

Implementing the OECD Anti-Bribery Convention

REPORT ON FRANCE

Foreword

This report surveys the legal provisions in place in France to combat bribery of foreign public officials and evaluates their effectiveness. The assessment is made by international experts from 36 countries against the highest international standards set by the OECD Anti-Bribery Convention and related instruments. This report is published as part of a series of country reviews that will cover all 36 countries party to the Convention.

In an increasingly global economy where international trade and investment play a major role, it is essential that governments, business and industry, practitioners, civil society, academics and journalists, be aware of the new regulatory and institutional environment to:

- enhance the competitive playing field for companies operating world-wide;
- establish high standards for global governance; and,
- reduce the flow of corrupt payments in international business.

This regulatory and institutional environment is mainly based on two groundbreaking instruments adopted in 1997 by OECD Members and associated countries: the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (“the Convention”) and, the Revised *Recommendation on Combating Bribery in International Business in International Business Transactions* (the “Revised Recommendation”). The Convention was the first binding international instrument imposing criminal penalties on those bribing foreign public officials in order to obtain business deals and providing for surveillance through monitoring and evaluation by peers. The Revised Recommendation complements the Convention by its focus on deterrence and prevention of foreign bribery.

The OECD Working Group on Bribery in International Business Transactions (the “Working Group”) is entrusted with the monitoring and follow-up of these instruments. The Working Group, chaired by Professor Mark Pieth, is composed of experts (government officials), from the 36 countries Parties to the Convention (see Appendix 4, section iv). These government experts developed a monitoring mechanism which requires all Parties to be examined according to a formal, systematic and detailed procedure including self-evaluation and mutual review. Its aim is to provide a tool for assessing the implementation and enforcement of the Convention and Recommendation.

In designing the monitoring mechanism, the Working Group was eager to respect the Convention’s core principle of ‘functional equivalence’ under which the Parties seek to achieve a common goal while respecting the legal traditions and fundamental concepts of each country. Consequently, the Working Group examines each Party’s anti-bribery provisions in light of its individual legal system.

Immediately after the Convention's entry into force in February 1999, the Working Group began conducting the first phase of monitoring to determine whether countries had adequately transposed the Convention in national law and what steps it has taken to implement the Revised Recommendation.

As the Working Group neared completion of this first phase, it moved progressively into a new and broadened monitoring phase. The second phase examines compliance and whether structures are in place to provide effective enforcement of the laws and rules necessary for implementing the Convention. The second phase also encompasses an extensive examination of the non-criminal law aspects of the 1997 Revised Recommendation.

The monitoring procedures developed for the Phase 1 and Phase 2 examinations are similar. For each country reviewed, a draft report is prepared which is submitted to a Working Group consultation. This report is based on information provided by the country under examination as well as information collected by the OECD Secretariat and two other countries who act as "lead examiners" either through independent research or, under Phase 2, through expert consultations during an on-site visit to the country examined. Consultations during on-site visits include discussions with representatives from various governmental departments as well as from regulatory authorities, the private sector, trade unions, civil society, academics, accounting and auditing bodies and law practitioners.

The outcome of the Working Group consultation is the adoption of the final country report, which contains an evaluation of the country's laws and practices to combat foreign bribery. Prior to issuing the final country report, the country under review has an opportunity to review the report and to comment on it. The country under review may express a dissenting opinion, which is then reflected in the final report, but cannot prevent adoption of the evaluation by the Working Group.

This Phase Two monitoring report of France describes the structures and the institutional mechanisms in place to enforce national legislation implementing the Convention and assesses the effectiveness of the measures to prevent, detect, investigate and criminalise the bribing of foreign public officials in international business transactions. Appendix 1 contains the evaluation made by the Working Group under the Phase 1. In Appendix 2, the reader will find extracts of the most relevant implementation laws and Appendix 3 contains suggestions for further reading. The *(i)* Convention, *(ii)* the Revised Recommendation, the *(iii)* the Recommendation on the Tax Deductibility of Bribes and *(iv)* a list of Parties to the Convention are in Appendix 4.

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The Foreign Bribery Offence: Application and Practice by France

Introduction¹

The new Act in the context of French foreign trade and investment

The adoption by France of Act No. 2000-595 of 30 June 2000 amending the Criminal Code and the Code of Criminal Procedure with regard to the fight against corruption (subsequently referred to as the “Act of 30 June 2000”) was a milestone in the efforts made by the French authorities to combat bribery in international business transactions. Previously, French law prosecuted only active and passive bribery involving French persons entrusted with public authority, charged with a public service mission or holding an elected office (Articles 433-1 and 432-11 of the Criminal Code). Where international business transactions were concerned, since the 1970s the French government, followed by most of its European counterparts and other OECD countries, tolerated bribes, officially known as commissions or “exceptional commercial expenses”, and their deduction for tax purposes, if they were paid to a foreign public official.

The transposition into French law of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (subsequently referred to as the “OECD Convention”), is part of the on-going process of reform in this area implemented by the public authorities since the early 1990s in order to fight more effectively against corruption in the world of business: from now on, any person who bribes or attempts to bribe a foreign public official 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 €150,000. In addition, a company can be judged criminally liable and punished accordingly. Thus, actions which, for some time, could be performed with impunity and were legal from a tax point of view, are now subject to heavy sanctions.

Given the international role played by French enterprises, the transposition of the OECD Convention into French domestic law is of particular significance. France ranks second in the world for the export of services, fourth for the export of manufactured products. Among the industries which traditionally contribute to France’s foreign trade surplus are the armaments, automobile and surface-transport industries, as well as aeronautics and industrial equipment. The European Union accounts for 61% of France’s exports, with a further 11% going to the Americas. Although trade with other countries is growing rapidly, it is nevertheless more limited, with Africa and South-East Asia taking just 6% of French exports. It is worth noting that small and medium-sized enterprises (SMEs) account for 31% of exports, and this proportion could well increase given the measures recently adopted by the French authorities to encourage French SMEs to become more involved in global trade.

France is also a heavyweight in terms of foreign direct investment (FDI), ranking third internationally. Although most of France’s FDI is in the OECD area, developing countries are assuming ever greater importance. They accounted for 13% of French

¹ This report was examined by the Working Group on Bribery in October 2003.

foreign investment at the end of 2000, as against a mere 8% in 1990. Viewed sector by sector, half of France's direct investment abroad is in industrial activities (electricity, gas, water, chemicals, automobiles, etc.), half in services (mainly in the financial sector).

In the armaments sector, French enterprises come third worldwide, with five French groups ranking high in the league of European constructors. In the telecommunications sector, the world's fourth largest equipment manufacturer is a French company, which also holds first place in the transmission systems and submarine cables sectors. In aeronautics, the major French companies form part of a European group which ranks third on the international scene. The global leader in the nuclear energy sector is also a French enterprise.

These figures demonstrate the extent to which French companies and their foreign subsidiaries are exposed to markets in which the payment of secret commissions is a frequent practice. The recent judicial investigation of the Elf case, or the enquiry into commissions alleged to have been paid by a major French industrial group as part of the sale, in 1991, of French frigates to Taiwan, have revealed to the general public the size of the commissions paid in connection with oil and armaments-related contracts. One of the principal defendants in the Elf case mentioned a figure of 25% for commissions normally paid in connection with arms deals, 2% in connection with oil contracts. The investigation of the Elf case has also brought to light, in the oil sector, the so-called "*système des abonnements*" (subscription system), consisting in the payment of a secret "tithe" of 40 cents per barrel, which would amount according to certain estimates, to, over 150 million euro paid annually to foreign decision-makers.

Coming to terms with the phenomenon

Since the beginning of the 1990s, approximately 3,600 criminal convictions have been handed down each year for economic and financial offences. Of these, a hundred or so are concerned with bribery.¹ The vast majority of these convictions are for "small-scale bribery" of public officials by senior managers and employees of small and medium-sized enterprises, principally limited liability companies. The unlawful payments giving rise to prosecution (when they took the form of money) range from € 450 to €800,000. To these figures, it is appropriate to add convictions for misuse of corporate assets, which in fact involve acts of bribery. Under the name of misuse of corporate assets, it is possible to prosecute the payment of bribes by senior managers to public officials in order to secure contracts, the former committing the offence of misuse of corporate assets, the latter that of receiving. Larger companies have been sanctioned on charges of misuse of corporate assets, often with more substantial sums involved.

Greater awareness of the phenomenon does, however, seem to have been generated, notably owing to the increasing number of "affairs" that have come to light since the mid-1990s. These have been concerned essentially with the bribery of French public officials in connection with the awarding of water distribution and public works contracts, and also, more recently, with the paying of commissions to secure international contracts. These developments have resulted in a greater demand for transparency in company management and may also explain why greater efforts are apparently being made to prosecute corrupt behaviour, as evidenced by an increase in the number of probity-related offences brought before the courts over the last five years.

Recent convictions and the profile of certain cases under judicial investigation would seem to signal a shift in emphasis: the criminal operations concerned involve larger sums of money and are more complex, calling for intermediaries and sophisticated financial

stratagems; and captains of industry are now being investigated and sentenced to terms of imprisonment. Finally, although no conviction for offences of bribery as criminalised by the Act of 30 June 2000 has been handed down since this text came into force, a number of offences falling within the scope of the Convention were being investigated at the time of France's examination (under a variety of criminal charges). One of these cases began with the opening of a preliminary investigation in April 2002 before a court in a Paris suburb into counts of misuse of corporate assets and receiving, following an information laid by the French anti-money laundering unit which drew attention to major movements of funds on the French bank accounts of a minister from a foreign state outside the European Union. It gave rise, in June 2003, to an additional charge of active bribery of a foreign public official. The minister referred to was investigated for receiving, with regard to the same offence, in respect of those acts committed after the law entered into force; the acts committed before the entry into force of the law were prosecuted as misuse of corporate assets. Another case, concerning "fees" paid by a company part of whose capital was held by a major French enterprise to a company describing itself as a commercial intermediary, whose function was to obtain "facilities" from foreign public authorities, gave rise to the opening in October 2003 of a preliminary investigation on a count of active bribery of foreign public officials outside the European Union, based on facts which occurred after the entry into force of the Act of 30 June 2000. In an era of increasing globalisation, and given the dominant position of many French enterprises in markets which are particularly sensitive to corruption, it is to be hoped that the number of investigations and prosecutions for breaches of the new anti-bribery legislation will increase.

Prosecution on grounds of misuse of corporate assets in bribery cases

According to a majority of participants, the great difficulties in the fight against corruption in France lie in issues of detection (of a "secret" offence), evidence (notably a prior corruption pact), and statute of limitations applicable to the bribery offence. Consequently, over the past years, judges, relying on case law from the Cour de Cassation, have sought to qualify, where possible, bribery offences as misuse of corporate assets or receiving of misused corporate assets, in order to make it possible to sanction acts which would otherwise not be punishable (should the statute of limitations expire, for instance), or which would be difficult and take longer to prove.² This offence (covered by articles L-241-3 and L-242-6 of the commercial code) sanctions acts by managers of companies who use companies' assets for personal purposes, and contrary to the company's interests.³ A number of factors explain this scaling down of the charge from bribery to misuse of corporate assets. On the one hand, the virtual imprescriptibility of the offence of misuse of corporate assets is convenient for magistrates, since the three-year period for the statute of limitation does not begin to run, in the event of dissimulation, until the day on which the offence comes to light and is established as being prosecutable, whereas, in cases of bribery, the statute of limitation begins to run from the day on which the last payment was received or the date of last receipt of the advantage promised. On the other, the very broad interpretation given by the courts to the notion of corporate interest makes it easier to demonstrate misuse of corporate assets. The Cour de Cassation [France's highest appellate jurisdiction] has in fact stated, in a judgement of 20 June 1991 and since referred to in a number of judgements – including the "Carignon" judgement of 27 October 1997 – that "the use of a company's assets is necessarily improper when such use is made for an unlawful purpose". Finally, the onus of proof is partially reversed where this offence is concerned: if the prosecution can prove that funds were misappropriated or removed from the company secretly, it is incumbent on the company's

senior manager to prove that they were used on behalf of and in the interest of the enterprise.

Nevertheless, there are a number of drawbacks to the practice of prosecuting for misuse of corporate assets rather than for bribery. Firstly, in applying only the offence of misuse of corporate assets to instances of corruption, there is a danger of wrongly ascribing a purely economic colouring to the factual and judicial analysis of the situation, whereas bribery implies a serious failure to fulfil one's duty to be honest and to respect the authority of the state.⁴ Secondly, the penalties are not the same: although the fines for misuse of corporate assets are higher than those applicable to bribery, the prescribed prison sentences are shorter by half⁵ and the additional penalties are not equivalent. Furthermore, the scope of application of the two violations is not the same: only the senior managers of a company can be liable for the offence of misuse of corporate assets, whereas the bribery offence can be committed both by individuals and legal persons.⁶

Structure and methodology of this report

Taking into account this particular French context, this report recognises the numerous initiatives France has taken in order to combat bribery of foreign public officials, and offers proposals in certain cases where these initiatives could be improved upon. It thus highlights the strengths and also the problems likely to influence the effectiveness of efforts to prevent, detect and punish the bribery of foreign public officials in France. In conformity with the procedure adopted by the OECD Working Group on Bribery for the second phase of self and mutual evaluation of implementation of the Convention and the Revised Recommendation, the purpose of this examination is to study the structures in place in France to enforce laws and regulations implementing the Convention and to assess their application in practice, as well as to monitor France's compliance in practice with the 1997 Recommendation. The Phase 2 examination reflects an assessment of the information obtained from France's answers to the Phase 2 questionnaires, interviews with over 90 government experts, company managers, lawyers, professional accountants and representatives of civil society during the on-site visit in June 2003 (see annex to this report), a study of all the relevant legal texts and of specific cases, as well as independent analyses carried out by the Secretariat and the examiners.

Since the purpose of Phase 2 of the monitoring process is to assess the concrete application of the Convention and the Revised Recommendation, this report is organised more in relation to the key points identified by the examining team than with reference to the structure of the questionnaires submitted in Phase 2. The first part is devoted to the mechanisms introduced, in both the public and private sectors, to prevent and detect acts of bribery of foreign public officials, and examines ways in which they could be made more effective. The second part is concerned with the effectiveness of mechanisms for prosecuting the offence of bribery of foreign public officials and related accounting and money-laundering offences. The third part concentrates on the punishment of persons judged guilty of active bribery of foreign public officials and related offences. The report concludes with specific recommendations formulated by the OECD Working Group on Bribery, regarding prevention and detection, as well as prosecution. It also identifies those matters which the Working Group considers should be followed up or further reviewed as part of the continuing monitoring effort.

Notes

- 1 Criminal records office: convictions by category for economic and financial offences; and Infostat Justice n°62, June 2002. For the sake of comparison, approximately one million criminal convictions were handed down in 2001 (key figures in relation to criminal justice, Ministry of Justice web site, <http://www.justice.gouv.fr/chiffres/cles02.htm>). Although the number of convictions has remained fairly constant, the number of offences committed has increased considerably and, of these, corruption offences have doubled. The French authorities reckon that this increase is due to an improvement in the prosecution of such offences, rather than an increase in corruption itself.
- 2 See also the 1997 Report of the Central Department for Corruption Prevention (Service Central de Prévention de la Corruption). The person receiving the bribe, as well as the person trading in influence could be sanctioned for receiving of misused corporate assets.
- 3 Other solutions have also been used by the French authorities to overcome these obstacles. For instance, the offence of favouritism was created with the aim of preventing acts of corruption, thus avoiding the need to bring evidence of the pact in cases of passive bribery.
- 4 Annual report of the Central Department for Corruption Prevention (Service central de prévention de la corruption), 1997.
- 5 The “plea-bargaining” procedure provided for in the draft law reforming the criminal justice system to take into account changes in criminal behaviour, which was being examined by Parliament at the time of the Phase 2 examination of France, whereby the prosecutor can propose a penalty to a person he intends to prosecute for an offence punishable by a prison sentence of up to five years who acknowledges his guilt, would be applicable to the offence of misuse of corporate assets, but not to bribery, which carries a sentence of up to 10 years.
- 6 The draft law reforming the criminal justice system to take into account changes in criminal behaviour, in the version adopted by the Senate in October 2003, contains provisions intended to broaden the field of application of the criminal liability of legal persons to cover all offences, thereby including the offence of misuse of corporate assets. However, in the case of misuse of corporate assets, the enterprise whose funds are misappropriated to pay a bribe is considered as the victim of the misappropriation, and not as the perpetrator of the violation. This means that legal persons may only be held criminally liable for misuse of corporate assets in a very limited number of cases, where one company exercising control over another company uses that company’s assets for its own purposes and against that company’s interests.

Measures for Preventing and Detecting the Bribery of Foreign Public Officials

Preventing the bribery of foreign public officials

The growing awareness of large French corporations

For many years, the bribing of foreign public decision-makers entitled the perpetrator to a tax deduction. Now that the OECD Convention has been transposed into French law, an activity formerly tolerated has become subject to heavy penalties. This legal revolution has made French business circles aware of new risks and has given rise to a growing demand for transparency and ethical conduct in company management. These developments have resulted in the adoption of an increasing number of codes of conduct and other charters incorporating various ethical concerns, and the introduction, at least in some major companies, of internal control mechanisms intended to prevent their being charged with criminal offences.

A study of these codes shows that, where bribery is concerned, many still only contain measures of a general nature, without explicitly referring to the outlawing of bribes in international business transactions. Only a minority of them explicitly make the rejection of bribery as part of their business culture or contain an express reference to the OECD Convention and to the Guidelines for Multinational Enterprises (which themselves refer to the Convention). An even smaller proportion of enterprises have made the effort to define acts of bribery, and the conditions under which it is or is not admissible for their personnel to offer advantages, and to affirm the need for a rigorous selection of agents and intermediaries involved in the commercial process.

However, in the opinion of the lead examiners, there is another factor to be taken into account in drawing conclusions as to the extent of the change of mentality among major French industrial groups: an investigation – or even a simple allegation – in relation to the newly established offence under French law can have considerable repercussions for the company image. For these French groups, the vigilance of competitors ready to report to the authorities any payment that might be suspect under the new law, the adverse publicity, the institution of criminal proceedings, the judicial investigations and possible prosecutions that might follow have greater dissuasive force than a mere requirement to make a display of positive values. The enterprises interviewed by the examining team were in no doubt that news of the launch of an investigation could seriously damage the image of their company, its managers, and its business operations.

In addition to risks to their reputation and consequent impacts on companies' commercial activities, the major French groups are particularly attentive to the scope of the French definition of the offence of bribing foreign public officials and how it might apply to many acts of corruption long practised in some international markets. The companies' legal counsels interviewed by the examining team all stressed that the field of application of the French law, which they saw as very broad, represented a considerable risk to any company – and its senior staff – that was not able to control the activity of its subsidiaries or intermediaries.

In the opinion of the examiners, the fact that some major French corporations have put in place ethical committees and managers, with the task of receiving confidential reports from employees and, more generally, ensuring that principles of ethical conduct are implemented within the company, is an encouraging development. The work being done by the Central Department for Corruption Prevention (Service central de prévention

de la corruption / SCPC), an inter-ministerial body under the supervision of the Minister of Justice, in relation to a number of major French enterprises in both the public and private sectors, should, in the medium term, strengthen this trend. The work of the SCPC has notably resulted in the signature of partnership agreements with some companies. These agreements cover three areas: sharing of information; participation in bodies concerned with corporate ethics and the formulation (or revision) of codes of ethical conduct; and training of the personnel most heavily exposed to the risks of corruption. This is a very recent initiative and as yet involves only a limited number of companies¹; it will therefore be some years before its role and real effectiveness in making enterprises more responsible and preventing corruption can be fully assessed. Nevertheless, the work being done should contribute to the introduction of internal prevention mechanisms in a growing number of French companies active on foreign markets. To demonstrate their determination to combat corruption, the enterprises involved in this partnership arrangement could use their annual reports, or other forms of communication, to inform people of their efforts to prevent corruption and to make their managers and employees more aware of the issues involved.

Commentary

The lead examiners take note of measures taken by the French authorities to raise enterprises' awareness to the phenomenon of bribery in the conduct of international business. They recommend that the French government continue and strengthen its efforts in this area, particularly through the SCPC, and especially as regards the introduction of companies' internal alert systems. In addition, they encourage the French authorities to promote among French companies, in collaboration with the SCPC, the formulation of codes of conduct which specifically tackle the issue of transnational bribery and the creation of ethics committees.

Increasing the awareness of small and medium-sized enterprises (SMEs)

Although major enterprises have taken on board the new legal requirements, it soon became clear to the examining team that a large proportion of SMEs were as yet unfamiliar with the Convention and its transposition into domestic law. A legal consultant interviewed during the on-site visit confirmed that the information had taken longer to reach SMEs, but that, thanks to the joint efforts of the Centre français du commerce extérieur (CFCE / French centre for foreign trade), the Conseil français des investisseurs en Afrique (CIAN / French Council of Investors in Africa) and the Mouvement des entreprises de France (MEDEF / French employers' federation) in particular, awareness of the issue was beginning to dawn among the senior management of SMEs.

Since the Convention and the corresponding French law came into force, the MEDEF (through its international ethics and business ethics committees, which have considered ways of combating corruption and passed on their recommendations to companies) has actively adopted a policy of making French businessmen aware of the new offence. In particular, the MEDEF has organised information meetings, which have been attended by representatives of French government departments, to broadcast and clarify the content of the new French legislation. The MEDEF's legal affairs department has also drafted notes and circulars regarding the Act of 30 June 2000 in particular, and bribery generally. The MEDEF's regional branches (it has roughly 150 branches at region and *département* level) have also held information meetings to make their members aware of the existence and implications of the OECD Convention and its incorporation into domestic law. The MEDEF representatives interviewed during the on-site visit emphasised the important

role played, in their opinion, by these regional branches in the dissemination among SMEs of information regarding the offence of bribery of foreign public officials.

Awareness raising in the field of export credits and bilateral development aid

In the opinion of the lead examiners, the measures taken by the public authorities to prevent corruption in the field of export credits and bilateral development aid are also likely to enhance the awareness of enterprises, and particularly of SMEs, as to the requirements of the new French legislation.

Important measures have indeed been taken to make clients of Coface (French export credit agency) aware of the Act of 30 June 2000. Coface is an organisation which, since 1946, has managed, on behalf of the French State, a broad range of products to support important exportation contracts. Since 1 January 2001, applying the OECD Action Statement on Bribery and Officially Supported Export Credits, to which France has subscribed, a mechanism has been put in place requiring that, when an exporter makes an application for credit insurance, he must declare that the contract covered by the guarantee was not secured by actions outlawed by the articles of the Criminal Code introduced by the French law transposing the OECD Convention. Moreover, the remuneration paid to agents (included in the export contract) is only covered if it is in fact remuneration for services whose purpose, materiality and lawful character can be verified. These assurances must be provided at the time of the application and, if the circumstance arises, before a claim is settled. Moreover, the entitlement to indemnity is lost if the insured party is subsequently convicted for an offence provided for in the OECD Convention. In addition to having his credit insurance contract cancelled, the exporter, if convicted, must reimburse Coface for compensation received in settlement of a claim. This measure also covers sums paid to banks in settlement of a claim relating to the buyer credits involved in the contract. This mechanism is complemented by the systematic provision of information on the OECD Guidelines for Multinational Enterprises. This takes the form of a letter, to be signed by the enterprise concerned, in which it states that it is aware of the Guidelines.

The general conditions governing prospection insurance policies, another form of public support for export credits managed by the Direction des relations économiques extérieures (DREE / Department for External Economic Relations) of the Ministry for the Economy, Finance and Industry, have also been amended. Since August 2002, the insured party is obliged to declare that his company has not committed, or will not commit, any of the acts of bribery prohibited by the new legislation in respect of the contract covered by the guarantee. Subsequently, the company is obliged to report, without delay, any action or fact likely to affect the magnitude of the risk covered or the conduct of the prospection operations envisaged, and undertakes to inform the DREE, without delay, of any criminal conviction against it for corruption, forgery or other offences. Any failure to comply with these provisions results in automatic cancellation of the contract, particularly if the insured party is convicted of corruption by a French court in application of Article 435 of the Criminal Code.

Measures have also been introduced to prevent corruption in the context of French bilateral aid. Thus, following the OECD Development Aid Committee's 1996 recommendation on including anti-bribery clauses in contracts funded by development aid, the French government decided to introduce a measure formally outlawing the practice of paying extraordinary commercial expenses (*frais commerciaux extraordinaires* / FCEs).² Authorities in the area covered by the Agence Française de

Développement (AFD / French Development Agency), through which bilateral aid (i.e. aid given to foreign countries or overseas *départements* and territories) is channelled, were informed of the anti-bribery measure by ambassadors, prefects and government high commissioners. There are three parts to the measure: a requirement to include an *ad hoc* clause in AFD-group funding agreements whereby the beneficiary of the aid declares that the contracts do not involve FCEs and undertakes to include similar clauses in agreements with those to whom contracts are awarded; the appointment of AFD managers responsible for receiving complaints made in respect of funded contracts put out to competitive tender by the AFD, investigating such complaints and checking the quality of internal controls to detect and prevent FCEs; and penalties for enterprises convicted of funding FCEs out of AFD aid, together with an obligation to pay back the value of any such commissions to the beneficiary of the aid. These measures could be more effective if the French authorities supplemented them with specific training for officials of the various export credit and bilateral aid institutions in combating the active bribery of foreign public officials. In addition, COFACE personnel and those officials of the AFD not subject to the civil service statutes could be made subject to an obligation to report suspicious circumstances to the Public Prosecutor's Office, just as civil servants are required to do by Article 40, sub-section 2, of the Code of Criminal Procedure.

Support for enterprises from the Public Revenue Department (Trésor) and French diplomatic missions

The French National Contact Point (NCP) is responsible for implementing the OECD Guidelines for Multinational Enterprises. Given its tripartite composition (enterprises, trade unions and government departments), the regularity of its meetings (held every month or two), and its participation in numerous promotional seminars (MEDEF workshops, training courses for company managers organised by the Institut de l'entreprise (Business institute), seminars organised by chambers of commerce), this body is another useful channel for promoting the Guidelines relating to acts of bribery committed by French enterprises on international markets. The French authorities note that its role could usefully extend beyond that of simply raising awareness: if enterprises or trade unions thought it useful, the NCP could provide a means of encouraging dialogue between enterprises and government departments regarding the soliciting of bribes. The internal regulations of the French NCP would not in fact prevent representatives of French enterprises (belonging to the NCP) from turning to it to report the soliciting of bribes by foreign public decision-makers.

On the other hand, in the opinion of the lead examiners, the Ministry of Foreign Affairs seems to have stepped back from its role of supporting and increasing the awareness of SMEs. The enterprises and business federations interviewed during the on-site visit stressed the vital role that diplomatic missions could play in informing enterprises at the local level which are seeking customers abroad, in particular SMEs. They expressed regret that the dissemination of information has been very uneven from one country to another. In addition, enterprises expressed the wish to be better supported by their embassies when they are confronted with solicitations from foreign public officials. They might hesitate to request French embassies abroad to intervene with the authorities of their country of accreditation as this could be perceived as interference in the country's domestic affairs. Furthermore, enterprises sometimes consider that such steps aimed at revealing suspicious behaviour on the part of competitors to embassies or foreign authorities may cause these enterprises to be identified and permanently excluded from further market opportunities. This leaves

businessmen faced with a dilemma: should they refuse to give a bribe and so lose the contract, or agree to pay a bribe, sometimes under constraint, and so put themselves in breach of the law? For their part, the representatives of the Ministry of Foreign Affairs interviewed during the on-site visit stated that they had not been informed by French embassies of cases where enterprises had turned to them for help following the solicitation of bribes.

Since 1999, the Ministry of Foreign Affairs has worked to provide its diplomatic officials with awareness-raising and training on the importance of the fight against bribery of foreign public officials. Detailed instructions have several times been given to diplomatic missions concerning the actions to be taken when they learn that a French company or its subsidiary has been solicited for a bribe. In 1999, a round table of the “Conférence des ambassadeurs de France” (French ambassadors conference) informed them of the legislative reform then being adopted. In 2001, the Ministry’s Diplomatic Institute devoted a session to the fight against corruption. Furthermore, France appointed a special ambassador to deal with issues relating to the fight against organised crime and bribery, and a meeting to provide companies with information on this subject was organised by the Ministry of Foreign Affairs in 2002. Finally, a document addressed in March 2003 to all ambassadors serving abroad recommends that they encourage enterprises to report problems of this kind, and reminded diplomatic staff of the duty to alert the Public Prosecutor of any violation of the law on the part of French companies, in application of Article 40, sub-section 2, of the Code of Criminal Procedure.

Commentary:

The lead examiners believe that French diplomatic missions abroad have an important role to play in enhancing the awareness of enterprises, particularly SMEs, which seek their help when considering investment or exports abroad. In addition to their work of raising awareness, the lead examiners would encourage the Ministry of Foreign Affairs and its diplomatic missions to provide more advice and active support to French enterprises faced with solicitation of bribes when tendering for international contracts. They recommend that instructions already given to diplomatic missions regarding the actions to be taken when they learn that a French enterprise or its subsidiary has been solicited for a bribe be repeated on a regular basis. The lead examiners also recommend that the authorities at the Ministry of Foreign Affairs regularly remind diplomatic missions of their duty to systematically alert the Public Prosecutor to any violation of the law on the part of French enterprises, in application of Article 40, sub-section 2, of the Code of Criminal Procedure. In addition, the lead examiners recommend that Coface and the AFD establish procedures for alerting the Public Prosecutor’s Office when there are credible signs, in its business relations with an entity, that a violation of the Act of 30 June 2000 has occurred. They also recommend that these agencies set up policies to evaluate the eligibility of enterprises that have been found guilty in the past of acts of foreign bribery for the financial assistance provided by these agencies.

Detecting the bribery of foreign public officials

In seeking to uncover instances of bribery in international business transactions, the Public Prosecutor’s Office can draw on various “conventional” sources. These include complaints made by victims, denunciations received by the police and gendarmerie or referred directly to the Prosecution Service in the person of the Public Prosecutor, denunciations by civil servants and public bodies exercising regulatory powers in a

particular sector, disclosures made to the Public Prosecutor's Office by auditors, and through the media. Offences may also come to light in the course of police enquiries.

Reporting of an offence by the perpetrators and third parties

Denunciation by one of the people involved, a rival, or anonymously or in the press

It is rare for a legal action to result from information laid by one of the people involved in bribery, since it is not in the interests of either party. French law in fact provides for a reduction or waiving of the penalties imposed on persons turning in evidence for the prosecution only in respect of a limited number of offences connected with terrorism or drug trafficking.³ According to the economic and financial magistrates in Paris, the few revelations of this kind tend to come from spouses or cohabitees who, in the heat of a private quarrel, decide to inform the authorities of criminal behaviour they have become aware of in the course of daily living with their partner. Instances of bribery also sometimes come to light during investigations of persons prosecuted for other offences, who, in defending themselves, mention offences that third parties have committed in other circumstances, or they may appear from a statement made by a witness. It was following a preliminary inquiry ordered to verify statements made by a witness that a preliminary investigation for active bribery of a foreign public official was opened in October 2003 into the payment of "fees" in the course of an industrial programme in a foreign country.

In the case of business competitors, the Prosecutor's Office will normally be cautious, unless the evidence provided is sufficiently credible and detailed. Experience shows that revelations made to the police or prosecuting magistrates by companies that have, for example, lost a public contract to a rival rarely result in legal proceedings, for lack of solid documentation.

Similarly, according to magistrates and judicial police authorities interviewed by the examining team, it is unlikely that a Public Prosecutor will decide to launch a preliminary enquiry into an instance of bribery brought to his attention by an anonymous informant, unless the evidence provided is sufficiently credible and detailed. A study of the cases brought before the Criminal Chamber of the Cour de Cassation over the last five years confirms that only a handful of anonymous denunciations have led to convictions in respect of domestic bribery. Of the cases falling within the scope of the Convention that were subject to police or judicial investigation in the summer of 2003, only one was the result of an anonymous denunciation. It is equally unlikely that a prosecutor will consider that an offence brought to his attention by the press alone justifies a police investigation, unless the revelations are well documented.

Denunciation by company employees

Although disclosures of bribery by one of the perpetrators of the offence, or by an anonymous informant or by press revelations, are unlikely to arise, more likely is a denunciation by a company employee who, having witnessed a criminal act, wishes to inform the competent authorities. In practice, it is unusual in France for employees to report business-related offences or instances of bribery. Spontaneously reporting financial misconduct to the competent authorities is not easy for an employee, because, in the French historical context, it tends to be regarded as "*délation*" (laying information with malicious intent against a person). The reactions to the expression "reporting a matter to

the Public Prosecutor's Office" (*dénonciation au parquet*) that the examining team received from senior managers of major companies and MEDEF representatives bear this out. The code of ethical conduct of one of the enterprises interviewed moreover contains provisions reminding employees that "informing with malicious intent against a person does not form part of the values of (that enterprise)". Some companies did nevertheless present the mechanisms they are implementing to enable employees to give information anonymously. The very name of these schemes (*droit d'alerte* / right to raise the alarm) is calculated to avoid the pejorative connotation of "malicious informing", while instituting a system which allows information to reach the top management. Several companies with subsidiaries abroad also mentioned their concern to adapt these mechanisms to local circumstances – especially in situations where labour legislation affords less protection. According to the companies interviewed, the possible consequences of an employee reporting a matter to the Public Prosecutor or the police, namely the danger of its adversely affecting the company image or having a negative commercial impact, are another powerful reason for employers to carefully manage this type of behaviour.

Nor does the law really come to the aid of employees who, having witnessed a misappropriation of funds, wish to alert the competent authorities to the fact. In French criminal law, in the absence of specific provisions, the offence of failing to report a crime (and associated criminal sanctions) is provided for only in relation to serious crimes, and offences against the physical integrity of minors aged fifteen or less or "vulnerable persons", but not business-related offences. Although the labour code (*code du travail*) makes provision for an employee who reports health and safety issues or instances of sexual harassment, it makes no provision for an employee who wishes to denounce an act of bribery or accounting fraud. Therefore, a manager or employee who has become aware of criminal behaviour and spontaneously decides to reveal it to the public authorities will run the risk of being dismissed for professional misconduct, given that his identity will be known. This is despite the fact that French law affords general protection, in that a company is not permitted to dismiss a person who can legally justify his/her insubordination. The Cour de Cassation has recently dealt with a case of this kind, in which a young woman was sacked by her company for serious misconduct in October 1993, after she had written to the Inspection Office of the Ministry of Labour (*Inspection du Travail*) to reveal misappropriations of company funds (Cass. Companies, 14 March 2000).⁴ In addition, any reporting of criminal offences may expose the employee to a counter-charge of "defamatory denunciation". Someone who spontaneously reports to the prosecutor matters liable to lead to another person being penalised effectively denounces him or her. Nevertheless, the intentional element of the offence, which has to be proven for the person making the allegation to be found guilty, lies not in the falsity of the allegation itself, but in the fact that he or she knew, on the day the allegation was made, that it was false. A denunciation is therefore a lawful act if the allegation is true; or if the allegation is false but the defendant was not aware of its falsity. It is punishable if the allegation is false, the person making it is aware of the fact that the allegation is false, and its falsity has been declared by the competent authority.

To cover himself, a vigilant employee may appeal to collective structures, such as a trade union. Such organisations may then bring a civil party petition as part of the criminal proceedings ("*se constituer partie civile*"), collectively demanding an investigation. But applications of this kind are rarely made, despite the fact that all the trade-union representatives met during the on-site visit said they were prepared to take up revelations of this kind. The fact is that French courts do not always allow trade unions to bring actions in the context of criminal proceedings for business-related and financial

offences, in particular for the misuse of corporate assets. If the Act of 30 June 2000 itself provides for the possibility of such civil party petition being brought within a criminal proceeding, it limits it however to acts of bribery of officials of the European Union or member states of the European Union. Moreover, it is by no means certain, for lack of precedent, that the courts will recognise the right of trade unions to bring independent actions in cases of bribery of European public decision-makers.

A person claiming knowledge of an offence who is called to give evidence during a preliminary investigation or at the pre-trial stage may also fear the vengeance of the accused, since the services responsible for administering the criminal law cannot guarantee that the identity of the witness will not be disclosed in the course of proceedings. An exception is made for a paid informer used by the police or administration, who is not required to appear during proceedings, neither before the examining magistrate nor in court on the witness stand. To allay a witness's fear of reprisals, the French legal authorities recently introduced a system intended to preserve his or her anonymity. The Act of 15 November 2001, supplemented by the Act of 4 August 2002, introduced into criminal procedure the concept of a "protected" witness. A witness can be accorded this status and heard by the public authorities (police, prosecutor, investigating magistrate) in any proceedings in respect of crimes and offences carrying a prison sentence of at least three years (which includes the offence of bribing foreign public officials), when knowledge of the identity of the witness giving evidence is likely "seriously to endanger the life or physical integrity of this person, members of his family or close relations".⁵ His identity, though known to the police and magistrates, does not feature in the case record unless, "with regard to the circumstances in which the offence was committed or the personality of the witness, knowledge of the identity of the person is indispensable to the exercise of the rights of the defence". In the absence of any practice, due to the fact that this provision was introduced so recently, the effectiveness of the system is difficult to evaluate.

This leaves the employee with the option of taking his complaint to the company's internal bodies for them to deal with, if they exist. Although most, if not all, the enterprises interviewed by the examiners stressed the importance of ethical values in the conduct of their business, only a minority had introduced internal mechanisms which would allow an employee who had witnessed financial misconduct to alert the enterprise to the fact with the assurance that his identity would not be disclosed: one company had introduced regular audits during which employees could unburden themselves of information about criminal behaviour; another had established an ethics committee specially charged with receiving allegations of misconduct under guarantee of confidentiality. According to the manager responsible for ethical matters in the second of these companies, developments were encouraging: whereas in 2002 some twenty employees had exercised the right to give information to the company's ethics committee, this figure had already been surpassed in the first six months of 2003. With regard to the audits conducted by the other company, they had already resulted, according to senior managers, in the identification of three persons guilty of misconduct, who had been dismissed and reported to the local prosecuting authorities. In the autumn of 2003, the MEDEF set up a study group to decide what additional measures might be introduced, by enterprises or by the government or both, in order to encourage employees to report suspected acts of bribery without fear of reprisals from their employers.

Disclosure by salaried accounting staff and chartered accountants working in companies

Financial managers and chartered accountants (“experts-comptables”) who, in the course of their activities, detect criminal transactions are faced with similar obstacles. The obligation to maintain professional secrecy or the duty of discretion and confidentiality they are subject to prohibits them, in most cases, from spontaneously revealing matters they uncover in the course of their duties. Case law provides several examples of chartered accountants who have been convicted for having divulged information about the conduct of a company, including straightforward doubts about the legality and genuineness of its accounting records (Cass. Crim. 24 Jan. 1957). According to the representative of the body regulating their profession (Conseil Supérieur de l’Ordre des experts-comptables), the only way open to a chartered accountant who has detected financial misconduct is to inform the senior managers of the company and, if they fail to act, to dissociate himself/herself from the criminal behaviour concerned by dropping the client company.

Where financial managers and other salaried accounting staff are concerned, since they do not exercise a profession whose activities are legally recognised, in the general interest and for the sake of public order, as having a confidential and secret character, they are not bound to preserve secrecy in the performance of their duties. (Cass. Crim. 14 Jan. 1933). However, as managers of a company’s accounts, they are under a particularly strict obligation to act with discretion and reserve. An accounting manager who has become aware of fraudulent activities and spontaneously decides to reveal them to the Public Prosecutor would be running the risk of dismissal for wrong-doing in that he had failed in his duty to act with discretion and reserve.

Commentary:

Given the vital role that informants can play in the detection of bribery, the lead examiners would strongly encourage France to adopt stronger protection measures that would enable employees of private companies to disclose suspected acts of transnational bribery without fear of being dismissed or sued.

Disclosure of the offence by auditors

Auditors and the detection of business-related offences

An apparently powerful tool in the French system of detecting business-related offences is the obligation incumbent on auditors to report criminal activities, on pain of making themselves liable to prosecution. This is not in conflict with their obligation to preserve professional secrecy and is additional to their obligation to report irregularities and inaccuracies they have uncovered in performing their task to the next shareholders' meeting. The criminal penalty for non-disclosure can be severe: according to Article L. 820-7 of the Commercial Code, failure to report criminal activities of which they are aware to the public prosecutor is punishable with a prison sentence of five years and a fine of 75,000 euro. Some auditors have criticised this measure, arguing that an auditor is not an auxiliary of the Public Prosecutor's Office and has not been publicly appointed to perform this task. In the case law, the arguments put forward by auditors to exempt themselves from this obligation have fallen on deaf ears: each year, ten or so cases result in convictions for non-disclosure. If an auditor believes there are grounds for disclosure, he is required to make it without delay, informing the Public Prosecutor's Office of the evidence on which he bases his belief that an offence has been committed (Cass. Crim., 8 February 1968).

The presence of auditors in a large number of enterprises, comprising France's major companies, and the breadth of the tasks entrusted to them should give them an important role in detecting the active bribery of foreign public officials or, at least, certain factors in any such scheme. All of France's 170,000 public limited companies (700 of which are listed on the stock exchange), two or three thousand simplified joint-stock companies ("sociétés par actions simplifiées") and the hundred or so limited partnerships with share capital are in fact required to appoint at least one auditor. The same is required of limited companies (SARLs), limited companies run by a sole proprietor (EURLs), limited liability partnerships and partnerships (SNCs), if they are of a certain size, i.e. if at the end of the financial year they exceed the figures set by decree of the Council of State (*Conseil d'État*) on two of the three following counts: their total balance sheet [value], their pre-tax turnover, and the number of people they employed in the course of the financial year. Similarly, associations and other legal persons instituted under private law must engage an auditor if they do a substantial amount of business. In total, according to a survey carried out by the auditors' professional body (Compagnie Nationale des Commissaires aux Comptes (CNCC)), auditors hold more than 250 000 mandates in French companies.

According to Article L. 225-235 of the Commercial Code, which defines the essential tasks of auditors, it is their duty to certify "that the annual accounts are lawful and genuine and give a true picture of the results of the operations performed over the financial year now ended". Auditors must also verify "the company's assets and accounting records". As well as performing these general tasks, auditors are often entitled, or indeed duty bound, to make representations not only to partners in the business but also to the courts, for instance in implementing the warning system provided for by the Act of 1 March 1984 when companies are in difficulties, or in relation to making tax returns. The checks performed by auditors may thus touch on accounting items of particular sensitivity where the offence of active bribery foreign public officials is concerned. To preserve the independence of auditors in performing their duties, the law and the regulations of their professional body (CNCC) have established a list of incompatible activities both of a general nature and relative to the company in which an

auditor is working, for example: his duties are deemed to be incompatible with any salaried employment or any commercial activity carried out directly or through an intermediary; the founders and directors of a company and its subsidiaries, and their relatives and associates to the fourth degree, may not act as auditors for the company, etc.

The duty of disclosure as it works in practice

Despite this potentially powerful factor within the French system for detecting “white-collar” crime, the actual number of disclosures has remained relatively small in recent years, amounting on average, according to the Paris Public Prosecutor’s Office, to 150 disclosures per annum in the jurisdiction of the Paris *Tribunal de grande instance*, even though the number of business-related and financial offences prosecuted by the courts increased steadily over the same period. Most of these disclosures were in any case concerned with minor offences. None of the criminal proceedings in progress at the time of the examining team’s visit had been initiated following a disclosure made by an accountant. According to the members of the economic and financial section of the Paris Prosecutor’s Office and representatives of the Paris fraud squad (*Police financière parisienne*), “no major case has resulted from a revelation made by an auditor”.

The representatives of the auditors’ professional body (Compagnie Nationale des Commissaires aux Comptes / CNCC) interviewed by the examining team pointed out that they were not under any obligation to achieve certain outcomes and that auditors were not adequately equipped to detect what were sometimes very complex frauds. The duty of disclosure in fact relates to matters which the auditor has been able to ascertain when actually auditing the accounts, in making specific checks he is legally required to carry out, and in related interventions performed when the company decides to undertake certain transactions, such as increasing its share capital. Normal diligence is required, as made clear by the CNCC in two recent regulations: the auditor, in the performance of his duties, is not required to implement special procedures to seek out the possible existence of criminal activity.⁶ Therefore it may sometimes be difficult to detect an offence, even for an aware and particularly vigilant professional. Although some illegal payments may well be detected as a result of normal diligence (for example, unjustified expenses, dummy invoicing intended to supply secret funds used for rewarding foreign officials) or may focus the auditor’s attention because of their sensitive nature (e.g. intra-group relationships), other operations may go undetected, either because they are not readily apparent (a small sum in the midst of much more substantial transactions), or because they are concealed among hundred or even thousands of entries.

The fact that, to be reported, findings have to be “significant”, as required by a Chancellery circular dated 23 October 1985, itself based on a CNCC recommendation of 12 September 1985, puts a further restriction on the scope of the duty of disclosure. This recommendation introduces criteria which are both quantitative (“appreciably changes the net situation”, “distorts the interpretation of the results”) and qualitative (“damages or is such as to damage the enterprise or a third party”). The risk here is that many bribes, though unlawful in terms of the criminal law, will not be detected because the sums in question do not fulfil these criteria.

There is yet another constraint on the scope of an auditor’s duty of disclosure: the absence of any legal obligation for the auditor to report to the Public Prosecutor criminal offences committed within companies other than those whose books he/she is auditing (i.e. companies outside the consolidated group).⁷ When the accounts of a subsidiary do not fall within the ambit of consolidation with the parent company, offences committed within the subsidiary are excluded from the field of application of the duty of disclosure.

The auditor is nevertheless legally obliged to check whether the company whose accounts he is auditing or its senior staff can be regarded as accomplices in or receivers from offences identified within the subsidiary. He must in addition ensure that the criminal activities do not have any impact on the accounts of the company for which he is acting. Finally, he is duty bound to get in touch with the subsidiary's auditor, if it has engaged one, and let him have his findings in writing.⁸

According to the Paris economic and financial magistrates and police investigators, the system tends to work better in smaller-sized companies than in the major groups. This is because the size of the company and regular contact with senior staff impact on the degree and quality of the auditor's control over the company accounts and therefore his ability to detect financial misconduct. In their opinion, the paltry number of disclosures by auditors is influenced by the financial interest and bond of trust between them and the senior staff of the enterprises they are auditing. Finally, according to the magistrates interviewed by the examining team, there is a further factor that would tend to explain the overcautious attitude of auditors in performing their duty of disclosure: the fact that the courts convict auditors for non-disclosure only in cases where they have been guilty of positive actions, by inciting or aiding and abetting an offence consummated by the company's managers.

In the opinion of the professional accountants and representatives of the criminal justice system interviewed by the examining team, the situation could nevertheless change for the better in the near future. New regulations developed by the CNCC put the emphasis on the effectiveness of the measures deployed to detect financial misconduct and insist on the need for auditors to adopt a critical attitude, as opposed to an "over-conciliatory" one – to quote the representative of a large firm of auditors interviewed by the examining team – towards the senior staff of the company whose accounts they are auditing. This could result in changes in the training given to auditors, which until now has included only day-long modules of a general nature on the detection of fraud and criminal business law.⁹

For its part, the law on financial security of 1 August 2003 contains a number of provisions intended to strengthen supervision of the profession. It provides for a supreme council responsible for overseeing the auditing profession (Haut conseil du commissariat aux comptes), with three quarters of its membership consisting of outsiders (magistrates and prominent people with appropriate qualifications)¹⁰, and a series of measures aimed at strengthening the independence of auditors in performing their duties within a company, particularly by guarding against situations of conflict of interests and the danger of collusion between an auditor and the company whose accounts he is responsible for auditing.¹¹ Finally, the prosecutors' offices specialising in financial and economic crime, or at least the Paris office, hope to take the opportunity offered by this legislative reform to establish a generalised system for warning regional auditors' committees of misconduct among their members, so that disciplinary sanctions can be taken against those who have failed to perform their duty of disclosure.

Commentary:

The lead examiners appreciate the vital role played by the French legislation governing accounting and auditing in detecting the offence of active bribery of foreign public officials, in particular the duty incumbent on auditors to disclose any criminal activity. The lead examiners recommend that the French authorities strengthen this latter mechanism by introducing measures to make accounting professionals more aware of the provisions of the Act of 30 June 2000. They should

also introduce with more stringent detection regulations, making auditors subject to a clear obligation whether or not the facts appear significant, to report to the Public Prosecutor observations they may find in the course of their audit which could indicate the possibility of an unlawful act of bribery. The lead examiners also invite the French authorities to make use of the new Supreme Council for the accounting profession (Haut conseil du commissariat aux comptes) to impose stricter disciplinary measures on auditors who fail to perform their duty of disclosure.

Reporting of the offence by civil servants and institutional bodies exercising supervisory powers

There is another way in which the offence can be referred to the courts: if an instance of bribery is reported by a civil servant or an institutional body exercising supervisory powers. Sub-section two of Article 40 of the Code of Criminal Procedure in fact stipulates that “any constituted authority, any public official or civil servant who, in the exercise of his duties, acquires knowledge of a crime or offence is required to report the matter without delay to the Public Prosecutor and to forward to this magistrate all related information and documentation”. Disclosure to the Public Prosecutor’s Office of proven or suspected acts of bribery can thus be made by public officials in the course of their normal duties or in the course of supervisory missions conferred on the body, organ or department under whose authority they are working. Such bodies exercising supervisory or investigative powers are numerous: the revenue department, the unit specialised in combating money-laundering, the customs service, the bodies responsible for supervising the management of public funds, and sectoral regulatory authorities. Several cases falling within the scope of the Convention which were under investigation at the time of the lead examiners’ on-site visit had originated as a result of a report by an institutional body.

Detection of the offence by the tax authorities

The revenue department can be an excellent source of information and reporting on the offence of actively bribing foreign public officials. This is even more the case now that, since the law establishing the offence came into force, it is no longer permissible to deduct from taxable profits sums paid or benefits granted to a public official or third party “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” (Article 39-2bis of the General Tax Code). Reports to the public prosecutor may thus originate from tax inspectors who have become aware of actions relating to the offence of bribing foreign public officials when carrying out a tax inspection or checking on an abnormal management procedure. Moreover, an instruction issued to revenue offices on 14 November 2000 obliges them, when refusing to allow a claim for deductible expenses, to inform the Public Prosecutor’s Office accordingly, on the basis of Article 40 of the Code of Criminal Procedure.

The revenue has a useful detection tool in its arsenal: the statutory requirement that obliges companies to make an annual declaration of the commissions and fees they have paid. A study of such declarations, which have to be made on a special form, can be a valuable aid to tax officials in detecting sums which are by definition suspect: unusually large payments, payments addressed to tax havens, frequent payments to the same person. In preparation for these inspections, tax officials are given guidance in ways of detecting offences. They receive administrative directives and technical dossiers compiled by the Direction Nationale des Enquêtes Fiscales (National Tax Investigations Department), and

can access information published on a special web site (guide to tax havens, handbook on the detection of bribery produced by the OECD, etc.). When its declaration has been examined, the company in question may be subjected to more rigorous investigation, involving its accounting records.

Of the various structures operating within the revenue department with responsibility for inspecting companies, there is one that is especially well placed for detecting the offence of actively bribing foreign public officials: the Direction des vérifications nationales et internationales (DVNI / Department for National and International Verifications), whose task is to conduct external inspections of major companies' operations. In all, more than 30,000 companies, 12,000 of which can be categorised as very large, come within the remit of this department. The information pack on tax inspection activities published each year by the Direction générale des impôts (Inland Revenue) states that major companies subject to the DVNI have their accounts inspected once every six or eight years on average. According to one of the Revenue representatives interviewed by the examining team, 3,000 companies – including those identified as most prone to tax fraud – have their books checked each year. Meanwhile, companies active in economic sectors deemed sensitive are subject to an in-depth inspection every three years. Taking all the tax inspection structures together, according to Ministry of Finance statistics, on average 45,000 small, medium-sized and major enterprises are subject to an on-site inspection of their accounts each year.

When carrying out on-site checks, the tax inspectors have a number of effective “weapons” at their disposal, namely checking the presence of the mandatory accounting records – book of first entry and inventory ledger – and access to all the company's commercial records (invoices, financial documents such as bank statements) and legal documentation (contracts with clients and suppliers, minutes of shareholders' meetings, etc.). These checks are often fruitful: on average, 85% of inspections result in the detection of misconduct in tax matters; more than 800 give rise, on the basis of Article 1741 of the General Tax Code, to the gathering of evidence leading to a complaint being lodged in respect of tax fraud; while a handful of inspections lead to matters being referred to the Public Prosecutor, in accordance with Article 40, sub-section 2, of the Code of Criminal Procedure. To date, however, no inspection has uncovered behaviour falling within the scope of the French legislation transposing the OECD Convention.

Disclosure in relation to cases of money-laundering

French measures to prevent money-laundering may serve as a useful additional tool in both detecting and dissuading potential offenders from bribing foreign public officials. Bribery and money-laundering are in fact closely linked: the money paid as a bribe is generally channelled through money-laundering circuits, as the Central Department for Corruption Prevention (Service Central de Prévention de la Corruption) pointed out in the report it published in 1997. Article 324-1 of the French Criminal Code makes it an offence to launder the proceeds of any crime or misdemeanour, and therefore the laundering of money deriving from the active bribery of foreign public officials. Under the terms of this article, participation in a transaction to invest, conceal or convert the direct and indirect proceeds of a crime or an offence or to facilitate, 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, is punishable with a term of imprisonment of five years and a fine of €375,000.

To facilitate the detection of money-laundering transactions, the law has established extensive obligations whereby the professions closest to the point at which such transactions occur are required to exercise vigilance. The Monetary and Financial Code (Code monétaire et financier) stipulates that financial organisations must draw up and retain information regarding the identity of their clients – including occasional clients – and the transactions they have effected for a period of five years. They must also carry out specific checks on any substantial transaction (in excess of €150,000) which does not appear to have any business-related justification or legitimate purpose. In addition, Article L.562-2 of the Monetary and Financial Code imposes an obligation to declare any suspicions of money-laundering on institutions and financial organisations, as well as on the professions mentioned by Article L.562-1 of the Monetary and Financial Code.¹²

The scope of the declaratory regime instituted in France is vast: it covers the whole banking and financial sector (the public treasury, banks, the financial services managed by the Post Office, the Caisse des dépôts et consignations [deposit and consignment office], the Banque de France, public financial establishments, bureaux de change, insurance companies, insurance and reinsurance brokers, investment firms and mutual benefit societies), intermediaries in the property business (chiefly notaries and estate agents) and some non-financial professions (casino managers, auctioneers and luxury goods dealers, in application of the Act of 15 May 2001 on the new economic regulations). This list is set to lengthen with the inclusion, when the transposition into French law of the second European anti-money-laundering directive of 4 December 2001 has been completed, of further sectors (chartered accountants, auditors and lawyers). For the time being, the latter are obliged, under the terms of the Monetary Code, to report directly to the Public Prosecutor *definite* instances of money-laundering of which they have become aware. In this respect, their position is the same as that of all other professionals not covered by the obligation to declare suspicious findings, who, in the exercise of their business, perform, supervise or advise on transactions involving movements of capital.

At the heart of the French detection system is a specialised unit, working under the authority of the Minister for the Economy and Finance: TRACFIN (Unit for Intelligence Processing and Action against Secret Financial Channels). The task of TRACFIN is to receive and analyse declarations of suspicion made by organisations required to do so by law and, when appropriate – i.e. when on analysis of the information the initial suspicion grows into a presumption of money-laundering –, to refer the matter to the judicial authorities. To perform its task, TRACFIN, though it does not have its own budget, is allocated the annual sum of 1 million euro and a staff of about forty people, some thirty of whom play an investigative role, including a number of financial analysts. It has the right to require production of documents from institutions subject to the obligation to disclose suspicions: Article 5 of the Act of July 1990 relating to the “prevention of use of the financial system for the purposes of money laundering” in fact empowers it to “gather and bring together all the information required to establish the origin of sums or the nature of transactions to which the declaration refers”. Information cannot be withheld on the grounds of banking secrecy.

At the time of the on-site visit, six potential cases of bribery of foreign public officials which were at the preliminary enquiry stage or subject to judicial investigation had been opened as a result of reports from TRACFIN. One of these cases, featuring large payments into the bank accounts of a minister of a foreign country, resulted – following the issuing of letters rogatory by the investigating magistrates – in the first prosecution in France of the offence of active bribery of a foreign public official, as introduced by the

Act of 30 June 2000 incorporating the OECD Convention. The French businessmen concerned were prosecuted on a charge of bribery of foreign public officials, while the foreign minister was charged with receiving in relation to the same offence.

As far as the lead examiners could see, where transactions to invest, conceal or convert the proceeds of a bribe paid to a foreign public official were concerned, TRACFIN's role in "bringing business" to the criminal justice system appeared to be limited. Indeed, the law limits the duty of disclosure to suspect sums or transactions which "might arise from drug trafficking or organised criminal activities" (Art. L 562-2 of the Monetary and Financial Code). According to the TRACFIN representatives interviewed by the examining team, the discrepancy between the wide scope of the criminal offence of laundering and the more limited scope of declarations of suspicion is more apparent than real. The philosophy behind the system would be to get financial organisations to declare any abnormal transaction to TRACFIN. In practice, financial establishments would not seek to discover the exact origin of all capital sums; they would simply declare to TRACFIN all transactions they regarded as suspect. However, this explanation is undermined somewhat by a statistical analysis of the proportion of reports which, following analysis by the judicial authorities, revealed acts which might fall within the scope of the Convention: of the 673 dossiers transmitted by the unit to the Public Prosecutor's Office during the period 2000–2002, the six reports from TRACFIN represented barely 1% of all the cases of money laundering detected by the unit.

In the opinion of the lead examiners, there is another constraint which limits TRACFIN's role in "bringing in business": the effectiveness of penalties imposed on persons who do not comply with their duty of disclosure in practice. During the on-site visit, all the professions bound by obligations to exercise vigilance pleaded for self-regulation, citing the severity of the penalties they themselves imposed on those in breach. In their discussion with the lead examiners, the public authorities, in particular the Commission bancaire, referred to the administrative and disciplinary penalties at their disposal, which may in extreme cases result in their withdrawing approval from a financial institution. They also pointed out that administrative penalties do not exclude application of the provisions of the Criminal Code governing aggravated laundering (Articles 324-1 ff introduced by the Act of 13 May 1996).

The examining team expressed scepticism as to the dissuasive nature of administrative or disciplinary penalties as implemented to date by the supervisory organs or disciplinary bodies. Furthermore, some professions subject to the obligation to exercise vigilance do not have a disciplinary body (real estate professionals, for example). Criminal penalties, on the other hand, will be applied only in cases where the financial organisation or professional concerned features as the co-author or objective accomplice of the money-laundering activity, i.e. when the laundering "is committed habitually or using the facilities afforded by the exercise of a professional activity" (Art. 324-2). This was the reason why the parliamentary mission set up to study the issue of money laundering in France recommended in its report, published in 2002, the institution of criminal penalties. It cited in particular the examples of the United States and the United Kingdom, where failure to exercise due diligence carries a prison sentence of between 2 and 5 years.¹³

Commentary:

The lead examiners welcome the central role acquired by TRACFIN in revealing instances of money laundering to the competent prosecuting authorities. This mechanism could be strengthened by introducing measures to make financial and

professional organisations which are subject to the obligation to declare suspicion more aware of the provisions of the Act of 30 June 2000, and by introducing stricter detection standards, putting the said organisations under a clearer obligation to notify TRACFIN of any suspicion of money laundering activities connected with the bribery of foreign public officials. The lead examiners recommend, moreover, that the available sanctions, including criminal penalties, be effectively applied to all the organisations and professions subject to this obligation.

Detection of the offence by other departments, services and constituted authorities

There are other agencies which might possibly intervene in the chain of public authorities leading to judicial proceedings. These include regulatory authorities responsible for individual sectors, the Central Corruption Prevention Department (SCPC) and government bodies charged with monitoring the management of public funds. Most ministries have their own internal inspection services which, in performing their task of monitoring the use of public resources, might detect criminal activities referable to the Public Prosecutor on the basis of Article 40, sub-section 2, of the Code of Criminal Procedure. One of the representatives of these services interviewed by the examining team nevertheless acknowledged that, given the specific mandate under which they operate, they were unlikely to detect acts of bribery as defined by the Act of 30 June 2000.

The work of these services is supplemented by procedures – devised in this case by financial magistrates working in the Audit Court (Cour des comptes) and the regional audit chambers – to monitor the use of public funds by public institutions, public enterprises in which the state has a majority interest and their subsidiaries abroad, regional and local authorities, and private bodies receiving financial assistance directly from the European Union. Although, at the time of the on-site visit, no instance of bribery of foreign public officials had been reported, over the last fifteen years these courts have proved to be among the foremost institutional agencies in France in bringing to light acts of corruption. According to the report made public by the Audit Court in 2002 for the period 1983–2002, the financial courts had reported 50 cases of active and passive bribery and trading in influence (almost 15% of all the reports made). According to the Audit Court judge interviewed by the examining team, these statistics understate the real picture, revealing only cases of bribery characterised on the basis of Article 40, sub-section 2, of the Code of Criminal Procedure, and therefore referred to the public prosecutor as such.

Two sectoral regulatory authorities, the Commission des opérations de bourse (COB / French stock exchange watchdog) and the Commission bancaire (Banking Commission), are also vested with powers which might contribute, at least indirectly, to the detection of acts of bribery. The Banking Commission is responsible for overseeing 2,600 financial establishments. As well as being empowered to verify documents and carry out on-the-spot inspections, it enjoys a right to require the disclosure of documents, to enable it to ensure that the establishments under its supervision are not complicit in circulating funds of fraudulent origin or passing them through the financial circuits. According to its annual report, 231 on-the-spot inspections were carried out in 2001, nine of which resulted in matters being referred to the Public Prosecutor. As a result of a check of this kind, carried out in a bank in Monaco, and the subsequent report made to the Public Prosecutor's Office in 2001, evidence of acts of bribery committed in relation to the construction of a power station in a European country was brought to light by the French police and forwarded to the competent foreign prosecuting authorities in July 2002.

The COB's primary task is to ensure that the financial markets are operating properly and to guarantee the accuracy of company information inviting members of the public to invest their savings. It also has general monitoring and investigative powers, and may carry out administrative enquiries and, under the supervision of a judge, investigative measures. It was as a result of a check carried out by the COB, originally concerned with the refloating of a textile group by the French company Elf Aquitaine, that information was laid against X, in 1994, for "misuse of corporate assets and breach of trust". This was followed by eight years of judicial investigations which revealed many illicit financial transactions, some of which were connected with bribery in relation to foreign business contracts.

As a result of the COB exercising these powers, roughly one hundred enquiries are initiated each year, half of them triggered by analysis of the behaviour of financial markets, half on the basis of denunciations made by auditors or company managers, former managers or employees. Ten or so result in administrative penalties being imposed on senior company managers (in 2002, five for "non-compliance with the obligation to inform the public" and four for "non-compliance on the part of insiders", the administrative counterpart of the criminal offence of insider trading). Meanwhile, a further twenty or so, concerned with non-compliance with regulations on how to present accounts, insider trading or irregularities which could be qualified as misuse of corporate assets, false accounting or use of forged instruments, were referred to the Public Prosecutor (19 in 2001; 23 in 2002). The creation of a new stock exchange authority, the *Autorité des marchés financiers* (Financial Markets Authority), born of a merger between the COB and the *Conseil des marchés financiers* (Financial Markets Council), should result in an increase in the means and resources (in particular an increase in staff numbers of between 10% and 20% over five years) devoted to the work of monitoring and investigating.

The Central Corruption Prevention Department (SCPC), the only specialised agency in this field, is not intended to bring to light acts of corruption with a view to the punishment of offenders but, essentially, to study the phenomenon and issue recommendations to prevent its spread. When it was first set up, this department was given investigative powers, but they were subsequently withdrawn on the grounds of unconstitutionality.¹⁴ Its role can be summarised today, in the words of the 1993 Act relating to the prevention of corruption, as "centralising the information necessary for the detection and prevention of acts of active and passive bribery (...)" and referring matters to the Public Prosecutor when such information reveals acts of bribery. In practice, lacking the investigative powers and the right to require disclosure of documents which would enable it to check the reliability of the information it gathers, its role in making disclosures to the Public Prosecutor is modest: between October 1999 and the end 2002, of 178 cases handled (58 in 2000, 55 in 2001 and 65 in 2002), only 10 (5 in 2000, 2 in 2001 and 3 in 2002) resulted in referrals to the Public Prosecutor in respect of acts which may be qualified as bribery, unlawful taking of interest, favouritism or trading in influence.

The place and role of the public administration and public officials in the mechanisms for detecting the offence of bribery

It emerged clearly in the course of the on-site visit that, despite the continuous strengthening of the means of detecting business-related offences, none of the existing mechanisms was specifically designed to concentrate on acts of bribery. Each of the

departments, though aware of the existence of the new offence, focuses its attention on concerns other than the detection of bribery: tax fraud, money laundering, insider trading, misappropriation of public funds, and customs offences. As a result, these mechanisms are probably at present capable of revealing only a tiny proportion of this type of crime. Many instances of bribery therefore emerge, in the lead examiners' opinion almost "by coincidence", in the course of enquiries originally launched to target actions falling within the remit of the agencies concerned, having no initial connection with acts of bribery, yet leading to the uncovering of acts of corruption that no one could have foreseen at the outset. Some of the French justice system's "star" cases of bribery over the last few years bear this out. No one could have foreseen, for example, that a straightforward COB enquiry into the suspicious bailing out of one company by another would result in the revealing of a whole network of dealings partly connected with bribery in foreign business transactions.

The departments concerned are, however, bound by the terms of Article 40 of the Code of Criminal Procedure to inform the Public Prosecutor of any criminal act detected in the course of their duties. On the one hand, while failure to disclose attracts a disciplinary sanction, no criminal penalty is provided for in this case, except if there is complicity.¹⁵ On the other hand, those concerned enjoy a degree of discretion in carrying out this obligation, under the supervision of the administrative judge.¹⁶ According to one administrative decision (Council of State, 27 October 1999 – Solana), given in a case involving a constituted authority, any person subject to Article 40, sub-section 2, of the Code of Criminal Procedure must notify the Public Prosecutor "of matters of which he has knowledge in the exercise of his duties, if these matters seem to him sufficiently well established and if he believes that they constitute a sufficiently serious breach of the provisions which it is his task to apply". The administration may therefore exercise a relatively broad discretion in evaluating the facts, with regard to their materiality ("sufficiently well-established facts"), their seriousness ("a sufficiently serious breach of the provisions which it is his duty to apply") and the circumstances in which they were brought to its knowledge ("knowledge in the exercise of his duties").

Commentary:

The lead examiners consider that, although existing mechanisms for detecting criminal acts afford a number of "access points" for unmasking instances of bribery of foreign public officials, these mechanisms are probably capable of revealing only a small proportion of this type of crime. For this reason, and in the light of the very broad discretionary powers granted to French public officials in disclosing offences to the Public Prosecutor, they recommend that the French authorities make persons attached to services vested with supervisory powers who are subject to Article 40 sub-section 2 of the Code of Criminal Procedure more aware of the importance of its application in cases of bribery, and remind them of the disciplinary sanctions which apply if this obligation is not complied with.

Notes

- 1 At the time of the on-site visit, only four agreements had been signed between the SCPC and private-sector enterprises. Fourteen additional enterprises had shown an interest in taking part in these initiatives.
- 2 FCEs comprise any commission not mentioned in the main contract or not at least figuring in an independent contract drawn up in due form which refers to the main contract, any commission which does not reward some effective, legitimate service, any commission paid in a tax haven, or any commission paid to a beneficiary who is not clearly identified or to a company which has all the appearances of a shell company.
- 3 The draft law reforming the criminal justice system to take into account changes in criminal behaviour, which was being examined by Parliament at the time of the examination of France, provided for this list of offences to be extended, but without including bribery.
- 4 In this case, the Cour de Cassation overturned the judgement handed down by the Court of Appeal in 1997, which ruled that the denunciation itself was misconduct. The Cour de Cassation however held that the dismissal was unlawful.
- 5 This measure applies equally to French public officials.
- 6 CNNC, “Normes – commentaires – déontologie” (Regulations – comments – professional ethics), 1998, no 10 and 11, p. 1506.
- 7 In the case of consolidated accounts, the auditor working on the accounts of the lead company is deemed responsible for reporting criminal offences committed in other companies falling within the scope of the consolidation, as he is regarded as the guardian of the legality of the whole group.
- 8 If the subsidiary in question does not have its own auditor, the auditor of the parent company is nevertheless not obliged to disclose the offences to the prosecutor’s office (*CNCC Bulletin* 1983, no 52, p. 518).
- 9 Cf. Campus Compagnie: Formation commissaires aux comptes (training auditors) 2002-2003, CNCC training department, 2002.
- 10 Besides the fact that the law no longer reserves exclusive control of the profession to regional auditors’ associations, the text adopted by Parliament is innovative in providing for inspections and enquiries initiated by authorities external to the profession, i.e. the Minister of Justice (Garde des sceaux), the Supreme Council (Haut conseil) and the new financial markets authority, which replaces the former stock-exchange transactions commission (Commission des opérations boursières / COB).
- 11 In this way, the law is more rigorous in regulating the accumulation of auditing and advisory functions for one and the same client and provides for the auditors of a particular client to be rotated.
- 12 The declaratory regime instituted in France differs from the regime of systematic declaration in force in other parties to the Convention, such as Australia or the United States. Whereas systematic declaration is based on objective criteria (set thresholds, the nature of a transaction) which require the financial organisation automatically to inform the authority concerned of all operations defined as vectors of money-laundering (and it is then up to the structure receiving the information to detect the suspect mechanisms), declaration of suspicion rests on subjective criteria which make the financial intermediary responsible for analysing the transactions it is managing and deciding whether there is a risk that they may be concealing suspect activities.

- 13 . Report by the joint information mission on obstacles to the control and suppression of financial crime and money laundering. Tome 2: The Fight against Money Laundering in France, Volume 1, Assemblée Nationale no 2311 (April 2002), pp. 47-50.
- 14 Judgement of 20 January 1993 declaring several provisions of the law to be unconstitutional because they were such as to compromise personal freedom and jeopardise property rights. The offending provisions concerned the power to conduct “investigations of a technical character” (with no clear restriction on administrative enquiries); a broadly based right to require production of documents (with no obligation to give reasons or right of recovery); the right to summon any person within 48 hours without mention of the person’s right to be accompanied by the legal advisor of his choice nor obligation to draw up a report with right of reply; and finally the penalties applicable (a fine of 7,500 euro) in the event of a refusal to hand over the documents requested or participate in the hearings arranged by the department (penalty judged excessively severe).
- 15 While according to the doctrine, a public official who fails to inform the Public Prosecutor’s Office runs the risk of disciplinary liability, it does not appear, to date, that any case law exists on this point ; (Le Courier Juridique des Finances et de l’Industrie no. 8 , March and April 2001, Study, Article 40 of the Code of Criminal Procedure)
- 16 The exercise of this discretionary power, which should not be confused with the power of the Public Prosecutor to decide whether or not to institute proceedings, is supervised by the administrative judge who can, at the request of any interested party, overturn any decision not to disclose facts to the Public Prosecutor.

Mechanisms for the Prosecution of Foreign Bribery Offences

The instigation of public legal action

French criminal procedure is governed by a discretionary principle: prosecutors have the freedom not to initiate proceedings in respect of an act which has all the characteristics of an offence. In application of this principle, it is the task of the Public Prosecutor to centralise complaints which are made to him directly or first lodged with the police services or the gendarmerie. He also collects from all public authorities information or reports relating to crimes and offences of which they may have knowledge.

On the basis of information received and supplemented, if appropriate, by investigations performed by the competent services on their own initiative or on the prosecutor's instructions, this magistrate can decide either to initiate a prosecution or to close the case, in application of sub-section 1 of Article 40 of the Code of Criminal Procedure, which stipulates that "the public prosecutor shall receive complaints and denunciations and assess what steps to take. He shall notify the complainant of the closure of the case, as well as the victim, if the victim has been identified". Prosecution means instigating public proceedings and referring the case to an investigating magistrate, or directly to a trial judge. Closure, on the other hand, means putting an end to the procedure that might have been initiated and results in no public proceedings. The absence of a direct victim, the lack of serious and consistent evidence, the insignificance of the harm done, and also other "discretionary criteria" external to the case itself may all lie behind a decision to shelve the case. As French legislation stood at the time of the Phase 2 examination of France, this decision was not open to appeal (see *infra*).

Instigation of public proceedings and the possibility of bringing a civil party petition as part of the criminal proceeding

An important instrument in French law – and a way of overcoming reluctance to act on the part of a public prosecutor who, having been advised of the facts, thinks it not appropriate to prosecute – is the possibility, for the victim(s) of a criminal offence committed entirely or partly on French territory¹, of bringing a civil party petition as part of the criminal proceeding. The consequence of this procedure is to deprive the prosecutor of his/her power to close a case for discretionary reasons. Provided that the facts set out in the complaint amount to an offence that can be prosecuted and that the author of the civil party petition can provide evidence of having suffered "personal and direct damage" (Article 2 of the Code of Criminal Procedure), the Prosecutor's Office must launch a judicial investigation. Bringing a civil party petition before the criminal courts also gives the victim a further significant advantage: it makes him a party in the criminal trial, enabling him/her to influence investigations by requesting certain procedures and by exercising his/her rights of appeal against the decisions of the investigating magistrate.

In cases of active bribery of foreign public officials committed partly or entirely on national territory and involving public officials who are not from EU member countries or not community public servants, the regime applicable in prosecuting the offence departs from generally applicable French law. The Act of 30 June 2000 in fact stipulates that the offence of active bribery of persons belonging to foreign states outside the European Union can only be prosecuted at the behest of the Public Prosecutor's Office. A

consequence of this provision is that a company excluded from a foreign contract outside the EU area is not allowed to bring a civil party petition within the criminal proceedings resulting from such bribery against the company that was awarded the contract, and thereby itself initiate proceedings. According to the representatives of the Ministry of Justice interviewed by the examining team, this is a safeguard which the French legislator, fearing “manipulation” of the French justice system in this area, has put in place by giving the public prosecutor sole discretion as to whether or not to prosecute. It is also supposed to “ensure equivalence with signatory countries of the OECD Convention which do not allow civil parties to initiate proceedings”. The fact that it is nevertheless possible to bring a civil party petition as part of the criminal proceedings for bribery of officials of member states of the European union and of European Community officials is explained by the “particularly well integrated character of the legal systems of the EU member countries, which is not the case in the wider framework of the OECD”.

All the companies interviewed during the on-site visit, and the employers represented by the MEDEF, emphasised the danger of criminal prosecutions being used as a “weapon” between competing firms. The danger was all the greater in that there were major differences between the criminal justice systems of the states party to the Convention, including with regard to the functional equivalence criterion, since, in the opinion of some of these companies, some states party to the Convention reserve for themselves an appreciable margin of discretion in bringing prosecutions. During the on-site visit, the lead examiners noted that companies and the MEDEF seemed to place hope in the monopoly over prosecutions enjoyed by the Public Prosecutor’s Office and the concurrent jurisdiction at national level attributed to the Paris Prosecutor.² They saw this as a mechanism that might ensure that competitors operating under different criminal justice systems would be competing on a “level playing field”.

In addition to their questioning of the legitimacy of a system which departs from the general law – a matter on which the group, in phase 1, had expressed reservations with regard to its conformity with Article 5 of the Convention –, the lead examiners expressed their scepticism about the first part of the reason adduced by France to justify this mechanism, i.e. the idea of preventing “manipulation” of the justice system by banning improper civil party petitions being made in the course of criminal actions, the only purpose of which would be to damage the image of French companies active in highly competitive foreign markets. In practice, this mechanism could prove quite ineffective. The fact is that the slightest indiscretion towards a French company, cleverly orchestrated by a competitor, could quite easily trigger a media operation that would damage the image of the company in question. A complaint to the judicial authorities of the foreign country could also lead to the enforcement, on French territory, of international letters rogatory, which, if seized on by the media, could be equally damaging to the company under investigation. Instances of corruption could also be brought to the attention of the French prosecuting authorities under the cover of other accusations, such as misuse of corporate assets, tax fraud or money laundering. In a nutshell, a foreign company animated by malicious intent has various ways of getting round the obstacle of not being allowed to bring a civil party petition as part of a criminal action and, therefore, of damaging its rival.

On the other hand, the second possible basis of justification, in the eyes of certain French industrial groups, for giving the Public Prosecutor’s Office a monopoly over prosecution, namely the need to ensure equality of treatment for French companies in relation to competitors subject to different criminal justice systems, gave the examining team cause for concern, particularly in the light of the pre-eminent role which the law

accords to representatives of the Public Prosecutor's Office in legal proceedings. In the opinion of the lead examiners, there is a danger regarding the Public Prosecutor's influence on the direction and outcome in a case of corruption brought to his notice. This danger derives from two fundamental principles governing criminal prosecution in France: the discretionary principle as to whether or not to prosecute, which allows prosecutors to decide not to prosecute the perpetrator of an offence, even if it has all the marks of an offence; and the statutory subordination of the Public Prosecutor's Office to the executive by virtue of the very hierarchical internal organisation presided over by the Minister of Justice. This translates in practice into an obligation on *substituts* (prosecutor's deputies) to carry out the instructions of their superiors, the prosecutors, who themselves owe obedience to the chief prosecutors appointed by the Council of Ministers, who act under the authority of the Minister of Justice. The departure from normal practice in the prosecution of offences of bribery of foreign public officials, and the granting to the Paris Public Prosecutor of concurrent, nationwide jurisdiction, could potentially result in pressure being brought to bear on the Paris Prosecutor's Office to ensure the shelving of certain cases in order to protect the economic interests of France.

The role of the Public Prosecutor's Office in the conduct of proceedings

The role of the Public Prosecutor and the initiatives the law permits prosecutors alone to take at all stages of legal proceedings can determine the direction, pace and outcome of a case. From the preliminary enquiry, which determines whether or not a criminal investigation should be initiated, to the committal of the accused to the court which will try the case, via the opening of a judicial investigation and the issuing of an additional indictment, which alone can authorise the investigating magistrate to look into matters other than those originally referred to him, the Prosecutor's Office oversees the proceedings step by step.³ Although this poses no problems in cases covered by the general law, the same is not true of "earmarked" cases, such as cases of bribery of foreign public officials. In cases of this type, in addition to the technical opinion of specialised assistants, "discretionary criteria" may, where appropriate, be taken into account at the prompting of the *chef du parquet* - a magistrate appointed by presidential decree on the advice of the *Conseil supérieur de la magistrature* (Supreme council of the magistracy), a constitutional body. This may involve weighing up the foreseeable consequences that a decision to prosecute might have in the political and economic fields.

According to the French authorities, there are various factors which would alleviate the risk of improper considerations -- notably economic considerations -- affecting the prosecutor's decision whether to proceed. The first of these is article 36 of the Code of Criminal Procedure, which, as France pointed out during the Phase 1 examination, forbids the Minister of Justice from giving instructions or orders for a case to be shelved: the only thing the Minister could do is to issue injunctions to the senior prosecutor, urging him to instigate a prosecution, and these have to be set down in writing and included in the case file in accordance with the legal provisions introduced in 1993. Then, there are the mechanisms proposed in the draft law reforming the criminal justice system to take account of changes in criminal behaviour, which seeks to set limits on the Public Prosecutor's power to shelve cases. Among these mechanisms are: a new Article 40-1 of the Code of Criminal Procedure under which a case could only legally be shelved where "*this is justified by particular circumstances relating to the commission of the acts*"; the new obligation on a prosecutor deciding to shelve a case to advise both complainants and victims (and as the case may be the public authorities who reported the violation) of his decision, giving reasons; and the new possibility for any person who has reported acts to

the public prosecutor to exercise a right of hierarchical appeal to the Prosecutor General (Appeal Court prosecutor) against a decision to shelve a case.⁴ Besides this, the French authorities emphasised that several preliminary investigations involving major French exporting companies or foreign entities had been opened on the orders of the prosecutors, and that it was thus obvious from French judicial practice that the decision whether to prosecute was not influenced by improper considerations.

The lead examiners nevertheless noted that the mechanisms intended to limit the right of the public prosecutor to shelve cases, provided for in the draft law reforming the criminal justice system to take account of changes in criminal behaviour, were part of a text which establishes a central role for the Minister of Justice in the conduct of prosecutions, assisted by Prosecutors General whose task would be to “coordinate the carrying out of prosecution policy” by guiding and coordinating the actions of the public prosecutors; and that the public prosecutors’ obligation to prosecute except where “*particular circumstances relating to the commission of the acts*” justified shelving the case, was not accompanied by any detailed explanation as to what such “circumstances” might be.⁵ The lead examiners moreover noted that, independently of France’s undertaking to rule out the giving of any instruction not to proceed in particular cases, there remained a requirement that the Prosecutor’s Office refer back to the Chancellery all possible information about cases relating to the new offence of transnational bribery, to “allow the Chancellery to assess, as with any new offence, how it was being implemented in practice”.

Commentary:

The lead examiners noted the assurances given by the Ministry of Justice that, in accordance with the law, no instruction not to prosecute is given in specific cases. However, given the current exceptional regime assigning to the public prosecutor sole authority to offences of bribery involving public officials of states that are not members of the European Union, and given the hierarchical structure of the public prosecutor’s office which is by law subject to the executive, they recommend that the French authorities facilitate prosecutions based on complaints lodged by victims in cases involving bribery of public officials of any foreign state, on the same basis as that provided for bribery of French public officials. In addition, they invite the French authorities to gather statistics regarding the number of proceedings featuring bribery that lead to prosecution and that are shelved, for future evaluation by the OECD Working Group.

Prosecution of the offence

Means of investigation and prosecution

Although cases are referred to the Public Prosecutor’s Office, it is the criminal police who actually carry out judicial investigations. Whether during the preliminary enquiry or at the pre-trial investigation stage, after the Public Prosecutor has initiated criminal proceedings and entrusted the case to an investigating magistrate, it is the criminal police who conduct the investigations.

Structures supporting the Public Prosecutor’s Office and investigating magistrates

A number of structures within the national police force and the gendarmerie have a special role in investigating corruption in the context of international business transactions. At national level, two departments of the Sous direction des affaires

économiques et financières de la Direction centrale de la police judiciaire (Sub-directorate of Economic and Financial Affairs of the Central Judicial Police Directorate) specialise in assisting the Public Prosecutor's Office and investigating magistrates in their enquiries: the Division nationale des investigations financières (National Division for Financial Investigations), which is responsible for investigating matters such as misuse of corporate assets, bankruptcy-related and similar offences, and the Office central pour la répression de la grande délinquance financière (OCRGDF / Central Office for Fighting Major Financial Crime), which targets the recycling of sums of money through laundering. The Sub-directorate of Economic and Financial Affairs of the Central Judicial Police Directorate is also responsible for the training, at national level, of specialised investigators engaged in the fight against economic and financial crime and, in particular, against national or international corruption.

As well as the two departments of the Sub-directorate of Economic and Financial Affairs with national competence, at local level, in metropolitan France and the DOM-TOMs, prosecuting and investigating magistrates can also count on the support of specialised investigators seconded to the Economic and Financial Divisions (Divisions économiques et financières / D.E.F) of the nineteen Regional Judicial Police Services (SRPJs / services régionaux de police judiciaire), which are attached to inter-regional judicial police bodies. They can also seek support from the 30 research sections of the gendarmerie specialising in economic and financial crime (délinquance économique et financière / DEFI), which have territorial competence in the appeal-court districts in which they are based. Where Paris and its suburbs are concerned, the body best qualified to investigate bribery in international business transactions is the Brigade financière, which is dependent on the Sub-directorate for Economic and Financial Affairs of the Regional Judicial Police Department (Sous direction des affaires économiques et financières de la Direction régionale de la police judiciaire) of the Paris police prefecture, and handles the most complex economic and financial cases.

In total, public prosecutors and investigating magistrates conducting investigations in cases of international corruption can call on the services of some 900 criminal police officers specialising in economic and financial crime. In practice, they will tend to rely mainly on the national police force and, more particularly, the regional departments, especially the specialised services of the Sub-directorate of Economic and Financial Affairs of the Criminal Police of the Paris Police Prefecture, where most of the more complex cases are handled. This body has the most effective and best trained officers, in particular the 70 or so operational officers of the Brigade financière. On the whole, teamwork between police departments and investigating magistrates seemed to the lead examiners to be effective, the magistrates in charge of cases of business-related offences being able to rely on experienced officers and sharing with them a relish for checking an accounting item or a businessman's diary, despite the generally acknowledged fact that the financial units of the criminal police are overloaded with work.⁶

The lead examiners were advised that the human resources available for conducting enquiries relating to transnational corruption should increase with the creation, by the end of 2003, of an inter-ministerial investigation group to be known as the Central Brigade for Combating Corruption (Brigade centrale de lutte contre la corruption), consisting of twenty or so officials (police, gendarmerie, customs officers, and officials from the tax, competition, and consumer affairs authorities and the fraud squad) operating within the National Division for Financial Investigations. Competent to carry out investigative procedures relating to all forms of bribery (of domestic and foreign public officials), charged with keeping documentation for operational purposes and maintaining

operational contact with specialised foreign services, it should provide an additional resources for magistrates responsible for cases concerning matters falling within the scope of the Convention.

Commentary:

The lead examiners welcome the initiative taken by the French authorities to provide prosecutors and investigating magistrates with additional, better-targeted resources for investigating and prosecuting instances of bribery of foreign public officials. They would encourage the future Central Brigade for Combating Corruption to work closely with the SCPC within the framework of the latter's mandate, particularly in centralising the information needed to detect and prevent acts of bribery, and co-operating with the judicial authorities when they so request.

Numbers of magistrates responsible for business-related crime and the resources available to them

Specific offences relating to the corruption of foreign public officials are primarily the responsibility of the economic and financial sections of the Prosecutor's Office and specialised judicial investigation departments and the 300 or so specialised magistrates belonging to them. According to the magistrates interviewed by the examining team, these sections are characterised by a high mobilisation of available resources. To them are referred all business-related and financial offences, i.e. the whole range of offences against company law, employment and environment law, and minor cheque card fraud. Every year, the Prosecutor's Office of the Paris economic and financial pole handles 17,000 new cases and draws up 1,100 initial charges (80% of initial charges are drawn up following the institution of civil party petitions within the criminal proceedings).⁷ The financial section (F2), which deals with cases connected with corporate criminal law, crimes relating to the stock-exchange, crimes relating to tax, and the fight against corruption and laundering, registers between 60 and 70 new cases per month.⁸ The vast majority of these cases are concerned with small-scale crime: according to an internal survey at the Paris pole, the "heavy cases" handled there accounted, at the end of 2002, for only 13% of business-related and financial crime.⁹

While the prosecutor's ten or so deputies working at the Paris pole are each responsible for an average of one hundred cases, it is not uncommon, as one of the investigating magistrates practising there explained to the examining team, for a single investigating magistrate to be managing up to sixty cases, with the attendant danger that some cases will never be looked into, despite the efforts made by the Prosecutor's Office to ensure that only the most significant ones are referred to them. As a result, when the Elf case was being investigated, the magistrates were forced to refrain from prosecuting several dozen individuals, so that the proceedings did not get bogged down.

Competence in conducting prosecutions is acquired mainly through on-the-job training, as proceedings pass through the magistrates' hands. According to the magistrates of the Paris pole interviewed by the examining team, the training given at the École nationale de la magistrature (National Magistrates Training College), though improving, is still in many respects too general. Placements are rarely spent with directly operational units (most are organised with supervisory or monitoring bodies such as the stock-exchange watchdog (COB) or the financial courts), are still too short, and prove difficult to arrange for lack of time. The training of prosecutors is said to be better, half of them having practised in the private sector before joining the criminal justice system. According to the magistrates interviewed by the examining team, the heavy workload,

combined with training which in many cases is still not adequate, results all too often, under the constant pressure, in oversights which are picked up by procedurally-aware defence lawyers and penalised by the courts. It also results in long delays before cases are committed for trial. Expertise acquired on the job is in any case undermined by the high turnover of both prosecution staff and investigating magistrates.

The economic and financial poles

The creation, in 1998, of economic and financial poles was an attempt to make up for this deficit in resources. Conceived by the then Minister of Justice, the economic and financial poles were supposed to provide public prosecutors and investigating magistrates with the assistance of specialised staff from the various economic and financial departments of the administration (Customs, Revenue and Competition authorities, stock-exchange watchdog, Banque de France, etc.). These specialists would help them in their work of analysis and contribute to the work of multi-disciplinary teams consisting of prosecutors, investigating magistrates, police experts and magistrates of the Audit Court. Another idea behind the creation of the poles was that any magistrate posted to one of these units would have received, prior to his/her posting, a specific, specialised training.

Now that this system has been operational for three years, the results, as shared with the examining team by the French authorities during the on-site visit, have appeared to be somewhat disappointing. The idea of a recruiting policy for financial magistrates taking into account their specialisation gained in the framework of either prior posting or prior training had not yet been implemented. Meanwhile, the idea of placing specialised assistants – high-ranking civil servants from other departments – alongside magistrates working in the financial poles has not yielded the anticipated results, mainly because the new concept of a specialised assistant does not sit easily with French judicial culture.¹⁰ At the time of the on-site visit, only seven specialists were working in the Paris pole, assisting some thirty financial magistrates. And, as noted earlier, these magistrates were spending much of their time on small-scale crime, to the detriment of more weighty cases.

The fact that magistrates' skills are often focused on "minor" offences, despite the efforts being made to improve the situation, is compounded by logistical weaknesses. Statistical information is a case in point. The lead examiners noted that the financial magistrates did not have access to statistics regarding the number of bribery cases which resulted in prosecutions or in the proceedings being shelved, before or after judicial investigation. Yet, such information is vital for evaluating – and developing, if necessary – criminal policy in this area. Similarly, there is still no single database fed with information by all the French courts which enables magistrates to do more than search for previous convictions. Magistrates lack a database that would enable them to establish connections in cases of international bribery involving many individuals acting under assumed identities, and structures falling within different criminal jurisdictions.

It was to solve these problems that, in the summer of 2003, the Chancellery decided to initiate a reform of the Paris economic and financial pole. The aim, as described by the Paris Public Prosecutor, was to "restrict the perimeter of competence by removing a certain number of types of case", in other words to refocus the pole's activities on major financial cases, in particular transnational crime. As part of this reform, some of the criminal cases currently handled by the so-called "smart crime" section [*délinquance astucieuse*] should, by the end of 2003, be handed over to prosecutors and investigating magistrates working in the "general" department. The number of investigating

magistrates operating in the pole itself is expected to decrease from twenty-nine to nineteen – but in future they will concentrate on the most important, targeted cases.

Commentary:

The lead examiners congratulate France on its decision to refocus the activities of the Paris economic and financial pole on “weighty” cases of business-related and financial crime. They hope that this reform will be accompanied by the allocation of sufficient human and financial resources for prosecuting cases of bribery of foreign public officials, and by an increase in the number of specialised assistants. It is also highly desirable that magistrates be given training in the mechanisms of transnational bribery and methods of securing evidence. Finally, they would encourage the Chancery to gather and keep statistics regarding the number of bribery proceedings and whether they lead to prosecution or to closure, before or after investigation, to enable financial magistrates to assess criminal policy in this area.

Means of investigation

French criminal law allows for the use of many different kinds of evidence. These may depend on the reasoning powers of the magistrate, working from clues and assumptions, or they may take a more direct form: documents, witness statements, the findings of the police and examining magistrate, expert opinions and confessions. To secure evidence, in the opinion of the lead examiners, the prosecuting authorities have significant means of investigation at their disposal, at the preliminary enquiry stage and, even more so, during the judicial investigation itself: searches, interception of telecommunications, access to any financial or tax information they deem useful from any financial establishment or any person holding funds belonging to the accused¹¹, provisional measures affecting the assets of persons under investigation, placement of a person charged with an offence under judicial supervision, use of expert opinions. In addition, France is party to a vast network of bilateral and multilateral agreements governing mutual assistance in matters of law enforcement. Of these, the 1959 *European Convention on Mutual Legal Assistance in Criminal Matters* and the 1990 *Convention Applying the Schengen Agreement (Schengen Application Convention)* are of great practical importance on account of the predominantly European flow of international co-operation in which France is involved.¹² Among the major obstacles facing prosecutors and investigating magistrates in effectively prosecuting the offence of bribing foreign public officials – apart from the difficulty of securing evidence in uncooperative foreign countries or in countries in which the bribery of foreign public officials is not an offence – all the people interviewed by the examining team pointed to the very short time allowed for criminal proceedings under the statute of limitation.

International mutual assistance

Most of the people interviewed by the examining team insisted on the vital role of international co-operation in securing evidence of financial crime and, in particular, the bribery of foreign public officials. The tracing of flows of money abroad is a necessary measure in many cases of this type, and investigating magistrates – in particular those of the Paris economic and financial pole – have no hesitation in seeking assistance from foreign authorities by issuing international letters rogatory (*commissions rogatoires internationales* / CRIs). Many such requests for assistance were issued at the time of the Elf case, as a result of which the Swiss authorities, acting on international letters rogatory originating in Paris, investigated over 300 bank accounts and froze assets worth tens of

millions of euro. Although the magistrates acknowledged that their CRIs are executed effectively by some countries, such as Switzerland during the Elf investigation, they deplored an almost systematic lack of co-operation on the part of some others, the effect of which was to make it extremely difficult, if not impossible, to pursue investigations in certain directions.

French requests for mutual assistance may be made by a member of the Public Prosecutor's Office or, if they relate to a judicial investigation, by an investigating magistrate. The same authorities are responsible for executing in-coming requests, according to their respective areas of competence. At the Paris economic and financial pole – where a large proportion of the requests made to France for assistance in investigating business-related and financial crime is concentrated – requests needing to be dealt with by an investigating magistrate are executed by the most senior investigating magistrate, unless he decides to delegate the matter to another investigating magistrate working at the pole who has been involved in a related case.

Some of the delays in providing mutual assistance are caused by the formalism which still bedevils the process of transmitting requests and returning documents. For instance, even in the framework of the *Schengen Application Convention*, which provides for direct contacts between judicial authorities, France still requires that investigating magistrates have their applications for mutual assistance transmitted, via the public prosecutor, by the *procureur général* of the appeal court whose jurisdiction they come under, and that the latter return the enforcing documents.¹³ Requests for assistance made to the French judicial authorities follow the reverse route. Article 15.2 of the 1959 European Convention on Mutual Legal Assistance in Criminal Matters nevertheless provides, in emergency situations, for the possibility of direct transmission from investigating magistrate to investigating magistrate, although documents have to be returned via the Public Prosecutor's Office in the routine way. In the case of conventions providing for transmission between the respective ministries of justice, the very large number of cases handled by the Bureau de l'entraide répressive internationale et des conventions pénales (International Bureau for Mutual Assistance in Law Enforcement and Criminal Conventions) of this ministry, which subjects them to a preliminary examination, and the Bureau's relatively modest level of staffing, is no doubt a factor in prolonging the processing of the cases concerned. Investigating magistrates have nevertheless observed over the last few years that the direct relations they have been able to cultivate with some of their European counterparts have made it possible, regardless of the implementing legislation, to reduce the times taken to execute requests and improve efficiency of mutual assistance in criminal matters. Consequently, requests transmitted via official channels are more and more frequently preceded by informal approaches enabling the judicial authorities concerned to provide assistance more rapidly on receipt of the official documentation.

France may refuse to execute a request for assistance from a foreign country if the application jeopardises France's essential interests. According to a circular on international mutual assistance issued by the Minister of Justice on 29 December 1999, such interests may be of an economic or social nature. However, such grounds for refusing assistance very rarely arise and have apparently never been used as a basis for not executing a CRI relating to a business-related or financial offence. The statistical apparatus recently introduced to monitor extradition procedures shows that the four requests for extradition received by France since 1 July 2001, arising from instances of bribery of foreign public officials, were all being processed at the time of the lead examiners' on-site visit.

Moreover, the Code of Criminal Procedure was amended in 1999 to make mutual assistance more effective by allowing compliance with some of the formal conditions laid down by the requesting state. For instance, it is now possible for some procedures to be performed by a court, if this is necessary to ensure that the evidence secured can be lawfully used in the criminal procedures of the requesting state.

Commentary:

The lead examiners recommend that mutual legal assistance granted by France in the context of the fight against bribery of foreign public officials should be followed up, as the practice develops, to ensure that this assistance is not influenced by considerations of an economic nature. They furthermore invite the French authorities to envisage measures that would reduce the time taken to process international applications for mutual assistance issued or received by France, for example by making more human and financial resources available.

Statute of limitation as it applies to the offence of bribing foreign public officials

Although there are no statistics for the number of prosecutions for corruption which have not been instigated or have had to be abandoned because of a time bar, most of the French respondents interviewed by the examining team stated that the statute of limitation on criminal proceedings for the offence of corruption was a serious obstacle to prosecutions in France. The statute of limitation is in line with that applied in common criminal law, i.e. three years, and begins running on the day the offence was committed, in application of Articles 7 and 8 of the Code of Criminal Procedure. The interviewees therefore echoed the fears expressed by the OECD Working Group when France was examined in phase 1. The fact that the courts have consistently ruled in specific cases that the offence of corruption is renewed each time the pact between the briber and the person receiving the bribe is repeated makes little difference to the difficulty inherent in instigating public proceedings before the statute of limitation has run its course.

Secret commissions, the use of false invoices, multiple intermediaries, and so on, make it very difficult to unmask this type of carefully concealed crime. Moreover, such practices often come to light only when investigations are conducted in respect of other offences. The 1997 report of the SCPC (Central Corruption Prevention Department) stresses this point: “Corruption, generally well camouflaged under an appearance of legality, is very difficult to detect. When, exceptionally, a situation involving corruption is unmasked, it is very difficult as the law stands at present to secure proof of it, even when, as often happens, the statute of limitation – three years from the date of commission of the offence – has not already done its work”. For this reason, the Department, at the time of the parliamentary discussion of the draft law establishing the new offence, had recommended that the statute of limitation for the offence should be extended to six years.

It is because of this difficulty *inter alia* that magistrates sometimes decide to qualify instances of active and passive bribery as misuse of corporate assets and receiving in relation to misuse of corporate assets. This choice enables them to avoid the stumbling block of the time bar, as, with this type of offence, the period of limitation does not start to run until the offence is actually discovered. To alleviate the problems of detection and give adequate time for investigations and prosecutions, the courts have indeed ruled that the statute of limitation should not begin running until the unlawful actions are discovered. Such a ruling was given for instance in the Noir-Botton-Crasnianski case (Cass. Crim., 6 February 1997), which generated much publicity because it involved

some well-known personalities, in particular the Mayor of Lyon, who was also the then Minister for Foreign Trade. As it happened, the magistrates had uncovered all the evidence to indicate an offence of bribing French public officials (the senior manager of a company had removed a sum of money from company funds and paid it to the son-in-law of the Mayor/Minister in return for an intervention on the latter's part to reduce the company's debt to the state in the context of a programme to set up a business abroad with a public subsidy). Since this offence could no longer be prosecuted because of the time bar, it was decided to bring a prosecution for misuse of corporate assets.

Several solutions have already been suggested, including a prolongation of the statute of limitation for all covert offences (including bribery) to 5, 6 or 10 years, or making the statute of limitation run from the date on which the offence was discovered, as in cases of misuse of corporate assets, or from the date on which the advantage gained came to an end (the end of the public contract, for example). The various representatives of the French justice system interviewed by the examining team indicated, without taking sides for one solution or the other, that these issues were part of a wider debate in France on the need for an overall review of limitations periods for financial offences, since developments in case law did not make clear when the statute of limitation for these offences should begin to run. For instance, the Cour de Cassation recently made a more restrictive decision, ruling in a case of misuse of corporate assets that the statute of limitation should run from the date of publication and approval of the accounts of the company concerned, if no attempt had been made to cover up the offence.

Commentary:

The duration of statutes of limitation and the procedures applying them were identified in phase 1 as a problem shared by many of the Parties to the Convention. The examiners are of the opinion that, given the growing complexity of the techniques deployed to pay and conceal bribes, the statute of limitation rules, as they exist at present, do not allow a reasonable period of time for investigation and prosecution, and may therefore prejudice the effective implementation of the law. For this reason, the lead examiners recommend that measures be taken 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.

Establishing the offence of bribery

In French legal proceedings, it is the task of the Public Prosecutor's Office to provide proof of all the elements constituting the offence of active bribery of foreign public officials – the moral element and the material element – and it is on the basis of the evidence adduced that the trial judge, acting on his own supreme authority, will subsequently form an opinion as to the guilt of the accused. All the constituent elements must be found to exist by the trial judge and, as the Cour de Cassation has pointed out, this finding is obligatory.

How the intentional element in the offence of bribery is dealt with

An awareness of breaking the criminal law – the criminal intent required by the legislator in Article 121-3 of the Criminal Code, and generally referred to by the terms “knowingly”, “voluntarily”, “fraudulently”, “in knowledge of the fact” or “maliciously” – must necessarily be established for the offence of active bribery to exist in law and to found a conviction. In practice, it is rare for a court ruling to formally characterise the

criminal intent. The Cour de Cassation does not require that it be the subject of an express finding, provided that it can be implicitly deduced from the combination of other constituent elements. According to the magistrates met during the on-site visit, the proof of intention does not raise any practical problem where bribery is concerned, even though its absence is sometimes pleaded as a defence.

There are many company managers who think they can exonerate themselves by pleading an absence of criminal intent, for instance the corporate executive officer who maintains that his actions were dictated by an external constraint. However, trial judges have consistently ruled that harassment and threats by the passive party to reveal the act of bribery (Cass. Crim., 30 May 2001) or a demand made by a public official to a company for a bribe to secure a contract (Cass. Crim., 7 June 2000) do not exonerate company managers from their responsibility. Nor did the oft-repeated claim “everybody does it or was doing it”, pleaded by some of the defendants in the Elf case, exonerate them from criminal intent. The Cour de Cassation gave a reminder of this in a case of misuse of corporate assets, pointing out that the fact that something is current practice “cannot in any case be used as a justification” (Cass. Crim., 3 February 1992). Similarly, in a case of active bribery of Malagasy public officials to secure an agri-foodstuffs contract, prosecuted as a misuse of corporate assets, the trial judges rejected the argument put forward by the industrialist to the effect that his actions were dictated by a state of necessity, i.e. the survival of his company (Tribunal de Grande Instance, St. Denis de la Réunion, 10 December 2002).

Other businessmen try to exonerate themselves by claiming that they were unaware of the transaction concerned. For instance, in a case concerning the award of a public works contract to develop the port of Bonifacio in Corsica – secured on payment by an intermediary of a bribe of € 10,000 to one of the members of the municipal committee handling the matter –, the Cour de Cassation ruled that the senior managers of the company being prosecuted, “by paying an unofficial commission in cash taken from a secret fund, could not be ignorant of the fact that the intermediary was at least trading in influence” (Cass. Crim., 8 January 1998).

How the material element of the offence of bribery is dealt with

As well as the moral element of the offence, it is necessary that the material elements be proven if a conviction is to be secured. When domestic cases of bribery have been brought before them, the French courts have had plenty of opportunity to assess many of the elements constituting the active bribery of foreign public officials: the notion of “gifts”, “presents” and “advantages of any kind” (as noted at the time of the phase 1 examination); payments made to “third party beneficiaries” or through “intermediaries”; the notion of French “public official” and the criterion of “official duty”. Thus, judgements in specific cases have confirmed the declarations made by the French authorities during phase 1 concerning the direct or indirect character of bribery (Cass. Crim., 13 February 2002) and the coverage of bribes paid not directly to the public official but to the legal person he directs, the bribes eventually finding their way to the public official (Cass. Crim., 7 February 2001). The courts have also on several occasions interpreted the notions of actions pertaining to a function or facilitated by the function, for example in relation to the delegation of public service (Cass. Crim., 27 October 1997) or refraining from reporting an offence (Children’s Court, Sarreguemines, 11 May 1967). Finally, where facilitation payments are concerned, the offence of bribery has been prosecuted for the mere fact of speeding up the procedure for obtaining a residence card (Cass. Crim., 12 January 2000).

However, there are other elements of the offence which have not yet been tested, or only partially tested, by the French courts, and this gives rise to uncertainty as to their interpretation. These elements include¹⁴ the precise definition 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, including that of 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; whether or not the term “foreign state” covers local subdivisions of foreign public administrations or foreign organised zones or entities, such as an autonomous territory or a distinct customs territory (Commentary 18 to the Convention); the application of the law to persons not officially exercising a public office, such as political party managers in one-party state, given that they effectively exercise decision-making or constraining powers by delegation of public authority (Commentary 16); and the application of the law to the bribing of an official to persuade him to use his office to ensure that another official awards a contract, without it being necessary to bring a charge for trading in influence vis-à-vis a foreign public official (Commentary 19). Other areas of uncertainty remain unresolved, in particular as regards the need to prove the existence of a corruption pact, the mode of transmission of the advantage, and the act in respect of which a charge may be brought.

The concept of “without right”

The concept of “without right” qualifying the offer, promise or giving of a bribe, incorporated into the new Criminal Code, has to date received only a marginal interpretation in specific cases where defendants have been committed for trial for bribing domestic public officials.¹⁵ According to the Minister of Justice¹⁶, this expression means that the advantage is neither grounded in nor justified by a current legal text or court ruling. The absence of any interpretation allowing the scope of this concept to be fully understood might be explained by the fact that, in French law, a public official may not receive any advantage whatsoever. This expression might nevertheless find application in cases of bribery of foreign public officials, where the legislation or case law of the state of which the bribed official is a national permits him/her to receive certain advantages. According to the Public Prosecutor’s Office, there will be a presumption of absence of right to an advantage. On the other hand, a trial judge was of the opinion that the prosecution would have to prove by all possible means that the foreign public official was not entitled to receive advantages. This magistrate also noted that, since the definition of a foreign public official was broader than that of a civil servant, it was possible that some foreign individuals performing public service tasks were entitled to receive such advantages. Therefore the defence might well present evidence to contradict the prosecution evidence to the effect that the official was not entitled to receive advantages.

The role played by the intermediary in transmitting the offer of a bribe

With regard to the ways in which an advantage is transmitted, while the prosecution of offenders who channel the offer of a bribe or the bribe itself through an intermediary does not appear to be problematic in France when the public official has accepted the bribe or, on the contrary, has disclosed it to the prosecuting authorities, this does not seem to be the case when the intermediary does not succeed in his plans. At the time of phase 1, the French authorities indicated that it was unimportant whether the person to whom the offer was addressed was actually unaware of it for reasons independent of the intent of the perpetrator, such as an error in postal distribution or because the intermediary did

not act as planned: the intention followed by the first stage of putting it into effect would be sufficient. However, it seems that the trial judges have adopted a different interpretation so far. For instance, in a case tried by the Cour de Cassation, a person who had agreed to give some 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 in fact managed to convince the public official to commit the act sought by the offer of a bribe; in this specific instance, the Appeals Court considered that the existence of a corruption pact had not been proved (Cass. Crim., 30 June 1999, Housse Avia). The offence was then redefined as fraud on the part of the lawyer. According to the French authorities, this acquittal for active bribery was based on an error of law in holding that it was necessary to prove the existence of a corruption pact.

In the opinion of the lead examiners, this acquittal for active bribery and the redefinition of the acts committed by the intermediary as fraud is worrying in that the accused knew that his lawyer was proposing an act of bribery and agreed to it (whereas other persons to whom such a proposal had been made had refused).

The distinction between bribery and trading in influence

A distinction needs to be made between actions of the function or actions facilitated by the function, which give rise to the offence of bribery, and the misuse of influence, which gives rise to the offence of trading in influence. In the latter case, a triangular relationship is established between the “briber”; the trader in influence, who actually receives the bribe; and the public official who grants an advantage to the “briber”. Trading in influence is included in the same provision of the Criminal Code as active bribery, where domestic public officials are concerned, since the two offences are very closely related; however it is not punishable where foreign public officials are concerned.¹⁷

The lead examiners tried to obtain clarifications regarding the distinction made between bribery and trading in influence, particularly when the two offences are committed concurrently to “buy” the vote of a member of a decision-making body. A study of specific cases reveals that the boundary between bribery and trading in influence is somewhat blurred: sometimes charges of both bribery (buying the vote of a public official) and trading in influence (influence exercised by the public official on other members of the committee) are brought (Cass. Crim., 30 May 2001); at other times, only a charge of trading in influence (Cass. Crim., 8 January 1998) or of bribery (Cass. Crim., 16 May 2001) is brought.

At the time of Phase 1, the French authorities indicated that the offence of bribery covered both actions which it is the duty of the public official to perform “either alone or together with others” as well as “those in which he participates, while not being able to perform them himself”. In the opinion of the lead examiners, the shifting in case law between trading in influence and bribery raises concern in that trading in influence vis-à-vis a foreign public official is not an offence under the Criminal Code. In particular, there is uncertainty as to the attitude of trial judges towards defendants who allegedly bribed a member of a decision-making body, when in many countries public contracts are awarded on the decision of a committee. Members of the Public Prosecutor’s Office questioned on this issue nevertheless stressed that, in a case involving the bribery of a foreign public official, the prosecution would certainly make every effort to prove that bribery had been committed, since trading in influence is not punishable for the time being. In this respect, a draft law authorising ratification of the Council of Europe’s Criminal Convention on Corruption was presented to Parliament on 19 June 2003 and was expected to be adopted

by the end of 2003. The lead examiners consider that the implementation into French law of that convention, and particularly the criminalisation of trading in influence towards a foreign public official would resolve a number of difficulties.

The corruption pact

As indicated during phase 1, in law, the offence of active bribery is perpetrated simply by the making of offers or promises for the purpose defined by the law, whether such offers or promises have been accepted or not. For the offence to exist it is sufficient that there be proof, on the one hand, of the offers or promises; on the other, of their purpose, viz. the performance of or refraining from an action connected with an official's duties. In law, the attitude of the public official in respect of the offers or promises does not need to be elucidated. Nevertheless, where the bribery of a French public official is concerned, the courts use the notion of a corruption pact, i.e. a meeting of minds between the briber and the recipient of the bribe. The authorities specified that this pact is not a "contract" setting out the details of how the decision is "bought", and that it is sufficient that 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 taking or refraining from the decision.¹⁸ The judge must therefore establish whether there was agreement or disagreement between the two parties (two culpable intentions, or one intention and one refusal) and determine what advantages both parties received or were intended to receive by putting the pact into effect.¹⁹ The case-law notion of a pact, by requiring the proof of intent on the part of the public official, therefore demands proof of an element not provided for in the legal text setting the offence of active bribery. Indeed, proof of the existence of a pact can be a delicate matter, especially when it has to be sought in a non-co-operative foreign country. All the people interviewed during the on-site visit emphasised this difficulty – a difficulty which often causes magistrates to bring charges for misuse of corporate assets rather than bribery, so as to avoid the obstacle of having to prove the existence of a pact.

Nevertheless, according to the financial magistrates interviewed by the examining team, the difficulty connected with proving the existence of a pact is not necessarily insurmountable. Magistrates and police officers indicated that the existence of a pact could be established by all kinds of evidence (witness statements, searches, expert opinions, etc) and on the basis of a range of clues. The credibility of the justifications put forward by the person offering the bribe could thus be taken into account. Similarly, proof of a financial movement between the briber and the public official, on the one hand, and an action performed by the public official in favour of the alleged briber, on the other, could be regarded as indicating a meeting of minds. However, a movement of funds into the foreign country with no proof of payment to the foreign public official would not constitute sufficient proof, since the funds could just as well have been intended for an honest intermediary. Also, to facilitate administration of the evidence, the legislator had inserted the phrase "at any time" in the legal definition of the offence of bribery. As a result, the law does not make prosecution of the offence conditional on proof that the meeting of minds sealing the corruption pact occurred prior to the act or omission of the public official being committed. Most of the respondents nevertheless agreed that any assessment of the effectiveness of the "at any time" formula was premature, in the absence of case law.

Commentary:

The lead examiners are of the opinion that French law contains strong provisions against bribery and are confident that the transposition into domestic law of the Council of Europe’s Criminal Convention on Corruption will strengthen these provisions, in particular by making trading in influence vis-à-vis a foreign public official a criminal offence. Given that no cases of bribery of foreign public officials have been tried to date, it is difficult to foresee exactly how some elements of the offence will be interpreted in practice. Doubts remain, in particular, as to the need and possibility of demonstrating the existence of a corruption pact in the context of complex transnational dealings, and the effectiveness of the formula “at any time” in the legal definition of the offence of bribery. The lead examiners invite the Working Group to follow up and re-evaluate these questions when specific cases have been tried.

French criminal law jurisdiction

The scope of application of French criminal law is extensive, deriving from a broad interpretation of territorial jurisdiction and from the existence of a notion of personal jurisdiction based on the nationality of the perpetrator or victim of a crime, which makes it possible in certain circumstances to prosecute offences committed outside French territory.

Territorial jurisdiction – Offences committed or deemed to have been committed on the territory of the French Republic

Article 113-2 of the Criminal Code stipulates that French criminal law is applicable not only to an offence committed on the territory of the Republic but also to an offence deemed to have been committed there because one of its “constituting elements” took place there. In specific cases, the notion of “constituting elements” has been interpreted more broadly than the elements constituting the offence itself. For instance, territorial jurisdiction can be claimed on the grounds that acts preparatory to the offence took place in France, or that its effects were felt in France. Thus, in a case of misuse of corporate assets the Criminal Chamber of the Cour de Cassation ruled that French law was applicable to an instance of misuse of corporate assets arising from a misappropriation of funds committed “in part” in Paris (Cass. Crim., 4 February 1995). It has also been ruled, in a fraud case, that “an attempted fraud is deemed to have been committed in France if preparatory actions constituting one of the necessary components of the fraudulent manoeuvres concerned were perpetrated on national territory” (Cass. Crim., 11 April 1998). The Criminal Chamber also ruled that French law was applicable in a case of misuse of corporate assets committed to the detriment of a Belgian company, as a result of its senior manager granting abnormal price and deadline terms to a French company (Cass. Crim., 23 November 1995).

The courts have also recognised French territorial jurisdiction in respect of offences committed abroad on the grounds of their being closely connected with or inseparable from offences committed in France. This was recognised in the case of a bribery offence committed abroad in conjunction with an association of criminals formed in France (Cass. Crim., 23 April 1981) or the case of breach of trust committed abroad but judged inseparable from an offence of vote-buying committed in France (Cass. Crim., 15 January 1990). Finally, according to Article 113-5 of the Criminal Code, the law is applicable to an act of complicity committed from France, even if the offence itself was committed abroad, provided that the principal offence is punishable under French law and

the law of the other country, and has resulted in a conviction by the foreign court. The courts, basing their decision on the provision of Article 121-6 of the Criminal Code assimilating an accomplice to the perpetrator of an offence, also recognise the territorial jurisdiction of French criminal law in respect of acts of complicity committed abroad in relation to a principal offence committed in France.

Where subsidiary companies are concerned, this broad concept of the territorial jurisdiction of French criminal law establishes a legal framework which, though it cannot punish all instances of financial crime, makes it possible to “net” a fair number.²⁰ The notion of indivisibility of certain offences committed abroad from other offences committed in France, and that of “shell company” or “bogus company”, have been used to bring some criminally punishable activities perpetrated by foreign-based subsidiaries within the scope of French criminal law.²¹

Personal jurisdiction – Offences committed outside the territory of the French Republic

French criminal law is applicable to offences committed by French nationals outside of French territory if the offences in question are punishable under the legislation of the country where they are committed (the “active personal jurisdiction” referred to in Article 113-6 of the Criminal Code). In the absence of case law relating to the determination of the nationality of a legal person with a view to criminal prosecution, it is not possible to give a final answer as to what criteria are taken into account. Nationality should *a priori* be determined by reference to the rules laid down in the framework of civil law. In this respect, Article 1837 of the Civil Code provides that “companies whose head office is located on French territory are subject to French law”. For its part, the Cour de Cassation has ruled, in a tax case, that “for a company, nationality is determined, in theory, by the location of its real head office, defined as the seat of effective management and presumed to be its statutory head office” (Cass., Ass. plénière, 21 December 1990). However, some legal doctrine does not exclude the possibility of the criminal judge departing from these criteria in order to thwart fraud, and so extending the criteria established in civil law.

Under the terms of Article 113-7 of the Criminal Code, French law is also applicable when the victim is French, in accordance with the principle of “passive personal jurisdiction”. Given that French law treats the offence of bribery as an attack on the authority of the state, the status of “victim” would seem to be reserved to the foreign state, making the passive personal jurisdiction of French criminal law inapplicable under the circumstances. The courts have tended, however, to widen the category of victims of bribery to include persons other than the state when they can provide evidence of having suffered damage. Such was the case of a consumers’ association which had to bear an increase in prices resulting from the award of a public-service water distribution contract in a tendering process distorted by corruption (Cass. Crim., 27 Oct. 1997). In a case of misuse of corporate assets, it was ruled that a parent company, having suffered embezzlement which took place in its 100% owned subsidiary, could bring a civil party petition in the criminal proceedings for misuse of corporate assets (Cass. Crim., 13 Dec. 2000).

The exercise of active or passive jurisdiction is nevertheless subject to procedural requirements which can make its use particularly difficult when prosecuting the offence of bribery of foreign public officials. Indeed, Article 113-6, sub-section 2, of the Criminal Code not only stipulates that prosecutions based on personal jurisdiction (active or passive) are the sole preserve of the Public Prosecutor’s Office²², but also requires that this exercise be preceded by the lodging of a complaint by the victim or an official

denunciation on the part of the country where the offence was committed (Art. 113-8 of the Criminal Code).

Commentary:

The lead examiners consider that French law and judicial practice confer a wide degree of territorial jurisdiction on the French courts where bribery is concerned. However, doubts remain as to the effectiveness of personal jurisdiction in respect of this offence as prosecution is conditional on the prior lodging of a complaint by the victim or an official denunciation, and, in view of the nature of the offence concerned, foreign authorities may be reluctant to report the activities of their own public officials. The lead examiners invite the French authorities and the Working Group to follow up and re-evaluate this question when a body of case law has been established.

Notes

- 1 Since French law gives the Public Prosecutor the exclusive right to initiate proceedings for any offence committed abroad, this course of action is not open to the victim of an offence committed in a foreign country.
- 2 Article 706-1 of the Code of Criminal Procedure stipulates that “for the prosecution, judicial investigation and trial of acts which are offences under Articles 435-3 and 435-4 of the Criminal Code, the Paris Public Prosecutor, investigating judge and criminal court shall exercise concurrent jurisdiction to that laid down [in common law]. When they are competent to prosecute and investigate offences set forth in Articles 435-3 and 435-4 of the Criminal Code, the Paris public prosecutor and investigating judge shall exercise their powers throughout French national territory.” The legislator justified this provision on the ground that, by centralising international corruption cases in Paris, prosecutions will be handled consistently.
- 3 In application of the discretionary principle in respect of prosecutions, prosecutors alone are entitled to ask investigating magistrates to look into certain matters: investigating magistrates can only investigate a matter if the prosecuting magistrates refer the file to them. In addition, the investigating magistrate may only look into matters mentioned in the public prosecutor’s introductory brief: if he wishes to broaden the enquiry to cover other matters, an authorisation is required from the prosecutor, and this takes the form of an additional indictment.
- 4 According to the draft law, as adopted on first reading by the Senate in 2003, if the Prosecutor General upholds this appeal, he will order the public prosecutor to institute proceedings ; if on the other hand he considers the appeal unfounded, he will inform the claimant, giving grounds for his decision. There is no appeal from this decision.
- 5 According to the French authorities’ reading of this provision, it would exclude any considerations « of a general nature » or « political or economic » concerns.
- 6 In 2001, the financial units of the criminal police handled 43% of all the cases dealt with by the criminal police force, whereas they themselves accounted for only 28% of the active staff responsible for conducting judicial enquiries. On average, these units handle more than 5,000 cases each year (Statistical data given by Daniel Vaillant, then Minister of the Interior, to the Parliamentary Mission on Money Laundering, 30 January 2002). According to Paris Criminal Police figures published by the daily newspaper *Le Monde* (19 December 2001), the Paris Sub-Directorate for Economic and Financial Affairs had a strength of approximately 280 officers.
- 7 *Quels métiers pour quelle justice?* Senate: Information Report 345 (2001-2002) – law committee.
- 8 Ibid.
- 9 Figures quoted in *Le Monde*, 17 December 2002.
- 10 See the *Report to Mme the Minister of Justice* made by the Group responsible for monitoring the economic and financial poles (Paris, 2001).
- 11 If, during their investigations, the prosecuting authorities find evidence giving rise to a presumption of fraud or any kind of manoeuvre to evade tax, they are obliged to report the fact to the revenue department, so that it can pursue its own enquiries.
- 12 90% of requests for mutual assistance come from parties to the 1959 Convention. It is worth noting that, although mutual assistance is primarily granted in application of a convention binding France and the

- applicant country, French assistance in criminal matters is not formally conditional on the existence of a convention.
- 13 Where applications for mutual assistance within the European Union are concerned, the draft legislation reforming the criminal justice system to take into account changes in criminal behaviour, which transposes the Convention of Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000, establishes the principle of direct transmission of applications for mutual assistance between legal authorities in the European area, even in non-urgent cases.
- 14 With regard to the element “in order to obtain or retain a contract or an improper advantage in international trade”, which has to date received no positive interpretation, it is worth noting that the Paris prosecutor’s office decided not to prosecute in a case of alleged bribery of a member of the International Olympic Committee, considering that the matter was not connected with international trade.
- 15 In this case, the accused referred to the law on the financing of political parties and to the “right” for a locally elected official to seek financing for his party, whereas the facts concerned an act performed, in his function, by a corrupt elected official relating to public procurements for which the accused had given bribes, without right (Cass. Crim. 30 June 1999, St-Denis).
- 16 “National Assembly. Full record. Session of 14 December 1999” *Journal Officiel de la République française*, Dec. 1999, p. 10920.
- 17 Trading in influence occurs when the purpose of the bribe is to persuade a French public official to “misuse his real or supposed influence to obtain distinctions, employment, contracts or any other favourable decision from a public authority or department”. Trading in influence by a private individual occurs when any person commits the same unlawful actions, the penalties being, in this case, reduced by half (Articles 433-1 and 433-2 of the Criminal Code).
- 18 A pact is also required in a case of trading in influence: between the person who pays the bribe and the person who misuses his influence.
- 19 It should be noted that, in the case Cass. Crim. 30 June 1999 Housse Avia previously mentioned, the public official did not make known his agreement or his refusal. The Court thus concluded that there was no proof of the existence of a pact which would have determined the transfer of funds from the enterprise to the intermediary.
- 20 For instance, in the case of a preliminary enquiry being held at the time of the on-site visit involving a joint venture set up abroad with French participation, the prosecutor’s office was looking for elements which could establish French territorial jurisdiction over the matters in question.
- 21 Since a “shell company” acts as the agent of a French-based company which gives it its orders, the practice adopted by the prosecutor’s office is to attribute the activities of the foreign subsidiary directly to the senior managers of the parent company, by exploiting the territorial jurisdiction of French law.
- 22 Moreover, in the particular case of the offence of bribery of foreign public officials, the Public Prosecutor’s Office has a monopoly on prosecutions, whether the offence comes under personal or territorial jurisdiction (Art. 435-3 and 435-4 of the Criminal Code).

Sanctioning the Offence of Active Bribery of Foreign Public Officials and Connected Offences

Persons judged guilty by the courts

Where active bribery is concerned, the legislation concerned targets the offence without mentioning the status of the perpetrator. Consequently, any natural person to whom the Criminal Code applies is liable to be prosecuted for bribery, as is also any legal person pursuant to Article 435-6 of the Criminal Code. On the other hand, where connected offences are concerned, offences associated with business accounting and taxation, French legislation ascribes responsibility for the commission of the offence to the senior manager of the company concerned.

Persons judged to be perpetrators of the offence of actively bribing foreign public officials

Since 1994, the Criminal Code has allowed the judge, in cases prescribed by the legislation, to assign criminal responsibility to legal persons. This is true for active bribery of foreign public officials, an offence for which companies can be declared liable when it is committed on their behalf by their organs or representatives. The prosecution of one or more natural persons does not preclude the concomitant prosecution of the legal person (Article 121-2 of the Criminal Code). In practice, no prosecution has yet been brought against a legal person on a charge of bribery. According to criminal record office statistics, of a total of just over one thousand convictions for “bribery” (of all kinds) between 1994 and 2001, not one has been in respect of a legal person, despite the fact that some of the cases brought before the courts were concerned with acts of bribery committed, in whole or in part, after the new Criminal Code came into force¹.

The people interviewed by the examining team put forward several reasons to explain the absence of prosecutions against legal persons on charges of bribery. The first, advanced by all the respondents, was the revolution in French legal culture brought about by the introduction of the concept of the criminal responsibility of legal persons, which up to that time were not considered as having intentions of their own. An analysis of definitive convictions of legal persons made by the Chancellery in 1999 confirmed that it was rare for legal persons to be convicted on charges of business-related and financial offences². This analysis showed that convictions were most commonly handed down for offences relating to environmental law, clandestine employment and injuries resulting from negligence. The study also revealed disparities depending on where the offence was committed – a further indicator that criminal policy in this area is not yet completely harmonised throughout French territory. Even so, the French authorities expect positive growth in the practice of magistrates invoking the criminal liability of legal persons, if the provisions in the draft law reforming the criminal justice system to take account of changes in criminal behaviour by extending the scope of application of corporate criminal liability to cover all offences, are adopted by Parliament: the introduction of these provisions into French law would be bound to contribute to a greater awareness on the part of magistrates of the importance of criminal liability of legal persons in penalising offending behaviour committed by businesses.

Another explanation put forward by those interviewed by the examining team was more specifically to do with the problem of the evidence required to prove that bribery has been committed. According to the Chancellery and the Public Prosecutor’s Office, the

offence is already difficult to establish when committed by a natural person. It would be even more difficult in the case of a legal person, since it would first be necessary to establish the responsibility of a natural person, and then prove that the person concerned acted as an organ or representative of the legal person and on its behalf. Representatives of the Public Prosecutor's Office also stated that, in the absence of precise and detailed evidence, they would not prosecute the legal person, since this could have major repercussions for the situation, or even the survival, of the company concerned, particularly with regard to the financial markets. On the other hand, a magistrate expressed doubts regarding the dissuasive aspect of the monetary sanctions that could be imposed. In the absence of specific cases, it is not possible to identify principles that could be used to foresee whether the criminal responsibility of the legal person would be given priority over that of the natural person, or whether it would be treated together with that of the managers or employees of the company who had perpetrated the offence.

To date, only individuals have been held responsible of the offence of bribing public officials. The persons most frequently convicted in connection with the securing of contracts have been senior staff of commercial companies, such as chairmen, directors, managers or executives of real estate companies or private companies (Cass. Crim., 30 May 2001), enterprises set up as EURLs (limited one-person companies) or SAs (public limited companies) (Cass. Crim., 12 May 1998) or construction companies (Cass. Crim., 29 September 1993). Convictions have also been passed on members of specific firms such as research consultancies (Cass. Crim., 7 February 2001) and chartered accountants' and lawyers' practices (Cass. Crim., 13 February 2002). Also found guilty was the delegate of the economic development agency of a *département*, a body subject to control applicable to public budgets (Cass. Crim., 16 November 1999); and various employees (Cass. Crim., 12 May 1998: drivers of a transport company who had given backhanders). Some senior staff have tried to exculpate themselves by disclaiming responsibility for actions committed by lesser employees, but without success³.

Commentary:

The lead examiners take the view that, although it is normal for new legal provisions to be implemented gradually, progress seems to have been slow where implementation of the criminal responsibility of legal persons is concerned. A circular recalling the legislation and its scope is needed to encourage the police and members of the Public Prosecutor's Office to systematically examine whether the responsibility of legal persons is involved. The circular would also be an opportunity to make investigating magistrates and trial judges more aware of the advantages of recognising the criminal responsibility of legal persons as a way of penalising corrupt behaviour on the part of companies.

The responsibility of companies with regard to the anti-bribery legislation and to French law generally

Until specific cases of bribery or related offences have been tried by the courts, it is difficult to say how they will in practice interpret the criminal responsibility of legal persons in relation to bribery. Some of the interpretations given by the French authorities in phase 1 have nevertheless been confirmed by case law in relation to offences other than bribery. For instance, with regard to the delegation of authority, the courts have agreed that the delegation, or even sub-delegation, of powers to an employee or subordinate is sufficient for the holder of such powers to be treated as a representative of the legal person as far as Criminal law is concerned (Cass. Crim., 4 December 2001; Cass. Crim.,

26 June 2001). A court of first instance has also convicted a legal person for acts committed by a de facto senior manager (T. corr. Strasbourg, 9 February 1996, case in which the offence was not perpetrated by the interim director of the SA, but by the former general manager, who continued to manage the company de facto).

As to entities subject to criminal responsibility, a fairly wide range of them have already been convicted: not only commercial companies, but also not-for profit private legal persons, such as trade associations, and public-law legal persons, such as local authorities, semi-public companies, public service franchisees and public institutions. On the other hand, the Cour de Cassation has already indicated that, when offences are committed by a company which is subsequently absorbed by another, criminal responsibility cannot be transferred to the company performing the takeover (Cass. Crim., 20 June 2000). The Court ruled that, since no one can be responsible for acts other than their own, the company performing the takeover could not be held responsible for offences committed on behalf of the company it had absorbed. This interpretation is nonetheless worrying, as it implies that a company being investigated for an offence need only get itself taken over by another in order to avoid any form of criminal penalty.⁴ Although there is no case law on the point, the French authorities take the view that it would be possible to prosecute the acquiring legal entity for receiving the product of the principal offence committed by the company it had taken over – in this case, active bribery – if it was proved that the acquiring company had profited from the bribery offence.

Other issues still remaining unresolved, as for example issues pertaining to the interpretation of the interest (“on behalf”) of the legal person in the commission of bribery; to the conditions under which a legal person can be prosecuted for offences committed by an employee or subordinate, or the under which a parent company can be prosecuted for offences committed by a subsidiary; the non-identification of an individual who actually perpetrated the acts⁵; and to the impact of the existence of an internal policy of refusing to offer bribes on the responsibility of the legal person and/or the penalty that can be imposed on it.

It is therefore not certain that a legal person could be held liable when the offence has been committed by an employee or subordinate to whom authority has not been delegated. Of the magistrates of the Paris economic and financial pole interviewed by the examining team, some thought that, for a legal person to be held liable, the employee would have to have acted on the orders or with the authorisation of a company organ or representative, who would then be co-perpetrator or accomplice by instigation. Others thought that the mere fact that the company board knew of the matter would be sufficient. On the other hand, where the identification of the individual(s) who had committed the offence was concerned, the magistrates interviewed by the examining team seemed to agree that it would be an important pre-condition for prosecuting the legal person, even if, in theory, such identification is not required by law.

The issue of the impact of the existence of an internal policy of refusing to offer bribes on the responsibility of the legal person also gave rise to differing opinions. Some respondents thought that the existence of a policy of this kind – evidenced, for example, by the introduction of a code of conduct and internal warning procedures – might well work in favour of the legal person, either by exonerating the company from paying a penalty or by reducing it. Others, however, thought it would carry no legal weight. One interviewee stated that failure to comply with the internal policy would work against the natural person concerned, who would be judged all the more guilty for having received clear instructions not to resort to bribery.

Commentary:

The lead examiners recommend that the bringing into play of the criminal responsibility of legal persons in bribery cases be monitored as case law in this area develops, with special emphasis on the conditions relating to the identification of natural persons and the actions by senior staff that may result in the legal person being held liable.

Holding companies liable for the illegal activities of foreign subsidiaries

The possibility of a company being held liable for the illegal activities of foreign subsidiaries is also important in the fight against transnational corruption, particularly in the case of companies which might be tempted to resort to “externalisation”, i.e. setting up structures constituted under foreign law – in which decision-making power, and therefore responsibility, is concentrated – so that they can continue to pay commissions to foreign decision-makers without incurring the risk, at least *a priori*, of falling foul of the criminal law. The foreign subsidiary of a French company is a foreign legal person, having the nationality of the country in which it is registered, and is therefore technically not subject to the anti-bribery provisions of French law.

Nevertheless, as the magistrates from the Public Prosecutor’s Office interviewed by the examining team made clear, a French parent company could be prosecuted and held liable on a charge of co-authorship if it were found to have authorised, incited or ordered a foreign subsidiary to commit an act of bribery (the interested party being the intellectual instigator who gets a third party to actually commit the offence). Similarly, the parent company could be prosecuted for complicity in aiding or abetting a French agent employed by the foreign subsidiary if it were found that the parent company, having knowledge of the bribery, intentionally allowed him to commit the offence. This is because the courts treat as accomplices individuals who, though passive, have a determining role in the commission of an offence. An act of bribery committed by a 100%-owned subsidiary would be even more likely to trigger a prosecution of the French parent company, because the subsidiary would have no real independence vis-à-vis the senior managers of the parent company.

The prosecuting authorities who spoke with the examining team also explained that the parent company or its senior managers could be prosecuted under other legislation for actions committed by a foreign subsidiary. In fact, the senior manager of the parent company could be subjected to investigations for complicity in misuse of corporate assets committed in the subsidiary because he had given instructions for the commission of the offence; or the senior managers of the parent company could be held liable for criminal activities committed by shell companies, the latter being regarded as transparent instruments of fraud in respect of these managers. Unlawful acts committed by a completely legitimate subsidiary, but whose senior manager had been deprived of his powers for the operation in question, could also lead to a prosecution being initiated against the senior manager of the parent company for breach of trust towards its subsidiary.

Persons judged to be accomplices and receivers in relation to the offence of active bribery

While employees and senior staff of a company who are the direct perpetrators of the offence are of course prosecuted, a wider circle of persons involved in bribing foreign public officials (both within and outside the company) may be convicted by the courts for acting as accomplices. An abundance of specific cases of domestic bribery reveals the

most usual situations of complicity which are also typical of the bribery of foreign public officials. In recent cases, intermediaries have been judged complicit in active bribery (Cass. Crim., 27 November 2001; Cass. Crim., 19 December 2001), as was a legal advisor who gave information on financial arrangement to pay a bribe through a foreign company so as to conceal the consummation of the offence (Cass. Crim., 9 November 1995). Evidence of knowledge of the principal offence must be provided for the complicity to be validly established. For instance, in a case of misuse of corporate assets, it was ruled that a banker who granted overdraft facilities to a company on condition that the overdraft in the senior manager's personal account be paid off could not be convicted of complicity in the misuse of corporate assets since he was ignorant of the fraudulent character of the payments he accepted (Cass. Crim., 12 January 1987).

French law also provides for the punishment of the beneficiaries of the offence, who are often its economic justification. All those who hold an asset, or benefit from it, knowing that this asset derives from the commission of a crime – in this case the active bribery of foreign public officials – are guilty of the offence of receiving. Receiving by physically keeping an asset is broadly interpreted in case law. The asset does not need to be held personally: the bribe received may be in the keeping of a proxy, for example in a bank account. Nor does the asset have to be the item deriving from the offence; it can be the funds resulting from the sale of the item in question. Prosecution of a parent company which benefits from a contract won by the payment of a bribe by its foreign subsidiary could thus be allowed on the grounds that the parent has received the benefit of the proceeds of the offence. This possibility is still theoretical, since the Cour de Cassation has not yet had to deal with a case of a legal person charged with receiving. Only one case of receiving in relation to passive domestic bribery has so far been tried by the Court, as a result of which a natural person was convicted of receiving in relation to passive bribery, having benefited from a bribe that was paid to his father, a corrupt public official (Cass. Crim., 30 June 1999). In the first case of active bribery of a foreign public official in which charges had been brought at the time of the Phase 2 examination of France, it was the foreign public official who was being prosecuted for receiving in relation to active bribery.

Persons found guilty of accounting and tax offences

Where accounting-related offences are concerned, such as the keeping of off-balance-sheet accounts, off-balance-sheet or inadequately identified transactions, the entry of non-existent expenses or the use of forged documents (Article 8 of the Convention), French law ascribes the primary responsibility to senior company staff (manager, chairman, chief executive, director, members of the board, members of the supervisory committee). Apart from those cases where auditors are prosecuted as accomplices in primary offences committed by senior managers, they are also sometimes held criminally liable for offences peculiar to the exercise of their profession.

The responsibility of company management in relation to accounting matters

The French courts penalise company managers for two main categories of accounting offences: on the one hand, offences relating to the keeping of accounts; on the other, those concerned with the accounts – and particularly the annual financial statements – as a basis for interpreting the state and progress of the company. Given that French law lays down very precisely which person or persons in a company are responsible for complying with the obligations to keep and present accounts, and who will be punished in the event of an offence occurring, the courts have no scope for interpretation and can convict only the persons expressly mentioned in the legal texts.⁶

The offence relating to the process of drawing up accounts covers a number of situations in which the senior manager of a company may have tried to camouflage the payment of a bribe. This offence covers, in particular, the keeping of fictitious accounts which encompasses situations as varied as the entering of items with no real basis or the keeping of two sets of accounts (one set which appears to be in order but is in fact fictitious and another which is real but not disclosed), all of which are punishable under Article L. 626-2-4^o of the Commercial Code. On this basis, senior company managers were convicted for false entry and use of forgeries in a case of misappropriation of corporate funds in order to bribe Malagasy officials and so obtain an authorisation to fish in the territorial waters of Madagascar (TGI St-Denis de la Réunion, 10 December 2002). The trial judges in this case had noted that “the funds featured in the accounts under the heading ‘Purchase of shrimps, which was a forgery intended to conceal the destination of the funds, whatever that may have been, and once it was entered in the accounting records, it gave the withdrawals an incontrovertibly secret character”. Another conviction was passed on senior company managers who, using false invoices, had withdrawn sums from company funds to ensure that the company was awarded a contract (Lyon Appeal Court (CA), 29 November 1999).

Similarly, offences relating to the drawing up of annual financial statements cover various situations which could be exploited to camouflage the payment of bribes to foreign public officials. These include, in accordance with Article 8 of the Convention, failure to comply with the standards required of annual financial statements (regularity, true and fair view), punishable under the offence of publishing or presenting annual accounts which do not give a true picture of the company’s activities. Senior managers have been found guilty of this offence for attempting to conceal secret remunerations (Cass. Crim., 15 May 1974). In the case of business for which there is no specific offence of publishing or presenting annual accounts which fail to give a true view (private companies, some partnerships, sole traders), court judgements show that it is nevertheless possible to prosecute their senior staff in respect of “untrue” accounts on the charge of fraud. Similarly, prosecuting the offence of forging private documents may provide a way of punishing the legal person on behalf of which the presentation or publication was performed, in application of Article 441 of the Criminal Code.

Prosecution of salaried accountants, chartered accountants and auditors

Where the criminal liability of accounting professionals is concerned, separate regimes apply to chartered accountants and salaried accountants, on the one hand, and auditors, on the other. The former, in the absence, in most cases, of offences specific to their field of activity⁷, are generally prosecuted as co-perpetrators or accomplices in offences committed by senior company managers. Case law shows that the offences for which companies’ accounting and financial managers or chartered accountants are most frequently prosecuted are those of complicity in tax fraud, fraud, or misuse of corporate assets. On this basis, in accordance with Article 1742 of the General Tax Code, a conviction as accomplice in a tax fraud was passed on a salaried company accountant who had entered in the company’s books, under a false expenditure heading, amounts paid in remuneration which were not deductible because of their secret character (Cass. Crim., 24 October 1973). A chartered accountant was found guilty of being an accomplice of irregular book-keeping in a fraud case, having knowingly agreed to make inaccurate entries in the books of the company whose accounts he was responsible for (Cass. Crim., 10 November 1971), while another certified public accountant was convicted of complicity in the misuse of corporate assets for having, knowingly, concealed misappropriations of company funds and drawn up minutes of shareholders meetings authorising some of the transactions under investigation (Cass. Crim., 19 May 1999).

Where auditors are concerned, when they concur in the commission or concealment of an accounting offence for which the senior managers of the company are primarily responsible, they may also be prosecuted on a charge of complicity in the offence concerned. As the financial magistrates interviewed by the examining team explained, an auditor can be prosecuted for complicity if he is guilty of performing positive actions, by way of instigation or by aiding and abetting, which contribute to the consummation of the offence by the senior managers, either by facilitating its commission or, more likely, by concealing it from third parties. There have been specific cases, particularly in cases of misuse of corporate assets, in which the courts have convicted auditors for participating in drawing up untrue balance sheets or advocating the entry of items intended to conceal misappropriations (Cass. Crim., 26 May 1986). There are no cases of auditors having been convicted of complicity in acts of active bribery committed by a senior company manager.

As well as being convicted as accomplices, auditors may be held criminally liable for offences peculiar to the exercise of their profession, in particular the offence of confirming untrue information, which is connected with their obligation to certify that the financial statements are regular and give a true and fair view. For an auditor to be found guilty, the Cour de Cassation requires that the courts establish that he was aware of the misappropriations performed by the senior managers concerned. Courts may convict auditors for taking part in the preparation of inaccurate balance sheets, arranging for entries to cover fictitious transactions, and certifying accounts without reservation when they knew, for example, that off-balance-sheet transactions had taken place. Auditors have been prosecuted on these grounds in cases of misuse of corporate assets: in one instance, for certifying an inaccurate balance sheet covering misappropriations on the part of senior staff (Paris Appeal Court, 9th Chamber, 15 February 1979); in another, for failing to note, in his special reports, the existence of agreements organising misappropriations, despite the fact that the auditor was aware of them (Douai Appeal Court, 11 June 1974).

Sanctioning the non-deductibility for tax purposes of bribes paid in connection with exporting activities

According to the representatives of the revenue department interviewed by the examining team, companies which attempt to pass off bribes and commissions paid in relation to export contracts as deductible expenses run the risk of incurring three types of penalty. In application of Article 2 bis incorporated into Article 39 of the General Tax Code (Code général des impôts / CGI), which prohibits the deductibility of bribes paid directly or through intermediaries to foreign public officials in the context of international business transactions, not only will the revenue department oppose the deduction of such bribes from taxable profits, but also, if the senior manager of the company is found to have acted fraudulently, it will take steps to ensure that he is prosecuted for tax fraud on the basis of Article 1741 of the CGI, which punishes anyone who has fraudulently avoided or attempted to avoid payment of all or part of taxes. The revenue department may also decide to increase the penalty imposed on the company by resorting to Article 1729 of the CGI, which provides for tax to be increased by 40% if the bad faith of the senior manager is established, or by 80% if he is found guilty of fraudulent manoeuvres or abuse of rights. Finally, revenue officials, in common with other civil servants, will be bound to notify the Public Prosecutor's Office of the offence of active bribery of foreign public officials in accordance with the provisions of Article 40, sub-section 2, of the Code of Criminal Procedure.

However, as noted by the OECD Working Group when France was examined during phase 1, there is a geographical loop-hole in French tax law where the ban on the deduction for tax purposes of bribes offered in relation to export contracts is concerned. The provisions

of Article 39-2 bis of the CGI do not apply to France's overseas territories (TOMs: French Polynesia, the French Southern and Antarctic Territories, Wallis and Futuna and various islands in the Indian Ocean), nor to New Caledonia and Mayotte, which enjoy tax powers independent of those of Metropolitan France, each managing its own budget and having its own tax regime.⁸ Because of this independent status, only *ad hoc* legislation, adopted by the decision-making assemblies of these territories, can explicitly prohibit the tax deductibility of commissions paid to foreign officials. To date, no such provisions have been enacted.

Because of the absence of these provisions, and the autonomy of tax law in relation to criminal law, the tax authorities of these territories could – basing their policy on the jurisprudential construction of the “abnormal act of management”⁹ – apply a “managerial” concept of the deductibility of expenses. In other words, they could decide that the payment of a bribe to a foreigner, because it enabled the company to increase its turnover and the amount of the bribe was proportional to the value of the business handled, was in the interests of the company and therefore constituted a normal act of management –which would in turn allow for its deductibility from taxable profits. The unlawful character of the action in criminal law would be of little consequence: if the action was regarded by the tax-court judge as being in the company's interests, it could be regarded as not constituting an abnormal act of management. This is a manifestation of the autonomy of tax law. There are legal precedents for “commissions” paid to French public officials with a view to securing a contract. For instance, in a recent case concerning “fees” paid to a “research consultancy firm”, the tax-court judge ruled that “the payment of these fees was a condition imposed by municipalities for the securing of public contracts (...); therefore, and *despite the fact that these practices constitute offences under the laws and regulations in force*, the corresponding expenses incurred *in the interests* of the company are *in the nature of deductible expenses*” (Lyon administrative court, 17 June 1997).

Nevertheless, the Act of 30 June 2000 relating to the fight against bribery is automatically and fully applicable in these territories. Therefore any presentation to a tax official of documents proving the payment of a commission to a foreign public official, with a view to obtaining a tax deduction, should lead the official, in compliance with Article 40 of the Code of Criminal Procedure, to report the offence to the Public Prosecutor's Office. Persons engaging in bribery will be exposing themselves to criminal prosecution every time they attempt to obtain a tax deduction in respect of such commissions in these territories. At the same time, they will make the offence all the more visible, since it will be displayed in the accounting records presented in support of tax returns.

Commentary:

The lead examiners are of the opinion that, on the whole, France has enacted consistent tax provisions concerning the non-deductibility for tax purposes of bribes paid to foreign public officials. They are, however, concerned by France's persistent contravention of Article IV of the 1997 Revised Recommendation with regard to some of its overseas territories and other territories having special status. When France was examined during phase I, the French authorities undertook to take steps to ensure that these territories enacted legislation in conformity with the Revised Recommendation. The lead examiners therefore call upon France to proceed with the necessary consultation to ensure that appropriate fiscal provisions are enacted as soon as possible in those of its territories that enjoy an autonomous tax status, taking into account the relative risk factors associated with them.

Punishing the offence of active bribery of foreign public officials: penalties handed down by judges

The sanctions applicable and the penalties actually imposed by judges

A significant feature of French law is that it prescribes robust penalties for criminal and other offences. Where anti-bribery provisions are concerned, companies and other legal persons are liable to a fine of up to 750,000 € and/or¹⁰ various prohibitions, deprivations of rights and professional disqualifications, including being excluded from participation in public contracts and being banned from exercising a profession for up to five years. Senior company managers, directors, shareholders, employees and agents or any other natural person found guilty of the offence of active bribery of a foreign public official are, for their part, liable to a fine of up to 150,000 € and/or a term of imprisonment of up to ten years. To these penalties imposable on individuals, the courts are empowered to add additional penalties such as the 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.

In practice, in conformity with French law, penalties are fixed by judges taking into account the circumstances of the offence and the character of the offender. Similarly, when courts impose a fine, they determine the amount taking into account the financial resources and outgoings of the offender, in accordance with the provisions of Article 132-24 of the Criminal Code. The principle laid down in this Article enables the judge to tailor the penalty by granting the culprit the benefit of a straightforward suspended sentence or a suspended sentence with probation, a suspended sentence with the obligation to perform community service, semi-liberty, spreading of the penalty over time or the discretionary waiver of the penalty, or by using a complementary or alternative penalty (e.g. community service, deprivation of rights) as the main penalty.

The penalties imposed in practice by the courts

Two points emerge from an analysis of the judgements handed down by the Cour de Cassation. The first point is the small amounts of money involved in the transactions giving rise to prosecutions for the active bribery of public officials: most cases are concerned with petty bribery of public officials by senior managers and employees of medium-sized enterprises, predominantly SARLs (private limited partnerships). The unlawful inducements involved, when they take monetary form, range from €450 to €800,000. However, a number of cases tried recently seem to suggest a change in this trend, with criminal transactions involving larger amounts. For instance, in the Carignon affair, almost one million euro were withdrawn by the senior managers of two companies from company funds in order to bribe a mayor, and thereby secure the concession for supplying water to the city of Grenoble (Cass. Crim., 27 October 1997). In another case, prosecuted as a case of misuse of corporate assets, though it comprised all the elements of a case of active bribery, a ship owner had misappropriated more than €600,000 to bribe Malagasy public officials for the benefit of two Malagasy subsidiaries of his company (TGI St-Denis de la Réunion, 10 December 2002). As for the Elf affair, tried in the lower court of Paris in the autumn of 2003, the judicial investigation revealed that tens and tens of millions of euro were paid as secret commissions abroad to secure international contracts.

The second point is that most convictions for bribery result in fairly moderate fines and suspended or partly suspended prison sentences rather than actual imprisonment, and in no case has a legal person been convicted. Moreover, magistrates make little use of the

complementary penalties at their disposal in penalising the criminal behaviour of senior company managers. Of the 160 convictions for active bribery passed between 1999 and 2001, although almost three quarters of them resulted in prison sentences, just over half of these sentences (52.5 %) were suspended in their totality and 13.5 % in part. By way of comparison, in 1999 almost half of the convictions for theft and receiving stolen goods resulted in part of the sentence being served in prison, as against one fifth in the case of active bribery. The average duration of time served in prison for active bribery in 1999 was 13 months, while the average amount of the fines – which are imposed as the main penalty in 15% of convictions for active bribery – was €1,250.¹¹ Questioned about the criteria he judged necessary for imposing a severe penalty on persons who had bribed foreign public officials, one trial judge said that he would take into account the type of contract involved (e.g. was it connected with selling arms to certain countries or with drug trafficking?), the position held by the foreign public official, the amount of the bribe, and the impact of the bribe on the award of the contract.

For accounting offences, the proportion of convictions resulting in time served in prison is even smaller: of the 7 judgements relating to the performance of auditors' duties and the 32 for false balance sheet handed down in 1999, not one resulted in actual imprisonment. More than two thirds of the convictions (85 % in the case of judgements relating to auditors' duties) resulted in fines. Only when money laundering is involved do judges tend to hand down many prison sentences, which may or may not be partially suspended (they were suspended in more than three quarters of the judgements handed down in 1999), together with large fines. The average fine in 1999 was 1.5 million euro, which is far in excess of the maximum prescribed for money laundering (€381,000 or €762,000), because the courts applied Article 324-3 of the Criminal Code, which stipulates that the fine may be increased to half of the value of the goods or funds involved in the money laundering operation.

Commentary:

The lead examiners consider that the penalties imposed for bribery seem light, even though some cases tried recently would seem to suggest a reversal of this tendency. In view of this and of the fact that courts have still not tried any cases of bribery of foreign public officials, the examiners recommend that the issue of the level of penalties be followed up by the Working Group when data regarding their application to the offence of transnational bribery become available.

French courts and confiscation of the object or proceeds of the offence

With very few exceptions (which did not involve bribery or misuse of corporate assets)¹² the French courts do not generally impose penalties involving confiscation of the proceeds of the offence. The very few sentences relating to bribery which have involved confiscation have focused on the bribe itself: for instance, in a case of active bribery (and trading in influence) of a legal administrator by the managing director of a company experiencing difficulties, the trial judges ordered the confiscation of the “sum seized” (Cass. Crim., 27 October 1998). During the on-site visit, reasons were advanced to explain this reluctance to resort to confiscation, despite the fact that it is a powerful weapon, which directly hits the wallet of both the briber and the person receiving the bribe.

According to the magistrates interviewed, confiscation in business-related matters is not part of French legal “culture”. Two recent examples illustrate the reluctance of magistrates to order the confiscation of the proceeds of an offence. In the Elf case, one of the principal investigating magistrates admitted that he had chosen to focus his investigations on the

misuse of assets and on instances of personal enrichment, on “retro-commissions” rather than bribes paid abroad to secure contracts. Another case, recently tried in Aix-en-Provence, which bears witness to this reluctance was a fraud perpetrated against the state of Madagascar: in the event, the French magistrates did not act on the opportunity to confiscate the funds which had been frozen by their Swiss colleagues in Geneva and restore them to the victims of the offence.

The magistrates met during the on-site visit also stated that, although they systematically attempted to seize and demand the confiscation of bribes when it was still possible, they did not do so in respect of the proceeds of active bribery. Their view was that, in order to demand confiscation of the proceeds of active bribery, it was first necessary to establish their materiality, i.e. the connection between an advantage assumed to have been obtained (funds or a contract) and the actual acts of bribery, which could be difficult when only a part of the advantage derived from the bribery. It was then necessary to determine the amount of the proceeds of the active bribery and locate them, which also could be difficult given the many obstacles in the way of tracking down funds, such as the use of assumed names, the channelling of monies through off-shore havens and the slow pace of international co-operation. All in all, the procedure could sometimes be too demanding of time and effort to be “profitable”. Moreover, in cases where it proved impossible to confiscate the proceeds of the bribery directly, or even confiscate assets of an equivalent value, the maximum imprisonment for non-payment that could be imposed on that account was six months. Finally, confiscation of assets equivalent in value to the contract or of the profit derived from the contract secured through bribery would mean prosecuting the legal person which had benefited, which was also difficult. Some magistrates nevertheless agreed that confiscation was an option to be explored and it was desirable that prosecutors be tougher in calling for confiscation measures.

Commentary:

The lead examiners consider that the French authorities should develop measures to make magistrates more aware of the advantages of confiscation, particularly in cases where the maximum legal fine is less than the bribe paid and the advantages received in exchange. They should also be offered training in tracking down the proceeds of bribery and assessing the value of such proceeds.

- 1 This was true of a case concerned with bribes paid by companies between 1990 and 1995 (Cass. Crim., 16 May 2001) and of another case in which the acts were committed after the criminal responsibility of legal persons came into force (Cass. Crim., 19 December 2001).
- 2 As concerns the misuse of corporate assets, a company whose assets are misappropriated to pay a bribe is regarded as the victim rather than the perpetrator of the crime.
- 3 “Although the execution of the task was entrusted to one employee and the invoice in respect of fees was approved for payment under the signature of another, the defendant appeared to be the mastermind behind the operation and the decision-maker in respect of the agreements – in particular the financial agreements – concluded prior to the execution of the task – and these agreements were the result of personal contact between [the accused and the bribed public official], which was in accordance with the managerial office exercised by the accused.” (Cass. Crim., 5 December 2001).
- 4 In this case, the Appeal Court had ruled that not to declare the company performing the takeover responsible “was tantamount to depriving of all usefulness Articles 121-2 ff of the Criminal Code

- providing for the criminal responsibility of legal persons, which would be able to defy the law as they pleased and escape prosecution without even being dissolved or liquidated”.
- 5 In a case concerning use of forged attestations in the course of a judicial inquiry (Cass. Crim. 24 May 2000), the offence was attributed to an enterprise, without identification of the physical person author of the acts, since, on the one hand, the intentional element of the offence resulted from the sheer nature of the acts, and, on the other hand, it was clear that the offence had been committed by one of the company’s organs.
 - 6 For instance, in SARLs (private limited liability companies), partnerships and limited partnerships, the sanctions laid down in the Commercial Code apply to the managing director, who bears all the criminal responsibility. The criminal penalties prescribed for the managing director of a SARL apply equally to the managing director of an EURL (limited liability sole trader). In conventional SAs (public limited companies), it is, in theory, the chairman of the board who, being responsible for the general management of the company, is the person criminally liable. However, most of the corporate offences provided for in the Commercial Code (misuse of corporate assets, publication or presentation of inaccurate accounts...) also target other members of the board and general managers. Finally, in more complex companies with a board of management and a supervisory committee, the penalties laid down for the directors, chairmen and general managers of conventional SAs are also applicable, according to their respective attributions, to the members of the management board and the supervisory committee (Paris 15 February 1979, CNCC Bull. no. 34, June 1979, p. 197: conviction of the chairman of a supervisory committee for presenting “inaccurate” accounts).
 - 7 The offence for which a chartered accountant is most likely to be prosecuted is that of drawing up or helping to draw up false balance sheets.
 - 8 By virtue of Law no 2001-616 of 11 July 2001, which redefined the status of Mayotte, the provisions of the CGI will apply there as from 1 January 2007.
 - 9 “An abnormal act of management is an act or transaction expressed in an accounting entry having an impact on the taxable profit which the Administration proposes to disallow as being extraneous or contrary to the interests of the enterprise.”: Conclusions submitted by the government commissioner to the Conseil d’État in the procedure leading its decision of principle, 27 July 1984.
 - 10 Article 132-17 of the Criminal Code stipulates that “the court is not bound to impose both of the penalties incurred for the offence referred to it”.
 - 11 Some cases result in heavy fines, on account of the identity of the defendants (gangsters) or the large number of offences being prosecuted. For instance, a sentence of 6 years’ imprisonment with no fine was passed in a case of bribery of a captain of police by criminals, in order to facilitate their criminal activities (Cass. Crim., 27 November 2001). In another case in which several offences were prosecuted together (active bribery, breach of trust, forgery and use of forgeries, complicity in forgery and use of forgeries, trafficking in influence), the judges imposed a fine of 1 million francs, the maximum legally permitted (Cass. Crim., 30 May 2001).
 - 12 In a case of money laundering connected with drug trafficking, the court ordered the confiscation of the credit balances held in bank accounts which were frozen at the judicial investigation stage and of three apartments (Tribunal de grande instance de Paris, 1 July 1999, Noriega, subject to appeal).

Recommendations

In conclusion, based on the findings of the Working Group with respect to France's implementation of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to France. In addition, the Working Group recommends that certain issues be revisited as the case-law continues to develop.

Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials

With respect to awareness raising efforts to promote the implementation of the Act of 30 June 2000 amending the Criminal Code and the Code of Criminal Procedure with regard to the fight against corruption, the Working Group recommends that France:

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)]

Recommendations regarding detection, the Working Group recommends that France:

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]
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]
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. [Revised Recommendation, Article I]
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].
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]

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]

Recommendations for ensuring adequate mechanisms for the effective prosecution of offences of bribery of foreign public officials and related offences

The Working Group recommends that France:

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]
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]
10. Ensure that, within the framework of the reorganisation of the judiciary specialized 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]
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]
12. To 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 1].
13. To 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]

Follow-up by the Working Group

The Working Group will follow up the issues below, as the case-law and practice continue to develop, in order to evaluate:

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]

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 1

Summary table of judgements handed down by the Criminal Chamber of the Cour de Cassation, from 1999 to 2003, in cases of active bribery of French public officials*

| Case | Description of the persons convicted of active bribery in role of perpetrator or accomplice | Other offences committed | Purpose of the bribe | Term of imprisonment | Fine ¹ | Other penalties |
|-------------------|---|---|--|---------------------------------------|-------------------|--|
| 5 February 2003 | bar manager | - | bribery of police officer to allow them to exercise their profession in breach of the legal conditions | 1 year suspended | 1,500 € | - |
| | restaurant manager | - | | 1 year suspended | 1,500 € | - |
| 13 February 2002 | defending lawyer of person prosecuted for drug trafficking | - | bribery of police officer to obtain information about a case in progress | 18 months suspended | - | - |
| 5 December 2001 | manager of a company agency | complicity in unlawful taking of interest | public contract | 8 months suspended | 7,500 € | - |
| 27 November 2001 | criminal (perpetrator) | - | bribery of police officer | 6 years | - | - |
| | criminal (perpetrator) | - | | 6 years | - | - |
| | captain of police (accomplice) | - | | 30 months, of which 2 years suspended | - | - |
| | another person (accomplice) | - | | 30 months | - | - |
| 10 October 2001 | not available | - | not available | 6 months suspended | 3,000 € | - |
| 12 September 2001 | private individual | - | shelving of a tax adjustment | 1 year suspended | 60,000 € | 5 years' deprivation of civic, civil and family rights |

| Case | Description of the persons convicted of active bribery in role of perpetrator or accomplice | Other offences committed | Purpose of the bribe | Term of imprisonment | Fine ¹ | Other penalties |
|------------------|---|---|--|---------------------------------------|-------------------|---|
| 30 May 2001 | Manager of a number of companies | breach of trust, forgery and use of forgeries, complicity in forgery and use of forgeries, trading in influence | sitting of a shopping centre, bribery of a member of the town-planning committee | 4 years, of which 2 suspended | 150,000 € | - |
| | not available | receiving in relation to breach of trust | | 2 years, of which 20 months suspended | 75,000 € | (civil damages) |
| 16 May 2001 | not available | conspiracy to defraud | public contract | 8 months suspended | 15,000 € | - |
| 4 April 2001 | not available | smuggling of non-prohibited goods | not available | 2 years, of which 1 suspended | - | 5 years' deprivation of civic, civil and family rights; customs fines and penalties |
| 7 February 2001 | Chairman of a consultancy and hotel promotion company | misuse of corporate assets | construction of a hotel complex | 2 years, of which 18 months suspended | 120,000 € | 3 years' deprivation of civic, civil and family rights |
| | director of a consultancy and hotel promotion company and manager of a research consultancy | misuse of corporate assets, complicity in trading in influence | | 2 years, of which 18 month suspended | 60,000 € | 3 years' deprivation of civic, civil and family rights |
| 15 November 2000 | trusted advisor of the president of a regional assembly | complicity in trading in influence | construction of a hotel complex | 2 years, of which 1 year suspended | 75,000 € | 5 years' deprivation of civic, civil and family rights |
| 7 June 2000 | Company chairman and managing director | - | construction of a supermarket | 1 year suspended | - | (civil damages) |

| Case | Description of the persons convicted of active bribery in role of perpetrator or accomplice | Other offences committed | Purpose of the bribe | Term of imprisonment | Fine ¹ | Other penalties |
|------------------|---|--|--|----------------------------------|---------------------------------------|--------------------------------------|
| 11 May 2000 | private individual | undeclared transfer of capital abroad | to induce a customs officer to overlook an offence | 4 months suspended | 10,750 € | |
| 12 January 2000 | private individual | complicity in fraudulent obtaining of administrative documents, assisting foreigners to enter or stay in France unlawfully | to speed up delivery of a residence permit | - | Referred to Appeal Court for sentence | - |
| 14 December 1999 | not available | - | Private investigation conducted by the police | - | 4,500 € | - |
| 30 June 1999 | company manager | - | public contracts | 24 months, of which 18 suspended | 75,000 € | 5 years' deprivation of civic rights |
| | company manager | - | | 24 months, of which 18 suspended | 75,000 € | 5 years' deprivation of civic rights |
| 30 March 1999 | driving school manager | - | bribing driving test examiners | 1 year suspended | 3,000 € | - |
| | driving school manager | - | | 1 year suspended | 3,000 € | - |
| | not available | - | | 1 year suspended | 3,000 € | - |
| | not available | - | | 1 year suspended | 3,000 € | - |

* The information given here is based on judgements handed down by the Criminal Chamber of the Cour de Cassation between March 1999 and March 2003. It was compiled by the OECD Secretariat.

- 1 For the sake of clarity, the amounts of fines are here expressed in euros, although they were expressed in French francs in the judgements themselves. The conversion has been performed using the table relating to fines and other monetary penalties appended to Order no 2000-916 of 19 September 2000 changing amounts expressed in francs in legislative texts into their euro equivalents (J.O n° 220 of 22 September 2000 p. 14881)

Annex 2

List of institutions met during the on-site visit, 23 to 27 June 2003

*Public institutions or institutions with a public service mission**Ministries*

| Ministry | Department | Service |
|---|---|---|
| Ministry of Economic Affairs, Finance and Industry | Direction des relations économiques extérieures (foreign trade) | Sous-direction politique financière (financial policy) |
| | Direction du Trésor (Public revenue office) | <ul style="list-style-type: none"> - Bureau endettement international et assurance crédit (international debt and credit guarantees) - Sous-direction dette, développement et marchés émergents (debt, development and emergent markets) - Service des participations - Bureau autres participations - Sous-direction financement de l'économie et développement des entreprises (economic funding and business development) - Service des affaires européennes et internationales (European and international affairs) - Sous-direction Europe et affaires monétaires internationales (Europe and international monetary affairs) |
| | Direction Générale des Douanes et des Droits Indirects (Customs and indirect taxes) | |
| | Direction générale des impôts (General tax directorate) | Sous-direction du contrôle fiscal (Tax inspection) |
| Ministry of Economic Affairs, Finance and Industry | Direction nationale du renseignement et des enquêtes douanières (customs information and enquiries) | |
| | Inspection Générale des Finances (General finance inspectorate) | |
| | TRACFIN (Unit for intelligence processing and action against secret financial channels) | Direction des enquêtes (investigations) |

| Ministry | Department | Service |
|------------------------------------|---|---|
| Ministry of the Interior | Brigade de recherches et d'investigations financières, Direction régionale de la police judiciaire (Financial research and investigations brigade, Regional directorate of criminal investigation police) | Sous-direction des affaires économiques et financières (Sub-directorate of economic and financial affairs) |
| | Brigade financière, Direction régionale de la police judiciaire | Sous-direction des affaires économiques et financières (Sub-directorate of economic and financial affairs) |
| | Brigade nationale d'enquêtes économiques, Direction centrale de la police judiciaire (National economic investigations brigade) | Sous-direction des affaires économiques et financières |
| | Service régional de police judiciaire (Regional criminal police service) | - Section économique et financière (Lille) - Section économique et financière (Lyon) |
| Ministry of Defence | Direction des relations internationales de la délégation générale pour l'armement | Sous-Direction des affaires générales (general affairs) |
| | Direction générale de la gendarmerie nationale (Directorate general of the national gendarmerie) | Bureau de la Police Judiciaire, Section criminalité organisée (Criminal police bureau, organised crime section) |
| Ministry of Justice | Direction centrale de la police judiciaire (Central directorate of criminal police) | Office central pour la répression de la grande délinquance financière (Central office for fighting major financial crime) |
| | Direction des affaires civiles et du sceau (civil affairs and seal) | |
| | Direction des affaires criminelles et des grâces (criminal affairs and pardons) | Sous-Direction de la justice pénale spécialisée (specialised criminal justice) |
| | Service Central de Prévention de la Corruption (Central corruption prevention department) | |
| Ministry of Foreign Affairs | Ambassadeur chargé des questions de lutte contre le banditisme et le crime organisé (Ambassador responsible for the fight against gangsterism and organised crime) | |

| Ministry | Department | Service |
|----------|--|---|
| | Direction des affaires économique et financières (economic and financial affairs) | - Sous-Direction des affaires financières internationales (international financial affairs) - Sous-Direction des questions industrielles et des exportations sensibles (industrial issues and sensitive exports) |
| | Direction générale de la coopération internationale et du développement (international co-operation and development) | Service de la stratégie, des moyens et de l'évaluation (strategy, resources and evaluation) |

Other public institutions or institutions with a public service mission

| Institution | Department |
|---|--|
| Agence française de développement (French development agency) | Département des politiques régionales (regional policy) |
| COFACE | Direction du moyen terme (mid-term projects) |
| NATEXIS | Direction des activités institutionnelles (institutional activities) |
| Commission bancaire (Banking commission) | Direction moyen terme (medium-term) |
| Commission des opérations boursières (Stock exchange watchdog) | Service juridique (legal affairs) |
| Parquet général près la cour des comptes (Prosecutor's Office, Audit Court) | Service des affaires comptables (accounting matters) |
| Pôle économique et financier de Paris (Specialised prosecutions unit, business-related and financial crime) for | |
| Tribunal correctionnel de Paris | |
| Tribunal de grande instance de Paris | |

Private Sector*Trade unions and representatives of private-sector organisations*

| Institution | Department |
|--|---|
| MEDEF (French employer's federation) | <ul style="list-style-type: none"> - GPA Entrepreneurs - Comité fiscal (taxation committee) - Direction des relations commerciales et financières internationales (commercial and financial international relations) - Comité de déontologie (ethics committee) - Groupe de proposition et d'action (proposals and action group) - Comité exportateur équipement (equipment exports committee) - Direction des affaires juridiques (legal affairs) |
| CFDT (trade union) | |
| CFTC (trade union) | |
| CGC (trade union) | |
| CGT (trade union) | |
| CGT-FO (trade union) | |
| Confédération Générale des Petites et Moyennes Entreprises (General confederation of small and medium-sized enterprises) | |

Professional bodies

| Institution | Department |
|---|---|
| Barreau de Paris (Paris bar association) | |
| Compagnie nationale des commissaires aux comptes (National auditors' professional body) | |
| Conseil supérieur de l'ordre des experts-comptables (Supreme council for the accounting profession) | Secteur exercice professionnel et formation professionnelle (Department for professional practice and training) |

Legal and accounting practices

Legal practices

- Francis Lefebvre
- Herbert Smith
- Soulier Granturco and Associates
- Waque, Farge and Hazan

Auditing firms

- Deloitte, Touche, Tohmatsu
- Ernst & Young

Banking sector

| Institution | Individual banks |
|---|--|
| <ul style="list-style-type: none"> • Fédération Française Bancaire (French Banking Federation) | <ul style="list-style-type: none"> • BNP Paribas • Crédit Lyonnais |

Enterprises

- Alstom
- Bouygues
- Thalès International
- TotalFinaElf
- Vinci
- Enterprise from the armament industry

Civil Society

- Centre national de la recherche scientifique (CNRS / National Scientific Research Centre)
- École supérieure de commerce de Paris (ESCP-EAP / Paris Higher School of Commerce)
- Le Point (daily newspaper)
- Transparency International, France

APPENDIX I

Evaluation of France by the OECD Working Group (December 2000)

Legal Framework

Evaluation of France¹

General comments

The Working Group complimented the French authorities on the conscientious way in which they had implemented the Convention in domestic law. It thanked the authorities for having provided detailed replies which had facilitated the review procedure.

In order to meet the requirements of the Convention and the Recommendation, the French Parliament adopted the Act of 30 June 2000 on combating bribery, amending the Criminal Code, the Code of Criminal Procedure and the General Tax Code. The Group is of the opinion that the Act adopted by France generally conforms to the requirements of the Convention. However, certain aspects of the French implementing legislation, listed below, raised concerns as they may affect the effective implementation of the Convention in France. These aspects shall therefore require careful examination in Phase 2.

Specific questions

The definition of foreign public officials

The Working Group noted that French legislation did not adopt the autonomous definition of a foreign public official as provided in Article 1.4.a of the Convention, but took the concept of public official as it exists in French law. As that concept is very broad, the Group considered that it covers the different categories referred to in Article 1.

Elements of the offence

Under French law, the act of “proposing, without right, offers, promises, gifts, presents or advantages of any kind” constitutes the offence of bribery. Although provided for implicitly by the law, it does not explicitly mention the act of giving any undue pecuniary or other advantage.

The Group raised the question whether French courts would pursue an act of giving any undue pecuniary or other advantage that takes place after the entry into force of the legislation, as a result of a corruption pact (meeting of minds between the briber and the recipient of the bribe) entered into before the law’s entry into force. On this point, the

¹ This evaluation was completed by the Working group on Bribery in December 2000.

French authorities referred to their description of French case law provided for in Section 1.1.3 of the report.

The Group took note of the explanations provided by France but expressed concerns whether existing case law provides, with sufficient certainty, a positive answer to the question raised above. The Group considered that this issue should therefore be carefully monitored during Phase 2.

Criminal responsibility of legal persons

The Working Group noted that the conditions for implementation of the criminal responsibility of legal persons were identical to those provided for in the case of bribery of a French public official. However, in the event of a restrictive interpretation by French courts, those conditions could rule out the criminal responsibility of legal persons when the offence is committed by an employee or a subordinate.

The French authorities recalled that the conditions for implementation of the criminal responsibility of legal persons are flexible and comprehensive enough to encompass numerous situations. They believe that the situations that could give rise to an exclusion of liability would relate to problems of proof and not to a restrictive interpretation of the conditions for implementation of the criminal responsibility of legal persons.

The Group considers that this question should be re-examined in Phase 2.

Jurisdiction

The Working Group noted that French law provides for both territorial jurisdiction and jurisdiction based on nationality, the latter being subject to the condition of dual criminality. In this latter case, proceedings may be initiated only after a complaint has been lodged with the French authorities by the victim or after an accusation made by the authority of the country in which the bribery took place. The Working Group considered that if the term “victim” applies only to the country of the foreign public official, this could restrict the effective exercise of jurisdiction based on nationality.

On this point, the French authorities refer to the details and their description of French case law provided for in paragraph 4.2.1. of the report.

The Group urged France to review its application of nationality jurisdiction in light of Article 4.4 of the Convention.

Rules for instituting prosecutions

Prosecutions concerning the bribery of foreign public officials under the OECD Convention, unlike the case of the bribery of French or EU public officials, can be initiated solely by the public prosecutor’s office, regardless of where the offence took place. This excludes the possibility of an action being brought automatically by the victim, even if the offence was committed in France. The French authorities stated that this provision already exists in French law with regard to offences committed entirely abroad.

The Working Group nevertheless expressed reservations whether this differential treatment complies with the spirit of Article 5. Its impact on the effectiveness of prosecutions will be assessed in Phase 2.

Statute of limitations

The Working Group expressed concerns with regard to the fact that the statute of limitations in France for the bribery of foreign public officials is three years, even though it may be interrupted or suspended. France drew the Group's attention to the fact that under case-law on "concealed" offences, the statute of limitations only begins to run from discovery of the unlawful acts. The courts have not so far, however, ruled on whether bribery constitutes such an offence.

Article 6 of the Convention provides that an adequate period of time shall be allowed for investigations and prosecutions. The Group noted the explanations by the French Delegation but considered that this matter, already mentioned in previous reviews, constitutes a general problem calling for a comparative analysis of the legal situation in Member countries with a view to ensuring the coherent and effective implementation of the Convention.

APPENDIX 2

Principal Legal Provisions

Extracts of the Criminal Code and the Code of Criminal Procedure, as amended by the Act No. 2000-595 of 30 June 2000

Criminal Code

SECTION III. – BREACHES TO THE DUTY OF HONESTY

§ 2. – PASSIVE CORRUPTION AND TRAFFICKING IN INFLUENCE BY PERSONS HOLDING PUBLIC OFFICE

ARTICLE 432-11

The direct or indirect request or acceptance without right of offers, promises, donations, gifts or advantages, when done by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate, is punished by ten years' imprisonment and a fine of € 150,000 fine where it is committed:

1. to carry out or abstain from carrying out an act relating to his office, duty, or mandate, or facilitated by his office, duty or mandate;
2. or to abuse his real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision.

SECTION I. – ACTIVE CORRUPTION AND TRAFFICKING IN INFLUENCE COMMITTED BY PRIVATE PERSONS

ARTICLE 433-1

An offence punished by ten years' imprisonment and a fine of € 150,000 is committed by unlawfully proffering, directly or indirectly, any offer, promise, donation, gift or reward, in order to induce a person holding public authority, discharging a public service mission, or vested with a public electoral mandate:

1. to carry out or abstain from carrying out an act pertaining to his office, duty, or mandate, or facilitated by his office, duty or mandate;
2. or to abuse his real or alleged influence with a view to obtaining distinctions, employments, contracts or any other favourable decision from a public authority or the government;

The same penalties apply yielding to a person holding public authority, discharging a public service mission, or vested with a public electoral mandate who, unlawfully, directly or indirectly solicits offers, promises, donations, gifts or rewards to carry out or to abstain from carrying out any act specified under 1°, or to abuse his influence under the conditions specified under 2°.

CHAPTER V. – OFFENCES AGAINST THE PUBLIC ADMINISTRATION OF THE EUROPEAN COMMUNITIES, MEMBER STATES OF THE EUROPEAN UNION, OTHER FOREIGN STATES AND PUBLIC INTERNATIONAL ORGANISATIONS

SECTION I. – PASSIVE CORRUPTION

ARTICLE 435-1

For the implementation of the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union signed at Brussels on the 26th May 1997, the unjustified request or acceptance at any time, directly or indirectly, by a community civil servant or national civil servant of another member State of the European Union or by a member of the Commission of the European Community, the European Parliament, the Court of Justice or the Court of Auditors of the European Community of any offer, promise, donation, gift or reward of any kind, to carry out or abstain from carrying out an act of his office, mission or mandate, or facilitated by his office, duty or mandate, is punished by ten years' imprisonment and a fine of € 150,000.

SECTION II. – ACTIVE CORRUPTION

SUB-SECTION 1. - ACTIVE CORRUPTION OF CIVIL SERVANTS OF THE EUROPEAN COMMUNITY, CIVIL SERVANTS OF MEMBER STATES OF THE EUROPEAN UNION, MEMBERS OF THE INSTITUTIONS OF THE EUROPEAN COMMUNITY

ARTICLE 435-2

For the implementation of the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union signed at Brussels on the 26th May 1997, the unlawful proffering, at any time, directly or indirectly, of any offer, promise, gift, present or advantage of any kind to a community civil servant or national civil servant of another member State of the European Union or to a member of the Commission of the European Community, the European Parliament, the Court of Justice or the Court of Auditors of the European Community to carry out or abstain from carrying out an act of his office, mission or mandate, or facilitated by his office, duty or mandate, is punished by ten years' imprisonment and a fine of € 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 to carry out or abstain from carrying out an act specified in the previous paragraph.

SUB-SECTION 2. – OF ACTIVE CORRUPTION BY PERSONS ACTING UNDER THE AUTHORITY OF FOREIGN STATES OTHER THAN THE MEMBER STATES OF THE EUROPEAN UNION AND PUBLIC INTERNATIONAL ORGANISATIONS OTHER THAN THE INSTITUTIONS OF THE EUROPEAN COMMUNITY

ARTICLE 435-3

For the implementation of Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed in Paris the 17th December 1997, 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, to carry out or abstain from carrying out an act of his function, duty or mandate or facilitated by his function, duty or mandate, with a view to obtaining or keeping a market or other improper advantage in international commerce is punished by ten years' imprisonment and a fine of € 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 to carry out or abstain from carrying out an act specified in the previous paragraph.

Prosecution of the misdemeanours referred to under the present Article may only be initiated on the orders of the public prosecutor.

ARTICLE 435-4

For the implementation of Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed in Paris the 17th December 1997, the unlawful proffering, at any time, directly or indirectly, of any offer, promise, gift, present or advantage of any kind to obtain from any judge or prosecutor, juror or any other person holding judicial office, arbitrator or expert (whether nominated by the court or by the parties) or a person entrusted by judicial authority with a duty of conciliation or mediation, in a foreign State or within a public international organisation, to carry out an act or abstain from carrying out an act of his office, duty or mandate or facilitated by his office, duty or mandate, with a view to obtaining or keeping any market or other unjustified advantage in international commerce is punished by ten years' imprisonment and a fine of € 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 to carry out or abstain from carrying out an act specified in the previous paragraph.

Prosecution of the misdemeanours referred to under the present article may only be initiated on the orders of the public prosecutor.

SECTION III. –ADDITIONAL PENALTIES AND LIABILITY OF LEGAL PERSONS

ARTICLE 435-5

Legal persons convicted of any of the offences set out under the present Chapter incur the following additional penalties;

- 1° forfeiture of civic, civil and family rights in accordance with the conditions laid down under article 131-26;
- 2° prohibition to hold, for a maximum period of five years, a public office or to undertake the professional or social activity in the course of which or on the occasion of the performance of which the offences was committed;
- 3° public display or dissemination of the decision in accordance with the conditions set out under article 131-35;
- 4° confiscation, in accordance with the conditions laid down under article 131-21, of the object which was used or intended to commit the offence or the object which is the product of it, except for articles liable to restitution.

Banishment from French territory, either permanent or for a period of up to ten years, may be imposed under conditions set out in article 131-30, may additionally be imposed on any foreigner who is guilty of one of the offences mentioned in the first paragraph.

ARTICLE 435-6

Legal persons may incur criminal liability pursuant to the conditions set out under article 121-2 for the offences set out under articles 435-2, 435-3 and 435-4.

The penalties incurred by legal persons are:

- 1° a fine, in the manner prescribed to under article 131-38;
- 2° for a maximum period of five years:

- prohibition to undertake directly or indirectly the professional or social activity in which or on the occasion of which the offence was committed;
 - placement under judicial supervision;
 - closure of the establishment or one of the establishments of the enterprise which was used to commit the offence;
 - disqualification from public tenders;
 - prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, or to use credit cards;
- 3° confiscation, in accordance with the conditions laid down under article 131-21, of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it, except for articles liable to restitution;
- 4° The public display or dissemination of the decision, in accordance with the conditions set out under article 131-35.

Code of Criminal Procedure

Article 689-8

For the application of the Protocol to the Convention on the Protection of the Communities' Financial Interests made in Dublin on 27th September 1996 and of the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union made in Brussels on 26th May 1997, the following can be prosecuted and judged under the conditions provided for in article 689-1:

- 1° Any community civil servant working for one of the European Communities' institutions or for an organisation created in accordance with the treaties instituting the European Communities and having its seat in France, who is guilty of the misdemeanour provided for in article 435-1 of the Criminal Code or of an offence which damages the financial interests of the European Communities, in the sense of the Convention on the Protection of the Communities' Financial Interests made in Brussels on 26th July 1995;
- 2° Any French person or any other member of the French civil service guilty of any of the misdemeanours provided for in articles 435-1 and 435-2 of the Criminal Code or of an offence which damages the financial interests of the European Communities in the sense of the Convention on the Protection of the Communities' Financial Interests made in Brussels on 26th July 1995;
- 3° Any person guilty of the misdemeanour provided for in article 435-2 of the Criminal Code or of an offence which damages the financial interests of the European Communities in the sense of the Convention on the Protection of the Communities' Financial Interests made in Brussels on 26th July 1995, where these offences are committed against a French national.

Article 706-1

For the public prosecution, investigation and trial of the offences set out in articles 435-3 and 435-4 of the Criminal Code, the district prosecutor for Paris, the investigating judge and the Paris correctional court exercise a concurrent jurisdiction to the one which results from the application of articles 43, 52, 282, the second paragraph of article 663 and article 706-42.

Where they are competent to investigate and prosecute the offences provided for in articles 435-3 and 435-4 of the Criminal Code, the district prosecutor and the investigating judge for Paris exercise their remit over the whole national territory.

*APPENDIX 3***Suggested Further Reading**

- (1) **Phase 1 Report, Review of Implementation of the OECD Anti-Bribery Convention and 1997 Recommendation (published in February 2001):**
<http://www.oecd.org/dataoecd/24/50/2076560.pdf>
- (2) **Laws and regulations for the implementation of the Convention**
<http://www.legifrance.gouv.fr>
 - Criminal Code:
http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm
 - Criminal Procedure Code:
http://www.legifrance.gouv.fr/html/codes_traduits/cpptextA.htm
 - Commercial Code
http://www.legifrance.gouv.fr/html/codes_traduits/commercetextA.htm
 - General Tax Code
 - Monetary and Financial Code
- (3) **Other material**
 - GRECO (Group of States against Corruption) Evaluation Report on France – First Round
[http://www.greco.coe.int/evaluations/cycle1/GrecoEval1Rep\(2001\)4E-France.pdf](http://www.greco.coe.int/evaluations/cycle1/GrecoEval1Rep(2001)4E-France.pdf)
 - GRECO Compliance Report on France – First Round
[http://www.greco.coe.int/evaluations/cycle1/GrecoRC-I\(2003\)10E-France.pdf](http://www.greco.coe.int/evaluations/cycle1/GrecoRC-I(2003)10E-France.pdf)
 - GRECO Evaluation Report on France – Second Round
[http://www.greco.coe.int/evaluations/cycle2/GrecoEval2Rep\(2004\)5E-France.pdf](http://www.greco.coe.int/evaluations/cycle2/GrecoEval2Rep(2004)5E-France.pdf)
 - Reports of the Financial Action Task Force (FATF): <http://www.fatf-gafi.org/>

APPENDIX 4

*i) Convention on Combating Bribery of Foreign Public Officials
in International Business Transactions*

Commentaries on the Convention on Combating Bribery of Foreign Public Officials
in International Business Transactions
(Adopted by the Negotiating Conference on 21 November 1997)

*ii) Revised Recommendation of the Council on Combating Bribery
in International Business Transactions*

Annex
Agreed Common Elements of Criminal Legislation and Related Action

*iii) Recommendation of The Council on the Tax Deductibility of Bribes
to Foreign Public Officials*

iv) Parties to the Convention

Countries Having Ratified/Acceded to the Convention

(i) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

Preamble

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

Have agreed as follows:

Article 1

The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.
3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as “bribery of a foreign public official”.
4. For the purpose of this Convention:
 - a) “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
 - b) “foreign country” includes all levels and subdivisions of government, from national to local;
 - c) “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorised competence.

Article 2

Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3

Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.
2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.
3. Each Party shall 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.
4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4

Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.
4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

Article 5

Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Article 6

Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

Article 7

Money Laundering

Each Party which has made bribery of its own public official 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.

Article 8

Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.
2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

Article 9

Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.
2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.
3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Article 10

Extradition

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.
2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.
3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.
4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

Article 11

Responsible Authorities

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

Article 12

Monitoring and Follow-up

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

Article 13

Signature and Accession

1. Until its entry into force, this Convention shall be open for signature by OECD members and by non-members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.
2. Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

Article 14

Ratification and Depositary

1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.
2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

Article 15

Entry into Force

1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares set out in DAFPE/IME/BR(97)18/FINAL (annexed), and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.
2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

Article 16

Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

Article 17

Withdrawal

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, co-operation shall continue between the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

Annex
Statistics on OECD Exports

| OECD EXPORTS | | | |
|-------------------------|------------------|---------------|---------------|
| | 1990-1996 | 1990-1996 | 1990-1996 |
| | US\$ million | % | % |
| | | of Total OECD | of 10 largest |
| United States | 287 118 | 15,9% | 19,7% |
| Germany | 254 746 | 14,1% | 17,5% |
| Japan | 212 665 | 11,8% | 14,6% |
| France | 138 471 | 7,7% | 9,5% |
| United Kingdom | 121 258 | 6,7% | 8,3% |
| Italy | 112 449 | 6,2% | 7,7% |
| Canada | 91 215 | 5,1% | 6,3% |
| Korea (1) | 81 364 | 4,5% | 5,6% |
| Netherlands | 81 264 | 4,5% | 5,6% |
| Belgium-Luxembourg | 78 598 | 4,4% | 5,4% |
| Total 10 largest | 1 459 148 | 81,0% | 100% |
| Spain | 42 469 | 2,4% | |
| Switzerland | 40 395 | 2,2% | |
| Sweden | 36 710 | 2,0% | |
| Mexico (1) | 34 233 | 1,9% | |
| Australia | 27 194 | 1,5% | |
| Denmark | 24 145 | 1,3% | |
| Austria* | 22 432 | 1,2% | |
| Norway | 21 666 | 1,2% | |
| Ireland | 19 217 | 1,1% | |
| Finland | 17 296 | 1,0% | |
| Poland (1) ** | 12 652 | 0,7% | |
| Portugal | 10 801 | 0,6% | |
| Turkey * | 8 027 | 0,4% | |
| Hungary ** | 6 795 | 0,4% | |
| New Zealand | 6 663 | 0,4% | |
| Czech Republic *** | 6 263 | 0,3% | |
| Greece * | 4 606 | 0,3% | |
| Iceland | 949 | 0,1% | |
| Total OECD | 1 801 661 | 100% | |

Notes: * 1990-1995; ** 1991-1996; *** 1993-1996

Source: OECD, (1) IMF

Concerning Belgium-Luxembourg: Trade statistics for Belgium and Luxembourg are available only on a combined basis for the two countries. For purposes of Article 15, paragraph 1 of the Convention, if either Belgium or Luxembourg deposits its instrument of acceptance, approval or ratification, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 per cent of combined total exports of those ten countries, which is required for entry into force under this provision.

Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

General:

1. This Convention deals with what, in the law of some countries, is called “active corruption” or “active bribery”, meaning the offence committed by the person who promises or gives the bribe, as contrasted with “passive bribery”, the offence committed by the official who receives the bribe. The Convention does not utilise the term “active bribery” simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.
2. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party’s legal system.

Article 1. The Offence of Bribery of Foreign Public Officials:

Re paragraph 1:

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments “to induce a breach of the official’s duty” could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an “autonomous” definition not requiring proof of the law of the particular official’s country.
4. It is an offence within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.
5. “Other improper advantage” refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.

6. The conduct described in paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity.

7. It is also an offence irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

8. It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.

9. Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

10. Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offences described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offences covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

11. The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4:

12. "Public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

13. A "public agency" is an entity constituted under public law to carry out specific tasks in the public interest.

14. A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, *i.e.*,

on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

16. In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

17. “Public international organisation” includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.

18. “Foreign country” is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

19. One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office – though acting outside his competence – to make another official award a contract to that company.

Article 2. Responsibility of Legal Persons:

20. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

Article 3. Sanctions:

Re paragraph 3:

21. The “proceeds” of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.

22. The term “confiscation” includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.

23. Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.

Re paragraph 4:

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Article 4. Jurisdiction:

Re paragraph 1:

25. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

Re paragraph 2:

26. Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offences, the reference to “principles” includes the principles upon which such selection is based.

Article 5. Enforcement:

27. Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, “1997 OECD Recommendation”), which recommends, *inter alia*, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

Article 7. Money Laundering:

28. In Article 7, “bribery of its own public official” is intended broadly, so that bribery of a foreign public official is to be made a predicate offence for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

Article 8. Accounting:

29. Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offences referred to in Article 8 will generally occur in the company’s home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

Article 9. Mutual Legal Assistance:

30. Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re paragraph 1:

31. Within the framework of paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2:

32. Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.

Article 10. Extradition

Re paragraph 2:

33. A Party may consider this Convention to be a legal basis for extradition if, for one or more categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

Article 12. Monitoring and Follow-up:

34. The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:

- i) receipt of notifications and other information submitted to it by the [participating] countries;
- ii) regular reviews of steps taken by [participating] countries to implement the Recommendation and to make proposals, as appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following complementary systems:
 - a system of self evaluation, where [participating] countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;

- a system of mutual evaluation, where each [participating] country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the [participating] country in implementing the Recommendation.
- iii) examination of specific issues relating to bribery in international business transactions;
- ...
- v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

35. The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For non-members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.

36. The follow-up of any aspect of the Convention which is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the Parties to the Convention and, as appropriate, the participants party to another, corresponding instrument.

Article 13. Signature and Accession:

37. The Convention will be open to non-members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by non-members in this Working Group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the Working Group, which follows from the relationship of the Convention to other aspects of the fight against bribery in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to non-members to adhere to the 1997 OECD Recommendation and to participate in any institutional follow-up or implementation mechanism, i.e., in the Working Group. The current procedures regarding full participation by non-members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organisation, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.

**(ii) Revised Recommendation of the Council on Combating Bribery
in International Business Transactions**

Adopted by the Council on 23 May 1997

The Council,

Having regard to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Considering that enterprises should refrain from bribery of public servants and holders of public office, as stated in the OECD Guidelines for Multinational Enterprises;

Considering the progress which has been made in the implementation of the initial Recommendation of the Council on Bribery in International Business Transactions adopted on 27 May 1994, C(94)75/FINAL and the related Recommendation on the tax deductibility of bribes of foreign public officials adopted on 11 April 1996, C(96)27/FINAL; as well as the Recommendation concerning Anti-corruption Proposals for Bilateral Aid Procurement, endorsed by the High Level Meeting of the Development Assistance Committee on 7 May 1996;

Welcoming other recent developments which further advance international understanding and co-operation regarding bribery in business transactions, including actions of the United Nations, the Council of Europe, the European Union and the Organisation of American States;

Having regard to the commitment made at the meeting of the Council at Ministerial level in May 1996, to criminalise the bribery of foreign public officials in an effective and co-ordinated manner;

Noting that an international convention in conformity with the agreed common elements set forth in the Annex, is an appropriate instrument to attain such criminalisation rapidly;

Considering the consensus which has developed on the measures which should be taken to implement the 1994 Recommendation, in particular, with respect to the modalities and international instruments to facilitate criminalisation of bribery of foreign public officials; tax deductibility of bribes to foreign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement;

Recognising that achieving progress in this field requires not only efforts by individual countries but multilateral co-operation, monitoring and follow-up;

General

- I) **RECOMMENDS** that member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.
- II) **RECOMMENDS** that each member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal:
- i) criminal laws and their application, in accordance with section III and the Annex to this Recommendation;
 - ii) tax legislation, regulations and practice, to eliminate any indirect support of bribery, in accordance with section IV;
 - iii) company and business accounting, external audit and internal control requirements and practices, in accordance with section V;
 - iv) banking, financial and other relevant provisions, to ensure that adequate records would be kept and made available for inspection and investigation;
 - v) public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with section VI for procurement contracts and aid procurement;
 - vi) civil, commercial, and administrative laws and regulations, so that such bribery would be illegal;
 - vii) international co-operation in investigations and other legal proceedings, in accordance with section VII.

Criminalisation of Bribery of Foreign Public Officials

- III) **RECOMMENDS** that member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.

DECIDES, to this end, to open negotiations promptly on an international convention to criminalise bribery in conformity with the agreed common elements, the treaty to be open for signature by the end of 1997, with a view to its entry into force twelve months thereafter.

Tax Deductibility

- IV) **URGES** the prompt implementation by member countries of the 1996 Recommendation which reads as follows: “that those member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal.”

Accounting Requirements, External Audit and Internal Company Controls

V) **RECOMMENDS** that member countries take the steps necessary so that laws, rules and practices with respect to accounting requirements, external audit and internal company controls are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business.

A) Adequate accounting requirements

- i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.
- ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.
- iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

B) Independent External Audit

- i) Member countries should consider whether requirements to submit to external audit are adequate.
- ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.
- iii) Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies.
- iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

C) Internal company controls

- i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.
- ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.
- iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.
- iv) Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

Public Procurement

VI) RECOMMENDS:

- i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement;
- ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that member's national laws and, to the extent a member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.¹
- iii) In accordance with the Recommendation of the Development Assistance Committee, member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts.²

International Co-operation

VII) RECOMMENDS that member countries, in order to combat bribery in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

- i) consult and otherwise co-operate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition;
- ii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;
- iii) ensure that their national laws afford an adequate basis for this co-operation and, in particular, in accordance with paragraph 8 of the Annex.

Follow-up and Institutional Arrangements

VIII) INSTRUCTS the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a programme of systematic follow-up to monitor and

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1. Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence.
 2. This paragraph summarises the DAC recommendation, which is addressed to DAC members only, and addresses it to all OECD members and eventually non-member countries which adhere to the Recommendation.

promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:

- i) receipt of notifications and other information submitted to it by the member countries;
 - ii) regular reviews of steps taken by member countries to implement the Recommendation and to make proposals, as appropriate, to assist member countries in its implementation; these reviews will be based on the following complementary systems:
 - a system of self-evaluation, where member countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;
 - a system of mutual evaluation, where each member country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the member country in implementing the Recommendation.
 - iii) examination of specific issues relating to bribery in international business transactions;
 - iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;
 - v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.
- IX) **NOTES** the obligation of member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the OECD Convention.
- X) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises to review the implementation of Sections III and, in co-operation with the Committee on Fiscal Affairs, Section IV of this Recommendation and report to Ministers in Spring 1998, to report to the Council after the first regular review and as appropriate there after, and to review this Revised Recommendation within three years after its adoption.

Co-operation with Non-members

- XI) **APPEALS** to non-member countries to adhere to the Recommendation and participate in any institutional follow-up or implementation mechanism.
- XII) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the Recommendation and its follow-up.

Relations with International Governmental and Non-governmental Organisations

- XIII) **INVITES** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to consult and co-operate with the international organisations and international financial institutions active in the combat against bribery in international business transactions and consult regularly with the non-governmental organisations and representatives of the business community active in this field.

ANNEX

Agreed Common Elements of Criminal Legislation and Related Action

1) Elements of the Offence of Active Bribery

- i) *Bribery* is understood as the promise or giving of any undue payment or other advantages, whether directly or through intermediaries to a public official, for himself or for a third party, to influence the official to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business.
- ii) *Foreign public official* means any person holding a legislative, administrative or judicial office of a foreign country or in an international organisation, whether appointed or elected or, any person exercising a public function or task in a foreign country.
- iii) *The offeror* is any person, on his own behalf or on the behalf of any other natural person or legal entity.

2) Ancillary Elements or Offences

The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting state are recognised as applicable to the offence of bribery of a foreign public official.

3) Excuses and Defences

Bribery of foreign public officials in order to obtain or retain business is an offence irrespective of the value or the outcome of the bribe, of perceptions of local custom or of the tolerance of bribery by local authorities.

4) Jurisdiction

Jurisdiction over the offence of bribery of foreign public officials should in any case be established when the offence is committed in whole or in part in the prosecuting State's territory. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

States which prosecute their nationals for offences committed abroad should do so in respect of the bribery of foreign public officials according to the same principles.

States which do not prosecute on the basis of the nationality principle should be prepared to extradite their nationals in respect of the bribery of foreign public officials.

All countries should review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if not, should take appropriate remedial steps.

5) Sanctions

The offence of bribery of foreign public officials should be sanctioned/punishable by effective, proportionate and dissuasive criminal penalties, sufficient to secure effective mutual legal assistance and extradition, comparable to those applicable to the bribers in cases of corruption of domestic public officials.

Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe.

Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.

6) Enforcement

In view of the seriousness of the offence of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim.

Complaints of victims should be seriously investigated by the competent authorities.

The statute of limitations should allow adequate time to address this complex offence.

National governments should provide adequate resources to prosecuting authorities so as to permit effective prosecution of bribery of foreign public officials.

7) Connected Provisions (Criminal and Non-criminal)

Accounting, recordkeeping and disclosure requirements

In order to combat bribery of foreign public officials effectively, states should also adequately sanction accounting omissions, falsifications and fraud.

Money laundering

The bribery of foreign public officials should be made a predicate offence for purposes of money laundering legislation where bribery of a domestic public official is a money laundering predicate offence, without regard to the place where the bribery occurs.

8) International Co-operation

Effective mutual legal assistance is critical to be able to investigate and obtain evidence in order to prosecute cases of bribery of foreign public officials.

Adoption of laws criminalising the bribery of foreign public officials would remove obstacles to mutual legal assistance created by dual criminality requirements.

Countries should tailor their laws on mutual legal assistance to permit co-operation with countries investigating cases of bribery of foreign public officials even including third countries (country of the offer or; country where the act occurred) and countries applying different types of criminalisation legislation to reach such cases.

Means should be explored and undertaken to improve the efficiency of mutual legal assistance.

**(iii) RECOMMENDATION OF THE COUNCIL ON THE TAX
DEDUCTIBILITY OF BRIBES TO FOREIGN PUBLIC OFFICIALS**

adopted by the Council on 11 April 1996

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the OECD Council Recommendation on Bribery in International Business Transactions [C(94)75/FINAL];

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that the Council Recommendation on Bribery called on Member countries to take concrete and meaningful steps to combat bribery in international business transactions, including examining tax measures which may indirectly favour bribery;

On the proposal of the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises:

- I. RECOMMENDS that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal.
- II. INSTRUCTS the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-Member countries and to report to the Council as appropriate.

(iv) PARTIES TO THE CONVENTION
Countries Having Ratified/Acceded to the Convention*

| | Country | Date of Ratification |
|-----|-----------------|----------------------|
| 1. | Iceland | 17 August 1998 |
| 2. | Japan | 13 October 1998 |
| 3. | Germany | 10 November 1998 |
| 4. | Hungary | 4 December 1998 |
| 5. | United States | 8 December 1998 |
| 6. | Finland | 10 December 1998 |
| 7. | United Kingdom | 14 December 1998 |
| 8. | Canada | 17 December 1998 |
| 9. | Norway | 18 December 1998 |
| 10. | Bulgaria | 22 December 1998 |
| 11. | Korea | 4 January 1999 |
| 12. | Greece | 5 February 1999 |
| 13. | Austria | 20 May 1999 |
| 14. | Mexico | 27 May 1999 |
| 15. | Sweden | 8 June 1999 |
| 16. | Belgium | 27 July 1999 |
| 17. | Slovak Republic | 24 September 1999 |
| 18. | Australia | 18 October 1999 |
| 19. | Spain | 14 January 2000 |
| 20. | Czech Republic | 21 January 2000 |
| 21. | Switzerland | 31 May 2000 |
| 22. | Turkey | 26 July 2000 |
| 23. | France | 31 July 2000 |
| 24. | Brazil | 24 August 2000 |
| 25. | Denmark | 5 September 2000 |
| 26. | Poland | 8 September 2000 |
| 27. | Portugal | 23 November 2000 |
| 28. | Italy | 15 December 2000 |
| 29. | Netherlands | 12 January 2001 |
| 30. | Argentina | 8 February 2001 |
| 31. | Luxembourg | 21 March 2001 |
| 32. | Chile | 18 April 2001 |
| 33. | New Zealand | 25 June 2001 |
| 34. | Slovenia | 6 September 2001 |
| 35. | Ireland | 22 September 2003 |
| 36. | Estonia | 23 November 2004 |

* In order of ratification/accession received by the Secretary General.