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Sacré Bleu! France Sends a Message in the Fight Against Foreign Bribery

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On June 2, 2020, French Minister of Justice Nicole Belloubet issued a « circulaire » (hereafter, the “Circular”) on “criminal policy related to international bribery,” which provides guidance to French prosecutors on the priority of enforcing France’s anti-corruption laws. The Circular reflects another significant French development in the corruption enforcement landscape and sends two important messages to French and foreign companies.¹

First: France will be more proactive and aggressive in the detection and enforcement of foreign bribery.

Second: France intends to follow “the U.S. way” by looking not only at French companies involved in foreign bribery, but also at foreign companies, including U.S. companies, that fall within its jurisdiction, which was broadened under French legislation known as Sapin II.

Background

Historically, France was regularly criticized for its failure to prosecute French companies including by international organizations, such as the Organization of Economic Cooperation and Development (“OECD”) and the Group of States Against Corruption (“GRECO”). In the absence of French prosecution of French companies, other countries, including the United States, historically had brought foreign bribery prosecutions of French companies. The Circular, which is the French Justice Ministry’s first policy memorandum devoted exclusively to foreign bribery, represents another milestone in French efforts over the last few years to put its legal and enforcement systems in line with international best practices, respond to international criticism and ensure that other countries are not the sole prosecutors of French companies for foreign bribery.

In fact, since the creation in 2014 of a national Financial Prosecutor, the Parquet National Financier (“PNF”), which “has national jurisdiction over offenses committed anywhere in France” and handles “the most serious criminal investigations related to economic and financial offenses,” France has been developing a more robust approach to anticorruption enforcement.²

In 2016, France enacted the Sapin II legislation, which brought significant changes in relation to the prevention and elimination of corruption, including: (1) an obligation on French companies to implement a compliance program; (2) protected status for whistleblowers; (3) the creation of a French Anticorruption Agency, the “*Agence française anticorruption*” (“AFA”); and (4) the establishment of a legal public-interest agreement as an alternative to criminal prosecution, known as Convention Judiciaire

d'Intérêt Public ("CJIP"), which is akin to a deferred prosecution agreement ("DPA") in the United States.³

Following the enactment of Sapin II, the PNF entered into CJIPs with two major multinationals, Société Générale (in 2018) and Airbus (in 2020), both of which involved coordinated resolutions with the PNF and its foreign counterparts, including the U.S. Department of Justice and the United Kingdom's Serious Fraud Office.⁴

A More Proactive Detection and Enforcement

Beyond its recognition of the PNF's leadership role in French foreign bribery cases, the Circular identifies a multitude of actors who may bring matters to the PNF's attention, ranging from the French tax authorities and the Tracfin (the French equivalent to Fincen) to agencies like the French Export Credit Agency (the equivalent of the Export-Import Bank of the United States) or the French Agency for Development (the equivalent of the United States Agency for International Development ("USAID")), as well as the AFA. It invites the PNF to look carefully at media reporting, whistleblower allegations, Mutual Legal Assistance requests from other countries that implicate French companies or companies with a presence in France, and complaints brought by anticorruption Non-Governmental Organizations ("NGOs") specially designated by the French Ministry of Justice.⁵

Further, the Circular calls on the PNF to look in particular at seven economic sectors identified as high risk by the OECD and the EU: construction, extractive industry, transport, telecommunications, pharmaceutical industry, energy, and defense.

The Circular makes a concerted push for voluntary disclosure by companies subject to French jurisdiction. It notes that voluntary disclosure may be in a corporation's best interests, particularly where it leads to a CJIP, which can avoid the debarment that could arise following a conviction. In a new approach, the Circular invites the PNF to enter into a dialogue with the two major French business associations "to define and implement a framework and practical ways to encourage spontaneous disclosure." It remains to be seen if these associations will respond to this request from the PNF and/or whether companies will choose to voluntarily disclose potential misconduct without clearer guidance regarding the benefits of disclosure to the PNF.

Last, but not least, the Circular sets three criteria that determine the availability of a CJIP: (1) the corporation's lack of a criminal history; (2) the voluntary nature of the corporation's disclosures; and (3) the degree of cooperation with the judicial authorities by the corporation's leadership, including a particular focus on the identification of individuals involved in the underlying corruption. The Circular includes an explicit reference to DOJ's policy on Individual Accountability for Corporate Wrongdoing (e.g., the Yates memo), suggesting that French prosecutors will follow the U.S. lead and undertake at least some prosecution of individuals for foreign bribery offenses.

A More Aggressive Assertion of French Criminal Jurisdiction That Creates Risk for Foreign Companies with a Presence in France

For foreign companies with a presence in France, the Circular's most important section is the explicit reminder that, following Sapin II, French law can apply to any instance of corruption or bribery committed abroad by persons or corporate entities "residing usually, or exercising all or part of [their] economic activity, in French territory."

Until now, this provision, very much inspired by the U.K. Bribery Act, has never been applied by French authorities and its exact scope was unclear. The Circular represents an important shift by the French authorities—where available information implicates individuals and entities in foreign bribery. In such case, and however it learns about the facts, the PNF is expected to “systematically verify” whether it has jurisdiction over those involved in foreign bribery.

The Circular further states that the French government’s legislative intent reflected a broad reading of the concept of the exercise of economic activity in France. Thus, corporations “exercising all or part of [their] economic activity in France” include, at a minimum, any foreign entity “with a subsidiary, branches, commercial offices or other office operating in France, even if these would not have their own legal personality.”

In other words, a U.S. company could find itself subject to French jurisdiction for a bribery offense committed in any country in the world (other than the U.S. and France), by the simple fact that it has a representational office in France, and even if such office played no role in the bribery scheme. This is broader than the jurisdictional scope of the U.S.-equivalent foreign bribery law, the Foreign Corrupt Practice Act (“FCPA”), which limits the U.S. territorial jurisdiction to acts taken while in the territory of the United States related to the bribery scheme. In contrast, it is unclear whether a listing on a French stock exchange would trigger jurisdiction, which does occur under the FCPA.

While it is too soon to know how or whether the PNF will make use of this extremely broad jurisdiction, the Circular emphasizes the “judicial sovereignty” of French prosecutors, to use Minister Belloubet’s own words. As the Minister, to which the PNF is hierarchically attached, made crystal clear—“we (the French) need to overtake foreign judicial authorities, in reality the Americans.”⁶ In this context and taking into account the current political environment, one can expect that the PNF will seek to deliver concrete results by bringing foreign bribery cases both against French companies and, potentially, U.S. or other companies that have representational offices in France.

Takeaways

In light of the posture of the French Ministry of Justice, as set forth in the Circular and Minister Belloubet’s public comments, a company with any presence in France should be mindful that there is a new authority to consider in the enforcement of foreign bribery and incorporate the following points into its ongoing anti-corruption analysis:

1. Assess its risk profile, including whether it is in one of the sectors that France considers high-risk, and whether the company may be subject to this newly expanded French jurisdiction in light of even minimal business activity and presence in France;
2. Better understand its own global enforcement risks by France, the U.S. or other enforcement authorities, based on its own unique risks, among other criteria, including, industry, nationality, and competitors and how those factors could be influenced by the changing political dynamics in anti-corruption enforcement, including the role of international institutions (OECD,⁷ GRECO, and others), national policies and priorities, and increasingly competitive and tense international relations;
3. In light of changing enforcement environments, ensure that its compliance program meets all relevant standards under the FCPA, U.K. Bribery Act and Sapin II (and other applicable legislation such as the future German law on criminal liability for legal persons); and

4. Before initiating any voluntary disclosure to French, U.S., or other authorities, carefully assess with counsel experienced in multijurisdictional resolutions what are the pros and cons of individual or multiple disclosures, particularly in light of the increasing risk that multiple countries may seek to claim jurisdiction.

France's recent efforts are only the latest of an ever evolving enforcement landscape that must be carefully understood by companies that could be subject to multiple enforcement authorities. Without an understanding of these legal and political developments, companies may focus too narrowly on traditional enforcement authorities, like the U.S. or U.K., in developing their strategies, and neglect the importance of emerging players like France.



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¹ The Circular is available in French on the website of the Ministry of Justice. <http://www.justice.gouv.fr/bo/2020/20200611/JUSD2007407C.pdf>. See also, <https://www.wsj.com/articles/france-moves-to-embrace-fight-against-corporate-corruption-11592003246>.

² <https://www.tribunal-de-paris.justice.fr/75/missions>.

³ <https://www.paulhastings.com/publications-items/details/?id=37f4ea69-2334-6428-811c-ff00004cbded>.

⁴ All the CJIPs are available at <https://www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public>. Another CJIP related with foreign bribery and dealt exclusively by France has been entered.

⁵ A few years ago France introduced a unique system by which designated anti-corruption NGOs (as of today there are only three, including Transparency International France) can initiate a legal action.

⁶ Interview given to Agence France Presse on 3 June, 2020. The original French quote reads as follows « *il faut prendre de vitesse les autorités judiciaires étrangères, en réalité les Américains* ».

⁷ The OECD will evaluate France's implementation of the OECD Anti Bribery Convention in 2021.

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