act of bribery has been committed by a subsidiary is not enough for the parent company's criminal liability to be engaged. It can only be if the parent company has been associated with that bribe. Then, under that assumption, the parent company can assuredly be considered as the author or the co-author of the bribe given the control its position gives it on its subsidiaries.

(21) See, for example, the decision of 6 February 1996 of the Criminal Division of the Cour de Cassation, published in *Bulletin of the Cour de Cassation*, no 60, and its decision of 31 January 2007 in *Bulletin of the Cour de Cassation* no 28.

(22) Decision of 31 janv. 2007, *supra*.

A similar solution will certainly be applicable if the bribe is committed by a foreign intermediary acting on a French company's behalf. Such a case is not one of complicity of the French company, unlike what the GRECO maintained in its Third Evaluation Report on France.²³ It should be remembered that offences of active corruption include indirect acts. Thus, paragraph 1 of Article 435-1 of the Criminal Code targets the fact of '*directly or indirectly*' offering a public official a reward to carry out an act of his office or facilitated by his office. Paragraph 2 of Article 435-1 of the Criminal Code similarly sanctions yielding to a public official who '*directly or indirectly*' solicits an advantage to carry out an act of his office or facilitated by his office. As a consequence, the French company which uses an intermediary or which accepts the solicitation conveyed by an intermediary is not an accomplice but the author of a bribe. Article 113-5 of the Criminal Code on complicity in offences committed outside the French Republic is therefore not applicable against it.

Consequently, Articles 113-5 and 113-6 of the Criminal Code are not applicable in a case of bribery committed abroad which involves a French company. For that case is not within the field of application of those two articles. Similarly, the requirement of double criminalisation does not diminish the French jurisdiction in cases of bribes committed abroad to the detriment of a French company, since the personal passive jurisdiction provided for in Article 113-7 of the Criminal Code does not provide for it. Consequently, such cases can be prosecuted by French criminal courts without their criminalisation abroad being taken into account. Therefore, there is no reason, according to the Committee, for recommending that the French criminal law about the French extra-territorial jurisdiction in cases of transnational bribery be amended. However, public prosecutors should be alerted to foreign acts of bribery of which French companies have been victims so as to prosecute the foreign companies that have committed them. Those prosecutions would show France's capacity and will to act against bribery at an international level, as the USA with the FCPA and the UK with the UKBA.

(23) Third Evaluation Round, Evaluation Report on France, 19 February 2009, par. 96.

In any case, the criticisms levelled at France regarding the condition of double criminalisation to prosecute offences of transnational bribery result, at least, from an insufficient analysis of the legal dispositions and judicial solutions.

B. On the absence of criminalisation of international trading in influence

It should be remembered that the absence of criminalisation of international trading in influence may be explained by the fact that concluding international deals often makes it necessary to call on intermediaries whose work is to lobby or intervene with decision makers. The French authorities are concerned that the creation of an offence of international trading in influence will punish such practices and therefore put at a disadvantage the French companies that would be unable to call on intermediaries, whose intervention is often useful and even necessary.²⁴ They have remarked that such a criminalisation does not exist in many states. The government has voiced a reservation about it at the Council of Europe Criminal Convention on Bribery. Such a reservation was of course allowed by that Convention.²⁵ It is to be noted that it was also made by such states as Belgium, Denmark, Italy, the Netherlands, the United Kingdom and Sweden.²⁶ In the same sense, neither the FCPA nor the UKBA provide for that offence.

The Committee thinks that the reasons for that absence of criminalisation remain relevant. In numerous cases, international trade makes it necessary to call on intermediaries that are close to public decision makers. Such an intervention must not, of course, hide the corruption of the decision maker, which may be the case. However, the offence of bribery, which punishes the solicitation or indirect acceptance of advantages to carry out an act of one's office or facilitated by one's office (Criminal Code, Article 435-1), may then apply. Under that assumption, the intermediary is an accomplice and the decision maker the author. The French company can then be prosecuted as the author of passive bribery if it was aware

(24) See 13th National Assembly, Anti-Bribery Bill (Projet de loi relatif à la lutte contre la corruption), no 171.

(25) Council of Europe Criminal Law Convention on Corruption of 27 January 1999, Art. 37.

(26) Germany has not ratified that Convention.

of the aim of the intermediary's intervention. Consequently, the offence of bribery is manifest as soon as the public decision maker receives a payment. It does not matter that such a payment is not made directly to him. It is also of no matter that that payment does not benefit him personally, since the offence of bribery also punishes giving advantages to others. In those conditions, there seems that the acknowledged facts of illegal trading in influence, that is, those which result in bribery, are punished under French criminal law. The reproach the OECD has made to France is therefore excessive.

C. On the conditions of attributing criminal liability to moral persons

The Committee does not think that the conditions of attributing criminal liability to moral persons are likely to hinder the punishment of transnational bribes.

Such conditions are no obstacle to the criminal liability of moral persons being engaged, since bribes made for a company to profit from a deal or to enter into a contract may assuredly be considered to be committed on its behalf, as provided in Article 121-2 of the Criminal Code. The requirement that facts be committed by a body or a representative seems fully justified, since the criminal liability of a moral person is only admissible provided the acts have been committed by persons that represent it and have therefore engaged its liability by acting. It would not be acceptable that a moral person be criminally liable for acts committed unbeknownst to those who have the power to manage or to represent it. The Committee wishes to underline that paying bribes should not necessarily engage the criminal liability of the moral person in question. This should be the case only provided the bodies of the moral person have taken part in it in some capacity.

On that subject, the question was raised whether, on the issue of bribery in companies, the application of the case law solution pursuant to which the employees who are entrusted with a delegation of powers engage the criminal liability of their company should be maintained. Considering the consequences on the image of the company, it might be possible

indeed to challenge the fact that an employee engages the criminal liability of his company simply because he is entrusted with some delegation of authority and when he has acted on his own initiative, even if that act may seem to have been made on his behalf. Consequently, it could be possible to establish the reverse principle of the absence of engagement of the criminal liability of the company due to an employee being entrusted with authority, such principle being set aside only in cases in which it has been established that the actions of the said employee were known by the bodies or representatives of the company or in cases in which there were reasons for those bodies or representatives to know those actions.

Though the Committee thinks that there is no reason to add exemptions to the common law system of the criminal liability of moral persons as provided for in Article 121-2 of the Criminal Code, it considers that the mechanism of reduction of penalties that is provided for natural persons should be extended to moral persons. Article 435-6-1 of the Criminal Code indeed provides that the penalties of deprivation of liberty that the authors or accomplices of an offence of passive or active bribery of foreign public officials incur will be reduced by half *'provided (they have) made it possible, if need be, to put an end to the offence or to identify the other authors or accomplices by informing the administrative or judicial authorities.'* That mechanism was added to the offences of bribery by the Act of 6 December 2013. It only applies to natural persons. That limit is admittedly not only that of offences of bribery. When it is provided for other offences, it is also limited to natural persons. However, such limit may be explained by the nature of the offences it was designed and planned for. They were those of drug trafficking and terrorism, that is, serious offences against the person which belong to an organised type of criminality. The Act 2004-204 of 9 March 2004 called 'Loi Perben II' added other similar offences such as murder, poisoning, torture and acts of barbarism.

In any case, the limit of the mechanism of reduction of the penalties to natural persons is not due to the impossibility of applying it to moral persons, but to the nature of the offences for which it was initially devised. There is no obstacle to its being extended to moral persons for offences of a different nature, inasmuch as the legislator has already chosen to apply

it to those offences. That is precisely the case for offences of bribery for which the mechanism has been designed and which does not include moral persons, though there is no justification for the fact that it is not applied to the latter.

On the contrary, the Committee considers that its application to moral persons is justified since it refers to a situation that may occur in the life of a moral person. Several members of the Committee and some of the experts and practitioners it has auditioned have underlined that a moral person may discover that acts of bribery have been committed by persons who may engage its own criminal liability. The criminal liability it then risks will not be reduced even though it reacts to it and takes appropriate measures and even puts an end to it. Such a situation may lead the companies to deal with the issue internally without informing the authorities. Therefore, the criminal liability of companies should be attenuated as soon as the moral person reacts to the discovery of bribes by immediately taking any measure within the company to remedy it and by notifying the authorities and doing everything in its power to stop them. There is indeed no reason for the mechanism of reduction of penalties not to be applicable, unlike what happens to natural persons who are in the same situation. The profit of the reduction of the penalties should nonetheless be limited in the case when the company has drawn no profit from the offence. The fine should, in any case, be related to the profit it has obtained. The reduction of the penalty could then be applied to the amount likely to be beyond that profit. Taking this into consideration could even then open the possibility for an exemption from penalty if the reaction of the company has put an end to the situation and has prevented it from reproducing its effects, and when it implements a compliance programme under the surveillance of the Central Service for the Prevention of Corruption (Service Central de Prévention de la Corruption (SCPC)).²⁷

(27) See below.

Therefore, the Committee considers that the fine incurred by moral persons due to the bribery of foreign public officials should be reduced by half in the same conditions as those of the reduction of prison sentences provided for natural persons. The mechanism could be extended to some of the other penalties applicable to moral persons; the length of the incurred sentences of interdiction could thus similarly be reduced by half. The possibility that the punishment be waived could even be provided for in cases where the reaction of the company puts an end to the bribes and neutralises their effects and where it implements a programme of compliance, if it is not already the case.

D. On the amounts of fines

The amount of the fines applicable to bribery of foreign public officials has been severely criticised by the working groups set up by the organisations and institutions at the origin of the Conventions on Bribery. However, those criticisms were made before the amount of those fines was increased in the Act of 6 December 2013. The latter increased the penalty to € 1,000,000 for natural persons, which increases it to € 5,000,000 for moral persons pursuant to Article 131-38 of the Criminal Code. The Act of 6 December 2013 thus provided that the fine could amount to twice the amount of the profit derived from the offence. This makes it possible for the fine not to be lower than that profit, as was the case in the ruling against the SAFRAN company which sentenced the latter to a € 500,000 fine, though the offence was related to a €170 mm deal.

II. On procedural improvements

This is the area where the criticisms that are being levelled are the strongest. It is considered the main cause for the low number of criminal sentences for bribery of foreign public officials. There again, some of those criticisms are unfounded or exaggerated to a large extent. The majority of the members of the Working Committee of the Club des Juristes therefore deems excessive the criticisms on the lack of independence of the prosecutors and the shortness of the period of prescription.

The lack of independence of the prosecutors has been repeatedly criticised. It was once again recently criticised by the OECD Working Group in its Declaration of 23 October 2014. It is constantly repeated by NGOs specialised in anti-bribery fight. Today, such a criticism is weakened by the recognised possibility for associations fighting bribery to be a party in civil suits in cases of breach of integrity and the related cancellation of the prosecutor's request of prosecution for bribery of foreign public officials. Those two reforms, which result from the Act of 6 December 2013, neutralise the prosecutor's power to decide on the appropriateness of prosecuting by allowing associations against bribery to ask an investigating magistrate (*juge d'instruction*) to initiate an investigation.²⁸ Some members of the Committee were surprised that the denunciation of the lack of independence of the prosecutors remained so strong, since the associations against bribery can ask for an investigation to be initiated even when the prosecutor is opposed to it. Apparently, so thinks the Chairman of the Committee, the fight against bribery is sometimes used to support political claims, and even corporatist ones.

The prescription period is also the object of recurring criticisms which point out to its duration.²⁹ They are repetitions in principle, since there is no disputing that case law has largely made the rules of calculation more

(28) The conditions for the approval of anti-bribery associations for the purpose of the exercise of the rights granted to a party in civil matters were established in the decree 2014-327 published in the *Journal officiel* of 14 March 2014. TRANSPARENCY INTERNATIONAL was approved by the decree of 22 October 2014.

(29) See for example Phase 3 Report on Implementing the OECD Anti-Bribery Convention in France, October 2012.

flexible. Thus, it reports the starting point of prescription to the day of the last executed action, which allows it to be set after the pact of bribery.³⁰ It also often labels bribes misuse of corporate property to report its prescription to the day it was notified in conditions that allow for public action to be taken. A decision handed down on 6 May 2009 even seems to have applied that solution to bribery.³¹ Moreover, there is no example of prosecution for bribery failing because of prescription. The grievances against France on that issue therefore result from an eminently abstract analysis of the assessment of prescription.

Those conclusions do not mean that no improvement may be made in prosecutions. However, those improvements are to be made in other areas, that is, on other points than those usually examined in that domain. They are about the establishment of an appropriate procedure of prior admission of guilt and on the necessity to avoid multiple prosecutions.

A. Adaptation of the procedure of prior admission of guilt

The auditions carried out by the Committee have revealed that the French companies which are confronted with issues of bribery sometimes, if not often, prefer dealing with them strictly «internally», that is, without informing the authorities. Such a decision may be explained by their being concerned that notifying the authorities may result in criminal charges being brought against them and in legal proceedings that are likely to last a long time. It may also be explained by the image they have of criminal justice as a justice that is remote from the business world and quite ignorant of it, and which, in this respect, they think will not be able to offer an individualised answer to their situation. Undoubtedly, there are cases in which prosecution is justified, even though it concerns facts

(30) Decision of 27 October 1997 of the Criminal Division of the Cour de Cassation, published in *Bulletin of the Cour de Cassation* no 352.

(31) Criminal Division of the Cassation Court, 6 May 2009, appeal no 08-84407. Admittedly, one may wonder on the actual scope of this decision, since it also decided an offence of breach of trust and the two offences were systematically mentioned in the grounds for the decision. The decision could therefore be considered to apply only to the offence of breach of trust, especially since it was not published in the Bulletin, which does not lead one to give it much importance.

that the companies in question have revealed. In those cases, it should be possible for those companies to count on a fast and simple processing of the charges, with a privileged interlocutor they can easily identify and who they will think knows how companies work. This is one of the conditions for them to spontaneously inform the authorities of the issues of bribery they are facing.

The work of the Committee has also revealed how frequently ill-adapted judicial investigations, as a mode of prosecuting international bribery, are. That they are not adapted is not due to the examining magistrate himself of course. It is due to the slowness of the investigation, a procedure that usually lasts several years. However, that length of time is not adapted to the processing of issues involving companies that deal on international markets. On the contrary, those companies need the procedure to be fast, so that their legal situation may not be unclear. A long judicial investigation is also harmful to the French legal proceedings, since it allows the possibility that foreign proceedings for the same offences be carried out before even though they may concern first and foremost French companies, which are destined to be judged by French courts. **That is why that prosecuting transnational bribery could be dealt with in a fast and efficient procedure should be considered.**

The Committee acknowledges that it has considered that the Anglo-Saxon procedures should be drawn upon, especially the *Deferred Prosecution Agreement*, which is a flexible and fast procedure that is particularly well adapted to acts of bribery.³² It makes it possible for heavy fines to be imposed without trial, the length of which is inevitably long and the result necessarily uncertain. There is also some preventive efficiency in it, since it may lead the companies to implement measures that aim to avoid the repetition of such problems. They will be all the more willing to consent to its implementation when the procedure is fast, which, in that respect, spares them a long trial. Admittedly, the amount of the fines they are exposed to is also a very good incentive.

(32) See, for example, A. Mignon-Colombet, F. Buthiau, 'Le Deferred Prosecution Agreement américain, une forme inédite de justice négociée', *JCP éd. Gén.* 2013, ét. p. 621 ; Ph. Goossens, 'Faut-il devenir anglo-saxon pour savoir lutter contre la corruption ?', *LesEchos.fr*, 24 Oct. 2014.

However, the aim is not to reproduce the *Deferred Prosecution Agreement*. The latter is deeply ingrained in the American tradition and consequently cannot be transposed as such into the French criminal procedure. It also gives too much power to the prosecutor as far as the French constitutional requirements are concerned. In addition, it involves a high cost for the companies, especially when it is accompanied with the implementation of a mechanism of *monitoring*,³³ which moreover resembles a privatisation of criminal justice. The aim is to draw on the transactional philosophy of the *Deferred Prosecution Agreement*, since it is the main cause of its proven efficiency. The usefulness of alternative procedures in issues of bribery is moreover explicitly acknowledged by the French authorities. In a leaflet of presentation that is accessible on the website of the Ministry of Justice, the Central Service for the Prevention of Corruption (Service Central de Prévention de la Corruption (SCPC)), which helps the authorities fight against bribery,³⁴ explicitly asserts that transaction or negotiation are efficient anti-corruption measures. Thus a procedure that would allow such a way of dealing with bribery should be provided for, or at least adapted.

Those are the considerations which have led the Committee to recommend that offences of bribery be dealt with through an adapted procedure of prior admission of guilt. The choice of a procedure of prior admission of guilt imposed itself because of the many advantages it offers, which give it a flexibility that is close to that of an alternative procedure, without it being one.

First, it is a preexisting procedure, not one which is created *ex nihilo* and whose creation to prosecute offences of bribery especially would inevitably raise suspicion. Then, as its name suggests, it is a procedure which leads to an appearance on admission of guilt. In this respect, the Committee has dismissed the idea of resorting to a transaction, given the derogatory nature of such a procedure, which may project the image of an unfair justice that benefits those it prosecutes. Finally, it is a fast

(33) It consists in appointing a third party to the company whose mission is to assess and monitor the compliance programme set up by the *Deferred Prosecution Agreement* (see A. Mignon-Colombet, F. Buthiau, *supra*, esp. no 33 and following)

(34) See below.

and simple procedure, which makes it especially adapted to offences of bribery that implicate a company which is assumed to deal on international markets. Indeed, those companies need their legal situation to be clarified as soon as possible. One of the advantages it offers is also that it leads to conviction, not to a closed case, which protects against the always easy suspicion of indulgence for economic operators and offers them a legal solution that contains no uncertainty since it has the force of *res judicata*.

The Committee has also considered the possibility that transnational bribery may lead to a settlement.³⁵ Such a procedure offers advantages that are similar to that of a procedure of prior admission of guilt. Its implementation is undoubtedly more flexible. For example, someone else than the public prosecutor may be entrusted with it. It also allows for alternative measures that are not provided for by the procedure of prior admission of guilt. However, its disadvantage is that it appears as an alternative measure to prosecution, which may seem unsuitable to the criminal answer that should be given to bribes. That is what explains that it can only be implemented for offences that carry a maximum sentence of five years in prison.³⁶ In that sense, the Committee considers that public opinion is not ready to accept that bribery may be dealt with by a procedure that will not formally entail prosecution. That is what has led it to dismiss settlement, even if it thinks that it might also be considered.

The Committee thinks that the procedure of prior admission of guilt should be adapted when it concerns the specific issue of cases of transnational bribery that implicate a French company even though the latter has informed the authorities or admitted the facts. Those adaptations would mean having the SCPC intervene to act as the interlocutor of companies during the phase of admission of guilt, taking into account the situation of the company in the proposal of penalties and making the rules applicable to the appearance hearing more flexible.

(35) Code of Criminal Procedure, Art. 41-2.

(36) Code of Criminal Procedure, Art. 41-2, par. 1.

a. Intervention of the Central Service for the Prevention of Corruption (Service Central de Prévention de la Corruption (SCPC)) during the phase of admission of guilt

The processing of acts of bribery within the framework of an adapted procedure of prior admission of guilt requires the intervention of an authority which is specialised in the domain of bribery, and consequently knows the business world. The Committee thinks that that authority should be the SCPC rather than the new financial public prosecutor. Such a choice may be explained by their respective characteristics.

The usual role of the financial public prosecutor is to prosecute.³⁷ The first prosecutor to be appointed to that office herself described that new institution as a '*strike force*'.³⁸ This mission is therefore eminently, if not exclusively, conceived as one of punishment. This prevents the prosecutor from being the good interlocutor of companies which facing an issue of bribery, since the solution to be brought may not be strictly one of punishment. This is all the more the case when the problem does not imply that the criminal liability of the company be engaged. There is therefore serious doubt about the possibility for the financial public prosecutor to make a good distinction among the situations of the companies, given his conception of his mission.

The SCPC is, for its part, an autonomous interdepartmental structure at the Ministry of Justice. It is chaired by a prosecutor and it includes judges and public officials.³⁹ Its mission is to gather the information necessary to prevent bribery. Its role is also to establish direct relations with companies by raising their awareness to bribery and by signing conventions with them which will help them implement programmes of compliance. That is why it is assuredly in a better position than the financial prosecutor to intervene in a positive way within the framework of a procedure of prior admission of guilt in cases of transnational bribery. That intervention nonetheless implies that he be legally repositioned so as to have authority to accomplish that mission.

(37) Code of Criminal Procedure, Art. 705 s.

(38) Éliane Houlette : 'Le parquet national financier doit être une force de frappe', *Lemonde.fr*, 3 March 2014.

(39) Act 93-122 of 29 Jan. 1993, Art. 1.

Indeed, the SCPC does not have jurisdiction in particular cases.⁴⁰ On the contrary, it must refer to the prosecutor facts it has been submitted and which are likely to be an offence, and to withdraw itself as soon as legal proceedings of investigation or information are initiated.⁴¹ That position itself is harmful to the mission of the SCPC, when the latter considers that it consists in acting positively towards private and public companies.⁴² This makes it appear as an auxiliary to the prosecutors, which does not allow it being considered as an interlocutor that can accompany companies in their dealing with an issue of bribery. In any case, such has been the feeling several representatives of companies have expressed before the Committee. That is why those dispositions should be reconsidered so as to allow for a positive intervention of the SCPC when dealing with facts likely to characterise an offence of transnational bribery, and to make it, in this respect, the interlocutor of the companies within the framework of the procedure of prior admission of guilt adapted to those facts.

This role of interlocutor could be carried out in cases known to companies. The SCPC could be designated as the service which the companies must contact when confronted with transnational bribery. It is to be noted that the legislator already recognises that the SCPC has a role of that type. The Act of 6 December 2013 created a new Article 40-6 of the Code of Criminal Procedure which provides that a person who has notified a crime or an offence that has been committed in their company or in their administration is put into contact, when they ask for it, with the SCPC when it has jurisdiction to decide that offence. That disposition shows a redirection of the missions of the SCPC which makes it intervene in particular cases. Giving it the role of the interlocutor of the companies within the framework of a procedure of prior admission of guilt would fall within that redirection by providing that the SCPC and the companies be put into contact. It would make the SCPC the service having jurisdiction in all cases of bribery.

(40) Except that which provides for its being put into relation with the person who has notified a crime or an offence that has been committed in their company or administration and which is within its jurisdiction (Code of Criminal Procedure, Art. 40-6). However, this being put into contact only happens when the person involved asks for it, which reduces its impact.

(41) Act 93-122 of 29 January 1993, Art. 2 and 3.

(42) Admittedly, that mission is not included in the provisions of the Act of 29 January 1993, which only gives the SCPC missions to public authorities. The SCPC's intervention to companies is therefore the result of its own initiative.

This role of interlocutor would consist in receiving information from the company involved and hearing its representatives and counsel. Within the framework of its mission, the SCPC would make recommendations to the financial prosecutor on the follow-up of the facts of which it has received notification. Those recommendations would only concern the criminal liability of the company. They could be to drop the charges, to implement a procedure of prior admission of guilt or to conduct usual prosecution.⁴³ In those three cases, it should be justified in relation to the elements that have been recorded. The law should specify that the implementation by the company of a programme of compliance is an element to be taken into account when resorting to a procedure of prior admission of guilt. The SCPC would also have jurisdiction to propose penalties. They could include the implementation of a programme of compliance or the assessment of it and its amendment in case it already exists.

In any case, the SCPC's observation of the criminal nature of the facts notified would not result in its stepping down, unlike what is provided in Article 3 of the Act of 29 January 1993. Indeed, that is the condition for the SCPC to be considered as a real interlocutor and not as an authority remote from companies. The financial prosecutor would admittedly have to be informed of the notified bribery. However, that notification would not result, as has been said, in the SCPC's stepping down. The latter would have to notify the possible implications of natural persons so that the financial prosecutor be able to immediately investigate and, if need be, prosecute them. The documents collected by the SCPC would of course be accessible to the financial prosecutor.

Moreover, the role of interlocutor of the companies attributed to the SCPC would also apply even when the bribery involving them would have been notified by other means. For this case does not necessarily preclude a procedure of prior admission of guilt. This could be the case, for example, if a programme of compliance has been implemented within the

(43) The implementation of a procedure of prosecution, which the procedure of prior admission of guilt is, cannot be set as imperative. It should still be possible not to initiate prosecution in cases where it seems that facts cannot be punished or are too minor. One could imagine, in this second case, that the SCPC propose that the case be abandoned provided there is an implementation or assessment of a programme of compliance. The SCPC would have jurisdiction to decide that implementation or to evaluate the existing programme.

company. This would not be enough to exempt it from a criminal point of view. It may nonetheless authorise the implementation of a procedure of prior admission of guilt. The question may be raised to know whether the submission might not, in that case, be a right or whether the usual prosecution should be at least subject to the consent of the SCPC.⁴⁴ In any case, the involvement of a company in transnational bribery that is notified to the prosecutor should result in the prosecutor's referral to the SCPC for the latter to make the recommendation mentioned above. The latter could be to drop the charges, to implement a procedure of prior admission of guilt or to conduct usual prosecution.

*b. Taking into account the situation of the company
in the proposition of penalties*

The Committee thinks that the SCPC should be given the possibility to make recommendations on the penalties to be imposed on a company prosecuted for bribery of foreign public officials.

It considers that the financial prosecutor should have to apply them in cases when bribery has been notified by the company itself. That solution seems to be within its objective of inciting the companies to notify the authorities when they are confronted with issues of bribery. Knowing that the recommendations of the SCPC on penalties will be mandatory for the public prosecutor cannot but encourage the companies to contact the SCPC. That is why, in that case, the financial prosecutor should only propose penalties with the consent of the SCPC. The judge deciding the case would anyway keep the possibility to refuse the proposition of penalties that is submitted to him.

Those recommendations would, on the contrary, only be simple in opposite cases, that is, when the company is not at the origin of the notification to the authorities. However, the financial prosecutor should be compelled to justify his decision when he decides not to follow the SCPC's recommendations. His proposition of penalties should then explain the reasons why it is different from the SCPC's recommendations.

(44) See below.

The penalties would, in any case, be formally proposed by the public prosecutor, pursuant to Article 495-8 of the Code of Criminal Procedure. They should take into consideration the situation of the company.

That is why programmes of compliance should be given an important role. The law could thus provide for a conviction consisting in implementing a programme of compliance if there is none, or in assessing it and modifying and/or strengthening it if there is one. That implementation would be controlled by the SCPC, which would also have jurisdiction to assess the programme of compliance or to have it modified. The subsequent failure of implementation or correction could result in criminal sanctions.

The conviction prescribing to adopt or modify a programme of compliance would of course not preclude other penalties. However, a maximum fine could be conceived within the framework of the implementation of a procedure of prior admission of guilt like the maximum prison sentence within the same framework. That maximum would be related to the implementation of a procedure of prior admission of guilt. It would be different from the reduction of penalties linked to the company's notification to the authorities. The two solutions could be articulated as follows: a maximum limited to three quarters of the applicable penalty in case of a procedure of prior admission of guilt, a reduction by a half when the company has contacted the authorities and has put an end to the effects of the bribe. The maximum and the reduction would be applicable provided the company has not cleared higher profits than the applicable fines.

c. Making the rules of the hearing more flexible

The implementation of a procedure of prior admission of guilt for transnational bribery involving French companies within the framework of international deals would make it necessary to make the phase of approval more flexible.

The Committee first recommends that the mechanism of double summons as provided for by Article 495-15-1 of the Code of Criminal Procedure be dismissed. It would indeed not be suitable to a procedural dealing based on consensus.

The Committee has examined the principle of *in camera* hearings to incite companies to give all the information they possess to the judicial authorities. However its conclusion is to keep the principle of public hearings to preserve the legitimacy of the procedure of prior admission of guilt. There could be a possibility of an *in camera* hearing if publicity would have disproportionate consequences on the reputation of the company or *a fortiori* if trade secrets and/or national defence secrecy are involved.

In the same way, the Committee considers that the specificity of the cases of bribery allows the company which is prosecuted to oppose the communication of documents pertaining to trade secrets to the civil party. *A fortiori* the latter would not be given access to documents pertaining to national defence secrets.

The Committee also considers that both the complexity of bribery cases and the penalties that the prosecutor may propose justifies that the interval provided in Article 495-10 of the Code of Criminal Procedure be lengthened. This could without harm be increased to a month, since the procedure of prior admission of guilt in cases of transnational bribery is assumed to target a moral person, which will not flee, which is the reason for the ten-day interval in Article 495-10.

B. Forbidding multiple prosecutions

The extra-territorial nature of the different anti-bribery legislations allows for a same case of bribery to be prosecuted in several states. Multiple prosecutions may even result in multiple sentences since the *non bis in idem* rule does not apply at international level.⁴⁵ Such a situation has already been observed in France where companies were prosecuted for bribery of foreign public officials though they had been convicted for the same facts in the United States.

(45) The International Covenant on Civil and Political Rights of 19 December 1966 limits the recognition of the force of *res judicata* to the internal framework, that is, to the hypothesis of a double sentence being imposed by a same state. It is the same for Protocol 7 to the European Convention on Human Rights (on that point, see D. Rebut, *Droit pénal international*, 2^{ème} éd., Dalloz, 2014, no 86).

Admittedly, there are mechanisms which can lessen the effects of those multiple prosecutions and sentences. That is the case in France where the Cour de Cassation [the highest appellate court] has decided that penalties imposed abroad must necessarily be deducted from the penalties imposed by French courts.⁴⁶ Such a deduction may be explained by the principle of proportionality of penalties, which forbids that a person be imposed a penalty higher than the maximum provided for by the French criminal law that sanctions the offence they have committed. Consequently, a second prosecution in France cannot result in a conviction whose *quantum* added to the foreign penalty is above the maximum provided by French law. However, that limit does not preclude multiple prosecutions nor cumulative sentences. Moreover, the foreign conviction is only taken into account regarding the penalties that have been imposed. The penalties that have not been imposed, by assumption, are not limited in any way. Such is the case, for example, of enhanced sentences. It may be feared that the impossibility to impose a fine because of a prior foreign conviction may lead the court deciding the case to impose other sentences.

That the *non bis in idem* principle is not applied at international level may be explained for offences whose punishment is not organised at international level and which, in that respect, may vary depending on the courts that will decide them. It is therefore legitimate that states have their own answer to facts that may have breached their domestic public order and do not refer to the convictions that those facts may have resulted in in other states. However, such an argument is lessened in the case of law enforcement organised at international level by international conventions. That international law enforcement allows the application of the *non bis in idem* principle since it supposes a harmonisation of the national criminal reactions to the offences in question.

(46) Decision 13-83899 of 23 October 2013 of the Criminal Division of the Cour de Cassation published in Bulletin of the Cour de Cassation no 201, D. 2013. Jur. 2950, note D. Rebut, RSC 2013, p. 857, obs. D. Boccon-Gibod.

That is precisely what happens in cases of transnational bribery for which the principle of punishment itself results from international conventions.⁴⁷ That is why that punishment should not intervene jointly or successively on the territories of several states that are parties to the case. That is a concern that is expressed indeed in the OECD Convention of 17 December 1997. Article 4 thus provides

'Article 4 Jurisdiction

1. *Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.*
2. *Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.*
3. ***When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.***
4. (...).'

That article provides for an obligation of consultation in cases of concurrent jurisdiction so that prosecution will be conducted by only one state. Consequently, it may be induced from it that bribery of foreign public officials should not be subject to multiple prosecutions and *a fortiori* to multiple sentences. The expression of that interdiction however is not explicitly made, which precisely explains that cases of multiple prosecutions and sentences have been observed. Therefore, the OECD should clarify that situation in a protocol to its Convention, which would provide for the

(47) See above

application of the *non bis in idem* principle for the punishment of bribery of foreign public officials.

That protocol could even organise how conflicts of jurisdiction should be solved based on criteria from the nature of the jurisdiction likely to be exercised by each state. Thus, it could give priority to territorial jurisdiction over other sorts of jurisdiction. Admittedly, transnational bribery is likely to pertain to the territorial jurisdiction of several states. Additional criteria should then be decided to determine which state should be given jurisdiction to prosecute the facts in question. They could be related to the nationality of the persons in question and especially the 'nationality' of the company in question, priority being given to the state on whose territory that company's headquarters is.

In any case, it is necessary to put an end to multiple prosecutions and sentences for offences of bribery of foreign public officials, when law enforcement is organised at international level, which allows to apply the principle of *non bis in idem*. That application should therefore be expressly provided for in the international instruments which are at the origin of the criminal punishment of those offences. That provision would make it necessary that a protocole to the OECD Convention be adopted, since the latter only implicitly forbids that plurality in its current text.

2ND PART

Acknowledging the programmes of compliance implemented in companies

The work of the Committee has shown that many French groups that have a transnational or cross-border activities have implemented programmes of compliance. The latter consist in particular in implementing internal measures of prevention and processing of bribery. Preventive actions result, for example, in public commitments taken by the management to refuse in advance any operation tainted with bribery. It is accompanied with measures to raise awareness, training and information of the staff on the risks of bribery and on the firm position of their company in that respect. Some French groups entrust the definition of the preventive instructions to be respected to a dedicated structure that is given enough resources to efficiently implement them. They provide special processes for the signing of deals in risky domains. Prevention also provides mechanisms of internal control of the intermediaries, compensations and operations. Controls are then conducted by services that are organically separated from those which have signed the operations that are being controlled. The processing of bribery consists in implementing a process of transmission of suspicions of bribery to a department that is especially trained to assess them and accompany the informers. It provides disciplinary procedures against those who have committed acts of bribery, but also against those who have not respected the internal instructions of prevention of corruption.

Those internal programmes of compliance were initially elaborated to prevent the possibility of criminal conviction for bribery. This risk appeared

positively with international conventions against bribery, which led the states to pass strict anti-corruption legislations. The extra-territorial scope of those laws often gave them jurisdiction to decide cases involving foreign companies. The FCPA played a leading role in that domain, by allowing the American courts to easily decide they had jurisdiction in cases of transnational bribery committed by non-American companies. The heavy fines applicable by those American courts were undoubtedly a strong incentive factor of adoption of programmes of compliance.

However, it would be simplistic to attribute the current implementation of programmes of compliance only to the fear of criminal prosecution. Companies also act in accordance with ethical objectives, being alerted on the consequences of bribery on the economic development and democratic operation of the states where it is practised. The United Nations Global Compact, which was launched by Mr Kofi ANNAN when he was the UN Secretary-General, aims to promote the civic responsibility of companies around ten principles they are invited to voluntarily apply. The tenth principle, which was added in 2004 after the United Nations Convention against Corruption, provides that: *'Businesses should work against corruption in all its forms, including extortion and bribery.'* The participant companies commit to implement those principles so as to guarantee a responsible corporate activity. That is the case of several French companies which have signed the Global Compact and which, in that respect, apply its tenth principle. Applying it requires them to implement internal anti-bribery programmes.⁴⁸ The programmes of compliance they implement therefore fall within that approach of application of the principles of the Global Compact.

However, there is no regulation of those programmes of compliance in France.⁴⁹ As a result, the French companies themselves decide their

(48) 'As a first and basic step, introduce anti-corruption policies and programs within their organizations and their business operations' (Practical steps to fight corruption, <https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle10.html>)

(49) The professionals whose activities are subject to specific regulations are subject to specific norms, such as the bankers, who must respect the Regulation 97-02 providing the implementation of a system of compliance (especially Article 11 and following), investment service providers, who are compelled to implement such programmes by the Financial Markets Council and by the 'Autorité des marchés financiers' general regulations, or insurers.

content. The paradox is that that definition is inspired by anti-bribery foreign legislations, since they take them into account in their implementation and their scope is extra-territorial which may make them applicable to French companies. That is the case of the FCPA and UKBA whose application is amended if the company in question has implemented an effective programme of compliance.⁵⁰ This has led the French companies to adapt their programme of compliance to the requirements of those two laws. That concern may lead them to ask for certifications from companies that claim they can grant them. That is how anti-corruption certifications develop which guarantee that the companies' programmes conform to the requirements of the FCPA and UKBA. In that respect, one may mention the certifications offered by such companies as ADIT, Mazars or ETHIC-Intelligence.⁵¹ They expressly target the French companies, even though the French legislation does not take into account the implementation of a programme of compliance. They claim they can validate their programme of compliance in relation with the requirements of the FCPA and UKBA.

One may legitimately wonder that the French companies define the content of their programme of compliance based on foreign legislations. That situation may be explained by the fact that the French law does not take into account programmes of compliance. It is assuredly not satisfying, since it results in the French companies' activities being regulated by foreign laws. Moreover, it introduces differences in the programmes of compliance since the definition of their content depends on several different foreign laws. Finally, it does not guarantee that the French companies will implement a programme of compliance since that implementation depends on their assessment of their risk of exposure to the application of the FCPA and UKBA. The programmes of compliance are assuredly the most efficient anti-bribery means, and as a result, their implementation should be generalised. Those observations have led the Committee to recommend that the programmes of compliance be regulated by the French law and to consider that they should be taken into account in the punishment of transnational bribery.

(50) See É. Seassaud, *supra*, esp. no 61 s.

(51) On that point, see, A. Almy, 'Certification des programmes de prévention de la corruption. - Quelle utilité pour les entreprises?', *Cahiers du droit de l'entreprise 2014*, no 5, dossier 30.

I. Regulating programmes of compliance

That regulation would come from the SCPC, which would be the institution having jurisdiction to define the recommendations on compliance for the companies. The advantage of that solution is first that it gives flexibility to the formulation of those recommendations, which could easily be updated or amended depending on the observations from practice. It also offers the advantage of legitimising the intervention of the SCPC in the criminal assessment of bribes committed in a company, since, by assumption, that assessment will include the issue of the implementation of a programme of compliance whose content will have been defined by the SCPC. The principle of taking into account the implementation of programmes of compliance and that of the reference to the recommendations of the SCPC for their definition could be stated in the Criminal Code after the articles defining the offences of bribery of foreign public officials.

The Committee had examined the questions of the definition of the field of application of the programmes of compliance so as to know whether companies should be distinguished based on their size. One could imagine a minimum level of implementation for the small and medium size enterprises and a higher level for the big companies. Indeed, the implementation of a programme of compliance requires some resources and in that respect causes expenditures that cannot uniformly be supported by companies. After considering that question, however, the Committee has dismissed the idea of adjusting the obligations of a programme of compliance based on the size of the companies. It considers that it would not be defensible to provide for a light version next to a version that would by assumption be supposed to be more efficient. It has observed in that sense that the field of application of the obligations of fighting against money laundering, which pertains to a similar theme, does not vary depending on the size of the organisations they apply to. That observation does not preclude however that the SCPC can decide to adjust its recommendations of compliance depending on criteria that take into account the size or activity of the companies.

The regulation of the programmes of compliance will have to determine the obligations that will be related to it. This report does not aim to determine those obligations, which determination is developed and specified

in the SCPC's project of Guidelines. The latter mentions the usual requirements, which are related to commitment of the management and the whole hierarchy, to the communication to the public and the company's personnel and trade partners, to the training of the staff, to the identification of risky domains, to the implementation of specific processes in those domains, to the control by a distinct department, to the provision of a mechanism of ethical alert, to the support of whistleblowers and to the punishment of those who have committed acts of bribery and also of those who have not respected the requirements of the programmes of compliance. The Guidance of the British Ministry of Justice to specify the '*adequate procedures*' to be implemented in the programmes of compliance may indeed be a source of inspiration as well as those of the 'Autorité de contrôle prudentiel et de résolution', of TRACFIN, or of the 'Autorité des marchés financiers.'

The Committee has also examined the question of whether the certification of the programmes of compliance by external societies should be made obligatory. It acknowledges the advantage of their intervention, which results in a complete and external audit of the programmes of compliance by professionals with a strong expertise in that domain. It however considers that the companies should be given the possibility to decide to call on those certification companies given the cost of their intervention. Including an external certification in the programmes of compliance would certainly also create difficulties in the assessment of the criminal responsibilities related to the observation of a bribe. It has therefore unanimously concluded to the inopportuneness of an obligatory external certification of the programmes of compliance.

The Committee recommends that a French regulation of the programmes of compliance be created so that they be not left to the appreciation of the companies anymore, and that the companies implementing programmes of compliance know the obligations it provides for and no longer refer to foreign legislations.

II. Taking into account the programmes of compliance in law enforcement

The Committee considers that the regulation of the programmes of compliance implies that they be taken into account in law enforcement. Taking them into account must consist in their being made to produce criminal effects.

The first effect could be including in the criminal penalty the lack of or insufficient implementation of a programme of compliance. An offence should be created that would provide for the prosecution of those facts. This solution has been dismissed, for the Committee considers that bribery should only be punished when acts of bribery have actually been committed, not only in cases of lack of implementation of preventive obligations. That is also the path generally followed by the French law. Thus, the obligations of fighting money laundering do not in themselves lead to criminal penalties. Consequently, their violation is not in itself a criminal offence. The situation is different if a causal link can be established with an act of money laundering.

That is the solution provided for in the UKBA, which does not punish the lack of implementation of a programme of compliance.⁵² Punishment is only used in cases of bribery that are imputable to a person in relation to the company. The criminal liability of the latter is then rightfully engaged by this fact except if it demonstrates that it has implemented adequate procedures aiming to prevent bribery.⁵³ Admittedly however, the observation of the lack of implementation of a programme of compliance is enough to engage its criminal liability in cases of bribery committed by a person related to the company. That is undoubtedly a very strong incentive to implement such a programme.

The Committee has rejected the idea of transposing the British mechanism. It considers that engaging criminal liability should, in all the cases, be subordinated to the observation of a positive involvement of the company in bribery. Once again, that analysis can align itself with the money-laundering regime, since the criminal liability of financial organisations

(52) Section 7, par. 1.

(53) V.J. Mattout, 'Le Bribery Act ou les choix de la loi britannique en matière de lutte contre la corruption. Un danger pour les entreprises françaises ?', *JDI* 2011, doctf. 12 ; N. Tsé, J.-F. Le Gal, 'UK Bribery Act : analyse d'une législation', *Rev. Juristes Sciences Po* no4, nov. 2011. 44.

is engaged only in cases of involvement as the author of or accomplice to an operation of money laundering.

A second possible criminal effect could be related to the applicable penalties. One could imagine a reduction of the penalties applicable to the company when it has implemented a programme of compliance. The Committee has dismissed this idea, for it considers that a reduction of the penalty cannot be granted based on the sole reason that the company has implemented a programme of compliance. This implementation should not allow for a diminution of the liability of a company which has implemented a deficient programme of compliance. The Committee moreover recommends that such a reduction depend on the company's notifying the authorities and on the end of the offence or the identification of its authors.⁵⁴

The third possible effect is a procedural one. It would consist in defining a specific mode of prosecution when the company has implemented a programme of compliance. The procedure of prior admission of guilt would be used as soon as the company has admitted the facts. Resorting to that procedure would then be imperative. The mode of intervention of the SCPC would be as described above. The SCPC would issue a recommendation on the criminal liability of the company and would propose penalties in the case it considers that that criminal liability is engaged. Those recommendations would only be imperative when the company has revealed the bribe. The prosecutor could choose not to follow that advice in the reverse case. He would however have to justify his decision not to follow the recommendations of the SCPC. In any case, the ruling judge would not be compelled to accept the penalties proposed to him.

The Committee recommends that the company which has implemented the programme of compliance be prosecuted only through a procedure of prior admission of guilt if it admits the facts. That procedure of prior admission of guilt would trigger the intervention of the SCPC whose role would be to formulate recommendations on the criminal liability of the company, and, if need be, on the penalties that should be applied.

(54) See above.