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REPORT

FOR A EUROPEAN LAW OF COMPLIANCE

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le club des juristes

AD HOC COMMISSION

FOR A EUROPEAN LAW OF COMPLIANCE

CLUB DES JURISTES REPORT

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PREFACE

The Law of 9 December 2016 on transparency, anti-corruption and economic modernisation, known as the Sapin 2 Law, has endowed our country with a body of rules and institutions aimed at ensuring integrity in public life which is probably one of the most comprehensive and robust in existence both in Europe and in the world. This is indeed how it has been described by Transparency International, the leading NGO dedicated to the promotion of transparency and the fight against corruption.

The report entitled 'For a European law of compliance' by the Committee of the Club des Juristes, chaired by Bernard Cazeneuve and led by Antoine Gaudemet, highlights – rightly, in my view – that now is not the time, only four years after the Law was voted in, to put the text back on the drawing board, i.e. to legislate again or to modify the institutional arrangements. It wisely recommends letting it mature in order to give stakeholders, law officers, public decision-makers and businesses time to take ownership of it and adapt their practices. At most, it suggests in its first part (Recommendations 1 to 13) some marginal amendments aimed in particular at clarifying the duties and modes of operation of the French Anti-Corruption Agency, at transposing into national law the recent European directive on whistleblowers, and at issuing an anti-corruption compliance framework tailored to local authorities. Two other recommendations, however, deserve to be implemented without delay. The first, which does not require changes to the law, would consist of enhancing the position and role of the compliance director in larger enterprises by attaching the function to both the chief executive officer and the board of directors, through its governance and/or ethics committee. The second, which is greater in scope since it concerns what I consider to be the major reform of the Sapin 2 Law in the field of judicial proceedings, would be to extend the scope of the deferred prosecution agreement (convention judiciaire d'intérêt public) to cover economic offences other than corruption, in particular environmental damage and consumer law. For my part, I believe that a further step along the path of transactional justice could be taken by extending such agreements to individuals, as many democratic countries already do, with of course all the guarantees of the rule of law (transparency of procedure, respect for the rights of the defence and victims, approval of the agreement by an independent law officer). Thus a dynamic would be set in motion that

would profoundly alter the behaviour of stakeholders and contribute to increasing the speed and effectiveness of investigations and sanctions in these areas.

But it is above all the second part of the report, entitled *'Building a European model of compliance in the fight against corruption'*, which opens up a truly historical perspective. This would involve making the European Union (and its Member States) a fully sovereign, consistent and exemplary stakeholder in respect of the integrity of state action and democratic life. From the legal and geostrategic points of view, the issue is of paramount importance since it would mean removing a factor of distortion of competition and conflicts of jurisdiction between Member States, whilst also restoring an equal footing with the United States, which has managed to impose the primacy of its legislation (the Foreign Corrupt Practices Act) and its prosecuting and law enforcement authority (Department of Justice) on its OECD partners and businesses around the world. To achieve this, the report of the Club des Juristes recommends the adoption by the European Union of an 'anti-corruption package' which essentially corresponds to the French scheme: the integration of OECD anti-corruption principles and recommendations into the law of each State, obligations of prevention and detection for all larger enterprises and the criminalisation of private sector corruption committed abroad. Regaining sovereignty in this area by Europe would also include the introduction of anti-corruption clauses in European sectoral regulations (such as banking and investment services), as well as in agreements negotiated with third countries.

This European anti-corruption package could be rapidly adopted by means of directives and constitute an additional pillar of the ambitious Recovery Plan endorsed by the European Council in July 2020.

A tall order, as General de Gaulle would have said, but a tremendous step forward for Europe!

Daniel Lebègue,
former Director of the Treasury, Honorary President
of Transparency International France

STATEMENT OF CONCLUSIONS OF THE COMMITTEE

PART ONE: COMPLETING THE FRENCH MODEL OF COMPLIANCE IN THE FIGHT AGAINST CORRUPTION

I. Improving the French model of compliance in the fight against corruption

A. CHANGING THE STATUS OF THE FRENCH ANTI-CORRUPTION AGENCY AND CLARIFYING THE SCOPE OF ITS GUIDELINES

The Committee took note of the status of a government agency with national authority conferred by Law No. 2016-1691 of 9 December 2016 on transparency, anti-corruption and economic modernisation, known as the Sapin 2 Law, on the French Anti-Corruption Agency (AFA) and noted the disadvantages associated with this status:

- lack of budgetary and operational autonomy;
- concentration within a single department of work involving advice, supervision and sanctions likely to provoke the mistrust of regulated entities;
- poor comprehensibility abroad.

On the basis of this observation, **it recommends that a merger of the AFA and the High Authority for Transparency in Public Life (HATVP) be considered in the long term (Recommendation no. 1)**.

Such a merger would have several advantages, in particular:

- enabling the optimisation of public resources allocated to the fight against corruption and transparency in public life within a context of control over public expenditure and a limitation of the number of independent administrative authorities;
- enabling the authority resulting from the merger, having the status of an independent administrative authority, to manage the recruitment of its staff assigned to advising and supervising businesses subject to the implementation of a compliance programme more flexibly than the AFA can currently do.

Moreover, it would not be without precedent, since the Public Service Transformation Law No. 2019-828 of 6 August 2019 had already merged the Public Service Ethics Commission and the HATVP, on the grounds that the two authorities had *'spheres of competence, working and operational methods that are close in many ways'*[1].

In the immediate future, however, the Committee considered that such a merger might weaken the AFA and the HATVP, which had only recently been established, and was unlikely to be decided on by the current legislature.

It therefore sought to explore ways of improving cooperation between these two authorities and, more broadly, between the various national authorities involved in the fight against corruption and the promotion of transparency in public life.

In addition, the Committee heard representatives of businesses subject to the AFA's supervision, which indicated that they were working on good terms with the Agency under its current status and were seeking above all a clarification of the Guidelines issued by the Agency.

In this respect, the Committee considered that the regulatory architecture established by the Sapin 2 Law – a statutory obligation of compliance and periodically updated guidelines – should be maintained against a background of international competition with certain foreign laws (especially in the United States and the United Kingdom) in the fight against international corruption.

It further found that the scope of the guidelines issued by the regulatory authorities was a matter already known to French law, in particular to the administrative court, and that the AFA's Sanctions Committee had begun to address this matter, in particular with regard to the Agency's Guidelines.

Conscious, however, of the uncertainties still surrounding the scope of the AFA's Guidelines and the reputational risk run by businesses in the fight against corruption, the Committee expressed the wish for these uncertainties to be resolved quickly, in the interests of legal certainty.

In this respect, the Committee recommends that the legislature, on the one hand, should expressly confirm the jurisdiction of the Conseil d'Etat to hear first and final appeals as of right against decisions of the AFA's Sanctions Committee and, on the other hand, should conclude the examination of such appeals within a shortened timeframe (Recommendation no. 2).

1. HATVP, 'The President of the High Authority welcomes the merger with the Public Service Ethics Commission', press release issued on 10 May 2019.

B. TRANSPOSING THE EUROPEAN DIRECTIVE ON WHISTLEBLOWERS WITHIN A SHORT TIMEFRAME

Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law provides that whistleblowers will have the opportunity to apply directly to the judicial or administrative authorities and, if they do not take action, to disclose the information they have to the public.

From the point of view of French law, this Directive has the merit of deciding the debate on the desirability of the internal *'first level'* in the context of whistleblowing.

It must be transposed by the Member States by 17 December 2021 at the latest and will therefore require the French legislature to amend the system resulting from the Sapin 2 Law.

In this respect, **the Committee recommends that the French legislature transpose Directive (EU) 2019/1937 of 23 October 2019 as soon as possible, in order to ensure legal certainty for both whistleblowers and businesses, and amend without delay the system resulting from the Sapin 2 Law (Recommendation no. 3).**

It also recommends that, on this occasion, a debate be launched on the application of the Directive in the context of shareholder activism, in so far as it includes *'shareholders'* among those likely to report breaches of Union law (Recommendation no. 4).

C. IMPROVING THE COMPREHENSIBILITY OF THE DIRECTORY OF LOBBYISTS

In the course of its work, and having taken note of the conclusions of the Evaluation Report adopted by the Group of States against Corruption (GRECO) in December 2019, the Committee found that the concepts of public decision-making, public decision-maker and lobbying had been conceived in too broad terms by the Sapin 2 Law and Decree No. 2017-867 of 9 May 2017 concerning the digital directory of lobbyists taken for the enforcement of the Law.

It considered that this situation was likely to impair the clarity of the reporting of lobbyists and the comprehensibility for citizens of the digital directory.

In this respect, the Committee joined in the criticisms by the HATVP itself of the existing legislative and regulatory system.

In the interests of legal certainty for lobbyists and transparency for citizens, **it recommends that a new implementing decree define the scope of the digital directory of lobbyists with regard to the concepts**

of public decision-maker and public decision-making.

This decree should, on the one hand, refocus the concept of public decision-maker on the members of the executive and Members of Parliament and, on the other hand, focus the concept of public decision-making on laws and regulations (Recommendation no. 5).

It would thus enable the digital directory of lobbyists better to account for their impact on the development of laws and regulation.

In addition, the Committee recommends that the directory specify the public decision in respect of which, as well as the identity of the public decision-maker to whom, the lobbying activity has been addressed, which is not currently the case (Recommendation no. 6).

Finally, it would like the Government to respond to the call made to it by Article 18-5, 9° of Law No. 2013-907 of 11 October 2013 on transparency in public life, in its formulation resulting from the Sapin 2 Law, and adopt a code of ethics for lobbyists by decree in the Conseil d'Etat (Recommendation no. 7).

II. Strengthening the French model of compliance in the fight against corruption

A. SUPPORTING THE INCREASED IMPORTANCE OF ANTI-CORRUPTION COMPLIANCE OFFICERS IN BUSINESS

The Committee discussed the desirability of providing anti-corruption compliance officers with a regulatory framework, as was done for data protection officers.

It concluded that such a framework would not be appropriate, but that flexibility should be given to businesses, particularly as regards the positioning of the anti-corruption compliance officer within them.

In the Committee's view, the *Practical Guide to the Anti-Corruption Compliance Function in Business*, published by the AFA in January 2019 and updated in December of the same year, whilst not compulsory, nonetheless constitutes a satisfactory framework as regards the designation, positioning, profile and liability of the anti-corruption compliance officer.

Therefore, the Committee only recommends that the AFA consider in future the possibility of:

- substituting the designation 'compliance director' for 'compliance officer', in order to enhance the value of the anti-corruption compliance function within businesses and, in all likelihood, improve its positioning within them;

- promoting as a matter of good practice the dual attachment of the anti-corruption compliance officer to the chief executive and to the chairman of the ethics committee of the board of directors, in businesses where such a committee exists (Recommendation no. 8).

B. CREATING AN ANTI-CORRUPTION COMPLIANCE FRAMEWORK TAILORED TO LOCAL AUTHORITIES

In the course of its work, the Committee approved the launch by the Minister of Justice and the Minister for Government Action and Public Accounts in January 2020 of the *'first multi-annual national anti-corruption plan'*, developed around four priorities:

- better knowledge and detection of corruption;
- training and awareness-raising of all public officials in the fight against breaches of probity;
- strengthening prevention systems within public authorities and improving the effectiveness of criminal sanctions;
- improving international cooperation in the fight against corruption.

In this respect, the Committee regretted that the Sapin 2 Law, which focused mainly on the fight against international corruption, did not devise a specific anti-corruption compliance framework tailored to public stakeholders, in particular local authorities.

In the absence of such a framework, the AFA currently supervises local authorities on the basis of Article 17 of the Sapin 2 Law, while of course tailoring its supervision to their specific circumstances.

However, the Committee considered that this article, designed especially for larger enterprises, was not suitable for local authorities.

The latter are already subject to a high level of supervision consisting, on the one hand, of the legal auditing of the *Préfecture* (the chief administrative authority for the region) and, on the other, of the accounting and financial supervision of the regional audit chambers.

In addition, certain obligations imposed by Article 17 of the Sapin 2 Law, including the obligation to evaluate third parties, conflict with other rules, in particular those arising from the law of public procurement, to which local authorities are also subject.

In the interests of clarification, **the Committee therefore recommends that the legislature create an anti-corruption compliance framework, tailored to local authorities, which would take into account the specific**

circumstances of their status and size (Recommendation no. 9).

Such a development would be consistent, on the one hand, with the obligation of the AFA under Article 3, 2° of the Sapin 2 Law to tailor its Guidelines *'to the size of the entities concerned and to the nature of the risks identified'*, and, on the other hand, with the concern expressed by the Agency itself at the end of its *Investigation into the prevention of corruption in local public service*, published in November 2018, in the following terms: *'The AFA emphasises that [the] anti-corruption tools must be tailored to the specific situation of each stakeholder, taking into account its means and size. This implies that small authorities may not remain inactive. At the very least, they may focus their efforts on preventing breaches of probity in the key processes of: recruitment, public purchasing, budgetary and accounting management, grant allocation or procedures leading to a consent or award decision'.* [2]

In the Committee's view, failure by local authorities to comply with this specific anti-corruption compliance framework should not be subject to specific sanctions, as is the case at present under Article 17 of the Sapin 2 Law.

C. REFINING THE SYSTEM OF THE DEFERRED PROSECUTION AGREEMENT *(CONVENTION JUDICIAIRE D'INTÉRÊT PUBLIC)*

In the preamble to its work, the Committee wished to reaffirm that the objective of a *convention judiciaire d'intérêt public* (CJIP) is not to exempt businesses from criminal liability but, on the contrary, to accelerate their punishment and make the latter more certain than it would be at the end of a criminal trial, in the interests of efficacy.

But it was aware that there was a different feeling in public opinion, which saw in CJIPs a cause of impunity for businesses.

Following a detailed study, the Committee concluded that the CJIP, although foreign to the French legal tradition, had been rapidly adopted by the prosecution, in particular the financial public prosecutor (PRF) and the Public Prosecutor of Nanterre, and that its current system, helpfully supplemented by the Circular of the Directorate of Criminal Matters and Pardons of 31 January 2018, the Despatch dated 21 March 2019 of the same Directorate and the Guidelines published jointly by the PRF and the AFA on 26 June 2019, was generally satisfactory.

It approved, in particular, the CJIP entered into between the PRF and Société Générale on 24 May 2018, and between the PRF and Airbus SE on 29 January 2020, as the first such agreements to be entered into on the basis of acts likely to be classified as corruption of a foreign

2. Investigation into the Prevention of Corruption in Local Public Service, French Anti-Corruption Agency, November 2018, p. 38.

public official, following investigations conducted in parallel with foreign prosecution authorities and concurrently with criminal settlement agreements with the same authorities.

The Committee therefore chose to focus its reflections on the desirability of extending the scope of application of the CJIP to individuals, as well as additional offences.

As a result of these reflections, it concluded that the CJIP was an instrument of recent creation, a significant break with the French legal tradition, which needed to be consolidated and whose premature extension to individuals might not be understood by public opinion.

The Committee therefore recommends not to extend the scope of the CJIP immediately to individuals, but to consider this possibility in the long term (Recommendation no. 10).

It considers, however, that the scope of the CJIP should be extended to cover most offences relating to the economic and financial crimes of businesses, as well as offences affecting the environment, as already proposed in the draft law on the European Public Prosecutor's Office and Specialised Criminal Justice adopted by the Senate at its first reading on 3 March 2020 (Recommendation no. 11) [3].

In this connection, the Committee notes that the administrative settlement procedure before the Financial Markets Authority (AMF) has developed in a comparable way: first introduced by Law no 2010-1249 of 22 October 2010 on banking and financial regulation with a scope limited to breaches of the professional rules applying to providers of investment services, this settlement procedure in the field of law enforcement was subsequently extended by Law no. 2016-819 of 21 June 2016 reforming the system of law enforcement for market abuse to cover breaches of obligations to prevent such abuses and to breaches of financial reporting.

Finally, **the Committee does not recommend the institution of exclusive jurisdiction for the PRF to enter into a CJIP, for fear of marginalising provincial public prosecutors and giving credence to the ideas that the CJIP is an instrument of justice reserved for large businesses and that corruption is a mainly 'Parisian' subject (Recommendation no. 12).**

It considers that the risk of possible discrepancies arising between the PRF and other public prosecutors concerning CJIPs is already partly remedied by the Circular of 31 January 2018 and the Despatch of 21 March 2019 of the Directorate of Criminal Matters and Pardons, addressed to all public prosecutors.

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3. https://www.leclubdesjuristes.com/les-publications/vers-des-conventions-judiciaires-dinteret-public-vertes.

The Committee recommends, however, that these texts be reviewed by the Directorate of Criminal Matters and Pardons so as to incorporate the Guidelines for the implementation of a CJIP published jointly by the PRF and the AFA on 26 June 2019, in order to make them apply to all public prosecutors (Recommendation no. 13).

PART TWO:
BUILDING A EUROPEAN MODEL OF COMPLIANCE IN THE FIGHT AGAINST CORRUPTION

I. Completing the European acquis in the fight against corruption

Having examined all the legal instruments that make up European Union law in the fight against corruption and having noted their shortcomings, the Committee approved the choice of the new President of the European Commission, Ursula von der Leyen, to put respect for the rule of law and the defence of European values among her priorities, as well as her desire to promote the European Union as a 'guardian of multilateralism' [4].

It considered that, in pursuit of these objectives, the fight against corruption should occupy a central place on the agenda of the new European Commission and regretted that it was neither one of the priorities displayed by the President of the European Commission, nor in the mission letters sent by her to the new European Commissioners.

The Committee also noted the paradox of making the fight against corruption the first of the requirements imposed on candidate States for accession to the European Union in the Communication of the European Commission of 6 February 2020 on the enlargement of the Union, without giving equivalent importance to this theme for the Member States themselves.

It considered that the time had come for the European Union to develop a coherent and ambitious policy on combating corruption.

In the Committee's view, there are several reasons which combine to make this policy necessary:

- The fight against corruption is a condition of citizens' confidence in the proper functioning of institutions and the market: it is thus a fundamental component of the rule of law and democracy, threatened by the rise of populism;

- the disparities between Member States in the area of law enforcement and, more importantly, the prevention of corruption are distortions of

4. European Commission, 'The von der Leyen Commission: towards a more ambitious Union', press release published on 10 September 2019.

competition within the European single market. These disparities are significant: Transparency International's Corruption Perceptions Index, which varies among Member States, reflects this; only some Member States currently impose legal obligations on larger enterprises relating to the prevention and detection of corruption;

- Against this background, the increasingly international dimension of corruption is the cause of conflicts of jurisdiction: courts in several Member States potentially have jurisdiction to hear the same cases; this constitutes further damage to the functioning of the European single market and to the legal certainty of European businesses;

- this situation has already had consequences: the lack of a robust EU anti-corruption policy to date has helped to promote the extraterritorial enforcement of foreign legislation with regard to European businesses, in particular the US Foreign Corrupt Practices Act; over the last decade, the largest penalties imposed on the basis of this law have generally been imposed on European businesses;

- in comparison, the standards adopted by the European Union in the fight against corruption, if not non-existent, are without real influence in the world, unlike European standards of personal data protection and competition, which are among the best international standards in their respective fields.

For all these reasons, the Committee recommends that the European Union adopt without delay an anti-corruption policy with the following objectives:

- to ensure respect for the rule of law and democracy;

- to establish a level playing field between European businesses and to prevent conflicts of jurisdiction at a European level;

- to protect the interests of European businesses around the world, by rebalancing the EU's relationship with the United States of America and other world powers;

- to promote European anti-corruption standards and practices worldwide (Recommendation no. 14).

II. Harmonising European law in the fight against corruption

In order to achieve these objectives, the Committee recommends that the following be decided, in parallel with one another:

- the adoption of an EU law *"anti-corruption package"*, composed of three new texts;

- the inclusion of anti-corruption clauses in EU secondary legislation, present and future.

A. ADOPTING AN EU LAW ANTI-CORRUPTION PACKAGE

The EU law anti-corruption package should consist of three texts, adopted in the form of directives.

A first directive should require Member States to comply with the principles and recommendations of the Organisation for Economic Co-operation and Development (OECD) in the fight against corruption, on the basis in particular of its Convention on Combating Bribery of Foreign Public officials in International Business Transactions signed in 1997 (Recommendation no. 15).

The directive would be a first step in harmonising the laws of Member States and would immediately enhance the credibility of the EU in the fight against corruption, while demonstrating its confidence in the functioning of multilateral institutions, in this case the OECD.

It could be adopted on the basis of Article 83.1 of the Treaty on the Functioning of the European Union (TFEU) without foreseeable blocking, since most Member States have already ratified the 1997 OECD Convention.

This first directive should be accompanied by a second measure consisting of repealing Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, then incorporating the content of the Framework Decision into a directive, also adopted on the basis of Article 83.1 TFEU, at the same time as updating it.

In particular, the new directive adopted should require Member States to criminalise acts of active or passive corruption in the private sector committed outside their territory but having a link with it, as permitted, for example, by Article 435-6-2 of the French Criminal Code since the entry into force of the Sapin 2 Law (Recommendation no. 16).

This amendment would enable the courts of all Member States to be brought onto an equal footing with the courts of third States that are most active in the fight against international corruption, particularly in the United States and the United Kingdom.

In doing so, it would help to rebalance the European Union's relationship with the United States and better protect European businesses.

Finally, a third directive should require Member States to impose obligations on larger enterprises to prevent and detect corruption, whilst leaving them free to choose the authority responsible for supervising compliance with such obligations and sanctioning any breach of them (Recommendation no. 17).

The content of this directive should be taken from the OECD acquis

in this area, in particular from the OECD Council Recommendation of 26 November 2019, as well as a review of the laws of Member States already imposing obligations on their businesses to prevent and detect corruption.

This directive would help to establish a European level playing field in the fight against corruption, conducive to the good functioning of the European single market.

As such, it could be adopted on the basis of Article 114.1 TFEU.

B. INTRODUCING ANTI-CORRUPTION CLAUSES IN EU SECONDARY LEGISLATION

In parallel with the adoption of an EU law anti-corruption package, the Committee recommends introducing anti-corruption clauses in EU secondary legislation, in particular sectoral directives and trade agreements entered into by the EU.

Such clauses already exist, as regards access to public procurement, in the Directives on public procurement since these were revised in 2014 [5].

Similar clauses should be introduced in sectoral EU secondary legislation which would make the exercise of certain regulated activities, such as banking, investment services and insurance, subject to authorisation (Recommendation no. 18).

These clauses, by making economic operators' access to the European single market conditional on requirements of probity, would help to restore a balanced relationship between the EU and the United States of America, as well as other world powers, in the fight against corruption.

They could be introduced into the relevant EU legislation on the basis of Article 114.1 TFEU.

Association agreements concluded between the EU and third States usually contain a clause, sometimes called the *'fundamental rights and rule of law clause'*, which allows third States failing to comply with certain commitments relating to fundamental rights to be deprived of their benefits under them.

A conditionality clause on combating corruption should also be systematically required by the EU in next-generation economic partnership agreements entered into by the EU with third States (Recommendation no. 19).

5. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on the award of public contracts and repealing Directive 2004/18/EC.

Like the *'fundamental rights and the rule of law'* clause which has become customary in association agreements entered into by the EU, this other clause would allow third States failing to comply with certain commitments relating to the fight against corruption to be deprived of their benefits under them.

It would thus contribute to the international credibility of the EU, its anti-corruption standards and practices.

III. Improving cooperation between Member States in the fight against corruption

A. IN THE LONG TERM, EXTENDING THE JURISDICTION OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

The Committee recommends that the possibility of extending the substantive jurisdiction of the European Public Prosecutor's Office to cover all acts of international corruption be considered in the long term, irrespective of whether or not they affect the European Union's financial interests (Recommendation no. 20).

In the immediate future, however, the Committee is conscious of the major obstacles to such an extension:

- on a practical level, the European Public Prosecutor's Office, which was established in the context of enhanced cooperation, has not yet been set up and will therefore only gradually be able to gain credibility, as its activity develops;

- on a political level, such an extension would concern criminal legal matters, which, despite the establishment of the European area of freedom, security and justice since the Treaty of Amsterdam in 1997, remains an important element of national sovereignty accorded to the Member States and, as a result, would risk giving rise to blocking reactions;

- finally, on a legal level, extending the jurisdiction of the European Public Prosecutor's Office to cover all acts of international corruption could not be achieved by means of a revision of Regulation (EU) 2017/1939 within the context of further enhanced cooperation, but should, in accordance with Article 86.4 of the TFEU, be adopted unanimously by the members of the European Council, after obtaining the consent of the European Parliament and after consulting the European Commission.

B. IN THE IMMEDIATE FUTURE, STRENGTHENING COOPERATION BETWEEN MEMBER STATES

In view of the obstacles to an immediate extension of the jurisidiction of the European Public Prosecutor's Office, the Committee initially

recommends strengthening cooperation between Member States in the fight against international corruption.

In this respect, it recalls the possibilities for cooperation in law enforcement matters between Member States within the European area of freedom, security and justice, in particular the existence of Eurojust and Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

Despite the existence of these instruments, the Committee nevertheless found that the possibilities for cooperation between Member States within the European area of freedom, security and justice were underexploited and largely remained *'virtualities'* in the fight against international corruption.

In particular, it observed that Eurojust's activity remained focused on certain forms of organised crime – mainly fraud, money laundering and human trafficking – more than corruption, even though the latter has been designated by the Council of the EU as one of Eurojust's priorities.

On the basis of these findings, the Committee recommends strengthening cooperation between Member States in the fight against international corruption within Eurojust, which is the natural body for resolving conflicts of jurisdiction in law enforcement matters given the current state of EU law and pending the increased importance of the European Public Prosecutor's Office.

It considers that the fight against corruption should be affirmed as one of Eurojust's priority objectives, and that the human and financial means necessary for the pursuit of these objectives should be allocated by the Member States to Eurojust (Recommendation no. 21).

Finally, the Committee recalls that Council Framework Decision 2009/948/JHA of 30 November 2009 has now come within the area of competence of the European Commission and the Court of Justice of the European Union (CJEU) as a result of the entry into force of the Treaty of Lisbon.

Consequently, the fulfilment by the Member States of the obligations *'to make contact'* and *'to enter into direct consultations'*, which are incumbent on them in the event of parallel criminal proceedings begun on the same grounds, is now under the control of the European Commission and the CJEU as a remedy for the failure to fulfil obligations.

In practice, Member States could therefore be held liable by the CJEU for not informing or consulting one another, in order to avoid a conflict of jurisdiction in the presence of acts of corruption or any other criminally qualifying acts.

PART I

COMPLETING THE FRENCH MODEL OF COMPLIANCE IN THE FIGHT AGAINST CORRUPTION

CHAPTER I

IMPROVING THE FRENCH MODEL OF COMPLIANCE IN THE FIGHT AGAINST CORRUPTION

A. CHANGING THE STATUS OF THE FRENCH ANTI-CORRUPTION AGENCY AND CLARIFYING THE SCOPE OF ITS GUIDELINES

1. The status of the French Anti-Corruption Agency

■ **1.** In the course of its work, the Committee considered the need to change the status of the French Anti-Corruption Agency (*l'Agence française anticorruption - AFA*), in order to assist it in carrying out its tasks and to clarify the scope of its guidelines.

■ **2.** The Sapin 2 Law created the AFA, in place of the Central Corruption Prevention Service (*le Service central de prévention de la corruption - SCPC*) which had been established by the Sapin 1 Law of 29 January 1993 [6], on which it conferred the status of a government agency with national authority:

'The French Anti-Corruption Agency is a government agency with national authority, reporting to the Minister of Justice and the Minister responsible for the Budget, whose mandate is to assist the relevant authorities and the people who are confronted with it in preventing and detecting corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism' (Article 1 of the Sapin 2 Law).

Placing the AFA under the joint authority of two ministers establishes that its nature is not that of an independent administrative authority.

Indeed, the Agency 'participates in administrative coordination, centralises and disseminates information to help prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism' (Article 3, 1° of the Sapin 2 Law).

■ **3.** However, the creation of the AFA was justified by the need to abide by France's commitment under the United Nations Convention against Corruption of 31 October 2003 to establish an independent body responsible for preventing corruption [7], and it was argued during the

6. Law No. 93-122 of 29 January 1993 on the prevention of corruption and on transparency in economic life and public procedures.

7. Article 6 de la convention des Nations unies contre la corruption du 31 octobre 2003, dite convention de Merida.

parliamentary debates that the AFA should be given the independence required by the Convention.

■ **4.** This independence is guaranteed, on the one hand, by the status of the Director of the AFA, who is a judge outside the hierarchy of the judiciary, appointed by decree of the President of France for a non-renewable term of six years – longer than the mandate of the appointing authority – and who is irremovable, since 'his duties may only be terminated at his request or in the case of incapacity or serious deficiency' (Article 2 of the Sapin 2 Law).

It is guaranteed, on the other hand, by the prohibition on the Director of the AFA from receiving or seeking an instruction 'from any administrative or governmental authority in carrying out the work' of supervision entrusted to the Agency (Article 2 of the Sapin 2 Law).

In addition, AFA officers and, more generally, any person who contributes to the performance of the Agency's supervisory work are expressly 'bound by professional secrecy as regards the facts, documents or information of which they have knowledge owing to their duties'. This, again, constitutes a guarantee of independence (Article 4, paragraph 3 of the Sapin 2 Law).

■ **5.** Furthermore, while the AFA has power to impose sanctions on businesses and their managers convicted of failure to implement a compliance programme (Article 17, IV and V of the Sapin 2 Law), it also includes within its structure, for the exercise of this power, 'a Sanctions Committee responsible for imposing sanctions', independent of the Director of the Agency.

This Committee comprises six members, appointed by decree for a term of five years and bound by professional secrecy (Article 2 of the Sapin 2 Law).

The Director of the AFA 'may not be a member of the Sanctions Committee or attend its meetings' (Article 2 of the Sapin 2 Law), where the purpose of the latter is to exercise the decision-making powers conferred on the Committee by law, as stated by the Committee in the first decision it made public on 4 July 2019[8].

The presence of the Director of the Agency at a hearing

'15. Under Article 2 of the Law of 9 December 2016, the Director of the Agency 'may not be a member of the Sanctions Committee or attend its meetings'. It follows from these provisions, informed by the work that preceded the adoption of the Law, that the Director of the Agency may not attend the meetings at which the Sanctions Committee exercises

8. AFA, Sanctions Committee, Decision No. 19-01, 4 July 2019, S. Ltd and Ms. C.

the decision-making powers conferred on it, either its deliberations or, in particular, those meetings by which it adopts or amends its rules of procedure. On the other hand, the provisions are not intended and could not, in light of the provisions of the Constitution and of the European Convention for the Protection of Human Rights and Fundamental Freedoms on the right to a fair trial, have the effect of prohibiting the Director from attending or being represented as a party at hearings held by the Sanctions Committee (in accordance with the provisions of Article 5 of the Decree of 14 March 2017) to rule on the cases before it. During the public hearing the Committee heard on the one hand both the Director of the Agency and some of his colleagues and, on the other hand, Ms. C. personally, three of her close associates from S. Ltd and three lawyers representing the company, a legal entity, and its defendant manager. The Committee deliberated in the absence of anyone other than its five members, whose names appear above. The presence of the Director of the Agency at the public hearing prejudiced neither the independence of the Sanctions Committee from all parties, nor its impartiality, nor the adversarial nature of the proceedings and the rights of the defence.'

■ **6.** Nonetheless, while the independence of the AFA, as well as the independence within it of the Sanctions Committee, are satisfactorily guaranteed, the status of a government agency with national authority conferred by law on the Agency has certain drawbacks.

■ **7.** Three drawbacks, in particular, were highlighted during the work of the Committee.

■ **8.** First, the AFA, unlike an independent administrative authority, does not have budgetary and operational autonomy.

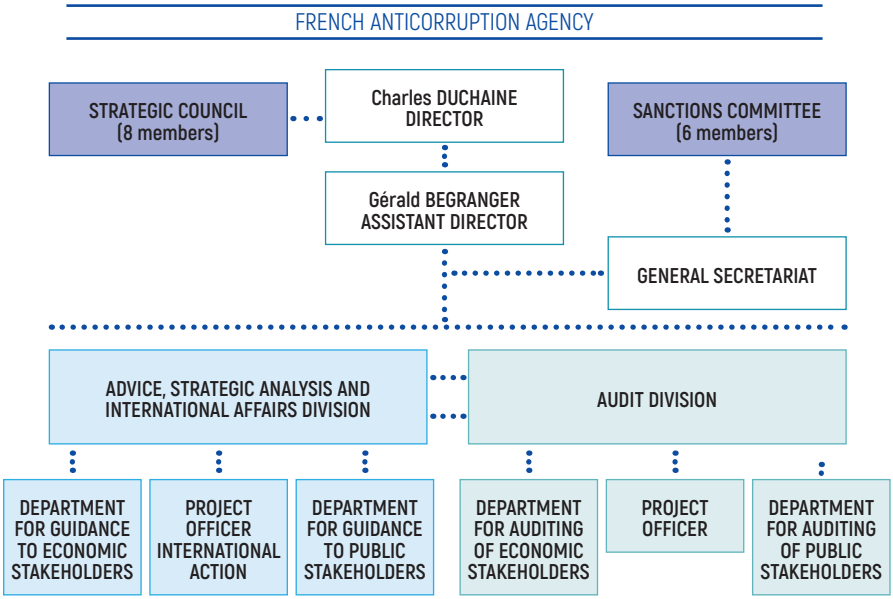
During his hearing, the Director of the Agency indicated that this situation had been without repercussions to date, in view of the support given to the AFA's work by successive Ministers of Justice and Ministers responsible for the Budget.

He added, however, that the Agency was thus obliged to recruit all its staff in accordance with the public service recruitment rules, under the authority of the Minister responsible for the Budget.

Some members of the Committee considered that the latter constraint was likely to limit the AFA's ability to recruit staff from the private sector for the purposes, in particular, of its work in advising and supervising businesses subject to the implementation of a compliance programme.

■ **9.** Secondly, it was observed that grouping together within a government agency of national authority tasks of advice, supervision and sanctions – even if such tasks were distinguished organisationally – was unusual and likely to lead to mistrust particularly on the part of businesses

subject to the implementation of a compliance programme under the supervision of the AFA.



■ **10.** Finally, the point was made that the status of a government agency with national authority reporting jointly to the Minister of Justice and the Minister responsible for the Budget was probably difficult to comprehend abroad, whereas one of the primary objectives of the Sapin 2 Law was to restore France's credibility in the fight against corruption, in order to bring the most active foreign authorities in this area, especially the US, to decline jurisdiction over French businesses.

At his hearing before the members of the Committee, the Director of the AFA agreed that the status of the Agency was not always understood by his international interlocutors, without repercussions in his opinion.

■ **11.** By contrast, the High Authority on Transparency in Public Life (*Haute Autorité de transparence de la vie publique (HATVP)*), whose principal task – promoting probity and exemplary conduct in public officials – is similar to that of the AFA, received the status of an independent administrative authority under the Law of 11 October 2013 on transparency in public life by which it was established (Article 19, I, of the Law of 11 October 2013).

For this reason it has budgetary and operational autonomy, within the limits of a budget and a cap on employment that are adopted each year in the Finance Law.

Budgets and human resources of the HATVP in 2019

The budget of the High Authority is set annually by the Finance Law.

For 2019, the High Authority has a budget of EUR 6,307,386 in payment appropriations (*crédits de paiement **(CP)***), of which EUR 4,268,189 is earmarked for staff expenditure and EUR 2,039,197 for operating expenditure.

The Finance Law also determines the maximum number of paid full-time equivalent jobs (*emplois équivalents temps plein travaillé (ETPT)*) for the High Authority each year.

For 2019, the initial Finance Law sets this ceiling at fifty-one ETPT. As at 1 January 2019, the High Authority had forty-seven staff members.

The HATVP Recruitment Policy

This is reflected in the search for a better match between tasks and skills. The profiles sought are varied and cover both the functions of supervisors, at the core of the High Authority's work, with expertise in ethics and asset management, and managerial or support functions (IT, etc.).

The recruitment of staff for the High Authority is advertised, in accordance with Article 61 of the Law of 11 January 1984, through publication on the Interministerial Public Employment Exchange (*bourse interministérielle de l'emploi public (BIEP)*), the High Authority's website and within the ministries.

The recruitment procedure is based on the principle that posts are occupied by public servants, pursuant to Article 3 of the Public Service Regulations. Applications from incumbent officials are considered as a priority. The recruitment of contractual agents takes place if there are not enough public service candidates or when there is a need to recruit more specific profiles, pursuant to Article 4 of the Law of 11 January 1984 on statutory provisions relating to the public service of the State and in accordance with the provisions laid down in the Law of 12 March 2012 on access to full employment and improvement of the employment conditions of contractual agents in public service, anti-discrimination and various provisions relating to public service.

■ **12.** In order to inform the Committee members of the reasons for this difference in status, the Minister of the Economy and the rapporteur of the Sapin 2 Bill in the National Assembly both indicated during their hearings that the status of a government agency with national authority had been established for the AFA in a general context of reducing the number of independent administrative authorities and, more broadly, controlling public expenditure.

■ **13.** Thus informed, the Committee members considered the desirability of granting the AFA the status of an independent administrative authority.

This could be achieved in two ways:

- either by merging the AFA with the HATVP, in that the authority resulting from the merger would retain the status of an independent administrative authority;
- or by giving the AFA the status of an independent administrative authority instead of a government agency with national authority.

■ **14.** 14. A merger of the AFA with the HATVP could be justified by the complementarity of the tasks given by law to the two authorities.

In general, the HATVP has received from the government the task of promoting probity and exemplary conduct in public officials (Articles 1 and 20, I, of the Law of 11 October 2013), while the AFA has been given the task of preventing and detecting breaches of probity (corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism) (Article 1 of the Sapin 2 Law).

In this respect, it is obvious that acts amounting to breaches of probity most often involve public officials, with the aim of influencing public decision-making.

Such acts are likely, therefore, to be translated into the wealth circumstances of public officials who are under the authority of the HATVP.

Moreover, it seems that the HATVP and the AFA are not always clearly distinguished in public opinion.

The complementarity of the tasks of the HATVP and the AFA in fact helped bring about the signature of a Memorandum of Cooperation on 26 November 2019, promoting collaboration and coordination between the two bodies, particularly in their tasks of preventing and detecting the unlawful taking of interest.

The Memorandum also specifies the means by which the President of the High Authority may request the AFA to conduct an audit.[9]

■ **15.** Above and beyond combining their complementary tasks, merging the AFA into the HATVP could offer other benefits, including:

- enabling the public resources allocated to the fight against corruption and transparency in public life to be optimised, within a general context of controlling public expenditure and limiting the number of independent administrative authorities;

9. French Anti-Corruption Agency, Annual Activity Report for the Year 2019, p. 28.

- enabling the authority resulting from the merger, which would have the status of an independent administrative authority, to manage the recruitment of its staff assigned to advising and supervising businesses subject to the implementation of a compliance programme more flexibly than the AFA can currently do.

■ **16.** Such a merger would, moreover, not be without precedent.

Under the Law of 6 August 2019 on the transformation of public service, the legislature decided to merge the Public Service Ethics Committee and the HATVP, particularly on the grounds that the two authorities had 'spheres of competence, working and operational methods that are close in many ways [10]'.

Since 1 February 2020, the HATVP has therefore been responsible for assessing 'compliance with the ethical principles inherent in the exercise of a public service', as the Public Service Ethics Committee had until then been doing.

■ **17.** At the end of their discussions, the Committee members concluded that a merger of the AFA and the HATVP should be encouraged in the long term.

■ **18.** In the immediate future, however, they felt that such a rapprochement might weaken both the authorities, which had only recently been established, and would be unlikely to be decided on by the current legislature.

The Committee members also noted that the AFA's status as a government agency with national authority, although a possible source of constraints for the AFA, did not appear problematic from the point of view of the entities under the Agency's supervision.

In this respect, representatives of businesses under the AFA's supervision, in particular, indicated during their hearings that they had a 'good working relationship' with the Agency under its current status, and were mainly seeking clarification of the scope of the Guidelines it had issued.

Therefore, the Committee members chose to concentrate their thoughts and proposals on these Guidelines and, more broadly, the AFA's regulatory output.

2. The scope of the French Anti-Corruption Agency's Guidelines

■ **19.** Under Article 3, 2° of the Sapin 2 Law, the AFA 'shall draft guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of

10. HATVP, 'The President of the High Authority welcomes the merger with the Public Service Ethics Committee', press release issued on 10 May 2019.

interest, misappropriation of public funds and favouritism.'

Such guidelines shall be adapted to the size of the entities concerned and the nature of the risks identified. They shall be regularly updated to take account of developments in practice and shall be the subject of a notice published in the *Official Journal*.'

■ **20.** Such guidelines were, in fact, drawn up by the Agency following a public consultation procedure and then published by means of a notice in the *Official Journal* of 22 December 2017 [11].

They are described in the following terms:

'Inspired by the best international standards, the Agency's Guidelines complete the arrangements established by the abovementioned Law of 9 December 2016 and are France's official anti-corruption policy framework. These Guidelines shall apply throughout the territory of the Republic. They contribute to the implementation of France's international commitments in the fight against corruption[12].'

In accordance with the Sapin 2 Law, and as their name suggests, these Guidelines are, however, non-binding.

In this respect they state, under the heading 'Legal Force of the Agency's Guidelines':

'Under the terms of the Law of 9 December 2016, the Agency's Guidelines shall be published in the *Official Journal*, but they are not legally binding.

The Agency's Guidelines provide the language for organisations to define their anti-corruption compliance programmes as part of their risk management strategy, including management of reputation risk and business risk[13].'

■ **21.** In its first decisions published on 4 July 2019 and 18 February 2020, the AFA's Sanctions Committee indeed confirmed that its Guidelines were not compulsory in nature, stating in turn that they 'only constitute a framework, the use of which is by no means compulsory[14].'

■ **22.** Yet the true scope of the AFA's Guidelines gave rise to considerable debate in the course of the Committee's work.

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11. AFA, 'Guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism', version 12-2017, *Official Journal* of the French Republic (JORF) of 22 No. 0298 of 22 December 2017, Text No. 176.
12. *Ibid.*, p. 3.
13. *Ibid.*, p. 4.
14. AFA, Commission des sanctions, décision n° 19-01, 4 juillet 2019, Société S SAS et Mme C., §§ 18 et 26 ; AFA, Commission des sanctions, décision n° 19-02, 18 février 2020, Société I et M. C K.

■ **23.** The majority of the business representatives who were heard indicated that they felt the AFA conducted its supervision of businesses having particular regard to its Guidelines, thereby conferring on them a binding nature which the law, in principle, did not recognise.

They said that they felt this ambiguity particularly in terms of:

- risk mapping, where they could not tell whether it had to be based on the methodology recommended by the Agency's Guidelines or whether it could depart from such methodology in order to match specific features of the business;
- the methods for implementing accounting control procedures designed to prevent the risk of corruption.

■ **24.** The Director of the AFA replied that, although the Agency's Guidelines were not compulsory in nature, they nonetheless necessarily added to the letter of the law and, from this point of view, provided a degree of legal certainty to businesses seeking support in the practical implementation of the compliance programme imposed on them by Article 17 of the Sapin 2 Law.

He added that, in his opinion, notifying a supervised business of a claim based on lack of knowledge of an AFA guideline on, for example, risk mapping would not be acceptable.

■ **25.** At the end of the discussions, the Committee members first wished to re-emphasise that the regulatory architecture established by the Sapin 2 Law – consisting of statutory obligations and periodically updated guidelines – was set against a background of international competition with certain foreign laws (especially in the United States and the United Kingdom) in the fight against international corruption.

Such other laws were generally based on the same regulatory architecture:

- under US law, the Foreign Corrupt Practices Act (FCPA) of 1977, which does not formally require businesses to implement a compliance programme, is supplemented by the Federal Sentencing Guidelines [15] and the FCPA Guide issued jointly by the Department of Justice and the Securities and Exchange Commission [16];

- under English law, the United Kingdom Bribery Act (UKBA) of 2010, which established the existence of 'adequate procedures' as grounds for the offence of 'failure of commercial organisations to prevent bribery' [17], is supplemented by guidance issued by the Ministry of Justice [18].

15. United States Sentencing Commission, United States Federal Sentencing Guidelines.
16. United States Department of Justice and Securities and Exchange Commission, *FCPA: A Resource Guide to the US Foreign Corrupt Practices Act.*
17. UKBA 2010, Section 7 (2).
18. United Kingdom Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing.*

If French law were to depart from this regulatory architecture combining hard and soft law periodically revised, the message given to foreign authorities and businesses would probably be confused.

■ **26.** Secondly, the Committee members considered, this time from the internal point of view, that this regulatory architecture was not unknown to French law and, moreover, not excessively problematic for the entities to which the AFA's Guidelines were addressed, given the latest state of administrative case law.

Since its Fairvesta judgment of 21 March 2016, in particular, the Conseil d'État had decided:

'Whereas the opinions, guidelines, warnings and position statements adopted by the regulatory authorities in carrying out the mandates vested in them may be referred to the court hearing cases of misuse of authority when they are in the nature of general and compulsory provisions or when they set out individual requirements of which such authorities may subsequently censure lack of knowledge; whereas such acts may also be the subject of such an application, made by an applicant with a clear and direct interest in their cancellation, when they are likely to have significant effects, particularly of an economic nature, or are intended to have a significant impact on the behaviour of the people to whom they are addressed; whereas in the latter case it is up to the court, having powers in this respect, to examine the defects likely to affect the legality of such acts taking into account their nature and characteristics, as well as the discretionary power of the regulatory authority; and whereas it also has power, if arguments are presented to it for this purpose, to use the powers of injunction that it has under heading I of Book IX of the Code of Administrative Justice[19].'

It follows that the AFA's Guidelines fall within the scope of the administrative court's ability to review legality. In order to set them aside, therefore, they may be referred to the court hearing cases of misuse of authority, either by way of a claim or as a defence.

If, in particular, a business being supervised by the AFA were notified of a claim for having disregarded an Agency Guideline, it would be able in its defence to challenge the legality of that Guideline.

■ **27.** Finally, the Committee members noted in the course of their work that the AFA's Sanctions Committee had undertaken to clarify the scope of the Agency's Guidelines, on the following grounds given in its first two published decisions of 4 July 2019 and 18 February 2020:

'If the party concerned has followed in this respect, on all counts, the method recommended by the Agency itself in its above-mentioned

19. *CE, 21 mars 2016, Fairvesta International GmbH, n° 368082.*

Guidelines, they should be regarded as providing sufficient evidence unless the Agency can demonstrate that they did not in fact follow the Guidelines. If the person in question has not followed this method, or has only followed it in part, as it has the right to do so because the Guidelines only constitute a point of reference, the use of which is by no means compulsory, it is the responsibility of the person to demonstrate the relevance, nature and effectiveness of the system for detecting and preventing corruption by justifying the validity of the method it has freely chosen and followed[20].'

Accordingly, whether or not the AFA's Guidelines are followed would have presumptive value:

- if the Guidelines had been followed, it would be for the Agency to demonstrate that the entity being supervised had nonetheless failed to meet its statutory obligation to implement a compliance programme;
- if the Guidelines had not been followed, it would be for the entity being supervised to demonstrate that it had nonetheless complied with its statutory obligation to implement a compliance programme by other ways and means.

■ **28.** Conscious, however, of the uncertainties still surrounding the scope of the AFA's Guidelines and the reputational risk run by businesses, in particular, in the fight against corruption, the Committee members expressed the wish for such uncertainties to be resolved speedily, in the interests of legal certainty for the entities mentioned in Article 17 of the Sapin 2 Law.

■ **29.** To this end, they wished to clarify the status of appeals made against decisions of the Agency's Sanctions Committee and to promote the establishment of a 'short circuit' for the determination of such appeals.

■ **30.** As it stands, Article 17, VII of the Sapin 2 Law only provides that 'appeals against decisions of the Sanctions Committee are appeals as of right', i.e. that the court to which appeal is made has power to overturn a decision referred to it, or even to substitute another decision for it.

Logically, this court should be the Conseil d' État, ruling at first and last instance, since it involves a ruling on a sanctions decision by an independent authority, even if it has the status of a government agency with national authority.

However, it would be appropriate for Article 7, VII of the Sapin 2 Law, and similarly Article L. 311-4 of the Code of Administrative Justice Code, expressly to confirm the direct jurisdiction of the Conseil d'État to hear appeals as of right against decisions of the AFA's Sanctions Committee.

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20. AFA, Sanctions Committee, Decision No 19-01, 4 July 2019, S Ltd and Ms C., §18; AFA, Sanctions Committee, Decision No 19-02, 18 February 2020, I Ltd and Mr C K.

■ **31.** In addition, the Committee members expressed the wish that the examination of such appeals should be concluded within a short period of time, also in the interests of legal certainty.

They recalled that appeals against individual decisions of the Financial Markets Authority (*Autorité des marchés financiers (AMF)*) concerning public offerings, in particular, are concluded within a short period.

Under Article L. 621-30 of the Monetary and Financial Code, in its formulation resulting from the Law of 30 December 2014 setting out various provisions for conforming legislation to EU law in economic and financial matters[21], the court to which such appeals are made – which is the Paris Court of Appeal – must make a decision within five months of the filing of an appeal:

'Where the appeals referred to in the first sub-paragraph of this Article relate to an individual decision of the Financial Markets Authority concerning a public offering referred to in Sections 1 to 3 of Chapter III of Title III of Book IV, the court to which such appeals are made shall make a decision within five months of the filing of an appeal.'

This solution could also be applied to appeals against decisions of the AFA's Sanctions Committee.

3. The Committee's recommendations

■ **32.** The Committee took note of the status of a government agency with national authority conferred on the AFA by the legislation and found the following drawbacks linked to this status: lack of budgetary and operational autonomy; concentration within a single administrative department of work involving advice, supervision and sanctions, likely to cause mistrust on the part of entities being supervised; poor comprehensibility abroad.

■ **33.** On the basis of these findings, it concluded that a merger of the AFA and the HATVP should be encouraged in the long term.

Such a merger would have several advantages, in particular:

- enabling public resources allocated to the fight against corruption and transparency in public life to be optimised, in a context of controlling public expenditure and limiting the number of independent administrative authorities;
- enabling the authority resulting from the merger, which would have the status of an independent administrative authority, to manage the recruitment of its staff assigned to advising and supervising businesses subject to the implementation of a compliance programme more flexibly than the AFA can currently do.

21. Law No. 2014-1662.

Moreover, it would not be without precedent, the Law of 6 August 2019 on the transformation of public service having already decided to merge the Public Service Ethics Committee and the HATVP, on the grounds that the two authorities 'had spheres of competence, working and operational methods that are close in many ways'.

■ **34.** In the immediate future, however, the Committee agreed that such a merger might weaken the HATVP and the AFA, which had only recently been established, and would be unlikely to be decided on by the current legislature.

It therefore also sought to explore ways to improve cooperation between the HATVP and the AFA and, more broadly, between the various national authorities involved in the fight against corruption and the promotion of transparency in public life.

■ **35.** In addition, the Committee heard representatives of businesses under the AFA's supervision which indicated that they had a 'good working relationship' with the Agency under its current status, and were mainly seeking clarification of the Guidelines it had issued.

■ **36.** In this respect, the Committee considered that the regulatory architecture established by the Sapin 2 Law – a statutory obligation of compliance and periodically updated guidelines – should be maintained, against a background of international competition with certain foreign laws (especially in the United States and the United Kingdom) in the fight against international corruption.

It further found that the scope of the guidelines issued by the regulatory authorities was a matter already known to French law, in particular to the administrative court, and that the AFA's Sanctions Committee had begun to address this matter, particularly with regard to the Agency's Guidelines.

■ **37.** Conscious, however, of the uncertainties still surrounding the scope of the AFA's Guidelines and the reputational risk run by businesses, in particular, in the fight against corruption, the Committee expressed the wish for these uncertainties to be resolved speedily, in the interests of legal certainty.

In this respect, it recommends that the legislature, on the one hand, should expressly confirm the jurisdiction of the Conseil d'État to hear first and final appeals as of right against decisions of the AFA's Sanctions Committee and, on the other hand, should conclude the examination of such appeals within a shortened timeframe.

B. TRANSPOSING THE EUROPEAN DIRECTIVE ON WHISTLEBLOWERS WITHIN A SHORT TIMEFRAME

■ **38.** The survey conducted by Transparency International, *Alternative to silence. Whistleblowing in 10 European countries*, showed that in 2009, 75-99% of employees in EU countries without specific legislation on whistleblowers remained silent for fear of retaliation, when they witnessed acts that were unlawful or contrary to the public interest.

It took ten years for the European Union – whose losses linked to the absence of protection for whistleblowers are estimated at EUR 5.8-9.6 billion annually[22], and of which still only a minority of Member States offer effective protection for whistleblowers today – to adopt Directive 2019/1937 of 23 October 2019 'on the protection of persons who report breaches of Union law'.

Sometimes called 'heroes of modern times'[23], whistleblowers nonetheless represent an ancient figure, embodying the tension that has always existed between the laws to which individuals subordinate themselves, the acts in which they participate, and their personal ethics.

Some thus see in figures ranging from Antigone to Jean Moulin via Gandhi, Martin Luther King or Lieutenant-Colonel Picquart, who pointed out to his superiors that the *bordereau* (memorandum) had been incorrectly attributed to Dreyfus[24], the many examples of this internal clash between the duty of obedience and the illegitimacy of the order, which has always existed in the history of human societies.

This conflict seems even more acute for public officials, often divided between several sometimes contradictory loyalties: loyalty to institutions, to democratically elected political authorities, or to their superior – the latter, though prescribed by law, capable of being abandoned by whistleblowers in favour of the first two[25].

Today, while the mythology of our time has contributed greatly to glorifying names like Bradley Manning, Edward Snowden, Irène Frachon or Antoine Deltour, whistleblowers reflect a daily reality that goes far beyond these few iconic figures.

As a result, countries around the world – sometimes very early – have introduced legislation to protect such individuals from the retaliation they might otherwise suffer.

In France, whistleblowers have long been subject to a partial, incomplete

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22. Estimating the Economic Benefits of Whistleblower Protection in Public Procurement, European Commission, 2017.
23. BOURDON (W.), *A Little Handbook of Civil Disobedience*, JC Lattès, 2015.
24. SAUVÉ (J.-M.), *'Preventing conflicts of interest and whistleblowing,'* AJDA , 2014, p. 2249.
25. VIGOUROUX (C.), Ethics of public office, Dalloz, 2nd edition, 2012, p. 359 et s.

approach by lawmakers; only a few dedicated sectoral laws provided them with a protection that was often insufficient.

The aim of the Sapin 2 Law of 9 December 2016 was to create a comprehensive system, common to all whistleblowers, inspired by the best international standards.

1. The protection of whistleblowers resulting from the Sapin 2 Law

a) The framework for whistleblowers before the Sapin 2 Law: an incomplete and fragmented set of laws

■ **39.** In the private sector, before the adoption of the Sapin 2 Law, there were several statutory regimes offering protection to employees who had reported facts of which they had become aware in the course of their duties.

■ **40.** Articles L. 1152-2 and L. 1132-1 of the Employment Code also prohibit employers from punishing an employee who has respectively reported acts of moral harassment or discrimination.

■ **41.** Article L. 823-12 of the Commercial Code, created by Order No. 2005-1126 of 8 September 2005, allows auditors to disclose to the public prosecutor criminal acts of which they have acquired knowledge in the course of their work, without incurring liability through the disclosure.

■ **42.** Law No. 2007-1598 of 13 November 2007 provides for the same prohibition on dismissal in respect of persons who have notified or borne witness to acts of corruption to their employer or to the judicial or administrative authorities.

■ **43.** The Mediator scandal in 2010, named after the case that made it possible to disclose the marketing of a drug posing risks to human health, also inspired the legislature to adopt Law No. 2011-2012 of 29 December 2011, which protects individuals who in the course of their duties have become aware of facts relating to the safety of medicines and have reported them to the authorities.

■ **44.** In environmental matters, Article 1 of Law No. 2013-316 (on the independence of expertise in healthcare and the environment and the protection of whistleblowers) states:

'Any natural or legal person has the right to make public or to disseminate in good faith information about a fact, piece of data or action, provided that lack of knowledge of such fact, piece of data or action appears to him to pose a serious risk to public health or the environment.

The information which they make public or disseminate must refrain from any defamatory or offensive allegation.'

■ **45.** In the public sector French law provides, first, for an initial type of reporting right in Article 40, paragraph 2, of the Code of Criminal Procedure, which states:

'Any authority, public office holder or official who, in the performance of his duties, acquires knowledge of a crime or offence shall give notice of it without delay to the public prosecutor and shall convey to him all information, minutes and acts relating thereto.'

However, these provisions, which create a disclosure obligation that applies to public officials, have been the subject of only limited application since being introduced into the Code of Criminal Procedure in 2004, as noted in the report submitted by Jean-Louis Nadal in January 2015, in particular because no penalty has been provided for in the legislation in the event of failure to disclose an offence[26].

■ **46.** The Law of 11 October 2013 on transparency in public life thus created a genuine reporting right for public servants, prohibiting them from being punished for having informed their employer, the authority responsible for ethics within their organisation or an approved anti-corruption association about a situation involving a conflict of interest[27].

■ **47.** The Law of 6 December 2013 on the fight against tax evasion also introduced, in what is known as the Le Pors Law that established the Public Service Regulations[28], an Article 6 ter A protecting public officials who have reported an offence or crime of which they have become aware in the exercise of their duties.

As a result of the Laws of 11 October and 6 December 2013, the protection of whistleblowers had therefore been strengthened before the Sapin 2 Law was passed.

The progress made by virtue of these two Laws must, however, be qualified, as they do not provide for a step-by-step reporting system, neither do they allow the possibility of sending information to the press as a last resort[29].

Thus, in his report entitled 'Restoring public trust', Jean-Louis Nadal noted that the measures provided for in these Laws did not appear to 'work optimally, not least because of the lack of proper structures to advise and guide whistleblowers[30].'

■ **48.** In the absence of a clear and homogeneous system in French law,

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26. NADAL (J.-L.), *Restoring public trust*, Report to the President of France on exemplary conduct in public officials, January 2015, p. 128.
27. Article 25, Law No. 2013-907.
28. Law No. 83-634 of 13 July 1983 on the rights and obligations of public servants.
29. FOEGLE (J.-P.), PRINGAULT (S.), 'Public service whistleblowers,' *AJDA*, 2014, p. 2256.
30. NADAL (J.-L.), *Restoring public trust*, Report to the President of the Republic on exemplary conduct in public officials, January 2015, p. 123.

the criteria developed by the European Court of Human Rights often guided the ordinary and administrative courts before the passing of the Sapin 2 Law. These courts took into account the employee's good faith, the authenticity of the facts (failing which their likelihood) and an implicitly accepted form of gradation in the reporting processes[31].

■ **49.** Indeed, the European Court of Human Rights has progressively defined the criteria allowing an individual to claim the status of whistleblower on the basis of Article 10 of the European Convention for the Protection of Human Rights, which regulates freedom of expression, one of the corollaries of which is the ability to publish information and to be informed.

The European Court of Human Rights thus established, in its seminal judgment Guja v Moldova (ECHR, Grand Chamber, 12 February 2008, No. 14277/04), the criteria which allow an individual to claim the status of whistleblower on the basis of Article 10:

- the person must have used the internal remedies available;
- the information disclosed must be in the public interest;
- the information disclosed must be genuine;
- the damage caused by the disclosure of information must not be disproportionate to the interest of its disclosure for the public;
- the whistleblower has acted in good faith;
- the whistleblower's penalty was severe and disproportionate.

■ **50.** The European Court subsequently extended its case law to whistleblowers in the private sector (Heinisch v. Germany, 21 July 2011, No. 28274/08), stated that disclosure may relate only to facts and not to value-based judgments (Pinto Pinheiro Marques v. Portugal, 22 January 2015, No 26671/09) and recalled the requirement of good faith in reporting (Soares v. Portugal, 21 June 2016, No. 79972/12).

■ **51.** All these criteria provided a useful reference point for the French courts prior to the adoption of the Sapin 2 Law of 9 December 2016.

b) The definition of whistleblower

■ **52.** Article 6 of the Sapin 2 Law gives the following definition of whistleblower:

'A whistleblower is a natural person who reveals or reports disinterestedly and in good faith, a crime or an offence, a clear and serious violation of an international commitment duly ratified or approved by France, of a unilateral act by an international organisation pursuant to such a commitment, or of laws and regulations, or a serious threat or damage to public interest, of which he or she has personal knowledge.'

31. LENOIR (N.), 'Whistleblowers, a French innovation from across the Atlantic', *La Semaine juridique : entreprise et affaires*, No. 42, 15 October 2015.

Its second paragraph specifies, however, that:

'Facts, information or documents, whatever their form or medium, which are covered by obligations of secrecy relating to national defence, medical confidentiality or legal professional privilege are excluded from the reporting regime defined in this chapter.'

■ **53.** First, it should be noted that the definition of whistleblower adopted by the Sapin 2 Law requires that the latter be an individual, thus excluding legal entities such as anti-corruption associations.

■ **54.** Secondly, Article 6 of the Sapin 2 Law, which goes beyond the case law of the European Court of Human Rights, imposes on the whistleblower the obligation to be in good faith and disinterested – the latter criterion not being the subject of any specific definition in Decree No. 2017-564, despite the novelty it introduced.

It is, however, possible to assume that the disinterested nature of the reporting may be a sign of the good faith of the person making the report[32].

The requirement of good faith, however, is not surprising: it is clearly a preference of the French legislature which could have decided, like its British counterpart, not to include it.

But the application of the Sapin 2 Law by some courts suggests that their discretion might lead to a relaxation of the latter criterion[33].

■ **55.** Thirdly and finally, the whistleblower must have been personally aware of the facts he reports – a condition that echoes the criterion of authenticity of the facts derived from the case law of the European Court of Human Rights and which makes it possible to ensure, as a minimum, the reliability of the reported information.

■ **56.** Article 6 of the Sapin 2 Law uses a particularly broad definition of the information likely to be the subject of a report.

Although it permits the reporting of a crime or offence, already permitted by many texts before the Sapin 2 Law, and adds to this the breach of an international undertaking or unilateral act, the words 'serious threat or damage to the public interest' appear more difficult to grasp.

■ **57.** It is interesting to note that, even though the aim of the Sapin 2 Law was to provide for a common definition of whistleblower, Law No. 2018-670 on the protection of business secrecy of 31 July 2018 introduced a

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32. 'Sapin 2 Law, the new status of whistleblower', *Revue de droit bancaire et financier*, LexisNexis jurisclasseur, January-February 2017.

33. ALIBERT (J.) and FOEGLE (J.-P.), 'First victory of a whistleblower on appeal under the Sapin 2 Law', *Revue des droits de l'homme*, 29 April 2019.

new Article L. 151-8 to the Commercial Code, which provides:

'Art. L. 151-8. In a case concerning the infringement of business secrecy, secrecy is not binding when its acquisition, use or disclosure has occurred:

[...]

'2° to reveal, for the purpose of protecting the public interest and in good faith, illegal activity, misconduct or wrongdoing, including the exercise of the reporting right defined in Article 6 of Law No. 2016-1691 of 9 December 2016 on transparency, anti-corruption and economic modernisation.'

Of course, it is welcome that these provisions refer explicitly to the reporting right as provided for by Article 6 of the Sapin 2 Law – which therefore allows those acting in this way not to be challenged on the grounds of business secrecy.

Nevertheless, it is a pity that the legislation, adding confusion to an already confused body of law, should have introduced a new definition of reporting, consisting here of 'revealing, for the purpose of protecting the public interest and in good faith, illegal activity, misconduct or wrongdoing'.

This alternative definition of the information capable of being reported carries the seeds of future contradictions between the different regimes.

■ **58.** Finally, it should be noted that Article 6 of the Sapin 2 Law introduces three exceptions to its first paragraph – namely facts, information or documents covered by obligations of secrecy relating to national defence, medical confidentiality or legal professional privilege –, from which it must be understood that the framework for their reporting is the regime to which those exceptions are already subject.

■ **59.** Whatever the framework in which it evolves, the reporting must be dealt with by 'appropriate procedures for receipt' which Article 8(III) of the Sapin 2 Law imposes on public or private sector entities having at least fifty employees, State administrations, local authorities (*communes*) of more than ten thousand inhabitants, as well as on public institutions for cooperation between local authorities with fiscal autonomy of which they are members, departments (*départements*) and regions.

■ **60.** More specifically, Article 8 of the Sapin 2 Law organises two reporting procedures: an ordinary procedure and an exceptional procedure.

■ **61.** In the ordinary procedure, the first stage of reporting is to bring the report to the attention of an individual's direct or indirect superior within the employer, or of a point of contact designated by the employer.

As regards the point of contact to which reporting may be made, Article 4 of Decree No 2017-564 indicates that this is to be designated by the appropriate authorities, that it may be external to the latter and that it must have, 'by virtue of its position, the necessary capability, authority and means to carry out its tasks'.

■ **62.** The second stage of reporting provides for the involvement of the judicial or administrative authorities, if the person receiving the disclosure does not take action 'within a reasonable period'.

However, this concept is understood in a very different way by the courts and thus offers little legal certainty to the whistleblower[34], especially as the implementing decree does not provide any details on this point.

■ **63.** Finally, in the event of inaction on the part of the judicial authorities within three months, the whistleblower may make the report public.

The means of publicising the report are not specified, either by the Law or by its implementing decree, but it may be assumed that the provisions of Article 8 may be interpreted in a liberal fashion, so that the whistleblower may, without needing to be worried, communicate the information that he holds to the press or on social media, as indicated by the parliamentary work on 'public disclosure[35] '.

Furthermore, the three month period in which the judicial authority is required to deal with the report has also been criticised for its brevity, especially since Article 53(II), of Law no. 2019-222 on 2018-2022 programming and judicial reform provides for the possibility of extending for a further three months the period following which a victim may sue for damages in criminal proceedings.

In these circumstances, a prosecutor could have a time limit of up to six months under the general law, in comparision with three months for dealing with a report[36].

■ **64.** The question whether the 'first level' of the reporting procedure under the general law is appropriate revealed a clear division among those heard by the Committee.

In general, some representatives of non-governmental organisations (NGOs) heard by the Committee argued that the procedure under the general law provided for by the Sapin 2 Law reduced their role, in so

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34. In a different context, but by way of example, the Assembly of the Conseil d'État held, on 13 July 2016 (No. 387763), that an individual administrative decision that was communicated but failed to mention the means and time limits for appeal could not be challenged beyond a reasonable period, which could not exceed one year.

35. National Assembly, Law Commission, 21 September 2016, 10 a.m. sitting.

36. LAGESSE (P.), ARMILLEI (V.), 'The status of whistleblower – the state of play and proposals for a European directive', *Revue internationale de la compliance et de l'éthique des affaires* No. 2, April 2019, Study 64.

far as whistleblowers are required to make their reports initially to their employer and then to the judicial authorities.

Consequently, NGOs may only be approached by and assist whistleblowers at the final level of reporting.

■ **65.** Article 8(II) of the Sapin 2 Law also opened up the possibility of making a report under an exceptional procedure separate from the previous one.

■ **66.** In order for this other procedure to be used, there must be a serious and imminent danger and a risk of irreversible damage.

■ **67.** The provisions of Article 8(II), however, cause some difficulty in that they do not appear to allocate any priority between a referral to the administrative or judicial authorities and the publicising of the report.

In view of this, it may be considered that the main purpose of the exceptional procedure is on grounds of urgency, to allow the whistleblower only to go beyond the first level, and thus to begin by referring the matter to the judicial authorities.

In any case, this may be inferred from the comment of the rapporteur of the Sapin 2 Law, in support of this amendment which he introduced, without entirely dispelling the doubts surrounding these provisions:

'However, for perfectly well-founded reasons, the whistleblower may sometimes need to omit the first step in order to go directly to a judicial authority. […] in an emergency, the whistleblower may directly approach the second level organisations, or even make the report public[37].'

■ **68.** However, a judgment recently given by the Administrative Court of Bordeaux (30 April 2019, No. 1704873), as well as a judgment of the Administrative Court of Appeal of Nancy (16 June 2019, No. 18NC01241), suggest that the criteria of the imminence of danger and the risk of irreversible damage prevail over all others, effectively abolishing in the exceptional procedure the hierarchy that exists between the levels in the procedure under the general law.

■ **69.** Decree No. 2017-564 again organises the management of procedures for the receipt of reports.

On the one hand, Article 5(I) of the Decree requires the procedures for receiving reports to specify the conditions under which the person making the report should address the report to his direct or indirect superior, to the employer or to the point of contact mentioned, provide the 'facts, information, or documents in any form or medium that may

37. National Assembly, Law Commission, 21 September 2016, 10 a.m. sitting.

support the making of the report when such information is available,' as well as the 'elements, if any, that permit an exchange with the recipient of the report'.

On the other hand, Article 5 II of the Decree provides helpful details as to the obligations imposed on the addressee of the report, so as to allow the reporting individual better to determine the point at which he may decide to move towards the second stage of the procedure:

'II. – The procedure shall specify the measures taken by the organisation: 1° to inform the individual making the report without delay of its receipt and of the reasonable and foreseeable period necessary for the examination of its admissibility, and of the manner in which he will be informed of the follow-up to the report;

2° to ensure the strict anonymity of the person making the report, the confidentiality of the disclosures and the persons named in them, even when investigation and processing of disclosures require communication to third parties.the facts to which the report relates and those named in it;

3° when no action is taken in respect of a report, to destroy items on the report file that may be used to identify the individual making the report and those named in it, as well as the time limit for this, which may not exceed two months from the completion of all steps relating to admissibility or verification. The individual making the report and those named in it shall be informed of such completion.'

■ **70.** Finally, Article 8(IV) of the Sapin 2 Law gives the *Défenseur des droits* (defender of human rights), an independent constitutional administrative authority, the power to guide whistleblowers.

This provision also accounted for the enactment on 9 December 2016 of the institutional Law No. 2016-1690, which amended Law No. 2011-333 of 29 March 2011 on the *Défenseur des droits*, in particular adding a provision that the latter is responsible for 'guiding towards the appropriate authorities any person making a report under the conditions prescribed by law, and for ensuring the rights and freedoms of that person'.

In this respect, the *Défenseur des droits* published in July 2017 a Guide entitled 'Guidance and protection for whistleblowers', available online on its website[38].

However, the work of the Committee has shown that the *Défenseur des droits* does not have sufficient human and financial resources to carry out this task, which is prejudicial to whistleblowers.

38. https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/guide-lanceuralerte-num-20.06.18.pdf

c) The protection of whistleblowers under the Sapin 2 Law

■ **71.** Article 7 of the Sapin 2 Law also introduced a provision in Article 122-9 of the Criminal Code under which a whistleblower who takes action in the context laid down by the Sapin 2 Law cannot be criminally liable for the infringement of a secret protected by law.

It is important to understand that this provision does not apply to whistleblowers who have breached secrets protected by law – as referred to in the second paragraph of Article 6, namely medical confidentiality, legal professional privilege and national defence secrecy – which are governed by their own régimes.

■ **72.** The procedures introduced within the legal entities covered by the provisions of Article 8(III) of the Sapin 2 Law must also allow strict confidentiality as to 'the identity of those making reports, those named in them and the information received by all addressees of the report', as specified in Article 9, I, of the Sapin 2 Law.

Details enabling the report to be identified may only be disclosed with the agreement of the whistleblower, whereas those likely to identify the person implicated in the report may only be disclosed once the validity of the report has been established [39].

Finally, Article 9(II) of the Sapin 2 Law provides that failure to comply with these provisions is punishable by a penalty of imprisonment for two years and a fine of EUR 30,000.

Such confidentiality constitutes 'the overriding condition for the trouble-free handling of a report, and the protection both of staff making reports and of staff being reported about[40] '.

The Committee's work highlighted the fact that the confidentiality of the person making the report often had to be the subject of special 'education' within businesses, some employees being gripped by the impulse to discover the identity of the whistleblower before becoming interested in the content of the report.

■ **73.** Finally, the provisions of Article 10 of the Sapin 2 Law prevent a whistleblower from being subject to any professional sanction, as was already provided by the many systems in existence to date.

Also with a view to protecting whistleblowers from retaliation, Article 11 of the Sapin 2 Law allows the administrative court to which such submissions are made to order the reinstatement of the public servant or employee.

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39. Article 9, I, paragraphs 2 and 3 of the Sapin 2 Law.
40. DYENS (S.), 'The whistleblower in the Sapin 2 Law: an illusory strengthening', *AJCT*, No. 127, 2017.

Article 12 of the Law also makes it possible for a whistleblower who is dismissed after making a report to bring a case before the employment tribunal.

Finally, the Sapin 2 Law provides for the offence of impeding a report, punishable by imprisonment for one year and a fine of EUR 15,000, and authorises an examining magistrate or investigating chamber receiving a complaint of defamation against a whistleblower to impose a civil fine of up to EUR 30,000 for bringing an improper or time-wasting civil claim in criminal proceedings [41].

■ **74.** Article 14 of the Sapin 2 Law, when referred to the Constitutional Council for its consideration, provided that the *Défenseur des droits* could grant a whistleblower who had received an unfavourable decision financial assistance in the form of an advance on costs incurred in the proceedings, as well as temporary financial assistance, if the *Défenseur des droits* believed that the whistleblower was facing financial difficulties 'of a serious nature impairing his living conditions'.

These provisions referred to the institutional Law No. 2016-1690, which was submitted for censure by the Constitutional Council, who decided that the possibility of providing financial support to those who applied to the *Défenseur des droits* was not part of the powers that the Constitution intended to confer on the *Défenseur des droits* [42].

■ **75.** This issue was the subject of a clear division among those heard by the Committee in the course of its work.

The Committee's hearings also enabled an appreciation of the role of NGOs, in the absence of any compensation being provided by law, including the 'House of Whistleblowers', a charity formed in November 2018 by seventeen NGOs aimed at providing financial and psychological assistance to whistleblowers.

However, the latter initiative, in the absence of government support, was considered largely insufficient by the NGOs.

2. Directive 2019/1937 of 23 October 2019

■ **76.** In the course of the Committee's work, on 23 October 2019 the European Parliament and the Council of the European Union adopted Directive 2019/1937 on the protection of persons who report breaches of Union law.

This is the first general European text on the status of whistleblowers.

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41. Article 13, I, II of the Sapin 2 Law.
42. Decision No 2016-740 of 8 December 2016, recitals 5 and 6.

■ **77.** The scope of the Directive *ratione personae*, provided for in Article 4, is broad, since it includes not only persons having the status of a worker or self-employed person within the meaning of Article 45 TFEU, but also shareholders and members of the administrative, management or supervisory body of a business, as well as non-executive members, volunteers or trainees and, lastly, any person working under the supervision and management of contractors, subcontractors and suppliers.

The Directive adds that it also applies to facilitators of reporting, third parties connected to persons reporting who are at risk of retaliation, and legal entities belonging to reporting persons or for which they work, or to which they are connected in a professional context.

■ **78.** In terms of the reporting procedure, Directive 2019/1937 organises a 'two-tier external' procedure, while encouraging the use of internal reporting channels and procedures.

Article 7 states that:

'1. As a general principle and without prejudice to Articles 10 and 15, information on breaches may be reported through the internal reporting channels and procedures provided for in this Chapter.

2. Member States shall encourage reporting through internal reporting channels before reporting through external reporting channels, where the breach can be addressed effectively internally and where the reporting person considers that there is no risk of retaliation.'

Under the provisions of Article 10 of the Directive, whistleblowers have the possibility of reporting information of which they are aware directly to the competent authorities:

'Without prejudice to point (b) of Article 15(1), those making reports shall report information on breaches using the channels and procedures referred to in Articles 11 and 12, having first reported through internal reporting channels or by directly reporting through external reporting channels.'

Finally, Article 15 of the Directive governs the possibility for whistleblowers to disclose the information available to them:

'1. A person who makes a public disclosure shall qualify for protection under this Directive if any of the following conditions is fulfilled:

a) the person has first reported internally and externally, or directly externally in accordance with Chapters II and III, but no appropriate action has been taken in response to the report within the timeframe referred to in point (f) of Article 9(1) or point (d) of Article 11(2); or

b) the person has reasonable grounds to believe that:

i) the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or risk of irreversible damage; or (ii) in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach.'

In other words, Directive 2019/1937 removes the mandatory recourse to the internal 'first level': in the future, whistleblowers will have the possibility to apply directly to the judicial or administrative authority and, if it does not take action within a reasonable period, to disclose to the public the information that they have.

They may also communicate the information that they have directly to the public in cases of urgency defined in Article 15(1)(b) of the Directive.

■ **79.** Finally, the Directive requires Member States to provide for measures for compensating damage resulting from whistleblowing, 'in accordance with national law [43] '.

3. The Committee's recommendations

■ **80.** Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 'on the protection of persons who report breaches of Union law' provides that whistleblowers will in future have the opportunity to apply directly to the judicial or administrative authorities and, in they do not take action, to disclose the information they have to the public.

■ **81.** From the point of view of French law, this Directive has the merit of deciding the debate on the desirability of the internal 'first level' in the context of whistleblowing.

The Directive will have to be transposed by the Member States by 17 December 2021 at the latest, and will therefore require the French legislature to amend the existing system resulting from the Sapin 2 Law.

■ **82.** In this respect, the Committee recommends that the French legislature transpose Directive 2019/1937 of 23 October 2019 as soon as possible, in the interests of legal certainty for both whistleblowers and businesses, and amend without delay the system resulting from the Sapin Law.

It also recommends that, on this occasion, a debate be launched on the application of the Directive in the context of shareholder activism, in so

43. Article 23 of the European Union Directive.

far as it includes shareholders among those likely to report breaches of Union law.

C. IMPROVING THE COMPREHENSIBILITY OF THE REGISTER OF LOBBYISTS

■ **83.** The distrust of lobbyists in France is not new. Isaac Le Chapelier declared as early as 14 June 1791, in the gallery of the National Assembly, in support of the law which was to bear his name and which, for nearly a century, accounted for the prohibition on corporations: 'There are no corporations in the State; there is only the particular interest of each individual and the public interest. No one is permitted to engender an intermediate interest, separating them from the public sphere by a corporate interest [44].'

■ **84.** This approach contrasts with that applying in countries of Anglo-Saxon culture, such as the United States, where Alexis de Tocqueville observed in 1835 that 'Americans of all ages, of all conditions, of all spirits, constantly join together [45] and where interest groups have always formed an essential part of the public decision-making process.

■ **85.** In France, fear of the influence that lobbyists might have on public authorities is rooted in the conception of popular sovereignty which, nurtured by the thought of Jean-Jacques Rousseau, sees in the law only 'the expression of the general will', which inherently transcends individual interests and to which such interests may not act as an obstacle.

■ **86.** The Declaration of Human and Civic Rights of 26 August 1789, imbued with the ideals of the Enlightenment, expressed this idea in its Article 3 – 'the principle of sovereignty lies primarily in the Nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it' – and its Article 6 – 'The Law is the expression of the general will'.

■ **87.** The prohibition of intermediate bodies provided by the decree of Allarde and the Le Chapelier Law was finally lifted by the Waldeck-Rousseau Law of 21 March 1884 on the creation of trade unions, and then by the Law of 1 July 1901 authorising the creation of associations.

■ **88.** But these important legislative developments were not enough to dispel French mistrust of intermediary organisations, traces of which may still be found in Article 27 of the Constitution of 4 October 1958, in which it is stated that 'No member shall be elected with any binding mandate' – a principle that prohibits a Member from 'be[ing] a member of any private,

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44. Meeting of the National Assembly of 14 June 1791, in Parliamentary Archives of 1787 to 1860, 1st Series, t. XXVII, Paul Dupont, 1887, p. 210.

45. TOCQUEVILLE (A. de), *Democracy in America*, II, Part 2 , Chapter V, in *Works*, Volume II, Gallimard, coll. "La Pléiade", 1992, p. 621.

local or professional association or interest group or enter[ing] into any commitment with them concerning his own parliamentary activities if such membership or commitment implies the acceptance of a binding mandate', as provided for in Article 79 of the Rules of Procedure of the National Assembly.

These provisions are consistent with the idea that private or vested interests have no place in parliamentary assemblies, where the general interest alone must prevail.

■ **89.** Today, under pressure of European integration and changes in the State – in particular decentralisation, which has multiplied places of power and opportunities for access to decision-making [46] the activity of lobbying has taken hold in the French institutional landscape; with the result that it is no longer possible to maintain the development of the standard within its historical framework, i.e. that of a binary relationship between the executive and legislative powers [47].

Le développement de l'activité de représentation d'intérêts, dont le ministre d'Etat Nicolas Hulot a dénoncé au moment de sa démission le 28 août 2018 l'influence excessive en matière environnementale, justifiait que cette activité fasse l'objet d'une réglementation spécifique visant à en limiter les abus.

1. The framework for lobbyists under the Sapin 2 Law

■ **90.** In October 2014, the non-governmental organisation Transparency International awarded France a score of 2,7 out of 10 for its ability to allow integrated and transparent lobbying, noting a 'near absence of rules' in places of public decision-making other than the National Assembly and the Senate [48].'

■ **91.** Indeed, prior to the entry into force of the Sapin 2 Law, the activity of lobbying was subject to limited guidance only in the National Assembly and the Senate.

■ **92.** The National Assembly adopted a first body of rules organising relations between members of parliament and lobbyists on 8 July 2009, with the aim of enforcing an obligation of transparency and publicity, and of defining a charter of the duties of parliamentarians.

■ **93.** Under these rules it was provided that 'any representative of public or private interests […] appearing on a list set by the Bureau [of the National Assembly could] receive a pass giving rights of access to the Palais Bourbon', in return for the submission of a form giving information

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46. ESCURIAT (A.), *Lobbying: A Democratic Tool*, Foundation for Political Innovation, February 2016, p. 18.

47. Report on behalf of the Working Group on Lobbying in the National Assembly, presented by Mr Christophe Sirugue, 27 February 2013.

48. Transparency and Integrity of Lobbying - A Challenge of Democracy, 2014, Transparency International.

about their activities and the interests being promoted [49].

■ **94.** This system initially evolved through two decisions of the Bureau of the National Assembly, on 27 February and 26 June 2013, which reinforced the obligations for lobbyists to be declared, required Members to indicate in their information reports the list of people they had heard, and made possible the adoption of a specific code of conduct for lobbyists [50].

The content of these reporting requirements is also monitored by the Ethics Officer of the National Assembly, a role established by a decision of the Bureau of the National Assembly dated 6 April 2011 on the observance of the Code of Ethics of Members [51].

The current Ethics Officer of the National Assembly, Mrs Agnès Roblot-Troizier, recommended in her annual report to the President of France, published in January 2019, that the code of conduct applicable to lobbyists be updated and supplemented [52].

On 4 June 2019, the National Assembly took note of her recommendation and amended its rules of procedure [53].

Since this last revision, an application may be made to the Ethics Officer by a number of people specified in the amended Rule 80-5 of the Rules of Procedure of the National Assembly, and she is to be provided with any information or documents necessary for the performance of her duties.

Moreover, Members who have not complied with the Code of Ethics may now be subject to a formal notice which may be made public.

■ **95.** The Senate adopted a regulation similar to that implemented by the National Assembly on 31 March 2010 [54], which provides, *inter alia*, that 'the right of access to the Senate is granted, under conditions determined by the *questeurs* (Senators responsible for the management and administration of the Senate), to representatives of interest groups registered on a public register and who commit to a code of conduct defined by the Bureau'.

■ **96.** This system is accompanied by a penalty for any breach of the Code of Conduct, which may lead to a removal of the access card to Senate premises.

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49. Report on behalf of the Working Group on Lobbies in the National Assembly, *op. cit.*

50. NADAL (J.-L.), *Restoring public trust*, Report to the President of France on exemplary conduct in public officials, January 2015, p. 65.

51. http://www2.assemblee-nationale.fr/decouvrir-l-assemblee/textes-de-reference/decision-du-bureau-du-6-avril-2011-relative-au-respect-du-code-de-deontologie-des-deputes

52. https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/194000114.pdf.

53. http://www.assemblee-nationale.fr/15/ta/tap0281.pdf

54. Order No. 2010-82 of the Bureau of 31 March 2010 and Order No. 2010-1258 of the Questure of 1 December 2010.

■ **97.** The Senate Bureau has adapted this system in order to incorporate the obligations arising from the Sapin 2 Law, by laying down (through two Orders dated 31 May 2017) the ethical rules applying to lobbyists in the Senate and by specifying the ways in which the Parliamentary Ethics Committee and, if necessary, the President of the Senate may ensure that these rules are complied with [55, 56].

Breaches of the ethical rules of the Code of Conduct may also be the subject of a formal notice which may be made public.

■ **98.** These two systems – which have recently been amended and whose efficacy is therefore difficult to assess – do not seem to have met with the hoped-for success: in 2014, only 185 and 114 lobbyists were respectively registered on the National Assembly and Senate registers [57].

■ **99.** Already conscious of the shortcomings of the French system, the President of France declared before the Bureaux of the Parliamentary Assemblies on 20 January 2015:

'To make the drafting of laws and regulations even clearer, we need better supervision of pressure groups. This is a project that will be begun this year. Citizens will know who has approached public decision-makers, and at what level, in order to improve, correct or alter a reform, and what arguments have been used.'

■ **100.** Articles 25 to 33 of the Sapin 2 Law added ten additional articles to Law No. 2013-907 of 11 October 2013 on transparency in public life.

■ **101.** The reform undertaken by the Sapin 2 Law pursued three objectives, as outlined in its impact study [58] :

- to identify those who may be regarded as lobbyists, so that the conditions for their involvement may be regulated;
- to subject them to ethical obligations determined by regulations and to sanction any breach of such obligations;
- to make the public decision-making process – 'the standard factory' – more transparent and more comprehensible for citizens.

■ **102.** The directory of lobbyists established by the Sapin 2 Law is mandatory for lobbyists, unlike those previously provided for by the Parliamentary Assemblies.

■ **103.** The system also introduces the novelty of establishing a common directory between the executive and Parliament, in order to simplify the

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55. Order No. 2017-106 establishing the code of conduct applicable to lobbyists in the Senate.

56. Order No. 2017-105 amending Chapter XXII bis of the General Instructions of the Bureau.

57. NADAL (J.-L.), *Restoring public trust*, Report to the President of France on exemplary conduct in public officials, January 2015, p. 68.

58. Impact Statement, Transparency, Anti-Corruption and Economic Modernisation Bill, 30 March 2016, p. 47.

reporting requirements applying to lobbyists – contrary to the Senate's desire that each Chamber have its own register [59].

■ **104.** Finally, in line with the stated aim to ensure greater transparency in the preparation of public decisions, the directory established by the Sapin 2 Law is freely accessible online, on the website of the High Authority on Transparency in Public Life (HATVP) [60].

■ **105.** The system organised by the Sapin 2 Law also has the merit of introducing a legal definition of lobbyists, which until then was lacking in French law.

The legislation deliberately adopted a particularly broad definition of lobbyist.

■ **106.** Article 18-2 of the Law on transparency in public life provides:

'Lobbyists, within the meaning of this section, are private law legal entities, public institutions or public consortia carrying on an industrial and commercial activity, organisations referred to in Chapter I of Title I of Book VII of the Code of Commerce and Title II of the Code of Manual Trades, of which a manager, employee or member has as its main or regularly activity the influencing of public decision-making, in particular with regard to the content of a law or regulation […].'

The Members of Parliament and Senators who had referred the matter to the Constitutional Council criticised these provisions for misunderstanding, on the one hand, the objective of intelligibility and accessibility of the law (which was of constitutional value), in that the terms 'main or regular activity' were insufficiently clear, and on the other hand the principle of equality before the law, by excluding from the definition of lobbyist people who only occasionally approached the public authorities.

On the first point, the Constitutional Council decided, in its Decision No. 2016-741 DC of 8 December 2016, that the terms 'main or regular activity' were sufficiently clear, since they made it possible to exclude from the definition those engaged in the activity of influencing only incidentally and infrequently.

On the second point, the Constitutional Council found that the legislature had, by limiting the scope of the obligations to those engaged in the activity of lobbyist mainly or regularly, treated those in other situations differently, so it had not misunderstood the principle of equality before the law.

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59. MONTECLER (M.-C. de), "The Public Law Component of the Sapin 2 Bill," *Dalloz Actualité*, 10 November 2016.

60. Article 18-1 of Law No. 2013-907 of 11 October 2013 on transparency in public life.

■ **107.** Article 1 of Decree No. 2017-867 defines a lobbyist as:

'a manager, employee or member [who] spends more than half his time on an activity that involves taking the initiative to approach the persons referred to in 1° to 7° of that Article with a view to influencing one or more public decisions, in particular one or more legislative or regulatory measures.'

The second paragraph of the same Article of the Decree adds:

'These provisions shall also apply to any person mentioned in the first paragraph of Article 18-2 of the above-mentioned Law No. 2013-907 of 11 October 2013, of which a manager, employee or member shall, on his own initiative, enter into communication at least ten times in the last twelve months with the persons referred to in 1° to 7° of that Article with a view to influencing one or more public decisions, in particular one or more legislative or regulatory measures.'

Finally, the appendix to Decree No. 2017-867 adds that actions aimed at influencing a public decision include,'in particular', the organisation of informal discussions, the organisation of events, hearings, public debates, invitations to an event, the sending of petitions, open letters or the establishment of a regular correspondence.

In order to assess the amount of time devoted to lobbying activity, the HATVP recommends focussing both on the duration of the communications themselves and also the time devoted to their preparation, organisation and follow-up [61].

■ **108.** The provisions of Article 18-2 of the Law on transparency in public life then set out the list of public decision-makers, within the meaning of the above provisions:

'1° a member of the Government, or a member of a ministerial private office;
2° a Member of Parliament, a Senator, an employee of the President of the National Assembly or of the President of the Senate, or of a Member of Parliament, Senator or parliamentary group, as well as the staff of the parliamentary assemblies;
3° an employee of the President of France;
4° the Director General, the Secretary General, or their deputies, or a member of the college or of a committee having the power of sanction, of an independent administrative authority or of an independent public authority referred to in 6° I of Article 11 of this Law;
5° a person holding a job or function referred to in 7° of I;
6° a person holding a function or mandate referred to in 2°, 3° or 8° of I;
7° a public official holding a job referred to in the Decree of the Conseil

61. Directory of Lobbyists: Guidelines, High Authority on Transparency in Public Life, October 2018, p. 23.

d'État provided for in Article 25 *quinquies* I of Law No. 83-634 of 13 July 1983 on the rights and obligations of public servants.'

■ **109.** The appendix to the Decree of 9 May 2017 relating to the directory also lists the members of the Government or ministerial private offices, independent administrative authorities and local officials referred to in Article 18-2.

■ **110.** Finally, the Law excludes from the definition of lobbyist: elected representatives in the course of their duties, political parties and groups, public service trades unions, religious associations and representative associations of elected officials.

■ **111.** As regards the definition of public decision-making, the use of the adverb 'in particular' indicates that the legislature wished it to be broad, which is further confirmed by the appendix to the Decree of 9 May 2017:

'Appendix relating to types of public decisions (10 of article 3)

- Laws, including constitutional laws;
- orders of Article 38 of the Constitution;
- regulations;
- decisions referred to in Article L. 221-7 of the Code of Relations between the Public and the Administration;
- contracts falling within the scope of Ordinance No. 2015-899 of 23 July 2015 on public procurement, where the estimated value excluding tax of the requirement is equal to or greater than the European thresholds published in *the Official Journal* of the French Republic;
- contracts falling within the scope of Ordinance No. 2016-65 of 29 January 2016 on concession contracts, where the estimated value excluding tax of the requirement is equal to or greater than the European thresholds published in *the Official Journal* of the French Republic;
- contracts referred to in Articles L. 2122-6 of the General Code of Public Property and L. 1311-5 of the General Code of Local Authorities;
- contracts referred to in Articles L. 1311-2 of the General Code of Local Authorities and L. 6148-2 of the Public Health Code;
- contracts referred to in Articles L. 3211-1,L. 3211-2 ,L. 3211-13 and L. 3211-14 of the General Code of Public Property;
- deliberations approving the establishment of a semi-public company with a single operation provided for in Article L. 1541-1 of the General Code of Local Authorities;
- other public decisions.'

■ **112.** First, lobbyists are bound by ethical obligations under Article 18-5 of the Law on Transparency in Public Life.

■ **113.** In general, they must 'conduct their business with probity and integrity'.

■ **114.** In particular, the law places an obligation on them to abstain from:
- offering or sending to public officials provided by law any presents, gifts or benefits of significant value;
- taking any steps with such persons with a view to obtaining information or decisions by fraudulent means;
- organising seminars, events or meetings, in which the terms for speaking by local officials are linked to the payment of remuneration in any form;
- using information obtained for commercial purposes;
- selling to third parties copies of documents deriving from the Government or an independent administrative or public authority to third parties [62].

■ **115.** Finally, the ninth paragraph of Article 18-5 of the Law on transparency in public life requires lobbyists to comply with all the rules mentioned above in their dealings with the 'direct entourage' of the public official they have contacted.

The latter obligation is to prevent lobbyists from circumventing their obligations by seeking to influence the public decision-maker's colleagues or relatives, without contacting the public decision-maker directly.

■ **116.** The legislature also called upon the government to specify the obligations of lobbyists by means of a code of ethics adopted by decree in the Conseil d'État, after consulting the HATVP – a decree whose publication the HATVP fully supported in its activity report for the year 2018 [63].

■ **117.** Article 18-3 of the Law on transparency in public life also specifies the nature of the information that lobbyists are required to declare.

■ **118.** In this connection, it is important to note that it was decided in Constitutional Council Decision No. 2016-741 DC of 8 December 2016 that:

'These provisions have neither the object nor the effect of forcing lobbyists to specify each of the actions they carry out and each of the corresponding expenses. By requiring only the disclosure of aggregate data and aggregate amounts relating to the past year, the contested provisions do not disproportionately affect the freedom to exercise a trade or profession [64].'

The forthcoming implementing decree was therefore necessarily constrained by the legal framework imposed by the Constitutional

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62. Article 18-5, 1° to 8° of the Law on Transparency in Public Life.
63. Article 18-5, paragraph 2, 9° of the Law on transparency in public life.
64. DC n° 2016-741 DC, §45.

Council, as regards the content of statements by lobbyists, in order not to infringe excessively on the principle of freedom to exercise a trade or profession.

■ **119.** Under the Decree of 9 May 2017, any lobbyist must communicate to the HATVP:

- its identity or that of his managers if he is an individual;
- its lobbying activity with public decision-makers;
- the number of people employed in its lobbying work;
- where applicable, its turnover for the previous year;
- the professional or trade union organisations or associations to which it belongs in connection with the interests it represents.

■ **120.** These requirements also apply to persons engaged in lobbying on behalf of third parties, who are therefore required to communicate the identity of such third parties to the HATVP.

■ **121.** Paragraphs 1 to 6 of Article 3 of Decree No. 2017-867 add that lobbyists must send to the HATVP within three months of the end of their accounting period:

- information about the type of public decisions to which their actions have related;
- the type of actions taken;
- the issues to which their actions have related, identified by their purpose and their area of activity;
- the categories of public officials with whom they have communicated;
- the identity of the third party for whom the action was taken, if applicable;
- the amount of expenditure devoted to representations, as well as the amount of turnover linked to the activity of lobbying according to the terms laid down by order of the Minister of the Economy [65].

■ **122.** For example, the HATVP states that the purpose of lobbying should be understood more as 'the goal pursued' than as the subject discussed, and that it could be described in terms such as: 'Accelerating the allocation of radio frequencies to mobile operators [66].'

■ **123.** In order to ensure compliance with the ethical and reporting requirements of lobbyists, the HATVP has the ability to call for any records of information or documents necessary for the performance of its duties, without it being possible to object on the grounds of professional secrecy [67].

■ **124.** The HATVP may also carry out on-site checks at the business premises of lobbyists, if authorised by the judge in charge of freedoms

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65. Order of 4 July 2017 setting the list of ranges provided for in 6° of Art. 3 of Decree No. 2017-867 of 9 May 2017 on the Digital Directory of Lobbyists, *Official Journal*, 14 July 2017.
66. Directory of Lobbyists: Guidelines, High Authority on Transparency in Public Life, October 2018, p. 32.
67. Article 18-6 of the Law on transparency in public life.

(*juge des libertés*) of the Paris High Court, who must give a ruling within forty-eight hours. The judge in charge of freedoms, who may attend the meeting, shall have the right to suspend or end it at any time [68].

■ **125.** Article 18-6, 1° and 2°, of the Law on transparency in public life opens up to public officials, to those required to comply with ethical obligations applying to lobbyists and to associations approved by the HATVP, the possibility of applying to the HATVP to determine how the activity of an individual or legal entity should be classified.

■ **126.** In accordance with the provisions of Article 7 of Decree No. 2017-867, an individual or legal entity applying to the HATVP shall set out in writing the details necessary to analyse the position and shall indicate the facts cited in support of its report.

■ **127.** The HATVP must then, through its President or any person to whom he has delegated this authority, deliver an opinion within a period of one month, which may be extended after the applicant has been informed of this [69].

■ **128.** The provisions of Article 18-7 of the Law on transparency in public life and Article 8 of Decree No. 2017-867 give the HATVP power to issue a formal notice in the event of a breach, either on its own initiative or following receipt of a report.

In exercising this power the HATVP must notify breaches of the obligations of the lobbyist, which has a period of one month to submit its observations.

■ **129.** At the end of this period, the HATVP may issue a notice to the lobbyist to comply with the obligations to which it is subject.

This formal notice takes the form of a registered letter with acknowledgement of receipt, which may be published on the HATVP's website, and is subject to appeal within two months of its receipt [70].

■ **130.** Finally, the Sapin 2 Law provides for two criminal penalties:
- the first, set out in Article 18-9 of the Law on transparency in public life, punishable by imprisonment of one year and a fine of EUR 15 000, applies to a lobbyist who fails to disclose, either on his own initiative or at the request of the HATVP, the information that he is required to disclose pursuant to article 18-3;
- the second, contained in Article 18-10, punishable with the same penalties, relates to a breach of the lobbyist's ethical obligations within a period of three years after the first formal notice.

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68. Article 9 of Decree No. 2017-867.
69. Article 18-6, 2°, 3rd paragraph of the Law on transparency in public life.
70. Article 8 of Decree No. 2017-867.

■ **131.** However, the HATVP has stated that its powers of supervision and sanction would not be implemented in the course of the first reporting of activities by lobbyists, in the interests of their 'education' [71].

2. The limits of the Sapin 2 Law and its implementing decree

■ **132.** Those heard by the Committee unanimously considered that the definition of lobbyist adopted by the legislation and the Government was both too broad and too complex:

- too broad, because by opting not to limit the concept of a lobbyist to a person promoting economic interests – as is the case in the United States and Canada – the French register is liable to contain a very large number of lobbyists;
- too complex, in that the criteria adopted by Decree no. 2017-867 of 9 May 2017 to define the concept of a 'main or regular' activity of lobbying – namely spending more than half its time on lobbying or having carried out a lobbying action at least ten times in the last twelve months – are difficult for lobbyists to measure and for the HATVP to supervise.

■ **133.** Only the definition of the activity of lobbying – that is, of contacting a public decision-maker – was considered sufficiently clear by some of those commenting [72].

However, the notion of public decision-maker, as understood by the Law and its implementing decree, largely neutralises this assessment.

Indeed, 'public decision-makers', within the meaning of the law, corresponds to a very large number of people, ranging from members of the Government to parliamentarians, through the staff of Parliamentary Assembly departments; that is, more than ten thousand people – though it should be added that local government officials, as well as some heads of department or deputy heads at headquarters, are excluded for the time being and will be regarded as 'public decision-makers' with effect from 1 January 2021 [73].

■ **134.** The ambition expressed in the definition of public decision-making was also considered excessive, since the appendix to the Decree defining the scope of application of this concept covers both law and regulations, public procurement contracts or any 'other public decisions'.

The hearings conducted by the Committee enabled a convergence to be seen on this issue between a large number of stakeholders, ranging from the HATVP to the French Association of Private Enterprises (AFEP)

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71. *Progress Report for the Year 2017*, High Authority on Transparency in Public Life, p. 92.
72. MIGNON (E.), "Sapin Law 2: Lobbying subjected to major reporting and transparency requirements," *Dalloz avocats – Exercer et entreprendre*, 2017, p. 111.
73. *Progress Report for the year 2017*, High Authority on Transparency in Public Life, p. 88.

and the French Entrepreneurs' Movement (MEDEF), through several non-governmental organisations.

While it is true that the HATVP has specified which 'public decisions' should be taken into account, nonetheless this concept is still understood very broadly today [74].

■ **135.** Moreover, the elastic nature of the concept of the 'direct entourage' of public decision-makers is also criticised by some commentators, as this term could require lobbyists to comply with their ethical obligations when dealing with a very large number of people [75].

■ **136.** Finally, there was criticism of the fact that lobbying activity should only be taken into account when contact is made on the initiative of the lobbyist, and not on the initiative of the public decision-maker.

The hearings carried out by the Committee have shown that this fact introduces an imbalance between small organisations, which usually initiate the contact with a public decision-maker, and large organisations, which are more often invited to take part in hearings or working groups by public decision-makers – which in the latter case exempts them from their reporting requirements.

■ **137.** While the aim of the directory of lobbyists was to improve transparency in the development of the standard, the comprehensibility of the directory that has been put in place in the end raises questions, and gives rise to the risk that information relevant to citizens will be buried under an excessive mass of data [76].

■ **138.** On 5 April 2017, a few weeks before the publication of the decree relating to the directory of lobbyists, the HATVP warned the government about the flaws in the draft decree, the contents of which risked weakening the intention of the lawmakers to clarify the public decision-making process [77].

■ **139.** The HATVP had expressed this concern by recalling in its activity report for 2017 that 'this extremely broad scope of application […] carries the risk of diluting its effectiveness [78] '.

■ **140.** Despite the HATVP's efforts to clarify matters, its assessment of the first reports by lobbyists unfortunately supports this intuition.

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74. Directory of Lobbyists: Guidelines, High Authority on Transparency in Public Life, October 2018, p. 15.

75. DYENS (S.), 'Digital Directory of Lobbyists: what consequences for local authorities? ', *AJCT*, 2017, p. 498.

76. MIGNON (E.), "Sapin 2 Law: lobbying subject to major reporting and transparency requirements," *Dalloz avocats – Exercer et entreprendre*, 2017, *op. cit.*

77. Deliberation No 2017-35 of 5 April 2017 relating to the opinion on the draft Decree on the Digital Directory of Lobbyists.

78. *Progress Report for the year 2017,* High Authority on Transparency in Public Life, p. 87.

■ **141.** Lobbyists have in fact been required to register in the directory provided for by the Sapin 2 Law since 1 July 2017. They were allowed to register until 1 September 2017, which was extended to 31 December 2017, and to declare their actions carried out in 2017 before 30 April 2018.

■ **142.** The HATVP found this first reporting exercise relatively satisfactory, without minimising its criticisms of the system, which had proved difficult to implement [79].

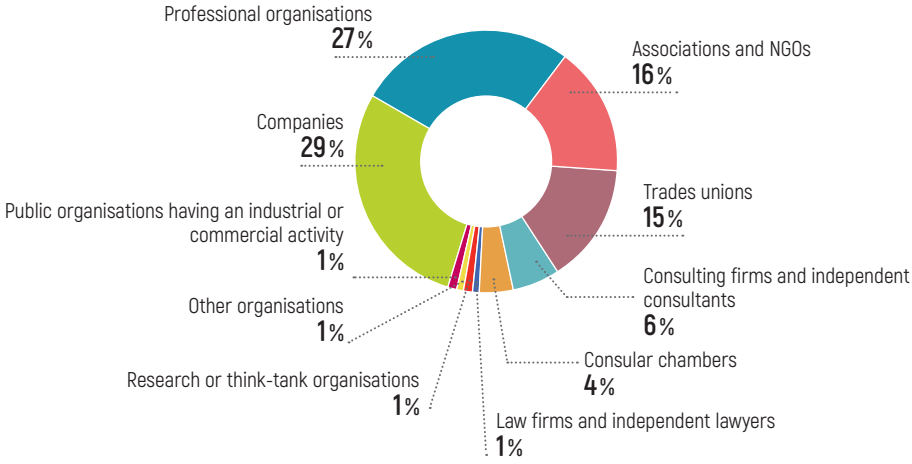
■ **143.** The total number of lobbyists entered on the register as at 21 April 2020 was 2046 , compared to only 816 as at 31 December 2017.

In comparison, it is useful to note that Ireland had 680 in 2015 and Canada 5,731 in the same year, suggesting that the French list remains incomplete for the time being [80].

Out of all those registering, 1,601 people published their activity statements, the uneven quality of which was highlighted by the HATVP [81].

■ **144.** The lobbyists listed in the directory were mainly companies (29%), professional organisations (27%), associations and NGOs (16%) and trades unions (15%).

Breakdown of subscribers which have published an activity report, by type of organisation

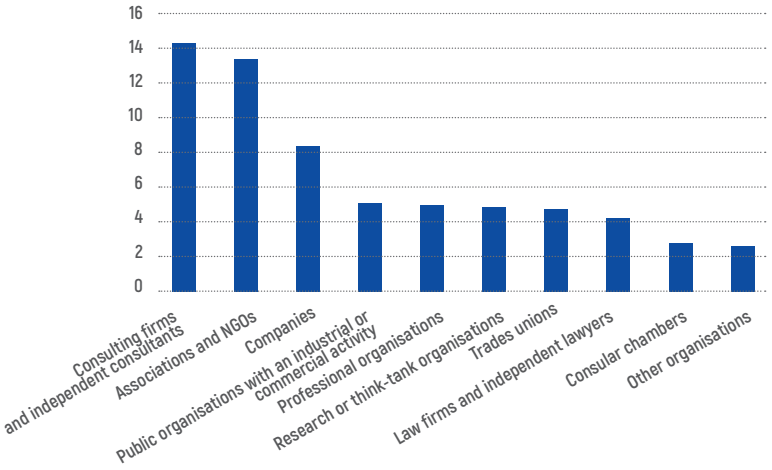


79. *Progress Report for the year 2018*, High Authority on Transparency in Public Life, p. 67.
80. JOURDAN (F.), "In terms of lobbying, transparency is progressing slowly", *La Semaine juridique*, General Edition, No. 26, June 25, 2018.
81. *Progress Report for the Year 2018*, High Authority on Transparency in Public Life, p. 73.

These figures are consistent with the common perception that the activity of lobbying is mainly carried out by specialist consulting firms [82].

■ **145.** The average number of actions declared by lobbyists was 5.15, which may appear low in the light of paragraph 2 of Article 1 of the Decree of 9 May 2017, which provides for a minimum of ten lobbying actions in order to be considered as a lobbyist [83].

Average number of actions by type of organisation



■ **146.** The HATVP activity report also revealed that 60 per cent of the actions of lobbyists had targeted the government and Parliament, with the aim of influencing the law in 38 per cent of cases.

In this respect, informal discussions or one-to-one meetings were the most common type of action for lobbyists (27% of actions), slightly ahead of writing to public decision-makers with the aim of persuading them (24%).

■ **147.** This first assessment led the HATVP to organise working sessions with lobbyists who had issued their activity reports in July 2018, so that they could share their comments and criticisms.

On that occasion, the lobbyists generally argued that the implementation of their reporting requirements was particularly complex and laborious.

82. LIGNIERES (P.), 'Lobbying: a year of applying the rules', *Revue internationale de la* compliance *et de l'éthique des affaires*, No. 4, August 2019.

83. JOURDAN (F.), 'In terms of lobbying, transparency is progressing slowly', *La Semaine juridique*, General Edition, No. 26, June 25, 2018.

This finding was in line with the HATVP's own conclusion in its 2018 activity report, which called for a refocusing of the directory on its primary objective of better accounting for the impact of lobbyists on the development of standards [84].

■ **148.** In addition, the Committee took note in the course of its work of the conclusions of the evaluation report on France adopted by the Group of States against Corruption (Greco) on 6 December 2019 on the 'Prevention of corruption and promotion of integrity in central governments (high-level executive functions) and law enforcement agencies [85] '.

Extracts from the assessment report on France adopted by Greco at its 84th Plenary Meeting (Strasbourg, 2 to 6 December 2019)

2. As regards persons with top executive functions (PTEF), the report notes that positive legislative developments have taken place with a view to strengthening significantly transparency in public life. However, in a number of respects, prevention needs to be adjusted and further tightened. The report recommends in the first place that the recently adopted action plan on corruption prevention that covers PTEFs in government be expanded to cover members of the President's private office. The High Authority on Transparency in Public Life (HATVP) and the French Anti-Corruption Agency (AFA) should strenghten their cooperation, notably concerning the assessment of the risks affecting PTEFs. The report underlines the need to adopt codes of conduct applying equally to all PTEFs working in government and covering all matters pertaining to integrity (conflicts of interest, obligations in terms of declarations, incompatibilities, gifts, post-employment obligations, contacts with lobbyists, confidential information, etc.), illustrated by relevant examples. The Ethics Charter of the President's private office ought to follow the same pattern. In order to guarantee their full respect, these instruments should go hand in hand with effective monitoring and proportionate disciplinary sanctions. In addition, the President of the Republic, ministers and private office members should be systematically briefed on questions linked to their integrity. Moreover, the confidentiality of advice given by ethics advisers should be embedded in the law and they should receive training on how to fulfil their role.

3. Regarding contacts between PTEFs and lobbyists, there is a striking need for more transparency, in particular through asking PTEFs to report publicly and regularly their meetings with lobbyists and the subject-matters discussed. Moreover, the existing register for lobbyists should cover all lobbyists having been in contact with PTEFs - at present, only

84. *Progress Report for the year 2018*, High Authority on Transparency in Public Life, p. 76.

85. Fifth Evaluation Round, Prevention of Corruption and Promotion of Integrity in Central Governments (Top Executive Functions) and Law Enforcement Agencies, Evaluation Report, France, adopted by Greco at 84th Plenary Meeting (Strasbourg, 2-6 December 2019), https://rm.coe.int/cinquieme-cycle-d-evaluation-prevention-de-la-corruption-et-promotion-/16809969fd.

those who have actively sought to contact PTEFs are required to register, therefore giving only a partial view of the situation.

4. The report also points out that the emerging practice of integrity checks on candidates for posts of advisers should be laid down in legislation so that future governments abide by it. Moreover, whilst welcoming the recent creation of a public register indicating areas where ministers will withdraw from the decision-making process so as to avoid any conflict of interest, the report finds that this register should also apply to private office members considering their often-crucial role in defining government decisions. The report also underlines that the asset and interest declarations filed by the elected President of the Republic whilst a presidential candidate should be examined upon taking office in order to help prevent any potential conflict of interest.

3. The Committee's recommendations

■ **149.** At the conclusion of its work, and having taken account of the Evaluation Report adopted by the Group of States against Corruption (Greco) in December 2019, the Committee shared the finding that the concepts of public decision-making, public decision-maker and lobbying had been conceived in too broad terms by the Sapin 2 Law and its implementing decree of 9 May 2017.

It considered that this situation was likely to impair the clarity of the reporting of lobbyists and, consequently, the comprehensibility for citizens of the directory of lobbyists.

In this respect, the Committee joins in the criticisms made by the HATVP itself of the existing legislative and regulatory machinery.

■ **150.** In the interests of legal certainty for lobbyists and transparency for citizens, the Committee recommends that a new implementing Decree should define the scope of the directory of lobbyists by reducing it as regards the concepts of public decision-maker and public decision-making.

This Decree should, on the one hand, refocus the concept of public decision-maker on the members of the executive and Members of Parliament and, on the other, focus the concept of public decision-making on laws and regulations.

It would thus enable the directory of lobbyists better to account for their regulatory impact on the development of laws and regulations.

■ **151.** In addition, the Committee recommends that the directory of lobbyists should specify the public decision in respect of which, as well as the identity of the public decision-maker to whom, the lobbying activity has been addressed, which is not currently the case.

■ **152.** Finally, the Commission wishes the government to respond to the call made to it by Article 18-5, 9°, of the Law of 11 October 2013 on transparency in public life, in its formulation resulting from the Sapin 2 Law, and adopt a code of ethics for lobbyists by decree in the Conseil d'État.

CHAPTER II

STRENGTHENING THE FRENCH MODEL OF COMPLIANCE IN THE FIGHT AGAINST CORRUPTION

A. SUPPORTING THE INCREASED IMPORTANCE OF THE COMPLIANCE OFFICER IN BUSINESS

■ **153.** As the news regularly reports, the implication of a business in economic and financial crimes, particularly of corruption, can have far-reaching financial, business and human consequences: the reputation of the business with its customers, and more broadly with its partners, can suffer lasting damage and its financing is likely to be made more difficult.

■ **154.** The existence of an effective compliance function enables businesses, on the contrary, to guard against the risk of seeing their reputation damaged and their economic value eroded. The compliance function is also involved in securing the economic performance of the business, in a competitive environment where values of probity and ethical behaviour are subject to increasing scrutiny by third parties.

■ **155.** For these reasons, the compliance function has gradually increased in importance in French businesses over the past few years. According to a survey conducted in 2017, 60% of businesses surveyed – from a panel comprised of 50% of listed companies – had a compliance officer, most often attached to the company's legal department [86].

■ **156.** The entry into force of the Sapin 2 Law, by requiring businesses exceeding certain thresholds to implement a compliance programme

86. Mapping of Legal Departments 2018 carried out by LEXqi Conseil in partnership with the Cercle Montesquieu and the French Association of Business Lawyers.

from 1 June 2017, has contributed to the increased importance of the compliance function in French businesses.

1. The lack of framework for the compliance officer function under the Sapin 2 Law

■ **157.** The fact remains that the Sapin 2 Law does not require the businesses concerned to appoint compliance officers, nor does it consider the skills required of them or their positioning within the business.

Article 17 of the Sapin 2 Law only refers in fact to business managers, who are alone responsible – along with the business itself – to the Sanctions Committee of the French Anti-Corruption Agency (AFA) for implementing the compliance programme.

The implementing decrees of the Sapin 2 Law also omit to consider the compliance officer function.

■ **158.** This situation differs, in particular, from that of data protection officers, in respect of whom Regulation 2016/679 of 27 April 2016 'on the protection of natural persons with regard to the processing of personal data' (GDPR) has conferred a mandatory status requiring them to be designated in certain cases (Article 36), their operational independence (Article 37) and their duties (Article 38).

■ **159.** The comparison between the duties of compliance officers and data protection officers highlights some similarities, but also several differences.

The main similarities are:

- only the managers of the business are responsible – along with the business itself – to the AFA Sanctions Committee for implementing the compliance programme. Similarly, only the data processing officer, or if applicable the designated subcontractor, is responsible to the National Commission for Information Technology and Civil Liberties (*Commission nationale de l'informatique et des libertés (Cnil)*) for implementing the protection of personal data. Neither compliance officers nor data protection officers are responsible to these administrative authorities;
- within the organisation concerned, the data protection officer is the Cnil's point of contact for data processing issues. In practice, the compliance officer is usually the AFA's point of contact when it carries out an audit.

The key differences are:

- in some cases determined by the GDPR, the appointment of a data protection officer is mandatory; while the managers of a business

that is subject to the implementation of a compliance programme are not required – from a statuory point of view – to appoint a compliance officer;
- the data protection officer may alternatively be a staff member of the data controller or an external service provider (Article 37.6 of the GDPR); while the compliance officer is almost always an employee of the business, even if the employee may use an external service provider to design or revise its compliance programme;
- the data protection officer is designated 'on the basis of professional qualities and, in particular, expert knowledge of data protection law and practices and the ability to fulfil [his] tasks' (Article 37.5 of the GDPR); while no standard defines the competencies required to perform the function of compliance officer.

2. The *Practical Guide to the Anti-Corruption Compliance* Function in Business of the French Anti-Corruption Agency

■ **160.** However, in January 2019, the AFA's Support Department for Economic Stakeholders published a *Practical Guide to the Anti-Corruption Compliance Function in Business* [87], updated in December 2019, which considers the designation, positioning within the company, profile and liability of compliance officers.

a) The designation of the compliance officer

■ **161.** In this respect, the Practical Guide to the Anti-Corruption Compliance Function in Business states, first, that the senior management of a business which is subject to the implementation of a compliance programme 'shall ensure the conditions for effective governance of anti-corruption compliance within the organisation' and, as such, 'shall designate the person responsible for the compliance function and be committed to protect him from any pressure he may encounter [88] '.

■ **162.** It then stipulates:

'A real commitment from senior management involves identifying a chain of responsibility in the administration of compliance, which in practice leads to the formal designation of a head of the anti-corruption compliance function.

This designation may be the subject of a specific communication to all employees and may be formalised by an engagement letter or an internal note signed by senior management specifying:
1. the independence of the compliance function;
2. its positioning within the organisation (in particular its positioning within the hierarchy);

87. https://www.agence-francaise-anticorruption.gouv.fr/files/files/2019-01-29_-_Guide_pratique_fonction_conformite.pdf.
88. *Practical Guide to the Anti-Corruption Compliance Function in Business*, AFA, p. 4.

3. how to access and report to senior management and, where relevant, to the board of directors and its specialist committees (ethics, risk, audit committees, etc.);
4. the duties assigned;
5. its connection with the other functions of the organisation and other areas of compliance;
6. the material and human resources linked with the function and any internal relays;
7. finally, the designation of the person responsible for the compliance function may be different according to the choice of the organisation and the scope of the tasks assigned to him [89] .'

■ **163.** In the latter respect, several members of the Committee felt that the designation 'compliance director' was to be preferred over 'compliance officer', including in the AFA's publications, in order to enhance the value of the compliance function and its positioning within the business.

The same members observed that in the businesses in which it is used, the designation 'compliance director' generally corresponds to a higher level of responsibility.

b) The position of the compliance officer

■ **164.** In this regard, the AFA's Practical Guide to the Anti-Corruption Compliance Function in Business states that 'the positioning of the compliance function in the organisation is the decision of senior management' and 'is therefore likely to vary among organisations [90] .'

■ **165.** It includes, however, two areas of clarification.

On the one hand, 'it is important that [the position of the compliance officer] ensures:

1. the objectivity of his assessments;
2. the independence of his action vis-à-vis the other functions of the organisation and the ability to have a real influence over them;
3. easy access to senior management, in order to be listened to and supported [91] .'

On the other hand, 'attaching the head of the anti-corruption compliance function to the general management and his participation in the executive committee testify to:

1. the commitment of senior management to preventing corruption;
2. the effectiveness and maturity of the organisation's compliance programme;

89. *Ibid.*, pp. 10-11.
90. *Ibid.*, p. 10.
91. *Ibid.*

3. the effectiveness of the anti-corruption system [92].'

It further states that:

'Attaching the head of the compliance function to the general management and his membership of the management committee are favourable but insufficient indicators if the head of compliance is not in a position to interact effectively and regularly with senior management and to obtain from it the decisions that are helpful for the performance of his or her duties.

Conversely, a lower-level assignment in the organisation chart does not constitute irrefutable evidence of a lack of independence for the head of the compliance function or of his inability to access senior management to obtain decisions [93].'

■ **166.** In addition, an empirical study conducted during 2015 among heads of compliance in ten businesses headquartered in France, in order to provide a 'benchmark of best practices in organisation and compliance programmes [94], identified a good practice for the positioning of the compliance officer in a business.

Its authors first note that 'the chief compliance officer (CCO), if rarely a member of the executive committee, usually has a direct line to the group's CEO, reports once or twice a year to the board of directors and also has direct access, as appropriate, to the audit/risk/ethics committee [95] '.

After this, however, in most of the businesses surveyed they observed 'a reluctance towards the idea that the chief compliance officer could have a functional relationship with the chairman of the audit committee, enabling him to ensure his independence from the chief executive officer [96] '.

'Its chief compliance officer explains that he has a dual link, in a direct line with the chief executive and with the audit committee (double reporting, solid line, to the chief executive and to the chairman of the audit committee). We also understand that some of his objectives, as well as his annual appraisal, are not dependent on the chief executive, which enables the chief compliance officer, over and above the symbolic value of this attachment, to offer an independent vision and approach to the management of the business as a whole. Here the point is to allow the chief compliance officer to say no, provided of course that his

92. *Ibid.*
93. *Ibid.*, p. 11.
94. BREEN (E.), GUTIERREZ-CRESPIN (A.), 'Compliance programmes : Ten good practices observed in France', *Compliance: a new world?*, under the direction of A. Gaudemet, Panthéon-Assas, 2016, p. 107 et seq.
95. BREEN (E.), GUTIERREZ-CRESPIN (A.), "Compliance programmes : Ten good practices observed in France", *La* Compliance *: un monde nouveau ?*, under the direction. A. Gaudemet, Panthéon-Assas, 2016, p. 116.
96. *Ibid.*

position is argued [97] .' In this way, the compliance officer is able to inform the audit committee of the board of directors of his or her assessment of compliance matters, possibly different from that of the chief executive.

Thus the authors see 'double reporting by the chief compliance officer to the chief executive and the chairman of the audit committee' as a good practice, which may be recommended in businesses having such a committee [98].

c) The profile of the compliance officer

■ **167.** The compliance officer is required to participate in the design, implementation and review of the compliance programme of the business. For these purposes, he must know, or be quickly capable of discovering, the organisation of the business and the sharing of responsibilities within it, both with regard to sites in France and those located abroad.

■ **168.** The AFA's *Practical Guide to the Anti-Corruption Compliance Function in Business* provides that the compliance officer may be either designated within the company or recruited from outside.

In any event, it must be checked that the compliance officer:

'1. is capable of performing a function that is cross-departmental. This will require good interpersonal and managerial skills: diplomacy, the ability to interact with senior management, objectivity and impartiality, the ability to work in a team, discretion, cool-headedness, patience, etc.;

2. has a solid knowledge of the regulations to be implemented as well as hands on experience of risk mapping and management methods, internal monitoring and analysis tools [99].'

In this respect, 'having a specific training in anti-corruption compliance is an indisputable asset [100].'

d) The liability of the compliance officer

■ **169.** Article 17 of the Sapin 2 Law makes the managers of a business liable for the implementation of the compliance programme. The AFA Sanctions Committee may hold them personally liable, as well as the business itself. The compliance officer may not, however, be held personally liable under this article.

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97. *Ibid.*, p. 117.
98. It is noted that, since the entry into force of Order No. 2008-1278 of 8 December 2008, the audit committee is mandatory in 'public interest entities', which include listed companies: Art. L. 823-18 Com.
99. *Practical Guide to the Anti-Corruption Compliance Function in Business*, AFA, p. 14.
100. *Ibid.*

This was what the legislature wanted, so that the managers of a business become personally involved in the implementation of the compliance programme and take full account of the compliance requirements of the business they run.

■ **170.** Accordingly, any delegation of authority by the manager of the business to the compliance officer may not have the effect of transferring disciplinary liability from the first to the second [101].

Certainly, it is common for the managers of a business in practice to delegate the operational implementation of the compliance programme to the compliance officer. See, for example, the AFA's Practical Guide to the Anti-Corruption Compliance Function in Business: 'in practice, senior management delegates to the compliance officer the operational tasks of rollout, implementation, evaluation and updating of the anti-corruption compliance programme [102] '.

But such 'operational delegation' should not, in principle, effectively transfer the disciplinary liability of the managers of a business to compliance officers as a result of their implementation of the compliance programme.

■ **171.** Consequently, it appears that compliance officers may only be held liable by way of an action under the general law [103].

■ **172.** In the case of corruption, in particular, anyone who has participated in the commission of the offence may be held criminally liable. In addition, the business in question may also be held criminally liable under the conditions laid down in Article 121-2 of the Code of Criminal Procedure:

'Legal entities, excluding the State, are criminally liable, according to the distinctions in Articles 121-4 to 121-7, for offences committed on their behalf by their bodies or representatives. '

In this respect, the AFA's Practical Guide to the Anti-Corruption Compliance Function in Business takes the view, however, that 'mere failure by the head of the compliance function in his professional duties may not constitute, from the point of view of the criminal law, an act of participation as instigator or accomplice in the offence of corruption.

To commit the offence of corruption, one must have taken part actively in the commission of the acts of corruption themselves. Incomplete risk mapping, insufficient third-party assessment, or lack of prior reporting to a manager in respect of a transaction - even one that involves a high risk

101. In this respect, see, for example , DAOUD (E.) and SFOGGIA (S.), 'Tightrope walker or orchestral conductor: what liability for the compliance officer? ', *Lamy droit des affaires* No. 143, December 2018, p. 25 ff.

102. *Practical Guide to the Anti-Corruption Compliance Function in Business,* AFA, p. 12.

103. See also, in this respect, DAOUD (E.) and SFOGGIA (S.), 'Tightrope walker or orchestral conductor: what liability for the compliance officer? ', *Lamy droit des affaires* n° 143, décembre 2018, op. cit.

of corruption - do not constitute acts of corruption or of participation in the offence. In practice, therefore, criminal liability for corruption on the part of the head of the compliance function is unlikely to arise if the head of the compliance function has merely acted (or refrained from acting) within the scope of his powers [104] .'

■ **173.** A compliance officer could, on the other hand, be held liable for a breach of his professional duties if acts of corruption take place and he was in a position to prevent them, for example by timely reporting to the managers of a business. The compliance officer would, in that case, be liable to disciplinary action by his employer.

As has been noted:

'The compliance officer is not […] immune from the employer's power of direction and sanction. Indeed, the employer may terminate his appointment if his shortcomings are sufficiently established by objective factors. The court was thus able to validate the dismissal of an executive incapable of managing a team or an employee who failed to meet the objectives set by his employment contract, which were deemed realistic and compatible with the market. By analogy, one might imagine that a compliance officer incapable of carrying out his duties, for example conducting a risk identification and assessment or a training programme, could be dismissed owing to his professional incomptence [105] .'

■ **174.** Finally, it should be recalled that the compliance officer is exposed to the risk of impeding whistleblowing, because of both his function and the elements of this offence which are yet to be clarified by case law. According to Article 13, I of the Sapin 2 Law, 'obstructing in any way the submission of a report to the persons and bodies referred to in the first two paragraphs of Article 8 I shall be punishable by one year of imprisonment and a fine of EUR 15,000'.

3. The Committee's recommendations

■ **175.** On the above basis, the Committee discussed with those heard by them the desirability of providing compliance officers with a regulatory framework, as was done for data protection officers.

It was agreed that such a framework would not be appropriate but that flexibility should be given to businesses, particularly as regards the positioning of the compliance officer within them.

The majority opinion of the Committee and of those heard by them was that the *Practical Guide to the Anti-Corruption Compliance Function*

104. *Practical Guide to the Anti-Corruption Compliance Function in Business*, AFA, p. 17.

105. DAOUD (E.) and SFOGGIA (S.), 'Tightrope walker or orchestral conductor: what liability for the compliance officer? ', *Lamy droit des affaires* N° 143, December 2018, op. cit.

in Business, published by the AFA in January 2019 and updated in December of the same year, albeit not compulsory, nonetheless provides a satisfactory framework for the designation, positioning within the business, profile and liability of the compliance officer.

The Committee therefore decided to recommend that the AFA consider the possibility of:

- substituting the designation 'compliance director' for 'compliance officer', in order to enhance the value of the compliance function within businesses and, in all likelihood, improve its positioning within them;

- to promote as good practice the dual attachment of the compliance officer to the chief executive and to the chairman of the committee of the board of directors, in businesses in which such a committee exists.

B. CREATING A COMPLIANCE FRAMEWORK TAILORED TO LOCAL AUTHORITIES

■ **176.** At a conference entitled 'Compliance, Public Law and the Administrative Court', former Vice-President of the Conseil d'État Jean-Marc Sauvé noted that the concept of compliance also runs through administrative law: 'Compliance exists. It is, if not a value, at least a process or a method of complying with rules that is increasing in importance [106]. ' The progressive appearance of compliance within local authorities since before the entry into force of the Sapin 2 Law is an example of this.

Indeed, while the phenomenon appears at first sight to be the prerogative of business, for some years now we have seen the development of compliance instruments within a decentralised administration that is becoming more concerned with matters of conduct, ethics and transparency, under pressure from public opinion and the legislature.

It is true that it would be an exaggeration to say that compliance is comparable in local government to what one sees in large businesses.

However, although one cannot say that identical compliance standards exist between businesses and local authorities, before the Sapin 2 Law came into force it was possible to see the emergence of a consensus on the behaviours that ought to be adopted, whether in the public or private sectors.

106. SAUVÉ (J.-M.), 'Compliance, Public Law and the Administrative Court', Conference Round on Regulation, Supervision, Compliance, November 30, 2016.

1. The system resulting from the Sapin 2 Law

a) The development of a culture of compliance in local authorities before the Sapin 2 Law

■ **177.** Law No. 2013-907 of 11 October 2013 on transparency in public life established a system to prevent infringements of probity and conflicts of interest by imposing reporting requirements on local elected officials in the form of declarations of interests and assets.

These requirements relate to the main officials of local government bodies, as well as those having a local mandate, as set out in Article 11 of the Law.

Declarations of assets and interests are addressed to the High Authority for Transparency in Public Life (HATVP), established in this instance by the legislature, which is responsible for checking their accuracy.

The preventive approach inherent in this reform is clearly set out in Article 1 of the Law ontTransparency in public life, which states:

'Members of the Government, persons holding a local elective office and those with a public service mandate are to perform their duties with dignity, probity and integrity and ensure that any conflict of interest is prevented or brought to an end immediately.'

This Law also had the merit of introducing, in Article 25 bis of Law No. 83-634 of 13 July 1983 on the rights and obligations of public servants, known as the 'Le Pors Law', a definition of the concept of conflict of interest, worded in this way:

'Within the meaning of this Law, a conflict of interest is any situation of interference between a public interest and public or private interests which is likely to influence or appear to influence the independent, impartial and objective performance of a duty [107].'

■ **178.** The public procurement sector has also seen the publication of ethical charters by several local authorities.

As well as restating existing texts, these charters specify the ethical values that the authority must adopt in the context of public procurement and public purchasing.

It is stated, for example, that 'officials must demonstrate integrity, honesty and impartiality by putting the public interest first above their personal interest in all circumstances, in order to avoid any form of favouritism [108].'

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107. Article 2, paragraph 1 of Law No. 2013-907 of 11 October 2013 on transparency in public life.
108. The Ethics Charter of the Hauts-de-Seine department, p. 2.

Ethical charters thus aim to influence the behaviour of officials by giving it a structure if, for example, they are confronted with a conflict of interest situation.

They go beyond mere compliance with applicable standards, since they involve adherence to a system of values that they wish to be shared by all officials, so that over time they comply with the rule of law [109].

■ **179.** These first local initiatives, whose early nature must be emphasised, were further developed through the establishment of the Charter of Local Elected Officials by Law No. 2015-366 of 31 March 2015 aimed at helping local elected officials to carry out their mandate. The Charter provides a particularly interesting illustration of the development of compliance instruments within local authorities, before the Sapin 2 Law came into force.

The Charter defines the ethical principles that guide local elected officials in carrying out their mandate and specifies the standards of behaviour that they must adopt in the course of their duties.

Since 2015, the first meeting of a municipal council, departmental council, regional council or the assembly of a public institution for cooperation between local authorities with fiscal autonomy (*établissement public de coopération intercommunal (EPCI)*) must begin with the chief executive of the authority reading the Charter, a copy of which he gives to all members of the assembly.

It is therefore an educational tool designed to enable values to be shared among the local elected officials of a single community and, in the same way, to participate in the development of a culture of compliance within local authorities.

Senator Bernard Sauney expressed this in his report: the purpose of the Charter of Local Elected Officials is to remind everyone of 'virtuous behaviour and good practices regardless of the law's prescriptions or prohibitions [110] ' – making a silent but indisputable reference to the idea of compliance.

Charter of the Local Elected Official

' 1. The local elected official shall carry out his duties with impartiality, diligence, dignity, probity and integrity.
2. In the carrying out of his mandate, the local elected official shall further only the public interest, to the exclusion of any personal interest of his, whether direct or indirect, or any other private interest.

109. COQ (V.), 'Ethical Charters in Public Procurement', *Contrats et marchés publics*, No. 4, April 2019.

110. Report No. 290 (2013-2014) made a name for the Law Commission (*Commission des lois*), tabled on 15 January 2014, p. 18.

3. The local elected official shall ensure that any conflict of interest is prevented or immediately brought to an end. Where his personal interests are involved in matters submitted to the deliberative body of which he is a member, the local elected official undertakes to make them known before the debate and vote.
4. The local elected official undertakes not to use for other purposes the resources and means available to him for carrying out his mandate or duties.
5. In carrying out his duties, the local elected representative shall refrain from taking steps that confer on him a future personal or professional advantage after the termination of his mandate and duties.
6. The local elected official shall participate diligently in meetings of the deliberative body and the bodies to which he has been designated.
7. The consequence of universal suffrage is that the local elected official is and remains responsible for his acts throughout his mandate to all citizens of the territorial authority, to whom he is accountable for the acts and decisions taken in the course of his duties. '

■ **180.** In the same way, Article 1 of Law no. 2016-483 of 20 April 2016 on ethics and the rights and obligations of public servants led to the dissemination of a culture of compliance in local public administration by enshrining in the Public Service Regulations the principle that 'the public servant shall perform his duties with dignity, impartiality, integrity and probity'.

Article 11 of the Law also created the function of 'ethical adviser', responsible for advising local public officials on the application of the ethical rules applying to them:

'Any official shall have the right to consult an ethical adviser, who shall provide him with any advice needed to help him comply with the obligations and ethical principles referred to in Articles 25 to 28.'

While the obligation to appoint an ethical adviser initially only concerned management centres [111], Article 1, 2° of Decree No 2017-519 of 10 April 2017 extended this to local government service from 1 January 2018.

In addition to his advisory role, the general scope of the terms governing the role of the ethical adviser suggests he is the main channel for ethics within local government.

This is how he finds himself entrusted with the preparation of internal documents such as charters, guidelines or guides of good practice which a local government body wishes to disseminate to its officials.

111. Management centres are local administrative public institutions, to which communes and local public institutions employing less than 350 established officials must be affiliated. Their task is to provide communities with assistance and expertise in human resources management for local communities, and assistance to the general public in recruitment for public communities and institutions. Their status is governed by Article 13 of the Law of 26 January 1984 on Local Public Service Regulations.

Paragraph 4 of new Article 6 *ter* A of the Le Pors Law provides, moreover, that:

'In the event of a conflict of interest, the public servant must first have alerted in vain one of the authorities to which he reports. He may also report such facts to the ethical adviser provided for by Article 28 *bis*.'

Article 8 of the Sapin 2 Law, which provides that the reporting of an ethical alert may be 'brought to the attention of the direct or indirect superior at the employer or of an adviser designated by the employer', and Article 4 of Decree No. 2017-564 of 19 April on procedures for receiving reports made by whistleblowers within public or private sector entities or State authorities also offer ethical advisers the possibility of being assigned the function of 'ethical alerts adviser'.

Article 2 of Decree No. 2017-519 of 10 April 2017 on ethical advisers in public service thus gives local authorities a lot of flexibility in putting this system in place, as they may choose whether to designate one or more people from the community concerned or from another authority, or a college of persons from outside the authority or outside public service.

Without imposing on them the means to achieve this objective, the Decree of 10 April 2017 also ensures that local authorities appoint the ethical adviser 'at a level that enables him to carry out his duties effectively' and that the head of department shall make 'available to the ethical adviser whom [112] he appoints in accordance with the terms laid down in Article 4 the means, particularly in terms of information technology, to enable him to carry out his duties effectively'.

The importance of the role thus entrusted by the legislature to the ethical adviser within authorities led some authors to question the relevance of a parallel between this function and that of a compliance officer [113].

■ **181.** The developments charted have gradually extended the role and operational scope of local authority legal departments, making them channels for the dissemination of ethical rules within local authorities.

Above all, the gradual generalisation of these instruments within local authorities has enabled many officials to be trained in a culture of ethics and, in this way, to prevent and limit breaches of the law.

However, despite this remarkable progress, some local authorities were still too exposed to the risk of infringements.

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112. Articles 4 and 6 of Decree No. 2017-519 of 10 April 2017 relating to ethical advisers in public service

113. COLLARD (C.), 'No one is meant to ignore compliance: local authorities and the compliance function,' AJ *Collectivités Territoriales*, 2018, p. 481.

■ **182.** This was revealed by a 2014 survey conducted by the Central Service for the Prevention of Corruption (SCPC) of local authorities and public institutions with more than fifty thousand inhabitants.

The survey revealed that the situations of local authorities were extremely diverse.

Admittedly this finding preceded the advent of guides to good conduct, ethical charters and the ethical adviser, but it is not unreasonable to believe that these developments, whilst helping to clean up certain practices, remained insufficient to address the structural difficulties highlighted by this investigation, which seemed to accuse a large number of authorities of effectively protecting themselves against the risk of corruption [114].

The SCPC suggested developing a national-style ethics charter – a proposal seized on by the legislature with the Charter of the Local Elected Official – while recommending that it be adapted to the specific circumstances of each authority – a recommendation that was sadly not followed by the legislature.

Only a few authorities have therefore agreed to draft their own ethical codes, the others being de facto referred to the general principles contained in the Public Service Regulations, as amended by the Law of 20 April 2016, or the Charter of the Local Elected Official.

Finally, the SCPC's investigation observed that, where they existed, the audit and internal monitoring departments of local authorities 'did not always have the technical skills necessary to ensure the satisfactory performance of the contract [115] '.

The report called for establishing within local authorities exceeding a certain population threshold the obligation to establish an internal audit and monitoring body, as well as developing a plan for the prevention of the risks of breaches of probity.

■ **183.** This finding was corroborated by an investigation conducted by the Internal Audit Department of the City and the Eurometropole of Strasbourg on behalf of the Conference of Local Government Inspectors and Auditors (CIAT) and the French Institute of Internal Audit and Monitoring (IFACI) in 2016, which showed that of the 96 large-scale local authorities surveyed, only 38% had an internal audit department, while 54% did not. [116].

In particular, the survey noted that there was 'a lack of a culture of internal monitoring in local authorities […] [where] either monitoring exists but

114. Preventing Corruption in Local authorities, Central Service for the Prevention of Corruption, 4 July 2014, p. 265.

115. *Ibid.*, p. 272.

116. GARCZYINSKI (M.), YEH (A.), *Internal audit functions in local authorities*, Internal Audit Department of the City and Eurometropole of Strasbourg, in partnership with IFACI and CIAT, 2016.

remains unformalised, or monitoring is insufficient or non-existent [117].'

■ **184.** This is the context within which the need to strengthen the development of a culture of compliance within local authorities through the Sapin 2 Law emerged, taking note of the SCPC's findings and requiring local authorities to implement compliance and internal monitoring programmes, like those requested of businesses.

b) The contributions of the Sapin 2 Law

■ **185.** Article 3 of the Sapin 2 Law entrusted the French Anti-Corruption Agency (AFA) with a mandate of advice and supervision as regards local authorities, in order to enable them to take ownership of and implement their obligations in the fight against corruption.

■ **186.** Paragraphs 1 and 2 of this Article state that:

'The French Anti-Corruption Agency:
1. shall participate in administrative coordination, centralise and disseminate information to help prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism. In this context, it shall provide support to State authorities, local authorities and any individual or legal entity;

2. shall develop recommendations to assist public and private sector entities to prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism.

These Guidelines shall be adapted to the size of the entities concerned and to the nature of the risks identified. They shall be regularly updated to take account of developments in practice and shall be the subject of a notice published in the *Official Journal*.'

Article 1, II of the Decree of 14 March 2017 adds:

'II. – as part of its mission to support State authorities, local authorities and any individual or legal entity mentioned in Article 3 of the above-mentioned Law of 9 December 2016, the French Anti-Corruption Agency shall provide training, awareness-raising and assistance in preventing and detecting risks in respect of corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism.'

Finally, Article 2 of the Decree of 14 March 2017 on the organisation of the AFA states that:

117. *Ibid.*, p. 4.

'The department for advice to public officials shall provide assistance to State authorities, local authorities, their public institutions and semi-public companies, associations and foundations recognised as being of public benefit, as well as individuals. It shall develop and update guidelines to assist them in preventing and detecting the offences listed.'

This preventive and advisory work that the legislature assigned to the AFA rapidly manifested itself in the publication of several documents designed to support local authorities in implementing their anti-corruption obligations.

■ **187.** In order to provide training for elected officials and local government officials, on 28 May 2018 the AFA signed a partnership agreement with the National Centre for Local Public Service (*Centre national de la fonction publique territoriale - CNFPT*), with the aim of helping committees of experts develop a training programme for local government officials, undertake awareness-raising and carry out and relay studies to local authorities.

This partnership appears to have prospered as the AFA and the CNFPT, among other things, hosted an online seminar on the prevention of corruption in local public management in September 2018.

This initiative, which brought together 6,662 registered users in the first year of its implementation, was repeated in September 2019 [118].

■ **188.** Inspired by the same desire to educate, in January 2019 the AFA published a Charter for the Support of Public Stakeholders.

■ **189.** In April 2019 the AFA also released a 'benchmark sheet' to clarify the scope of supervision under the Sapin 2 Law with regard to local authorities.

■ **190.** In the same month the AFA published a 'Charter of the rights and duties of parties involved in the supervision provided for in Article 3° and 3 Article 17 III of Law No. 2016-1691 of 9 December 2016'.

■ **191.** The AFA's advisory work has also resulted in many meetings of associations of local elected officials and professional associations of the local public sector [119].

The AFA's 2018 activity report thus mentions 66 awareness-raising events for public stakeholders and support being given to seven local authorities at their request [120].

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118. Activity Report of the French Anti-Corruption Agency for the year 2018, p. 14.
119. Speech by the Director of the French Anti-Corruption Agency at the Congress of Mayors on 21 November 2018.
120. Activity Report of the French Anti-Corruption Agency for the year 2018, p. 7.

■ **192.** On 15 July 2019 the AFA published online a questionnaire for elected and public officials to enable them to test their knowledge of corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism [121].

■ **193.** Finally, on 23 March 2020 the AFA published on its website a new session of the free online course on the prevention of corruption in local public management [122].

■ **194.** These many initiatives have enabled the AFA to fulfil the mandate of guidance, assistance and support to local public stakeholders that it received from the legislature, initially focussing on the preventive and educational dimension.

■ **195.** The issue of supervision of local authorities in turn fuelled important discussions during the preparatory work for the Sapin 2 Law.

Although the legislature chose to supervise local authorities, it did not wish to define a specific framework for them – unlike for businesses, whose supervisory framework is set out in Article 17.

Thus the Sapin 2 Law states, in Article 3:

'The French Anti-Corruption Agency:
[…]
3° Shall supervise on its own initiative the quality and effectiveness of the procedures implemented within State authorities, local authorities, their public institutions and semi-public companies, and associations and foundations recognised as being of public benefit to prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism. It shall also supervise compliance with the measures referred to in Article 17 II.'

As the legislature seemed to call upon it to do – and in the absence of a specific framework for supervising local public stakeholders – the AFA, showing pragmatism, has thus 'duplicated' for local authorities the framework provided for businesses.

In this respect, the Agency indicated on 22 December 22 2017, concerning the 'scope' of its Guidelines:

'These Guidelines are intended for all private and public sector entities, regardless of their size, legal structure, business area, revenue or number of employees. These entities are hereinafter called *'organisations'*.'

121. Activity Report of the French Anti-Corruption Agency for the year 2019, p. 16.
122. https://www.agence-francaise-anticorruption.gouv.fr/fr/nouvelle-diffusion-mooc-corruptionfavoritisme detournement-comment-prevenir-dans-gestion-locale.

The Charter of the rights and duties of parties involved in supervision, published in April 2018 for the attention of public stakeholders, associations and foundations recognised as being of public benefit, then stated that the AFA saw in the framework provided for by Article 17 of the Sapin 2 Law the sole basis for the supervision of local authorities.

Finally, the 'benchmark sheet' published by the AFA in April 2019 suggests that the scope of supervision of local authorities comprises, without distinction, all the authorities mentioned in Article 72 of the Constitution, i.e. the communes, departments, regions, authorities with special status and overseas authorities governed by it.

■ **196.** In accordance with Article 3 of the Decree of 14 March 2017 on the organisation of the AFA, audits of local authorities may be carried out:

' […] on documents and on site, the quality and effectiveness of the procedures implemented in State authorities, local authorities, their public institutions and semi-public companies and associations and foundations recognised as being of public benefit for the purpose of preventing and detecting the offences referred to in Article 2 of this Order.'

The Charter of the rights and duties of parties involved in supervision helpfully specifies the organisation and conduct of these audits: as for private economic stakeholders, the supervision of local authorities aims to establish whether the obligations laid down by law for the prevention of corruption are being properly enforced and complied with; they may take the form of an on-site audit following by an audit of documents, or vice versa.

■ **197.** Audits of local authorities result in the preparation of a provisional report sent to the entity for which the audit was made, containing the AFA's observations on the existence, quality and effectiveness of the anti-corruption system put in place and, where appropriate, recommendations to remedy any deficiencies found.

The local authority then has a period of two months in which to make observations, with a view to supplementing the final report.

■ **198.** The Charter of the rights and duties of parties involved in supervision provided the AFA with an opportunity to define the principles of good conduct of audits, and are addressed both to the AFA's officials and to the entities under supervision.

The AFA's officials are thus asked to act 'with trustworthiness and professionalism, in compliance with applicable laws and regulations,' and to behave 'with courtesy'.

Entities being audited are, for their part, required to organise themselves 'in a way that facilitates the audit', including responding 'with diligence and trustworthiness to requests for interviews and information'.

■ **199.** In any event, it can be seen that the AFA has ensured that the framework developed by the Sapin 2 Law for businesses applies in the same way to local authorities.

But there are still significant differences between the two types of audit, so it is not possible to see any real convergence between the two models at the moment.

■ **200.** On the one hand, it should be noted that the legislation has not provided any threshold for the auditing of local authorities, which may thus result in the auditing of all local authorities, including very small ones.

However, this risk has been mitigated by the AFA, which through its Director declared that it had made a choice 'initially to audit [only] the largest and best-equipped organisations [123]'.

This desire to focus in the first instance on the largest local public stakeholders was declared immediately upon the publication of the AFA's first activity report in the following terms:

'Authorities with sufficient human and material resources must, in the AFA's view, move towards the best management practices of the private sector as regards anti-corruption policy [124]'.

As at 21 November 2018, the Director of the AFA stated that the Agency had audited fourteen public entities, including two regions, two departments and one metropolis (*métropole*) [125].

The objective, according to the Director, was to achieve around twenty audits of public stakeholders per year [126].

■ **201.** The only exception to the lack of thresholds for carrying out local authority audits is in the whistleblowing system set out in Article 8, III, of the Sapin 2 Law in the following terms:

'III. – appropriate procedures for the receipt of reports issued by members of their staff or by external and occasional associates shall be established by public or private sector entities with at least fifty employees, State authorities, communes of more than ten thousand inhabitants as well as

123. Speech by the Director of the French Anti-Corruption Agency to the Congress of Mayors on 21 November 2018.

124. Activity report of the French Anti-Corruption Agency 2017, May 2018.

125. DUCHAINE (C.), "Supervised local authorities are not yet fully imbued with the Sapin 2 Law," *La Gazette des communes*, 21 November 2018.

126. *Ibid.*

public institutions for cooperation between local authorities with fiscal autonomy of which they are members, departments and regions, under conditions laid down by decree in the Conseil d'État.'

Article 1 of the Decree of 19 April 2017 on procedures for the receipt of reports states as follows:

"I. – Public sector entities other than the State or private sector entities with at least fifty officials or employees, communes of more than ten thousand inhabitants, departments and regions as well as public institutions under their control and public institutions for cooperation between local authorities with fiscal autonomy comprising at least one commune with more than ten thousand inhabitants, shall establish the procedures for the receipt of reports provided for in Article III of Article 8 of the above-mentioned Law of 9 December 2016 , in accordance with the rules governing the legal instrument that they adopt.'

This point has been debated in both the National Assembly and the Senate.

A review of the parliamentary documents shows that the first question was to set the threshold for communes subject to the obligation to establish a system for receiving reports at 3,500 inhabitants.

The Rapporteur of the Sapin 2 Law, however, recalled during the parliamentary debates that:

"We share [this] concern: an adaptation is necessary. The target of the AFA is not in fact the commune of three thousand five hundred inhabitants [127].'

This concern seems to have been heard by the AFA, as shown by the initial audits it has carried out on local public stakeholders.

■ **202.** On the other hand, unlike businesses – which may, in accordance with Article 17, IV and V of the Sapin 2 Law, have sanctions imposed on them by the Sanctions Committee of the AFA – the draftsman has not provided any instrument enabling local authorities to be sanctioned for failing to fulfil their obligations in the fight against corruption.

From this point of view, however, the Director of the AFA objected that it was possible – and even required – for him to send a report to the public prosecutor pursuant to Article 40 of the Code of Criminal Procedure. In 2019, the AFA thus had four reports on public stakeholders on the basis of this article [128].

127. National Assembly, second sitting of Monday, 6 June 2016.
128. French Anti-Corruption Agency, Annual Activity Report for the year 2019, p. 29.

La *compliance* et le principe constitutionnel de libre administration des collectivités locales

The principle of the self-government of local authorities has both a constitutional and a legislative basis.

Article 34 of the 1958 Constitution provides that the law lays down 'the basic principles […] of the self-government of territorial communities, their powers and revenue'.

Article 72 adds: 'In the conditions provided for by statute, these communities shall be self-governing through elected councils and shall have power to make regulations for matters coming within their jurisdiction. '

Finally, it follows from Article 1 of Law No. 82-213 of 2 March 1982 on the rights and freedoms of communes, departments and regions that 'communes, departments and regions shall be self-governing through elected councils', provisions which are codified in Article L. 1111-1 of the General Code of Local Authorities.

The principle of self-government takes the form of institutional and operational autonomy [129].

Accordingly, the fact that the legislation imposes obligations, prohibits behaviour or provides for a means of supervision or sanction of local authorities is likely to undermine the operational autonomy of local authorities, and thus their self-government [130].

Thus, on the basis of the above constitutional provisions, the Constitutional Council found, inter alia, that the principle of self-government of local authorities did not prohibit the carrying out by the State of audits to ensure compliance with the law by local authorities (Cons. Const., 25 February 1982, 82-167 DC).

However, it should be clarified that the Constitutional Council regulates this possibility and has, for example, sanctioned as being contrary to the principle of self-government of local authorities the provision of a penalty for delay in implementing legal obligations – without distinguishing 'the nature or value of the reasons for the delay' (Cons. Const. 7 December 2000, No. 2000-436 DC, cons. 46 and 47).

Similarly, subjecting local authorities to an obligation of result in the context of unclear objectives has been condemned (Cons. Const., 7 December 2000, No 2000-436 DC, cons. 13).

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129. LEHMANN (P. E), *Self-Government and QPC: Lessons from four years of case law, Civitas Europa*, 2015/1, No. 34, p.226.

130. *Ibid*., p. 228.

By contrast, in a QPC Decision No. 2011-210 of 13 January 2012, the Constitutional Council decided, in connection with a measure punishing mayors for failing to comply with obligations linked to their duties, that 'the imposition of sanctions punishing mayors for failing to comply with obligations linked to their duties does not in itself infringe the self-government of local authorities; that suspension or revocation, which has an impact on all the powers of the mayor, takes place in accordance with the law.'

2. The limits of the system provided for by the Sapin 2 Law

■ **203.** On 13 July 2018, the AFA presented a summary of its survey on the prevention of corruption in local public service conducted between February and May 2018 among 3,277 local stakeholders.

It published its final analysis report in November 2018.

The questionnaire used in support of this survey included questions relating to the characteristics of the community, perceptions of the risk of corruption and the actions taken by the community in order to prevent the risk of corruption.

■ **204.** The survey offers very instructive feedback.

It confirms a trend identified at the time by the Central Corruption Prevention Service (SCPC), that large-scale local authorities are becoming more mobilised in the fight against corruption – unlike smaller communes that are doing little to put in place measures to prevent corruption, for reasons largely related to their lack of human and financial resources.

Indeed, one cause for satisfaction in the survey lies in the efforts made by large local authorities – particularly the regions, which are model students.

The regions have very largely implemented their anti-corruption obligations, reflecting an increased awareness of the risks of breaches of probity.

It should be noted, however, that many of the communities surveyed in the AFA questionnaire – regardless of size and means – do not seem to be making their officials sufficiently aware of the risks of corruption.

■ **205.** Moreover, for the Director of the AFA, the low number of ethical advisers in place, along with systems for the receipt of reports, gives particular cause for concern [131].

131. Speech by the Director of the French Anti-Corruption Agency to the Congress of Mayors on 21 November 2018.

■ **206.** The AFA survey also showed that the level of training and knowledge of officials and locally elected officials regarding the risks of corruption and conflicts of interest remained unsatisfactory, an analysis which was confirmed by the activity report for the year 2019 [132].

3. The Committee's recommendations

■ **207.** In the course of its work, the Committee approved the launch by the Minister of Justice and the Minister for Government Action and Public Accounts of the first 'Multi-annual National Anti-Corruption Plan', developed around four main priorities:

- better knowledge and detection of corruption;
- training and awareness-raising of all public officials in the fight against breaches of probity;
- strengthening prevention systems within authorities and improving the effectiveness of criminal sanctions;
- improving international cooperation in the fight against corruption.

■ **208.** The Committee regretted, however, that the Sapin 2 Law, which focused mainly on the fight against international corruption, did not devise a specific anti-corruption compliance framework tailored to public stakeholders, in particular local authorities.

In the absence of such a framework, the AFA currently supervises local authorities on the basis of Article 17 of the Sapin 2 Law, while of course tailoring its supervision to their specific circumstances.

■ **209.** However, the Committee considered that this article, designed especially for larger enterprises, was not suitable for local authorities.

The latter are already subject to a high level of supervision consisting, on the one hand, of the legal auditing of the *Préfecture* (the chief administrative authority for the region) and, on the other hand, of the accounting and financial supervision of the regional audit chambers.

In addition, certain obligations imposed by Article 17 of the Sapin 2 Law, including the assessment of third parties, conflict with other rules arising in particular from the law of public procurement, to which local authorities are also subject.

■ **210.** In the interests of clarification, the Committee therefore recommends that the legislature create an anti-corruption compliance framework tailored to local authorities, which would take into account the specific circumstances of their status and size.

132. Activity Report of the French Anti-Corruption Agency for the Year 2019, p. 27.

Such a development would be consistent, on the one hand, with the obligation imposed by the Sapin 2 Law to adapt the AFA's Guidelines to the size of the entities under supervision and the nature of the risks identified [133] and, on the other hand, with the concern expressed by the AFA, following its investigation into the prevention of corruption in local public service conducted in 2018, in the following terms:

'The AFA emphasises that these anti-corruption tools must be tailored to the specific situation of each stakeholder, taking into account its means and size. This implies that small authorities may not remain inactive. At the very least, they may focus their efforts on preventing breaches of probity in key processes such as recruitment, public purchasing, budgetary and accounting management, grant allocation, and procedures leading to a consent or award decision [134].'

Failure by local authorities to comply with this specific anti-corruption compliance framework should not be subject to specific sanctions, as is the case at present under Article 17 of the Sapin 2 Law.

C. REFINING THE SYSTEM OF THE DEFERRED PROSECUTION AGREEMENT (*CONVENTION JUDICIAIRE D'INTÉRÊT PUBLIC*)

■ **211.** The failure of criminal proceedings to stamp out international corruption and, more broadly, the economic and financial crime of globalised businesses is a well-known fact [135].

Under French law, the offence of active bribery of a foreign public official was introduced by a Law of 30 June 2000, adopted as part of the ratification of the OECD Convention 'on Combating Bribery of Foreign Public Officials in International Business Transactions' of 1997 [136].

Until 2018, a legal entity had never been found guilty of this offence [137].

The resulting situation, regularly criticised by several international and non-governmental organisations, gradually created conditions favourable for the extraterritorial application to French businesses of certain foreign laws, particularly the *US Foreign Corrupt Practices Act*: Alcatel-Lucent, Technip, Total, Alstom, to name only those companies, have been sanctioned by the US judicial authorities, sometimes for very large amounts, most often by means of deferred prosecution agreements.

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133. Article 3, 2°, 2nd paragraph of the Sapin 2 Law.
134. Investigation into the Prevention of Corruption in the Local Public Service, French Anti-Corruption Agency, November 2018, p. 38.
135. See in particular, making this statement: GARAPON (A.), SERVAN-SCHREIBER (P.), *Judicial deals, the American market of globalised obedience*, PUF, 2013.
136. Law No. 2000-595 amending the Penal Code and the Code of Criminal Procedure in respect of the fight against corruption.
137. Total has since been found guilty of it in the 'oil-for-food' case: CA Paris, 26 February 2016, No. 13/09208: D. 2016, p. 1240, note J. Leknotter; Cass. crim., March 14, 2018, No. 16-11-82.117, P+B: JurisData No. 2018-003623.

■ **212.** In order to save other French businesses from the same fate in the future, the French criminal justice system needed an equivalent settlement instrument, in the presence of acts likely to be classified as the bribery of a foreign public official.

This is the pragmatic origin of the *'convention judiciaire d'intérêt public'* (CJIP), introduced into French law by the Sapin 2 Law, which the public prosecutor may now propose to a legal entity implicated in corruption, influence peddling or laundering of tax evasion, before the setting in motion of a public prosecution.

■ **213.** Its two essential characteristics are linked.

It is an agreement, which distinguishes it from the criminal settlements already known to French law, particularly in the field of customs and consumer affairs.

Because it is an agreement, it does not involve an admission of criminal guilt, which distinguishes it in particular from a court hearing on prior admission of guilt (*comparution sur reconnaissance préalable de culpabilité (CPRC)*), which is also available to legal entities.

The second feature, which protects the businesses involved from the automatic consequences of an admission of guilt, must induce them to enter into negotiations with the public prosecutor and allow him to propose for them a 'public interest fine' of a large amount [138].

■ **214.** This is essentially what is at stake with a CJIP.

It should help to build the international credibility of French criminal justice in the fight against international corruption, and more generally in stamping out the economic and financial crimes of globalised businesses, and in so doing to restore the sovereignty lost by France in this area.

One would like to hope, in particular, that the most active foreign judicial authorities in this area, the Americans and the British, will now have reasons to decline to exercise jurisdiction, in whole or in part, with regard to French and foreign businesses implicated in acts falling within the jurisdiction of the French criminal courts, as has already been seen on certain occasions, particularly in the Netherlands [139].

■ **215.** From this point of view the Committee approved, in particular, the CJIP reached between the financial public prosecutor (*procureur de la République financier (PRF)*) and Société Générale on 24 May 2018 and

138. See, for example, MIGNON-COLOMBET (A.), "The *convention judiciaire d'intérêt public*: towards cooperative justice? ', AJ Penal, 2017, p. 68.

139. In the SBM Offshore case, the Department of Justice was then going to prosecute the firm for acts related to those for which it had already reached a compromise with the Dutch public prosecutor's office.

validated by the President of the High Court (*tribunal de grande instance*) of Paris on 4 June 2018.

This agreement is remarkable in several respects: it was the first CJIP to be concluded at the preliminary inquiry stage, owing to acts that could be classified as bribery of a foreign public official, following an investigation conducted in parallel with the US judicial authorities (Department of Justice and Attorney's Office for the Eastern District of New York), together with two criminal settlement agreements (a deferred execution agreement and a guilty plea agreement) with the same authorities.

As such, it includes a section entitled 'Coordination with the US judicial authorities', which successively reveals that:

'The Department of Justice and the National Financial Prosecutor's Office (Parquet national financier) shared their evidence and agreed to a coordinated resolution of their respective investigations.'

'As a result of the agreement entered into between the National Financial Prosecutor's Office and the Department of Justice, made known to Société Générale, the prosecuting authorities have decided to share equally the amount of the penalties that Société Générale agrees to pay for the actions that occurred in connection with its relationship with the Libyan Investment Authority and other Libyan public financial institutions [140] .'

■ **216.** The Committee, in the course of its work, similarly approved the CJIP entered into between the PRF and Airbus SE on 29 January 2020 and validated by the President of the High Court of Paris on 31 January 2020.

Press release of the financial public prosecutor

On 31 January 2020, the President of the Judicial Court of Paris validated the *convention judiciaire d'intérêt public (CJIP)* entered into on 29 January 2020 by the financial public prosecutor and Airbus (Airbus SA) under Article 41-1-2 of the Code of Criminal Procedure.

Under the terms of the CJIP, Airbus undertakes to pay a public interest fine of EUR 2,083,137,455 to the Treasury within ten days. Airbus also undertakes to have the French Anti-Corruption Agency (AFA) evaluate the effectiveness of its compliance programme for three years. In 2017 the audit carried out by the AFA revealed that the programme had already been completed.

Subject to the performance of these obligations, the validation of the CJIP acknowledges the end of the proceedings against the company

140. CJIP between the financial public prosecutor and Société Générale SA, 24 May 2018, §§44 and 45.

in the context of the preliminary investigation begun on 20 July 2016 by the National Financial Prosecutor's Office (PNF) and entrusted to the Central Office for Combating Corruption and Financial and Tax Offences (OCLCIFF).

The PNF and OCLCIFF investigations have focused on acts of bribery of a foreign public official and private corruption committed between 2004 and 2016 in connection with contracts for the sale of civil aircraft and satellites by Airbus group entities.

They were conducted as part of a joint investigation team established between the PNF and the Serious Fraud Office (SFO), and in parallel with the investigation initiated by the US Department of Justice (DoJ) and the District Attorney for the District of Columbia (Washington DC).

The PNF, SFO and the US judicial authorities coordinated their actions to achieve the simultaneous signature of a CJIP and two deferred prosecution agreements (DPA) with Airbus. The agreements reached separately by Airbus with the SFO and the US judicial authorities provide that Airbus will pay a fine of EUR 983,974,311 to the UK authorities and a fine of EUR 525,655,000 to the US Treasury.

The PNF will inform the SFO and the DoJ, in compliance with the provisions of Law No. 68-678 of 26 July 1968 (the so-called "blocking law"), of the implementation of the compliance measure provided for by the CJIP.

This new breakthrough in the fight against international corruption is the result of the work carried out by the PNF in confidence and in full cooperation with the SFO, the DoJ and the District Attorney for the District of Columbia. It is also the result of the investment of the OCLCIFF investigators, to which must be added the financial and operational support provided by Eurojust and Europol.

■ **217.** In general, the Committee and those heard by them expressed support for the principle of the CJIP, with the exception of the representative of a non-governmental organisation.

Therefore the Committee has chosen to focus its thinking on ways to improve the current system of the CJIP and the desirability of extending its scope to apply to individuals, as well as additional offences.

1. The current system of the *convention judiciaire d'intérêt public*

■ **218.** From the legislative point of view, the CJIP is currently governed by Articles 41-1-2 and 180-2 of the Code of Criminal Procedure, both of which derive from the Sapin 2 Law.

The first article gives the public prosecutor the power to propose to a legal entity implicated in certain listed offences to enter into a CJIP, 'as long as a public prosecution has not been set in motion', i.e. from the stage of the preliminary inquiry.

The second article gives to the investigating judge apprised of acts constituting one of these offences – which the legal entity under investigation admits and accepts their criminal nature – power to order the transfer of the proceedings to the public prosecutor for the purposes of entering into a CJIP.

■ **219.** These two articles of law were supplemented by a decree of 27 April 2017 [141], as well as by several other successive texts:

- A circular from the Directorate for Criminal Matters and Pardons of 31 January 2018 [142] ;
- A Despatch from the same Directorate of 21 March 2019, which included in the appendix a *Guide to the convention judiciaire d'intérêt public* [143] ;
- Guidelines for the implementation of a *convention judiciaire d'intérêt public* published jointly by the French Anti-Corruption Agency (AFA) and the financial public prosecutor (PRF) on 27 June 2019 [144].

a) The scope of the CJIP

■ **220.** The scope of a CJIP is limited both in subject matter (*ratione materiae*), as regards the offences covered, and in personal application (*ratione personae)*, as regards those who may be offered an agreement by the public prosecutor.

■ **221.** As regards the offences covered, the scope of a CJIP is not limited to the offence of active bribery of foreign public officials.

It also extends to the offences of:

- active corruption (Article 433-1 of the Criminal Code) and influence peddling (Article 433-2 of the Criminal Code) committed by an individual;
- active bribery (Article 435-3 of the Criminal Code) and active influence peddling (Article 435-4 of the Criminal Code) of a foreign public official;
- corruption of a member of a foreign judicial institution (Article 435-9 of the Criminal Code);

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141. Decree No. 2017-660 concerning the CJIP and the judicial guarantee.

142. Circular JUSD1802971C of 31 January 2018 on the presentation and implementation of the criminal provisions provided for by Law No. 2016-1691 of 9 December 2016 on transparency, anti-corruption and economic modernisation.

143. Despatch 2019/F/0419/FA1 of 21 March 2019 on prevention and exchange arrangements between the prosecution service and the French Anti-Corruption Agency.

144. FRP and AFA, Guidelines for the implementation of a *convention judiciaire d'intérêt public*, 26 June 2019.

- influence peddling over a member of a foreign judicial institution (Article 435-10 of the Criminal Code);
- active private corruption (Article 445-1 of the Criminal Code) and passive private corruption (Article 445-2 of the Criminal Code);
- active sports corruption (Articles 445-1-1 of the Criminal Code) and passive sports corruption (Article 445-2-1 of the Criminal Code);
- active corruption of a member of a judicial institution (penultimate paragraph of Article 434-9 of the Criminal Code);
- active influence peddling over a member of the judicial institution (second paragraph of Article 434-9-1 of the Criminal Code);
- tax evasion (Articles 1741 and 1743 of the General Tax Code);
- laundering of the proceeds of tax evasion;
- and related offences of the above.

■ **222.** Within this list, the offences of tax evasion and laundering of the proceeds of tax evasion are distinct.

Unlike the others, these offences do not fall within the category of 'breaches of probity', and their commission is not necessarily linked to a finding of such breaches.

They were introduced during the parliamentary debates leading to the adoption of the Sapin 2 Law in light of two judicial investigations that had been begun by the National Financial Prosecutor's Office (PNF) against the banks UBS and HSBC Private Bank Switzerland for laundering of the proceeds of tax evasion and unlawful direct selling in banking and finance.

In this respect it is noteworthy that the first CJIP entered into was with HSBC Private Bank Switzerland for acts that were classified not as corruption or influence peddling, but as laundering of the proceeds of tax evasion and unlawful direct selling in banking and finance, viewed in a related way [145].

■ **223.** This particular feature attracted the attention of the Committee, in that it shows how the scope of application *ratione materiae* of the CJIP could, where appropriate, be extended to cover additional offences and enable more generally the economic, financial and even environmental crimes of businesses to be caught.

In this respect, the draft law on the European Public Prosecutor's Office and Specialised Criminal Justice, adopted by the Senate at its first reading on 3 March 2020, proposes to extend the material scope of the CJIP to include environmental offences [146].

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145. CJIP between the financial public prosecutor and HSBC Private Bank Switzerland, 30 October 2017. The proceedings with UBS did not lead to the entry into of a CJIP, because there was no agreement on the amount of the proposed public interest fine.

146. https://www.leclubdesjuristes.com/les-publications/vers-des-conventions-judiciaires-dinteret-public-vertes/.

However, the Committee shared the view of some authors that the extension of the scope of application of the CJIP to offences of tax evasion and laundering of the proceeds of tax evasion, during the parliamentary debates leading to the adoption of the Sapin 2 Law, had given rise to inconsistencies that should first be rectified.

According to these authors, 'this late extension is a source of inconsistencies. It manifests itself first in an incongruity: the first CJIP published on the AFA's website is unrelated to corruption or influence peddling. It goes on to explain how the PNF was unable to subject HSBC to the implementation of a compliance programme under the supervision of the AFA, as permitted by Article 41-1-2 of the Code of Criminal Procedure: the compliance programme was designed by the Sapin 2 Law to assist the detection and prevention of corruption and influence peddling, not the laundering of the proceeds of tax evasion. The immediate consequence is that the CJIP procedure is being placed in competition with the power of settlement available to the tax authorities, which may not have been sufficiently considered. In the longer term, it will be necessary to consider improving this flawed approach, particularly if the scope of the CJIP procedure is extended to cover new offences, as has been the case with the administrative settlement procedure before the Financial Markets Authority (FMA) [147].'

■ **224.** As regards the persons involved, the entry into of a CJIP may be proposed by the public prosecutor to any 'legal entity', without further clarification.

Two observations must be made in this regard.

On the one hand, the offences listed above can, for the most part, be committed only by private sector entities.

On the other hand, the entry into of a CJIP may be proposed, where appropriate, to a legal entity that is not subject to the obligation to implement a compliance programme pursuant to Article 17 of the Sapin 2 Law: 'A legal entity which does not meet the criteria set out in this Article may […] be required to implement anti-corruption obligations, when it is the subject of an investigation into corruption offences covered by Article 41-1-2 of the Code of Criminal Procedure and agrees to enter into a *convention judiciaire d'intérêt public* with the prosecution. [148].'

■ **225.** On the other hand, individuals acting as lawful representatives of the legal entity concerned may not be offered the entry into of a CJIP by the public prosecutor - unlike, in particular, in the case of US law deferred prosecution agreements and non prosecution agreements [149].

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147. GAUDEMET (A.), DILL (A.), *'Convention judiciaire d'intérêt public*: an unusual first", *La Semaine juridique*, No. 51, December 18, 2017.

148. Rebut (D.), 'Businesses serving the fight against corruption: commentary on anti-corruption measures under the Sapin 2 Law', *Bull. Joly Bourse*, 2017, No. 1, p. 48.

149. These are applicable to individuals who are implicated by reason of the same acts as the legal entity.

On the contrary, Article 41-1-2, I, of the Code of Criminal Procedure expressly recalls at the end, unnecessarily, that 'the lawful representatives of the legal entity in question remain liable as individuals'.

It follows that the same acts of corruption or of influence peddling, for example, may give rise, on the one hand, to the entry into of a CJIP with the legal entity concerned and, on the other hand, to the prosecution of the individual representatives of the entity.

This situation – the Committee has agreed – could be such as to discourage the individual representatives of the legal entity concerned from entering into a CJIP on behalf of the latter: 'One might imagine that these representatives will have little inclination to consent to the entry into of a *convention judiciaire d'intérêt public* if they are the subject of criminal proceedings in their personal capacity, which should be the case if they were in office at the time of the acts and these were a matter of practice in the business [150].'

■ **226.** However, prosecuting the individual representatives of the legal entity concerned is not essential.

The representatives may benefit from a criminal settlement procedure, simultaneously with the CJIP procedure in respect of the legal entity, where the offence involved is punishable by a term of imprisonment of up to five years.

They may also be the subject of a court hearing on prior admission of guilt (*comparution sur reconnaissance préalable de culpabilité (CPRC)*), where the offence is punishable by imprisonment for more than five years (Article 495-7 of the Code of Criminal Procedure).

According to the Circular of the Directorate for Criminal Matters and Pardons of 31 January 2018, 'the desirability of prosecuting the individual, or of implementing one of the alternative measures to prosecutions provided for by Article 41-1 of the Code of Criminal Procedure, will need to be assessed on a case-by-case basis [151] '.

Similarly, the Guidelines for the implementation of a *convention judiciaire d'intérêt public* published jointly by the financial public prosecutor and the AFA on 26 June 2019 state: 'For the individuals involved, whether managers and employees (or former managers and employees) of the legal entity entering into a CJIP, the PRF will assess on a case-by-case basis the action to be taken in their situation [152].'

150. Rebut (D.), 'Businesses serving the fight against corruption: commentary on anti-corruption measures under the Sapin 2 Law', *Bull. Joly Bourse*, 2017, No. 1, s. prev.

151. Circular JUSD1802971C, 31 January 2018, p. 16.

152. PRF and AFA, Guidelines (op cit.).

b) The CJIP procedure

■ **227.** Article 41-1-2 of the Code of Criminal Procedure reserves to the public prosecutor the power to propose that a CJIP be entered into.

In practice, however, the lawful representative of a legal entity interested in the entry into of a CJIP, or his counsel, may request one from the public prosecutor.

■ **228.** In any event, the public prosecutor assesses, on a case-by-case basis, the appropriateness of initiating a CJIP procedure.

For this purpose the Circular of the Directorate of Criminal Matters and Pardons of 31 January 2018 calls upon him to take into account, in addition to the statutory conditions laid down in Article 41-1-2 of the Code of Criminal Procedure [153], several other criteria, such as:

- 'the antecedents of the legal entity';
- 'the voluntary nature of the disclosure';
- 'the degree of cooperation with the judicial authorities shown by the legal entity [154] '.

■ **229.** These criteria were clarified and supplemented by the Guidelines for the implementation of a *convention judiciaire d'intérêt public* published jointly by the financial public prosecutor and the AFA on 26 June 2019.

■ **230.** By way of introduction, these Guidelines state:

'Enabling businesses to escape a criminal conviction and the associated consequences, [the CJIP] must be reserved for situations in which it appears in the public interest not to bring criminal proceedings […]. The use of the CJIP satisfies the public interest when it significantly reduces the time of an investigation, ensures the effectiveness and firmness of the judicial response to the behaviour pursued, ensures compensation for the prejudice to the victim and contributes to the prevention of recidivism through the establishment of effective systems for detecting breaches of probity [155].'

Thereafter, the Guidelines list the following criteria, the importance of which varies:

- a sufficient level of evidence of the commission of acts falling within Article 41-1-2 of the Code of Criminal Procedure;
- the absence of any prior sanction for acts falling within Article 41-1-2 of the Code of Criminal Procedure;
- the implementation of an effective compliance programme;

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153. As to which, see *supra* No. 9 et seq.
154. Circular JUSD1802971C, 31 January 2018, p. 16.
155. PRF and AFA, Guidelines (op cit.).

- cooperation in the investigation and the implementation of internal investigations;
- compensation for the victim.

■ **231.** The procedure of the CJIP, organised by Articles 41-1-2 and 180-2 of the Code of Criminal Procedure and the Decree of 27 April 2017, is detailed in the Circular of the Directorate of Criminal Matters and Pardons of 31 January 2018.

■ **232.** First, under Article R. 15-33-60-1 of the Code of Criminal Procedure, 'the public prosecutor shall inform the victim, where one has been identified, by any means of his decision to propose to the legal entity involved that a *convention judiciaire d'intérêt public* be entered into. He shall then set a time limit within which the victim may submit to him any evidence to establish the reality and extent of the damage suffered.'

■ **233.** The Circular of 31 January 2018 states: 'The notice by the prosecutor to the victim should only be given if, in the course of an informal discussion with the legal entity concerned, the possibility of entering into a CJIP is confirmed. The prosecutor must also draw the victim's attention to the need not to disclose this notice before the CJIP has been formally proposed to the legal entity concerned.'

The victim, therefore, may neither bring about the signing of a CJIP, nor oppose the public prosecutor's decision to suggest a CJIP, nor appeal against the order of the President of the Regional Court validating the CJIP.

■ **234.** Secondly, the proposal for a CJIP, a draft of which is appended to the Circular of 31 January 2018 [156], must be addressed to the lawful representatives of the legal entity involved by registered letter with acknowledgement of receipt.

It contains:

- the business name of the legal entity concerned;
- a precise statement of the facts of the case, as well as the legal classification that may be applied to them;
- the nature and quantum of the obligations proposed pursuant to Article 41-1-2, 1° and 2° I – to pay a public interest fine to the Treasury and to submit to a compliance programme for a maximum of three years under the supervision of the AFA;
- where applicable, the maximum amount of costs incurred by the AFA for supervision of the implementation of the compliance programme and to be borne by the legal entity concerned;
- where applicable, the amount and terms of the compensation for damages linked to the acts in question.

156. Annex 1.

The public prosecutor must also inform the legal entity concerned of the time limit within which the latter must inform him of its acceptance or refusal of the proposed CJIP.

By the same letter, the public prosecutor informs the lawful representatives of the legal entity of the possibility of having the legal entity assisted by a lawyer.

■ **235.** Thirdly, Article R. 15-33-60-2 of the Code of Criminal Procedure provides for two means of acceptance of the proposed CJIP by the legal entity concerned, within the time limit set by the public prosecutor: a letter signed by its lawful representatives, or a declaration made by them before the public prosecutor, who draws up a record of it.

■ **236.** Finally, when the legal entity in question gives its agreement to the proposed CJIP, the public prosecutor applies, by way of a dated and signed application, to the President of the Regional Court for it to be validated.

The application is accompanied by the proposed CJIP accepted by the legal entity concerned, the instrument certifying its agreement, and details of the enquiry or investigation procedure.

The application is notified to the lawful representatives of the legal entity and, where applicable, to the victim by registered letter with acknowledgement of receipt.

These persons are also informed, in the same way, of the date, time and place of the public hearing at which they are called upon to appear, as well as of the possibility of being assisted by a lawyer at it.

■ **237.** The President of the Regional Court proceeds to holds a hearing, in public, of the legal entity involved and of the victim assisted, as the case may be, by their lawyers.

At the end of this hearing, the President of the Regional Court takes the decision whether or not to validate the proposed CJIP, checking the merits of the use of the CJIP procedure, whether it has been conducted properly, whether the amount of the public interest fine complies with the limitations provided for in Article 41-1-2, I, of the Code of Criminal Procedure, as well as the proportionality of the measures provided for with the benefits derived from the breaches of which the legal entity concerned is charged.

The decision of the President of the Regional Court is notified to the legal entity concerned and, where applicable, to the victim. It is not subject to appeal.

■ **238.** If the President of the Regional Court makes a validation order, the legal entity in question has a period of ten days from the date of

validation to exercise its right of withdrawal.

Such withdrawal is notified to the public prosecutor by registered letter with request for notice of receipt.

It renders the proposed CJIP void.

If the legal entity concerned does not exercise its right of withdrawal within the given time limit, the obligations under the CJIP are implemented.

■ **239.** Under Article 41-1-2 of the Code of Criminal Procedure, the CJIP may impose on the legal entity concerned 'one or more of the following obligations:

1° To pay a public interest fine to the Treasury […];
2° To submit, for a maximum period of three years and under the supervision of the French Anti-Corruption Agency, to a compliance programme designed to secure the existence and implementation within it of the measures and procedures listed in Article 131-39-2, II of the Criminal Code.'

In practice, however, the obligation to submit to a compliance programme may not be imposed on the legal entity involved where the entity is implicated solely by reason of acts likely to be classified as tax evasion or laundering the proceeds of tax evasion: the compliance programme was designed by the Sapin 2 Law to assist the detection and prevention of corruption and influence peddling, not tax evasion and laundering of the proceeds of tax evasion, as has already been seen [157].

■ **240.** On the one hand, Article 41-1-2 of the Code of Criminal Procedure provides that the amount of the public interest fine 'shall be fixed in a manner proportionate to the benefits derived from recognised breaches, within a limit of 30 % of the average annual turnover calculated by reference to the last three annual turnover figures known at the date of the finding of the breaches'.

The Circular of the Directorate of Criminal Matters and Pardons of 31 January 2018, followed by the Guidelines for the implementation of a *convention judiciaire d'intérêt public* published jointly by the PRF and the AFA on 26 June 2019, specified on the one hand the means for assessing 'benefits derived from recognised breaches' and, on the other hand, the criteria for determining the amount of the public interest fine within the ceiling set by Article 41-1-2 of the Code of Criminal Procedure.

■ **241.** With regard first to the means for assessing benefits from recognised breaches, the Circular states that such benefits 'may be measured in this way':

157. See *supra* Nos. 11 and 12.

- as regards the laundering of the proceeds of tax evasion, one may take into account the profits earned by financial institutions by virtue of the laundered funds;
- as regards corruption, it is a case of direct and indirect profits derived from the market obtained fraudulently' [158].

■ **242.** With regard next to the criteria for determining the amount of the public interest fine, the Guidelines point out that this amount 'may not exceed 30 % of the annual average turnover calculated by reference to the last three annual turnover figures known at the date of the finding of the breaches', pursuant to Article 41-1-2 of the Code of Criminal Procedure.

Thereafter, they indicate that 'the public interest fine includes a dimension for the restitution of illegal profits and a punitive dimension by applying a multiplier calculated on the basis of the application of several criteria'.

In respect of the 'restitution dimension', the amount of the public interest fine is at least equal to the amount of the 'benefits derived from recognised breaches', assessed in the way we have seen.

In respect of the 'punitive dimension', the seriousness of the recognised breaches is assessed by taking into account, inter alia, the following factors leading to an increase or reduction.

Factors resulting in an increase	Factors resulting in a reduction
Corruption of a public official	Spontaneous disclosure of the facts to the public prosecutor before the opening of any criminal enquiry and within a reasonable time
Legal entity falling within the scope of Articles 3 (3°) and 17 of the Sapin 2 Law	Excellent cooperation and thorough and effective internal investigations
Legal entity already convicted/ sanctioned in France or abroad for acts of corruption	Effective compliance programme/implementation of corrective actions and adjustment of internal organisation
Use of the resources of the legal entity to conceal the acts of corruption	Spontaneous implementation of a compliance programme by a legal entity which is not legally obliged to do so
Repeated or even systemic acts of corruption	

158. Circular JUSD1802971C, 31 January 2018, p. 17.

■ **243.** On the other hand, the submission to a compliance programme, when imposed on the legal entity concerned by a CJIP entered into with the public prosecutor, consists for that person in establishing a compliance programme designed to secure the existence and implementation within it of the measures and procedures listed in Article 131-39-2, II of the Criminal Code.

The AFA is responsible for supervising the implementation of this compliance programme, the duration of which may not exceed three years.

To carry out its task of supervision, the AFA may use experts, persons or authorities qualified to assist in the conduct of legal, financial, fiscal and accounting analysis.

The costs related to this appeal are borne by the legal entity, within a ceiling fixed by the CJIP entered into.

Thus designed, the obligation to submit to a compliance programme must enable the legal entity concerned to organise itself better in order effectively to prevent the risk of breaches of probity.

■ **244.** The Guidelines for the implementation of a *convention judiciaire d'intérêt public*, published jointly by the PRF and the AFA on 26 June 2019, specify the conditions for determining the obligation to submit to a compliance programme, as well as those for its supervision by the AFA.

■ **245.** With regard first to the conditions for determining the obligation to submit to a compliance programme, the Guidelines provide that the PRF shall consider the advisability of imposing such an obligation on the legal entity concerned by taking into account the following three elements, if necessary after consulting the AFA.

First, the determination of the measures and procedures imposed on the legal entity concerned takes into account, where applicable, the findings of any audit report previously prepared by the AFA on the basis of Article 17 of the Sapin 2 Law, where the report is sufficiently recent.

The existence of a compliance obligation imposed by a foreign authority may also be taken into account, provided that its object is close to the requirements of Article 41-1-2 of the Code of Criminal Procedure.

Secondly, the Guidelines provide that the duration of the compliance programme imposed must be set at a minimum of two years, without exceeding three years under Article 41-1-2 of the Code of Criminal Procedure, in order to 'enable the AFA to ensure the effectiveness and robustness of the measures taken'.

Finally, the AFA estimates the maximum amount of experts' costs necessary for carrying out its task of supervision, on the basis of the

relevant facts and a questionnaire submitted to it by the legal entity concerned via the PRF [159].

Its estimate is based on the number of hours required to supervise the compliance programme imposed on the business concerned.

It distinguishes between the costs of designing the compliance programme and those of supervising its implementation.

■ **246.** Where several national prosecution authorities are dealing with the same facts charged against the same legal entity, and the entity's submission to a compliance programme is contemplated by those authorities, the Guidelines recommend the designation of a single 'monitor'.

They consider that this monitor must be the AFA, 'in the event that the legal entity concerned has its registered or operational office in France, or […] carries out all or part of its activity on French territory'.

The monitoring of the compliance programme is then exercised by the AFA, which informs the PRF, which in turn informs any foreign prosecution authorities where applicable, in accordance with the rules of international assistance in criminal legal matters.

■ **247.** Also in this regard, the CJIP entered into between the PRF and Société Générale on 24 May 2018 is an interesting precedent, as noted by the Committee.

The US Department of Justice, on the basis of the AFA's monitoring of the compliance programme imposed on Société Générale, declined to impose on the company the designation of a monitor as part of the deferred execution agreement entered into with it.

The press release issued by the Department of Justice, on this occasion, states: *'The company's significant remediation, together with the company's risk profile and ongoing monitoring by the French Anti-Corruption Agency, resulted in the Department determining that a monitor was not necessary in this case* [160] *.'*

It indicates that the AFA has already gained credibility with the US prosecuting authorities, and that the latter may wish in future to make it a rule not to impose the designation of a monitor on a company when it is placed under the supervision of the AFA.

This rule was reinforced by the CJIP entered into between the PRF and Airbus SE on 29 January 2020.

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159. Cost calculation questionnaire, Appendix 2 and 2a to Circular JUSD1802971C of 31 January 2018 (op cit.)
160. US Department of Justice, *press release*, 4 juin 2018.

c) Conventions judiciaires d'intérêt public entered into

■ **248.** On this basis, ten CJIPs had been entered into and validated at the date of the submission of this report, having the characteristics summarised in the table below:

Date	Procureur de la République	Personne morale mise en cause	Infractions en cause
30 October 2017	PRF	HSBC Private Bank (Suisse) SA	• unlawful direct selling in banking and finance to French or French resident prospects by unauthorised persons; • aggravated laundering of the proceeds of tax evasion.
14 February 2018	Public Prosecutor of Nanterre	SAS Set Environnementt	• active public corruption
15 February 2018	Public Prosecutor of Nanterre	SAS Kaeffer Wanner	• active public corruption
4 May 2018	Public Prosecutor of Nanterre	SAS Poujaud	• active public corruption
24 May 2018	PRF	Société Générale SA	• active corruption of foreign public officials
28 June 2019	PRF	Carmignac Gestion	• tax evasion • aggravated tax evasion
12 September 2019	PRF	Google France Google Ireland Ltd	• voluntary non-declaration in the establishment of corporation tax; • complicity in voluntary non-declaration in the establishment of corporation tax.
28 November 2019	PRF	SAS Egis Avia	• corruption of foreign public official
10 January 2020	PRF	Bank of China	• laundering of the proceeds of tax evasion
29 January 2020	PRF	Airbus SE	• corruption of foreign public agent; • private corruption.

	Montant de l'amende d'intérêt public	Obligation de mise en conformité	Accord simultané avec des autorités de poursuite étrangères
	157 975 422 euros	No	No
	800 000 euros	Yes	Non
	2 710 000 euros	Yes	Non
	420 000 euros	Yes	Non
	250 150 755 euros	Yes	Yes: • deferred prosecution agreement with the Department of Justice • guilty plea agreement with the US Attorney's Office for Eastern District of New York
	30 000 000 euros	No	No
	500 000 000 euros	No	No
	2 600 000 euros	No	
	3 000 000 euros	No	
	2 083 137 455 euros	Yes	Yes: • deferred prosecution agreement with the Department of Justice; • deferred prosecution agreement with the Serious Fraud Office

■ **249.** After reviewing each of these CJIPs, together with their validation orders, the Committee found in particular that:

- seven CJIPs had been entered into with the PRF, three with the Public Prosecutor of Nanterre;
- six CJIPs had been entered into with legal entities having their headquarters in France, five with legal entities having their headquarters abroad;
- six CJIPs had been entered into for acts capable of being classified as breaches of probity, four for acts capable of being classified as tax evasion or laundering of the proceeds of tax evasion;
- the ten CJIPs had imposed a public interest fine on the legal entity concerned of a minimum amount of EUR 420 000, a maximum amount of EUR 2 083 137 455 and an average amount of EUR 303 079 363,20;
- together, the ten CJIPs had imposed public interest fines on the legal entities concerned for a total amount of EUR 3 030 793 632,00;
- five CJIPs had required the legal entity concerned to submit to a compliance programme – programmes that had been the subject of enforcement reports to the prosecution [161] – and five had not required it, in the presence of acts capable of being classified as tax evasion or laundering of the proceeds of tax evasion;
- two CJIPs had been entered into along with other agreements made with foreign prosecution authorities.

■ **250.** The Committee concluded that the CJIP, although foreign to the French legal tradition, had been rapidly appropriated by the prosecution, in particular the PRF and the Public Prosecutor of Nanterre, and that its current system, helpfully supplemented by the Circular of the Directorate of Criminal Matters and Pardons of 31 January 2018, the Despatch dated 21 March 2019 of the same Directorate and the Guidelines published jointly by the PRF and the AFA on 26 June 2019, was generally satisfactory.

It therefore agreed to focus its reflections on the desirability of extending the scope of application of the CJIP to individuals, as well as additional offences.

2. The possibilities for extending the scope of the *convention judiciaire d'intérêt public*

■ **251.** In the preamble to these reflections, the Committee unanimously wished to reaffirm that the objective of a CJIP is not to exempt legal entities from criminal liability but, on the contrary, to accelerate their punishment and make the latter more certain than it would be at the end of a criminal trial, in the interests of efficacy.

It stated that it was aware, however, that there was a different feeling

161. Activity Report of the French Anti-Corruption Agency for the year 2019, p. 30.

in public opinion, which saw in CJIPs a cause of 'impunity' for legal entities.

In this connection, the Committee heard the representative of a non-governmental organisation who, during his hearing, said that he was opposed to the principle of CJIPs on this ground.

■ **252.** Thereafter, the Committee's reflections focused on the desirability of extending the scope of application of CJIPs to individuals and additional offences, as well as establishing exclusive jurisdiction for the PRF to enter into a CJIP.

a) Extending the scope of CJIPs to individuals

■ **253.** Several members of the Committee and of the people heard by them said that they would favour extending the scope of CJIPs to individuals, like the deferred prosecution agreement under US law, while stressing (a) that the CJIP was a recent creation, breaking with French legal tradition, and (b) the risk of thereby helping to foster the public's sense of impunity for big business leaders.

In particular, they found that under the current state of French law, the same acts of corruption or influence peddling, for example, could give rise to, on the one hand, a CJIP being entered into with the legal entity concerned, and on the other hand the prosecution of the individuals representing the entity.

They expressed the fear that this situation might discourage the individuals representing the legal entity from entering into a CJIP on behalf of the latter.

■ **254.** Other members of the Committee and of the people heard by them observed, in return, that prosecution of the physical representatives of the legal entity was not compulsory and that such representatives could also benefit, where appropriate, from an alternative procedure to prosecution, in parallel with the CJIP procedure begun in respect of the legal entity: a criminal settlement, for offences punishable by a term of imprisonment of up to five years, and an appearance on prior acknowledgement of guilt, in the case of offences punishable by a term of imprisonment of more than five years.

They recalled that this possibility was, moreover, expressly envisaged by the Circular of the Directorate of Criminal Matters and Pardons of 31 January 2018 [162], and the Guidelines for the implementation of a *convention judiciaire d'intérêt public* published jointly by the financial public prosecutor and the AFA on 26 June 2019. [163]

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162. Circular JUSD1802971C, 31 January 2018, p. 16.
163. PRF and AFA, Guidelines (op cit.).

■ **255.** In the end, the idea gradually took hold within the Committee that the CJIP was an instrument of recent creation, in a distinct break with French legal tradition, whose premature extension to individuals might not be understood by the public.

The Committee therefore agreed not to recommend, in the short term, the extension of the scope of the CJIP to individuals and to consider this possibility in the longer term.

A different conclusion was reached about extending the scope of the CJIP to cover additional offences.

b) Extending the scope of the CJIP to cover additional offences

■ **256.** On this other matter, several members of the Committee and of those heard by them expressed the wish that the scope of the CJIP should be extended to cover offences relating to the economic and financial crimes of businesses in general, and even their environmental crimes.

■ **257.** On a technical level, other members of the Committee argued in turn that extending the scope of the CJIP to cover offences of tax evasion and laundering the proceeds of tax evasion, during the parliamentary debates leading to the adoption of the Sapin 2 Law, was the source of inconsistencies that should first be addressed.

It prevents, in practice, the public prosecutor from submitting the legal entity charged with tax evasion or laundering of the proceeds of tax evasion to a compliance programme under the supervision of the AFA, as provided for in Article 41-1-2 of the Code of Criminal Procedure, since the compliance programme was designed by the Sapin 2 Law to assist the detection and prevention of corruption and influence peddling.

■ **258.** More fundamentally, the Committee ultimately decided that the scope of the CJIP was naturally meant to be extended to cover most economic and financial criminal offences by enterprises, as well as offences affecting the environment, over the long term.

In this connection, the Committee noted that the existing procedure for an administrative settlement with the Financial Markets Authority (*Autorité des marchés financiers (AMF)*) had developed in a comparable way: first introduced by a Law of 22 October 2010, with an area of application limited to breaches of the professional rules applicable to providers of investment services [164], this criminal law settlement procedure was subsequently extended by a Law 21 June 2016 to cover market abuse, breaches of obligations to prevent its occurrence and breaches of financial reporting [165].

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164. Law No. 2010-1249 of 22 October 2010.
165. Law No. 2016-819 of 21 June 2016.

The Committee also noted that the draft law on the European Public Prosecutor's Office and Specialised Criminal Justice, adopted by the Senate at its first reading on 3 March 2020, already proposes to extend the substantive scope of the CJIP to cover certain environmental offences [166].

3. Establishing exclusive jurisdiction for the financial public prosecutor

■ **259.** Finally, during the hearings conducted by the Committee, the possibility was suggested of the PRF having exclusive jurisdiction to enter into a CJIP.

■ **260.** In this connection, the Committee noted that, as the Guidelines for the implementation of a *convention judiciaire d'intérêt public* published jointly by the AFA and the FRP only concerned this prosecutor, the question was whether they were intended to apply also to other public prosecutors, who also have power to enter into a CJIP with a business implicated in corruption, and have already exercised this power several times [167].

Indeed, it would not be appropriate for different practices, depending on prosecuting authority involved, to arise on the conditions required to be able enter into a CJIP, the rules for determining the public interest fine and the conditions for imposing a compliance obligation.

■ **261.** The observation was made, in turn, that the establishment of exclusive jurisdiction for the PRF to enter into a CJIP would risk marginalising provincial prosecutors, in particular, and give credence to the ideas that the CJIP was an instrument of justice reserved for large businesses and that corruption was mainly a 'Parisian' issue.

The Committee therefore did not wish to go down this route.

It considered that the risk of discrepancies arising between the PRF and other public prosecutors in respect of CJIPs was already partly remedied by the Circular of 31 January 2018 and the Despatch dated 21 March 2019 of the Directorate of Criminal Matters and Pardons, addressed to all public prosecutors.

It wished to recommend, however, that these texts might be reviewed by the Directorate of Criminal Matters and Pardons so as to incorporate the Guidelines for the implementation of a *convention judiciaire d'intérêt public* published jointly by the FRP and the AFA, in order to make these apply to all public prosecutors.

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166. https://www.leclubdesjuristes.com/les-publications/vers-des-conventions-judiciaires-dinteret-public-vertes/.

167. See *supra* Nos. 45 and 46.

4. The Committee's recommendations

■ **262.** In its preamble, the Committee wished to reaffirm that the objective of a CJIP is not to exempt legal entities from criminal liability but, on the contrary, to accelerate their punishment and make the latter more certain than it would be at the end of a criminal trial, in the interests of efficacy.

It stated that it was aware, however, that there was a different feeling in public opinion, which sometimes saw in CJIPs a cause of 'impunity' for legal entities.

■ **263.** Following a detailed examination, the Committee concluded that the CJIP, although foreign to the French legal tradition, had been rapidly adopted by the prosecution, in particular the PRF and the public prosecutor of Nanterre, and that its current system, helpfully supplemented by the Circular of the Directorate of Criminal Matters and Pardons of 31 January 2018, the Despatch dated 21 March 2019 of the same Directorate and the Guidelines published jointly by the PRF and the AFA on 26 June 2019, was generally satisfactory.

It approved, in particular, the CJIP entered into between the PRF and Société Générale on 24 May 2018, and between the PRF and Airbus SE on 29 January 2020, as the first such agreements to be entered into on the basis of acts likely to be classified as corruption of a foreign public official, following investigations conducted in parallel with foreign prosecution authorities and concurrently with criminal settlement agreements with the same authorities.

It therefore agreed to focus its reflections on the desirability of extending the scope of application of the CJIP to individuals, as well as additional offences.

■ **264.** Following these reflections, the Committee concluded that the CJIP was an instrument of recent creation, breaking with the French legal tradition, which needed to be consolidated and whose premature extension to individuals might not be understood by public opinion.

It therefore resolved not to recommend, in the short term, the extension of the scope of the CJIP to apply to individuals, but to consider this possibility in the longer term.

The Committee considered, however, that the scope of application of the CJIP was naturally meant to be extended to cover most offences relating to the economic and financial crimes of businesses, as well as offences affecting the environment, in the long term.

In this connection, it observed that the existing procedure for an administrative settlement with the AMF had developed in a comparable

way: first introduced by a Law of 22 October 2010 with an area of application limited to breaches of the professional rules applying to providers of investment services, this settlement procedure in the field of law enforcement was subsequently extended by a Law of 21 June 2016 to cover market abuse, breaches of obligations to prevent it from occurring and breaches of financial reporting.

■ **265.** Finally, the Committee did not wish to recommend establishing exclusive jurisdiction for the PRF to enter into a CJIP, for fear of marginalising provincial public prosecutors and giving credence to the ideas that the CJIP was an instrument of justice reserved for large businesses and that corruption was a mainly Parisian issue.

It considered that the risk of possible discrepancies arising between the PRF and other public prosecutors in respect of CJIPs was already partly remedied by the Circular of 31 January 2018 and the Despatch dated 21 March 2019 of the Directorate of Criminal Matters and Pardons, addressed to all public prosecutors.

It wished to recommend, however, that these texts be reviewed by the Directorate of Criminal Matters and Pardons, so as to incorporate the Guidelines for the implementation of a *convention judiciaire d'intérêt public* published jointly by the FRP and the AFA, in order to make them apply to all public prosecutors.

PART II

BUILDING A EUROPEAN MODEL OF COMPLIANCE IN THE FIGHT AGAINST CORRUPTION

CHAPTER I

COMPLETING THE EUROPEAN ACQUIS IN THE FIGHT AGAINST CORRUPTION

■ **266.** An examination of the engagement letters sent by the new European Commission President, Ursula Van der Leyen, to the Commissioners appointed by the Member States, has shown that none of them mentioned the fight against corruption as an objective of their future term of office [168].

Equally tellingly, only three lists out of the 34 presented by France in the April 2019 European elections put forward the fight against corruption as a issue in their mission statement [169].

These factors contribute to the sense that fighting corruption is not a priority for the European Union.

■ **267.** Yet a 2017 Eurobarometer survey on corruption pointed out that corruption is a major concern, as well as a practice considered unacceptable, for nearly three out of four European citizens [170].

■ **268.** Indeed, corruption in any form deeply affects Member States, their citizens and the European Union as a whole.

■ **269.** First, it represents an obstacle to the functioning of the internal market, creating distortions of competition between businesses using corrupt practices and the rest.

It leads to a decrease in investment levels and reduces the level of public funds available [171].

In this regard, it is helpful to recall that in its first anti-corruption report published in 2014 [172], the European Commission estimated the cost of corruption at EUR 120 billion, or 1 % of the European Union's gross domestic product (GDP).

Another study published in 2016 by think tank Research and Development (RAND) Europe, and taken up by the European Parliament, estimated

168. https://ec.europa.eu/commission/interim/commissioners-designate_fr
169. https://programme-candidats.interieur.gouv.fr/
170. Eurobarometer survey, *corruption*, No. 470, October 2017.
171. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Fighting Corruption in the EU, 6 June 2011, COM (2011) 308 final.
172. Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report, 3 February 2014, COM (2014) 38.

that corruption costs the European Union between EUR 179 billion and EUR 990 billion annually [173].

■ **270.** Acts of corruption then facilitate the organisation of criminal groups and help them to infiltrate the lawful economy [174].

A report of the European Parliament published on 7 October 2016 explicitly established this link in the following terms:

'Whereas the primary goal of organised crime is profit; whereas law enforcement must therefore have the capacity to turn the spolight on the financing of organised crime, often inherently linked to corruption, fraud, counterfeiting and smuggling [175].'

Europol's report of 28 February 2017 entitled Serious and Organised Crime Threat Assessment (SOCTA) also showed that organised crime groups often use corruption to facilitate their activities [176].

■ **271.** Finally, corruption endangers European democracies, insofar as it affects citizens' confidence in the functioning of public institutions and the market [177].

In this respect, the European Program Manager at the Center for Strategic and International Studies has stated:

'The level of corruption has now reached a point where it is an existential threat to the democratic integrity and national security of EU Member States as well as the unity of the EU itself [178].'

■ **272.** Aware of all these risks, Jean-Claude Juncker, President of the European Commission from 2014 to 2019, recalled at the opening ceremony of Romania's Presidency of the Council of the European Union:

'Yes, the European Union is made up of compromises, but when it comes to human rights, when it comes to the rule of law, when it comes to respect for the rule of law, when it comes to the fight against corruption, no compromise is possible [179].'

■ **273.** Whilst Jean-Claude Juncker's wish to give major importance to the subject can only be welcomed, an examination of the European

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173. https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579319/EPRS_STU(2016)579319_EN.pdf
174. GAYRAUD (J.-F.), "A new criminal capitalism: blind deregulation, giant crime scenes," *Revue française de criminologie et de droit pénal*, No. 3, October 2014, p. 77 ff.
175. Report on the fight against corruption and follow-up of the Commission resolution CRIM (2015/2110 (INI)), 7 October 2016, 18-0284/2016.
176. *Serious and organized crime threat assessment*, Europol, 2017, p. 16.
177. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *op. cit.*
178. Judy asks: Is the EU too lax on Corruption? Judy Dempsey, Carnegie Europe, available at https://carnegieeurope.eu/strategiceurope/77468, accessed 16 October 2019.
179. https://europa.eu/rapid/press-release_SPEECH-19-325_fr.htm

Union's legal framework for combating corruption shows that the EU acquis on corruption remains insufficient.

A. A FRAGMENTARY BODY OF LAW

1. The movement of internationalisation in the fight against corruption

■ **274.** In response to the passing in the US of the Foreign Corrupt and Practices Act (FCPA) in 1977, several groups of States negotiated anti-corruption conventions in the late 1990s and early 2000s.

■ **275.** On 17 December 1997, the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed in Paris.

Article 1 of the OECD Convention provides that:

'Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.'

Paragraphs 1 and 2 of Article 4 of the Convention add, with respect to the jurisdiction of signatory States:

'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.'

This legislation is clearly modelled on the US FCPA, including the limiting of its scope of application to bribery of foreign public officials, active – not passive – corruption, and illegal acts to retain or obtain business [180].

The Convention entered into force on 15 February 1999 and forty-four States have ratified it to date, including eight States that are not

180. BREEN (E.), FCPA. *France in the face of American Anti-Corruption Law*, Joly, 2017, p. 24.

members of the OECD [181].

2. The proliferation of regional initiatives in the fight against corruption

■ **276.** In parallel with this, several international conventions with regional scope have been adopted.

■ **277.** The Organization of American States (OAS) adopted the Inter-American Convention against Corruption on 29 March 1996.

■ **278.** Similarly, the Council of Europe established a Criminal Law Convention on Corruption the following year, which was opened for signature on 27 January 1999, supplemented by a Civil Law Convention opened for signature on 4 November 1999, followed by an additional protocol to the Criminal Law Convention opened for signature on 15 May 2003.

The Council of Europe Criminal Law Convention covers many examples of corruption.

Active or passive bribery of domestic public officials (Articles 2 and 3), bribery of members of domestic public assemblies (Article 4), bribery of foreign public officials (Article 5), bribery of members of foreign public assemblies (Article 6), active or passive bribery in the private sector (Articles 7 and 8), bribery of officials of international organisations (Article 9), bribery of members of international parliamentary assemblies (articles 10), and bribery of judges and officials of international courts (article 11) are all considered.

In addition, in its Article 1 it defines a public official as an 'official', 'public officer', 'mayor', 'minister' or 'judge' in the national law of the State in which the person in question performs that function and as applied in its criminal law.

■ **279.** The African Union also adopted its own Convention on Preventing and Combating Corruption on 11 July 2003.

■ **280.** It should be stressed that all these international instruments provide, as a minimum, for the criminalisation of domestic public corruption, as well as active corruption of foreign public officials [182].

■ **281.** This movement culminated in an initiative that was global in scope, with the adoption of the United Nations Convention against Corruption, which was opened for signature on 9 December 2003 in Merida, Mexico.

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181. http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf

182. ZANIN (H.), *The fight against corruption in the area of freedom, security and justice through the criminal law*, thesis presented on 29 September 2016, Paris-Saclay University, p. 35.

In its Article 1, the latter provides that:

'The purposes of this Convention are:

(a) To promote and strengthen measures to prevent and combat corruption more effectively;
(b) To promote, facilitate and support international cooperation and technical assistance for the prevention of and fight against corruption, including in asset recovery;
(c) To promote integrity, accountability and proper management of public affairs and public property.'

■ **282.** It is in this context of the emergence of regional and then international standards designed to fight corruption that the European Union's first initiatives came into being..

3. The late development of EU law in the fight against corruption

■ **283.** The first attempt to impose in the legislation of the Member States of the European Union the offence of active and passive corruption dates back to 1976, when a draft Treaty was presented 'amending the Treaties establishing the European Communities with a view to adopting a common regulation on the criminal-law protection of the Communities' financial interests and on the prosecution of infringements of the provisions of those Treaties'. [183]

Articles 3 and 5 of the Protocol appended to this draft provided for an obligation, for each Member State of the European Community, to penalise equally the active or passive corruption of a national official as well as of an official of the European Community [184].

The project did not succeed, but the assimilation principle on which it was based, namely to impose on Member States a requirement to give the interests of the Communities a degree of protection equivalent to that given to their own interests [185], would be included in the first EU Convention on the Punishment of Corruption.

■ **284.** Although it could be understood as part of the third pillar of the Maastricht Treaty, relating to police and judicial cooperation in criminal matters, the fight against corruption was not expressly included in this pillar and therefore needed to be supported by a broader objective [186].

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183. Commission proposal of 19 August 1976, OJ C 222 of 22 September 1976, pp. 13-17, p. 15.
184. ZANIN (H.), *The fight against corruption in the area of freedom, security and justice through the criminal law*, thesis presented on 29 September 2016, Paris-Saclay University, p. 45.
185. FLORA (D.), European criminal law – *The challenges of European criminal justice*, 2nd ed., Larcier, Brussels, 2014, p. 307.
186. ZANIN (H.), *The fight against corruption in the area of freedom, security and justice through the criminal law*, thesis presented on 29 September 2016, Paris-Saclay University, p. 46.

■ **285.** The fight against corruption was thus initially conceived as part of the 'protection of the European Union's financial interests', as illustrated in particular in a Council resolution of 6 December 1994, drafted in these terms [187] :

'Member States should take effective measures to punish bribery involving officials of the European Communities in relation to the financial interests of the Communities.'

A year later, the first Convention on the protection of financial interests to combat fraud was adopted on 26 July 1995 [188].

■ **286.** This Convention was then supplemented on 27 September 1996 by a protocol which required the active and passive corruption of national and Community officials to be made a criminal offence.

The protocol defines passive corruption as:

' […] the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests [189].'

Active corruption is defined in the following terms:

' […] the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting, in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests shall constitute active corruption.'

It should be emphasised that the 1995 Convention on the Protection of the European Communities' Financial Interests, as well as its 1996 Protocol, expressly limit the examples of corruption to acts which might infringe the European Union's financial interests.

■ **287.** These first initiatives were rapidly extended by a Convention on corruption involving officials of the European Communities or officials of Member States of the European Union, adopted in 1997 [190].

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187. Council Resolution of 6 December 1994 on the legal protection of the financial interests of the Communities, OJ C 355 of 14 December 1994, p. 2-3.

188. Convention drawn up on the basis of Article K. 3 of the Treaty on European Union, on the protection of the European Communities' financial interests

189. Council Act drawing up a Protocol to the Convention on the Protection of the European Communities' financial interests, 27 September 1996.

190. Council Act of 26 May 1997 drawing up the Convention established on the basis of Article K.3 (2) (c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

This other Convention has the merit of covering all acts of public corruption, even when they are not intended to obtain or retain business [191].

Article 1 of the Convention states:

'For the purposes of this Convention:

(a) 'official' shall mean any Community or national official, including any national official of another Member State;
(b) 'Community official' shall mean:
- any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities,
- any person seconded to the European Communities by the Member States or by any public or private body, who carries out functions equivalent to those performed by European Community officials or other servants.

Members of bodies set up in accordance with the Treaties establishing the European Communities and the staff of such bodies shall be treated as Community officials, inasmuch as the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities do not apply to them;
(c) 'national official' shall be understood by reference to the definition of 'official' or 'public officer' in the national law of the Member State in which the person in question performs that function for the purposes of application of the criminal law of that Member State. '

However, the 1997 Convention on the fight against corruption suffers from a certain lack of ambition, since it only contemplates making active or passive corruption a criminal offence when it is committed by officials – thereby excluding members of the Government, elected officials and contract staff entrusted with a public service remit.

Corruption is therefore defined more narrowly than in the OECD, Council of Europe or United Nations Conventions [192].

■ **288.** The corrupt person must, first of all, be an official, a concept less extensive than that of a public officer.

Secondly, the Convention is only concerned with the corruption of officials of the Member States of the European Union.

For example, the situation in which the head of a European business, in order to obtain a contract in an African State, pays bribes to local public

191. ZANIN (H.), *The fight against corruption in the area of freedom, security and justice through the criminal law*, thesis presented on 29 September 2016, Paris-Saclay University, p. 46.
192. See *infra* n° 277 to 288.

officials, is not contemplated by the Convention [193].

Finally, unlike the Criminal Law Convention of the Council of Europe and the Merida Convention, corruption is only contemplated in a public, not a private, context – a shortcoming which Framework Decision 2003/568/JHA of 22 July 2003 would later attempt to correct.

Moreover, the late entry into force of the Convention, on 28 September 2005, as well as the absence of a peer review mechanism, set the final seal on its inefficacy [194].

■ **289.** The Treaty of Amsterdam, which entered into force on 1 May 1999, opened up the possibility of legislating by means of a framework decision in the fight against corruption.

The effects of a framework decision are identical to those of a directive, with the exception of direct effect, i.e. framework decisions do not directly create rights for the benefit of the public, whose direct enforcement they may claim through the national courts.

The Treaty of Amsterdam also enshrined the establishment of an 'area of freedom, security and justice', defined by Article 29 of the Treaty in the following terms:

'Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.

That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud.'

Definition of framework decision

Framework decisions were defined in Article 34(2)(b) of the 2002 Treaty on European Union (2002/C 325/01), which stated:

'The Council shall take measures and promote cooperation, using the appropriate form and procedures set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously

193. KNOTTER (J.), 'The place of the European Union and its future financial public prosecutor in the fight against corruption', in Bonfils (P.), Mucchielli (L.), ROUX (A.) (Ed.), *Understanding and fighting corruption*, coll. 'Rights, powers and societies', Aix-Marseille University Press, 2015, p. 101.

194. See *infra* No. 313.

on the initiative of any Member State or of the Commission, the Council may:

[…]

(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.'

It is no longer possible to adopt framework decisions since the entry into force of the Lisbon Treaty in 2009.

■ **290.** It was therefore not within the framework for the protection of the European Union's financial interests, but within this new framework established by the Treaty of Amsterdam, that Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector was established.

The major innovation in this text, which incorporates the definition of active and passive corruption adopted by the Protocol of 27 September 1996, lies in the extension of the criminalisation of corruption to the private sector [195].

■ **291.** The Framework Decision calls on Member States to put in place effective and proportionate sanctions, as detailed in its Article 4:

'2. Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 2 is punishable by a penalty of a maximum of at least one to three years of imprisonment.

3. Each Member State shall take the necessary measures in accordance with its constitutional rules and principles to ensure that where a natural person in relation to a certain business activity has been convicted of the conduct referred to in Article 2, that person may, where appropriate, at least in cases where he or she had a leading position in a company within the business concerned, be temporarily prohibited from carrying on this particular or comparable business activity in a similar position or capacity, if the facts established give reason to believe there to be a clear risk of abuse of position or of office by active or passive corruption.'

■ **292.** The Framework Decision also states that the Member States are to have jurisdiction where the offence has been committed, in whole or in part, within their territory, if the perpetrator of the offence is one of

195. CASSUTO (T.), "European Union law on corruption and influence peddling", *AJ Pénal*, 2015, p. 343.

its nationals, or if the offence was committed for the benefit of a legal person that has its head office in the territory of that Member State [196].

In France, this Framework Decision was transposed by Law No. 2005-750 of 4 July 2005 into Articles 445-1 et seq of the Criminal Code, but the offence has only rarely been implemented by the courts [197].

■ **293.** The European Union also acceded to the Merida Convention of 28 September 2003, to which all the Member States of the European Union were already parties – with the exception of Estonia, which signed it on 12 April 2010 – by a Decision of the Council of the European Union of 25 September 2008 (2008/801/EC).

■ **294.** With the entry into force of the Treaty of Lisbon on 1 December 2009, corruption became one of the ten 'eurocrimes' listed in Article 83 of the Treaty on the Functioning of the European Union (TFEU), for which the European Union has the necessary jurisdiction to adopt directives to define offences and provide for sanctions.

Article 83 of the Treaty on the Functioning of the European Union

'1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament. '

The inclusion of corruption in this list is not surprising, as it increasingly has a transnational dimension and can be an instrument of organised crime [198].

196. Article 7 of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector.

197. Hearing of 13 September 2019.

198. KNOTTER (J.), 'The place of the European Union and its future financial public prosecutor in the fight against corruption', in Bonfils (P.), Mucchielli (L.), ROUX (A.) (Ed.), *Understanding and fighting corruption*, coll. 'Rights, powers and societies', Aix-Marseille University Press, 2015, p. 100.

■ **295.** The major innovation of the Treaty of Lisbon, which marks 'a decisive turning point in the europeanisation of criminal law [199] is the shift from an intergovernmental perspective to a community perspective in criminal matters [200].

Some saw in this the birth of a new era, marked by the decline of the Member States' absolute sovereignty in criminal matters and the gradual emergence of an EU jurisdiction: 'The time when one could say that the Member States had entire sovereignty in criminal matters, when the existence of even an embryonic European criminal justice system could be considered an illusion, is therefore far gone. The recognition of the European Union's criminal jurisdiction is not, however, a radical break, but, on the contrary, the result of a long development [201].'

■ **296.** Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 'on the fight against fraud to the Union's financial interests' accompanied the establishment of the European Public Prosecutor's Office, whose jurisdiction was limited by Regulation (EU) 2017/1939 of 12 October 2017 to the offences provided for in the directive.

Article 4 of Regulation (EU) 2017/1939 of 12 October 2017
Tasks

'The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in Directive (EU) 2017/1371 and determined by this Regulation. In that respect the European Prosecutor's Office shall undertake investigations, and carry out acts of prosecution and exercise the functions of prosecutor in the competent courts of the Member States, until the case has been finally disposed of.'

■ **297.** The eighth and ninth recitals of Directive (EU) 2017/1371 provide an understanding that in this text corruption is seen only as an offence of facilitation, accompaniment or fraud on the EU budget:

'8. Corruption constitutes a particularly serious threat to the Union's financial interests, which can in many cases can also be linked to fraudulent conduct. Since all public officials have a duty to exercise judgment or discretion impartially, the giving of bribes in order to influence a public official's judgment or discretion and the taking of such bribes should be included in the definition of corruption, irrespective of the law or regulations applicable in the particular official's country or to the international organisation concerned;

199. ZANIN (H.), T*he fight against corruption in the area of freedom, security and justice through the criminal law*, thesis presented on 29 September 2016, Paris-Saclay University, p. 48.

200. *Ibid*., p. 49.

201. GIUDICELLI-DELAGE (G.), 'The troubled waters of the criminal law of the European Union', *Archives de philosophie du Droit*, No. 53, 2010, p. 131.

9. The Union's financial interests can be negatively affected by certain types of conduct of a public official who is entrusted with the management of funds or assets, whether he or she is in charge or acts in a supervisory capacity, which types of conduct aim at misappropriating funds or assets, contrary to the intended purpose and whereby the Union's financial interests are damaged. There is therefore a need to introduce a precise definition of criminal offences covering such conduct.'

Article 4.2. of the Directive, entitled 'Other criminal offences affecting the Union's financial interests', thus sees the criminalisation of corruption in the following way:

'2. Member States shall take the necessary measures to ensure that passive and active corruption, when committed intentionally, constitute criminal offences.

(a) For the purposes of this Directive, 'passive corruption' means the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests.

(b) For the purposes of this Directive, 'active corruption' means the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests.'

The scope of this text is, in fact, narrower than that of the Convention of 26 May 1997 on the fight against corruption, detached from the question of the European Union's financial interests, and much narrower than that of the OECD Convention.

■ **298.** Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017, however, sets out the merit of harmonising the definition of public official in its Article 4.4, for all the Member States of the European Union:

'(a) a Union official or a national official, including any national official of another Member State and any national official of a third country;
(i) 'Union official' means a person who is:

- an official or other servant engaged under contract by the Union within the meaning of the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68 (16) (the 'Staff Regulations');

- seconded to the Union by a Member State or by any public or private body, who carries out functions equivalent to those performed by Union officials or other servants.

Without prejudice to the provisions on privileges and immunities contained in Protocols No 3 and No 7, Members of the Union institutions, bodies, offices and agencies, set up in accordance with the Treaties and the staff of such bodies shall be assimilated to Union officials, inasmuch as the Staff Regulations do not apply to them;

(ii) 'national official' shall be understood by reference to the definition of 'official' or 'public official' in the national law of the Member State or third country in which the person in question carries out his or her functions.

Nevertheless, in the case of proceedings involving a national official of a Member State, or a national official of a third country, initiated by another Member State, the latter shall not be bound to apply the definition of 'national official' except insofar as that definition is compatible with its national law.

The term 'national official' shall include any person holding an executive, administrative or judicial office at national, regional or local level. Any person holding a legislative office at national, regional or local level shall be assimilated to a national official;

(b) any other person assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries.'

■ **299.** It follows from all this that the legal framework gradually established by the European Union in the field of combating corruption is somewhat narrow in scope.

EU law contemplates only instances of corruption of EU officials – or public officials, but only where corruption undermines the Union's financial interests – and private corruption.

The corruption of foreign public officials from a third State to the European Union is not covered by European Union law, with the exception of the examples described in Article 4.4 of Directive 2017/1371 – although this is the type of corruption that the FCPA successfully combats [202].

■ **300.** The uneven implementation of this law by the Member States has also contributed to increasing the difficulty for the European Union in fighting corruption effectively.

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202. KNOTTER (J.), 'The place of the European Union and its future financial public prosecutor in the fight against corruption', in Bonfils (P.), Mucchielli (L.), ROUX (A.) (Ed.), *Understanding and fighting corruption*, coll. "Rights, powers and societies", University Press of Aix-Marseille, 2015, p. 102, see *infra* No. 327.

B. UNEVEN IMPLEMENTATION BY MEMBER STATES

1. The late adoption of measures to monitor the anti-corruption system of the EU

■ **301.** Several international anti-corruption conventions adopted monitoring measures very early on in order to oversee their implementation by States Parties.

■ **302.** The 1997 OECD Convention, in particular, is being monitored by the OECD Working Group on Bribery, divided into two distinct phases [203]:

- A four-step evaluation phase:
  - the first step is to examine national laws and assess their compatibility with the Convention. The analysis of national laws is carried out in the plenary session of the Working Group, in the presence of the State under consideration. This assessment is the subject of a report published on the OECD website;
  - the second step is to examine the effectiveness of the legislative and institutional frameworks for combating corruption in States Parties [204]. This review includes a one-week mission to the State under review, during which the Working Group's examiners and the OECD Secretariat conduct detailed discussions with other stakeholders;
  - The third step has only been in existence since 2010 and aims to ensure a more targeted assessment by focusing on the following three areas: progress made by States Parties in addressing the gaps identified at the second step; the problems posed by the development of the different countries' legislative and institutional systems; the implementation efforts and their results; and other cross-cutting issues of interest to the Working Group as a whole; [205]
  - a fourth step was introduced in 2016 to examine the difficulties and the progress of the State being assessed. This phase is also the subject of an assessment report [206].
- A 'round-table' meeting takes place at each plenary meeting of the Working Group, at which States Parties are called upon to share recent developments in their legal framework for combating corruption [207].

■ **303.** The OECD Working Group on Combating Bribery also publishes an annual report.

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203. LETLEUR (J.), PIETH (M.), 'Ten years of application of the OECD Convention against Transnational Corruption', *Collection Dalloz*, 2008.
204. https://www.oecd.org/fr/daf/anti-corruption/consultationpubliquesurlaphase4desuividelaconvention.htm
205. *Ibid.*
206. https://www.oecd.org/fr/corruption/publication-des-rapports-du-groupe-de-travail-de-ocde-sur-la-corruption-en-finlande-et-le-royaume-uni-le-jeudi-23-mars-2017.htm
207. LETLEUR (J.), PIETH (M.), "Ten years of application of the OECD Convention against Transnational Corruption", *Collection Dalloz*, 2008.

■ **304.** The Council of Europe also established a body on 1 May 1999 to monitor its Criminal Law Convention against Corruption, a few months after the opening of the Convention for signature: The Group of States against Corruption (Greco).

Article 1 of the Appendix to Council of Europe Resolution 99 (5) establishing Greco states:

'The aim of the Group of States against Corruption (hereinafter referred to as the "GRECO") is to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings in this field.'

■ **305.** While the OECD's approach is primarily aimed at promoting economic development and growth by securing foreign trade transactions, Greco sees the fight against corruption as a means of ensuring respect for human rights in Europe [208].

This is evident, in particular, in the preamble to Council of Europe Resolution 99(5), which states as follows:

'Convinced that corruption represents a major threat to the rule of law, democracy, human rights, fairness and social justice, hinders economic development, and endangers the stability of democratic institutions and the moral foundations of society.'

The monitoring of the Criminal Law Convention against Corruption by Greco thus involves three procedures:

- a horizontal assessment procedure, in which all Member States are assessed in the course of an assessment cycle. This procedure gives rise to recommendations or comments that States are called upon to take into account [209];
- a compliance procedure aimed at assessing the measures adopted by States to implement the Greco recommendations [210];
- an emergency procedure, effective since June 2017, allowing Greco to act urgently when a State is experiencing a worrying development, such as a constitutional or legislative reform that may result in ground being lost in the fight against corruption [211].

In this connection, the Committee took note in the course of its work of the conclusions of the assessment report on France adopted by Greco

208. MAÎTREPIERRE (A.), "Greco, the Council of Europe's anti-corruption body: what features, what achievements, what challenges? ', *Revue de droit international d'Assas*, 2018, p. 107.

209. https://www.coe.int/fr/web/greco/about-greco/how-does-greco-work

210. *Ibid.*

211. MAÎTREPIERRE (A.), "Greco, the Council of Europe's anti-corruption body: what features, what achievements, what challenges? ', *Revue de droit international d'Assas*, 2018, p. 108.

on 6 December 2019 on the 'prevention of corruption and promotion of integrity in central governments (high-level executive functions) and law enforcement [212] '.

■ **306.** On 10 July 2019, the Council of Europe announced that the European Union had become an observer to Greco.

In this respect Frans Timmermans, Senior Vice-President of the European Commission, said:

'The participation of the European Union in Greco as an observer brings the European Union and the Council of Europe closer together and strengthens our common efforts to consolidate the rule of law and the fight against corruption across Europe [213].'

Whilst this decision is to be welcomed, it is nonetheless revealing to underline that it was first considered by the European Commission sixteen years ago, in the following terms:

'Hence, the Commission will prepare, within the limits of Community competence, the accession of the European Community to both Conventions on Corruption of the Council of Europe and request the Council for authorisation to negotiate with the Council of Europe the terms and modalities of the Community's subsequent participation in GRECO. [214] '

■ **307.** Finally, the 2003 United Nations Convention against Corruption established a monitoring mechanism, pursuant to its Article 63, according to which:

'1. A Conference of the States Parties to the Convention is hereby established to improve the capacity of and cooperation between the States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation.
[...]
4. The Conference of the States Parties shall agree upon activities, procedures and methods of work to achieve the objectives set forth in paragraph 1 of this article, including:
[...]
(e) Reviewing periodically the implementation of this Convention by its States Parties;
(f) Making recommendations to improve this Convention and its implementation;

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212. Fifth Evaluation Cycle, Prevention of Corruption and Promotion of Integrity in Central Governments (High-Level Executive functions) and Law Enforcement, Evaluation Report, France, adopted by Greco at 84th Plenary Meeting (Strasbourg, 2-6 December 2019), https://rm.coe.int/cinquieme-cycle-d-evaluation-prevention-de-la-corruption-et-promotion-/16809969fd. See *supra* No. 149.

213. https://www.coe.int/fr/web/greco/-/eu-becomes-observer-to-anti-corruption-body-greco

214. Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a comprehensive EU policy against corruption, 28 May 2003, COM (2003) 317.

(g) Taking note of the technical assistance requirements of States Parties with regard to the implementation of this Convention and recommending any action it may deem necessary in that respect.

■ **308.** Resolution 3/1 of the Conference of States Parties, meeting for the third time in November 2009, adopted a review mechanism for the implementation of the Convention [215].

This mechanism could have enabled the European Union to be assessed, as the European Union had been a party to the Convention since 2008 [216].

The first assessments, however, led to a finding that this mechanism was relatively cumbersome and complex to apply.

In addition, the mechanism was criticised on the grounds that it lacked measures for monitoring the recommendations made to States Parties, as well as being somewhat opaque, since transparency of the review process was not guaranteed [217].

■ **309.** The majority of authors believe that the implementation of peer review measures is an effective tool for monitoring the implementation of conventions by States:

'the diplomatic and political pressure exerted by these high-level expert bodies is an effective incentive for States to comply with their international obligations. Monitored by one another in a tangible way, it is difficult for States to ignore their commitments under conventions [218].

■ **310.** In this respect, the European Union has taken a long time to introduce follow-up monitoring arrangements for its anti-corruption instruments.

■ **311.** As early as 2003, the European Commission expressed the view in a communication that the effectiveness of legal instruments to combat corruption was conditional on their peer review and assessment [219].

It noted, on that occasion, that 'the EU instruments do not provide a genuine follow-up monitoring or evaluation mechanism comparable

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215. Review Mechanism for the Implementation of the United Nations Convention against Corruption, Basic Documents, United Nations Office on Drugs and Crime, 2011.

216. See *supra* No. 295.

217. ZANIN (H.), *The fight against corruption in the area of freedom, security and justice through the criminal law*, thesis presented on 29 September 2016, Paris-Saclay University, p. 458.

218. KNOTTER (J.), 'The place of the European Union and its future financial public prosecutor in the fight against corruption', in Bonfils (P.), Mucchielli (L.), ROUX (A.) (Ed.), *Understanding and fighting corruption*, coll. 'Rights, powers and societies', Aix-Marseille University Press, 2015, p. 90.

219. Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a comprehensive EU policy against corruption, 28 May 2003, COM (2003) 317.

to the (subregional) OECD Working Group on Bribery or the (mainly European) Group of States against Corruption (GRECO) mandated to ensure the implementation of the OECD Bribery Convention and the Council of Europe's Civil and Criminal Law Conventions [220] '.

In addition, in 2005, Council Resolution No 6902/05 'concerning a comprehensive EU policy against corruption' called on the Commission to explore the possibility for the European Union to accede to Greco or to establish a mechanism for monitoring the EU legal framework on combating corruption [221].

■ **312.** Article 70 TFEU could have provided a legal basis for the establishment of such a mechanism.

Under this article:

'Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.'

■ **313.** Yet the European Union waited until 2011 to establish a proper monitoring and evaluation mechanism, with the publication of the 'European Union Anti-Corruption Report' [222].

On 6 June 2011, the European Commission decided:

'In order to support the implementation of a comprehensive anti-corruption policy in the Union, a reporting mechanism for the periodic assessment of anti-corruption efforts in the Union is hereby set up [223].'

This report is one of the instruments to combat corruption adopted by the Commission in 2011, to which should also be added:

- a Communication on Fighting Corruption in the EU, which presents the objectives of the EU Anti-Corruption Report and the practical aspects of its development;

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220. *Ibid.*, p. 10.
221. Council Resolution No 6902/05 concerning a comprehensive Union policy against corruption.
222. Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Fighting Corruption in the EU, 6 June 2011, COM (2011) 308.
223. Commission Decision of 6 June 2011 establishing an EU anti-corruption reporting mechanism for periodic assessment in the fight against corruption, C(2011) 3673 final, Article 1.

- a Commission Decision establishing an EU anti-corruption reporting mechanism;
- a report on the implementation of Council Framework Decision 2003/568/JHA on combating corruption in the private sector;
- a report on the modalities of EU participation in the Council of Europe Group of States against Corruption (GRECO) [224].

■ **314.** The aim of the EU Anti-Corruption Report is 'to promote enforcement of existing the legal and institutional tools [225].'

Article 2

Objectives of the EU reporting mechanism in the fight against corruption ('EU Anti-Corruption Report')

The EU Anti-Corruption Report has the following objectives:

(a) periodically to assess the situation within the EU in the fight against corruption;
(b) to identify trends and best practices;
(c) to make general recommendations to guide EU policy on preventing and fighting corruption;
(d) to make tailor-made recommendations;
(e) to assist Member States, civil society and other stakeholders in identifying shortcomings, raising awareness and providing training on anti-corruption.

The aim of the report is therefore to create an additional incentive for the Member States of the European Union to combat corruption by implementing the existing European legal framework in their national legislation.

Article 4 of the Commission Decision also provides for recommendations tailored to the needs of each Member State and for the publication of the report every two years.

Finally, the Commission calls for cooperation with existing monitoring and evaluation mechanisms, 'to avoid additional administrative burdens for Member States and duplication of efforts [226] '.

■ **315.** The first Anti-Corruption Report of the European Commission was published on 3 February 2014 and in particular highlighted that:

'The individual country analyses revealed a wide variety of corruption-related problems, as well as of corruption control mechanisms, some of which have proved effective and others have failed to produce results.

224. https://europa.eu/rapid/press-release_IP-11-678_fr.htm?locale=fr
225. *Ibid.*, p. 6.
226. *Ibid.*, p. 7.

Nevertheless, some common features can be noted either across the EU or within clusters of Member States [227] '.

The report also explored the possibility of establishing an experience-sharing programme to help 'member states, local NGOs and other stakeholders to identify best practices and overcome shortcomings in anti-corruption policies, raise awareness or provide training [228] '.

Unfortunately, the publication of an EU Anti-Corruption Report has never been repeated by the European Commission, despite the commitments which it made.

2. The lack of implementation of follow-up measures in the EU anti-corruption system

■ **316.** The second EU Anti-Corruption Report should have been published in 2016.

The European Parliament expressed its regret in October 2016 that the European Commission had failed to published this report, which it had committed to doing:

'The European Parliament: […] 9. Regrets that the Commission has not yet published its second Anti–Corruption Report, which was due at the beginning of 2016; calls on the Commission to submit it as soon as possible; reiterates that anti-corruption reports should not be limited to the situation in the Member States but should also include a section on the European Union Institutions; calls on the Commission, therefore, to find an appropriate way to monitor corruption in the EU Institutions, bodies and agencies [229] .'

Another report published on 10 January 2019 by the European Parliament gave the latter the opportunity to express its disapproval once more:

'The European Parliament: […] 30. […] urges the Commission, therefore, to continue publishing its anti-corruption reports; reiterates its call on the Commission to engage in a more comprehensive and coherent EU anti-corruption policy, including an in-depth evaluation of the anti-corruption policies in each Member State [230] .'

■ **317.** Coupled with the weakness of the EU anti-corruption instruments, the lack of effective monitoring of their implementation invariably leads to uneven and insufficient enforcement in the Member States.

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227. *EU Anti-Corruption Report,* Report from the Commission to the Council and the European Parliament, 3 February 2014, COM (2014) 38, p. 8.
228. *Ibid.*, p. 5.
229. Report on the fight against corruption and follow-up to the resolution of the CRIM Committee, (2015/2110 (INI)), 7 October 2016, p. 25.
230. European Parliament report on the 2017 annual report on the protection of the European Union's financial interests – combating fraud (2018/2152 INI), 10 January 2019.

In any case, it seems unlikely that compliance with the planned monitoring mechanism alone would have been sufficient to implement the EU anti-corruption legal framework.

The EU Anti-Corruption Report is, indeed, a flexible instrument of law and does not provide any mechanism of 'reward' for the efforts undertaken by the Member States.

Therefore, even assuming that its publication had been repeated by the European Commission, it is possible to doubt the capacity of this report alone to generate sufficient momentum throughout the European Union [231].

■ **318.** As early as 2014, the EU Anti-Corruption Report found that not all Member States had adopted anti-corruption measures in their national laws and that, where such measures had been adopted, they remained of unequal quality and intensity:

'However, the long-standing absence of comprehensive anti-corruption strategies in some Member States which are facing systemic corruption problems turned out to be an issue of concern, since the type of problems that need to be addressed require a comprehensive coordinated approach at central level. In some of these Member States a national anti-corruption strategy was recently adopted, while in others no such strategy is yet in place [232].'

■ **319.** Above all, EU anti-corruption law has itself been the subject of uneven implementation by the Member States.

In particular, this was emphasised in the Commission's report to the European Parliament and the Council of 26 July 2019, which assessed the application by the EU Member States of Framework Decision 2003/568/JHA.

■ **320.** It is true that this report noted that Member States had undertaken reforms since 2011:

'As far as the transposition itself is concerned, it is still not satisfactory, despite some progress achieved. The main problem lies in weak transposition of some elements of Articles 2 and 5. With regards to the transposition of Article 5, the assessment was mainly carried out against the national criminal law provisions, as notified by the Member States.

[…]

231. ZANIN (H.), *The fight against corruption in the area of freedom, security and justice through the criminal law*, thesis presented on 29 September 2016, Paris-Saclay University, p. 509.

232. *EU Anti-Corruption Report*, Report from the Commission to the Council and the European Parliament, 3 February 2014, COM (2014) 38, p. 9.

The Committee recalls the importance of fighting corruption in the private sector and calls upon Member States to adopt without delay all the necessary measures in this regard [233].'

The Member States of the European Union have therefore made significant progress:

'Overall, the level of transposition of the Framework Decision has improved significantly since the implementation of 2011. The level of sanctions provided for in the national criminal codes complies with the minimum thresholds of the Framework Decision in all Member States [234].'

But, despite this improvement, the report concluded that the transposed provisions were only too rarely implemented by national criminal courts.

In this regard, it noted in particular that:

'Only 13 Member States provided data on corruption in the private sector, out of the twenty-two Member States which provided statistics in the 2018 update for the reference years 2014 to 2016. There have been very few convictions for corruption in the private sector in recent years [235].'

■ **321.** These findings attest to the fact that there is no level playing field between the EU Member States in the fight against corruption.

Moreover, the sense of corruption, which varies among EU Member States, is not generally declining.

3. The persistence of a sense of corruption within the EU

■ **322.** The study on corruption carried out by the Eurobarometer Institute in 2017 showed that the sense of corruption was perceived in very different ways among the Member States [236].

For example, 96% of Greeks, 94% of Spaniards and 86% of Hungarians responded that they viewed corruption as widespread in their country, in comparison with only 22% of Danes or 44% of Dutch.

Moreover, it is enlightening to note that 69% of the Europeans surveyed believe that corruption offences are not sufficiently prosecuted in their country [237].

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233. Report from the Commission to the European Parliament and the Council, based on Article 9 of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector.
234. *EU Anti-Corruption Report*, Report from the Commission to the Council and the European Parliament, 3 February 2014, COM (2014) 38, p. 12.
235. *Ibid.*, p. 12.
236. Eurobarometer Survey, *Corruption*, No. 470, October 2017, p. 7.
237. *Ibid.*, p. 12.

This figure is 83% in Bulgaria and 80% in Lithuania, compared to 40% in Denmark.

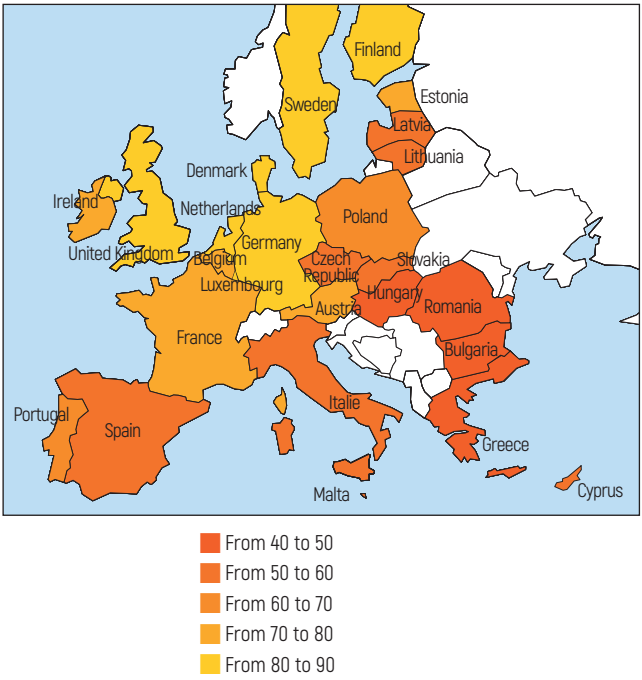
■ **323.** In any case, the Eurobarometer survey highlighted the worrying situation that almost one in two Europeans (43%) considered the level of corruption in their country higher in 2017 than in 2013.

Transparency International's latest survey on the perception of corruption, published on 30 January 2019, also showed that while Europe is well rated compared with other parts of the world, it still has wide disparities between States.

Transparency International's ranking is thus dominated by the northern European States such as Sweden and Finland, which both have a score of 85/100 [238].

On the other hand, some other states such as Hungary or Spain have seen their scores decline since 2016 [239].

[Corruption Perceptions Index in Europe (2018)



Data: Transparency International]

238. https://www.transparency.org/news/feature/cpi_2018_global_analysis
239. https://www.touteleurope.eu/actualite/la-corruption-en-europe.html

Once again, these contrasting results indicate a lack of a comprehensive and coherent EU policy on combating corruption.

■ **324.** This weakens the European Union and its businesses, in a context of economic rivalry with the US and other regional powers that has intensified in recent times.

■ **325.** The report presented on 26 June 2019 by Mr Raphaël Gauvain recalled, in this connection, the high number of convictions by foreign judicial authorities, in particular in the United States, against European companies over the last twenty years:

'Tens of billions of dollars of fines were claimed from French, European, South American, and Asian companies because their business practices, customers or some of their payments did not comply with US law, even though none of these practices had a direct connection to the territory of the United States and/or those companies were complying with the law of their own country (with respect to international sanctions) [240].'

However, the US Department of Justice's conviction of the German company Siemens in 2008 brought the rivalry between the US and the European Union into a new era [241].

Suspected of offences of corruption, Siemens was fined almost EUR 1 billion, including EUR 450 million by the Department of Justice and EUR 350 million by the Securities and Exchange Commission on the basis of the FCPA, and then fined EUR 596 million by the German authorities [242].

The table of the largest convictions imposed under the FCPA between 2008 and 2018 is, in this respect, significant [243]:

240. GAUVAIN (R.), *Restoring the sovereignty of France and Europe and protecting our businesses from extraterritorial laws and measures*, National Assembly, 26 June 2019, p. 3.

241. LAÏDI (A.), *Law, New weapon of economic war: how the United States destabilises European businesses*, Actes Sud, 2019, p. 159.

242. *Ibid.*, p. 160

243. GAUVAIN (R.), *Restoring the sovereignty of France and Europe and protecting our businesses from extraterritorial laws and measures*, National Assembly, 26 June 2019, p. 19.

No.	Business	Country	Year	Total amount (in millions of dollars)
1	Siemens	Germany	2008	800
2	Alstom	France	2014	772
3	Telia	Sweden	2017	691,6
4	KBR/Halliburton	USA	2009	579
5	Teva Pharmaceutical	Israel	2016	519
6	OCH-ZIFF CXapital Mngt	USA	2016	412
7	BAE	United Kingdom	2010	400
8	Total	France	2013	398,2
9	Vimpelcom	Netherlands	2016	397,5
10	Alcoa	USA	2014	384
11	ENI/ Snamprogetti	Italy	2010	365
12	Technip	France	2010	338
13	Société générale	France	2018	293
14	Panasonic	Japan	2018	280
15	JP Morgan Chase	USA	2016	264
16	Odebrecht/ Braskem	Brazil	2017	260
17	SBM Offshore	Netherlands	2017	238
18	JGC Corporation	Japan	2011	218,8
19	Embraer	Brazil	2016	205,5
20	Daimler	Germany	2010	185
21	Petrobras	Brazil	2018	170,6
22	Rolls-Royce	United Kingdom	2017	17
23	Weatherford	Switzerland	2013	152,6
24	Alcatel	France	2010	138
25	Avon Products	USA	2014	135
26	Keppel Offshore & Marine	Singapore	2017	105

An examination of this table shows that fourteen of these convictions, more than half, concerned European businesses, which paid an overall amount of $5.339 billion, representing 60.17 % of the total amount of fines imposed [244].

■ **326.** This heightened economic rivalry undermines European Union businesses and, as a result, the EU itself, which still lacks the legal instruments to defend itself effectively.

■ **327.** Already the Parliamentary Information Report on the extraterritoriality of American legislation, published in 2016, called upon the European Union to react, in the following terms:

'The ability of the European Union, a true economic and legal superpower whenever it wishes, to mobilise will be crucial. […] Transatlantic relations […] must be preserved. This implies that their equilibrium must not be challenged [245] '

4. The Committee's recommendations

■ **328.** Having examined all the legal instruments that make up European Union law in the fight against corruption and having noted their shortcomings, the Committee welcomed the choice of the President of the European Commission to put respect for the rule of law and the defence of European values among her priorities, as well as her desire to promote the EU as a 'guardian of multilateralism'.

The Committee considered that, in pursuit of these objectives, the fight against corruption should be central to the European Commission's agenda and regretted that it was neither one of the priorities displayed by the President of the European Commission, nor in the mission statements addressed by her to the European Commissioners, unlike for example the fight against money laundering and the financing of terrorism.

The Committee underlined the paradox of making the fight against corruption the first of the requirements imposed on candidate States for accession to the EU in the Communication of the European Commission of 6 February 2020 on the enlargement of the Union, without giving equivalent importance to this theme for the Member States themselves.

It considered that the time had come for the EU to develop a coherent and ambitious policy on combating corruption.

■ **329.** In the Committee's view, there are several reasons which combine to make such a policy necessary:

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244. *Ibid.*, p. 19.

245. LELLOUCHE (P.), BERGER (K.), *Information report on the extraterritoriality of American legislation*, National Assembly, 5 October 2016, pp. 11-12.

- the fight against corruption is an indispensable condition of citizens' confidence in the proper functioning of institutions and the market: it is, as such, a fundamental component of the rule of law and democracy, threatened by the rise of populism;

- the current disparities between Member States in the fight against corruption, and even more so in the prevention of corruption, are distortions of competition within the single market. These disparities are significant: Transparency International's Corruption Perceptions Index, which varies by country, reflects this; only four States currently impose on larger enterprises obligations to prevent and detect corruption;

- against this background, the increasingly transnational dimension of corruption is the cause of conflicts of jurisdiction: courts in several Member States potentially have jurisdiction to hear the same cases; this constitutes further damage to the single market and to the legal certainty of European businesses;

- this has already had far-reaching consequences: the lack of a robust EU anti-corruption policy to date has probably helped to promote the extraterritorial enforcement of foreign legislation, particularly the US Foreign Corrupt Practices Act, with regard to European businesses; over the last decade, the largest penalties imposed on the basis of this law have predominantly been imposed on European businesses;

- in comparison, the standards adopted by the European Union in the fight against corruption, if not non-existent, are without real influence in the world, unlike European standards of personal data protection and competition, which constitute the best international standards in their respective fields.

■ **330.** For all these reasons, the Committee recommends that the European Union adopt an anti-corruption policy without further delay, with the following four objectives:

- to ensure respect for the rule of law and democracy;

- to establish a level playing field between European businesses and to prevent conflicts of jurisdiction at a European level;

- to protect the interests of European businesses around the world by rebalancing the EU's relationship with the US and other regional powers;

- to promote European anti-corruption standards and practices worldwide.

CHAPTER II

HARMONISING EUROPEAN LAW IN THE FIGHT AGAINST CORRUPTION

■ **331.** In order to achieve these objectives, the Committee considered that the following should be explored, in parallel:

- the adoption of an EU law anti-corruption package consisting of several new texts;
- the inclusion of anti-corruption clauses in existing and future EU secondary legislation.

■ **332.** The EU law anti-corruption package should consist of three texts, adopted in the form of directives, mainly on the basis of Article 83.1 of the Treaty on the Functioning of the European Union (TFEU), which ranks corruption among 'eurocrimes'.

Article 83

'1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

A first directive would require all Member States to comply with the internationally recognised OECD anti-corruption principles and recommendations.

This directive would be accompanied by a second directive incorporating the content of Framework Decision 2003/568/JHA of 22 July 2003 on corruption in the private sector and extending it so as to impose on Member States a requirement to criminalise extraterritorial acts of corruption.

Finally, a third directive would require Member States to impose obligations on larger enterprises to prevent and detect corruption, while leaving them free to choose the authority responsible for monitoring compliance with such obligations and sanctioning any breach of them.

A. ADOPTING AN EU LAW ANTI-CORRUPTION PACKAGE CONSISTING OF THREE DIRECTIVES

1. Requiring Member States to comply with the OECD acquis in the fight against corruption

■ **333.** The Committee considered that a first directive should require Member States to comply with OECD anti-corruption principles and recommendations, based on the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

The directive would be a first step in harmonising the laws of Member States [246], and would immediately increase the EU's credibility worldwide, while demonstrating its confidence in the functioning of multilateral institutions.

■ **334.** It could be adopted according to the ordinary legislative procedure referred to in Article 83.1 of the TFEU, without foreseeable blocking, since most Member States have already ratified the 1997 OECD Convention, with the exception only of Cyprus, Croatia, Malta and Romania.

Country	Approval/ratification of the Convention	Entry into force of the Convention	Entry into force of implementing legislation
Germany	10 November 1998	15 February 1999	15 February 1999
Austria	19 October 1999	18 December 1999	17 December 1999
Belgium	27 July 1999	25 September 1999	3 April 1999
Bulgaria	22 December 1998	15 February 1999	29 January 1999
Denmark	5 September 2000	4 November 2000	1 May 2000
Spain	14 January 2000	14 March 2000	2 February 2000
Estonia	14 December 2004	12 February 2005	1 July 2004
Finland	10 December 1998	15 February 1999	1 January 1999
France	31 July 2000	29 September 2000	29 September 2000
Greece	5 February 1999	15 February 1999	1 December 1998
Hungary	4 December 1998	15 February 1999	1 March 1999

246. See *infra* n° 339 .

Country	Approval/ratification of the Convention	Entry into force of the Convention	Entry into force of implementing legislation
Ireland	22 September 2003	21 November 2003	26 November 2001
Italy	15 December 2000	13 February 2001	26 October 2000
Latvia	31 March 2014	30 May 2014	21 March 2014
Lithuania	16 May 2017	15 July 2017	3 May 2017
Netherlands	12 January 2001	13 March 2001	1 February 2001
Poland	8 September 2000	7 November 2000	4 February 2001
Portugal	23 November 2000	22 January 2001	9 June 2001
Czech Republic	21 January 2000	21 March 2000	9 June 1999
United Kingdom	14 December 1998	15 February 1999	14 February 2002
Slovakia	24 September 1999	23 November 1999	1 November 1999
Slovenia	6 September 2001	5 November 2001	23 January 1999
Sweden	8 June 1999	7 August 1999	1 July 1999

In this way, the globally recognised 'OECD acquis' on anti-corruption would be incorporated into EU secondary law.

■ **335.** This acquis consists, first of all, in the provisions of the 1997 OECD Convention themselves, together with their official commentaries [247].

In this respect, it incorporates Article 1 of the said Convention, which contains a wide definition of the offence of corruption as well as of the concept of public official.

Article 1
The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation

247. Commentaries on the Convention on Combating Bribery of Foreign Public officials in International Business Transactions.

of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official'.
4. For the purpose of this Convention:
   a. "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
   b. "foreign country" includes all levels and subdivisions of government, from national to local;
   c. "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

The official commentaries on this article specify, *inter alia*, that 'the term "public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement', and that 'the term "public enterprise" means any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence'.

■ **336.** Secondly, the OECD acquis on combating corruption consists of all texts adopted by OECD bodies on the basis of the 1997 Convention and sometimes referred to as 'related documents', namely:

- the Recommendation of the Council on Bribery and Officially Supported Export Credits, adopted by the OECD Council on 14 December 2006;
- the Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the OECD Council on 25 May 2009;
- the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the OECD Council on 26 November 2009;
- the Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption, adopted by the OECD Council on 16 November 2016;
- Chapter VII, entitled 'Combating Bribery, Bribe Solicitation and Extortion', of the OECD Guidelines for Multinational Enterprises.

■ **337.** Incorporating this acquis into a European Directive and then, by transposition, into the national laws of the Member States would be a first step in harmonising these laws, in order to establish a European level playing field in the fight against corruption.

2. Requiring Member States to criminalise extraterritorial corruption

■ **338.** In the Committee's view, the first directive should be accompanied by a second measure consisting of repealing Framework Decision 2003/568/JHA of 22 July 2003 on corruption in the private sector and incorporating its system into a directive, adopted on the basis of Article 83.1 TFEU, at the same time bringing it up to date.

■ **339.** At present the Framework Decision of 22 July 2003 is both unevenly transposed into the laws of the Member States and insufficiently implemented by them, as the European Commission and Parliament recently noted in a report submitted to the Council on 26 July 2019 [248].

Report from the Commission to the European Parliament and the Council assessing the extent to which the Member States have taken the necessary measures to comply with Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector

Overall, the level of transposition of the Framework Decision has improved significantly since the 2011 implementation report. The level of sanctions provided for in the national criminal codes complies with the minimum thresholds of the Framework Decision in all Member States.

However, certain provisions of the Framework Decision have been difficult to implement in some Member States. For example, acceptance of the promise of a bribe is not covered in the national legislation of all Member States and, in some countries, the commission of an offence by a person in the exercise of managerial or work duties is limited to specific posts or powers. The concept of unfair advantage offered or granted to third parties is not fully covered in some Member States. It is also defined in different ways, sometimes covering more than is strictly necessary, but omitting important elements in other cases. In addition, some Member States have limited the scope of the offence related to corruption in the private sector, either by specifying certain conditions for the commission of the offence or by limiting the scope of the offence to businesses and other profit-making entities, thereby omitting not-for-profit organisations. In some Member States, the relevant provisions of the Criminal Code do not extend to not-for-profit entities.

While several Member States have tried to amend their national legislation, their efforts must be extended to the enforcement of these criminal measures. Only 13 Member States provided data on corruption in the private sector, out of the 22 Member States which provided statistics in the 2018 update for the reference years 2014 to 2016. There have been very few private sector convictions for corruption in these years.

248. Report from the Commission to the European Parliament and the Council assessing the extent to which the Member States have taken the necessary measures in order to comply with Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, COM(2019) 355 final, 26 July 2019, see *supra* no. 321.

■ **340.** The reworking of the Framework Decision of 22 July 2013 in the form of a directive should be accompanied on this occasion by an amendment to its Article 7, entitled 'Jurisdiction', which is currently drafted in the following terms:

'1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2 and 3, where the offence has been committed:

a) in whole or in part, within its territory;
b) by one of its nationals, or
c) for the benefit of a legal person that has its head office in the territory of that Member State.

2. Any Member State may decide that it will not apply the jurisdiction rules in paragraph 1(b) and (c), or will apply them only in specific cases or circumstances, where the offence has been committed outside its territory. '

As it stands, this Article allows a great deal of latitude to Member States not to exercise their jurisdiction systematically with regard to acts of corruption committed outside their territory, but having a link with it.

The Committee agreed that this Article should be amended, in order to require Member States to make criminal offences of active or passive corruption in the private sector committed outside their territory but having a link with it, as Article 435-6-2 of the French Criminal Code for example allows since the entry into force of the Sapin 2 Law.

Article 435-6-2 of the French Criminal Code

Where the offences under Articles 435-1 to 435-4 are committed abroad by a French person or by a person habitually resident or carrying on all or part of his economic activity in French territory, French law shall apply in all circumstances, as an exception to the second paragraph of Article 113-6, and Article 113-8shall not apply.

For the prosecution of a person who has been found guilty in French territory as an accomplice of an offence under Articles 435-1 to 435-4 committed abroad, the condition under Article 113-5 of the offence being established by the final decision of a foreign court shall not apply.

■ **341.** This amendment would be consistent with the extraterritorial approach adopted by Article 4 of the 1997 OECD Convention, under which:

'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.'

This could also be recommended by item 20 of the G-20 leaders' declaration at the end of the Osaka summit in June 2019, which stated:

'We will intensify our efforts to combat foreign bribery and to ensure that each G20 country has a national law in force for criminalising foreign bribery as soon as possible. '

■ **342.** Moreover, this amendment would enable the courts of all the Member States to be placed on an equal footing with the courts of third States that are most active in fighting international corruption, particularly the US and UK courts.

In doing so, it would help to rebalance the EU's relationship with the United States of America and other regional powers in this area and, ultimately, better protect European businesses.

3. Requiring Member States to subject larger enterprises to obligations of preventing and detecting corruption

■ **343.** Finally, the Committee felt that a third directive should require Member States to subject larger enterprises to obligations to prevent and detect corruption.

At present, at least four Member States require such obligations of their businesses.

The adoption of a directive would therefore contribute to the establishment of a European level playing field in the fight against corruption, conducive to the functioning of the internal market.

For this reason, this directive could be adopted on the basis of Article 114.1 TFEU, under which: 'The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.'

■ **344.** The Committee also felt that the content of this directive could be borrowed from the OECD acquis in this area – in particular from the OECD Council recommendation of 26 November 2019 –, as well as a review of Member States' national laws already imposing obligations on their businesses to prevent and detect corruption.

The choice of the authority responsible for monitoring compliance with these obligations and punishing any breach of them should, however, be left to the discretion of the Member States.

a) The OECD acquis on preventing and detecting corruption

■ **345.** The Recommendation of the OECD Council 'for Further Combating Bribery of Foreign Public Officials in International Business Transactions', adopted on 26 November 2009, recommends that businesses implement measures to prevent corruption, taking into account their individual circumstances.

It also encourages them to evaluate these measures regularly so that they can improve their effectiveness.

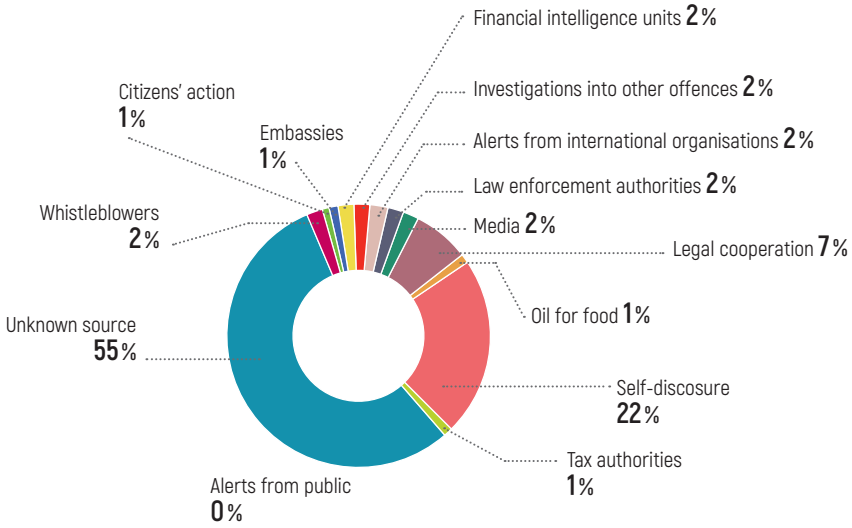
■ **346.** This recommendation also includes, since 18 February 2010, an Appendix II, '"Good practice guidance on internal controls, ethics, and compliance' for companies, and recommends the following:

- 'strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery';
- 'a clearly articulated and visible corporate policy prohibiting foreign bribery';
- 'ethics and compliance programmes or measures designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, inter alia, the following areas: (i) gifts; (ii) hospitality, entertainment and expenses; (iii) customer travel; (iv) political contributions; (v) charitable donations and sponsorships; (vi) facilitation payments; and (vii) solicitation and extortion';
- 'ethics and compliance programmes or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners';
- 'a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or to hiding such bribery';
- 'measures designed to ensure periodic communication and documented training for all levels of the company, on the company's ethics and compliance programme or measures regarding foreign bribery, as well as, where appropriate, for subsidiaries';
- 'appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company's ethics and compliance programme or measures regarding foreign bribery';
- 'periodic reviews of the ethics and compliance programmes or measures, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, taking into account

relevant developments in the field, and evolving international and industry standards'.

■ **347.** The effectiveness of these measures in preventing and detecting foreign bribery is exemplified in an OECD study conducted in 2017, entitled 'The Detection of Foreign Bribery'.

How are mechanisms of transnational corruption detected?
1999-2017



Source: OCE database on transnational corruption cases

In particular, this study found that 24% of the foreign bribery incidents identified during a reference period had been identified as a result of self-disclosure or the disclosure of a whistleblower.

In fact, at least four EU Member States already impose obligations on larger enterprises for the prevention and detection of corruption: Germany, Italy, France, and the United Kingdom.

b) Existing systems for preventing and detecting corruption in the Member States

■ **348.** In this connection the Committee took note, in particular, of the comparative study carried out by the Directorate-General of the Treasury at the request of the French Anti-Corruption Agency in 2018 [249], and of available comparative law resources.

249. Directorate-General of the Treasury, *International comparative study, Prevention of corruption*, January 2018.

It drew from them the following key findings.

■ **349.** In Germany, the federal law does not impose a legal obligation of preventing or detecting corruption, strictly speaking, on any business.

However, where it is established that a business has participated in an act of corruption through a manager or employee, the prosecutor's office of the Länd having jurisdiction may have regard to the lack of implementation of measures designed to prevent the commission of such an act [250].

Where an act of corruption has been committed by a manager of a business, a fine may be imposed on the business on the basis of Article 30 of the Federal Law on Administrative offences [251].

Where such an act has been committed by an employee of a business, a fine may still be imposed on the business, provided it can be shown that the business has been negligent in the implementation of measures designed to prevent the commission of acts of corruption.

In any event, the amount of the fine imposed takes account of measures adopted or not adopted by the business in respect of compliance and, more specifically, the prevention of corruption [252].

■ **350.** In Italy, a legislative decree of 8 June 2001 defined a system for the prevention of corruption offences, the implementation of which by larger enterprises is compulsory [253].

Businesses required to implement this system have an obligation to develop, in particular, a code of ethics and a 'model of organisation and management' designed to prevent the commission of offences, including offences of corruption.

For this reason the legislative decree requires businesses that are subject to it:

- to identify the activities in which offences may be committed;
- to identify arrangements for managing financial resources that are likely to prevent the commission of such offences;
- to provide for a disciplinary system that enables non-compliance with the measures adopted to be sanctioned [254].

Compliance with this system enables businesses that are subject to it to be exempt from the criminal liability instituted by the legislative decree

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250. *Ibid.*
251. *Ibid.*
252. *Ibid.*
253. Decree No. 231/2001 of 8 June 2001.
254.https://www.camera.it/parlam/leggi/deleghe/01231dl.htm

of 8 June 2001, in the event that one of the offences covered is committed in its name or on its behalf [255].

A law of 6 November 2012 also imposed additional preventive measures on public undertakings and aggravated penalties for a breach of such measures [256].

■ **351.** In France, as we have seen, the Law of 9 December 2016 'on transparency, anti-corruption and economic modernisation', known as Sapin 2, requires businesses exceeding certain thresholds to implement a compliance programme consisting of several measures and procedures [257].

Article 17

II. – The persons referred to in I shall implement the following measures and procedures:
1° A code of conduct defining and illustrating the different types of behaviour prohibited as being likely to characterise acts of corruption or influence peddling. Such code of conduct shall be incorporated into the internal regulations of the undertaking and shall therefore be subject to the procedure for the consultation of staff representatives provided for by Article L. 1321-4 of the Employment Code;
2° An internal alerts system designed to enable reports to be received from employees regarding the existence of conduct or situations contrary to the company's code of conduct;
3° Risk mapping in the form of regularly updated documentation to identify, analyse, and prioritise the risks of exposure of the company to external calls for bribery, in accordance with, inter alia, the sectors of activity and geographical areas in which the company operates;
4° Procedures for assessing the situation of clients, top suppliers and intermediaries with regard to risk mapping;
5° Accounting controls procedures, internal or external, to ensure that books, records and accounts are not used to mask acts of corruption or influence peddling. These checks may be carried out either by the company's own accounting and financial control services or by instructing an external auditor on completion of the certification audits of the accounts provided for by Article L. 823-9 of the Commercial Code;
6° A training system for managers and staff most at risk of corruption and influence peddling;
7° A disciplinary regime enabling employees of the company to be sanctioned in the event of a breach of the company's code of conduct;
8° A system for internal monitoring and assessment of the measures implemented.
Irrespective of the liability of the persons mentioned in I of this Article,

255. *Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Italy: Phase 2*, OECD, 2004.
256. Law No. 190/2012 of 6 November 2012.
257. See *supra* No. 5 .

the company shall also be liable as a legal entity in the event of failure to comply with the obligations set out in II.

An administrative authority established by the same law, the French Anti-Corruption Agency (AFA), monitors compliance with these measures and procedures by the undertakings that are subject to them, and has the power to sanction any breach of them.

■ **352.** Finally, in the United Kingdom, the United Kingdom Bribery Act (UKBA), adopted in 2010, creates the offence of failure of commercial organisations to prevent bribery and establishes the existence of 'adequate procedures' as evidence of this offence [258].

Guidance published by the Ministry of Justice adds that these procedures, although left to the discretion of commercial organisations, must comply with several principles.

In particular, it is recommended that commercial organisations subject to the UKBA:

- put in place procedures commensurate with the dimensions of the organisation and the nature of its activities: this includes, inter alia, the establishment of an ethical alerts procedure capable of ensuring the confidentiality of disclosures;
- affirm a clear and unambiguous commitment by the organisation's managers to the fight against corruption: the guidance states that this requirement is necessary, regardless of the dimensions or nature of the organisation's activities;
- conduct an assessment of internal and external corruption risks to the organisation: this assessment must be regular and documented; it must allow for the categorisation of corruption risks according to the country, industry and nature of the transaction;
- provide for the implementation of audits and audits of business partners, so as to prevent the organisation from engaging in business with partners who have committed or are likely to commit acts of corruption;
- communicate internally and externally about the organisation's anti-corruption policy, and train their staff to prevent corruption risks;
- finally, monitor and assess periodically the procedures in place so that their effectiveness may be improved.

Thus designed, the UK legislation is generally considered to be one of the most demanding in the world [259].

■ **353.** At the end of this review, the Committee considered that the content of the directive requiring Member States to subject larger

258. UKBA 2010, Section 7 (2).
259. EU Anti-Corruption Report, *op. cit.*, p. 21.

enterprises to obligations of preventing and detecting corruption should be borrowed from the existing laws of Member States, as well as the OECD acquis in this area.

It also wished to consider the question of the authority responsible for monitoring compliance with these obligations and punishing any breach of them.

c) The authority responsible for monitoring compliance with the obligations of preventing and detecting corruption

■ **354.** In this respect, the Committee considered that the directive adopted should require Member States to designate an authority to monitor compliance with the obligations of preventing and detecting corruption that apply to larger enterprises, leaving them free to choose such authority, which could be administrative as well as judicial.

■ **355.** Each Member State shall provide for one or more independent public authorities to be responsible for monitoring the application of this Regulation, in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union ('supervisory authority').

2. Each supervisory authority shall contribute to the consistent application of this Regulation throughout the Union. For that purpose, the supervisory authorities shall cooperate with each other and the Commission in accordance with Chapter VII.

3. Where more than one supervisory authority is established in a Member State, that Member State shall designate the supervisory authority which is to represent those authorities in the Board and shall set out the mechanism to ensure compliance by the other authorities with the rules relating to the consistency mechanism referred to in Article 63.

4. Each Member State shall notify to the Commission the provisions of its law which it adopts pursuant to this Chapter, by 25 May 2018 and, without delay, any subsequent amendment affecting them.'

An initial assessment of the application of GDPR showed, on the one hand, that Member States had complied with their obligation to appoint an independent authority responsible for the processing of personal data, and, on the other hand, that the designated authorities had made effective use of the powers conferred on them by the regulation [260].

■ **356.** As regards the fight against corruption, some Member States such as France already have specific authorities responsible for

260. European Commission, 'The General Regulation on Data Protection gives results, but work must continue', press release, 24 July 2019: https://ec.europa.eu/commission/presscorner/detail/fr/IP_19_4449.

supervising the obligations of preventing and detecting corruption that apply to larger enterprises.

Other Member States have made the different choice of giving the courts specific jurisdiction in the fight against corruption [261].

■ **357.** Against this background, it appeared to the Committee that, whilst it would be appropriate for the directive adopted to require Member States to designate an authority to monitor compliance with the obligations of preventing and detecting corruption that apply to larger enterprises, they should remain free to choose the authority.

The creation of a single European authority or agency responsible for such monitoring did, furthermore, appear to the Committee to be unrealistic at this stage.

4. The Committee's recommendations

■ **358.** In order to achieve the objectives of a comprehensive and coherent EU policy on combating corruption, the Committee recommends that the following be considered, in parallel:

- the adoption of an EU law anti-corruption package consisting of several new texts;
- the inclusion of anti-corruption clauses in existing and future EU secondary legislation.

■ **359.** The EU law anti-corruption package should consist of three texts, adopted in the form of directives.

■ **360.** A first directive should require Member States to comply with OECD anti-corruption principles and recommendations, based in particular on the 1997 Convention on Combating Bribery of Foreign Public officials in International Business Transactions.

The directive would be a first step in harmonising the national laws of Member States and would immediately enhance the European Union's credibility in the world, while demonstrating its confidence in the functioning of multilateral institutions.

It could be adopted on the basis of Article 83.1 TFEU, without foreseeable blocking, since most Member States have already ratified the 1997 OECD Convention, with the exception of Cyprus, Croatia, Malta and Romania.

■ **361.** This first directive should be accompanied by a second measure consisting of repealing Framework Decision 2003/568/JHA of 22 July

261. European Union Anti-Corruption Report, op. cit., p. 15.

2003 on corruption in the private sector, then incorporating the content of the Framework Decision into a directive, also adopted on the basis of Article 83.1 TFEU, at the same time as updating it.

In particular, the new directive adopted should require Member States to criminalise acts of active or passive corruption in the private sector committed outside their territory but having a link with it, as permitted, for example, by Article 435-6-2 of the French Criminal Code since the entry into force of the Sapin 2 Law.

This amendment would enable the courts of all Member States to be brought onto an equal footing with the courts of third States that are most active in the fight against international corruption, particularly the United States and the United Kingdom.

In doing so, it would help to rebalance the European Union's relationship with the United States of America and better protect European businesses.

■ **362.** Finally, a third directive should require Member States to impose obligations on larger enterprises to prevent and detect corruption, whilst leaving them free to choose the authority responsible for supervising compliance and sanctioning any breach of those obligations.

The content of this directive should be taken from the OECD acquis in this area – in particular the OECD Council Recommendation of 26 November 2019 –, as well as a comprehensive review of the laws of Member States already imposing obligations on their businesses to prevent and detect corruption.

This directive would help to establish a European level playing field in the fight against corruption, conducive to the functioning of the internal market.

For this reason it could be adopted on the basis of Article 114.1 TFEU.

B. INSERTING ANTI-CORRUPTION CLAUSES IN EU SECONDARY LEGISLATION

■ **363.** In parallel with the adoption of an anti-corruption package, anti-corruption clauses should be included in EU secondary legislation, in particular in sectoral directives and trade agreements entered into by the EU.

1. Inserting anti-corruption clauses in sectoral directives

■ **364.** The Committee found that such clauses already exist as regards access to public procurement, in the directives on public procurement since they were revised in 2014.

■ **365.** For example, Directive 2014/24/EU of 26 February 2014 on the award of public contracts states, in a recital:

'Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests, terrorist offences, money laundering or terrorist financing [262].'

Thereafter, in its Article 57 entitled 'Exclusion Grounds', the Directive states:

'Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying […], or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:

[…]

(b) Corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2(1) of Council Framework Decision 2003/568/JHA as well as corruption as defined in the national law of the contracting authority or the economic operator.'

Comparable provisions exist in Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services [263] sectors, and in Directive 2014/23/EU on the award of concession contracts [264].

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262. Recital 100.
263. In Article 53.
264. In Article 35.

■ **366.** The effectiveness of these provisions is recognised, provided the contracting authorities effectively use their right of *a priori* exclusion of unreliable economic operators in terms of conflicts of interest, corruption or fraud.

In its 'Meca' judgment of 19 June 2019, the Court of Justice of the European Union confirmed the contracting authorities' right of *a priori* exclusion, acknowledging that they could exclude a tenderer in the event of serious misconduct, including where an appeal against such misconduct was pending [265].

CJEU, 19 June 2019, Meca, excerpt

42. In the light of the foregoing, the question raised may be answered by saying that Article 57(4)(c) and (g) of Directive 2014/24 must be interpreted as running counter to a national regulation whereby the introduction of a legal remedy against the decision to terminate a public contract, taken by a contracting authority because significant deficiencies occurred during its performance, prevents the contracting authority issuing a new call for tenders from making any assessment at the tenderer selection stage of the reliability of the operator whose contract has been terminated.

Similarly, a breach of competition law has recently been regarded by the CJEU as 'serious misconduct', constituting a legitimate ground for exclusion from public procurement [266].

By analogy, it seems obvious that an act of corruption would constitute serious misconduct within the meaning of the CJEU's case law, giving contracting authorities the right to exclude *a priori* an economic operator from the possibility of tendering for a public contract.

■ **367.** The Committee therefore took the view that anti-corruption clauses, comparable to those already existing in the directives on public procurement, should be included in sectoral EU secondary legislation to make certain regulated activities subject to authorisation, such as banking, investment services and insurance.

Such clauses, by making economic operators' access to the internal market conditional on requirements of probity, would help to restore a balanced relationship between the European Union and the United States, as well as other regional powers, in the fight against corruption.

They could be introduced into the relevant sectoral EU secondary legislation on the basis of Article 114.1 TFEU, under the ordinary legislative procedure.

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265. CJEU, 19 June 2019, Meca, Case C-41/18.
266. CJEU reg., 4 June 2019, CNS.

2. Inserting anti-corruption clauses in trade agreements entered into by the EU

■ **368.** The Committee also found that association agreements entered into between the EU and third States usually contain a clause, sometimes referred to as the 'fundamental rights and rule of law clause', which allows third States failing to comply with certain commitments relating to fundamental rights to be deprived of their benefits under them.

This clause, originally introduced in the agreements entered into with Estonia, Latvia and Lithuania in 1992, has since been extended to all association agreements entered into by the European Union [267].

■ **369.** Moreover, the so-called 'new generation' trade agreements between the European Union and third States sometimes contain provisions on corruption or, more broadly, governance.

For example, the EU's partnership and cooperation agreement made with Indonesia in 2009 contains a clause under which:

'The Parties agree to cooperate and contribute to the fight against organised, economic and financial crime and corruption through full compliance with their existing mutual international obligations in this area including on effective cooperation in the recovery of assets or funds derived from acts of corruption. This provision constitutes an essential element of this Agreement.'

Similarly, the EU's economic partnership agreement with Japan in 2019, which recently came into force, contains a clause under which:

'1. The Parties acknowledge the importance of an effective corporate governance framework to achieve economic growth through well-functioning markets and sound financial systems based on transparency, efficiency, trust and integrity.

2. Each Party shall take appropriate measures to develop an effective corporate governance framework within its territory, recognising that those measures will attract and encourage investment by enhancing investor confidence and improving competitiveness, thus enabling best advantage to be taken of the opportunities granted by its respective market access commitments.'

The latter clause, while it does not expressly mention the fight against corruption, nevertheless refers to the principles of transparency and integrity.

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267. See for example LOCHAK (D.), 'Human rights in association and cooperation agreements entered into by the European Union', *Union européenne et droit international*, Pedone, 2012, p. 539.

It may be considered that the 'effective corporate governance framework' which it requires from States Parties should enable corruption to be effectively prevented and detected.

■ **370.** On the basis of these findings, the Committee agreed that a conditionality clause on combating corruption should be systematically required by the European Union in the next generation economic partnership agreements entered into with third States.

Like the widespread 'fundamental rights and rule of law' clause used in association agreements entered into by the European Union, this other clause would allow third States failing to comply with certain fundamental anti-corruption commitments to be deprived of their trade benefits under them.

It would thus contribute to the international credibility of the European Union, its anti-corruption standards and practices.

3. The Committee's recommendations

■ **371.** In parallel with the adoption of an EU law anti-corruption package, anti-corruption clauses should be included in EU secondary legislation, in particular in sectoral directives and trade agreements entered into by the EU.

■ **372.** Such clauses already exist, as regards access to public procurement, in the directives on public procurement since their revision in 2014.

Similar clauses should also be introduced in sectoral EU secondary legislation to make the exercise of certain regulated activities such as banking, investment services and insurance subject to authorisation.

Such clauses, by making economic operators' access to the internal market conditional on requirements of probity, would help to restore a balanced relationship between the European Union and the United States of America, as well as other regional powers, in the fight against corruption.

They could be introduced into the relevant sectoral EU secondary legislation on the basis of Article 114.1 TFEU.

■ **373.** Association agreements between the EU and third States usually include a clause, sometimes known as the 'fundamental rights and rule of law clause', which allows third States failing to comply with certain commitments on fundamental rights to be deprived of their benefits under them.

A conditionality clause on combating corruption should be systematically required by the European Union in the next generation economic partnership agreements entered into with third States.

Like the widespread 'fundamental rights and rule of law' clause in EU association agreements, this clause would remove trade benefits from third countries that do not meet certain fundamental anti-corruption commitments.

It would thus contribute to the international credibility of the European Union, its anti-corruption standards and practices.

CHAPTER III

IMPROVING COOPERATION BETWEEN MEMBER STATES IN THE FIGHT AGAINST CORRUPTION

■ **374.** The adoption of an EU law anti-corruption package should be accompanied at the procedural level by a strengthening of cooperation between Member States in the fight against transnational corruption.

■ **375.** On this level, the Committee wished to reflect on the possibility of extending the jurisdiction of the newly created European Public Prosecutor's Office to all acts of transnational corruption, irrespective of whether or not they affect the EU's financial interests.

As a result of this reflection, however, it found that such an extension, although desirable in the long run, still faced several major obstacles in the immediate future.

Therefore the Committee chose to recommend, as a first step, a strengthening of cooperation between the Member States in the fight against transnational corruption mainly within Eurojust, which is the natural context for resolving conflicts of jurisdiction in law enforcement matters.

A. IN THE LONG TERM, EXTENDING THE JURISDICTION OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

1. The limits to the jurisdiction of the European Public Prosecutor's Office

■ **376.** The jurisdiction of the European Prosecutor's Office, created by Regulation (EU) 2017/1939 of 12 October 2017, is currently limited in

several respects: in time; in space – within and outside the EU –; and as regards the offences covered.

a) Limitation of the jurisdiction of the European Public Prosecutor's Office in time

■ **377.** The Committee agreed, at the end of its work, that the EU should without further delay adopt a comprehensive and coherent policy on combating corruption [268].

■ **378.** However, the establishment of the European Public Prosecutor's Office, and thereafter its effective exercise of its jurisdiction, will necessarily take place over time.

■ **379.** It is true that the Regulation of 12 October 2017 entered into force on the 20th day following its publication in the *Official Journal* of the European Union, i.e. on 20 November 2017.

But its effects are time-delayed pursuant to its Article 120.2, which provides that:

'The EPPO shall exercise its competence with regard to any offence within its competence committed after the date on which this Regulation has entered into force.

The EPPO shall assume the investigative and prosecutorial tasks conferred on it by this Regulation on a date to be determined by a decision of the Commission on a proposal of the European Chief Prosecutor once the EPPO is set up. The decision of the Commission shall be published in the *Official Journal of the European Union*.

The date to be set by the Commission shall be not earlier than 3 years after the date of entry into force of this Regulation.'

■ **380.** It follows from these provisions that the European Public Prosecutor's Office will only be set up on 20 November 2020 at the earliest.

■ **381.** Moreover, it will only have jurisdiction in respect of offences that fall within its powers committed after 20 November 2017, excluding any offences committed before that date.

This then raises the question of the jurisdiction of the European Public Prosecutor's Office with regard to continuing offences begun before 20 November 2017, the effects of which persist after that date.

■ **382.** Finally, in the context of the implementation of the Regulation of 20 November 2017, the following texts are to be adopted at national level:

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268. See *supra* No. 330.

- an institutional law on the statutory aspects of the European Public Prosecutor's Office;
- a special law on the procedural arrangements for the functioning of the European Public Prosecutor's Office;
- the inclusion in the annual Finance Laws of budgetary expenditure relating to the functioning of the European Public Prosecutor's Office [269].

b) Limitation of the jurisdiction of the European Public Prosecutor's Office within the EU

■ **383.** The limitation of the jurisdiction of the European Public Prosecutor's Office in space, within the European Union, is linked to the fact that the Regulation of 12 October 2017 was adopted under the procedure for enhanced cooperation.

■ **384.** The Regulation was originally adopted at the request of sixteen Member States: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain.

It was then adopted by four Member States in 2017 (Austria, Estonia, Italy and Latvia) and by two additional Member States in 2018 (Malta and the Netherlands).

At present, the Regulation of 12 October 2017 'implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office' applies in twenty-two Member States, out of a total of twenty-eight.

Five Member States also have the possibility of accession (opting in) to the Regulation: Denmark, Ireland, Hungary, Poland and Sweden.

■ **385.** The Regulation lays down two specific provisions for cooperation with Member States which do not participate in enhanced cooperation.

On the one hand, Article 99, entitled 'Common provisions', envisages the existence of 'cooperative relations' and the conclusion of 'working arrangements of a technical and/or operational nature'.

Article 99
Common provisions

1. In so far as necessary for the performance of its tasks, the EPPO may establish and maintain cooperative relations with institutions, bodies, offices or agencies of the Union in accordance with their respective objectives, and with the authorities of Member States of

269. See, on this point, the Bigot-Joissains Report to the Senate No. 509 (2018-2019) of 16 May 2019.

the European Union which do not participate in enhanced cooperation on the establishment of the EPPO, the authorities of third countries and international organisations.

2. In so far as relevant to the performance of its tasks, the EPPO may, in accordance with Article 111, directly exchange all information, with the entities referred to in paragraph 1 of this Article, unless otherwise provided for in this Regulation.

3. For the purposes set out in paragraphs 1 and 2, the EPPO may conclude working arrangements with the entities referred to in paragraph 1. Those working arrangements shall be of a technical and/or operational nature, and shall in particular aim to facilitate cooperation and the exchange of information between the parties thereto. The working arrangements may neither form the basis for allowing the exchange of personal data nor have legally binding effects on the Union or its Member States.

On the other hand, Article 105, entitled 'Relations with Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO', specifies the content of the working arrangements referred to in Article 99 and provides for other possibilities for cooperation, which the Committee unanimously considered complex.

Article 105

Relations with the Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO

1. The working arrangements referred to in Article 99(3) with the authorities of Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO may in particular, concern the exchange of strategic information and the secondment of liaison officers to the EPPO.

2. The EPPO may designate, in agreement with the competent authorities concerned, contact points in the Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO in order to facilitate cooperation in line with the EPPO's needs.

3. In the absence of a legal instrument relating to cooperation in criminal matters and surrender between the EPPO and the competent authorities of the Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO,

the Member States shall notify the EPPO as a competent authority for the purpose of implementation of the applicable Union acts on judicial cooperation in criminal matters in respect of cases falling within the competence of the EPPO, in their relations with Member States of the European Union which do not participate in enhanced cooperation on the establishment of the EPPO.

■ **386.** Despite these possibilities for cooperation, the fact that the Regulation is currently applicable only in certain Member States, to the exclusion of others, limits the value of extending the jurisdiction of the European Public Prosecutor's Office to cover all acts of transnational corruption.

Even if such extension took place, the jurisdiction of the European Public Prosecutor's Office would not, in any event, cover Member States concerned with such acts which do not participate in enhanced cooperation on the European Public Prosecutor's Office.

c) Limitation of the jurisdiction of the European Public Prosecutor's Office outside the EU

■ **387.** Article 23 of the Regulation of 12 October 2017, entitled 'Territorial and personal competence of the EPPO', provides that the European Public Prosecutor's Office will be competent, once it has been set up, in respect of offences falling within its powers, 'where such offences:

a) were committed in whole or in part within the territory of one or several Member States;
b) were committed by a national of a Member State, provided that a Member State has jurisdiction for such offences when committed outside its territory; or
c) were committed outside the territories referred to in point (a) by a person who was subject to the Staff Regulations or to the Conditions of Employment, at the time of the offence, provided that a Member State has jurisdiction for such offences when committed outside its territory.'

■ **388.** Thus designed, this Article endorses the absence of a common solution adopted by the Regulation establishing the jurisdiction of the European Public Prosecutor's Office in respect of offences falling within its powers which are not committed in the territory of a Member State.

In this case the Regulation refers the matter to the national rules of jurisdiction, whether territorial or personal, for example to Articles 113-1 et seq of the Criminal Code so far as French law is concerned.

■ **389.** This is why the Committee recommends that the Framework Decision 2003/568/JHA of 22 July 2003 on the fight against corruption in the private sector be revised so as to require Member States to

criminalise acts of active and passive corruption in the private sector, committed outside their territory but having a link with it [270].

d) Limitation of the jurisdiction of the European Public Prosecutor's Office regarding the offences covered

■ **390.** This is the main challenge from the point of view of extending the jurisdiction of the European Public Prosecutor's Office to cover all acts of transnational corruption.

■ **391.** Under Article 22 of Regulation (EU) No 2017/1939 of 12 October 2017, entitled 'Material competence of the EPPO', the European Public Prosecutor's Office is primarily competent 'in respect of the criminal offences affecting the financial interests of the Union that are provided for in Directive (EU) No 2017/1371' – and 'irrespective of whether the same criminal conduct could be classified as another type of offence under national law'.

■ **392.** (a) The material competence of the European Public Prosecutor's Office is thus limited, in the first place, by the definition of the offences referred to in Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests.

■ **393.** Article 3 of this Directive is aimed in particular at 'fraud affecting the Union's financial interests' and proceeds to make a detailed list of offences.

Article 3
Fraud affecting the Union's financial interests

1. Member States shall take the necessary measures to ensure that fraud affecting the Union's financial interests constitutes a criminal offence when committed intentionally.
2. For the purposes of this Directive, the following shall be regarded as fraud affecting the Union's financial interests:

(a) in respect of non-procurement-related expenditure, any act or omission relating to:
  (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf;
  (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or
  (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted;

270. See *supra* No. 292.

(b) in respect of procurement-related expenditure, at least when committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests, any act or omission relating to:
  (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf;
  (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or
  (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests;

(c) in respect of revenue other than revenue arising from VAT own resources referred to in point (d), any act or omission relating to:
  (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf;
  (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or
  (iii) misapplication of a legally obtained benefit, with the same effect;

(d) in respect of revenue arising from VAT own resources, any act or omission committed in cross-border fraudulent schemes in relation to:
  (i) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget;
  (ii) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or
  (iii) the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

■ **394.** In addition, Article 4 of the Directive requires Member States to criminalise money laundering, as well as passive and active corruption.

Article 4
Other criminal offences affecting the Union's financial interests

1. Member States shall take the necessary measures to ensure that money laundering as described in Article 1(3) of Directive (EU) 2015/849 involving property derived from the criminal offences covered by this Directive constitutes a criminal offence.

2. Member States shall take the necessary measures to ensure that passive and active corruption, when committed intentionally, constitute criminal offences.

(a) For the purposes of this Directive, 'passive corruption' means the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests.

(b) For the purposes of this Directive, 'active corruption' means the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests.

■ **395.** The same Article also covers misappropriation.

Article 4
Other criminal offences affecting the Union's financial interests

3. Member States shall take the necessary measures to ensure that misappropriation, when committed intentionally, constitutes a criminal offence.

For the purposes of this Directive, 'misappropriation' means the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union's financial interests.

■ **396.** For each of the offences it covers, the Directive of 5 July 2017 also adopts a wide definition of the concept of public official, which includes Union officials and national officials within the meaning of the national law of the State which employs them, but also 'any other person assigned and exercising a public service function'.

Article 4
Other criminal offences affecting the Union's financial interests

4. For the purposes of this Directive, 'public official' means:

(a) a Union official or a national official, including any national official of another Member State and any national official of a third country:

(i) 'Union official' means a person who is:
- an official or other servant engaged under contract by the Union within the meaning of the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68 (1) (the 'Staff Regulations'), or
- seconded to the Union by a Member State or by any public or private body, who carries out functions equivalent to those performed by Union officials or other servants.

Without prejudice to the provisions on privileges and immunities contained in Protocols No 3 and No 7, Members of the Union institutions, bodies, offices and agencies, set up in accordance with the Treaties and the staff of such bodies shall be assimilated to Union officials, inasmuch as the Staff Regulations do not apply to them;

(ii) 'national official' shall be understood by reference to the definition of 'official' or 'public official' in the national law of the Member State or third country in which the person in question carries out his or her functions.

Nevertheless, in the case of proceedings involving a national official of a Member State, or a national official of a third country, initiated by another Member State, the latter shall not be bound to apply the definition of 'national official' except insofar as that definition is compatible with its national law.

The term 'national official' shall include any person holding an executive, administrative or judicial office at national, regional or local level. Any person holding a legislative office at national, regional or local level shall be assimilated to a national official;

(b) any other person assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries.

■ **397.** In this respect, and contrary to what is sometimes claimed, there is in fact therefore a European acquis on breaches of probity, in particular corruption, over which the European Public Prosecutor's Office will have jurisdiction provided such breaches affect the European Union's financial interests.

In particular, the European Public Prosecutor's Office will have jurisdiction from the time of its institution to investigate, enquire, prosecute and bring to trial in the competent national courts the perpetrators and accomplices of passive and active corruption, as defined in the Directive of 15 July 2017, even if the conduct in question would not constitute offences under the internal laws of the Member States.

■ **398.** This step forward does not, however, eliminate a major difficulty which impedes the immediate extension of the jurisdiction of the European Public Prosecutor's Office to all acts of transnational corruption.

■ **399.** (b) The substantive jurisdiction of the European Public Prosecutor's Office is, in fact, still limited in two respects.

■ **400.** On the one hand, the European Public Prosecutor's Office only has jurisdiction where the offences falling within its powers cause damage exceeding EUR 10 000 and, in the case of VAT fraud, EUR 10 000 000.

Following the logic of subsidiarity, the Member States' national prosecutors are considered to be better placed and more effective where the offences in question result in damage below these thresholds.

■ **401.** On the other hand, and above all, the European Public Prosecutor's Office has jurisdiction only where such offences 'affect the Union's financial interests' within the meaning of the Directive of 5 July 2017.

In particular, it follows that acts of transnational corruption that do not affect the European Union's financial interests are outside the jurisdiction of the European Public Prosecutor's Office.

2. Ways to overcome the limits to the jurisdiction of the European Public Prosecutor's Office

■ **402.** There are several possibilities for overcoming the limits placed on the jurisdiction of the European Public Prosecutor's Office.

■ **403.** One possibility would be to argue for a broad interpretation of the concept of an 'offence inseparably linked' to another offence falling within the remit of the European Public Prosecutor's Office.

Under Article 22.3 of the Regulation of 12 October 2017, 'The EPPO shall also be competent for any other criminal offence that is inextricably linked to criminal conduct that falls within the scope of paragraph 1 of this Article'.

The concept of an inseparably linked offence is clarified by two recitals of the Regulation in the following way:

'(55) The EPPO should have the right to exercise competence, where offences are inextricably linked and the offence affecting the Union's financial interests is preponderant, in terms of the seriousness of the offence concerned, as reflected in the maximum sanctions that could be imposed.

(56) However, the EPPO should also have the right to exercise competence in the case of inextricably linked offences where

the offence affecting the financial interests of the Union is not preponderant in terms of sanctions levels, but where the inextricably linked other offence is deemed to be ancillary in nature because it is merely instrumental to the offence affecting the financial interests of the Union, in particular where such other offence has been committed for the main purpose of creating the conditions to commit the offence affecting the financial interests of the Union, such as an offence strictly aimed at ensuring the material or legal means to commit the offence affecting the financial interests of the Union, or to ensure the profit or product thereof.'

The concept, however, appears complex and, in any case, closely linked to the existence of a main offence affecting the European Union's financial interests.

■ **404.** Thus, another possibility for extending the jurisdiction of the European Public Prosecutor's Office beyond offences affecting the European Union's financial interests would be to assert a broad interpretation of the concept of 'protecting the Union's financial interests' itself.

Evidence of such an interpretation already exists in the case law of the Court of Justice of the European Union (CJEU), in particular since its 'Taricco' judgment of 8 September 2015, which was decided by the following reasons:

'38 The Court noted, in that respect, that there is a direct link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the EU budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second.'

[...]

'42In the present case, it can be seen from the order for reference that the national legislation lays down criminal penalties for the offences at issue in the main proceedings, namely, inter alia, conspiracy to commit offences in relation to VAT and VAT evasion amounting to several million euros. Such offences constitute cases of serious fraud affecting the European Union's financial interests. '

[...]

'58 The national court must give full effect to Article 325(1) and (2) TFEU, if need be by disapplying the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under Article 325(1) and (2) TFEU [271].'

271. CJEU, 8 Sept. 2015, Taricco, Case C-105/14. Adde: CJEU, 5 December 2017, MAS and MB, Case C-42/17, Europe 2018, comm. 84 by D. Simon.

The relevance and importance of this case law, now constant in the field of fraud [272], are illustrated by the fact that the European Commission mentions it in its twenty-ninth report on the fight against fraud published in 2018, as an indicator of the strengthening of the fight against fraud [273].

However, while these case law considerations apply to VAT fraud, whose link with the protection of the European Union's financial interests is obvious, they are not sufficient to establish a potential jurisdiction of the European Public Prosecutor for acts of transnational corruption without any apparent link to the protection of the Union's financial interests.

■ **405.** The most radical solution from this last point of view would, of course, be to recommend an extension of the jurisdiction of the European Public Prosecutor's Office to acts of transnational corruption, breaking the link currently established by the Regulation of 12 October 2017 between the substantive jurisdiction of the Prosecutor's Office and the protection of the European Union's financial interests.

■ **406.** The Committee, however, agreed that the practical, political and legal difficulties of such an extension cannot be ignored.

■ **407.** On a practical level, the European Public Prosecutor's Office, whose establishment was secured in the context of a reinforced cooperation procedure, has not yet been set up and logic dictates that it will only gradually be able to establish its credibility, as its activity develops.

In this respect alone, an immediate extension of its substantive jurisdiction to cover acts of transnational corruption that do not affect the European Union's financial interests would be premature.

■ **408.** On a political level, there would also be the question of criminal law which, despite the establishment of the European area of freedom, security and justice (AFSJ) since the Treaty of Amsterdam in 1997, remains an element of the hard core of national sovereignty accorded to the Member States.

In this respect, an extension of the substantive jurisdiction of the European Public Prosecutor's Office to all acts of transnational corruption would be likely to trigger national blocking reactions in the current geopolitical context.

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272. See also: CJEU, 20 March 2018, Menci, Case C-524-15; CJEU, 20 March 2018, Garisson Real Estate SA, Case C. 537/16; CJEU, 20 March 2018, Di Puma, joined Cases C-596/16 and C-597/16. On the last three cases, see: Europe 2018, comm. 169 by D. Simon. Adde: CJEU, 2 May 2018, Scialdone, Case C-574/15.

273. Report from the European Commission to the European Parliament and the Council, 29th Annual Report on the Protection of the European Union's financial interests and the fight against fraud (2017), COM(2018) 553 final, 3 Sept. 2018.

■ **409.** Finally, on a legal level, such an extension could not be achieved by revising the Regulation of 12 October 2017 in the context of a new enhanced cooperation procedure, in view of the obstacle posed by Article 86 of the Treaty on the Functioning of the European Union (TFEU).

The first paragraph of this Article limits, in principle, the jurisdiction of the European Public Prosecutor's Office to 'offences affecting the Union's financial interests'.

It is true that the fourth paragraph of the same Article then states:

'The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.'

But such a decision, analysed as a simplified revision of the TFEU, could only be adopted by the European Council with the unanimity of its members, after obtaining the consent of the European Parliament and after consulting the European Commission.

It therefore appears legally impossible, for the Member States participating in the enhanced cooperation concerning the establishment of the European Public Prosecutor's Office, to extend the jurisdiction of the latter to offences which do not affect the European Union's financial interests, without the European Council acting with the unanimity of its members.

The most one could possibly imagine is that the power provided for in the fourth paragraph of Article 86 of the TFEU might be used in accordance with the procedure laid down in that paragraph, and that the extension of the European Public Prosecutor's Office's jurisdiction to acts of transnational corruption not affecting the Union's financial interests might then be made by the Member States participating in the enhanced cooperation concerning the establishment of the European Public Prosecutor's Office, by way of a revision of Regulation (EU) 2017/1939 of 12 October 2017.

■ **410.** For all these reasons the Committee concluded, in the end, that whilst extending the jurisdiction of the European Public Prosecutor's Office to cover acts of transnational corruption that do not infringe the Union's financial interests should be considered in the long term, it nevertheless faced several major obstacles.

Accordingly, the Committee preferred to recommend, as a first step, a strengthening of cooperation between Member States in the fight

against transnational corruption mainly within Eurojust, which is the natural context for resolving conflicts of jurisdiction in law enforcement matters.

3. The Committee's recommendations

■ **411.** The Committee recommends that the possibility of extending the substantive jurisdiction of the European Public Prosecutor's Office to cover all acts of transnational corruption be considered in the long term, irrespective of whether or not they affect the European Union's financial interests.

■ **412.** In the immediate future, however, the Committee is conscious of the major obstacles to such an extension:

- on a practical level, the European Public Prosecutor's Office, the establishment of which has been secured in the context of enhanced cooperation, has not yet been set up and will only gradually be able to gain credibility, as its activity develops;
- on a political level, such an extension would concern criminal legal matters which, despite the establishment of the European area of freedom, security and justice since the Treaty of Amsterdam in 1997, remain an important element of national sovereignty accorded to the Member States and could, as a result, give rise to blocking reactions;
- finally, on a legal level, extending the jurisdiction of the European Public Prosecutor's Office to cover all acts of transnational corruption could not be achieved by means of a revision of Regulation (EU) 2017/1939 of 12 October 2017, in the context of a new procedure of enhanced cooperation, but should, pursuant to Article 86.4 TFEU, be adopted unanimously by the members of the European Council, after obtaining the consent of the European Parliament and after consulting the European Commission.

B. IN THE IMMEDIATE FUTURE, STRENGTHENING COOPERATION BETWEEN MEMBER STATES

1. Possibilities for cooperation in law enforcement matters between the Member States

■ **413.** The Committee made a point of examining, first of all, the possibilities for cooperation in criminal matters between Member States within the European area of freedom, security and justice (AFSJ), since its introduction by the Treaty of Amsterdam in 1997.

■ **414.** Acts of corruption can, as of now, lead to:
- a European Investigation Order [274];
- the issue of a European arrest warrant [275];
- acts of cooperation within the context of Eurojust [276];
- acts of cooperation within the context of Europol [277].

In addition, freezing orders or confiscation of the instruments and proceeds of acts of corruption [278], as well as judicial or administrative decisions imposing financial penalties on the perpetrators of such acts [279], may benefit from mutual recognition between Member States.

Finally, acts of corruption are among the offences giving rise to measures to combat money laundering and terrorist financing [280], and allowing the use of data from passenger files [281].

■ **415.** Eurojust, in particular, is mandated under Article 85 of the TFEU 'to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol'.

In carrying out this mission, Eurojust pursues three main objectives, which are now set out in detail in Regulation (EU) 2018/1727 of 14 November 2018:

- to promote and improve coordination between the competent judicial authorities of the Member States, in particular with regard to serious forms of organised crime;
- to promote and improve cooperation between the same authorities, in particular facilitating the implementation of international judicial assistance and the enforcement of extradition requests;
- to support the same authorities, in order to enhance the effectiveness of their investigations and prosecutions.

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274. Directive 2014/14/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, Annex D.
275. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. Corruption is one of the offences for which prior checking of double incrimination is not required.
276. Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA. Corruption is one of the offences covered by Annex I to this Regulation.
277. Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA: see Annex I.
278. Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, Article 3.
279. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.
280. Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, Article 2.
281. Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, Annex II.

These objectives relate in particular to the fight against corruption, which the Council of the European Union has designated as one of Eurojust's priorities.

Presentation of Eurojust

Founded in 2002, Eurojust's mission is to promote and strengthen coordination and cooperation between national authorities in the fight against serious cross-border crime in the European Union. Each of the twenty-eight Member States has seconded a representative to Eurojust's premises in the Hague. These representatives are prosecutors, experienced judges or police officers of equivalent qualification. Together they fulfil Eurojust's mandate to coordinate national authorities at each stage of criminal investigation or prosecution, and also resolve practical difficulties and problems generated by divergences between the legal systems of the different Member States. National members shall be assisted by national deputies, assistants and experts seconded by the Member States. Where a cooperation agreement has been entered into between Eurojust and a third State, liaison law officers from that State may work on Eurojust premises. Eurojust is currently hosting liaison law officers seconded by Norway and the United States. A recent European decision also provides for the secondment of liaison law officers by Eurojust to third States. In addition, Eurojust houses the secretariats of the European Judicial Network (EJN), the Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, and the Network of Joint Investigation Teams (JITs). Eurojust relies on some two hundred and sixty employees who ensure that requests for assistance from national authorities and other European bodies are answered as soon as possible.

Each year Eurojust processes approximately two thousand files and holds approximately two hundred coordination meetings. These meetings bring together the judicial authorities and the authorities responsible for investigating and prosecuting Member States and third States, where appropriate. The purpose of these measures is to resolve the problems encountered in the files dealt with and to develop plans for the implementation of operational actions, such as simultaneous arrests and searches.

The coordination meetings deal specifically with types of crime, identified by the EU Council as priorities: terrorism, drug trafficking, human trafficking, fraud, corruption, cybercrime, money laundering and other activities linked to organised crime in the economic sphere.

■ **416.** Furthermore, the European Union has a mechanism for resolving conflicts of jurisdiction between Member States in law enforcement matters with Council Framework Decision 2009/948/JHA of 30 November 2009 'on prevention and settlement of conflicts of exercise

of jurisdiction in criminal proceedings'.

Under to its Article 1, the Decision has the following two objectives:

'(a) prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the final disposal of the proceedings in two or more Member States thereby constituting an infringement of the principle of 'ne bis in idem'; and
(b) reach consensus on any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings.'

To this end, the Framework Decision of 30 November 2009 imposes two obligations on the judicial authorities of the Member States in particular:

- an 'obligation to contact': 'When a competent authority of a Member State has reasonable grounds to believe that parallel proceedings are being conducted in another Member State, it shall contact the competent authority of that other Member State to confirm the existence of such parallel proceedings, with a view to initiating direct consultations as provided for in Article 10' (article 5);
- an 'obligation to enter into direct consultations': 'When it is established that parallel proceedings exist, the competent authorities of the Member States concerned shall enter into direct consultations in order to reach consensus on any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings, which may, where appropriate, lead to the concentration of the criminal proceedings in one Member State.'

Together, these obligations must help to avoid the disadvantages of parallel procedures, on the basis of the same facts, and to promote as far as possible the concentration of parallel procedures in a single Member State.

However, the Framework Decision of 30 November 2009 does not go so far as to impose on Member States a single criterion for the resolution of conflicts of jurisdiction in law enforcement matters.

2. Strengthening the fight against corruption within Eurojust

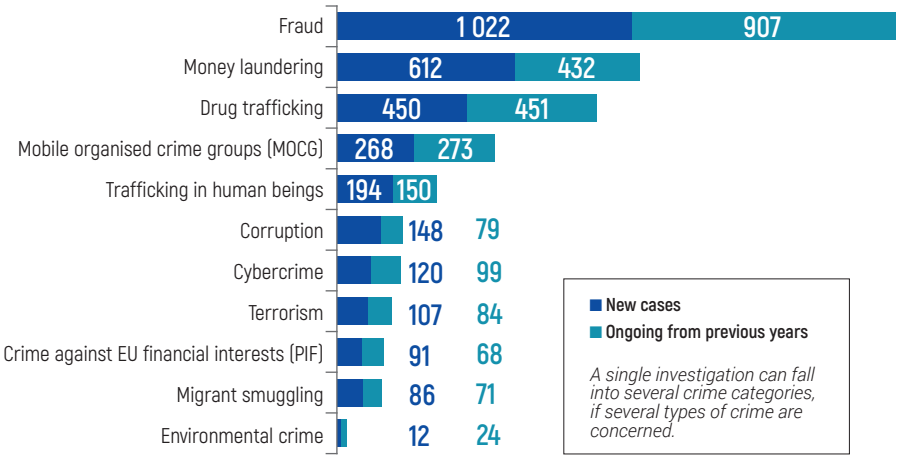
■ **417.** Despite the existence of these comparatively numerous legal instruments, the Committee found that the existing possibilities for cooperation in law enforcement matters between Member States within the European area of freedom, security and justice were underexploited and largely remained 'virtualities' in the fight against transnational corruption.

In particular, they observed that Eurojust's activity remained focused on certain forms of organised crime – mainly fraud, money laundering,

drug trafficking and human trafficking – rather than corruption, although the latter has been designated by the EU Council as one of Eurojust's priorities.

In the course of 2018, for example, the investigations coordinated by Eurojust were divided, according to the type of offence concerned, in the following proportions [282] :

Case by crime type in 2018



■ **418.** On the basis of this observation, the Committee agreed to recommend strengthening cooperation between Member States in the fight against transnational corruption within Eurojust, which represents the natural context for resolving conflicts of jurisdiction in law enforcement matters, given the current state of European law and in anticipation of the increased importance of the future European Public Prosecutor's Office.

The fight against corruption should again be affirmed as one of Eurojust's priority objectives.

For this to become a reality, Member States should allocate the corresponding human and financial resources to the agency.

■ **419.** Finally, the Committee found that, by the effect of the entry into force of the Treaty of Lisbon, Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts

282. *EEurojust Annual Report 2018*, p. 18.

of exercise of jurisdiction in criminal proceedings was now under the control of the European Commission and the Court of Justice of the European Union (CJEU), as a remedy for the failure to fulfil obligations.

This is the consequence of Article 10 of Protocol No 36 on the transitional provisions of the Treaty of Lisbon of 9 May 2008, under which:

'1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.

2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.

3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon.'

It is to be inferred from these provisions that the Framework Decision of 30 November 2009 falls within the scope of the European Commission and the CJEU since 1 December 2014, the date on which the transitional measure of Article 10 above ceased to have effect.

The fulfilment by Member States of the obligations 'to make contact' and 'to enter into direct consultations', which arise where parallel criminal proceedings are begun on the same grounds, is therefore now under the control of the European Commission and the Court of Justice of the European Union (CJEU) by the application of Article 258 of the TFEU, under which:

'If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.'

In practice, Member States could be held liable by the CJEU for not informing or consulting one another, in order to avoid a conflict of jurisdiction in the presence of acts of corruption or any other criminally qualifying acts.

3. The Committee's recommendations

■ **420.** In view of the obstacles to the immediate extension of the jurisdiction of the European Public Prosecutor's Office, the Committee initially recommends strengthening cooperation between Member States in the fight against transnational corruption.

■ **421.** In this respect, the Committee wishes to recall the possibilities for cooperation in law enforcement matters between Member States within the European area of freedom of security and justice, since its establishment by the Treaty of Amsterdam in 1997, in particular the existence of Eurojust and Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

■ **422.** Despite the existence of these instruments, the Committee found that the possibilities for cooperation between Member States within the European area of freedom, security and justice were still underexploited and largely remained 'virtualities' as regards the fight against transnational corruption.

■ **423.** In particular, it observed that Eurojust's activity remained focused on certain forms of organised crime – mainly fraud, money laundering, drug trafficking and human trafficking – more than corruption, even though the latter has been designated by the Council of the European Union as one of Eurojust's priorities.

On the basis of these observations, the Committee recommends strengthening cooperation between Member States in the fight against transnational corruption within Eurojust, which is the natural body for resolving conflicts of jurisdiction in law enforcement matters, given the current state of European law and pending the increased importance of the European Public Prosecutor's Office.

It considers that the fight against corruption should be affirmed as one of Eurojust's priority objectives, and that the human and financial means necessary for the pursuit of these objectives should be allocated by Member States to Eurojust.

■ **424.** Finally, the Committee recalls that Council Framework Decision 2009/948/JHA of 30 November 2009 has come within the area of competence of the European Commission and the Court of Justice of the European Union (CJEU) as a result of the entry into force of the Treaty of Lisbon.

Consequently, the fulfilment by the Member States of the obligations 'to make contact' and 'to enter into direct consultations', which are incumbent on them in the event of parallel criminal proceedings begun on the same grounds, is now under the control of the European Commission and the Court of Justice of the European Union (CJEU), as a remedy for the failure to fulfil obligations.

In practice, Member States could therefore be held liable by the CJEU for not informing or consulting one another, in order to avoid a conflict of jurisdiction in the presence of acts of corruption or any other criminally qualifying acts.

APPENDICES

APPENDIX I

LIST OF PEOPLE HEARD BY THE COMMITTEE

- **Frédéric Baab**, former French representative at Eurojust
- **Karine Berger**, former Member of Parliament
- **Nicola Bonucci**, former Director of Legal Affairs at the Organisation for Economic Co-operation and Development (OECD)
- **William Bourdon**, Lawyer, Founding President of the Sherpa Association
- **Dominique Bourrinet**, Legal Director of the Société Générale Group
- **Odile de Brosses**, Director of the Legal Department of the French Association of Private Enterprises (AFEP)
- **Jocelyne Cabanal**, National Secretary of the French Democratic Confederation of Labour (CFDT)
- **Emmanuelle Claudel**, Professor at the University of Paris II Panthéon-Assas, Director of the Masters' degree in European Business and Competition Law
- **Sébastien Denaja**, Senior Lecturer in Public Law at the University of Toulouse 1 - Capitole, former Member of Parliament and Rapporteur of the Sapin 2 Law
- **Olivier Dorgans**, Lawyer, Hughes Hubbard & Reed
- **Charles Duchaine**, Director of the French Anti-Corruption Agency
- **Gianluca Esposito**, Executive Secretary of the Group of States against Corruption (GRECO)
- **Marc-André Feffer**, President of the association Transparency International France
- **Mathilde Frapard**, Legal officer in charge of European and international issues at the CFDT
- **Elisabeth Gambert**, Director of Corporate Social responsibility (CSR) and International Affairs, AFEP
- **Lisa Gamgani**, General Secretary of the High Authority for Transparency in Public Life
- **Raphaël Gauvain**, Member of Parliament for Saône-et-Loire
- **Grégoire Guinand**, Senior mission officer at the MEDEF
- **Eliane Houlette**, former Financial Public Prosecutor
- **Helena Kazamaki**, Senior Vice President, General Counsel Europe & France, ABB

- **Corinne Lagache**, Chief Compliance Officer of the Safran Group
- **Juliette Lelieur,** Professor of Criminal Law at the University of Strasbourg
- **Ms. Frédérique Lellouche**, Vice-President of the CSR Platform
- **Jean-Claude Marin**, Honorary Prosecutor General at the Cour de Cassation
- **Astrid Mignon-Colombet**, Lawyer, Partner with August Debouzy
- **Jean-Christophe Picard**, President of the Anticor Association
- **Jeanne-Marie Prost**, Senior Adviser (Conseillère-Maitre) at the Auditor-General's Department, former National Delegate to the fight against fraud in public finances
- **Didier Rebut**, Professor at the University of Paris II Panthéon-Assas, Member of the Club des Juristes
- **Michel Sapin**, former Minister of the Economy and Finance, former Employment Minister
- **Pierre Servan-Schreiber**, Lawyer at the Bars of Paris and New York, Ombudsman
- **Joëlle Simon**, Deputy Legal Director General, Ethics and Corporate Governance at the French entrepreneurs Movement (MEDEF)

APPENDIX II

MEMBERS OF THE COMPLIANCE COMMITTEE OF THE CLUB DES JURISTES

CHAIRMAN

- **Bernard Cazeneuve,** former Prime Minister, Lawyer, Partner with August Debouzy

RAPPORTEUR

- **Antoine Gaudemet**, Rapporteur, Professor at the University of Paris II Panthéon-Assas

MEMBERS

- **Louis d'Avout**, Professor at the University of Paris II Panthéon-Assas
- **Pascal Cardonnel**, Auxiliary Judge (*Référendaire*) at the Court of Justice of the European Union
- **Denis Colin**, Compliance Officer for Iran, Total
- **Blandine Cordier Palasse**, President of BCP Executive Search
- **Anaïs Coviaux**, Lawyer at the Paris Bar
- **Catherine Delhaye**, Chief Ethics and Compliance Officer of the Valeo Group and President of the Compliance Circle
- **Charles Duchaine**, Director of the French Anti-Corruption Agency
- **Fabrice Fages**, Lawyer, Partner with Latham & Watkins LLP
- **Cecilia Fellouse-Guenkel**, General Secretary of the Compliance Circle
- **Dominique de la Garanderie**, La Garanderie Avocats, former Bâtonnier of the Barreau de Paris
- **Aurélien Hamelle**, Legal Director of the Total Group
- **Jean-Pierre Picca**, Lawyer, Partner with White & Case LLP
- **Jacqueline Riffault-Silk**, Senior Judge (*Conseiller-Doyen*), Commercial Chamber of the *Cour de Cassation*
- **Pascal Saint-Amans**, Director, Centre for Tax Policy and Administration, OECD
- **Pierre Sellal**, Ambassador of France
- **Denys Simon**, Professor Emeritus at the University of Paris I Panthéon-Sorbonne, Law School of the Sorbonne
- **Benjamin Van Gaver**, Partner with August Debouzy

SECRETARY OF THE COMMITTEE

- **Antoine Ory**, Barrister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