



PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN FRANCE

October 2012

This Phase 3 Report on France by the OECD Working Group on Bribery evaluates and makes recommendations on France's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 12 October 2012.

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EXECUTIVE SUMMARY

The Phase 3 report on France by the OECD Working Group on Bribery in International Transactions (the “Working Group”) evaluates and makes recommendations on the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “Convention”) and related documents. Phase 3 focuses on key Group-wide (horizontal) issues, in particular the implementation and enforcement of the Convention, and also examines country-specific (vertical issues) arising from changes in France’s legislative and institutional framework, as well as progress made since France’s Phase 2 evaluation in 2004.

The Working Group is seriously concerned that despite the very significant role of French companies in the international economy, only 33 foreign bribery proceedings have been initiated and five convictions – of which only one, not yet final, concerns a legal person – have been handed down since France became a party to the Convention in 2000. The Working Group is particularly concerned by the lacklustre response of the French authorities in relation to companies sanctioned by other Parties to the Convention.

The Working Group regrets in particular that legislative changes in 2007 and 2011 aimed at further combating corruption did not lead to the elimination of the dual criminality requirement and recommends that France remove it. The Working Group also regrets the special regime of common law that prohibits victims of foreign bribery (except corruption occurring within the EU) from being civil parties to proceedings and therefore initiating criminal cases. The Working Group recommends that France remove this limitation. It also recommends that France ensure that companies and their subsidiaries cannot avoid criminal liability. The applied and available penalties, along with the lack of any recourse to measures to confiscate the proceeds of corruption do not appear to be effective, proportionate or dissuasive: France should increase the maximum fines and make full use of confiscation and additional penalties that are available under the law, in particular debarment from public procurement.

The Working Group welcomes the reforms underway to guarantee greater independence of prosecutors and recommends that France continue in this direction in order to guarantee that the role of prosecutors in opening and in conducting criminal proceedings is performed in a manner that is independent from political power and that investigations and prosecutions in foreign bribery cases are not influenced by the consideration of factors prohibited under Article 5 of the Convention. While welcoming the progress made in 2009, the Group recommends that France ensure that the implementation of legal provisions for classification of documents covered by defence secrecy does not create an obstacle to investigations and prosecutions in foreign bribery cases. It also emphasises the limited resources available to investigations, which it sees as another possible explanation for the limited number of proceedings instigated to date, and asks France to rectify this situation. Moreover, while acknowledging the efforts of the French administration to raise the awareness of officials of the obligation to report suspected corruption to the Public Prosecutor’s Office, it regrets the low number of reports and therefore recommends the strengthening of mechanisms aimed at encouraging such reporting. More generally, the Working Group asks France to draw the attention of law enforcement authorities to the importance of reacting to the full extent expected in foreign bribery cases.

The Working Group welcomes the measures taken in 2010 and 2012 to facilitate the legal process for seizure and confiscation and the work of two specialised agencies in this area. The Working Group encourages France to make full use of these tools. France has also made substantial legislative progress by introducing protection for whistle-blowers into French law. The Working Group also congratulates France on its efforts to raise awareness of companies. With regard to the non-deductibility for tax purposes of bribes to foreign public officials, France is an example of good practice: the French tax

authorities have required reimbursements in 18 cases on these grounds. The Working Group also welcomes the role played by the anti-money laundering unit, TRACFIN, in detecting and reporting cases.

The report and its recommendations reflect the conclusions of the Italian and Swiss lead examiners and have been adopted by the Working Group on Bribery. France will make an oral report on the recommendations 1(b), 3 and 4(a) relating to the offence, sanctions and new directions in criminal justice policy, within a period of one year and will submit a written report on all the recommendations within a period of two years. The Phase 3 report is based on the texts of laws, regulations and other documents supplied by France as well as on information obtained by the evaluation team during its 3-day on-site visit to Paris from 2 to 4 April 2012, during which the team met representatives of the French public and private sectors and of civil society.

A. INTRODUCTION

1. The on-site visit

1. From 2 to 4 April 2012, a team from the OECD Working Group on Bribery in International Transactions (the "Working Group") visited Paris as part of the Phase 3 evaluation of France's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention"), the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the "2009 Recommendation") and the 2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the "2009 Tax Recommendation"). The Phase 2 evaluation of France took place in January 2004. The corresponding written follow-up report was presented to the Working Group in April 2006. The purpose of the on-site visit was to assess implementation by France of the Convention and the 2009 Recommendations, focusing essentially on developments since 2007.

2. The evaluation team was composed of lead examiners from Italy and Switzerland and members of the OECD Secretariat.¹ In order to prepare for the on-site visit, the French authorities provided the Working Group with answers to the Phase 3 questionnaires. They also produced the texts of laws and regulations, case law and various relevant publications, official or otherwise. The examiners also consulted the reports of the Group of States against Corruption (GRECO) and the Financial Action Task Force (FATF) on France, as well as the Executive Summary of the report on France by the Implementation Review Group of the United Nations Convention against Corruption. During the visit, the team met representatives of the French public and private sectors and of civil society.² The French government representatives decided to attend meetings with non-government representatives. In accordance with the Phase 3 procedure, government representatives did not intervene and participants did not object to their presence.³

3. The French authorities made commendable efforts to ensure that the on-site visit went as planned, preparing a detailed schedule of interviews. They made all possible efforts to ensure that most of the requested participants could be consulted, although it would have been desirable for competent jurisdictions to have been more broadly represented (in addition to the Paris Appeal Court, which has presided over the majority of transnational bribery cases to date), in order to gain a better understanding of how local prosecutors and decentralised police units work. The team particularly appreciated the French authorities' willingness to provide information about enforcement actions in cases of allegations of transnational bribery. They responded to all requests for information before and after the on-site visit. This cooperative spirit favoured constructive discussions of good practices as well as of aspects that pose potential problems for implementation of the Convention and the 2009 Recommendations. The evaluation team is also grateful to all the participants in the on-site visit for their cooperation and frankness during the discussions.

¹ Italy was represented by Mr. Lorenzo Salazar, Director of Office I – Legislative and International Affairs of the Ministry of Justice, and Mr. Andrea Palandri, Lieutenant-Colonel of the Guardia Finanzia, 2nd Department of the General Command; Switzerland was represented by Dr. Olivier Thormann, Federal Chief Prosecutor, Federal Public Ministry, and Mr. Benjamin Auderset, Team Leader, Federal Tax Administration, Federal Department of Finance. The OECD Secretariat was represented by Mr. Frédéric Wehrlé, Principal Administrator and Evaluation Coordinator, Mrs Sandrine Hannedouche-Leric, Principal Legal Analyst, Mrs Catherine Marty, Legal Analyst and Ms Leah Ambler, Legal Analyst, all from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

² See the list of participants in Annex 2.

³ See paragraph 26 of the Phase 3 Procedure, which states that the evaluated country may attend, but should not intervene, during the course of non-government panels.

2. Outline of the report

4. This report is structured as follows. Part B examines France's efforts to implement the Convention and the 2009 Recommendations. On the one hand, the report deals with key horizontal issues identified by the Working Group, with a particular focus on enforcement efforts and results. On the other hand, the report addresses vertical (country-specific) issues arising from the progress made by France in remedying the shortcomings identified in Phase 2, and issues raised by changes in France's domestic legislation or institutional framework. Part C sets out the recommendations made to France by the Working Group and issues for follow-up.

3. Progress since the on-site visit

5. A change in government took place after the on-site visit and the Working Group noted with satisfaction a significant positive evolution in French criminal justice policy, in the form of two circulars by the Minister of Justice reinforcing the independence of prosecutors, including by undertaking to no longer give individual instructions to the Public Prosecutor's Office.

4. Economic situation

(a) *Economic structure*

6. France is one of the largest economies in the Working Group, with a current estimated gross domestic product (GDP) of EUR 1,996.6 billion in 2011.⁴ Market services occupy a predominant position in the French economy, accounting for 56.9% of gross value-added at current prices in 2011,⁵ followed by the manufacturing and extractive industries (12.6% of gross value-added in the same year).⁶ Financial services and insurance also play an important role among market services in the French economy, representing 4.7% of gross value-added in 2011.⁷ France is the world's fourth-largest arms exporter after the United States, the United Kingdom and Russia, taking orders worth EUR 5.12 billion in 2010. The defence sector employs about 165,000 workers directly and probably as many again indirectly and generates annual sales of EUR 15 billion, a third of them on export markets.⁸ The State had a majority interest in 1,217 firms in 2010, generating sales of EUR 0.4 billion. According to INSEE (the French National Institute of Statistics and Economic Studies), France had 2 686 256 Small and Medium-sized Enterprises (SMEs) in 2010, accounting for 37.3% of total sales and 17.8% of export sales.⁹

(b) *International trade*

7. In 2011, France accounted for EUR 64.8 billion in outward flows of foreign direct investment (FDI), and ranked fourth out of the 39 States Parties to the Convention, representing 7% of the group's total outward FDI flows, behind the United States, Japan and the United Kingdom, which together account for 47%.¹⁰ France is the world's sixth largest exporter, with 117 170 exporting companies in 2011.¹¹ French companies exported EUR 538.2 billion in goods and services in 2011.¹² Manufactured goods, agricultural

⁴ OECD Economic Outlook 90 statistics and updates.

⁵ Source: INSEE

⁶ INSEE, national accounts – base 2005 (www.insee.fr/fr/themes/tableau.asp?reg_id=0&ref_id=nattef08152) (in French).

⁷ INSEE, Tables on the French Economy – 2012 edition (www.insee.fr/fr/ffc/tef/tef2012/tef2012.pdf) (in French).

⁸ Report to Parliament: French arms exports in 2010

(www.defense.gouv.fr/content/download/143252/1424667/file/Rapport%20au%20Parlement%20-%20Les%20exportations%20d'armement%20de%20la%20France%20en%202010.pdf) (in French).

⁹ Source: INSEE : www.insee.fr/fr/themes/detail.asp?reg_id=0&ref_id=esane-taille-2009.

¹⁰ The OECD and IMF FDI database. The figures for 2011 correspond to the first three quarters of the year.

¹¹ Source: http://lekiosque.finances.gouv.fr/APPCHIFFRE/Etudes/thematiques/A2011_operateurs_prov.pdf (in French).

¹² Source: INSEE www.insee.fr/fr/themes/comptes-nationaux/tableau.asp?sous_theme=1&xml=t_1101 (in French).

produce and oil and mineral products made up the bulk of exports. The principal destinations for French exports are EU countries, the United States, Switzerland, China and Russia.¹³

8. France has a large number of corporate groups which operate abroad, either directly or through subsidiaries, in industries where there is a heightened risk of bribery, such as defence, transport, infrastructure and telecommunications. For example, the General Directorate for Armament (*Direction Générale de l'Armement*, DGA) estimates that in 2011 French companies received EUR 6.5 billion in export orders for arms, making France the world's fourth largest arms exporter.¹⁴ France's largest clients in 2010 were Saudi Arabia, Brazil, India and Malaysia.¹⁵ The French arms industry comprises a dozen or so large French or Franco-European groups (Thales, EADS, MBDA, Safran, Dassault Aviation, Nexter, etc.) and several thousand SMEs. Dependent on public procurement, the arms industry is increasingly export-oriented: export markets account for 32% of the sales of companies based in France and considerable scope for growth remains. In addition, 300 to 350 SMEs account for 3 to 5% of French arms exports and a total of 1 217 companies in the defence sector, with an annual turnover of EUR 0.4 billion, are State-controlled. This issue is analysed in greater detail in the sections of the report that deal with defence secrecy and public advantages.

(c) *Situation of overseas territories*

9. Whereas French laws and regulations apply automatically to overseas departments and regions (Guadeloupe, French Guyana, Martinique, Mayotte and Reunion Island), overseas collectivities (Saint-Pierre-et-Miquelon, Wallis and Futuna, French Polynesia, Saint-Martin and Saint-Barthélemy) have specific powers in certain areas, notably taxation. With the exception of some highly specific sector-based characteristics, these territories are nevertheless generally governed by the same rules as metropolitan France. In this respect, criminal laws relating to the fight against corruption apply to the entire territory of the Republic. Overseas territories occupy a relatively small proportion of the French total, not only in demographic terms (3.9% of the French population) but above all in economic and financial terms (1.8% of French GDP, 0.01% of the balance-sheet total of the French banking sector).¹⁶ The overseas economies rely on a small number of industries (agriculture, tourism, construction) which only marginally expose them to international trade (most overseas collectivities' trade is with metropolitan France, which accounts, for example, for 50-60% of the foreign trade of overseas departments). However, specific industries play a prominent role in the economy of some territories, such as nickel in New Caledonia and the space industry in French Guyana.¹⁷ No collectivity has developed international financial services activities.

5. Cases of bribery of foreign public officials¹⁸

(a) *Convictions for active bribery of foreign public officials*

10. There were no convictions in France for bribery of foreign public officials before 2008. The three final convictions at the time of the Phase 3 visit involved a total of four individuals. No company had been convicted in France for bribery of foreign public officials at the time of the Phase 3 on-site visit. However, the first conviction of a legal person took place one month and a half before the adoption of this report.

¹³ Source: World Trade Organisation.

¹⁴ Direction Générale de l'Armement (DGA), 2011 Annual Report: www.defense.gouv.fr/content/download/154560/1566914/file/bilan_activite_dga_2011.pdf (in French). According to the French authorities, arms exports represented approximately 1.5% of total French exports in 2011.

¹⁵ Report to Parliament: French Arms Exports in 2010.

¹⁶ Cf. FATF Report, February 2011, page 29.

¹⁷ Nickel accounted for 94% of exports from New Caledonia in 2010, while exports of space transport accounted for nearly 90% of exports from French Guyana (Institut d'Émission d'Outre-mer 2010 annual report on New Caledonia and 2010 economic accounts of French Guyana).

¹⁸ See the table in Annex 5 for a list of final convictions in transnational bribery cases.

This conviction at first instance was subject to appeal at the time of adoption of this report. The three final convictions all related to minor cases, involving bribes of between EUR 9,000 and EUR 228,000 and the subject of a direct summons to the Public Prosecutor's Office. These cases did not undergo in-depth investigations that might have revealed more complex evidence involving legal persons linked to the convicted individuals. Furthermore, these convictions only gave rise to minimal penalties: suspended prison sentences and a maximum fine of EUR 10 000. The conviction of a legal person at first instance followed a judicial investigation opened in 2006.

11. The first final conviction, handed down on 29 September 2009, sanctioned the Director of an SME for the payment of bribes to Libyan public officials in order to facilitate the conclusion of clean-up contracts (the "Libyan oil waste case"). The amount of the bribe at issue was EUR 90 000. The second conviction was handed down in October 2010 against the manager of a limited liability company (SARL) for the payment of around EUR 97 000 in commissions to Congolese public officials in order to win an equipment supply contract worth EUR 326 000 (the "DRC equipment import case"). The third conviction sanctioned the co-managers of a simplified joint-stock corporation (SAS) for payments of EUR 194 440 to a Djibouti public official in order to win a hydraulic drilling contract (the "Djibouti hydraulic drilling case"). The conviction of a legal person at first instance, dated 5 September 2012, sanctioned a large French group active in the aerospace, defence and security sectors, for the payment of bribes amounting to EUR 380 000 to Nigerian public officials in relation to a USD 214 million (EUR 171 million) contract for the supply of 70 million identify cards (the "Nigerian identity card case"). For procedural reasons and specifically because it was under appeal, the judgment was not available at the time of drafting the report.¹⁹

(b) Number of proceedings initiated for the offence of active bribery of foreign public officials

12. According to figures provided by France, 33 proceedings had been initiated for, *inter alia*, active bribery of foreign public officials since 2000, when the relevant criminal provisions entered into force in France. Of the 33 investigations that had been opened into possible foreign bribery offences, 23 were ongoing at the time of the Phase 3 evaluation: 16 in the context of judicial investigations conducted by investigating magistrates, of which three were about to be judged (one had a hearing in June 2012, the other two were awaiting hearing); four in the framework of preliminary investigations directed by the Public Prosecutor's Office; two for which acquittal of the charge of bribery of foreign public officials was being appealed by the Public Prosecutor's Office; and one appeal by the legal person convicted at first instance by the Paris Regional Criminal Court on 5 September 2012. Most of the proceedings began on the basis of information communicated by the French anti-money laundering authority TRACFIN, official denunciations or information spontaneously transmitted by foreign authorities.

(c) Closure, dismissal and acquittal

13. Of the 33 proceedings initiated by France since the entry into force of the foreign bribery offence, three were closed. Two of the cases closed involved a company. France indicated that in each case the reason for closure was insufficient evidence of the offence. No proceeding has yet been closed because the offence was time-barred.

14. Dismissals were ordered in three cases. France did not provide the text of these orders on the basis of the provisions of article R. 156 of the Code of Criminal Procedure (CPP), which sets the rules for the transmission of dismissal orders to third parties to the proceedings.²⁰ However, France indicated that

¹⁹ The information related to this case and published in this report is based on facts published in the media or otherwise provided by France.

²⁰ Under article R. 156, a person who is not a party to the proceedings may request a copy of a dismissal order. The application must be made to the registry of the court where the dismissal order was issued. See on this point the ministerial answer on

one dismissal order, in 2009, had been issued because of insufficient evidence; another, in 2011, because the acts alleged against the persons under investigation had been committed before the entry into force of the foreign bribery offence; and the third, in 2008, the absence of a charge against a specific individual for having committed the offence of money-laundering and bribery of foreign public officials. The first two dismissals involved a major French group that is a leader in the energy and transport sectors and was suspected to have bribed foreign public officials. These cases are discussed below in the body of the report.

15. One individual was acquitted of the charge of bribery of foreign public officials in proceedings relating to the bribing of an African minister between 2000 and 2002 in return for the award of contracts (the accused was convicted of misappropriation, forgery and using forged documents). Two other individuals were acquitted for the same facts that gave rise to the first conviction of a legal person in France for bribery of foreign public officials. The conviction was at first instance and is under appeal.

Commentary:

The lead examiners deplore the very low number of convictions for bribery of foreign public officials handed down in France – four final convictions and one conviction under appeal since the offence entered into force more than 12 years ago. They also deplore the fact that only one of these convictions was of a legal person. They further consider that the number of proceedings initiated by France during the same period is low in relation to the size of the French economy and the exposure of French companies to the risk of transnational bribery. The lead examiners therefore recommend that France, in conformity with paragraph V of the 2009 Recommendation, review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials.

B. APPLICATION AND ENFORCEMENT BY FRANCE OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

1. The offence of bribery of foreign public officials

(a) Changes made to the offence since Phase 2

16. The changes made to the French Penal Code ("CP") in 2000²¹ in order to transpose the provisions of the Convention into French law have been supplemented since Phase 2 by laws passed in 2007²² and 2011,²³ the contributions of which are examined in detail below.

(i) Bribes paid to third parties

17. One of the aims of the 2007 Act was to transpose the offence of bribery of foreign public officials in the same terms as the equivalent offence in domestic law. The Act added the words "for himself or another" to the text of Article 435-3 CP (the main text relating to the offence, supplemented by Article 435-9 described below), thus removing any ambiguity as to whether the offence covers bribes paid to third parties. In practice, it seems less clear that this element of the offence is in fact covered, for the reasons examined below (in the subsection on trading in influence).

copies of dismissal orders (OJ French Senate, 26/08/2010, p. 2232): www.senat.fr/questions/base/2010/qSEQ100312359.html (in French).

²¹ Act 2000-595 of 30 June 2000 amending the Penal Code and Code of Criminal Procedure relating to the fight against corruption (the "Act of 30 June 2000").

²² Act 2007-1598 of 13 November 2007 relating to the fight against corruption (the "2007 Act").

²³ Act 2011-525 of 17 May 2011 to simplify and improve the quality of law (the "2011 Act").

(ii) *Removal of the international trade criterion and of the distinction between offences committed within and outside the European Union*

18. The 2007 Act also removed the words "in order to obtain or retain business or other improper advantage in the conduct of international business" from the definition of the offence which, without posing any major problem, makes the offence both broader but also less specific.²⁴ The distinction between offences committed within the European Union ("EU") or outside it has also been removed, although a distinction remains in relation to the procedure for initiating prosecutions, as examined in section 5.

(iii) *Removal of the condition of a prior corruption pact*

19. In Phase 2 the French authorities, while confirming the need to prove a pact between the giver and the recipient of the bribe,²⁵ emphasised that the words "at any time" had been added to the legal definition of the bribery offence in order to ensure that prosecution was not dependent on proof that the meeting of minds sealing the "corruption pact" took place before the actions of the public official. However, the Working Group reserved its interpretation of the scope of the phrase "at any time" and decided to follow up on its practical application. The 2011 Act clarifies the elimination of the condition that the solicitation, approval, offer, proposal or acceptance of a bribe must have preceded the act at issue.²⁶ The words "that [he] act or refrain from acting" have thus been replaced by the words "that [he] act or refrain from acting, or because [he] has acted or refrained from acting".²⁷

20. While this change to the law is to be welcomed, the fact remains, as some investigating magistrates pointed out, that the condition of a prior corruption pact (the corruption pact is examined in sub-section (c) (iii) below) continues in certain cases to hamper the prosecution of cases of bribery of foreign public officials that predate the changes to the law. Initially, the Paris Regional Criminal Court's (*tribunal correctionnel de Paris*) judgment in the Djibouti hydraulic drilling case seemed to uphold the French authorities' interpretation of the phrase "at any time", since it convicted the two senior managers of the company concerned of paying bribes to the administrator of the Djibouti Economic Development Fund in the form of "remuneration for services rendered", occurring, by definition, after obtaining the contract.²⁸ In contrast, in one of the three cases dismissed (in which a subsidiary of a leading group in the energy and transport sectors was suspected of paying bribes to a southern African minister),²⁹ the pact had been concluded before the enactment of the foreign bribery offence in French law but payments had subsequently continued until 2003. These actions could have been deemed to constitute a criminal offence only if the payments (made after the enactment of the offence) could be regarded as having been made "in remuneration of services rendered". Contrary to the position taken by the Paris Regional Criminal Court in the Djibouti hydraulic drilling case, the possibility of "remuneration for services rendered" was not considered. Another case along similar lines (involving the payment of bribes to an African minister between 2000 and 2002 in return for the award of national contracts) resulted in the acquittal of the

²⁴ The French authorities justified removing the reference, even though it transposes the terms of the Convention word for word, on the grounds of implementing a recommendation made in a GRECO evaluation report [Evaluation Report on France on Criminalisation (STE no. 173 ad 191, PDC 2) (Theme I), adopted on 19 February 2009]. It is true that the Paris prosecutors had interpreted this element restrictively in deciding not to prosecute a case of presumed bribery of a member of the International Olympic Committee, considering that the facts were not linked to international business.

²⁵ A criterion developed by case law in domestic bribery cases, discussed below with reference to issues identified in Phase 2 as justifying follow-up by the Working Group and for which no legislative changes had been made at the time of writing.

²⁶ France states that the law amends to that effect the wording of the texts relating not only to the passive or active bribery of a public official of a foreign State or international organisation or foreign or international judicial personnel but also to passive or active trading in influence directed towards an international public official or international judicial personnel.

²⁷ The complete text of the offence is set out in Annex 4 to this report.

²⁸ Paris Regional Court, 11th Division/2, Case no. 0703392018, judgment of 25 March 2011, no. 10.

²⁹ The case had also been reported to the French Public Prosecutor's Office by the Swiss Federal Attorney-General's Office in 2006 and led the World Bank to exclude two subsidiaries of the group from its procurement procedures.

individual charged with bribery of a foreign public official.³⁰ As a result of this flaw in the initial version of the law and its sometimes restrictive interpretation, payments of bribes remain unpunished in practice even though they took place after the Convention came into force and after the enactment of the foreign bribery offence in France.

(iv) *Other amendments*

21. In 2007, a new article 435-5 CP clarified that: "Agencies created pursuant to the Treaty on the European Union are deemed to be public international organisations for purposes of this section", thus eliminating the doubt raised in the Phase 2 report as to whether the notion of a "person entrusted with a public authority, charged with a public service mission or holding an elected office in a foreign State or within a public international organisation" covered a "community official, a national official of another Member State of the European Union or a Member of the Commission of the European Communities, the European Parliament, the Court of Justice or the Court of Auditors of the European Communities".

(b) *Difficulties linked to key elements of the bribery offence*

(i) *A narrow definition of foreign public official*

22. In Phase 2, the definition of foreign public official was identified as one of the key elements of the bribery offence to create uncertainty in its interpretation by the courts. Strengthening these uncertainties, during the Phase 3 visit some prosecutors expressed doubts, under the legality principle, as to the application of the law to persons who do not officially exercise a public function, such as political party officials in a one-party State, even where they effectively exercise a power of decision or coercion by delegation of public authority (Commentary 16 to the Convention). Following the rationale of this restrictive interpretation, in 2007 the case in which a subsidiary of a leading group in the energy and transport sectors was suspected of paying bribes to an African minister³¹ was dismissed on the basis of the principle of the non-retroactivity of criminal law, given that the former minister ceased to exercise his official functions at the time the bribes were paid, which occurred after the entry into force of the offence. While respecting the rule of *res judicata*, the Working Group wonders whether this obstacle could have been overcome by an interpretation of this principle that allowed payments made after the end of the official term of the minister to be taken into account for acts committed while he was still in office. The fact that he had formed his own opposition party and was planning to stand in the next presidential election³² had no effect on the decision to dismiss the case, since no consideration was given to the possibility, described in Commentary 10 to the Convention, that an advantage promised or given to any person in anticipation of his or her becoming a foreign public official might fall within the scope of the offence.

(ii) *The criterion of direct intervention by the foreign public official*

23. Not only is the definition of a foreign public official interpreted restrictively, but a criterion linked to the nature of the official's acts also seems to be required in practice. Both the prosecutors and the investigating magistrates that were interviewed said that once the investigation had enabled them to follow the financial flows from the briber to the foreign public official receiving the bribe, it was still necessary to prove that the official intervened "directly" in awarding the advantage or contract. The investigating magistrates commented that the requisite standard of proof was high and required the cooperation of the bribed official's country in order to prove "direct intervention", i.e. as a rule "his signature at the bottom of the decision to award a contract". This direct intervention criterion does not appear in either article 435-5

³⁰ Pontoise Regional Court, 6th Division 3 – collegial – financial, Case no. 0107407152, judgment of 13 February 2008.

³¹ *Ibid.*

³² An element noted in the prosecutor's motion for dismissal.

CP or Article 1 of the Convention. In practice, it seems to exclude from the scope of the offence cases where a public official is bribed to use his office to make another official award a contract (Commentary, para. 19), as well as mere offers or promises (these two issues being examined in detail below, in the sub-sections on the corruption pact and trading in influence respectively). The investigating magistrates interviewed were all disappointed that corrupt acts abroad were not criminalised in France in a broader and more flexible manner.

(iii) *The article 113-6 CP dual criminality requirement*

24. Article 113-6 CP adds another element not found in the Convention to the article 435-3 CP offence of bribery of foreign public officials by requiring the prosecution to prove that dual criminality exists. Article 113-6 CP provides that French criminal law "is applicable to offences committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed." France points out in its answers to the questionnaires that dual criminality does not require the offences to be identical and that it therefore matters little whether the offence is qualified differently in the foreign law. It is sufficient that the acts constitute a criminal offence in the foreign country.

25. Even with this broad interpretation, the requirement nevertheless contradicts Commentary 3 to the Convention, which explains Parties' obligations under Article 1. The commentary states, *inter alia*, that the offence should not "require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph." The Commentary also states that the definition should be "autonomous", "not requiring proof of the law of the particular official's country".

26. Concerning the legal principles, one of the law professors interviewed pointed out the incomplete nature of this regime for establishing jurisdiction over offences which, with the dual criminality requirement, constitute an exception to the rules of universal jurisdiction normally applicable to all nationals and thus created a "false case of universal jurisdiction". However, one investigating magistrate said that if there was a real will to prosecute an offence of bribery of a foreign public official, article 113-6 would not be an obstacle insofar as it would always be possible to find integral elements of the offence in France. That would also make it possible to link the offence to French territory and for France to exercise territorial jurisdiction. In practice, the courts had not examined this element in any of the three final convictions for bribery of foreign public officials concluded at the time of writing. However, this is not sufficient to confirm this analysis, since the three cases were the subject of a direct summons to the Public Prosecutor's Office and, according to the judgments; the Defence had not invoked dual criminality. Nor is it possible to know whether the argument had any effect on the decision to issue the three dismissal orders mentioned by France in its answers to the questionnaires, since the text of the orders was not provided to the examiners due to the confidentiality of criminal proceedings.³³ In addition, according to one of the investigating magistrates interviewed, defence lawyers could invoke the dual criminality argument in favour of companies suspected of paying commissions demanded by a foreign head of State, which consequently would not constitute an offence in that country (e.g. in Iraq in connection with the Oil-for-Food programme).

³³ Only one motion for dismissal from the Paris Public Prosecutor's Office was provided, in the case where a company from a leading group in the energy and transport sectors was suspected of paying bribes to a southern African minister, as mentioned above. The motion does not mention the dual criminality requirement set forth at Article 113-6 CP.

(c) *Issues identified as requiring specific follow-up by the Working Group*

27. In Phase 2, the Working Group undertook to follow up, as practice developed, whether: the legal principles of "without right", "at any time"³⁴ and foreign public officials; the case-law concept of "corruption pact"; and the treatment given to the role played by an intermediary in the payment of a bribe were sufficiently clear to allow effective prosecution of the offence of bribery of foreign public officials.³⁵ In its answers to the questionnaires, France considered that the abovementioned formulations did not pose any particular difficulty to their actual application by the courts. Nevertheless, the low number of transnational bribery prosecutions, and the even lower number that have led to convictions, are reasons for carefully re-examining whether the causes of the very low level of enforcement might not lie in the elements of the offence that had been identified as potentially problematic in Phases 1 and 2.

(i) *The notion of "without right"*

28. The notion of "without right" qualifying the nature of the offer, promise or gift of a bribe, introduced in the Penal Code, caught the Working Group's attention during Phase 2. The Public Prosecutor's Office had clarified that there was a legal presumption that an advantage was by definition without right, which would be consistent with Commentary 8. However, a judge had considered, to the contrary, that the burden of proof would rest with the Public Prosecutor's Office, which could present a major obstacle to prosecution of the offence, since in certain cases it would require international cooperation with the country of the official concerned. The issue was not examined in any of the three final convictions for bribery of a foreign public official. During the on-site visit, neither the Public Prosecutor's Office nor the investigating magistrates nor the judges considered this element problematic. Nevertheless, its application should continue to be followed up as case law develops.

(ii) *The role played by intermediaries in transmitting the offer of a bribe*

29. The Phase 2 report pointed out that the involvement of intermediaries would make it more complicated to prove that the foreign public official had accepted the offer of a bribe. A case decided by the Cour de Cassation in 1999 had generated some concern in this respect,³⁶ although France had stated at the time it was an error of law to decide that it was necessary to prove the existence of a corruption pact. The Phase 3 discussions therefore focused on the requirement of a corruption pact.

(iii) *The requirement of a "corruption pact"*

30. Most of the participants in Phase 2, with the exception of the Ministry of Justice, mentioned the difficulty of proving a corruption pact, described as proof of a meeting of minds between briber and recipient, as one of the main difficulties in the fight against bribery in France.³⁷ The Working Group consequently expressed concern as to the difficulty of discovering the public official's intention, which requires proof of an element not found in the text of the Convention and in contradiction to Commentary 3 to the Convention.

³⁴ As stated above, the 2011 Act clarified the removal of the condition that the solicitation, approval, offer, proposal or acceptance of a bribe must have preceded the act in question. The matter is therefore not re-examined here.

³⁵ Follow-up issue 2. The issue was not re-examined in the written follow-up.

³⁶ In this case, a person who had agreed to give money to his defence lawyer so that he could bribe a public official was found not guilty on the charge of active bribery because the lawyer had not managed to convince the public official to commit the act sought by the offer of a bribe; in the case, the Court of Appeal considered that the existence of a corruption pact had not been proved (Cass. Crim., 30 June 1999, Housse Avia). The charge was then amended to fraud, on the part of the lawyer.

³⁷ In Phase 2 (para. 10), the authorities specified that such a pact is not a "contract" and that it is sufficient if the briber knows the purpose of his proposal is to buy a decision or an omission, and that the bribed party is aware that he will receive an unlawful advantage in return for making or refraining to make the decision. The judge must therefore establish whether there was agreement or disagreement between the two parties.

31. As was the case in Phase 2, according to the investigating magistrates and prosecutors interviewed during the on-site visit, apart from simple cases like the three in which final judgments have been handed down to date,³⁸ the offence requires proof of a multitude of elements which is difficult to establish. Establishing proof of the corruption pact was unanimously identified as the main difficulty,³⁹ since such a pact is by definition concealed in large-scale and complex cases (as are the financial flows it generates). Some magistrates said that the intention of the bribed public official can be established in practice by confession. However, the French courts do not have jurisdiction to try foreign public officials in such cases and confessions are, in the vast majority of cases, impossible to obtain from a public official in another country. This therefore highlights the limits of transposing the concept of a corruption pact, developed by French case law in domestic bribery cases, to the bribery of a foreign public official.

(iv) Uncertainty as to the criminal nature of offers or promises

32. The Phase 2 report noted that the need to prove the existence of a corruption pact did not in principle prevent the offence of active bribery from being completed simply by the making of offers or promises, whether accepted or not. None of the magistrates interviewed ever spontaneously mentioned the possibility of prosecuting and punishing mere offers or promises in cases where the problematic elements of the offence, such as the corruption pact or the requirement of direct intervention by the foreign public official to grant the advantage, could not be proved. Even if there is no legal requirement to prove the public official's reaction to such offers or promises, certain investigating magistrates interviewed thought it unlikely in practice that proof of such mere offers or promises could be established. No case had been prosecuted on this basis at the time of writing.

(d) The distinction between bribery and trading in influence and the definition of misuse of corporate assets

(i) The distinction between bribery and trading in influence

33. As noted in Phase 2, trading in influence is not punishable in France where foreign public officials are concerned, except for officials of international organisations (article 435-4 CP), even though it is punishable in relation to domestic officials and included in the same provision of the Penal Code as active bribery (article 433-1 CP). In Phase 2, the examiners sought to obtain clarification regarding the distinction between bribery and trading in influence in order to evaluate the risk that certain acts of bribery of foreign public officials fulfil the criteria for trading in influence (and not active bribery) and hence escape sanction. Prosecutors said that in a case involving bribery of a foreign public official the Public Prosecutor's Office would certainly endeavour to prove that bribery had been committed, since trading in influence was not a criminal offence. The transposition into French law of the Council of Europe's Criminal Convention on Corruption, planned for 2003, offered the possibility of a solution to the problem

³⁸ In the Djibouti hydraulic drilling case, the Paris Regional Criminal Court found that an exchange of e-mails constituted proof of an exchange of consent. In the DRC equipment import case, while not making specific reference to the corruption pact, the Paris Regional Criminal Court judges also focused their reasoning on establishing proof of a meeting of minds. There was no difficulty proving the corruption pact in this minor bribery case, since the "commission" was sought in an order letter and accepted by an authorisation letter approved by the company's shareholders' meeting, an instance as clear-cut as it is exceptional (Paris Regional Court, 11th Division/1, Case no. 0710892041, judgment of 20/10/2010, no. 2). In the Libyan oil waste case, the Regional Criminal Court did not seek proof of intent on the part of the recipients of the bribes, but this was another exceptional case, as the trial judges interviewed concurred, since the briber confessed immediately (the case was also heard by direct summons at the request of the Public Prosecutor's Office) (Paris Regional Court, 11th Division/1, Case no. 0825992023, judgment of 29/09/2009.)

³⁹ This difficulty is also noted in the 2010 report on criminal justice policy by the Directorate of Criminal Affairs and Pardons of the Ministry of Justice.

by making trading in influence directed towards a foreign public official a criminal offence.⁴⁰ However, France made a reservation concerning such criminalisation, with the result that, eight years after Phase 2, the issue remains open.

34. Schematically, the offence of trading in influence may be committed in the context of a triangular relationship between the "briber", the trader in influence, who receives the bribe, and the public official who grants an advantage to the "briber". It should be possible in principle to prosecute a certain number of situations corresponding to this scheme under the law that transposed Article 1 of the Convention. At the very least, it should be possible for such situations to be covered by the criminalisation of "offers" or "promises" (Article 1.1 of the Convention and article 435-3 CP).⁴¹ As pointed out in the section on the corruption pact above, the actual prosecution of offers and promises raises a number of issues. It should be possible for prosecutions to be brought in other situations corresponding to trading in influence in domestic law, in connection with the advantage for a third party or the involvement of an intermediary (Article 1.1 of the Convention and the notion of advantage "for another" or an advantage proposed "directly or indirectly" in article 435-3 CP). None of the cases of bribery of a foreign public official tried in France to date has tested these possibilities and they therefore remain purely theoretical.

35. There remains a possibility that the offence would apply when a public official is bribed to use his position to make another public official award a contract (Article 1.4 of the Convention and Commentary 19). Prosecutors, asked about the possibility of applying the law to this type of situation, expressed great doubt on the basis of the legality principle. The joint criteria of a corruption pact and direct intervention (examined earlier), or at the very least a restrictive conception of the acts of the foreign public official liable to constitute a criminal offence, seem in practice to exclude this possibility from the scope of the offence. It was therefore not examined in the prosecutor's motion to dismiss proceedings in the case where a company from a leading group in the energy and transport sectors was suspected of paying bribes to a southern African minister, in which bribes continued to be paid to that minister after he had left office. As several of the magistrates interviewed pointed out, whereas trading in influence could have been proved if this was a domestic bribery case, the fact that trading in influence is not a criminal offence in cases of foreign bribery makes dismissal or even closure the most likely outcome.

36. Most of the magistrates and other legal professionals interviewed emphasised the narrowness of the definition of the offence of bribery of foreign public officials, ruling out a wide range of acts which, in domestic law, would be covered by trading in influence, despite the fact that many of them, as examined above, fall within the scope of Article 1 of the Convention. The legal vacuum left by non-extension of the offence of trading in influence in relation to a decision taken by a foreign public official has also been criticised by other international forums tasked with evaluating France's performance in the fight against bribery and in application of its international commitments, along with by non-governmental observers.⁴²

⁴⁰ The report envisaged a rapid resolution of the issue, since a draft law authorising ratification of the Council of Europe's Criminal Convention on Corruption had been presented to Parliament in June 2003 and was expected to be adopted by the end of that year.

⁴¹ Attempt and conspiracy, which should be criminalised under Article 1.2 of the Convention, are not separate criminal offences in France; insofar as criminalisation of the offer already criminalises the attempt (conspiracy is not a criminal offence in French law). See also the Phase 1 report.

⁴² This non-criminalisation gave rise to a recommendation in a GRECO evaluation report [Evaluation Report on France on Criminalisation (STE no. 173 ad 191, PDC 2) (Theme I), adopted on 19 February 2009]. It also gave rise to a recommendation in the evaluation of France's application of the United Nations Convention against Corruption [See the Executive Summary of the Implementation Review Group CAC/COSP/IRG/2011/CRP.13]. It has also been pointed out on a number of occasions by the NGO Transparency International.

(ii) *Qualification of misuse of corporate assets*

37. The Phase 2 report identified the tendency of French law enforcement authorities to qualify acts of bribery as misuse of corporate assets (and receiving misused corporate assets), relying on jurisprudence from the Cour de Cassation, in order to ensure the punishment of acts which would otherwise go unpunished (being time-barred, for example) or which would be more difficult and take longer to prove. The offence of misuse of corporate assets, contained in articles L.241-3 and L.242-6 of the French Commercial Code, sanctions acts by managers of companies who use corporate assets for personal purposes, and contrary to the company's interests.

38. France emphasises that investigations are often initiated on counts of both bribery of foreign public officials and misuse of corporate assets, since a conviction may be secured on both counts. There could be various reasons for subsequently bringing only the charge of misuse of corporate assets. First, the offence has been mentioned as a means used by some magistrates to circumvent the obstacle of proving a corruption pact. Second, the courts' very broad interpretation of the definition of corporate interest makes it easier to demonstrate misuse of corporate assets.⁴³ Third, the onus of proof is partially reversed: if the prosecution can prove that funds were misappropriated or removed from the company covertly, it is incumbent on the company director to prove that they were used on the company's behalf and in its interest. There are four drawbacks, however. First, an economic offence does not bear the same social or legal stigma or gravity as the offence of bribery of foreign public officials, which implies a serious violation of the duty of probity and of the authority of the State while, as France emphasises, misuse of corporate assets protects different social values. Second, only natural persons can commit the crime of misuse of corporate assets (see section below on the responsibility of legal persons). In addition, the penalties are not the same (five years' imprisonment and a fine of EUR 375,000 for misuse of corporate assets, ten years' imprisonment and a fine of EUR 150,000 for bribery under Article 435-3 CP). Third, although the number of such offences sanctioned by the courts is rising steadily and the judges interviewed said that many cases of misuse of corporate assets also involved elements of transnational bribery, France does not have any data from which an estimate may be made of how many alleged acts of bribery of a foreign public official have in fact been sanctioned for misuse of corporate assets.

(e) *Absence of a specific defence and small facilitation payments*

39. As pointed out in Phases 1 and 2, there is no specific defence in French law to the offence of bribery of a foreign public official. In addition, as small facilitation payments are not authorised and hence fall within the scope of bribery of foreign public officials, there is no specific defence in relation to such payments either. One case was mentioned in Phase 2 where a domestic bribery prosecution was brought merely for bribes paid to speed up the procedure for obtaining a residence permit (Cass. Crim., 12 January 2000). No case was brought to the attention of the examiners in Phase 3. The evaluation team was concerned that the absence of cases to date involving small facilitation payments might be explained by a use of the opportunity principle that would lead prosecutors to decide against opening a case in light of the limited damage caused by such payments. In response to this concern, France indicated that no case had been closed or dismissed on account of small facilitation payments. However, the absence of sanctions for small facilitation payments made abroad poses the question of the impact of the opportunity principle in this respect.

⁴³ The Cour de Cassation found, in a judgment of 20 June 1991 and since cited in several other judgments, including the *Carignon* judgment of 27 October 1997 that "the use of a company's assets is necessarily improper when such use is made for an unlawful purpose".

Commentary:

The lead examiners consider that the article 113-6 CP requirement of dual criminality continues, since Phase 2, to raise questions about the limitations that it could impose on the enforcement of the foreign bribery offence. Although none of the other issues identified above as problematic constitutes per se a prima facie breach of the Convention, they are disappointed that a systematically narrow interpretation of the offence tends to prevail from the preliminary investigation phase. The examiners consider that this narrow interpretation explains the extremely low number of final convictions of individuals for the offence of bribery of foreign public officials as well as the minor nature of these cases, nearly 12 years after the entry into force of the foreign bribery offence in France.

1) The examiners therefore urge France to clarify, by all appropriate means, that the criteria contained in the Convention and its Commentaries which define foreign public officials and acts they perform, must be interpreted in a sufficiently flexible and broad manner to enable the criminalisation of the full range of acts and situations referred to in Article 1 of the Convention, without needing to prove the law of the foreign public official's country or to systematically require international cooperation with that country; and in particular:

a) to eliminate as soon as possible, in relation to bribery of foreign public officials committed by French nationals outside French territory, the dual criminality requirement (that the acts are "punishable by the law of the country where the acts are committed"), set out in article 113-6 PC;

b) to clarify by all appropriate means that no element of proof other than those set out in Article 1 of the Convention is required to constitute an offence under articles 435-3 et seq. PC with regard to bribery of foreign public officials, and in particular that the definition of foreign public officials and the case-law principle of "corruption pact" do not, in practice, constitute such elements or obstacles to the criminalisation (i) of offers or promises of pecuniary or other advantages; (ii) of acts of bribery involving intermediaries; and (iii) of payments in favour of third parties;

c) to ensure by all appropriate means that the interpretation of the principle of non-retroactivity of criminal law does not pose an obstacle to the prosecution and sanctioning of bribery of foreign public officials occurring after the entry into force of the offence;

d) to examine the possibility either of criminalising bribery of a foreign public official sufficiently broadly, or of extending the offence of trading in influence, to ensure that the same acts of bribery are not treated differently according to whether the intended recipient is a French or a foreign public official; and

2) The examiners recommend that the Working Group continue to follow up:

a) application of the definition of "without right" as case law develops in order to ensure that it is not interpreted more restrictively than the definition of "improper advantage" in the Convention and therefore does not require proof that a law in force in the country of the recipient of the bribe prohibits that person from receiving a bribe; and

b) recourse to the offence of misuse of corporate assets in cases involving elements of transnational bribery, on the basis of data that France should collect and analyse, including in relation to charges brought against legal persons in cases where a natural person is convicted of misuse of corporate assets.

2. The liability of legal persons

40. The criminal liability of legal persons was introduced into French law in 1994. Corporate liability for the offence of transnational bribery was introduced by Section 3 of the Act of 30 June 2000, which created an article 435-6 CP, thereby extending the scope of the foreign bribery offences defined in articles 435-2, 435-3 and 435-4 CP to legal persons. Since then, Article 54 of Act 2004-2-4 of 9 March 2004 ("Perben II") abrogated the speciality principle for the criminal liability of legal persons, with effect from 31 March 2005. The criminal liability of legal persons is now applied generally: for enforcement purposes, it is no longer necessary for express provision for corporate liability to be made in each specific offence. More than 12 years since the entry into force of the foreign bribery offence, there is still no case law in France on the issue of the liability of legal persons for this offence. At the time of the finalisation of this report, a company had been convicted of the foreign bribery offence but the decision was subject to an appeal by the company and was not yet available. In addition to this conviction—subject to appeal and therefore not final—several procedures are ongoing against legal persons awaiting trial before the Paris Regional Criminal Court.

(a) *Rules and principles of liability*

(i) *Offences committed "on their account" by their "organs or representatives"*

41. Under article 121-2 CP, legal persons are criminally liable for offences committed *on their account*. The extent of the required link between the corrupt act and the benefit or interest of the company is not clear on the sole basis of the text of the offence. In practice, the law enforcement authorities tend to perceive legal persons as victims rather than perpetrators of a bribery offence. This is clearly apparent from the preponderance of prosecutions brought on the basis of misuse of corporate assets that generally also involve elements of transnational bribery.⁴⁴ Companies also present themselves as victims. During the on-site visit, prosecutors said that even the involvement of company directors in a corrupt transaction did not mean that it was possible to automatically deduce that they acted in the company's interest, and that it was necessary to prove, in addition, a company policy that supported the payment of bribes in the context of the company's business activities. In the Oil-for-Food case involving two oil companies, it was because senior managers with *decision-making powers* decided to pay bribes that the legal persons were also prosecuted. The interpretation of this element of the liability of legal persons therefore remains imprecise and could hamper prosecutions of legal persons for transnational bribery.

42. Article 121-2 also does not state which of a company's *organs or representatives* are capable of invoking the liability of the company in a transnational bribery case, while Annex I to the 2009 Recommendation calls for a flexible approach to the level of authority of the person whose conduct triggers the liability of the legal person. According to France, the criminal liability of legal persons is indirect and can therefore be invoked only through the intervention of individuals. According to a textbook on French case law on the subject, the *organs or representatives* that can invoke the liability of legal persons are the Board of Directors, the company's legal representative, the CEO, a deputy CEO, a manager or a specially authorised agent.⁴⁵ The prosecutors and investigating magistrates interviewed during the on-site visit cited the use of intermediaries, and in particular the transmission of bribes via consultants, as one of the difficulties in prosecuting legal persons to date. This explanation underlines the lack of clarity as to the nature of the link between the individual and the legal person required in order to establish the liability of the latter.

⁴⁴ See above the sub-section of the report on the qualification of misuse of corporate assets; see also the GRECO report on the third evaluation round of France.

⁴⁵ See Éditions Dalloz 2008: www.precis.dalloz.fr/public/pdf/97.pdf (in French).

43. The decisions handed down to date in foreign bribery cases do not clarify the requisite link between the individual and the legal person in order to establish the liability of the latter. In the three final convictions for foreign bribery, despite the senior hierarchical level of each of the convicted individuals (a CEO in the Libyan oil waste case, directors in the Djibouti hydraulic drilling case and a legal manager in the DRC equipment import case), the companies were not prosecuted. In the case decided at first instance by the Paris Regional Criminal Court in September 2012 involving a French aeronautical group, the judges, after having considered the two employees of the company also prosecuted as “organs” of the company, decided that their corrupt acts invoked the criminal liability of the group and, for this reason, sentenced the company to a fine and acquitted the two individuals.

44. Another question is that of a company's liability where authority has been delegated. In Phase 2 the Working Group, having considered case law whereby the beneficiary of a delegation of authority was deemed to be the legal person's representative,⁴⁶ concluded that it was not certain that the legal person could be held liable where the offence was committed by an employee or subordinate in the company who had not received any delegation of authority. The matter was not clarified during the on-site visit and remains to be followed up in future court decisions in cases involving the liability of legal persons for bribery of foreign public officials.

(ii) Liability of the parent company in cases of foreign bribery committed abroad by a local subsidiary

45. In Phase 2, prosecutors stated that a parent company could be held liable for a bribery offence committed in another country by a subsidiary on the grounds of conspiracy or complicity. In its answers to the Phase 3 questionnaires, France confirmed that the legal assimilation of the accomplice to the perpetrator of the offence (article 121-6 CP) applies in relation to the liability of parent companies for the acts of their foreign subsidiaries. However, France specifies that under article 113-5 CP the offence must be a criminal offence in both countries and that the principal offence must have been confirmed by a final decision of the foreign courts. In its report on the third evaluation round of France, the Group of States against Corruption (GRECO) noted that “this provision makes it very difficult to prosecute acts of complicity that also include, for example, the instigation by the parent company in France of a corruption offence committed by a local subsidiary abroad”.⁴⁷ This point seems to be borne out by the fact that, despite several final decisions of foreign courts relating to bribery offences involving a major French group with operations in over a hundred countries (see below, “Practical enforcement of parent company liability”), only two sets of allegations had resulted in the opening of a judicial investigation.

46. On the question of certain multinationals' practice of decentralising compliance to foreign subsidiaries, prosecutors interviewed during the on-site visit said that in order to instigate proceedings against the parent company under such circumstances, it would be necessary to prove the company's fraudulent intent in establishing such a practice. A large number of participants doubted that a parent company would be held liable for acts committed by a subsidiary, and France confirmed that there was no case law in this matter to date.

(b) Application of the liability of legal persons by the courts

(i) For bribery of foreign public officials

47. Only one company has been convicted, at first instance, for foreign bribery since the entry into force of the Convention in France. In addition to this conviction, liable to be revised or overturned on appeal, there were nine ongoing proceedings against legal persons at the time of France's Phase 3

⁴⁶ Crim. 9 November 1999 and 14 December 1999, *JCP E* 2000, p. 1618, M. Véron.

⁴⁷ GRECO, Report on the third evaluation round of France.

evaluation (five judicial investigations and four preliminary investigations).⁴⁸ In two of the judicial investigations awaiting judgment two oil conglomerates were being prosecuted for bribery of foreign public officials in the UN Oil-for-Food case. The trial in this case is scheduled for 21 January to 20 February 2013. The two cases will be heard jointly and the court will determine the order in which the accused individuals and legal persons will be heard.

48. According to France, when proceedings are initiated against a natural person employed by a legal person or acting on its behalf, an investigation will systematically be opened both in relation to the natural person and the legal person involved. The judges met at the on-site visit cited liquidation or dissolution of companies involved in corruption cases as the reason for the limited number of corporate prosecutions to date. Even if this has been the case in the few final convictions of individuals where small companies were also involved, the situation is vastly different when large corporate groups are involved in bribery.

49. No company was prosecuted in the three final convictions of individuals in France for bribery of foreign public officials, even though a company was involved each time. In one case, the company in question was liquidated a few months after TRACFIN referred the matter to the Paris Public Prosecutor's Office (the DRC equipment import case), but in the two other cases the judgments provided by France do not specify why the companies involved were not prosecuted. The lack of prosecution of the companies involved was even more notable for the examiners given that the suspicious withdrawal (the Libyan oil waste case) and the suspicious transfer (the Djibouti hydraulic drilling case) had been reported by TRACFIN (and hence instigated the proceedings) and were made using the bank accounts of the companies in question. Likewise, in another case against the director of a company (on conclusion of which the Pontoise Criminal Court ordered partial acquittal of the manager on the charge of bribery of foreign public officials), the prosecution apparently did not seek to hold the legal person liable. Despite the existence of French case law that the acquittal of individuals does not necessarily rule out the liability of legal persons,⁴⁹ the company in question was not prosecuted. In addition, each of the three convictions of individuals for bribery of foreign public officials resulted from a direct summons by the Public Prosecutor's Office. At the time of the on-site visit, the judges all emphasised that the complexity of the legal concept of the criminal liability of legal persons required detailed investigations that the direct summons procedure by definition does not allow.

50. As already observed earlier in the report, there is a tendency on the part of the French law enforcement authorities to prosecute individuals for misuse of corporate assets on the grounds of article 241-3-4 CP (see above) in cases that could involve transnational bribery. Insofar as the offence of misuse of corporate assets is intended, *inter alia*, to protect a company's assets (as France has pointed out) the examiners wonder whether the very extensive application of this offence and resulting in the company being made the victim (instead of holding it liable), is not another plausible reason for the quasi-absence of cases in which legal persons have been held liable for transnational bribery. In response to the Working Group's concerns about the use of this offence in transnational bribery cases when, by definition, the offence excludes the liability of companies, France indicated that liability could be established on the basis of a separate offence, when the natural person(s) have been charged or convicted of the offence of misuse of corporate assets. France was not able to provide any case law in which legal persons were prosecuted following convictions of individuals for misuse of corporate assets.

⁴⁸ In France, judicial examinations concern natural or legal persons against whom there is serious or consistent evidence that they could have participated, as perpetrator or accomplice, in the commission of a criminal offence (article 80-1 of the French Code of Criminal Procedure); only an investigating magistrate has the authority to order a judicial investigation. After the on-site visit, France said that all the judicial investigations in progress theoretically concerned legal entities but that judicial examinations had not necessarily been ordered against them, since the decision to open such examinations could depend on the stage reached in the judicial investigation.

⁴⁹ Cass. Crim. 8 September 2004, *BRDA* no. 10-2005, p. 4. The decision handed down at first instance by the Paris Regional Criminal Court in September 2012 is an example of the application of this jurisprudence: although the judges acquitted the two employees of the company, they held the company itself liable for bribery of foreign public officials.

(ii) *Practical enforcement of parent company liability*

51. One important issue in the enforcement of the liability of legal persons for transnational bribery is that of the liability of a parent company for acts of bribery by its foreign subsidiaries. As stated in Annex I to the 2009 Recommendation, "a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf". In this context, the examiners were interested in how the French authorities treated judicial and administrative decisions and proceedings initiated in other countries against the French group Alstom, the world's leading builder of power plants and railway networks, which is headquartered in France and has operations in over a hundred countries around the world.

52. The group has been the subject of several final administrative and judicial decisions in other countries for bribery of foreign public officials. In July 2004 Mexico's Ministry of Public Administration (SFP) excluded a company in the group from Mexican public procurement procedures for two years and imposed a fine of 352,470 Mexican pesos (around EUR 21,000) for bribery of Mexican public officials in connection with the award of a contract to build a power station.⁵⁰ In Italy, in the framework of the so-called "*patteggiamento*" (plea-bargaining) procedure, a settlement of 28 March 2008 (approved by the Milan Court of First Instance) sentenced four senior managers of a company in the group to suspended prison sentences of 9 to 11 months for having paid bribes in 2001 to Italian public officials from Enel, an Italian public company. In the same judgment, two group subsidiaries were also each ordered to pay a fine of EUR 240,000 in application of administrative liability for legal persons for not having taken all appropriate organisational measures to prevent the use of bribes.⁵¹ In February 2012, the World Bank debarred two subsidiaries of the group from World Bank-funded contracts for a maximum period of three years because of acts dating back to 2002 relating to the award of Bank contracts in a southern African country.⁵² On 20 July 2012, the Bank officially transmitted a referral of its investigative findings upon which the debarment was based to the French authorities. On 22 November 2011, the Swiss Federal Attorney General's Office issued a summary punishment order in which a Swiss subsidiary of the group was found guilty of not having taken all necessary and reasonable organisational precautions to prevent bribery of foreign public officials in three of the countries investigated: Latvia, Tunisia and Malaysia.⁵³ In addition, investigations into alleged bribery of foreign public officials involving the group have been publicly announced by law enforcement authorities in certain States Parties to the Convention. The UK Serious Fraud Office announced an investigation into two managers of the group's UK subsidiary.⁵⁴ Following this investigation, and combined with the existence of other ongoing investigations and the

⁵⁰ See Phase 3 report for Mexico; Phase 2 follow-up report for Mexico; press article from the Mexican Ministry of Public Administration (SFP) (in Spanish): <http://portal.funcionpublica.gob.mx:8080/wb3/work/sites/SFP/resources/LocalContent/594/3/BOL-068.doc>.

⁵¹ Milan Court of First Instance, Decision N. 685/09, 9 April 2009.

⁵² The debarment also applies to contracts financed by the African Development Bank, the European Bank for Reconstruction and Development, the Inter American Development Bank and the Asian Development Bank in application of the agreement concluded by the five banks in April 2010 to create a common list of companies debarred from their public procurement contracts. <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:23123315~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

⁵³ See the Phase 3 report on Switzerland. According to the order, in 2000 the group centralised its procedures for approving consultant contracts in its International Network (IN) division in Paris and at the same time created two subsidiaries, including one in Switzerland, to execute the control and payment systems. The Swiss subsidiary reported to the IN division in Paris and was supported by a team of employees from the IN division, with the manager working most of the time in Paris and visiting the subsidiary's headquarters in Switzerland only occasionally.

⁵⁴ Cf. the SFO website: www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/judicial-review-judgment-in-the-alstom-case--applications-of-stephen-burgin-and-robert-purcell-.aspx.

conviction handed down by the Swiss authorities in November 2011, the Norwegian Ministry of Finance decided in December 2011 to place the group under observation for four years.⁵⁵

53. Notwithstanding this background, only two judicial investigations were opened in connection with these cases in France following spontaneous information transmissions by Switzerland in 2006 and 2007, respectively: one in connection with suspected payment of bribes to a southern African minister by a company in the group; the other concerning transfers to offshore companies in the context of the construction of power plants in Venezuela and Indonesia between 1993 and 2003. In both cases, judicial investigations were opened at the request of prosecutors on the basis of an initial indictment against an unnamed person (in 2007 for the first case, in 2009 for the second), and in both cases the proceedings were closed.⁵⁶ In the first case, the dismissal order, dated 7 June 2011, was issued on a motion to that effect from the Public Prosecutor of the Paris Regional Court on the grounds that the stricter criminal law did not apply retroactively;⁵⁷ in the second case, the investigating magistrate of the Paris Regional Court issued a dismissal order on 19 October 2009 on the grounds of insufficient evidence, since the judicial investigation had not made it possible to qualify all the elements of the alleged offences.

54. Without being able to go beyond hypotheses, the fact that only two judicial investigations have been opened to date raises questions about the level of commitment of the French prosecuting authorities with regard to the matter. The answers obtained at the time of and after the on-site visit did not address any of these questions satisfactorily. After the visit, France confirmed that the company was not currently the subject of any ongoing investigation or prosecution. In the examiners' opinion, this situation could be illustrative of the limited scope of the liability of legal persons in France, insofar as it does not seem to allow for parent companies to incur criminal liability for acts of bribery by their subsidiaries, despite the French authorities' assertion of the principle on that point.

(iii) *Convictions of legal entities in French case law*

55. In relation to offences other than bribery of foreign public officials, according to a statistical information bulletin issued by the Ministry of Justice, between 2002 and 2005, 2,340 convictions were handed down against legal persons and entered in the criminal records. Illegal working was the principal offence in 28% of cases, followed by unintentional injury and manslaughter (25%), violations of competition and pricing laws (17%) and fraud and counterfeit (11%).⁵⁸ According to the data provided by the French authorities, taken from the criminal records of convicted legal persons, three legal persons received final convictions between 2008 and 2009 for the principal offence of bribery of French public officials (proposal or provision of advantage to a person charged with a public service mission). As the French authorities were unable to provide the judgments in these three cases, it is not possible to analyse the factors taken into account in finding the legal persons involved criminally liable.

⁵⁵ Cf. Norwegian Finance Ministry website: www.regjeringen.no/en/dep/fin/press-center/press-releases/2011/statens-pensjonsfond-utland-nye-beslutni/government-pension-fund-global-company-p.html?id=665635, and the Council on Ethics recommendation to the Finance Ministry in December 2010: www.regjeringen.no/upload/.

⁵⁶ In French criminal procedure, an investigating magistrate can open an initial judicial investigation only after an initial indictment from the Public Prosecutor's Office (a *réquisitoire introductif*). This may be issued against a named person or, where the perpetrator of the offence is not known, against an unnamed person (i.e. against "X"): in the latter case the purpose of the investigation is to identify the perpetrator(s) of the offence, whether a legal or natural person or persons. Once the investigation is complete, the case is passed on to the Public Prosecutor's Office for the issuance of a final indictment. Once the indictment has been issued, the judge issues a closing order in which s/he decides what further action to take. S/he may follow the prosecutor's indictment (in which case the order is consistent with the prosecutor's indictment) or not. The Public Prosecutor's Office can appeal a closing order.

⁵⁷ Bribery of foreign public officials became a criminal offence in France on 29 September 2000.

⁵⁸ Infostat Justice 103: Convictions of legal persons in 2005, Statistical information bulletin no. 103, September 2008.

(c) ***Raising awareness in the Public Prosecutor's Office and the judiciary***

56. During the Phase 2 evaluation, the Working Group recommended that France draw the attention of magistrates to the importance of applying effectively the criminal liability of legal persons (Recommendation 11). Following a similar recommendation in the GRECO evaluation,⁵⁹ a circular of 21 June 2004 asked public prosecutors, in cases involving bribery of foreign public officials, either prior to or following the opening of an investigation, to investigate legal persons that might be liable.⁶⁰ More than eight years later, as noted above, only one legal person has been convicted at first instance of bribery of foreign public officials, and judicial examinations of legal persons had been ordered in only five of the 16 judicial investigations under way at the time of writing. Noting this deficiency, on 9 February 2012, a few weeks before the on-site visit, France issued a new circular which, while recalling the Cour de Cassation's extensive interpretation of the question of the criminal liability of legal persons, did not attempt to clarify the terms "on their behalf" or "bodies and representatives", nor of parent company liability. The judges interviewed during the on-site visit emphasised the lack of ongoing training on the issue of the criminal liability of legal persons. The Ministry of Justice tempered the judges' opinions, stating that modules on economic and financial law were organised as part of French judges' mandatory ongoing training offered by the École Nationale de la Magistrature (ENM) and that the issue of the criminal liability of legal persons was addressed in these modules.

Commentary:

The lead examiners note that, to date, there has been no final conviction of a legal person in France for acts of foreign bribery. They are nonetheless encouraged by the first conviction, at first instance, of a legal person for foreign bribery. They hope that this first conviction marks a turning point in the application of liability of legal persons by the French courts. They are also encouraged by the ongoing proceedings against legal persons for foreign bribery. They recommend that the Working Group follow the development of these cases carefully.

The lead examiners nonetheless deplore the low number of legal persons investigated to date and are concerned that the requirements, according to which transnational bribery be committed on behalf of the legal person and by its bodies or representatives, constitute obstacles to the effective prosecution of French companies involved in cases of transnational bribery. They are also concerned about the fact that, in the absence of sufficient provisions in criminal law, the practice of decentralising compliance departments and payments of consultant commissions to foreign subsidiaries enables French groups to escape criminal liability in France. The reluctance of French law enforcement authorities to address this practice and to react to publicly available allegations of bribery or allegations brought directly to their attention by law enforcement authorities from other Parties to the Convention, often upheld by final decisions, calls into question the application of the Convention and the 2009 Recommendation. In addition, the lead examiners are concerned that the recourse by French prosecutors to the offence of misuse of corporate assets in cases involving foreign bribery constitutes an obstacle to establishing the liability of companies for this crime. They therefore recommend that the Working Group follow up on whether companies can be held liable, in practice, in foreign bribery cases in which natural persons have been prosecuted for misuse of corporate assets offence, to determine whether it is an obstacle to the liability of legal persons in France for the offence of bribery of foreign public officials.

The lead examiners therefore recommend that the French law enforcement authorities clarify the requirements for the criminal liability of legal persons to ensure that their approach fully

⁵⁹ GRECO Report on the second evaluation round of France, page 23.

⁶⁰ Follow-up report, p. 23.

takes into account Annex I of the 2009 Recommendation. They recommend the introduction, by France, of ongoing training for French law enforcement authorities relating specifically to enforcement of the criminal liability of legal persons in cases of transnational bribery.

3. Sanctions

(a) Sanctions against natural persons

57. The sanctions applicable to natural and legal persons found guilty of bribing foreign public officials have not changed since the last evaluation of France (articles 435-14 and 435-15 CP).

(i) Sanctions against natural persons

- Prison sentences, fines and additional penalties

58. Since France adopted the Act of 30 June 2000, any person who has bribed or attempted to bribe a foreign public official in order to obtain or retain an advantage in an international business transaction is liable to a penalty of up to ten years' imprisonment and a fine of EUR 150,000. The level of these penalties has remained unchanged since Phase 1 and was not called into question by the 2007 and 2011 Acts,⁶¹ which supplemented the changes introduced by the Act of 30 June 2000. During the on-site visit, the panellists interviewed unanimously agreed that the level of the maximum available penalty was low for a senior manager of a large company, especially in comparison with the maximum fine for misuse of corporate assets (EUR 375,000), despite the fact that bribery of foreign public officials constitutes a serious infringement of the duty of probity and of the authority of the State. The question whether these penalties are effective, proportionate and dissuasive (Article 3 of the Convention) is all the more serious in view of the penalties actually imposed by the courts to date (see below). The courts are empowered to impose additional penalties such as deprivation of civic and civil rights, a ban on exercising a commercial or industrial profession, and confiscation. Accomplices are liable to the same penalties as perpetrators.

- Sentencing by judges

59. In practice, in compliance with French law, judges hand down sentences taking into account the circumstances of the offence and the character of the offender. Similarly, when courts impose a fine, they determine the amount by taking into account the offender's financial resources and expenses (article 132-24 CP). The principle laid down in this article enables the judge to amend the sentence by allowing the offender the benefit, for example, of a suspended or conditional sentence or an additional penalty (deprivation of rights) as the main penalty. Article 132-24 CP states that "a prison sentence without suspension may be ordered only as a last resort if the seriousness of the offence and the character of the offender make such a sentence necessary and if any other penalty is plainly insufficient".

- Penalties imposed in practice by the courts

60. In two of the three cases of bribery of foreign public officials that have resulted in final convictions of individuals to date, the sole sanction imposed on the individuals convicted was a five-month suspended prison sentence, without any fine or additional penalty.⁶² In the third case, a fine of EUR 10,000 was imposed on the two individuals convicted.⁶³ It is therefore the only case to date in which a penalty for bribing foreign public officials has actually been imposed. No additional penalty was imposed in the three

⁶¹ Act 2007-1598 of 13 November 2007 relating to the fight against bribery and Act 2011-525 of 7 May 2011 to simplify and improve the quality of law.

⁶² The Libyan oil waste case and the DRC equipment import case, refs. *Ibid.*

⁶³ The Djibouti hydraulic drilling case, ref. *Ibid.*

cases. Confiscation was not ordered in any of the cases, the perpetrators being left with the benefit of the offence. The judges interviewed said that the penalties corresponded to those sought by the prosecution. In the fourth case to have been tried to date, the two accused individuals were acquitted of the charges respectively of bribing a foreign public official and receiving the proceeds of crime (a former minister of an African country being one of the accused).⁶⁴ The briber was convicted only of forgery and making use of forged documents with intent to defraud and fined EUR 10,000. After the on-site visit, a fifth conviction was handed down at first instance (Nigeria identity card case). In this case, according to the information provided by the French authorities, one individual in the case was acquitted because at the time of the offence he was an engineer and did not have the power to involve the company himself and had acted exclusively on the account of the company in the context of the company's defined commercial policy. The other acquitted individual was a director and therefore more senior in the corporate hierarchy than the first. He was acquitted because he did not act of his own accord but for the sole benefit of the company and did not have sufficiently autonomous decision-making powers to incur personal liability. The prosecution had requested a suspended sentence of 15 to 18 months' imprisonment and a fine of EUR 15,000 for each individual.

61. The low number of individuals sanctioned, or merely convicted, reflects the limited enforcement of the offence, given the level and nature of the trade generated by the French economy. The small amount of the bribes involved (between EUR 90,000 and EUR 228,000) and the corresponding penalties corroborate the analysis in Phase 2 of cases of bribery of French public officials: i) the small amounts of money involved; ii) most cases involved petty bribery of public officials by senior managers and employees of medium-sized enterprises, predominantly SARLs (limited liability companies); iii) fines were relatively modest, prison sentences were suspended and little use was made of additional penalties. The final analysis also applies to the sanctions requested by the prosecution against the two individuals tried in the Nigeria identity card case, even though the court found, in announcing their acquittal, that the two individuals had '*undeniably facilitated the award of the contract by acting on behalf of the company as part of a general, organised and coherent framework for paying commissions to intermediaries.*'⁶⁵

(b) Sanctions against legal persons

(i) Criminal penalties under article 435-15 CP

62. For companies and other legal entities, the penalties for bribery offences are a fine of up to EUR 750,000⁶⁶ and/or⁶⁷ various prohibitions, deprivations of rights and professional disqualifications, including exclusion from public procurement and a ban on exercising a profession for up to five years. These penalties have also not been increased since 2000. During the on-site visit, all the panellists interviewed (prosecutors, lawyers, law professors and representatives of the private sector) regarded the penalties as derisory for the largest French companies, especially in sectors such as aviation and defence. In these sectors, such penalties could be taken into account in companies' risks analyses and also bear no relation to actual or expected profits. The panellists thought that for the majority of large French companies the penalties cannot be considered to be "effective, proportionate and dissuasive", as the Convention requires, especially as no legal person has been the subject of a final conviction to date.⁶⁸ The argument put forward by France in Phase 2, of its ability to confiscate, cannot be regarded as sufficient to compensate for the low level of available fines against legal persons.

⁶⁴ *Ibid.*

⁶⁵ AFP alert of 5 September 2012.

⁶⁶ Article 131-38 CP, to which article 435-15 refers for determining the amount of the fine, states that "the maximum amount of a fine applicable to legal persons is five times that which is applicable to natural persons by the law sanctioning the offence".

⁶⁷ Article 132-17 CP states that "the court may decide to impose only one of the penalties applicable to the offence before it".

⁶⁸ The Working Group considers the level of penalties applicable to legal persons not only in relation to these three criteria, but also according to the size of the economy and the companies of the country evaluated.

63. This finding also needs to be seen in the broader perspective of criminal policy towards companies as it has emerged in France in recent years. In 2008, a parliamentary commission (the Coulon Commission) was tasked with reviewing the whole range of criminal sanctions applicable to companies with a brief to "limit the criminal risk to companies and consider regulatory methods better adapted to the economy ". Its brief also included proposing the elimination of useless sanctions or their adaptation or replacement by civil or commercial procedures or administrative, disciplinary or pecuniary sanctions.⁶⁹ It is therefore not surprising that the maximum level of the sanctions applicable to legal persons responsible for bribery of foreign public officials has not been increased.

(ii) *Additional penalties*

64. When questioned about incentives for prosecutors to seek the judicial examination of legal persons that might be liable in cases of transnational bribery, France said that a circular of 9 February 2012, describing new measures relating to international bribery and setting criminal policy guidelines, reminded prosecutors that deterrent additional penalties could be sought against legal persons if the facts of the case justified them. Provided for in article 435-15 CP,⁷⁰ these additional penalties include a ban on engaging in a professional or corporate activity; judicial observation; closure of the company's establishments used to commit the offence(s); exclusion from public procurement; a ban on public offerings of securities; a ban on issuing cheques other than certified cheques or cheques to withdraw funds or on using payment cards; confiscation of the instrument used or intended to be used to commit the offence or of the proceeds of the offence; and the display or dissemination of the judgment. In the Nigeria identity card case the Public Prosecutor's Office chose to defer to the discretion of the Court and not to request a sanction, including additional sanctions, against the company being tried. The Court decided only to sentence the company with a fine (see below) and refrained from imposing any additional sanctions, let alone confiscation of the benefit obtained by the company. France did not provide any information about the frequency with which additional penalties are imposed on legal persons in addition to fines in other cases of serious economic crime. The actual imposition of such additional penalties on legal persons is all the more important in that, in the opinion of all the panellists questioned on the issue, the only truly deterrent penalty for a company is exclusion from public procurement, followed by the damage to corporate image resulting from publication of the judgment.

(iii) *Criminal records*

65. Convictions are entered on the criminal record of legal persons (Act of 16 December 1992). However, access to computerised criminal records is extremely limited: Certificate no. 1, which contains all records, can be provided only to the law enforcement authorities, while Certificate no. 2, which contains only a partial list of records, can be provided only to persons listed in article 776-1-1 of the Code of Criminal Procedure (prefects, presidents of commercial courts, Financial Market Authority etc.). The conditions for access to the criminal records of legal persons in the context of public procurement procedures are set out at article 776-1 of the Code of Criminal Procedure, which states that: "Certificate no. 2 of the criminal records of legal persons is delivered: 1. to prefects, State administrations and territorial public bodies dealing with proposals or bids for the adjudication of public works or tenders". The named persons or bodies can therefore have access to the criminal records of legal persons; other persons or bodies involved in the award of public procurement contracts cannot.

⁶⁹ See "La dépenalisation de la vie des affaires (Decriminalisation of corporate life)", Jean-Marie Coulon, France, Ministry of Justice, La Documentation française, February 2008, Ref. 084000090, 133 p.

⁷⁰ The additional criminal penalties applicable to legal persons for bribery of foreign public officials are similar to those for bribery of French public officials.

(iv) *Penalties imposed on legal persons*

66. In the same way as for individuals, in the context of Phase 2 the Working Group undertook to follow up the application of sanctions as practice developed, with a view to determining whether they are sufficiently effective, proportionate and dissuasive to prevent and punish the offence of transnational bribery, focusing in particular on the practice of the courts with regard to the criminal liability of legal persons for the offence of active bribery of foreign public officials. Twelve years after the entry into force of the foreign bribery offence in France, no legal person has been sanctioned definitively for the offence in France. The conviction in the Nigeria identity cards case is to date the only example of the application of article 435-15 CP. In this case, the prosecution did not request a specific sentence against the company in question, leaving this determination to the court. The judges sentenced the company to a fine of EUR 500,000 – corresponding to two-thirds of the maximum available penalty for the offence (EUR 750,000). According to the French authorities, there were no additional penalties or confiscation in this case. This conviction naturally attracted the attention of the media as it marked a significant evolution from the former situation. Nonetheless, it is questionable whether the sentence imposed at first instance is effective, proportionate and dissuasive in accordance with Article 3 of the Convention, given that it was not accompanied by additional penalties nor were the proceeds of the crime in question confiscated (the benefits of the offence therefore being left to its perpetrators).

67. The proceedings against the French group mentioned above remain the only example of the conviction of a company for bribery of foreign public officials. That situation may slightly evolve in the near future, however, with the proceedings against two legal persons in the Oil-for-Food case which are pending trial for bribery of foreign public officials before the Paris Regional Criminal Court in early 2013, following a judicial investigation. The conclusion of other pending cases involving legal persons (five of the 13 ongoing judicial investigations and all four preliminary enquiries) remains more uncertain. France indicated that the oldest of these proceedings dates back to 2002 and the most recent to 2011.

68. The convictions handed down in other cases of economic and financial crime highlight the apparent reticence of the law enforcement authorities in invoking the criminal liability of legal persons in general. According to a study by the Ministry of Justice, in 2004, ten years after the introduction of corporate criminal liability, enforcement had been tentative. Fewer than a thousand companies have ever been held liable and, where prosecutions have been brought, a quarter has been acquitted, a rate six times higher than for natural persons. Where companies have been convicted, the sanctions imposed on them seem low: half the fines imposed up to 2007 were for less than EUR 3,000.⁷¹ The average amount of the fine imposed on a legal person for an economic offence in 2008 and 2009, according to a table provided by France⁷² and based on the criminal records of legal persons, was EUR 2,000 for misuse of corporate assets. The same table shows that, over the same period, in the only three cases where legal persons were subject to final convictions for the principal offence of bribery of a French public official (proposal or provision of advantage to a person charged with a public service mission), no fine was imposed, though other additional penalties could be imposed as the principal penalty. This situation is a source of particular concern for the effectiveness and dissuasiveness of the sanctions imposed in practice under French rules on the liability of legal persons.

(c) *Sanctions applicable under the procedure of appearance on prior admission of guilt (CRPC)*

69. Under article 495-7 of the Code of Criminal Procedure, the public prosecutor may suggest the Defendant agree to appear on prior admission of guilt (often described as the French version of plea-bargaining) whereby the Defendant accepts one or more of the principal or additional penalties for which he or she is liable. Since 2011, the procedure has been applicable to offences punishable with 10 years'

⁷¹ INFOSTAT, 2008, 103, Ministry of Justice.

⁷² Criminal justice policy assessment unit, DACG, April 2012.

imprisonment, and hence to the offence of bribery of foreign public officials under certain conditions (see Section 5(a)(ii)). Where a prison sentence is proposed, it may not be for more than one year or exceed half the maximum term of imprisonment available for the offence, which in a case of transnational bribery amounts to a maximum term of five years. Where a fine is proposed, the law states that the amount may not be more than that of the maximum fine available for the offence. Both fines and prison sentences may be suspended. The French authorities pointed out that the Act of 9 March 2004 makes no provision for negotiation between the defendant's lawyer and the public prosecutor, who is free to choose the penalties he or she intends to propose to the offender. According to the defence lawyers interviewed during the on-site visit, French companies would prefer to plead their case before a court than plead guilty and risk exclusion from European public procurement procedures pursuant to Directive 2004/18/CE of the Council of Europe, which provides for the exclusion of economic operators convicted of bribery.⁷³ At the time of writing, the procedure had not been applied in any case of bribery of foreign public officials.

Commentary:

With regard to the penalties applicable to natural persons, the examiners recommend that France (i) raise the maximum amount of the fines provided for in article 435-3 CP, in particular to bring it into line with the amount of available fines for the offence misuse of corporate assets; and (ii) ensure that the penalties imposed in practice are effective, proportionate and dissuasive. With regard to the penalties applicable to legal persons, the examiners recommend that France (i) raise the maximum amount of the available fine to a level that is effective, proportionate and dissuasive; and (ii) make full use of the available additional penalties (and confiscation measures discussed under sub-section below), in particular exclusion from public procurement, in order to contribute to the application of penalties that are effective, proportionate and dissuasive. Lastly, the examiners recommend that the Working Group follow up the application of sanctions under the procedure of appearance on prior admission of guilt as practice develops.

4. Confiscation of the bribe

70. Article 3.3 of the Convention requires each Party to "take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable". In Phase 2, the Working Group recommended that France encourage prosecutors to impose the penalty of confiscation wherever possible and, to that end, to take the necessary steps to make them aware of the usefulness of such a penalty to sanction the offence of bribery of foreign public officials (Recommendation 11). At the time of the written follow-up, the Working Group noted that a circular had encouraged public prosecutors in such cases to seek confiscation of the bribe and of the proceeds of the offence, and concluded that the Phase 2 recommendation had been satisfactorily implemented. There have been several legislative and institutional developments in this area since then.

(a) Applicable law

71. The Act of 9 July 2010 overhauled the rules applicable to seizure and confiscation, extending the scope of seizable assets,⁷⁴ establishing a criminal seizure procedure and creating an agency to collect and manage seized and confiscated assets (*Agence de gestion et de recouvrement des avoirs saisis et*

⁷³ Concerning exclusion from European public procurement procedures, see the section of the report that deals with the issue of public advantage.

⁷⁴ The principle is that it must be possible to seize any asset able to be confiscated, whatever its nature, movable or real, tangible or intangible, divisible or indivisible: specific procedures thus allow for the seizure of financial instruments, claims, bank accounts, insurance policies, etc.

confisqués, AGRASC). The Act of 27 March 2012 introduced a general possibility of seizure and value-based confiscation (article 131-21, para. 9 CP as amended and new article 706-141-1 CPP). It also supplemented the provisions of Article 131-21 CP in order to allow for the confiscation of assets which belong to the offender or, without prejudice to the rights of the bona fide owner, which that person is free to dispose of, where neither the offender nor the owner have been able to justify the origin. Given that confiscation in French law is a secondary penalty for all felonies and misdemeanours punished by imprisonment for more than one year (article 131-21 CP), it applies to bribery of foreign public officials. Thus, article 435-14 CP provides for confiscation of the instrumentalities used or intended to be used to commit the offence or the proceeds of the offence under the terms and conditions set forth at article 131-21 CP. According to article 435-15, para. 3 CP, legal persons are also liable to the confiscation penalties set forth at article 131-21 CP. The Act of July 2010 applies automatically in overseas departments and Article 18 expressly provides for its application in overseas collectivities. Under article 21 of the Act of 27 March 2012, the revised confiscation measures apply in New Caledonia, French Polynesia and the Wallis and Futuna islands, for which an express extension of the law is required. There is no provision in French law for civil forfeiture.

(b) Enforcement of seizure and confiscation measures

(i) Efforts to modernise enforcement methods

72. The Phase 2 report found that, with few exceptions, the French courts did not order confiscation of the proceeds of the offence: the few bribery-related confiscation orders (excluding transnational bribery) all concerned the bribe itself. There has been little change to the situation since then. However, efforts have been made to modernise the law on seizure and confiscation. Under the Act of July 2010, the judicial authorities (i.e. the prosecutor leading the preliminary investigation or the investigating magistrate leading the judicial investigation) have wider powers to seize assets, even before any conviction. During the preliminary investigation, investigating authorities can now seize the direct or indirect proceeds of an offence. These authorities also have wide powers to detect and trace the origin of criminal assets, including new powers of investigation, access to a large number of databases and the support of the Criminal Assets Identification Platform (*Plateforme d'identification des avoirs criminels*, PIAC). This Platform enhances investigations of the financial situation of suspects already carried out by investigating authorities with measures including international searches and the use of bilateral channels for cooperation with foreign countries.

73. As mentioned above, the Act of July 2010 also instituted the AGRASC, whose role is to improve the legal process for seizure and confiscation and to provide centralised management of all funds or assets seized during criminal proceedings in France (article 706-160 2 CPP). Its role of supporting prosecutors in decision-making and in the choice of the procedure that will guide their seizures addresses the need for a centralised, specialist body dedicated to the seizure and confiscation of assets. The on-site visit allowed the examiners to note with satisfaction how quickly the AGRASC had become integrated in the French justice system and its encouraging results from its first year of operation.⁷⁵ The AGRASC has set itself the priority of increasing the number of confiscations in France.

74. In support of the July 2010 reform, the authorities have rolled out training for law enforcement officials. The École Nationale de la Magistrature (ENM), the Ministry of Justice and the AGRASC organise training courses to inform law enforcement officials about the new law and the importance of seizure and confiscation in criminal matters. Since its creation, the AGRASC has organised over 40 training courses for law enforcement officials relating to enforcement of the 2010 Act. The PIAC has also

⁷⁵ 7,630 cases entered in the database, 202 criminal seizures of real property and 23 publications of confiscations in 2011 alone. Cf. AGRASC Annual Report 2011: www.justice.gouv.fr/art_pix/AGRASC_rapport_activite_2011.pdf (in French).

dispensed 345 training sessions on the identification of criminal assets to law enforcement officials over the last six years.

(ii) *Confiscation in international bribery cases in practice*

75. Despite the recent introduction of a coherent set of rules designed to promote confiscation as a type of dissuasive penalty, no confiscation has been ordered to date in the context of final convictions for transnational bribery. There are several explanations for this state of affairs. First, the seizure and confiscation of assets in cases of financial crime in addition to criminal sanctions *per se* is a relatively recent phenomenon, and takes place mainly in relation to the fight against organised crime.⁷⁶ This is not yet the case with transnational bribery. Another important element is that until March 2012, value-based confiscation was limited to cases where the confiscated asset had not been seized or could not be represented, which imposed an excessively restrictive framework on this type of confiscation.

76. It also transpired from the on-site interviews that investigating authorities find it difficult to imagine even the feasibility of seizing the proceeds of a bribery offence, especially where it is committed by a legal person. Judges, despite training initiatives, do not generally appear to have been made sufficiently aware of the opportunity of confiscation in the judgment phase. As a result, the use of seizure and confiscation is compromised in both the investigation and the judgment phases. The examiners acknowledge that the difficulty of quantifying the direct or indirect proceeds of a bribery offence is common to all the Parties to the Convention, but observe nevertheless the lack of consideration given by the authorities to this aspect of the enforcement of Article 3.3.

Commentary:

The examiners acknowledge recent legislative progress, in particular in order to allow for value-based confiscation, and the efforts made by the PIAC to facilitate the detection of assets of criminal origin and the valuable contribution of the AGRASC in recovering and managing them. In this respect, the creation of the AGRASC is an instructive experience that France could share with other countries. Nevertheless, the examiners deplore that no seizure or confiscation penalty has been imposed to date in the context of transnational bribery proceedings. Consequently they recommend that France take all appropriate measures to (i) develop a proactive approach to seizure and confiscation of the instrument and proceeds of the bribery of foreign public officials or assets of equivalent value, including in the context of proceedings involving legal persons; (ii) raise awareness among magistrates and investigating authorities of the importance in particular of confiscating the proceeds of bribery of a foreign public official (especially where the perpetrator is a legal person) and provide them with guidelines on methods for quantifying the proceeds of a bribery offence. In this respect, the French authorities could draw on work carried out at an international level, such as the study published jointly by the Working Group and the StAR (Stolen Assets Recovery) Initiative in June 2011 entitled " Identification and Quantification of the Proceeds of Bribery".

⁷⁶ PIAC figures illustrate this point: total assets seized by the PIAC rose from EUR 71,895,903 in 2006 to EUR 247,481,448 in 2011.

5. Investigation and prosecution of the foreign bribery offence

(a) Jurisdiction

77. There has been no change to the limitations noted in France's Phase 2 report (paras. 120 to 122) on active and passive personal jurisdiction set out in articles 113-6 to 113-8 CP (see also section 1 above in relation to dual criminality).

(b) Principles of investigation and prosecution

(i) Fundamental principles of criminal proceedings in France

78. As noted in Phase 2, the Public Prosecutor's Office (a hierarchical body of prosecutors subordinate to the Minister of Justice) is central to law enforcement. The Public Prosecutor controls proceedings: courts cannot act of their own accord and the Public Prosecutor must bring a prosecution before a conviction can be secured. The Public Prosecutor also has discretion to bring prosecutions, meaning that he or she can decide to instigate proceedings, apply the procedure for appearance on prior admission of guilt or, in the absence of serious and consistent evidence or due to the insignificance of the harm done, or discretionary criteria external to the case, close proceedings.

79. In order to accomplish its task, the Public Prosecutor's Office has, in principle, strong tools to bring cases. One is victims' complaints; another is the requirement that police forces must immediately inform the Public Prosecutor's Office of any felony or offence that comes to their attention (such as corrupt behaviour which had not been identified at the start of investigations into other criminal offences); a third lies in the mechanisms for sharing information in the French anti-money laundering system (TRACFIN reports). Public officials also have a duty in French law to report any criminal act (article 40 CPP), as do auditors exercising their activities in commercial companies. These mechanisms have since been strengthened by the introduction of a right to report for private-sector employees.

80. In addition, there is nothing to prevent the Public Prosecutor's Office from taking up a case on the basis of information published in the press or an anonymous report, in the context of mutual legal assistance requests submitted to France or following the spontaneous transmission of information by foreign law enforcement authorities. However, since prosecutors have the sole discretion whether or not to instigate proceedings, they are not bound to open an investigation following information published in the foreign press or reported by the French media, or by a complaint or prior denunciation, even though there are circumstances, provided for in the Penal Code, where the instigation of public proceedings requires a complaint, denunciation or even prior judgment. Just as prosecutors are not required to act on an official complaint or report, they are also not bound by the withdrawal or discontinuation of a complaint. Of 16 ongoing cases presented to the examiners during the on-site visit: four originated in official reports or spontaneous transmissions of information from foreign authorities; four in TRACFIN reports, three in reports made under article 40 CPP; three in victims' complaints; one in an anonymous report; one in a report by a private individual during legal proceedings; and one in a police report made in execution of a mutual assistance request. In contrast, none of the 16 proceedings seems to have been initiated on the basis of the three reports of acts liable to constitute the offence of bribery of a foreign public official submitted to the Public Prosecutor's Office under new legislation that protects private-sector whistle-blowers.

81. The public prosecutor, on the basis of information gathered or after a preliminary investigation that s/he directs, freely takes a decision whether to initiate proceedings in accordance with the opportunity principle. The prosecutor may also close the case if s/he considers that it does not warrant criminal proceedings, for example because there is insufficient evidence that an offence has been committed. S/he may also refer a case to an investigating magistrate if it is serious or complex or requires in-depth

investigation. S/he may bring the case before a trial court under the so-called "direct summons" procedure if s/he considers that the facts constitute an offence. S/he may also bring a prosecution under the procedure for appearance on prior admission of guilt, if the person in question admits the offence.

82. The Public Prosecutor's Office has a virtual monopoly on the instigation of proceedings in cases of transnational bribery. The only exception concerns bribery of public officials of EU Member States and public officials of the European Communities (article 435-6 CP). However, even this exception is restricted to such acts committed in France, since offences committed in other countries can be prosecuted only at the Public Prosecutor's behest (article 113-8 CP). Act 2007-291 of 5 March 2007 (article 85 CCP) further limited the scope of the exception by making it impossible for a victim to involve an investigating magistrate directly (by bringing a civil party petition), thus instituting a systematic filter by the Public Prosecutor's Office: the victim must first lay a complaint before the Public Prosecutor, who then decides whether to proceed with the case or not. Under article 85 CPP, if the Public Prosecutor's Office has taken no action in the three months after the complaint was filed, or if the case is closed, the individual may file a complaint and bring a civil party petition before an investigating magistrate. The possibility provided for at article 85 of referring a case to an investigating magistrate if the Public Prosecutor takes no action or closes it does not apply to cases of bribery of foreign public officials from non-EU countries, since under article 435-6 CP the Public Prosecutor's Office has a strict monopoly on such cases.

(ii) *The role of the Public Prosecutor's Office in the conduct of proceedings*

- The greater role of the Public Prosecutor's Office in instigating investigations and prosecutions

83. Under the opportunity principle, the Public Prosecutor's Office has the power to block the instigation of proceedings for bribery of foreign public officials, except EU officials. In an exception to ordinary law, article 435-6 CP gives the Public Prosecutor's Office a monopoly on proceedings for the offence of bribery of foreign public officials. For EU officials, the instigation of proceedings may be delayed, via the Public Prosecutor's Office filter introduced by the 2007 Act into article 85 CPP, whereby a victim cannot take the matter to an investigating magistrate until either the Public Prosecutor's Office gives notice of its decision to close the case or no action is taken in the three months after the complaint has been filed. Where the Public Prosecutor's Office has decided to initiate a preliminary investigation, it is also possible that in practice the victim will wait for the results of the investigation, the length of which is not limited by law (even though legally there is nothing to stop the victim from bringing a civil party claim after the three-month period expires).

84. The possibility for an anti-bribery NGO to bring a civil party claim, recently recognised by the Cour de Cassation⁷⁷ in the so-called "ill-gotten gains affair", does not apply to the prosecution of bribery of foreign public officials (with the rare exception of bribery of EU public officials committed in France, under article 85 CPP).⁷⁸ The tempering of the Public Prosecutor's Office monopoly that NGOs could usefully bring in such cases is therefore made impossible by article 435-6 CP. During the visit, civil society representatives, lawyers and law professors as well as several investigating magistrates deplored a monopoly that constitutes an exception to ordinary law. Article 435-6 CP has been described in legal doctrine as a "real legal anomaly".⁷⁹ During the on-site visit, several panellists pointed out that in the "ill-gotten gains" affair the filing of a complaint for bribery of foreign public officials had at one time been envisaged. However, the NGOs concerned considered that in such a politically and financially sensitive

⁷⁷ Cour de Cassation judgment Cass. Crim. 9 November 2010, 09-88272 recognised, for the first time, the possibility for an anti-corruption association to take legal action in defence of its collective interests.

⁷⁸ Before the Cour de Cassation judgment, the possibility for associations to bring civil party claims was recognised by the provisions of article 2 et seq. CPP, where their purpose was to defend certain victims or certain interests defined by law.

⁷⁹ See *La Semaine Juridique*, Edition Générale no. 23, 4 June 2012, 674, "Affaire Karachi: une nouvelle consécration du droit à la vérité", annotation of a judgment by Chantal Cutajar.

matter, the Public Prosecutor's Office monopoly would have resulted in the case being closed. The press and the NGOs have been highly critical of the Public Prosecutor's Office's inertia in the case at various stages in proceedings.⁸⁰

85. At the time of the visit, the Cour de Cassation handed down a judgment in the Karachi case which could help, in certain cases, to limit the Public Prosecutor's Office's refusal to investigate.⁸¹ In this case, the examining chamber of the Paris Appeal Court had initially followed the public prosecutor's submission and found the civil party claims of bribery of foreign public officials to be inadmissible since the Public Prosecutor's Office had a monopoly on proceedings under article 435-6 CP. The Cour de Cassation overturned the decision on the grounds of the link of indivisibility between the payment of commission to the Pakistani authorities and the murders (a car-bomb attack that killed 11 people), a link which enabled the civil parties to set in train public action for all the facts relating to the crime. The Court thus circumvented the Public Prosecutor's Office monopoly and extended the powers of the investigating magistrate, even though for the time being the scope of the judgment remains limited to offences connected with a "deliberate attempt on a person's life". A commentary on the judgment⁸² makes the point that "the judgment reveals the still considerable obstacles that hamper prosecutions for bribery of public officials, including in France", concluding that "a framework law is clearly needed".

86. In most cases, however, since the prosecution of bribery of foreign public officials is not instigated by a victim, there is no counterweight to the Public Prosecutor's Office monopoly, as the figures suggest. France indicates that, of the 33 proceedings initiated in the French criminal justice system, public prosecutors have closed only three of them to date. However, the role of the Public Prosecutor's Office is also measured by the treatment given to publicly available allegations of bribery of foreign public officials. No information was provided as to the reasons why 38 cases listed by the Working Group⁸³ in which French companies are allegedly involved have not given rise even to the opening of a preliminary investigation in France. The French authorities regard them as "unknown", even though they have been duly brought to the attention of its representatives in the Working Group. Six of the 38 cases concern the same leading French group in the energy and transport sector. It is because the role of the Public Prosecutor's Office lies at the heart of public action relating to bribery of foreign public officials, through the instigation of a preliminary investigation, the decision to prosecute and the conduct of the judicial investigation, that the question of its independence is so particularly acute.

- The greater role of the Public Prosecutor's Office in the conduct of investigations

87. In theory, subsequent proceedings could give the investigating magistrate a greater role, at least in complex cases (and most transnational bribery cases are complex) where the Public Prosecutor's Office may decide to refer the matter for judicial investigation. The proportion of cases to date involving investigating magistrates, who are independent, gives reassurance as to their role in investigations into transnational bribery offences. However, the figures are not sufficient to dispel the climate of suspicion as to the independence of the Public Prosecutor's Office which manages these proceedings. They must also be seen from the standpoint of the very low number of cases tried or ready for trial in France, 12 years after the entry into force of the foreign bribery offence. This number is so low in relation to the size of the French economy that close attention must be paid to the role of the Public Prosecutor's Office in the conduct of judicial investigations, especially through the additional charges transmitted to the Public

⁸⁰ See: www.transparence-france.org/ewb_pages/p/pcpc-Transparence-International.php and www.asso-sherpa.org/nos-programmes/ffid/campagne-ra/bma (in French).

⁸¹ Cass. Crim., 4 April 2011, no. 11-81.124, F P+B: JurisData no. 2012-006071

⁸² See annotation by Chantal Cutajar *Ibid.*

⁸³ Some of them have been the subject of investigations, prosecutions or sanctions in other countries (at least on the passive side), others have been revealed in the press.

Prosecutor's Office by investigating magistrates, possibly in connection with cases that may have started with another economic crime.

88. Certain affairs that have received extensive media coverage have helped to create a climate of suspicion as to the independence of the Public Prosecutor's Office in cases with a political and financial dimension. In the "ill-gotten gains" affair, for example, when the judicial investigation turned up new elements and the investigating magistrates asked the Public Prosecutor's Office for a supplementary indictment so that they could extend their investigation, the Public Prosecutor's Office refused. It took a new complaint from an NGO,⁸⁴ alleging new offences, for the Public Prosecutor's Office to initiate a preliminary investigation and then, on the basis of the results, to bring supplementary indictments for concealment and money-laundering. The NGO representatives and a magistrate interviewed during the visit said that the complaint had been filed "in the hopes of overcoming the inertia of the Public Prosecutor's Office and getting a judicial investigation opened" into the new evidence, so that the investigating magistrate could extend and continue his investigation.⁸⁵

89. In practice, there is a general tendency for the Public Prosecutor's Office to deal with a growing number of cases itself. Many observers, including during the visit, drew attention to the plan to phase out independent investigating magistrates (even if the planned reform which, after Phase 2, sought to do away with them altogether did not come to fruition).

90. Even after investigating magistrates have been asked to conduct a judicial investigation, they still need the human and financial resources to carry it out. The resources in terms of specialist investigators made available to investigating magistrates have diminished considerably since Phase 2. In addition, the scope of the investigations carried out by the investigating magistrate continues to be overseen throughout the procedure by the Public Prosecutor's Office, which may refuse to grant them a supplementary indictment so that they can extend their investigation (as examined above). France emphasises that, where a connection is established between the facts on which the initial referral to the investigating magistrate is made and the new facts, a supplementary indictment is generally issued in the interests of the proper administration of justice.

91. The greater role played by the Public Prosecutor's Office to the detriment of investigating magistrates has generated considerable comment, especially since the so-called Perben laws.⁸⁶ The assertion of the Minister of Justice's powers in the conduct of criminal cases, even extending to individual cases, and the introduction of the "guilty plea" procedure are the aspects likely to have an impact on enforcement of the offence of bribery of foreign public officials. The aim of "decriminalising corporate life", asserted in recent years at the highest level of the State, is part of this context (see Section B. 3. (b) of this report).⁸⁷

⁸⁴ The complaint filed on 3 May 2011 by an NGO (with the legal backing of a second NGO) and by a Gabonese citizen related to the conditions under which the heads of state of Congo-Brazzaville, Gabon and Equatorial Guinea and members of their entourage acquired substantial property and other assets in France.

⁸⁵ For more information about this complaint and the context in which it was made, see: www.asso-sherpa.org/nos-programmes/ffid/campagne-ra/bma (in French).

⁸⁶ The Perben laws are two acts of parliament, the bills of which were tabled by Dominique Perben, Minister of Justice from 2002 to 2005. The two laws (Act 2002-1138 of 9 September 2002, to orient and plan the justice system, known as Perben I, and Act 2004-204 of 9 March 2004 adapting the justice system to evolutions in criminal behaviour, known as Perben II, the more important of the two) concern both criminal procedure and criminal law. They are "modernisation" acts.

⁸⁷ In an interview with the newspaper *Le Monde*, Mireille Delmas-Marty, professor at the Collège de France, said that "the French Public Prosecutor's Office is not an independent authority. If it can not only investigate and prosecute but also sometimes judge, that calls into question the independence and impartiality that are the two conditions of a fair trial. Furthermore, the transfer of powers to the Public Prosecutor's Office may favour two-speed justice: over-criminalisation of ordinary delinquency on the one hand [...] and decriminalisation in corporate law on the other hand."

- The issue of the independence of the Public Prosecutor's Office

92. France stated in its answers to the questionnaires that there had been no legislative change to the status of the Public Prosecutor's Office since Phase 2 and recalled that article 64 of the French Constitution enshrines the principle of the independence of the judicial authority, "even if it is implemented differently for the Public Prosecutor's Office, which is placed under the authority of the Minister of Justice and does not benefit from the permanence provided at the end of aforementioned article 64". France was not considering any reform affecting the independence of the Public Prosecutor's Office at the time of the on-site visit. And yet this situation, the pitfalls of which were extensively highlighted in the Phase 2 report, has been the subject since Phase 2 of two judgments by the European Court of Human Rights (see below). France argued at the time of the Phase 2 visit that several judicial investigations involving major French exporters or foreign dignitaries had been opened on an indictment from the Public Prosecutor's Office; this was supposed to show that the decision to prosecute was not influenced by improper considerations. However, that argument can no longer have the same weight 12 years later, given that only three minor cases of bribery of foreign public officials have come to judgment and given rise to penalties against individuals (suspended in two of the three instances) and that only one company has been convicted at first instance. The fact that the three final convictions originated from a direct summons merely reflects their extreme simplicity. The French authorities point out that the Public Prosecutor's Office has been responsible for opening the 13 judicial investigations under way at the time of the on-site visit. However, this remains a small number in view of the size and characteristics of the French economy. Furthermore, the important role played by the Public Prosecutor's Office at the various stages of a case means that the issue has to be reassessed with care.

93. As noted earlier, the Public Prosecutor's Office is the institutional and operational channel through which the government's criminal justice policy as expressed by the Minister of Justice is implemented. To that end, the Minister of Justice issues general instructions for public action to the prosecutors of the Public Prosecutor's Office. However, recent reforms have extended this hierarchical authority. Since the Perben II law and new article 30 CPP, the Minister of Justice has also been able to "report violations of the criminal law of which he has knowledge to the Prosecutor General (representing the Public Prosecutor's Office within the appellate courts) and charge him, by means of written instructions attached to the case file,⁸⁸ to initiate prosecutions or to cause them to be initiated, or to seize the competent court of such written orders that the Minister considers to be appropriate" (this relates only to instructions to prosecute, since instructions to close cases are prohibited).⁸⁹ The question of independence is particularly acute in view of the fact that the Minister of Justice can intervene in proceedings by giving the Public Prosecutor's Office not only general instructions, such as circulars, but also individual instructions. In addition, although written instructions are placed on record, the practice of oral instructions given over the telephone cannot be ruled out and has been the subject of comment in both legal articles and the media. One magistrate interviewed during the on-site visit described prosecutors' practice, in their reports of "reported" investigations, of concluding them with the words "unless you advise otherwise, I envisage...", which in practice amounts to sending a request for permission to proceed up the hierarchical ladder, perhaps as far as the Minister of Justice in person. Nevertheless, the French authorities said after the visit that the question of individual instructions was under review, since the President of the

www.lemonde.fr/idees/article/2010/04/05/reformer-le-parquet-est-ineluctable-par-mireille-delmas_marty_1329004_3232.html (in French).

⁸⁸ France points out that until the 2004 Act individual instructions from the Ministry of Justice were set out in article 36 CPP, with a wording very similar to that of the last paragraph of article 30 (it was not until the Sapin-Vauzelle Act of 4 January 1992 that the instructions had to be given in writing, and not until the Act of 24 August 1993 that they were attached to the case file).

⁸⁹ France also points out that under article 36 CPP, the Prosecutor General can issue individual instructions to district prosecutors. The Minister of Justice may address his reports only to Prosecutors General; article 30 CPP does not authorise him to forbid the exercise of public action, i.e. to give instructions to close a case; his instructions must be given in writing and placed on record; at the hearing, the prosecutor obeys only the law and his conscience (article 33 CPP and article 5 of the order of 22 December 1958): he can speak freely.

Republic elected in May 2012 had stated in his election manifesto: "I will guarantee the independence of the justice system and of all prosecutors [...] I will prohibit government intervention in individual cases." Shortly before the finalisation of this report, the review resulted in the publication of two circulars by the Minister of Justice (the citation and contents of the circulars are discussed below), marking an evolution in the Ministry's criminal justice policy in this area.

94. Consequently, in "reported" cases such as those involving bribery of foreign public officials, as already noted in Phase 2, the considerations of the head of the Public Prosecutor's Office (a prosecutor appointed by presidential decree⁹⁰) may, where appropriate, be informed, in addition to the technical opinion of specialist assistants, by "discretionary criteria" which weigh up the foreseeable consequences that a decision to prosecute might have in political and economic terms. The possible inclusion of this type of criterion has been the subject of extensive comment, both in legal doctrine and in the press, with regard to several major affairs. The absence to date of any investigation of several major French companies raises the same type of question as to the consideration given to political and economic factors prohibited by Article 5 of the Convention. This situation gives all the more cause for concern in that, as emphasised by all the representatives of civil society interviewed, in cases of bribery of foreign public officials, only the Public Prosecutor's Office is empowered to instigate proceedings, which strengthens the suspicion of a lack of independence in relation to the central authority and a risk of subordination to the injunctions of the executive.

95. The European Court of Human Rights (ECHR), when asked about the status of French prosecutors, found in its Medvedyev judgment of 10 July 2008⁹¹ that the French Public Prosecutor's Office was not a "judicial authority" because it was not independent of the executive. In France, public prosecutors are historically placed "under the direction and control of their immediate superiors and under the authority of the Minister of Justice", which means that the government can guide their decisions with the aim of setting its criminal justice policy. The judgment, which confirmed consistent European case law, has since been reinforced. In a judgment of 23 November 2010,⁹² the Court again asserted that "on account of their status, the members of the Public Prosecutor's Office in France do not fulfil the requirement of independence with regard to the executive which is one of the guarantees inherent in the concept of an independent judiciary." Following what it regarded as "a ringing endorsement of the assertion that the French Public Prosecutor's Office is neither independent nor impartial", the Criminal Division of the Cour de Cassation took a position on the new conditions for appointing public prosecutors. A reform of the status of the Public Prosecutor's Office therefore seems necessary.

96. At the time of finalising this report, France forwarded two circulars from the Minister of Justice dated 31 July 2012⁹³ and 19 September 2012⁹⁴ that mark a significant evolution in the position of the French authorities with respect to the need to undertake such a reform. These circulars set out the decision of the Minister of Justice (i) not to address individual instructions to prosecutors; and (ii) not to override unfavourable decisions of the Supreme Council of Prosecutors on prosecutor nominations by the Executive. The 19 September circular provides that "these evolutions respect the existing legal framework which is destined to be modified in due course." At the time of drafting this report there was not yet any draft legislation in this regard.

⁹⁰ After an opinion (advisory and not assenting, as is the case for trial judges) of the Conseil Supérieur de la Magistrature, a constitutional body.

⁹¹ ECHR, Grand Chamber, 29 March 2010, Medvedyev and others v. France, application no. 3394/03.

⁹² ECHR, 23 November 2010, Moulin v. France, application no. 37104/06.

⁹³ www.justice.gouv.fr/la-garde-des-sceaux-10016/transparence-des-projets-de-nomination-des-magistrats-du-parquet-24488.html (in French).

⁹⁴ JUS D 1234837 C http://www.textes.justice.gouv.fr/art_pix/1_Circulaire_20120919.pdf (in French).

Commentary:

The examiners welcome the recent evolution evidenced by the two circulars by the Minister of Justice with the aim of defining the new relationship between the Ministry of Justice and prosecutors. They welcome, in particular, the decision of the Ministry of Justice not to override unfavourable decisions of the Supreme Council of Prosecutors in relation to the nomination of prosecutors and to put an end to the possibility of giving individual instructions to prosecutors.

The examiners, without expressing an opinion on the existence and role of investigating magistrates in French law, note the quasi-monopoly (strengthened since Phase 2) enjoyed by the Public Prosecutor's Office in instigating investigations and prosecutions in cases of bribery of foreign public officials and the important role it has in defining the scope of investigations, including in the framework of judicial investigations. Under these circumstances, and given the large number of allegations of bribery of foreign public officials that have not led to the opening of any investigation, even of a preliminary nature, they are greatly concerned by the lack of independence of the Public Prosecutor's Office, on which the European Court of Human Rights has given a clear ruling and on which the French Cour de Cassation has also taken a position.

They therefore encourage France to pursue the reforms set in motion by the two circulars by the Minister of Justice by modifying its legal framework: (i) to ensure that the Public Prosecutor's Office monopoly on the instigation of investigations and prosecutions, and its role in the conduct of judicial investigations, is exercised independently of the executive in order to guarantee that investigations and prosecutions in cases of bribery of foreign public officials are not influenced by factors prohibited by Article 5 of the Convention, namely considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved; and (ii) to break with past practices of individual instructions, as announced by the circular.

The examiners also recommend, as in Phase 2 that France allow the initiation of prosecutions following complaints by victims of corruption in any foreign State on the same basis as is foreseen in cases of corruption of EU public officials.

- Use of the "guilty plea" or procedure for appearance on prior admission of guilt

97. Act 2011-1862 of 13 December 2011 extended the use of the procedure for "appearance on prior admission of guilt" (*comparution sur reconnaissance préalable de culpabilité*, CRPC) to offences punishable by 10 years' imprisonment and hence to the offence of bribery of foreign public officials. The possibility of using the CRPC procedure in transnational bribery cases was also a recurring demand from certain NGOs. Henceforth, under article 495-7 CPP as amended, the public prosecutor may, of his own motion or at the request of the party concerned or his attorney, use the CRPC procedure provided that the accused admits the offence. The procedure may be used only with the consent of the accused, the Public Prosecutor's Office and the civil party. In addition, with the insertion of article 180-1 CPP, the CRPC procedure may now be used by an investigating magistrate on completion of a judicial investigation, in the framework of an order referring the matter to the public prosecutor for application of the CRPC.

98. A person convicted under the CRPC procedure does not have to appear before a trial court for an examination of the facts of the case, only for a hearing to approve the procedure (article 495-9). The judge hears the person in order to verify his consent (article 496-11) and to verify the reality of the offence and its legal qualification. The prosecutors interviewed said that the approval rate for such procedures was very high. The approval hearing is held in open court, but all the prosecutors interviewed emphasised that none

of the facts of the case are revealed, thus considerably limiting publicity. The order has the effect of a conviction (article 495-11 CPP). It may be appealed by the convicted person or the Public Prosecutor's Office. Where the convicted person refuses to accept the proposed sentence or the presiding judge of the regional court or his deputy issues an order withholding approval, and in the absence of any new facts, the public prosecutor refers the matter to the criminal court or demands the opening of a judicial investigation (article 495-12 CPP).

99. Prosecutors were informed, in a general circular issued on 9 February 2012, that use of the CRPC procedure in transnational bribery cases should be strictly limited to the simplest cases, in which the corruption pact was an isolated event, *outside the established commercial practices of the company in question*. As things stand at present, in theory the cases where the CRPC procedure may apply are therefore limited. France justifies this restriction on the grounds that the first phase of the procedure is not public (even though, as described above, the judge hears the approval petition in open court). However, as several magistrates and lawyers pointed out during the visit, as this restriction to the most simple cases of transnational bribery is not contained in statute, the procedure could in theory apply to more consequential cases (and/or the circular could be replaced), provided that the defence agreed.

100. According to the information provided by France, the CRPC procedure has not yet been applied to a case of bribery of foreign public officials. France points out that the procedure is used to prosecute legal persons, especially for economic and corporate offences such as illegal work or unintentional injury committed in a work context. It is possible, in theory, that application of the procedure will increase the number of legal persons convicted of transnational bribery, even though the representatives of the Ministry of Justice, of the Public Prosecutor's Office and of investigating magistrates interviewed during the visit emphasised that this possibility should be limited to the cases stipulated in the 2012 circular, i.e. "an isolated incident and a first offence".

101. The procedure has advantages in terms of reducing the time and cost of bringing cases to justice. Nevertheless, it has generated criticism both in the press and from legal commentators, who consider in particular that it is part of an ongoing process in France of decriminalising corporate law.⁹⁵ During the on-site visit, representatives of civil society and some prosecutors emphasised that an independent Public Prosecutor's Office was necessary for society to accept such a procedure, and hence for it to be successful, failing which it would carry the twin flaw of a risk of political interference and a lack of transparency. France emphasised that certain NGOs demanded the possibility of using the CRPC in relation to foreign bribery. The panellists also pointed out that, given the limited oversight exercised by judges; it was illusory to suppose that they would be in a position to assess whether the asserted facts represented the whole truth. Other representatives of civil society and some law professors expressed the fear that, under the current conditions of prosecutorial dependence, the procedure would be used only for individuals and ultimately would serve only to "make the underdog pay".

102. France stated in its answers that no investigation had been closed or suspended to date using this procedure. Since 2006, according to information provided by France on the basis of criminal records,⁹⁶ the CRPC procedure had never been used in more than 6% of total annual convictions by type of economic crime (the 6% corresponding to convictions for the offence of misuse of corporate assets). France also confirmed that, for all bribery offences, the CRPC procedure had been used in 22 out of 615 convictions in 2010, a rate of 3.6%.

⁹⁵ See esp. Mireille Delmas-Marty, of the Collège de France, ref. *Ibid.*

⁹⁶ *Ibid.*

Commentary:

The examiners consider that extending the use of the procedure for appearance on prior admission of guilt (CRPC) to offences punishable by imprisonment for 10 years and hence to the offence of bribery of foreign public officials, could lead to an increase in the number of convictions, especially of legal persons. However, the examiners consider that France should urgently take the necessary measures to ensure that the central role played by the Public Prosecutor's Office in the CRPC procedure is exercised in complete independence from the executive in order to guarantee that the agreements presented in the framework of the procedure to judges (who have limited oversight) are not influenced by factors prohibited by Article 5 of the Convention, namely considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

The examiners also recommend that France, as necessary and in compliance with the relevant rules and procedures, make public by all appropriate means, and respecting the fundamental rights of the Defendant, certain elements of the CRPC, such as the terms of the agreement, especially the approved penalty or penalties. In the absence of any application of the procedure in connection with bribery of foreign public officials at the time of writing, and given its very limited application to other economic crimes, the examiners recommend that the Working Group follow up its application as practice develops.

(b) Authorities responsible for investigations and prosecutions

(i) Specialisation of law enforcement authorities

103. In France, the court of the place where the offence was committed is responsible in principle for the investigation, prosecution and trial of offences of bribery of foreign public officials. However, as noted in Phase 2, the fact that cases involving bribery in foreign countries are often highly complex had led the public authorities to give specialist economic and financial jurisdictions (JRS) within the jurisdiction of each appeal court concurrent competence for offences of bribery of foreign public officials involving EU nationals, while the Paris Regional Court was given similar competence, nationwide, for non-EU offences.

104. This move towards specialisation continued in the wake of the Perben II law, whereby eight specialist interregional jurisdictions (JIRS), established in Paris, Lyon, Marseille, Lille and Bordeaux, inter alia, were given subsidiary competence for "highly complex" offences within the EU. "Highly complex" bribery cases within the EU remained within the competence of the JRS. However, these reforms have not produced the hoped-for results: the Paris Appeal Court jurisdictions were responsible for 15 of the 16 judicial proceedings in international bribery cases pending at the end of 2007 (the Paris Regional Court for eight and the Paris JIRS for seven). The other was being dealt with by the Pontoise Regional Court, within the competence of the Versailles JRS, in the Paris region.⁹⁷ In its 2008 annual report, the Central Corruption Prevention Department (*Service Central de la Prévention de la Corruption*, SCPC) raised the question whether the specialist jurisdictions, with the exception of Paris, actually had specialist knowledge of the bribery offence.

105. This was the context in which parliament, with the dual aim of simplification and efficiency – that of enabling all international bribery cases to benefit from the experience acquired by the Parisian judiciary in such matters – decided in 2007 to give the Paris Regional Court alone concurrent competence with the locally competent courts for all cases of international bribery, including bribery within the EU, whatever the complexity of the case. The specialised jurisdictions (JRS or JIRS depending on the degree of

⁹⁷ Figures cited in Report 51 by Mr. Portelli (Senate, session 2007-8) and in Report 171 by Mr. Hunault (National Assembly, session 2007-8) on the anti-corruption bill, pp.11 and 53 respectively.

complexity of the offences) continued to have competence for related offences (money laundering, misuse of corporate assets, tax evasion). In practice, referrals to Paris are made in the framework of informal consultations between the respective Public Prosecutor's Offices, which decide on the most appropriate level of competence according to the facts and, where relevant, indications received from the Ministry of Justice. Where competence is not given to Paris, the locally competent court remains responsible for prosecuting the offence. That occurred in a case involving EU public officials initially sent by the European Anti-Fraud Office (OLAF) to the Paris Public Prosecutor's Office which, after examination by the Paris authorities, was referred to the Mulhouse Public Prosecutor's Office, i.e. the jurisdiction of the place where the offence was committed.

(ii) *The concurrent competence of the Paris specialist jurisdiction in practice*

106. As stated above, the decision to give concurrent competence to the Paris jurisdiction alone was mainly motivated, apart from the concern to guarantee the consistency of public action in cases regarded as "sensitive" by the public authorities, by the finding that such cases are often highly complex and need to be dealt with by prosecutors who are thoroughly familiar with the issues. In practice, however, making the Paris jurisdiction competent for international bribery offences raises questions of interpretation, in the absence of clear criminal justice policy on the issue, leaving open the possibility that cases which parliament intended the Paris specialist jurisdiction to deal with in fact remain in the hands of local and often ill-equipped jurisdictions. Discussions during the visit suggested a certain lack of consistency in the courts' approach to such cases.

107. Although the statistics suggest that cases are frequently referred to the Paris jurisdiction, it cannot be ruled out that cases opened in relation to other offences in relation to which local courts have competence, such as misuse of corporate assets, remain in their hands and that no active attempt is made to refer them to Paris because prosecutors are not sufficiently aware of the Paris jurisdiction's competence. The two circulars issued in 2008 and 2012, relating respectively to the provisions of the Act of 13 November 2007 and to the evaluation of France, recalled the competence of the Paris jurisdiction only very succinctly.⁹⁸ Given that some courts, including specialist jurisdictions, are under-equipped, this situation can have an impact on investigations. One lawyer suggested that this had occurred in a case investigated in the south of France which revealed suspicions of foreign bribery. Having found that gathering evidence to prove the offence would require legal assistance from a North African country deemed uncooperative, the prosecutor reportedly decided not to investigate further. The Ministry of Justice, in one of its recent reports on criminal justice policy, noted the difficulty experienced by certain local Public Prosecutor's Offices, in national bribery cases, of establishing evidence of the offence.

108. The fact that Nanterre Regional Court (one of France's largest, whose jurisdiction includes the business district of La Défense, where many multinationals have their headquarters) has not dealt with any cases of international bribery also raises questions about certain courts' commitment to this issue. Steps to define "guidelines" could allow for a consistent criminal justice response nationwide, in order to concentrate law enforcement actions in the Paris specialised jurisdiction with a view to guaranteeing the effectiveness of its engagement in the fight against international bribery. However, the Paris jurisdiction's commitment to fighting international bribery can be effective only if it has sufficient resources at its disposal.

(iii) *Human resources provided for the Paris Regional Court to exercise concurrent competence*

109. Giving the Paris Regional Court concurrent competence in foreign bribery cases could have been expected to have been accompanied by an increase in personnel. Instead, the resources of the court's

⁹⁸ Circular CRIM 08-02/G3 of 9 January 2008 presenting Act 2007-1598 of 13 November 2007 relating to the fight against corruption and circular CRIM/2012-5/G3 of 9 February 2012 relating to the OECD evaluation of France in 2012.

financial section, which deals with almost all transnational bribery proceedings, have been steadily reduced over the last five years, as emphasised by the investigating magistrates interviewed on-site. According to the figures provided by France, the section had 27 magistrates in 2007 (14 prosecutors and 13 investigating magistrates) but only 18 at the time of the visit (8 prosecutors and 10 investigating magistrates), a reduction by over a third. This fall has been accompanied by a reduction in the number of specialist assistants tasked with helping the prosecutors. The Paris economic and financial pole had only four specialist assistants for a total of around 50 financial prosecutors in April 2012, compared with seven in Phase 2, and six fewer than the theoretical complement of ten.

110. In Phase 2, the Working Group recommended that France ensure that, within the framework of the specialisation of the justice system in economic and financial matters, sufficient resources were allocated to investigations and prosecutions in cases of transnational bribery, especially to the Paris economic and financial pole (Recommendation 10). During the on-site visit, the representatives of the Paris Public Prosecutor's Office linked the reduction in the resources of the Paris Regional Court's financial section to the budget cuts affecting the financial justice system as a whole. However, this does not seem to be borne out by the Court's greater commitment to prosecuting small-scale fraud, evidenced by the increase in numbers in the section of the pole that deals with fraud.⁹⁹ Legal professionals, anti-corruption associations and prosecutors' associations regard it as a sign of the lack of interest in white-collar crime (a category that involves "the powerful") expressed in particular in past government plans to "decriminalise corporate law".

111. The reduction in resources at the Paris economic and financial pole is one plausible explanation for the small number of cases dealt with by the Paris jurisdiction (15 of 16 proceedings ongoing at the Paris Public Prosecutor's Office according to the figures provided at the time of the on-site visit). Although the Paris jurisdiction has dealt with almost all cases of international bribery to date, this number seems small in relation to the Paris jurisdiction's specialisation and the potential number of cases, not only in the Paris region but nationwide. The fact that the number of prosecutors in the Paris Public Prosecutor's Office has almost halved in four years has an impact in particular on the level of their investment in investigating allegations of bribery. The on-site visit revealed great cautiousness on the part of the Public Prosecutor's Office when information reaches it through non-official channels, such as the press. The examiners also found that no web searches were made to keep abreast of cases having ramifications in France, or of the cases compiled by the Working Group. Mutual legal assistance requests do not generally lead to the opening of proceedings. The statistics confirm that it is above all official reports that give rise to proceedings, followed by victims' complaints; mutual legal assistance requests had given rise to only one investigation ongoing at the time of the on-site visit. The lack of initiative on the part of the Public Prosecutor's Offices undeniably detracts from detection of the offence. It is all the more problematic given the restrictions introduced since 2007 on the possibility for the parties concerned to apply directly to an investigating magistrate.

Commentary:

The examiners welcome the efforts made by the French authorities to have investigations and prosecutions in cases of bribery of foreign public officials conducted by specialised economic and financial investigators and prosecutors. However, in view of the Paris jurisdiction's specialisation and the potential number of cases not only in Paris but nationwide, they deplore the low number of international bribery cases that it has dealt with (15 of 16 ongoing proceedings on the basis of the figures provided at the time of the on-site visit).

⁹⁹ In this section, the number of prosecutors rose from 20 in 2009 to 24 at the time of the on-site visit.

In order to guarantee effective prosecution of the offence, the examiners recommend that France issue a comprehensive reminder, for example by way of instructions to all prosecutors and judges, that the Paris jurisdiction is competent to deal with all international bribery cases, whatever their degree of complexity, and, in this context, to implement mechanisms within local courts that enable prosecutors to identify cases that could be referred to the Paris court. Greater investment by prosecutors in the detection of international bribery offences is also crucial, especially those committed in other countries and having possible ramifications in France. The examiners therefore recommend that France develop new tools within Public Prosecutor's Offices that will enable detection of such cases, such as more systematic use of the internet and of the cases compiled by the Working Group.

The wish to see these cases dealt with by the Paris jurisdiction can be fulfilled only if it has sufficient resources. In this context, the examiners deplore that the Phase 2 recommendation, according to which sufficient human and financial resources be allocated to investigations and prosecutions in cases of bribery of foreign public officials, particularly within the Paris Regional Court, has not been implemented.

(c) *Means of investigation and prosecution*

(i) *Investigation units supporting the prosecution of bribery of foreign public officials*

112. Several specialist units of the judicial police may be involved in investigating international bribery. At a national level, the main unit is the Central Anti-Corruption Brigade (*Brigade centrale de lutte contre la corruption*, BCLC) attached to the National Division for Financial Investigations (*Division nationale des investigations financières*, DNIF), itself part of the Central Judicial Police Directorate (*Direction Centrale de la Police Judiciaire*, DCPJ). At local level, the role is devolved to the regional and interregional directorates (DRPJ and DIPJ) of regional judicial police services (SRPJ) and to investigating units (*sections de recherché*) of the national gendarmerie. In Paris, the role is assumed chiefly by the Financial Brigade and the Economic Crime Brigade (BRDE) of the Paris police prefecture. In practice, the Parisian prosecutors tend to rely on the BCLC, because of its proximity, or on the specialist units of the Paris police prefecture, which all have officers well-versed in economic crime.¹⁰⁰ Some prosecutors at the on-site visit referred to the risk of interference by the Executive in investigations in Paris, an example of which is the subordination of the police to the Ministry of the Interior. On this point, some mentioned the need to rethink the status of the police in order to guarantee it greater independence.

113. The situation outside the Paris region gives more cause for concern. The lack of units qualified to conduct financial investigations, regularly noted by the Ministry of Justice, can harm prosecutions. The review earlier in this report of the distribution of proceedings in international bribery cases seems to bear out this finding: almost no cases have been brought before the competent jurisdictions, with the exception of the Paris jurisdiction, where the best-trained investigators are to be found. The examiners noted, in this context, the absence of proceedings in the rest of France, with the exception of one investigation being conducted by the Strasbourg DRPJ at the time of the Phase 3 visit.

114. The creation of the BCLC in 2004 was intended to address the lack of resources by giving prosecutors the support of a specialist unit with national competence. After eight years in operation, the results seem mixed: by April 2012, the BCLC had been entrusted with only 16 investigations in connection

¹⁰⁰ At the time of writing, of 16 proceedings in progress at the Paris Regional Court, the majority were being investigated by the BCLC, another set of proceedings was being investigated by the two specialist units of the Paris police prefecture, and one case was being investigated by the National Brigade for combating Tax Crimes (*Brigade nationale de répression de la délinquance fiscale*). For the proceedings under way at the Paris JIRS, concerning various charges including bribery of foreign public officials, the preliminary investigation was entrusted to the DNIF.

with the 33 proceedings instigated by the judicial authorities since bribery of foreign public officials became an offence in France, despite two circulars, in 2005 and 2009, recalling the unit's mission.¹⁰¹ During the on-site discussions, one of its representatives linked this situation to the insufficient efforts made to detect the offence. Action should indeed be taken in this area. Although the circulars issued to date are indispensable insofar as they emphasise the BCLC's role, they do not embrace criminal justice policy as a whole, especially the need to raise awareness of the offence among investigators within the jurisdiction of provincial courts. Without precise guidelines for them or a proactive stance on the part of the magistrates who supervise them, it is likely that bribery cases will never come to light and be referred to the brigade for more detailed investigation. Even then, the BCLC can only investigate cases if it has sufficient resources. With only 14 investigators to deal with both domestic and transnational bribery offences and a total of 79 cases in progress at the end of 2011, the unit is heavily overworked. It should be remembered that the Working Group had recommended that France ensure that sufficient resources be allocated to the brigade (Recommendation 10).

Commentary:

The lead examiners observe the absence of proceedings instigated for offences outside the Paris jurisdiction, with the exception of one case within the jurisdiction of the Mulhouse Regional Court. While noting the French authorities' efforts to encourage use of the Central Anti-Corruption Brigade, a specialist central judicial police unit, for investigations relating to the offence, they consider that cases of international bribery can be referred to the brigade only if the devolved investigation units liable to detect them are made sufficiently aware of the offence and have sufficient resources at their disposal.

Consequently, the examiners recommend that France: issue instructions to the investigators and to the prosecutors who supervise them, in order to call their attention to the importance of systematically inquiring into a possible foreign bribery offence in the economic and financial cases they deal with; make it easier to establish the offence and; recall the fundamental role assigned to the central brigade. Steps should be taken in Public Prosecutor's Offices to monitor implementation of such instructions.

The wish to see international bribery cases dealt with as a priority by the central brigade can be fulfilled only if the brigade has sufficient resources. In this context, the examiners deplore the failure to implement the Phase 2 recommendation calling on the French authorities to give the brigade specific political and financial support in order to strengthen its resources. The examiners also consider that France should give thought to the status of the judicial police and its capacity to conduct investigations in transnational bribery cases that are not influenced by the considerations mentioned in Article 5 of the Convention.

(ii) *Investigative techniques*

115. The investigative powers of prosecutors responsible for bribery cases have been extended since Phase 2. Following the entry into force of the 2007 Act, they can now use certain investigative techniques that had previously been restricted to organised crime, including phone tapping at the preliminary investigation stage (and not just at the judicial investigation stage), undercover work, and sound and image recording of certain places or vehicles. These new methods complement new powers available in any investigation, in particular the possibility for investigators to obtain information from a computer system or database used by social or tax bodies or banks and, in principle, any public agency. As already noted, new resources have been allocated for the seizure of criminal assets. Many electronic databases are also

¹⁰¹ Circular of 23/02/2005 relating to the creation of the BCLC and circular of 20/01/2009 relating to the fight against bribery. The Brigade's role was again recalled in the circular issued on the occasion of the Phase 3 visit.

accessible. During the on-site visit, prosecutors and investigators said that they were generally satisfied with the investigative techniques available to them by law.

(iii) *Access to classified information*

116. Although law enforcement authorities seem to have sufficient means to conduct their investigations following recent changes to the law and new resources made available to them, one major procedural restriction was identified during the on-site visit with regard to access to documents covered by national defence classification. The definition of national defence classification in the Penal Code covers numerous activities associated with the "fundamental interests of the nation", including military and civil defence, diplomacy, internal security and protection of France's scientific and economic potential. In 2009, the Working Group decided to look into the issue and, at its request, France communicated a written memorandum outlining a Bill intended to define the terms and conditions for investigators to have access to places containing classified documents. The Bill was subsequently passed by Parliament in the form of a Military Planning Act (Act of 29 July 2009). The issue has caught the attention of prosecutors and police specialised in the fight against economic crime and a sector of civil society, in particular in connection with several cases where the executive power's use of the defence classification procedure was deemed extensive, who indicated that the procedure for lifting defence secrecy "has, on many occasions, demonstrated its limits."¹⁰²

117. The examiners in no way doubt the existence of the defence classification principle, the need for which is not disputed. However, they take an interest in the way that French law and legal practice balance the imperative need to safeguard the "fundamental interests of the nation" with the equally imperative need to investigate the perpetrators of criminal offences, especially in cases of bribery of foreign public officials. They noted the significant progress represented by the adoption of the 2009 Act on Lifting Defence Secrecy which was intended to bring about greater transparency and to facilitate criminal investigations in bridging a legal gap in this area. They are interested in the conditions attached to (i) the protection of information held by companies able to apply defence classification and (ii) prosecutors' access to defence classified information.

- The protection of information held by companies able to apply defence classification

118. The duty to classify documents covered by defence secrecy applies to all central administrations and agencies of the State concerned by defence secrecy and to any person in possession, even temporarily, of such a classifiable document, including in the framework of the award and performance of a contract. This therefore concerns arms companies that have entered into an agreement with the State for the control of the production and sale of such materiel. Under this framework, they have a duty to restrict access to documents, taking into account the relevant laws and regulations that define the criteria for classification.¹⁰³ The regulation provides that classification has a specific purpose and should be used with restraint and discernment to avoid pointless classification of documents. The classifications undertaken by these companies are governed by each agreement under a "Security Annex", drafted by the responsible ministerial authority (in general, the General Directorate for Armament of the Ministry of Defence).

119. Despite these precautions, prosecutors met at the on-site visit emphasised that it was possible that, in view of the economic issues at stake, companies might tend to extend defence secrecy classification to an entire operation, even where only one specific element would justify such treatment. This may result in the classification of purely commercial information which it may be important for an investigating magistrate to know about in the event of litigation. Civil society representatives also expressed the opinion

¹⁰² See: www.syndicat-magistrature.org/Agir-contre-la-corrupcion.html (in French).

¹⁰³ General interministerial instruction (IGI) no. 1300 of 30 November 2011 relating to the protection of national defence classification. The regulation is supplemented by ministerial instructions.

that "this confidentiality of convenience may also extend to corrupt behaviour during the sale process, the subsequent revelation of which is liable to cause the sale to fall through and entail, in addition to heavy fines, damage to one's image that would be likely to harm diplomatic relations".

120. The French authorities indicated in relation to this that it is a criminal offence to "camouflage" non-classified processes, objects, documents, information, computer networks, computerised data or files in places containing classified items so that they benefit improperly from the protection afforded by defence classification.¹⁰⁴ They also stated that if a company tries to prevent an investigating magistrate from examining documents by improperly classifying them, the authority mandated to provide an advice on declassification and communication of classified information, on referral, is tasked precisely with distinguishing those of the items subject to its control that genuinely justify classification from those that can, on the contrary, be produced in evidence. The same authorities recall that recipients can report improper classifications to the issuing authorities and that regular inspections take place, under the authority of the General Secretariat for Defence and National Security (*Secrétariat général de la défense et de la sécurité nationale*, SGDSN), to ensure that the regulation is properly applied. In each case, the Minister responsible for the department to which a company is attached may decide to maintain the classification if it appears justified, or to declassify the documents if s/he considers that the classification is inappropriate.

121. The authorities consider that companies tend to under-classify because of the constraints involved in seeking classification.¹⁰⁵ The investigating magistrates met during the on-site visit considered, to the contrary and consistent with several commentators, that "over-classification remains frequent in France and can unduly hamper the administration of justice".¹⁰⁶ The lead examiners note that companies in possession of classified documents, or awarded contracts involving the use or storage of classified information, have some latitude in their decision to classify, despite a theoretically restrictive framework. According to the examiners, this reality could jeopardise investigations in corruption cases. France emphasises that companies able to classify documents remain under the surveillance of the relevant Minister.

- Prosecutors' access to information classified under defence secrecy

122. The Constitutional Council validated the entire defence secrecy framework in France on 10 November 2011, except for provisions denying prosecutors access to certain places in the absence of declassification of those places by the relevant Minister. These provisions no longer exist. The Constitutional Council notably validated the procedure for declassification and communication of information, along with rules relating to searches in locations where information classified under defence secrecy is not subject to prior authorisation. The situation is therefore the following:¹⁰⁷ prosecutors can access any location in France for the purpose of their investigations, without exception. A prosecutor can access locations where there is information classified under defence secrecy, accompanied by a representative of the National Defence Secrecy Advisory Commission (*Commission consultative du secret de la défense nationale*, CCSDN).¹⁰⁸ The prosecutor must first inform the CCSDN, indicating the

¹⁰⁴ Article 56-4, para. 4 CPP, referring to the provisions that sanction the obstruction of justice (art. 434-4 CP).

¹⁰⁵ In the course of its inspections, the SGDSN has found only one case of a company failing to comply with classification rules in the last five years. Senior defence and security officials, the General Directorate for Armament and investigating units also carry out inspections and awareness-raising initiatives in companies. In this context, the SGDSN is unaware of any penalties imposed on companies in recent years for failure to comply with the rules relating to the protection of national defence classification.

¹⁰⁶ See the opinion of the academic B. Warusfel in the CCSDN report reviewing the period 1998-2005, p. 267: www.ladocumentationfrancaise.fr/var/storage/rapports-publics/054000109/0000.pdf (in French).

¹⁰⁷ Article 56-4 CPP.

¹⁰⁸ Created in 1998, the CCSDN consists of: a member of the Conseil d'Etat, a magistrate from the Cour de Cassation and a magistrate from the Cour des Comptes (Court of Auditors), appointed by the President of the Republic from a list of six names

information sought in the investigation (essentially the purpose of the search). The prosecutor may then visit the site in the presence of a CCSDN representative to seize documents, although s/he is not able to access them immediately. The seized documents are placed under seal in the custody of the CCSDN until they are declassified (or not) by the minister concerned. At the time of the search, the CCSDN issues an advice in favour of, or against, declassification. To this end, the CCSDN must take into account and balance the criteria set out in the law: the administration of justice (*mission du service public de la justice*), respect for the presumption of innocence, and the rights of the Defence, and the respect for France's international commitments as well as the need to protect France's defence capacity and the safety of its personnel (article L.2312-7 of the Defence Code). On the basis of the principle that only the authority that ordered the classification of a document under defence secrecy can order its declassification, it is then up to the Minister in possession of the classified information to decide whether to declassify it.

123. The reform introduced by the Act of 29 July 2009 on the search of classified locations and locations containing classified documents had the advantage of completing the framework for lifting defence classification. However, some magistrates and sectors of the public perceived certain provisions of this Act as a possible means of subverting the purpose of defence classification in cases such as the Taiwan frigates affair or the Karachi affair.¹⁰⁹ The result is suspicion about the existing rules on defence classification and their use. This suspicion was clearly evident in the interviews conducted during the on-site visit. The investigating magistrates testified to two significant difficulties. Firstly, the rules governing searches of locations containing documents classified under defence secrecy do not allow investigating magistrates access to the classified information that is seized, since the assessment of their interest with regard to the investigation is left to an administrative authority (in this case the CCSDN, subject to a final decision by the competent minister) and not to the investigating magistrate in charge of the investigation. Secondly, they were disappointed that if declassification is refused, the evidence remains inaccessible to the investigating magistrate. On this point, the authorities referred to the high proportion of CCSDN advices which were in favour of total or partial declassification which, according to them, demonstrates how the framework operates in favour of criminal investigations.¹¹⁰ The lead examiners nonetheless note that the absence of possible recourse against definitive decisions by the relevant Minister not to lift defence classification is a cause of concern that the authorities should address.

Commentary:

The examiners note that the application of defence classification procedures raise a significant risk of consideration being given to elements prohibited by Article 5 of the Convention and more generally of hampering investigations and prosecutions of transnational bribery offences, especially in an area as sensitive as defence. For that reason they recommend that the French authorities clarify by all means that (i) the law governing defence classification cannot hamper investigations and prosecutions of cases of transnational bribery, and (ii) the provisions of Article 5 of the Convention are taken into account in the decision to classify or, even more so, to declassify information necessary for investigations and prosecutions of transnational bribery. The examiners further consider that the issue of defence classification and its compatibility with the obligations contained in the Convention is a horizontal issue for the Working Group which it could examine in greater detail.

jointly proposed by the three presidents of the Courts, and two members of parliament. Although a majority of the Commission's members are appointed by the executive, the Constitutional Council considers that its mixed membership is such as to guarantee its competence, independence and impartiality (Decision no. 2011-192 QPC of 10 November 2011). The CCSDN is an independent administrative authority whose legitimacy remains, to date, uncontested.

¹⁰⁹ In the Taiwan frigates affair, for example, investigative magistrates asked for defence secrecy to be lifted three times, in 2001, 2002 and 2006. The request was turned down each time: www.transparence-france.org/e_upload/div/llt39.pdf (in French).

¹¹⁰ According to the figures provided to the examiners, between January 2007 and June 2010, 83% of opinions issued favoured total or partial declassification (50 out of 60 opinions).

(iv) *Information related to business activities*

124. The Act of 26 July 1968 dealing with the communication of documents and information of an economic, commercial, industrial, financial or technical nature to foreign natural or legal persons, as amended by the Act of 16 July 1980, the so-called “blocking statute”, prohibits sending such documents or information to foreign authorities except in cases specified in international treaties. Originally restricted to the field of maritime trade, the purview of the Act of 1968 was expanded in 1980 to protect French companies against discovery efforts by foreign authorities seeking access to information in their possession, including confidential information, without using the proper procedures for judicial co-operation, such as international letters rogatory.¹¹¹

125. Article 1bis of the “blocking statute” prohibits any individual, subject to the provisions of treaties or international agreements and prevailing laws and regulations, from requesting, searching for or communicating, in any form, economic, commercial, industrial, financial or technical documents or information likely to be used as evidence in or as part of foreign legal proceedings. The purview of this article is thus quite broad: the definition of information includes, generally, all of the data related to operating a business. Similarly, the text of the act encompasses all conceivable modes of communication, citing communication that is spoken, written, or “in any other form”. Breaches of the prohibition are punishable by six months of prison and/or a fine of EUR 18 000. Article 2 of the text stipulates that persons to whom such a request is addressed are required to inform the Ministry of Foreign Affairs without delay. Around a dozen such requests are reported every year.¹¹² As part of the statute’s implementation, the SCPC has been appointed to facilitate the transmission of information by an independent corporate monitor of a French company to US authorities (SEC, DOJ) in the context of the “blocking statute”.

126. While this law is rarely invoked in French courts,¹¹³ case law has demonstrated that the “blocking statute” can put French companies faced with a request for information stemming from the US justice system in a difficult position.¹¹⁴ If they refuse to supply the requested information, by virtue of the “blocking statute”, they expose themselves to the risk of significant penalties in the USA. The requester can petition the US judge to ask that the company refusing to supply the requested testimony or documents be sanctioned.¹¹⁵ Conversely, if the company supplies the requested information, it exposes itself in France to penalties under the “blocking statute”. As a result they generally choose not to seek the protections

¹¹¹ In common law countries, the discovery or pre-trial discovery process is a phase that precedes a civil trial during which each party may require the other to divulge all evidence relevant to the case that is in their possession, even if it is incriminating, regardless of the location or form of the evidence. The scope of application of this pre-trial procedure is very broad, as each party may ask the judge to require the other party to divulge not only evidence, but also any items or information that might facilitate the search for evidence. This injunction may be addressed to the plaintiff and defendant, but it may also be addressed to foreign third parties. It is worth noting that Article 23 of the 18 March 1970 Hague convention on the taking of evidence abroad in civil matters stipulates that “a Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.” France has issued a declaration to this effect. In addition to this reservation, France has also passed the aforementioned “blocking statute”.

¹¹² See the National Assembly Report aimed at sanctioning violations of commercial secrecy, written by Mr Carayon, January 2012: www.assemblee-nationale.fr/13/pdf/rapports/r4159.pdf (in French).

¹¹³ At the time of the on-site visit, the law had only been applied on three occasions (see the Carayon Report). One of these instances involved a French lawyer who was fined EUR 10 000 for attempting to obtain information of an economic nature from a French insurance company in order to use it in a case before the US courts involving Executive Life (the Californian insurance company’s 1991 bankruptcy) (Cass, 12 December 2007). See *La Lettre des Juristes d’Affaires*, No. 873 (25 March 2008).

¹¹⁴ See Kamil Haeri, attorney at law, *Gazette du palais* (March 2012): www.august-debouzy.com/sites/www.august-debouzy.com/files/Gazette%20du%20Palais%20-%20KHA.pdf (in French).

¹¹⁵ It is worth noting that the US Supreme Court, in a decision issued 15 January 1987 in the case *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, ruled that the existence of a blocking statute did not deprive a US court of the power to order the communication of documents as part of a discovery procedure, and did not constitute an excuse justifying a failure to comply by one of the parties.

offered by the law.¹¹⁶ The examiners learned that the blocking statute had been applied in a transnational bribery case, in relation to which several cases had been opened abroad, notably in Germany and the USA, and internal investigations conducted by the accused company in multiple countries. French authorities indicate that the co-operation between the subsidiary of a German company specialising in advanced technologies and public authorities in other countries was conducted in accordance with the provisions of the “blocking statute”. As a result, co-operation with public authorities in foreign countries was limited, even though the company in question wanted to co-operate fully. The examiners worry that respecting the provisions of the “blocking statute” appears in this case to have been an obstacle to gathering evidence as part of a transnational bribery investigation.

127. Furthermore, the French parliament has recently debated the relevance of protecting certain information in companies’ possession as provided for by the “blocking statute” as part of a project aimed at adopting a concept of “commercial secrecy” in France.¹¹⁷ This would involve replacing article 1bis of the “blocking statute” with a new provision built on an expanded notion of information that is “protectable” by companies.¹¹⁸ However, the demands of the parliamentary agenda prevented the bill from being adopted by the legislature before the end of the 2007-12 term. The parliamentary discussions under way on the “blocking statute” should take into consideration the fight against transnational bribery and the need for France to co-operate with public authorities in other countries. A non-governmental association interviewed on site has proposed, for example, that companies be authorised to contravene the “blocking statute” in specific cases where they suspect corruption within the company and want to conduct an internal investigation or co-operate with a foreign administration.

Commentary:

While companies appear to make limited use of the protection afforded them by the “blocking statute”, the lead examiners believe that its provisions present an obstacle to gathering evidence in cases of transnational bribery. This being the case, they recommend that French authorities take all appropriate steps, including potentially amending the “blocking statute”, to ensure that the conditions governing access to information in the possession of French companies do not stand in the way of foreign authorities’ ability to investigate and prosecute the bribery of foreign public officials.

(d) Statute of limitations

128. The legal statute of limitations within which law enforcement authorities must conduct proceedings is short: three years from the date the offence was committed. In Phase 2, the Working Group, while noting that each step in an investigation or prosecution initiates a new statutory period, deemed the three-year statute of limitations inadequate, notably because it is particularly difficult to detect bribery, which is by nature concealed, in another country. As a result, it recommended that France “take the necessary steps to extend to an appropriate period the statute of limitations applicable to the offence of bribery of foreign public officials so as to ensure the effective prosecution of the offence” (Recommendation 9). In the written follow-up report, while noting a certain jurisprudential flexibility that

¹¹⁶ Because the “blocking statute” has been enforced sparingly, several US Federal courts have ruled that French companies that are party to a court case in the USA cannot argue that they face a real risk of prosecution under the blocking statute, and that the experience of US courts has shown that the risk of the penalties stipulated by the French law being enforced was too small to stand in the way of the application of US Federal rules for civil proceedings.

¹¹⁷ See the aforementioned Carayon report.

¹¹⁸ Commercial secrecy is defined as: “Information protected as part of a company’s commercial secrecy includes (...) the processes, objects, documents, data and files of a commercial, industrial, financial, scientific, technical or strategic nature that are not publicly known and whose unauthorised disclosure would seriously compromise the interests of the company by undermining its scientific and technical potential, its strategic positions, its commercial or financial interests, or its ability to compete, and which the company has, consequently, taken specific steps to protect and guarantee its confidential nature.”

makes it possible to extend the statute of limitations in situations involving a series of bribe payments or bribe agreements, the Group still considered that the three-year statute of limitations could be an obstacle to prosecution of the offence and thus concluded that the Phase 2 recommendation had been only partially implemented.

129. Since then, a ruling by the Cour de Cassation has introduced greater flexibility to limitation periods by extending the case law on the offence of misuse of corporate assets to apply to the offence of bribery. In this ruling, the Court held that the three-year limitation period for acts that are concealed does not begin until the date when the crime is discovered and criminal proceedings can be opened (Cass. Crim., 6 May 2009, case no. 08-84 107). During the on-site visit, prosecutors and associations all welcomed this case law but emphasised that it is vulnerable to reversals and the whims of the broader debate, already noted in Phase 2, of judicial interpretation of the starting point for the statute of limitations on financial crimes. Considered by some legal professionals and in certain economic circles as a threat to legal certainty, this case law is regularly the target of attempts at reform.

130. Several participants in on-site discussions evoked in this context the bill opened for consultation in 2010 and in which authorities proposed to start the statute of limitations for the principal financial crimes on the date when they were committed and not on the date when they are discovered, as ruled by the Court, in exchange for extending the statute of limitations from three years to six. Criticised by some, including the Cour de Cassation, who saw in it a threat to the statute of limitations for financial crimes, the bill had to be withdrawn. At the time, the minister indicated that the text would be revised “to enshrine in law the current judicial precedent, under which the statutory period begins when the acts are discovered, and not when they are committed”. The demands of the legislative agenda prevented such a text from being drawn up before the 2012 presidential election. Thus, at the time of the Phase 3 evaluation, the offence remained subject to a three-year statute of limitations, which, as the investigating magistrates emphasised, could still be reversed by case law. After the on-site visit, the French authorities indicated that the current status of the case law was satisfactory enough not to legislate.

Commentary:

The lead examiners welcome the recent extension of the statute of limitations in the case law by the Cour de Cassation, which extended its rulings on the offence of misuse of corporate assets to apply to the bribery offence; this delays the start of the statute of limitations until the date when the infraction is discovered as opposed to when it is committed. Nevertheless, they maintain the position expressed by the Working Group in Phase 2 – that the three-year statute of limitations does not allow enough time for investigation and prosecution, notably owing to the particular difficulties of detecting the crime and gathering evidence. While noting the past legislative proposals to either extend the statute of limitations or enact the case law discussed above, the examiners note the lack of material progress in this respect. As a result, they reiterate the Phase 2 recommendation that France take measures to extend, to an appropriate period, the statute of limitations applicable to the offence of bribery of foreign public officials.

6. Money laundering

(a) Standards of liability and enforcement

131. French legislative provisions to prevent money laundering associated with the bribery of foreign public officials have not changed since the Phase 2 evaluation. Prohibited under article 324-1 CP, laundering money deriving from the bribery of foreign public officials is defined as facilitating, by any means, fraudulent justification of the origins of the assets or income of the perpetrator of a crime or offence from which the perpetrator derived a direct or indirect profit. Participation in a transaction to transfer,

conceal or convert the direct and indirect proceeds of a crime also falls within the scope of the offence. Money laundering is punishable with a term of imprisonment of five years and a fine of EUR 375 000.

132. At the time of the on-site visit, there had been no convictions for money laundering associated with the bribery of a foreign public official as introduced into the Penal Code by the Act of 2000, despite an increase since Phase 2 in the number of convictions for perpetrators of money laundering under article 324-1 CP (from 157 to 225 over just the period 2005-2008¹¹⁹). A February 2012 report by the Audit Court (Cour des comptes), however, deemed that “the number of convictions for money laundering remains low relative to the extent of the phenomenon”.¹²⁰ Two circulars (dated 27 July 2009 and 14 January 2010) urged Public Prosecutors to systematically prosecute crimes of money laundering, notably by using the possibilities offered under case law (notably the ability to prosecute self-laundering, Cass. Crim. 25 June 2003).

(b) Detection and reporting of suspicions of money-laundering linked to transnational bribery

133. In Phase 2, the Working Group recommended that France make financial entities and other professions required to report suspicious transactions to TRACFIN (the Financial Intelligence Unit) more aware of the provisions of the Act of 30 June 2000, and that it ensure that available sanctions applicable to these entities and professions are effectively enforced (Recommendation 7). When considering the written follow-up report, the Working Group noted French efforts to raise awareness among professions subject to the obligation to report suspicious transactions and to regularly monitor financial professions, and concluded that the Phase 2 recommendation was satisfactorily implemented. The examiners noted TRACFIN’s initiatives and its role in detecting transnational bribery. However, this report does not address the question of the enforcement of available sanctions for all entities and professions subject to the obligation to report suspicions, as the point is considered outside the scope of the Convention’s application (which, for the record, states that a Party that has “made bribery of its own public officials a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred”).¹²¹

(i) Legislative and institutional developments since Phase 2

134. The obligation for certain professions subject to anti-money laundering obligations to perform customer due diligence was strengthened in 2009 with the transposition into domestic law of the EU “Third Anti-Money Laundering Directive”. The legal apparatus notably stipulates that professionals required to perform customer due diligence must implement enhanced measures over and above the standard obligations when their client meets the criteria for a “politically exposed person”. This mechanism is an addition to the standard due diligence requirement, and is intended to permit the detection of illicit funds sent as part of a money laundering and/or bribery transaction. For example, according to authorities, in 2011 alone 69 cases of suspected bribery were reported to TRACFIN.

(ii) Efforts to raise awareness of professions subject to due diligence obligations regarding the detection of bribery

135. Efforts have been made to raise awareness of professionals subject to the reporting obligation about financial transactions possibly linked to bribery. For example, in 2008 TRACFIN collaborated with the Central Corruption Prevention Department (SCPC) to publish a guide on detecting financial transactions that could be related to bribery. This guide notably identifies “red flag indicators” that help

¹¹⁹ Ministry of Justice data, cited in the 2011 FATF report (www.fatf-gafi.org/dataoecd/40/7/47489546.pdf).

¹²⁰ See Audit Court report “TRACFIN and the fight against money laundering” of February 2012: www.comptes.fr/fr/CC/documents/RPA/Tracfin_lutte_contre_blanchiment_argent.pdf (in French).

¹²¹ This topic is explored in greater detail in the FATF report cited above (see p. 412 et seq. and p. 516 et seq.).

guide professionals' efforts to manage their internal procedures for detecting suspicious transactions. Since then, there have been no other efforts to raise awareness on this topic. The authorities indicated that the guide is currently being updated.

(iii) *Reporting suspicions of money laundering tied to transnational bribery*

136. As noted earlier in this analysis, one way the Public Prosecutor receives information on transnational bribery is from cases reported by TRACFIN (as was the case with four of the cases being prosecuted at the time of the on-site visit, and the three final convictions for the offence of bribery of foreign public officials). These figures highlight TRACFIN's important role in uncovering instances of transnational bribery, which received unanimous praise from the representatives of the Public Prosecutor's Office who met with the examiners.

137. TRACFIN reported eight instances of suspected bribery of a foreign public official to the Public Prosecutor in 2008; four in 2009, three in 2010 and 2 in 2011.¹²² The lead examiners inquired as to the reasons that may account for the decline in the number of reports. One of the magistrates interviewed on site cited a change in the *modi operandi* of bribers who, aware of the scrutiny being applied to transactions made through conventional financial channels (such as banks), are turning to other, less traceable bribery channels. No specific analysis was provided to the examiners that would allow them to verify (or discredit) this opinion. The question of training and awareness raising for professions required to conduct customer due diligence was also posed. While TRACFIN has no control over incoming reports (*i.e.* the substance of the suspicion transaction reports that the service receives) and says it has no power to evaluate the cases that are sent to law enforcement authorities (provided the reported offence is "sufficiently well established"), it is, however, responsible for efforts to raise the awareness of professions required to detect offences, including those of bribery. In this respect, TRACFIN has indicated that it is handling the issue of bribery as part of its ongoing remit to inform reporting professionals on matters related to the fight against money laundering. That said, these efforts remain difficult to quantify.¹²³

138. Lastly, during the on-site visit it was noted that investigating authorities have trouble envisaging, much less conceptualising, the very idea of laundering the *proceeds* of bribery (and not just the self-laundering of the amount of a bribe). There appears to be vital work to be done in raising the awareness of and leading discussions among all relevant authorities (notably investigating authorities, TRACFIN and magistrates). Furthermore, this work needs to be co-ordinated with efforts that the French authorities are being asked to make to promote the confiscation of the *proceeds* of the bribery of a foreign public official (see above, the section of the report dealing with the question of seizure and confiscation). The result of these efforts could ultimately be provided, in the form of guidelines for example, to professions in a position to detect instances of transnational bribery.

Commentary:

The lead examiners are pleased with the efforts aimed at strengthening the legal and institutional framework of the fight against money laundering since Phase 2. They applaud TRACFIN's role in uncovering instances of transnational bribery. However, they note with some concern the steady decrease over the past five years of the number of cases of bribery of foreign public officials communicated by TRACFIN to the Public Prosecutor's Office. Thus,

¹²² It is important to keep in mind that these figures do not, however, reflect all of the TRACFIN reports that may relate to bribery offences. In a significant number of cases, TRACFIN's administrative investigations do not make it possible to supply the kind of evidence needed to identify the offence underlying money laundering.

¹²³ Furthermore, based on recent evaluations, the FATF and the Audit Court concluded that TRACFIN has generally not adequately intensified its pedagogical efforts among professions required to perform customer due diligence, either in mainland France or the overseas departments and territories.

they recommend that TRACFIN continue or even intensify its efforts to raise the awareness of professions required to detect acts that may involve foreign bribery. Lastly, the examiners recommend that French authorities consider a review of the money laundering methods and schemes that could be used in instances of transnational bribery. If appropriate, authorities could share the results of these reviews with private sector professionals who are in a position to detect acts of transnational bribery.

7. Accounting rules, external audit and corporate compliance programmes

(a) Accounting standards

139. The 2009 Recommendation asked that Parties to the Convention require their companies to include a description of potential liabilities in the notes to their financial statements and to adopt effective, proportionate and dissuasive penalties for failure to comply with accounting standards. The international audit standards issued by the International Federation of Accountants (IFAC), notably the ISA 240 and ISA 250 standards (taking into consideration the possibility of fraud when auditing accounts and the risk of significant anomalies in the accounts resulting from a lack of legal and regulatory compliance), have been obligatory in all EU member countries from June 2008, and in 2011 they were enacted in French law. Statutory auditors are responsible for verifying the truthfulness and accuracy of the annual financial statements when they conduct their audits, during which they are required to determine “to a reasonable extent” that the accounts do not contain any “significant anomalies”.¹²⁴ A proven instance of fraud is punishable by a prison term of five years and a fine of EUR 375 000. France did not supply information on final convictions for breaches of accounting standards.

(b) External audit

140. The 2009 Recommendation also targets the independence of external auditors. It notes the role that they can play in detecting and reporting evidence of bribery by asking Parties to the Convention to require that auditors inform directors and, if need be, the governance bodies of the company of such evidence, and to consider requiring auditors to report suspected acts of transnational bribery to the competent authorities, independent of the company. As noted in Phase 2 and during the written follow-up report, the Financial Security Act (*loi sur la sécurité financière*, or LSF) of 1 August 2002 introduced a set of strict and detailed rules designed to strengthen the independence of statutory auditors, one of the most notable of which was a complete separation of audit and consulting activities to prevent conflicts of interest. Furthermore, the provisions in the code of ethics dealing with incompatibilities adopted in 2005 were reinforced by a decree dated 12 February 2010, which also defined certain prohibitions more clearly.

141. Other measures, adopted in the wake of the LSF, have focused more specifically on expanding the role of statutory auditors, but also that of accountants, in the French system for detecting bribery in business transactions. One result, as we have already seen, is that the requirement that suspicion of an illicit transaction be reported to TRACFIN has been expanded to include transactions resulting from international bribery offences (article L. 561-2 of the Monetary and Financial Code). This obligation complements the requirement, already noted in Phase 2, that statutory auditors not only report “any irregularities or inaccuracies uncovered in the performance of their duties to the next general meeting or meeting of the competent body”, but also to inform the Public Prosecutor’s Office of “criminal acts of which they are aware without being held liable for the revelation” (article L. 823-12 of the Commercial Code). According to data provided by the French association of statutory auditors, the *Compagnie nationale des commissaires aux comptes* (CNCC), 886 criminal acts were reported to the Public

¹²⁴ A significant anomaly is understood as “accounting or financial information that is inexact, insufficient or omitted due to error or fraud, the extent of which is such that, alone or together with others, it may influence the judgement of the user of the accounting or financial information.”

Prosecutor's Office in 2010 alone in application of article L. 823-12; the absence of indicators broken down by offence makes it impossible to determine how many of these reports had to do with transactions linked to bribery in foreign transactions. Of the reports made to TRACFIN by accounting professionals over the course of 2010-11, two were involved the predicate offence of bribery. Since 2009, three cases have been prosecuted against statutory auditors for failure to disclose criminal acts under the provisions of articles L. 823-12 and 15.

142. The volume of reporting of all criminal offences by accounting professionals, attests to the effort that French authorities have made to inform them of their reporting obligations, as recommended by the Working Group in Phase 2 (Recommendations 6 and 7). Representatives of auditing firms emphasised that there are also numerous private initiatives to raise awareness in the profession, not only of French anti-bribery laws, but also of US and UK laws. Training in the accounting sector thus appears to be up to date. However, there still seems to be a problem regarding the extent of the obligation to report to the Public Prosecutor's Office acts committed within companies other than those being audited. Since 2009, international standards have specified the duties of auditors in respect of "related parties"¹²⁵ (standard adopted in France by the decree of 21 June 2011), but the statutory auditors interviewed on site were of the view that their reporting obligations under article L. 823 are confined solely to the parent company that they are personally auditing: in their view, they would only consider reporting a subsidiary if the subsidiary's auditors were the same as that of the parent company. This is all the more worrisome considering the significant role that French groups' foreign subsidiaries play in international business transactions and the risks of transnational bribery that they face. Greater efforts should be made to raise awareness among accounting professionals regarding the decree of 21 June 2011, particularly in the light of recent convictions of foreign subsidiaries of French groups for transnational bribery.

(c) Internal controls, ethics and compliance programmes

143. The Phase 2 report noted the growing number of codes of ethics within French corporate groups, while observing that many of them contained no explicit reference to the prohibition against paying bribes. Since then, the 2009 Recommendation has encouraged the adoption of compliance programmes intended to prevent and detect transnational bribery, including its annex, the Good Practice Guidance on internal controls, ethics and compliance. Since Phase 2, the situation has improved greatly; most if not all of the major French companies that are the most active in foreign markets have both compliance programmes that specifically address the bribery of foreign public officials and internal control mechanisms. The threat of prosecution under foreign laws, chiefly the Foreign Corrupt Practices Act and the UK Anti-Bribery Act, has been a powerful motivator for French corporate groups to implement ethics charters and alert systems, even before the French legislation took effect.

144. Support actions carried out by the SCPC have also played an important role in the adoption of compliance programmes. For example, the SCPC has formed close ties with the pharmaceutical industry, a sector particularly vulnerable to international bribery, in order to promote best practices for transparency, notably with respect to protecting whistleblowers in the healthcare field. Ties have also been nurtured with other major industrial sectors, such as defence and aerospace companies. At the time of the on-site visit, the SCPC envisaged a complementary advisory activity to help companies develop compliance programmes, to ensure effective prevention and detection. According to the SCPC, even though this advice carries no legal weight, it actively contributes to orienting companies by helping to manage bribery prevention. The representatives of the private sector, however, believe that because the French criminal justice system – unlike in UK or US law – does not give any legal weight to a compliance programme in bribery cases, such a system of orientation is not very useful.

¹²⁵ ISA 550: www.ifac.org/sites/default/files/downloads/a029-2010-iaasb-handbook-isa-550.pdf.

145. As during Phase 2, SMEs seem to be lagging much further behind in their prevention practices. On-site discussions showed that, in general, there is some passivity on the part of the French administration and business associations, which consider that because French SMEs only operate in foreign markets as subcontractors or suppliers of large companies, the latter are responsible for implementing internal measures to prevent bribery by their subcontractors. However, this approach appears to neglect the growing role that French SMEs are playing in international trade (40% of exports in 2009), in which they are active as more than just subcontractors.

Commentary:

The examiners are pleased with the efforts to train statutory auditors in their obligation to report criminal acts to the Public Prosecutor's Office. They note, however, a certain amount of confusion among statutory auditors regarding the scope of this obligation, notably with respect to criminal acts committed by the foreign subsidiaries of companies that they are responsible for auditing. The examiners thus recommend that France, in accordance with the provisions of ISA 500, carry out more regular and targeted training on this topic.

Since Phase 2, French companies have adopted compliance programmes that more specifically target the fight against transnational bribery. To support this positive trend, the examiners encourage the administration, in partnership with business associations, to verify that these programmes are being effectively implemented in practice. They also recommend that France make more of an effort to encourage SMEs involved in international trade to adopt and implement compliance programmes to combat bribery in foreign markets.

8. Tax measures to combat bribery

(a) Non-deductibility of bribes

146. In Phase 2, the Working Group recommended that France carry out necessary consultations with a view to ensuring that appropriate tax provisions, in compliance with Article IV of the revised Recommendation of 1997 on the non-deductibility of bribes, were enacted as soon as possible in French territories that enjoy an autonomous tax status, taking into account the relative risk factors that are associated with them (Recommendation 13). It is useful to remember that Recommendation I(i) of 2009 on tax measures required that "Parties to the OECD Anti-Bribery Convention explicitly prohibit the tax deductibility of bribes to foreign public officials". The principle of the non-deductibility of bribes, as stated in article 39-2bis of the General Tax Code (Code général des impôts, CGI)¹²⁶ has since been extended to Mayotte (article 39-2bis of the CGI of Mayotte), New Caledonia (article 21-IV-9 of the tax code of New Caledonia) and Saint Martin (article 39-2bis of the CGI of the collectivity of Saint Martin). By contrast, no tax provision prohibits the deductibility of bribes in French Polynesia or Saint Pierre and Miquelon.¹²⁷ France has indicated that, owing to the autonomous tax status that these two territories possess, it has no power over their tax decisions and is unable to speak for these collectivities by pledging on their behalf that a provision equivalent to article 39-2bis of the GCI will be added to their tax laws.

¹²⁶ Article 39-2bis prohibits the deductibility of bribes paid directly or through intermediaries to foreign public officials "to incite the said official to act or refrain from acting in the performance of his official duties, so as to obtain or retain a contract or other undue advantage in international business transactions".

¹²⁷ In Wallis and Futuna and Saint Barthélemy, article 39-2bis does not apply because in these territories, companies are not subject to tax.

(b) Detection of bribes paid to foreign public officials

147. In Phase 2 the Group, while noting that tax authorities had useful methods for detecting offences, decided to monitor the efficacy of the existing mechanisms used by the administration to identify and reject bribes paid to foreign public officials from deductible expenses. The Department for National and International Verifications (DVNI), housed in the Directorate General for Public Finances (DGFIP), is responsible for external inspections of large corporations. In this respect, it remains especially well placed for detecting the offence of active bribery foreign public officials. The DVNI employs 480 agents comprising 30 brigades; it is in charge of inspecting a large number of companies (between 65 000 and 95 000), including France's largest corporations. France indicated that it is organised into departments specialised according to business sector with specific knowledge of the tax risks related to each activity on the one hand, and internal consultants specialised in international tax issues on the other.

148. The DVNI carried out 1 350 inspections in 2009, thus covering roughly 20% of large companies in 2007, which corresponds to an inspection every five years.¹²⁸ Companies operating in business sectors considered as sensitive are an enhanced inspection every three years on average. When conducting their inspections, the departments of the DGFIP, including the DVNI, strive to detect and rectify issues that arise within the company as a function of the challenges and the tax risks it faces. Any tax anomalies stemming from remunerations made abroad are taken into account. Authorities indicated that inspection departments apply risk analysis, inspect documentation and make on-site inspections (in this respect, the amounts of payments, their destination and whether or not the beneficiary is an intermediary can be indicative of risks under the provisions related to bribery in article 39-2bis CGI).

149. All in all, between 2008 and 2011 the tax authority required reimbursements in 18 cases based on article 39-2bis CGI: seven for a total of EUR 2.881 million in 2008; three for EUR 297 000 in 2009; five for EUR 751 000 in 2010 and three for EUR 188 000 in 2011. According to tax authorities, these figures are not representative of all of the actions that the inspection departments undertake with respect to commissions paid abroad. In cases where the administration is unable to prove that a foreign public official was the ultimate beneficiary of a bribe, it can still question the deductibility of the commission based on other provisions of the CGI. Under the current system of record-keeping, however, it was not possible for the revenue department to provide a concrete figure on the number of reimbursements required based on other provisions of the CGI which the department can use to disallow the deduction of sums thought to constitute bribes.

(c) Guidelines for tax agents

150. The tax adjustments made by the administration based on article 39-2bis show without a doubt that agents have been made aware of the non-deductibility of bribes, although it is unclear whether these adjustments are the result of a proactive policy or of information coming out of the Public Prosecutor's Office as part of legal proceedings. The Phase 2 report had already emphasised efforts made to raise the awareness of tax agents, notably a directive dated 14 November 2000 with commentary on article 39-2bis CGI. Since then, the administration has made available an online version of the 2009 OECD Bribery Awareness Handbook for Tax Examiners, as well as the Convention and the 2009 Recommendation. Administrative directives and technical dossiers, written notably by the National Directorate for Tax Investigations (DNEF), have also been sent out. However, it is important to note that the distribution of information to the overseas territories has not always been well organised: the authorities in New Caledonia, for example, were unaware of the OECD Handbook at the time of the visit. This may partly explain why, out of some 30 external tax inspections of companies conducted each year in New Caledonia, which is home to a sizeable nickel exporting industry, none were able to detect bribes non-deductible under

¹²⁸ 2012 Audit Court report: www.ccomptes.fr/fr/CC/documents/RPA/Pilotage_national_controle_fiscal.pdf; 2007 Audit Court report: www.ccomptes.fr/fr/CPO/documents/divers/RapportCPOSurLaFraude150207Pdf.pdf (in French).

article 21-IV-9 of the New Caledonia Tax Code. On-site discussions also showed a lack of specialised bribery training for tax agents, both in mainland France and the overseas territories.

151. The principal tool for teaching tax agents about non-deductibility remains the directive of 14 November 2000. This directive uses the language of the Convention and its commentaries, and specifies the conditions for prohibiting a company from deducting commissions as expenses: (i) obtaining an export contract, particularly if the contract is conditional upon the prior agreement of a political official or stems directly from the public official; (ii) one or more public officials have a say in awarding the contract or deciding the beneficiary; and (iii) there is information showing that the aforementioned public officials directly or indirectly benefited from said advantages. While the burden of proof required to invoke article 39-2 bis CGI may seem high (it must be demonstrated that the sums or advantages directly or indirectly benefited a public official or comparable individual), agents have the power to question the deductibility of a commission using other articles of the CGI, such as article 39-1 1 (general criteria for expense deduction) or article 238 A (if the intermediary is located in a country that is a tax haven). Detailed comments and instructions on implementing these provisions are available to the agents.

152. French criminal offences that do not cause direct harm to the tax administration (*i.e.* where there is no tax fraud) can be reported to the Public Prosecutor's Office.¹²⁹ A joint circular by the DGFIP and the Ministry of Justice from November 2010 reiterated and framed the obligation for civil servants to report to law enforcement authorities on the basis of article 40 CPP any case of bribery or unlawful taking of interest of which tax agents become aware in the performance of their duties (reported to superiors). Owing to the lack of a national database on incidents reported under article 40 CPP, the DGFIP indicated that it does not know how many of these reports have been made in cases of bribery. The lead examiners were informed of just one case reported by the DGFIP to the Paris Public Prosecutor's Office which then resulted in the opening of an investigation into transnational bribery.

(d) Administrative assistance and information-sharing in tax matters

153. Administrative assistance for tax purposes is governed by multiple conventions and agreements that permit the exchange of information with all of France's major economic partners, EU and OECD member countries, as well as many of the world's financial centres. France notably has a vast network of double taxation treaties and information-sharing agreements that include provisions on sharing information for tax purposes with more than 140 jurisdictions.¹³⁰

154. Since it was updated in 2005, section 12.3 of the commentary on Article 26 of the OECD Model Tax Convention has offered contracting States wishing to do so the ability to broaden the purposes for which they may use information exchanged under the convention by adding additional text to the article on information exchange. Because this is optional and the option to introduce this aspect is recent relative to the network of French bilateral conventions, not all of the conventions signed by France include this option. However, French authorities indicate that all of the information-exchange agreements signed since 2009 permit, under certain conditions, the use of information received for purposes other than those for which the convention was signed. Furthermore, Article 16.2 of Directive 2011/16/EU of 15 February 2011 on administrative co-operation in the field of taxation also allows information and documentation received pursuant to the Directive to be used for other purposes than the administration and enforcement of the domestic laws of the Member States related to taxes covered by the Directive, if the Member State supplying the information grants its permission and the laws of the Member State receiving the information allow it. The European directive thus mirrors the terms of the aforementioned section 12.3. This article,

¹²⁹ In cases of tax fraud, the DGFIP has the power to prosecute the perpetrator after obtaining a ruling from the committee on tax evasion, which is composed of prosecutors.

¹³⁰ June 2011 report on France from the Global Forum on Transparency and Exchange of Information for Tax Purposes (page 70): www.oecd.org/document/37/0,3746,fr_21571361_43854757_48081381_1_1_1_1,00.html.

which reiterates the provisions of Article 7.3 of Directive 77/799/EEC with some wording changes, has been transposed into domestic law in article R*114 A-3 of the book on tax procedures, which lays the foundation for the French tax administration to use information received from the administration of another EC Member State under the conditions and within the limits stipulated in articles L. 103 et seq. of the Book of Tax Procedures (on professional secrecy obligations). Furthermore, France is party to the joint Council of Europe/OECD Convention, as amended,¹³¹ on mutual administrative assistance in tax matters, which has already been signed by 35 countries¹³²; Article 22.4 of that convention contains a similar provision to the optional text in section 12.3 of the commentary on Article 26. In addition to the exchange of information upon request, France engages in automatic and spontaneous information exchanges. Lastly, it is worth noting that owing to the tax autonomy of overseas collectivities, France has signed conventions with those territories that specify the terms under which information is exchanged for tax purposes.

Commentary:

The lead examiners welcome the French tax authorities' ability to detect the payment of bribes (more than 15 instances between 2008 and 2011). They advise the tax authorities to persevere in their efforts to raise the awareness of tax agents on their role of detecting illicit transactions related to the bribery of foreign public officials, both in mainland France and in the overseas territories. They recommend that French authorities take all appropriate steps to promote the exchange of information in the possession of tax authorities for use by law enforcement authorities, notably through reporting under article 40 CPP.

Even though certain French territories with autonomy in tax matters have adopted the principle of the non-deductibility of bribes, the lead examiners remain concerned regarding the continued opposition of certain other territories to Recommendation VIII i) of 2009, which prohibits the tax deductibility of bribes paid to foreign public officials. As a result, they recommend that French authorities urge French Polynesia and Saint Pierre and Miquelon to apply the principle of the non-deductibility of bribes as soon as possible.

9. International co-operation: mutual legal assistance in criminal matters

155. The procedural aspects of mutual legal assistance (MLA) and extradition have not changed since Phase 2, except with respect to the transmission of MLA requests within the EU and, as already noted above, the seizure and confiscation of criminal assets, for which laws have been passed that strengthen international co-operation mechanisms, notably by implementing the principle of mutual recognition and execution of confiscation decisions between EU Member States. MLA continues to be governed chiefly by multilateral and bilateral treaties and, in cases where no convention exists, by the principle of reciprocity. The measures by which MLA is conducted in the French Republic automatically apply to the overseas departments and regions, as well as (with certain nuances) in the overseas collectivities of Saint Pierre and Miquelon, Saint Martin and Saint Barthélemy. None of these exceptions or adaptations has a material impact on the way existing MLA measures and mechanisms are implemented in France.

(a) Mutual legal assistance in France

(i) MLA mechanisms

156. A certain formality still prevails with respect to MLA, which can cause prolonged delays, except with respect to the transmission of assistance requests within the EU, which are sent directly from one law

¹³¹ The Amending Protocol for the Convention on Mutual Administrative Assistance in Tax Matters was opened for signature on 27 May 2010.

¹³² See the Charter for signatures and ratifications: www.oecd.org/dataoecd/8/62/48308691.pdf.

enforcement authority to its counterpart; this makes it possible to carry out requests more quickly. For other countries, owing to the lack of an international convention stipulating otherwise, the law continues to assert the role of the executive branch: requests intended for foreign authorities are sent via the Ministry of Justice; and requests sent from abroad are sent through diplomatic channels (article 994 CPP).¹³³ The Ministry of Justice's Office of International Assistance in Criminal Matters has jurisdiction over all legal proceedings in respect of which MLA requests are sent and received between French and non-EU law enforcement authorities.

157. These arrangements were presented by the prosecutors as particularly time-consuming because of the lack of adequate personnel in the courts, including the Paris Regional Court. Many emphasised that it is often only by making great sacrifices, notably in the management of other cases for which they are responsible, that the most willing magistrates are able to meet the needs for MLA, work that is furthermore neither recognised nor valued by the hierarchy (there is no accounting for the work prosecutors do to respond to MLA requests). According to some, these material difficulties are compounded by institutional ones. Investigating magistrates spoke of the growing number of cases being referred to the Public Prosecutor related to the execution of MLA requests; in their view, this trend undermines guarantees of impartiality in the execution of requests, notably in cases where mismanagement by the executive branch, via the Public Prosecutor's Office, cannot be ruled out. Furthermore, given the hierarchical ties between the police, which assist in the execution of MLA requests, and the executive branch, this link could influence how certain investigations are conducted, notably as a function of the persons targeted in the MLA requests.

(ii) *French responses to foreign MLA requests*

158. France, at first glance, does not appear to receive many requests from abroad for investigations into offences of the bribery of foreign public officials. All in all, since Phase 2 France indicates that it has received only three MLA requests concerning this offence, all of which came from Parties to the Convention. However, it is worth pointing out that France's statistical data do not permit an accurate accounting of the real level of activity in the area of MLA because the aforementioned figures only show requests for which transnational bribery is explicitly mentioned in the request for assistance. Between January 2010 and June 2011, 26 other MLA requests dealt with instances of "bribery" (a concept that covers all of criminal types of bribery under French law, including transnational bribery). Furthermore, these statistics only record requests that pass through the Office of International Assistance in Criminal Matters; direct requests between prosecutors are not counted by the central authority. None of the requests catalogued by the Office were rejected, and response times ranged from four (deposition of witnesses and copying of evidence) to six months (bank subpoenas).

(iii) *French MLA requests*

159. According to France, 13 MLA requests made by French authorities have been recorded since Phase 2 (four of these requests were made to Parties to the OECD Convention). Response times range from a few months to two years; no request was refused. At the time of the on-site visit, three of these requests were still being executed. As emphasised by several investigating magistrates interviewed on site, co-operation with foreign authorities, when France is making the request, can be arduous with certain countries, particularly those not party to the OECD Convention. However, they indicated that whereas they generally do not meet with a stated refusal to co-operate, they do encounter long procedural delays that slow the conduct of investigations. In this context, they emphasised the importance of the networks – and thus mutual trust – that they have built with their foreign counterparts in making progress on their investigations.

¹³³ The prevailing multilateral conventions generally stipulate the same procedures for sending and executing requests for assistance.

(b) Protecting France’s fundamental interests in the context of MLA requests

160. In Phase 2 the Working Group decided to conduct a follow-up to verify that decisions by France to grant MLA were not influenced by considerations of national economic interest (Article 5 of the Convention). Under French law, the principal reason for not providing assistance is that a request may threaten the public order or the “fundamental interests of the nation” (article 694-4 CPP), which notably includes safeguarding elements vital to its economic potential.¹³⁴ In response to the question of whether the public order or fundamental interests of the nation clause had been used to refuse a request for assistance, authorities replied that no request had been refused on those grounds over the past three years, although it could not speak to requests made prior to that period. Furthermore, they indicated that, due to the lack of relevant case law, they were unable to interpret how this “reservation” would apply in a case of transnational bribery. While the examiners are aware that reservations of this sort are written into numerous international conventions, they nevertheless believe that, due to the broad nature of the concept of “the fundamental interests of the nation” cited in the French Criminal Code on the one hand, and to the “over-classification” of certain types of information under the guise of protecting those interests on the other, the reservation could compromise the provisions of MLA under the conditions stipulated by the Convention.

Commentary:

The examiners are not in a position to make a detailed evaluation of French practices concerning the provision of MLA to other countries in the absence of a means by which the Working Group can obtain information from other Parties to the Convention on their experiences co-operating with France in response to requests for assistance. Nevertheless, they recommend that France make more resources available to prosecutors and investigating magistrates to ensure that prompt and effective MLA is provided to Parties to the Convention. Furthermore, they welcome the efforts France has made to fine-tune the statistical apparatus it uses for MLA; however, they recommend that France take care to ensure that statistics are collected on incoming and outgoing MLA requests executed directly between prosecutors. Lastly, to ensure French compliance with the provisions of Article 5 of the Convention, the examiners advise France to take all steps necessary aimed at: (i) ensuring that public prosecutors enjoy full autonomy to investigate, by using MLA, instances of bribery, with the assurance that the conduct of these investigations, notably those for which the Public Prosecutor is responsible, is not influenced by the identity of the natural persons or legal entities involved; and (ii) ensuring that decisions to MLA in cases of transnational bribery are not influenced by considerations of national economic interest under the guise of “the fundamental interests of the nation”.

10. Awareness-raising in the public and private sectors and reporting of acts of corruption

(a) Awareness-raising in the public and private sectors

161. In Phase 2, the Working Group's recommendations to France concerning awareness raising in the public sector dealt primarily with the need to make ministries and agencies aware of the offence in the context of the obligation whereby any constituted authority, any public official or civil servant who, in the exercise of his duties, acquires knowledge of an offence must report the matter without delay to the Public Prosecutor’s Office. The actions taken by France since that time are presented below, in the section dealing with the reporting of evidence of transnational bribery.

¹³⁴ A circular dated 29 December 1999 specified that “the provision in article 694-4 CPP must be applied rarely, and only certain requests that threaten secrets whose disclosure would harm the fundamental interests of the nation – a concept that includes not only the country’s military but also, notably, its economy, ecology and society – appear to call for the application of this text.”

162. With respect to actions targeted at the private sector since Phase 2, a number of awareness raising initiatives have been undertaken, in particular by the Ministry of Economy, Industry and Finance, SCPC and UBIFRANCE, often with the collaboration (particularly in training activities) of professional associations such as the employers' federation (Mouvement des entreprises de France, MEDEF) and the Chamber of Commerce and Industry of Paris (CCIP). The SCPC has also conducted sector-specific awareness raising activities with enterprises and organisations seeking to adopt internal codes of ethics and to put in place compliance programs. According to the SCPC, in this line of work the question of the responsibility of the parent corporation for the actions of its affiliates abroad has been raised but has not been dealt with in depth. As noted above in the section on corporate responsibility, it is important that parent corporations be warned of their exposure to risks owing to the acts of their subsidiaries.

163. In parallel to these initiatives, the heads of economic units at French embassies were recently asked (in January 2012) to organise meetings with a significant number of businesses in their geographic zone in order to make them aware of French criminal law and the 2009 OECD Good Practice Guidance on Internal Controls, Ethics and Compliance . It will be important to monitor activities of French missions in this field. Lastly, since 2009 the General Directorate of the Treasury has each year hosted four awareness raising sessions in France for French companies. These sessions have been targeted primarily at large companies, but also at medium-sized firms in all sectors, through the intermediary of an international consulting firm and in partnership with MEDEF.

Commentary:

The lead examiners welcome the strong and effective cooperation between the French government and employers' organisations with a view to raising awareness among businesses. They encourage France to pursue its awareness raising activities, with particular attention to the implementation of compliance programs that take into account the role of foreign subsidiaries of French groups and SMEs in international business activities. The examiners are also pleased to note the efforts recently made by the Ministry of Foreign Affairs and the General Directorate of the Treasury to publicise the Convention and the Good Practice Guidance on Internal Controls, Ethics and Compliance among their officials posted abroad. The examiners note, however, that France tends only to launch awareness raising activities on the occasion of an evaluation by the Group, and it is therefore not able to assess the effectiveness of such measures. The examiners therefore recommend that the Ministry of Foreign Affairs and the General Directorate of the Treasury should reinforce their internal awareness raising initiatives.

(b) Reporting suspicions of transnational bribery

(i) Reporting of suspected transnational bribery by whistleblowers in the private sector.

164. In Phase 2, the Working Group noted that whistleblowers in the private sector were subject to various obligations of discretion and precaution that in practice tended to discourage reporting. The Group consequently recommended that France "consider introducing stronger protective measures for employees who report suspicious facts that may indicate bribery in order to encourage them to report such facts without fear of retaliation in the form of dismissals" (Recommendation 5). Subsequently, the 2009 Recommendation calls on parties to the Convention to ensure that appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials (Recommendation IX (iii)).

165. New legislative provisions that came into force with adoption of the 2007 Act have introduced into the Labour Code the protection of employees who, in good faith, disclose or report acts of bribery to their employer or externally. Article 1161-1 of the code provides that "no employee may be punished, dismissed or subjected to any discriminatory measure, direct or indirect, in particular with respect to remuneration, training, transfer, assignment, qualification, classification, professional promotion, amendment or renewal of contract for having reported or disclosed in good faith, either to his/her employer or to the judicial or administrative authorities, acts of corruption of which s/he becomes aware in the exercise of his/her functions." This protection is interpreted broadly, and it applies as well to candidates for recruitment. Article 1161-1 also establishes a special procedure for protecting whistleblowers: it is up to the company to demonstrate before a judge that the penalties imposed on the employee have no relation to that person's disclosures.

166. With the amendments to the Labour Code, France is now able to respond satisfactorily to the recommendation from Phase 2 and to the 2009 Recommendation concerning the protection of whistleblowers in the private sector. These amendments could also lead to a greater number of reports since, according to the companies interviewed on site, their reporting mechanisms record few if any reports, and to date only three reports of the suspected bribery of a foreign public official have been forwarded to the Public Prosecutor's Office by employees or former employees. To give effect to the new provisions of article 1161-1, it is important however that the whistleblowing systems already in place in major French groups should now respect the protective purpose of the new law. Official statistics suggest that more needs to be done in this field, despite the laudable efforts of the SCPC in making businesses aware of the protection that the law accords employees: in 2009-2011, agents of the Labour Inspection Office, which exercises supervisory control over companies, formulated observations on 11 occasions to remind firms of the obligations set out in article 1161-1.

(ii) Reporting suspicions of transnational bribery in the public sector

167. While the amendments to the Labour Code constitute undeniable progress, they do not extend to the public sector. In Phase 2 the Working Group noted that government employees were required to report to the Public Prosecutor's Office any offence of which they become aware in the exercise of their function (article 40 (2) CPP); it was noted however that application of this obligation appeared in practice to be weak or nonexistent, as there was no visible sanction (apart from rarely applied disciplinary penalties) for non-compliance with this obligation. The Group consequently recommended that France should regularly remind public officials of their obligation under the Code of Criminal Procedure (CPP) as well as the disciplinary sanctions incurred in case of non-compliance (Recommendations 2 and 3). It had also recommended that, in the case of personnel of the agencies responsible for development assistance (AFD) and export credits (COFACE), procedures should be established for alerting the Public Prosecutor's Office to credible evidence of bribery of foreign public officials (Recommendation 4). During the written follow-up, noting the steps taken by France to make its agents aware of CPP provisions and the offence of foreign bribery, as well as implementation of a reporting mechanism within the AFD, the Group concluded that the recommendations from Phase 2 had been satisfactorily implemented.

168. Despite the additional efforts made since then (development of an instruction to employees of the General Directorate for Armament on the obligation to report suspected offences, supplemented by awareness raising sessions; implementation of a reporting mechanism within COFACE; a reminder in 2012 sent to personnel of the Ministry of Foreign Affairs and heads of the economic sections of the embassies), further progress is still needed. At the time of the on-site visit, the authorities had initiated proceedings in only three cases on the basis of article 40 (2). In reality, application of the CPP provisions seems limited if not nonexistent in certain exposed sectors, such as foreign affairs, defence, development assistance and export credits, even though some of these administrations were aware of cases of bribery, alleged or proven, in the exercise of their mission.

169. Among the grounds mentioned is the risk that agents reporting to the Public Prosecutor's Office may face counter-charges of slanderous reporting. This reflects a misunderstanding of the provisions of article 226-10 CP concerning defamation, according to which the intentional element of the offence lies not in the falsity of the allegation itself, but in the knowledge, on the day the allegation was made, that it was false. A report made in good faith pursuant to article 40 does not, then, fall within the scope of the law, as confirmed by the Court of Cassation (Cass. Crim., 14 December 2000, appeal n° 86595).

170. AFD representatives also cited as a source of difficulties for employees the Public Prosecutor's Office policy not to open proceedings in the absence of sufficient evidence. Problems in interpreting the obligation imposed by article 40 (2) were also mentioned, noting that the law does not clearly specify what is to be understood by "knowledge of an offence". The French authorities consider that this requires administrations to report only proven acts of bribery and not mere suspicions. The move from suspicion to proof would therefore constitute, according to France, the main obstacle facing public servants. The law however gives the judicial authority the exclusive power to determine the existence of an offence. Furthermore, agents of UBIFRANCE, who are present in 60 countries and play a key role in promoting international trade, do not have the status of civil servant and are thus not subject to the reporting obligation.

171. The biggest obstacle, however, is undoubtedly the tendency of public administrations to exercise broad powers of discretion in deciding whether to report to the judicial authorities facts brought to their attention – a tendency that apparently has its origin in the decision of the Court of Cassation cited above which, without relieving the agent of his/her personal obligation, recognises that the agent is part of a hierarchical organisation, and that therefore the communication of criminal acts can be done not only by the official who discovered the offence but also by his/her superior. During the on-site visit, situations were confirmed where the administration had not reported matters to the prosecution, specifically within agencies responsible for official assistance (see below, section 11 of the report). Jurisprudence, however, does not imply any transfer of responsibility that would give the hierarchical authority a power it does not have, i.e. to assess the appropriateness of the disclosure, as this is the prerogative of the criminal justice system. By proceeding in this way, there is a real risk that the law enforcement authorities will be deprived of important sources of detection.

Commentary:

The lead examiners welcome the introduction of legislative protection for employees who in good faith disclose acts of bribery and they consider that this text brings France into conformity with its commitments under the 2009 Recommendation. To improve the system further, they encourage France; with the assistance in particular of the Central SCPC and other social actors, to persevere in its efforts to raise the awareness of companies, large and medium-sized, of the protection the law affords whistleblowers.

When it comes to public sector reporting, the examiners condemn the fact that administrations and their agents are making little use of article 40.2 CPP, which obliges them to report all criminal acts to the Public Prosecutor's Office. Considering that this obligation constitutes one of the keystones for the effectiveness of the criminal justice response to bribery in its international dimension, they recommend that France take appropriate measures to encourage reporting under article 40 CPP, by means of protocols for reporting bribery offences between the government sectors concerned and law enforcement authorities, protocols that should be accompanied by a clarification of the provisions of section 2 of article 40 CPP, and ongoing training for officials. Moreover, they recommend that France reinforce existing provisions within the French Development Agency (AFD), COFACE, and UBIFRANCE, and bring them

into line with article 40. The above actions requested of France should be the subject of follow up by the Working Group.

11. Public advantages

(a) Official development assistance

172. The French Development Agency (AFD) is responsible for instituting and carrying out French development assistance projects. In Phase 2, the Working Group recommended that policies be established to evaluate whether companies convicted of acts of foreign bribery should be ineligible for the agency's financial assistance (Recommendation 4). Subsequently, the 2009 Recommendation called on parties to the Convention to suspend from competition for public contracts funded by official development assistance any enterprises determined to have bribed foreign public officials (Recommendation XI i).

173. In response to the Phase 2 recommendation and the 2009 Recommendation France has adopted a preventive approach aimed at eliminating bribery in projects carried out by the agency. Counterparties have been required to sign an anti-bribery clause whereby they declare that "the negotiation, award and execution of the contract did not and will not give rise to any act of bribery as defined in the United Nations Convention against Corruption". If those contractual commitments are breached, AFD has a range of sanctions it can apply if the contractor is found guilty of bribery, directly or through an agent, or if AFD concludes that the contractor has submitted incomplete, inaccurate or misleading information, or that the terms and conditions of the contract have been amended without AFD approval. A "Guide for the award of contracts financed by AFD in foreign countries"¹³⁵ has been supplied to contractors for this purpose, and contains full information on AFD policies.

174. This declaration is accompanied by control measures at different stages of the project, supplemented by training for AFD personnel. In this context, AFD verifies that contractors and their shareholders are not included on the lists of financial sanctions adopted by the UN, the EU and France. The presence of the contractor or its shareholders on the "blacklists" of multilateral development banks is verified at the opening stage, and then throughout the duration of the assistance, in the context of "fit and proper" controls conducted by the group as part of the "know your customer" precautions that all French financial institutions must observe. According to the responses from France, "if the counterparty has been convicted (or merely accused) of bribery, whether domestic or transnational", AFD may refuse its financing and may also "terminate the business relationship if the counterparty has engaged in corrupt practices during the life of the project". In practice, AFD rejected five projects for financing between 2010 and 2011 because of suspicions of bribery that arose during the initial assessment of the request for financing. In addition, of the six AFD credits that were tainted by suspicions of bribery, four were revoked or were subjected to early repayment, cancellation of the contract, or termination of the business relationship. According to AFD, because the grounds necessary for triggering the anti-bribery clauses of the Conventions were missing, the agency preferred to invoke other arguments.

175. As noted above, the agency has also introduced a mechanism for internal reporting of suspicions of irregularity, including bribery, in contracts financed by AFD. During the written follow-up, noting that this mechanism was instituted at the end of 2004, the Working Group concluded that the Phase 2 recommendation had been satisfactorily implemented. As mentioned, however, the fact that AFD has not to date reported any allegations to the Public Prosecutor's Office raises questions about the effectiveness of

¹³⁵ See: www.afd.fr/webdav/site/afd/shared/PORTAILS/SECTEURS/ENTREPRISE/pdf/Guide_Passation_Marches_AFD.pdf (in French)

this mechanism, recognising that no fewer than 11 cases of transnational bribery have been suspected in projects financed by the agency.¹³⁶

(b) Export credits

176. COFACE, the French agency that manages official export credit, holds 30% of the market in Latin America; it is also one of the four main players in the Russian market, and it has a presence in China, Southeast Asia and Eastern Europe. Since 2007, all COFACE insurance contracts require exporters to confirm, in a "letter of commitment to the fight against corruption", that neither they nor their collaborators or agents have bribed or will bribe foreign public officials. Under penalty of the sanctions stipulated in article 25.6 of the general policy conditions, insured parties are also required to advise COFACE immediately if their company appears on one of the blacklists of the multilateral development banks, or if it has been convicted of transnational bribery.¹³⁷

177. Controls are conducted at various stages of the insurance contract: when the request is first examined, at the time the policy is issued, and throughout the life of the contract. COFACE must take steps when issuing the guarantee to ensure that the exporter is not facing criminal prosecution, that it has not been convicted in the last five years (although the agency has no right of access to the criminal records of legal persons), and is not included on any temporary blacklist of a multilateral bank. In certain cases, COFACE officers verify that the exporter has in place internal controls against bribery. COFACE controls also require the exporter to provide details on commissions paid (amounts, purpose, identity of the agents) in cases where the exporter is included on a blacklist, if it has been convicted in the past, or if it is currently facing prosecution for bribery, or if there is evidence pointing to suspicions of bribery. COFACE also reserves the right to require the insured party to provide information on the identity of persons acting for its account in the context of a guaranteed contract, and on the amount and purpose of commissions that have been or are to be paid to such persons. Enhanced due diligence is undertaken if the amount of the contract is obviously overstated, if an agency contract is declared, or if the contract reveals the intervention of shell companies.

178. At the time of the on-site visit, one company was subject to enhanced due diligence following its appearance on the World Bank blacklist. In this case, COFACE arranged for the company to be audited and subsequently the company produced evidence that corrective measures had been taken or were underway. During the on-site visit, it was suggested that some companies might have withdrawn their request for a guarantee because of investigations initiated by COFACE. As noted above, procedures have been established to facilitate the reporting of bribery suspicions to the Public Prosecutor's Office. Yet, despite that system, COFACE had not made a report to the prosecution at the time of Phase 3, even though there had been some cases of suspected bribery.

(c) Arms exports

179. The General Directorate for Armament (DGA) manages and coordinates State support for arms exports. It assists producers in negotiations and participates in the process of controlling arms exports. All exports of defence materiel must have the prior approval (AP) of the Defence Ministry as well as a defence export license (AEMG) from the DGA. The DGA is also involved in State support of arms exports, and it has special tools for financing defence industry investments. As part of this mission, the DGA oversees the application of existing export support procedures implemented by COFACE, which also apply arms exports.

¹³⁶ One of these cases had been reported to TRACFIN, but as far as AFD is aware that report was not passed on to the prosecution.

¹³⁷ The sanctions available to COFACE in case of noncompliance in the award and execution of contracts include cancellation of the guarantee and repayment of any indemnity received.

180. In granting the AP and the AEMG (which are delivered by the Prime Minister), the French authorities take into account any information about convictions or prosecutions underway involving bribery. On 20 June 2011 a decree provided for the possibility of suspending or revoking the AP and the AEMG in situations where their continuation posed a risk to the fundamental interests of the nation, to national defence, to public safety, or to the external security of the State, or where France's international commitments so require. It is not clear whether acts or suspicions of transnational bribery would be covered by this decree and would thus entail suspension of an AP or an AEMG. Moreover, as noted above, an internal mechanism explaining the procedure to be followed by DGA personnel in the case of a serious event was instituted in 2010. This procedure recalls the obligation under article 40.2 (reporting to the Public Prosecutor's Office) and opens the possibility of seeking advice from the *gendarmérie d'armement*, a specialised unit of the national police attached to the DGA. At the time of Phase 3, no report of acts or suspicions of transnational bribery in arms exports had been submitted.

(d) Public procurement

181. In Phase 2, the Working Group recommended that France assess whether companies convicted of foreign bribery should still be eligible for government financial assistance (Recommendation 4). The 2009 Recommendation called for countries to have in place laws and regulations that would allow companies determined to have bribed foreign public officials in contravention of national laws to be suspended from competition for public contracts. There were some significant developments on this front in 2005: Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 was transposed into French domestic law. It requires that any candidate or tenderer who has been the subject of a bribery conviction by final judgment be excluded from participation in a public contract.

182. However, application of this provision by the two central agencies responsible in France for the granting of public contracts, the Union des groupements d'achat public (UGAP) and the Service des achats de l'État, appears in practice to be very weak or nonexistent – this despite the fact, as noted above, that private sector representatives consulted during the on-site visit insisted that it was not the risk of criminal sanctions but rather the risk of being excluded from public procurement that businesses feared most. One explanation may lie in the fact that the UGAP does not have access to the criminal records of legal persons. France confirmed that the Service des achats de l'État has access to these records but did not deny the fact that, in practice, the Service refrained from referring to the criminal records of legal persons when deciding to grant contracts to French companies. It was also noted that the two agencies did not check the blacklists of international financial institutions, which raises questions about their degree of awareness of the potentially dissuasive effect of the procurement ban. A greater awareness of legal provisions on the part of agents, combined with a right of access for all administrative authorities to the criminal records of legal persons, could make for stronger application of the suspension of access to public procurement for companies convicted of bribing foreign public officials.

Commentary:

The lead examiners applaud the efforts of the French Development Agency and of COFACE to punish counterparties suspected or convicted of acts of corruption. As noted above, however, they find that the two agencies are not applying the provisions of the CPP which impose upon "any constituted authority, any public official or civil servant" an obligation to convey to the Public Prosecutor's Office any information concerning an offence, including the bribery of a foreign public official. For this reason, the examiners recommend that France take appropriate steps to encourage reporting under article 40 CPP. Furthermore, in order to improve controls during the granting of public advantages, and to enhance their monitoring, the examiners recommend that France should give all authorities mandated to approve public

procurement contracts access to the criminal records of legal persons. They also recommend that these agencies provide specific training for their agents on due diligence procedures.

With respect to arms exports, the lead examiners congratulate the DGA for its efforts to raise awareness among its agents and among arms exporters, and they encourage the DGA to provide further training for its agents concerning the obligation to report acts of transnational bribery discovered in the course of granting arms export contracts. They recommend that the DGA undertake enhanced due diligence of the risk of transnational bribery by arms exporters at the time of application for the prior agreement of the Ministry of Defence and the defence export license , as well as ongoing monitoring. They also recommend that the DGA consider the suspension or exclusion of arms exporters who have been definitively convicted of bribing foreign public officials.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

183. The Working Group on Bribery welcomes France's efforts to enact a legal framework, modified in particular in 2007 and 2011, designed to comply with the requirements of the Convention and the 2009 Recommendation. However, the Working Group continues to be concerned by the very low number of convictions in France for bribery of foreign public officials since the entry into force of the offence more than twelve years ago – a total of five of which just one, under appeal, holds a legal person liable. In view of the very important role its companies play in the international economy, France appears particularly exposed to the risk of bribery of foreign public officials. The Working Group's concern is all the more acute insofar as, despite foreign judgments involving certain French companies, France does not seem to have pursued criminal action in such cases as vigorously as expected.

184. The Phase 2 evaluation of France, adopted in 2004, included recommendations and issues for follow-up, as indicated in Annex 1 of this report. Twelve out of the 13 recommendations adopted by the Working Group in 2004 were deemed to have been implemented at the time of the Phase 2 written follow-up report. Only Recommendation 9 was deemed to have been only partially implemented.

185. Based on this report concerning France's application of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations in Part I to reinforce implementation of the Convention; and (2) will follow up the issues identified in Part II. The Working Group invites France to make an oral report to the Working Group on implementation of the recommendations 1(b), 3 and 4(a) in one year's time (October 2013). It also invites France to submit a written follow-up report on all the recommendations and issues for follow-up in two years' time (October 2014).

1. Recommendations of the Working Group

Recommendations for ensuring the effective investigation, prosecution and sanctioning of bribery of foreign public officials

1. Regarding the offence of bribery of foreign public officials, the Working Group recommends that France:
 - (a) review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials [Convention, Article 1 and 5; 2009 Recommendation, V]
 - (b) eliminate, as soon as possible, the dual criminality requirement set out in article 113-6 CP in relation to bribery of foreign public officials committed by French nationals outside French

territory (that the acts are “punishable by the law of the country where the acts were committed”); [Convention, Article 1; 2009 Recommendation, III. ii) and V]

- (c) clarify by all appropriate means that no element of proof, other than those set out in Article 1 of the Convention is required to constitute an offence under articles 435-3 et seq. CP with regard to bribery of foreign public officials, and in particular that the case-law principle of "corruption pact" does not, in practice, constitute such an element or an obstacle to the criminalisation of (i) the offer or promise of pecuniary or other advantages; (ii) acts of bribery involving intermediaries; and (iii) payments to third parties; [Convention, Article 1; 2009 Recommendation, III. ii) et V]
 - (d) to ensure by all appropriate means that the interpretation of the principle of non-retroactivity of criminal law does not impede the prosecution and sanctioning of bribery of foreign public officials occurring after the entry into force of the offence; [Convention, Article 1; 2009 Recommendation, V.]
 - (e) examine the possibility either of criminalising the bribery of a foreign public official sufficiently broadly, or of extending the offence of trading in influence, to avoid a difference of approach for the same acts of bribery based whether the intended recipient is a French or a foreign public official; [Convention, Article 1; 2009 Recommendation, III. ii) and V]
2. Concerning the criminal liability of legal persons, the Working Group recommends that France:
- (a) clarify the requirements for the criminal liability of legal persons to: (i) ensure that their approach fully takes into account Annex I of the 2009 Recommendation; and (ii) that a legal person cannot escape liability for acts of bribery by making use of an intermediary, including a related legal person; [Convention, Article 2; 2009 Recommendation, Annex I(B)]
 - (b) introduce ongoing training for the French law enforcement authorities relating specifically to enforcement of the criminal liability of legal persons in foreign bribery cases. [Convention, Article 2; 2009 Recommendation, III(i), Annex I(D)]
3. Concerning sanctions in cases of transnational bribery, the Working Group recommends that France:
- (a) with regard to the penalties applicable to natural persons, (i) raise the maximum amount of the fines set out in article 435-3 CP, in particular to bring it into line with the amount of available fines for the offence of misuse of corporate assets; and (ii) ensure that the penalties imposed in practice are effective, proportionate and dissuasive; [Convention, Article 3; 2009 Recommendation]
 - (b) with regard to the penalties applicable to legal persons, (i) raise the maximum amount of the available fine to a level that is effective, proportionate and dissuasive; and (ii) make full use of the additional penalties available in the law, in particular debarment from public procurement, in order to contribute to the application of sanctions that are effective, proportionate and dissuasive; [Convention, Articles 2 and 3; 2009 Recommendation, III.vii) and XI.i)]
 - (c) make full use of the confiscation measures available in the law in order to contribute to the application of penalties that are effective, proportionate and dissuasive and, in this context: (i) develop a proactive approach to seizure and confiscation of the instrument and proceeds of the bribery of foreign public officials or assets of equal value, including in the context of proceedings involving legal persons; (ii) raise awareness among judges and law enforcement authorities of the importance of confiscating the proceeds of bribery of a foreign public official

(especially where the perpetrator is a legal person); and (iii) develop and disseminate guidelines on methods for quantifying the proceeds of corruption offences. [Convention, Article 3.3]

4. Concerning investigation and prosecution, the Working Group recommends that France:

- (a) pursue the changes initiated by the two circulars by the Minister of Justice concerning new relationships between the Ministry of Justice and prosecutors by progressing to amendment of the legal framework to (i) ensure that the Public Prosecutor's Office monopoly on the instigation of investigations and prosecutions, together with its role in the conduct of judicial investigations and the procedure for appearance on prior admission of guilt (CRPC), are exercised independently of the executive in order to guarantee that investigations and prosecutions in cases of bribery of foreign public officials are not influenced by factors prohibited by Article 5 of the Convention; and (ii) to break with past practices of individual instructions, as announced by the circular; [Convention, Article 5 and 2009 Recommendation, V. and Annex 1(D)]
- (b) accord the same rights to all victims of the bribery of foreign public officials, without differentiating between States, with regard to the instigation of criminal proceedings and bringing civil party claims and to and to eliminate the requirement of a prior complaint by a victim or his/her legal representatives or an official complaint by the country where the acts were committed, contained in article 113-8 CP; [Convention, Articles 4 and 5, 2009 Recommendation, Annex 1(D) and Phase 2 Recommendation 8]
- (c) as necessary and in compliance with the relevant rules and procedures, make public by all appropriate means, and respecting the fundamental rights of the Defendant, certain elements of the CRPC, such as the terms of the agreement, especially the approved penalty or penalties; [Convention, Article 3]
- (d) formally clarify, by circulars or any other official means, France's criminal justice policy with regard to bribery of foreign public officials in order to ensure a determined commitment on the part of public prosecutors and judicial police officers placed under their authority to systematically investigate the liability of persons suspected of committing the offence, including on the basis of information spontaneously transmitted by foreign authorities, mutual legal assistance requests and credible allegations that are reported to them or that come to their attention in the performance of their duties; [Convention, Article 5; 2009 Recommendation, XIII i) and ii) and Annex 1(D)]
- (e) issue a comprehensive reminder to all jurisdictions that the Paris jurisdiction and the Central Anti-Corruption Brigade have jurisdiction over all cases of bribery of foreign public officials and, in this context, (i) ensure that resources are in place in each appellate jurisdiction such as to allow Prosecutors General to identify cases suitable for referral to the Paris jurisdiction, including by holding regular meetings with the relevant decentralised units of the judicial police; and (ii) ensure that sufficient resources are allocated to investigations and prosecutions, in particular to the Financial Section of the Paris Regional Court and to the Central Brigade, including for processing mutual legal assistance requests; [Convention, Articles 5 and 9; 2009 Recommendation, II, V and XIII, Annex 1(D) 2) and 3); Phase 2 Recommendation 10]
- (f) within the overall review of the remit of the Public Prosecutor's Office, give thought to the status of the judicial police in order to ensure its capacity to conduct investigations that are not influenced by the considerations mentioned in Article 5 of the Convention; [Convention, Article 5 and Commentary 27; 2009 Recommendation, Annex 1(D)]

- (g) clarify by all means that the law governing classification of information covered by defence secrecy cannot impede the investigation and prosecution of foreign bribery cases and that the provisions of Article 5 of the Convention are taken into account in the decision to classify or, even more so, to declassify information necessary for investigations and prosecutions of foreign bribery; [Convention, Article 5]
 - (h) take all appropriate steps, including potentially amending the “blocking statute”, to ensure that the conditions governing access to information in the possession of French companies under this law do not stand in the way of foreign authorities’ ability to investigate and prosecute the bribery of foreign public officials. [Convention, Article 5]
5. Concerning the statute of limitations, the Working Group recommends that France take necessary measures to extend, to an appropriate period, the statute of limitations applicable to the offence of bribery of foreign public officials. [Convention, Article 6; Phase 2 Recommendation 9]
 6. Concerning mutual legal assistance, the Working Group recommends that France take all necessary measures to ensure that investigations conducted by the judicial police under the supervision and direction of the Public Prosecutor's Office before the opening of an formal criminal proceeding are not influenced by the identity of the natural or legal persons involved and, more generally, that decisions to grant mutual legal assistance in foreign bribery cases are not influenced by considerations of national economic interest under the guise of protecting "the fundamental interests of the nation". [Convention, Articles 5 and 9]

Recommendations for ensuring the effective prevention and detection of transnational bribery

7. Concerning money laundering, the Working Group recommends that France:
 - (a) pursue and increase its efforts to raise awareness of professions required to detect acts that may involve foreign bribery; [2009 Recommendation, III i)]
 - (b) consider a review of the money laundering methods and schemes that could be used in instances of transnational bribery review and share, if appropriate, the results of this review with private-sector professionals who are in a position to detect foreign bribery. [Convention, Article 7]
8. Concerning accounting rules, external audit and corporate compliance programmes, the Working Group recommends that France:
 - (a) support existing initiatives to train statutory auditors in the detection of bribery and the obligation to report criminal acts, ensuring that, in accordance with the provisions of ISA 500, such training also extends to criminal acts committed by the foreign subsidiaries of companies that they are responsible for auditing; [2009 Recommendation, III i), X B. v)]
 - (b) increase efforts to raise awareness among French companies of the need to take account, in their compliance programmes, of the role of their foreign subsidiaries and promote the adoption and implementation of compliance programmes in SMEs involved in international trade, according to the specific circumstances of each one. [2009 Recommendation X. C. i) and v); Annex II]

9. Concerning tax measures to combat bribery of foreign public officials, the Working Group recommends that France:
 - (a) urge French Polynesia and Saint Pierre and Miquelon to apply the principle of the non-deductibility of bribes as soon as possible; [2009 Tax Recommendation I(i) and Phase 2 Recommendation 13]
 - (b) pursue efforts to raise the awareness of tax agents on their role of detecting illicit transactions related to the bribery of foreign public officials, both in mainland France and in the overseas territories, and take all appropriate steps to promote the exchange of information in the possession of tax authorities for use by law enforcement authorities, notably through reporting under article 40 CPP. [2009 Tax Recommendation VIII(i)]
10. Concerning raising awareness of the offence of bribery of foreign public officials, the Working Group recommends that France reinforce its existing activities in order to ensure that officials of the Ministry of Foreign Affairs and of the General Directorate of the Treasury are suitably aware of the offence and of their role in raising awareness of the risks among companies. [2009 Recommendation III i) and iv)]
11. Concerning the reporting of transnational bribery, the Working Group recommends that France:
 - (a) persevere in its efforts to raise awareness of large, medium-sized and small companies, of the protection the law affords private-sector whistleblowers; [2009 Recommendation, III (i) and IX i) and iii)]
 - (b) ensure that appropriate measures are in place to encourage reporting under article 40.2 CPP, in particular by concluding protocols for reporting bribery offences between law enforcement authorities and relevant government sectors, accompanied by ongoing training for officials; [2009 Recommendation, IX]
 - (c) reinforce the reporting framework in place in the French Development Agency (AFD), COFACE, and UBIFRANCE and work towards aligning this with article 40 CPP. [2009 Recommendation, IX]
12. Concerning public advantages, the Working Group recommends that France:
 - (a) take the necessary steps to give all authorities mandated to approve public procurement contracts access to the criminal records of legal persons; [2009 Recommendation XI i)]
 - (b) provide specific training to the staff of agencies mandated to provide public advantages on the due diligence procedures that need to be undertaken when providing such advantages; [2009 Recommendation XI i)]
 - (c) reinforce the existing framework in the General Directorate for Armament with a view to (i) ensuring a comprehensive review of internal control, ethics and compliance programmes or measures at the time of application for the prior agreement of the Ministry of Defence and the defence export licence and (ii) allow for the suspension of access to arms exports of companies convicted of bribery of foreign public officials. [2009 Recommendation X. C. (vi); XI. (i)]

2. Follow-up by the Working Group

13. The Working Group will follow up the issues below as case law and practice develop, to ensure:
- (a) that the definition of “without right” is not interpreted more restrictively than the definition of “improper advantage” in the Convention and therefore does not require proof that a law in force in the country of the recipient of the bribe prohibits that person from receiving a bribe; [Convention, Article 1]
 - (b) (i) the extent of recourse to the offence of misuse of corporate assets in cases involving elements of transnational bribery, on the basis of data that France should collect and analyse; and
(ii) whether liability of legal persons can be established, in practice, in foreign bribery cases where natural persons are prosecuted for misuse of corporate assets, to determine whether this represents an obstacle to liability of legal persons in France for the offence of bribery of foreign public officials; [Convention, Articles 1 and 2]
 - (c) the development of ongoing foreign bribery cases against legal persons; [Convention, Article 2]
 - (d) that sanctions applied in the context of the procedure of appearance on prior admission of guilt are effective, proportionate and dissuasive; [Convention, Article 1]
 - (e) the application of the procedure of appearance on prior admission of guilt in foreign bribery cases; [Convention, Articles 3 and 5; and 2009 Recommendation, Annex 1, D]
 - (f) that statistics are collected on incoming and outgoing requests for mutual legal assistance executed directly between prosecutors; [Convention, Article 9]
 - (g) measures taken to encourage reporting under article 40 of the Code of Criminal Procedure. [2009 Recommendation, XI ii]

ANNEX 1

PHASE 2 RECOMMENDATIONS OF THE WORKING GROUP AND WRITTEN FOLLOW-UP

Phase 2 Recommendations from 2004	2006 written follow-up
<i>Recommendations for action</i>	
<p>With regard to awareness-building efforts to promote the OECD Convention and the offence of bribing a foreign public official under the anti-bribery provisions of French law, the Working Group recommends that France:</p> <p>1. Continue and strengthen its efforts vis-à-vis enterprises, including small and medium-sized enterprises that do business internationally, and encourage companies to develop and adopt internal control mechanisms, including putting in place ethics committees and warning systems for employees, as well as codes of conduct specifically addressing the issue of transnational bribery. [Revised Recommendation, Articles I and V.C.i)]</p>	Implemented
Regarding detection, the Working Group recommends that France:	
<p>2. Issue regular reminders, via inter-ministerial circulars or any other official channel, to all public officials, and particularly those working for agencies invested with supervisory powers, of their obligation to advise the Public Prosecutor promptly of any violation of the Act of 30 June 2000, pursuant to Article 40 subsection 2 of the Code of Criminal Procedure, and that they be reminded, in this regard, of the disciplinary sanctions applicable in the event of non-compliance with this obligation, having regard in particular to the broad discretion that is granted to them in this area. [Revised Recommendation, Article I]</p>	Implemented
<p>3. Issue regular reminders to diplomatic missions of specific instructions concerning measures to be taken when there are presumptions that a French enterprise or individual has bribed or attempted to bribe a foreign public official, including reminders of their obligation to advise promptly the Public Prosecutor. [Revised Recommendation, Article I]</p>	Implemented
<p>4. Establish procedures to be followed by employees of the Coface and the Agence Française de Développement for reporting credible evidence of the bribery of a foreign public official to the Public Prosecutor's office and encourage these agencies to set up policies to evaluate the eligibility of enterprises that have been found guilty in the past of acts of foreign bribery for financial assistance provided by these agencies. [Convention, article 3; Revised Recommendation, articles I and VI]</p>	Implemented
<p>5. Consider introducing stronger protective measures for employees who report suspicious facts that may indicate bribery in order to encourage them to report such facts without fear of retaliation in the form of dismissal. [Convention, Article 5; Revised Recommendation, Article I]. .</p>	Implemented
<p>6. Make use of the new law on financial security to enhance the awareness of auditors and provide them with further training regarding the provisions of the Act of 30 June 2000, in connection with their obligation to report any illicit act to the Public Prosecutor's office, and to subject those who fail to comply with that obligation to more severe disciplinary measures. [Convention, Article 8; Revised Recommendation, Article V]</p>	Implemented
<p>7. In order to enhance the overall effectiveness of French provisions to fight corruption, make financial and professional organisations which are subject to the obligation to declare suspicious transactions to TRACFIN (the financial intelligence unit) more aware of the provisions of the Act of 30 June 2000, and ensure that available sanctions are applied effectively to all those organisations and professions that are subject to this obligation. [Revised Recommendation, Article I]</p>	Implemented

<i>Recommendations for ensuring adequate mechanisms for the effective prosecution of offences of bribery of foreign public officials and related offences</i>	
8. Given the current exceptional regime assigning to the Public Prosecutor the sole authority to prosecute cases involving the bribery of foreign public officials of States that are not Members of the European Union, and given the hierarchical structure of the Public Prosecutors' office which is by law subject to the executive, facilitate the prosecution based on complaints lodged by victims in cases involving the bribery of public officials of any foreign State, on the same basis as that provided for bribery of French public officials. [Convention, Article 5; Revised Recommendation, Article VI]	Implemented
9. Take the necessary steps to extend to an appropriate period the statute of limitations applicable to the offence of bribery of foreign public officials so as to ensure the effective prosecution of the offence, and to facilitate responses to requests for extradition. [Convention, Article 6]	Partially Implemented
10. Ensure that, within the framework of the reorganisation of the judiciary specialised in economic and financial offences, sufficient human and financial resources are allocated to investigations and legal proceedings in cases of bribery of foreign public officials, particularly in respect of the new central anti-bribery brigade, the economic and financial poles and specialised training for magistrates assigned to these poles, as well as the processing of requests for international mutual assistance. [Convention, Article 9; Revised Recommendation Articles I and VII; Annex to the Revised Recommendation, Paragraph 6]	Implemented
11. Draw the attention of magistrates to the importance of applying effectively the criminal liability of legal persons in cases where enterprises are prosecuted for the bribery of foreign public officials and encourage them to impose, wherever possible, the penalty of confiscation and, to that end, to take the necessary steps to make them aware of the usefulness of such a penalty to sanction the offence of bribery of foreign public officials. [Convention, Articles 2 and 3]	Implemented
12. Compile statistics on the number of proceedings involving acts of transnational bribery that have resulted in prosecution or in the shelving of the proceedings, before or after investigation, in order to facilitate assessment and, where appropriate, encourage changes to the relevant criminal policy. [Revised Recommendation, Article I]	Implemented
13. Carry out the requisite consultations with a view to ensuring that appropriate fiscal provisions, in compliance with Article IV of the revised Recommendation of 1997 on the non-deductibility of bribes, are enacted as soon as possible in French territories that enjoy an autonomous tax status, taking into account the relative risk factors that are associated with them. [Revised Recommendation, Article IV; Phase 1 Evaluation].	Implemented
<i>Follow-up by the Working Group</i>	
1. The Working Group will follow up on the issues listed below, in light of evolving practice, in order to check:	
14. The application of sanctions with a view to determining whether they are sufficiently effective, proportionate and dissuasive to prevent and punish the offence of transnational bribery, in particular, the practice of the courts with regard to the criminal liability of legal persons for the offence of active bribery of foreign public officials. [Convention, Articles 2 and 3]	
15. Whether the current wording – notions of "without right", "at any time", and foreign public officials, and the case law concept of "corruption pact" – as well as the treatment given to the role played by the intermediary in the transmission of a bribe are sufficiently clear to allow effective prosecution of the offence of bribery of a foreign public official. [Convention, Article 1]	
16. Whether the current basis of personal jurisdiction, which makes prosecution contingent on the prior lodging of a complaint by the victim or the official authorities, is an effective means of combating the bribery of foreign public officials having regard to the type of offence in question and the reluctance that certain foreign authorities may have in reporting on the acts of their own public officials. [Convention, Article 4]	
17. The effectiveness of existing mechanisms at the disposal of the tax administration to identify and reject as deductible expenses bribes paid for export contracts. [Revised Recommendation, Article IV].	
2. The Working Group will furthermore follow up on the issue of provision of mutual legal assistance by France, to ensure that it is not influenced, in the context of the fight against bribery of foreign public officials, by economic considerations. [Convention, Article 9; Revised Recommendation, Article VII]	

ANNEX 2

LIST OF PARTICIPANTS DURING THE ON-SITE VISIT

ADMINISTRATIONS	
Ministry of Economic Affairs, Finance and Industry	<ul style="list-style-type: none"> ▪ DGFIP (Direction Générale des Finances Publiques) ▪ DAJ (Direction des Affaires Juridiques) ▪ DG Trésor (Direction Générale du Trésor) ▪ TRACFIN
Ministry of the Interior (Ministère de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration)	<ul style="list-style-type: none"> ▪ Délégation générale de l'Outre-mer ▪ Direction centrale de la police judiciaire ▪ Direction générale de la gendarmerie nationale ▪ Préfecture de police de Paris ▪ DNIFF (Division nationale des investigations financières et fiscales) ▪ OCRGDF (Office central de répression de la grande délinquance financière) ▪ PIAC (Plateforme d'identification des avoirs criminels) ▪ Section de recherches de Paris ▪ Section de recherches de Marseille
Ministry of Justice (Ministère de la Justice et des Libertés)	<ul style="list-style-type: none"> ▪ DACG (Direction des Affaires Criminelles et des Grâces) ▪ DACS (Direction des Affaires Civiles et du Sceau) ▪ SCPC (Service central de prévention de la corruption) ▪ AGRASC (Agence de gestion et de recouvrement des avoirs criminels saisis et confisqués)
Ministry of Defence (Ministère de la Défense et des Anciens Combattants)	<ul style="list-style-type: none"> ▪ DGA (Délégation Générale de l'Armement)
Ministry of Foreign Affairs (Ministère des Affaires Étrangères et Européennes)	<ul style="list-style-type: none"> ▪ DGM (Direction Générale de la Mondialisation)
Ministry of Labour	<ul style="list-style-type: none"> ▪ DGT (Direction générale du travail)
Ministry of the Civil Service (Ministère de la Fonction Publique)	<ul style="list-style-type: none"> ▪ DGAFP (Direction générale de l'administration et de la fonction publique) ▪ Commission de déontologie de la fonction publique
SGDSN (Secrétariat général de la défense et de la sécurité nationale)	
INDEPENDENT ADMINISTRATIVE AUTHORITIES	
<ul style="list-style-type: none"> ▪ CCSDN (Commission consultative du secret de la défense nationale) 	
PUBLIC AGENCIES	

<ul style="list-style-type: none"> ▪ AFD (Agence Française de Développement) 	
<ul style="list-style-type: none"> ▪ UBIFRANCE 	
PRIVATE SECTOR, BUSINESS ORGANISATIONS AND PROFESSIONAL ASSOCIATIONS	
Companies	<ul style="list-style-type: none"> ▪ Eurotradia ▪ Ipsen ▪ Technip ▪ Thalès ▪ Dassault Aviation ▪ EADS ▪ Alstom ▪ Bolloré ▪ DCNS (Naval Defence and Energy Solution)
Financial sector	<ul style="list-style-type: none"> ▪ BNP Paribas ▪ Crédit Agricole
Business organisations	<ul style="list-style-type: none"> ▪ MEDEF (Mouvement des Entreprises de France) ▪ FNTP (Fédération nationale des travaux publics)/SEFI (Syndicat des Entrepreneurs Français Internationaux) ▪ CIAN (Conseil Français des Investisseurs en Afrique) / Ethic Intelligence
	<ul style="list-style-type: none"> ▪ Chambre de commerce et d'industrie de Paris ▪ COFACE (Compagnie Française d'Assurance pour le Commerce Extérieur)
LEGAL PROFESSION	
Judiciary	<ul style="list-style-type: none"> ▪ Parquet général de la cour d'appel de Paris ▪ Tribunal de Grande Instance de Paris ▪ Tribunal de Grande Instance de Créteil ▪ Tribunal de Grande Instance de Mulhouse
Legal profession	<ul style="list-style-type: none"> ▪ LeBray & Associés ▪ Kiejman & Marembert ▪ Debevoise & Plimpton ▪ Cabinet Hugues Hubard
ACCOUNTING AND AUDITING PROFESSION	
Regulatory and supervisory authorities	<ul style="list-style-type: none"> ▪ ANC (Autorités des Normes Comptables) ▪ H3C (Haut Conseil du Commissariat aux Comptes) ▪ CNCC (Compagnie nationale des commissaires aux comptes) ▪ Conseil supérieur de l'ordre des experts comptables ▪ IFACI (Institut français de l'audit et du contrôle interne)
Audit firms	<ul style="list-style-type: none"> ▪ BDO ▪ Deloitte ▪ Scacchi & Associés

PROFESSIONAL ASSOCIATIONS

- USM (Union Syndicale des Magistrats)
- Syndicat de la Magistrature
- Force Ouvrière Magistrats
- IFEC (Institut Français des Experts Comptables)
- EFC (Experts comptables de France)

CIVIL SOCIETY AND ACADEMICS

Civil society

- ANTICOR
- Transparence Internationale
- Association Sherpa
- Secours catholique

Universities

- Université Paris 12 (Paris Créteil)
- Université de Cergy-Pontoise
- Université de Lorraine (Nancy 2)

ANNEX 3

LIST OF ABBREVIATIONS

ABS	<i>Abus de biens sociaux</i> (Misuse of corporate assets)
AEMG	Defence export license
AFD	Agence française de développement (French development cooperation agency)
BCLC	Brigade centrale de lutte contre la corruption (Central Anti-Corruption Brigade)
BRDE	Brigade de la répression de la délinquance économique (Economic crime brigade)
Cass. Crim	Criminal Chamber of the Court of Cassation
CCIP	Chamber of Commerce and Industry of Paris
CDI	Double taxation agreement
CGI	Code général des impôts (General Tax Code)
COFACE	Compagnie française d'assurance pour le commerce extérieur (French export insurance agency)
CNCC	Compagnie nationale des commissaires aux comptes (College of auditors)
CP	Penal Code
CPP	Code of Criminal Procedure
CRPC	<i>Comparution sur reconnaissance préalable de culpabilité</i> ("Appearance on prior admission of guilt")
DACG	Directorate of Criminal Affairs and Pardons of the Ministry of Justice
DCPJ	Central Judicial Police Directorate
DGFIP	General Directorate of Public Finances
DGPN	General Directorate of the National Police
DGA	General Directorate for Armament
DNEF	National Directorate of Tax Investigations
DNIF	National Division of Financial Investigations
DRPJ	Regional Directorate of the Criminal Police
DVNI	National and International Verifications Directorate
EUR	Euro
FATF	Financial Action Task Force
GRECO	Group of States against Corruption (Council of Europe)
LSF	Financial Security Act
JIRS	Juridiction interrégionale spécialisée ("specialist interregional jurisdiction")
JRS	Juridiction régionale spécialisée ("specialist regional jurisdiction")
MEDEF	Mouvement des entreprises de France (French Employers' Federation)
OLAF	European Anti-Fraud Office (European Commission)
PIAC	Plateforme d'identification des avoirs criminels (Criminal Assets Identification Platform)
GDP	Gross domestic product
SME	Small and medium-sized enterprises
SARL	<i>Société à Responsabilité Limitée</i> (Limited liability company)
SAS	<i>Société par actions simplifiée</i> (Simplified joint-stock corporation)
SCPC	Service Central de Prévention de la Corruption (Central Corruption Prevention Department)
SR	Investigation Unit (of the National Gendarmerie)
SRPJ	Service régional de police judiciaire (Regional judicial police service)
TRACFIN	Traitement du Renseignement et Action contre les Circuits Financiers clandestins (French Financial Intelligence Unit)
TGI	Tribunal de Grande Instance (Regional Court)
EU	European Union
UGAP	Union des groupements d'achat public (Central purchasing agency)
USD	United States dollar

ANNEX 4 – RELEVANT LEGISLATION

TEXT OF THE OFFENCE

Penal Code, article 435-3

The unlawful proffering, at any time, directly or indirectly, of any offer, promise, gift, present or advantage of any kind to a person holding public office or discharging a public service mission, or an electoral mandate in a foreign State, or within a public international organisation, as inducement to carry out or abstain from carrying out an act of his function, duty or mandate or facilitated by his function, duty or mandate is punished by ten years' imprisonment and a fine of EUR 150,000.

The same penalties apply to yielding to any person specified in the previous paragraph who unlawfully solicits, at any time, directly or indirectly, any offer, promise, gift, present or advantage of any kind as inducement to carry out or abstain from carrying out an act specified in the previous paragraph.

Penal Code, article 435-4

The unlawful proffering, at any time, directly or indirectly, of any offer, promise, gift, present or advantage of any kind to a person, for himself or another, as inducement to abuse his real or supposed influence in order to obtain distinctions, employment, contracts or any other favourable decision from a person holding public office or discharging a public service mission, or an electoral mandate in a foreign State, or within a public international organisation is punished by five years' imprisonment and a fine of EUR 75,000.

The same penalties apply to yielding to any person specified in the previous paragraph who unlawfully solicits, at any time, directly or indirectly, any offer, promise, gift, present or advantage of any kind, for himself or another, as inducement to abuse his real or supposed influence in order to obtain distinctions, employment, contracts or any other favourable decision from a person mentioned in the first paragraph.

Penal Code, article 435-5

Agencies created pursuant to the Treaty on European Union are deemed to be public international organisations for purposes of this section.

Penal Code, article 435-6

Prosecution of the offences mentioned in articles 435-1 to 435-4 may be initiated only at the behest of the public prosecutor, except when the offers, promises, gifts, presents or advantages are proposed or granted to a person exercising functions in one of the member States of the European Union or in the European Communities or an agency created pursuant to the European Union Treaty, or when they are solicited or agreed by such a person in order to obtain a favourable decision or to perform or abstain from performing an act of his function or facilitated by his function.

MISUSE OF CORPORATE ASSETS

Code of Commerce: Article L242-6

The following shall be punished by a prison sentence of five years and a fine of EUR 375,000: [...]

3° If the chairman, directors or managing directors of a public limited company use the company's property or credit, in bad faith, in a way which they know is contrary to the interests of the company, for personal purposes or to favour another company or undertaking in which they are directly or indirectly involved.

LIABILITY OF LEGAL PERSONS

Penal Code, article 121-2

Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 to 121-7.

However, local public authorities and their associations incur criminal liability only for offences committed in the course of activities which may be exercised through public service delegation contracts.

The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators of or accomplices to the same act, subject to the provisions of the fourth paragraph of article 121-3.

CONFISCATION

Penal Code, article 131-21

The supplementary penalty of confiscation is incurred in the cases stipulated by statute or regulation. It is also incurred, automatically, for felonies or misdemeanours punished by a prison penalty exceeding one year, except for breach of the press laws.

Confiscation applies to all movable or immovable properties, whatever their nature, severally or jointly owned, that were used or intended for committing the offence, and of which the offender is the owner or, if the owner is a third party, over which he has free disposal.

Confiscation also applies to all goods that are the object or the direct or indirect product of the offence, with the exception of goods subject to restitution to the victim. If the product of the offence has been mixed with funds of legitimate origin for the acquisition of one or more goods, the confiscation of those goods is limited to the estimated value of that product.

Confiscation may also apply to any movable or immovable good defined by statute or regulation punishing the offence.

In the case of a felony or misdemeanour punishable by at least five years' imprisonment, where a direct or indirect profit has been obtained, the confiscation may also apply to the movable or immovable goods, whatever their nature, severally or jointly owned, of which the offender is the owner or, if the owner is a third party, over which he has free disposal, when neither the offender nor the owner is able, upon demand, to justify the origin of the goods targeted for confiscation.

If a law punishing the felony or misdemeanour so provides, confiscation may also apply to all or a portion of the goods belonging to the offender or, if the owner is a third party, over which he has free disposal, whatever their nature, movable or immovable, severally or jointly owned.

Confiscation is mandatory for objects qualified as dangerous or harmful by statute or regulation, or the possession of which is unlawful, whether or not these goods are the property of the offender.

The supplementary penalty of confiscation applies under the same conditions to all intangible rights, whatever their nature, severally or jointly owned.

Confiscation in value may be ordered. For the recovery of the sum representing the value of the thing confiscated, the provisions governing judicial enforcement are applicable.

The thing confiscated devolves to the State, except where a specific provision prescribes its destruction or its attribution, but remains encumbered up to its full value with any proprietary right lawfully created in favour of third parties.

Where the thing confiscated is a vehicle that has not been seized or impounded during the investigation, the offender must, on the orders of the public prosecutor, hand over the vehicle to the department or organisation responsible for destroying or disposing of it.

JURISDICTION

Penal Code, article 113-6

French criminal law is applicable to any felony (*crime*) committed by a French national outside the territory of the French Republic.

It is applicable to misdemeanours (*délits*) committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed.

It is applicable to violations of the provisions of Regulation (EC) No. 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport, committed in another member state of the European Union and confirmed in France, subject to the provisions of article 692 of the Code of Criminal Procedure or proof that an administrative penalty has been executed or has expired by statutory limitation.

The present article applies even if the defendant has acquired French nationality after the commission of the offence of which he is accused.

Penal Code, article 113-7

French Criminal law is applicable to any felony, as well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place.

Penal Code, article 113-8

In the cases set out under articles 113-6 and 113-7, the prosecution of misdemeanours may only be initiated at the behest of the public prosecutor. It must be preceded by a complaint made by the victim or

his successor, or by an official accusation made by the authority of the country where the offence was committed.

French criminal law is applicable to offences committed beyond territorial waters, when international conventions and the law so provide.

Penal Code, article 435-6

Prosecution of the offences mentioned in articles 435-1 to 435-4 may be initiated only at the behest of the public prosecutor, except when the offers, promises, gifts, presents or advantages are proposed or granted to a person exercising functions in one of the member States of the European Union or in the European Communities or an agency created pursuant to the European Union Treaty, or when they are solicited or agreed by such a person in order to obtain a favourable decision or to perform or abstain from performing an act of his function or facilitated by his function.

CIVIL PARTY STATUS

Code of Criminal Procedure, article 85

Any person claiming to have suffered harm from a felony or misdemeanour may petition to become a civil party by filing a complaint with the competent investigating magistrate in accordance with the provisions of articles 52, 52-1 and 706-42.

However, the filing of a complaint as civil party is admissible only if the plaintiff can show that the public prosecutor has advised him, following a complaint deposited with the prosecution or with a criminal police unit, that the prosecution will not itself take action, or if three months has elapsed since the complaint was deposited with the prosecution, with receipt formally acknowledged, or after the plaintiff has, under the same terms, sent the prosecution a copy of his complaint filed with a criminal police unit. This condition of admissibility is not required in the case of a felony or of a misdemeanour established by the law of 29 July 1881 on freedom of the press or by articles L. 86, L. 87, L. 91 to 100, L. 102 to 104, L. 106 to 108, and L. 113 of the elections code. The statute of limitations on public action is suspended, to the benefit of the victim, from the time the complaint is deposited until the prosecutor responds or, at latest, for three months.

If a not-for-profit legal person files a complaint as civil party it is admissible only if that legal person demonstrates its resources by attaching its balance sheet and statement of earnings.

APPEARANCE ON PRIOR ADMISSION OF GUILT

Code of Criminal Procedure, Article 495-7

For all misdemeanours, with the exception of those mentioned in article 495-16 and of offences involving deliberate or involuntary personal assault and sexual aggression as defined in article 222-9 to 222-31-2 of the Penal Code punishable by a prison sentence exceeding five years, the public prosecutor may, of his own motion or at the request of the party concerned or his attorney, use the procedure of appearance on prior admission of guilt under the provisions of the present section, in relation to any person summoned to this end or brought before him under the provisions of article 393, where this person admits the matters of which he is accused.

NATIONAL DEFENCE CLASSIFICATION

Penal Code, article 410-1

The "fundamental interests of the Nation" in the sense of the present title covers its independence, the integrity of its territory, its security, the republican form of its institutions, its means of defence and diplomacy, the safeguarding of its population in France and abroad, the balance of its natural surroundings and environment, and the essential elements of its scientific and economic potential and cultural heritage.

Defence Code, Article L. 2312-1

The Consultative Commission on national defence secrets is an independent administrative authority. It is responsible for providing an opinion on the declassification and disclosure of information which has previously been classified pursuant to the provisions of Article 413-9 of the Penal Code, except in relation to information for which the rules of classification are not the sole province of the French authorities.

The Consultative Commission on national defence secrets shall issue an opinion at the request of a French court.

Defence Code, Article L. 2312-7

The Commission shall issue an opinion within two months from the time it is apprised of the matter. This opinion shall take into account the judicial system's duty of public service, the respect for the presumption of innocence and the rights of the defence, the respect for France's international commitments as well as the need to maintain defence capabilities and staff security.

If there is a tie, the Chairman shall cast the deciding vote.

The opinion may recommend full declassification, partial declassification or may refuse the request.

The Commission's opinion shall be transmitted to the administrative authority which classified the material.

DISCLOSURE BY THE STATUTORY AUDITORS OF CRIMINAL ACTS

Commercial Code, Article L8 23-12

The statutory auditors shall report to the next general assembly or meeting of the competent body any irregularities and inaccuracies detected by them in the course of their mission.

They shall report to the public prosecutor any criminal acts of which they have knowledge, and they shall incur no liability for such disclosure.

Without prejudice to the obligation to disclose the criminal acts, mentioned in the previous paragraph, the auditors shall respect the obligations concerning money laundering and the financing of terrorism defined in Chapter I of title VI Outlook V of the Monetary and Financial Code.

ANNEX 5

TRANSNATIONAL BRIBERY CASES SUBJECT TO A FINAL COURT DECISION

Case name	Date of judgment	Persons involved	Type of proceeding	Date of the offence	Alleged facts of the case	Total bribes paid	Charge preferred	Status of proceedings
CASES TRIED (2 DISMISSALS)								
Leading group in the energy and transport sectors (South America, Asia and others)	19/10/2009	1 individual	Judicial investigation		Suspicion of bribing foreign public officials to obtain contracts in Brazil, Venezuela and Singapore, with money laundered through offshore companies		Misuse of corporate assets. Receiving stolen property. Bribery of foreign public officials	Ruling of dismissal by the investigating magistrate of the Paris regional court on 19/10/09
Leading group in the energy and transport sectors (countries of southern Africa)	29/04/2011 (definitive charges laid)	6 individuals 1 legal person	Judicial investigation	1999 to 2005	Improper payments to a former Zambian minister to obtain contracts financed by the World Bank for the supply and installation of three hydroelectric stations in southern Africa	Around EUR 3 million	Misuse of corporate assets. Bribery of foreign public officials	Ruling of dismissal by the public prosecutor attached to the Paris regional court (no date). Decision by the World Bank to exclude an affiliate of the group
CASES TRIED (3 DEFINITIVE SENTENCES AND 1 ACQUITTAL)								
Congolese sports and technical education contracts	13/02/2008	2 individuals	Judicial investigation	April 1998 to 2002	Payments to Mr. O., Minister of Sports and Technical Education of the Republic of Congo, to his bank accounts in France, in recognition of contracts awarded in Congo.	1.500.000 francs (EUR 228.855)	Document tampering. Forgery Receiving goods obtained through breach of trust. Breach of trust. Misuse of corporate assets. Bribery of foreign public officials. Receiving stolen property	Judgment of 13 February 2008: partial conviction of Mr O., on charges of forgery, receiving stolen goods and breach of trust, with a fine of EUR 25,000, and of Mme D., director of the company, on charges of forgery and use of false documents, with a fine of EUR 10,000. Suspended sentence of four months imprisonment and court costs of EUR 90 each.

Petroleum waste treatment in Libya	29/09/2009	1 individual	Charges filed by the Paris prosecutor	July and August 2008	Payment of cash on 29/07/2008 at a meeting in the Concorde Lafayette Hotel to a person representing the National Oil Company (NOC) of Libya, resulting in a ward of the contract on 5/10/2008 in Libya. Payment of money to a Canadian engineer to facilitate customs clearance for installing pollution control equipment at the company's worksite in Yemen.	EUR 90.000	Active bribery of a foreign public official to obtain an improper advantage in international business.	Judgment of 29-09-09 by the Paris Criminal Court. Suspended sentence of five months imprisonment, court costs of EUR 90.
Equipment imports to the Democratic Republic of Congo	20/10/2010	1 individual	Charges filed by the Paris prosecutor	2004 to 2006	Payment of cash, directly and personally, to the vice minister of defence of the Democratic Republic of Congo, to five local managers including the director of the treasury, an agent of the Central Bank, an adviser to the budget minister, an assistant to the finance minister, and payments for the account and at the request of the vice minister involving various items (T-shirt printing press, flash disks, canteen, video projector etc.) to obtain and keep a contract for EUR 326.000. The commissions were approved by the general meeting of the company's shareholders.	EUR 97.102	Bribery of foreign public officials	Paris Criminal Court judgment of 20/10/10. Suspended sentence of five months imprisonment with court costs of EUR 90.
Hydraulic drilling in Djibouti	25/03/2011	2 individuals	Charges filed by the Paris prosecutor	April 2005 to October 2006	Three payments totalling US\$248,729 (EUR 194,440) to the General Secretary of the Ministry of Agriculture of Djibouti, administrator of the Djibouti Economic Development Fund, to obtain and keep a public contract for hydraulic wells in Djibouti	EUR 194 440	Bribery of foreign public officials	Paris Criminal Court judgment of 25/03/2011. EUR 10,000 fine.