

# EFFECTIVE LEGAL AND PRACTICAL MEASURES FOR COMBATING CORRUPTION: THE FRENCH SYSTEM

*Thomas Cassuto\**



*XVIII – “When the country is confused and in chaos, loyal ministers appear.”*  
Lao Tsu, *Tao Te Ching (Book of the Way and its Virtue)*, 6th c. BC

*“O, that estates, degrees, and offices  
Were not deriv’d corruptly, and that clear honour  
Were purchas’d by the merit of the wearer!  
How many men should cover that stand bare!  
How many be commanded that command!”*  
William Shakespeare, *The Merchant of Venice*, Act II, scene 9

This paper outlines the French system for combating corruption from the viewpoints of preventive justice and criminal justice. The two are complementary and rely on common institutions.

## I. STRENGTHENING THE LEGAL SYSTEMS OF CORRUPTION PREVENTION

### A. Introduction

Corruption is a serious problem affecting democracy and the economy and engendering grave consequences for the security of goods and persons. Corruption is to economic life and public life what doping is to sports, namely an illicit, camouflaged means of breaking the rules to gain undue advantage.

The conventional definition of corruption is based on the concepts of a corruptor, a corrupted party, and a corruption pact.

These have become standard definitions under the influence of international law, particularly the United Nations Conventions.

However, corruption is actually more complicated and should be described as a corruption system, for purposes of critical analysis of an abnormal, antisocial phenomenon as well as for detection and suppression. Corruption is not an isolated fact, nor is it an end in and of itself. Rather, it is a means of securing benefits. A corruption pact is forged from the converging interests of the corruptor and the corrupted party.

A corruption system corresponds to a set of anomalies in the source, conditions of conclusion and terms of performance of a contract (public in particular), as well as in the personal and financial relationships of the various protagonists. The economic and financial anomalies combine with laundering or reverse laundering of money or assets. More generally, these anomalies are often only subsidiary offences in the act of corruption. For example, favouritism is frequently the main objective for the parties to a corruption pact. This pact is fulfilled through manipulative accounting, embezzlement by the corruptor and laundering by the corrupted party.

Prevention, like the fight against corruption, can only be dealt with by gaining a thorough understanding of these different aspects - the economic links, personal ties, and the factual sides of the functioning of a corruption system.

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Several cases tried in France from the 1990s to 2000 underlined the extent of the phenomenon, its role in political party financing and its foothold in a variety of economic sectors. The so-called public procurement scandals involving secondary schools in the Paris region, that of the public housing agency *Office Public d'Habitations à Loyers Modérés* or of naval shipbuilder *Direction des Chantiers Navals* illustrate the risks of corruption in the functioning of public institutions, as well as the resulting detrimental effects on the safety of goods or buildings and the strain of extra costs on government finance.

Corruption is common practice at international level and until recently may have been encouraged - wrongly - by certain States or even justified by certain observers referring to it as a necessary evil.

However, the scale of the affairs exposed in recent years led to a long succession of measures designed to set strict rules for transparency and regularity in transactions, prevention of corruption and stronger instruments for corruption detection, suppression and punishment.

Practices took these instruments completely on board and adopted a system approach to the fight against corruption.

In an edict in 1302, King Philip the Fair prohibited royal officers from demanding or accepting gratuities in any form. The French Revolution made combating corruption a principle. The 1789 declaration of the rights of man and the citizen criticized "the ignorance, neglect, or contempt of the rights of man [which] are the sole cause of public calamities and of the corruption of governments". And of course Shakespeare made it a major theme of his play *The Merchant of Venice*. In truth, corruption shows contempt for and willingness to sacrifice the common good for personal gain.

Corruption must be combated.

## **B. Definition**

The definition of corruption under French law is classic in its principle. Its scope has been broadened. Two types of corruption are defined. Passive corruption is the soliciting or receiving of an undue advantage of any kind by a person in order that that person perform an act in the course of his or her business activities. Active corruption is promising or giving an undue advantage of any kind to a person in order that that person perform an act in the course of his or her business activities. By this definition, the punishment of the corrupt party or the corruptor may be envisaged separately. The definitions of active corruption and passive corruption both make reference to the corruption pact, which is the pivotal factor in proving corruption. To date, a gratuity given after the fact or a gratuity received after the fact cannot be characterized as an act of corruption. It may well be considered a sign of corruption, but never a sufficient demonstration. Legally, it is necessary to demonstrate that the agreement between the corruptor and the corrupted party preceded the latter's act.

This distinction can have unfortunate effects.

The fact is that public authorities and companies alike increasingly warn their employees that they should refuse gratuities in any form or gifts from business partners, except possibly those of modest value offered in customary or formal circumstances (e.g. end-of-year or official ceremonies).

The definition of corruption was broadened in scope following several legislative reforms. Now acts of corruption committed by officials of the European Communities, the European Union Member States, foreign States and public international organizations are punishable in France.

Corruption between players in the private sector is also punishable. The labour code punishes corruption of employees from another company.

This broader legal definition of corruption reflects a reality and corresponds to the implementation of international legal instruments adopted notably in the European Union and the United Nations. A particular feature in the latter case is that punishment of a foreign official does not require compliance with the dual criminality rule.

## **C. Means of Corruption Control**

### **1. In the Field of Public Law**

Regulation of political life is a first approach. Many reforms have been implemented to clarify the financing of political parties, verify elected officials' personal wealth and, of course, prevent risks of conflicts of interest.

Hence, holding elected office is absolutely incompatible with certain public functions. In addition, the number of elected offices that a single person can hold simultaneously is now limited.

Control over financing of electoral campaigns and political parties has been stepped up with the creation of the *Commission Nationale des Comptes de Campagne et des Financement Politiques* (National Campaign Accounts and Political Financing Commission). Party financing is partly public, proportionate to election results and capped for the presidential elections and other major elections. Private funds must be collected by an intermediary or agent and the amount a single donor can contribute is limited. Funds to finance electoral campaigns can only be donated by individuals.

Elected officials and members of the government have to report their personal wealth at the beginning and end of their term of office. These reports are published in the *Journal Officiel*.

### **2. Regulation of Public Activities**

Public agents are bound by such obligations as disinterested service, discretion and, of course, respect for the rule of law. Compliance with these obligations by definition excludes any behaviour that could characterize an act of passive corruption or participation in a corruption system.

Ethics commissions in each administration oversee the updating, interpretation and effective implementation of these rules. One of these commissions' essential functions is to render decisions on the transfer of civil servants to the private sector. Placement in non-active status is subject to authorization. In the event of resignation, failure to comply with incompatibility is subject to sanctions.

Certain public activities are watched with particular care. The most important are oversight of public procurement or exposed sectors such as real estate and, more generally, any administrative departments issuing mandatory administrative permits (e.g., residence or building permits). A number of procedures have brought to the fore the vulnerability of agents and the pressure sometimes exerted on them by repeated enticements from the public. Under certain circumstances, the low pay of public agents may encourage them to yield to the temptation.

The risks are naturally higher in the field of procurement awarding. In such cases, the administration's economic power may persuade on the one hand private contractors to spontaneously initiate a corruption process in order to circumvent procurement rules or, on the other, public agents to solicit compensation in exchange for organizing public procurement award procedures on the basis, for example, of proportionality criteria. The scandal of the *Ile de France* secondary school contracts offers a perfect illustration. The victims were the taxpayers, who had to pick up the bill, the common interest, which generally loses out when contracts are poorly performed, and the competing bidders, who were either in effect excluded or refused to go along with the scheme.

Three major reforms have been implemented in this area since 2001 to guarantee transparency in procurement award procedures and to enable the administration to intervene more effectively, in particular by retaining some flexibility in smaller contracts, for example. Still, two series of difficulties may arise. First, overconfidence in the formal strictness of contract award procedures risks leaving room for spurious unofficial systems to be put together. Second, the string of reforms adversely affects proper implementation of the law over time, especially with regard to enforcement, and leads to excessive red tape which may discourage economic operators.

Tax and customs administrations also seem particularly vulnerable because they often have confidential strategic information and exercise significant financial power in deciding whether or not to adjust a taxpayer's liability or destabilize a competitor by conducting overzealous audits.

#### **D. Prevention Measures and Upstream Investigations**

There are a number of institutions, independent bodies and oversight mechanisms that work to detect and combat corruption. They play a role in both dissuasion and suppression, entertaining a special relationship with the judicial institutions.

##### 1. Institutions, Independent Bodies and Oversight Mechanisms

The institutions are listed below but are not described in detail. Further information can be found on their websites (some of which are multilingual).

- *The Service Central de Prévention de la Corruption* (Central Service for the Prevention of Corruption), attached to the Ministry of Justice, performs functions which include training, assistance and promoting corruption control. It draws up an annual report covering various topics.  
<http://www.justice.gouv.fr/index.php?rubrique=10017&ssrubrique=10028&article=12081>
- *The Mission Interministérielle d'Enquête sur les Marchés* (Inter-Ministerial Unit for Procurement Investigations) and the public service delegation conventions.  
[http://www.finances.gouv.fr/mission\\_marches/](http://www.finances.gouv.fr/mission_marches/)
- TRACFIN, the unit responsible for collecting intelligence on opaque or suspicious financial transactions and, where necessary, referring its findings to the courts.  
<http://www.tracfin.minefi.gouv.fr/>
- FICOBA, the central record of bank accounts, under the authority of the Ministry for the Economy, Finance and Employment, is consulted to identify all bank accounts held in France by an individual or corporate entity.
- The General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF), part of the Ministry for the Economy, Finance and Employment, has broad auditing and investigation powers, particularly in the area of competition.  
<http://www.finances.gouv.fr/DGCCRF/>
- The devolved government services (regional prefectures) have power to control the administrative acts and finances of local authorities.  
[http://www.interieur.gouv.fr/sections/a\\_1\\_interieur/les\\_prefectures/votre\\_prefecture](http://www.interieur.gouv.fr/sections/a_1_interieur/les_prefectures/votre_prefecture)
- *The Commission Nationale des Comptes de Campagne et des Financements Politiques*, the national agency controlling electoral campaigns and political financing.  
<http://www.cncfp.fr/>
- *The Commission pour la Transparence Financière de la Vie Politique* verifies that elected officials do not gain personal wealth irregularly while in office.  
<http://www.commission-transparence.fr/>
- *The Conseil de la Concurrence*, an independent administrative authority, plays an indirect role in combating corruption by taking action against anticompetitive practices, which often underpin corruption pacts.  
<http://www.conseil-concurrence.fr/user/index.php>

The work accomplished by nongovernmental organizations should also be mentioned. Their reports are useful indicators, providing guidance for political policies. Two NGOs - Ethifrance, a limited company with SCIC status (common-interest co-operative) and an independent agency which supplies extra-financial analysis and specializes in Corporate Social Responsibility (CSR) audits for investors, and the French chapter of Transparency International - joined forces to draft a 2005-2006 report on major French companies' anti-corruption policies and procedures.

Certain results for France are worth mentioning. A questionnaire was sent to SBF 120 companies (introduced on 8 December 1993, the SBF 120 index contains the 40 stocks from the CAC 40 index and 80 stocks listed on the Premier Marché).

A summary was compiled of the 20 replies received (from AGF, Air liquid, Alcatel, Accelor, Axa, BNP Paribas, Carrefour, Dexia, EADS, Essilor International, France Télécom, Klepicue, La Faye, Michelin,

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Renault, Sanofi, Aventis, Scor, Véolia Environnement, Société Générale, Sodexo, Ste Microtechnics, Suez, Thalès, Total).

- 50% of the companies that responded had to deal with issues of corruption (25% passive corruption, 12.5% concerning active corruption of “high-level” public agents);
- 58% of the companies in the sample cited procurement as the most exposed function;
- 37.5% of the companies reported having been approached in extortion attempts “in certain countries”. 29% reported being approached for a bribe in Asia; 21% in Africa; and 17% in South/Central America and Eastern Europe;
- 58% of the companies in the sample reported having set up an internal alert system.

The international law firm, Simmons & Simmons, and Control Risks, a specialized risk prevention consultancy, periodically publish a joint survey on corruption: *International Business Attitudes to Corruption*. Interviews are conducted with 350 company heads in seven countries (France, the United States, China, Brazil, the Netherlands, Great Britain and Germany). According to one of the surveys, one out of three French companies lost a contract during the past 12 months for refusing to pay a bribe.

Only 10% of French companies, if faced with corrupt practices, would be prepared to expose these activities to the authorities.

Consulting firm PricewaterhouseCoopers publishes an index measuring economic, legal and ethical transparency vs. capital cost and access in 35 countries world-wide, rated on the basis of several components including corruption (the Opacity Index – [www.opacityindex.com](http://www.opacityindex.com)).

As a means of raising employee awareness and enhancing the effectiveness of corruption prevention systems, the *Service Central de Prévention de la Corruption* (SCPC) offers French private-sector companies the possibility of signing partnership agreements. Their purpose is to establish dialogue and information exchange, propose improvements in corporate codes of conduct and, at company request, take part in awareness-raising sessions for personnel most exposed to risks of corruption. This approach is the counterpart to the prevention measures implemented within the administrations. Through it, employees are better informed of their legal rights and duties and the means to protect themselves and their company against the risks of corruption.

Transparency in combating corruption is the subject of developments in various applicable legal standards and voluntary guidelines. In particular, the OECD's Guidelines for Multinational Enterprises sets forth standards of this kind recommended to enterprises. In 2004, a tenth principle was added to the United Nations Global Compact, specifically on the challenge of corruption. Lastly, the United Nations Merida Convention, which entered into effect in 2005, draws the signatory States' attention to the challenge of information and dialogue with civil society.

One might conclude that effectively combating corruption in all its forms is an integral part of Corporate Social Responsibility (CSR) policies founded on enforceable standards and guidelines. Unfortunately, a Novethic/SCPC survey shows that, overall, reporting on the fight against corruption is not satisfactory, whether in annual or sustainable development reports or in corporate website postings. [http://www.unglobalcompact.org/docs/issues\\_doc/7.7/BACbookFINAL.pdf](http://www.unglobalcompact.org/docs/issues_doc/7.7/BACbookFINAL.pdf)

In addition, at urging by both the FATF and the European Union, financial institutions (e.g., banks, insurance companies, stock brokerage houses), accounting professionals (e.g., accountants, auditors) and legal professionals (e.g., lawyers, notaries) have in recent years been required to declare dubious transactions, violations and suspicious transactions that could be linked to a laundering operation.

Under article L 562-1 (11) of the monetary and financial code, auditors and accountants are required, under the sanctions set forth in article L 563-6, to report any sums or transactions suspected of illicit source to TRACFIN (unit for intelligence processing and action against secret financial channels), worded as follows:

- “Any sums entered in their books which might derive from [...] corruption”;
- “Transactions involving sums which might derive from [...] corruption”.

They must additionally comply with a general obligation of vigilance pursuant to article L 563-3 by which *“any major transaction involving sums of a unitary or total amount greater than a sum determined in a Conseil d’Etat decree and which, without coming within the scope of Article L. 562-2, is subject to unusually complex conditions and does not appear to have any economic justification or lawful purpose, must be subject to special scrutiny”*, requiring due diligence (R. 563-2 of the CMF: €150,000).

An analysis of TRACFIN annual reports casts doubt on the extent to which this has materialized given the low rate of participation by accounting professionals in the declaration system compared with the overall volume of declarations received. Still, taking into account their rising participation and the relative newness of the legislation, this mechanism will undoubtedly become a significant source of information.

Article L 820-7 of the commercial code imposes criminal penalties on any person failing to disclose *“any criminal facts he is aware of”* to the Public Prosecutor.

Each year, there are 500 information reports, including 200 in Paris. Nevertheless, experience shows that in virtually all cases declared are *“obscuring offences”* (misappropriation of corporate assets, forgery, etc.).

The duality of declaring *“suspected of illicit origin”* to TRACFIN and *“criminal facts he is aware of”* to a Public Prosecutor’s office, beyond posing a semantic problem, does call for extreme caution in making the appropriate choice or simultaneous declarations, in that according to case law a declaration must be made to the Public Prosecutor’s office even if the criminal character of the offence cannot as it stands be defined with accuracy (Court of Cassation, Criminal Chamber, 15 September 1999).

Accounting professionals are likewise directly concerned by Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005, to be adopted in national law by 15 December 2007, on the use of the financial system for the purpose of money laundering and terrorist financing (3<sup>rd</sup> Directive).

The Directive broadened the scope of declaration to serious crimes defined as *“all offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year”*.

Such declarations constitute a first-rate information collection source for the detection of corruption activities. The reporting procedures may vary. Declarations are submitted to TRACFIN by financial institutions and by certain legal and accounting professionals. In some cases, they must be transmitted directly to the Public Prosecutor. Declarations may be cross-cut by TRACFIN, which then transmits the files in which suspicion of laundering is most strongly substantiated to the Public Prosecutor. The Public Prosecutor evaluates the next steps and may decide to request an investigation by police services or the opening of a judicial investigation.

The exercise of control and administrative penalties for breaches of legal provisions may be brought before the administrative judge and before financial and administrative jurisdictions (court of auditors for national public corporations, the central government and bodies supported by public funding and regional chambers of accounts for budget management of local authorities). Whenever criminal offences are established, every public body, every government service or civil servant has the obligation to notify the Public Prosecutor.

Article 40, 2<sup>nd</sup> paragraph of the code of criminal procedure provides that *“every constituted authority, every public officer or civil servant who, in the performance of his duties, has gained knowledge of the existence of a felony or of a misdemeanour is obliged to notify forthwith the district prosecutor of the offence and to transmit to this prosecutor any relevant information, official reports or documents”*.

At European level, institutions also take part in the prevention of corruption. The European Court of Auditors carries out public audits on the management of European funds. It works closely with the national courts of auditors. OLAF, for its part, is an investigative service operating independently of the Commission

(the European Union's executive body). OLAF has broad investigative powers within the Commission's services and can assist national services in their inspections and investigations.

Prevention of corruption is based, then, on a complete arsenal of suppression and dissuasion. This is where the concept of a corruption system becomes crucial. There is every reason to link up prevention of corruption with the punishment of such kinds of behaviour but also with activities that are closely related or associated. By extension, several offences can be included. This further entails broadening the scope of sanctions to target the proceeds of crime. That is why the French penal code grouped a number of offences together under a chapter on "breaches to the duty of honesty".

- Improper demands or exemptions in relation to taxes: article 432-10 of the penal code;
- Active and passive corruption: articles 432-11, 433-1 of the penal code; articles 435-1, 435-2, 435-3 and 435-4 for foreign public agents or members of public international organizations; article 445-1 of the penal code for corruption of persons not exercising a public function;
- Influence peddling: articles 432-12 and 433-1 of the penal code;
- Unlawful taking of interest: article 432-12 of the penal code;
- Offence against freedom of access and equality for candidates in respect of tenders for public service and delegates public service (favouritism); article 432-14 of the penal code;
- Unlawful taking of interest by a former civil servant; article 433-13 of the penal code;
- Misappropriation of public funds; article 432-15 of the penal code.

The last reform to date is particularly worth mentioning. The Act of 13 November 2007 incorporated two articles on corruption in the private sector:

"Article 445-1. - Making or tendering, at any time, directly or indirectly, offers, promises, gifts, presents or any other advantages, to obtain from a person who, not being a public official or charged with a public service mission, holds or occupies, within the scope of his professional or social activity, a management position or any occupation for any person, whether natural or legal, or any other body, the performance or non-performance of any act within his occupation or position or facilitated by his occupation or position, in violation of his legal, contractual and professional obligations, is punished by five years' imprisonment and a fine of €75,000.

The same penalties apply to giving in to any person referred to in the above paragraph who solicits, at any time, directly or indirectly, offers, promises, gifts, presents or any other advantages, to carry out or refrain from carrying out any act referred to in the above paragraph, in violation of his legal, contractual or professional obligations".

Taking associated offences into account is a key factor in the detection of corruption activity. These offences include:

- Money laundering: article 324-1 of the penal code;
- Financing of terrorism: article 421-2-2 of the penal code;
- Misappropriation of corporate assets and embezzlement: article 314-1 of the penal code, articles L 242-6 and L 241-3 of the *code des sociétés*;
- Insider trading: article L 465-1 of the monetary and financial code;
- More generally, offences of disclosure of confidential information (breach of professional secrecy): article 226-13 of the penal code, etc.

French criminal law recognizes the liability of legal persons, which must be envisaged wherever possible.

The criminal law allows the identification, the seizure and the confiscation of the proceeds of crime, and also the pronouncement of the prohibition against sentenced persons taking part in public or political activities, etc.

Naturally, the actual sanction and the publicity around procedures constitute effective tools in preventing corruption and a driving force in modernizing institutions and administrative procedures.

## 2. Prevention Mechanisms

Within the Administration, various mechanisms contribute to the detection and prevention of corruption:

- Internal hierarchical control. This is an inherent principle in any administration and an obvious mechanism in matters of control.
- Control of expenditure. This mechanism is generally multifaceted. The main administrations have inspection services which the Minister concerned can utilize to order an administrative investigation, the findings of which may be grounds for legal action.
- Distinction between authorizing officers and paymasters, the latter incurring financial liability when expenses paid are irregular.
- Ethics commissions, which participate in the prevention of conflicts of interest, which can be the underside of an incipient corruption system, particularly those based on influence peddling.
- Drafting and dissemination of codes of conduct along with appropriate training can also raise public agents' awareness of risks, promote whistleblowing procedures and, of course, explain the risks incurred in the event of breaches of ethical obligations when these constitute offences. A number of codes were drawn up in the national police force, the General Tax Directorate and the postal service (public enterprise). A code is currently being drafted by the *Conseil Supérieur de la Magistrature* (High Judicial Council).
- Increasingly, the accent is placed on the level of initial and continuing training of public agents. Promotion of the concept of a risk identification strategy is also necessary, although such an approach is all too rare.
- Disciplinary (administrative) action for breaches of legal obligations, even when they do not constitute an offence. Such measures are scaled according to the seriousness of the offence. They may complement criminal or financial penalties.
- The status of public agents must also be the focus of particular attention. The level of remuneration may be a risk factor. Another factor that can foster abuse is the absence of job rotation within an administration or geographically: prolonged proximity with local or habitual contractors can favour the development of corruption systems. Refusing job mobility - perhaps implicitly a refusal of promotion - may point to participation in a corruption system: the material gain generated by promotion may be far more limited than the benefits reaped in an illicit manner. A permanently small-scale administrative structure or the existence of local monopolies limit the effectiveness of hierarchical control and can also foster the emergence of corruption systems.
- Generally speaking, a blurring of the distinction between a public agent's personal, private activities and his professional activities may lead to non-compliance with ethical principles and rules of professional conduct, the first step towards participation in a corruption system.

Managers and public agents must be constantly attentive and vigilant. Corruption is an occult phenomenon breeding silent victims. Hence, there is every reason to fear that the persistence of established situations is an aggravating risk factor in the emergence of corruption systems. Prevention can only be effective if control procedures are real, effective and regular.

## II. THE FRENCH ANTI-CORRUPTION SYSTEM

*"Wisdom and goodness to the vile seem vile:*

*Filths savour but themselves."*

William Shakespeare, *King Lear* (1606)

Corruption is a particularly complex phenomenon to define. A corruption pact is in fact characterized by identifying the counterpart of the irregular act agreed by the corrupted party, namely, compensation.

First of all, anti-corruption enforcement generally covers the economic and financial sphere. In a sophisticated corruption system, funds or assets are transferred on several levels and at different points in time. Funds are "blackened", i.e. removed from official channels, by the corruptor and then laundered by the corrupted party. Each level may call for extremely opaque and complex arrangements. Furthermore, the

transactions may occur before or after the corrupted party's irregular act. As a result, the reach of investigations is vast, in both scope and time.

Judicial anti-corruption activity thus calls for varied technical competencies, in addition to a capacity for combining and co-ordinating those competencies.

The globalization of trade offers a favourable environment for corruption to develop. The logical consequence is the globalization of law. The second corollary is the opportunity offered to strengthen anti-corruption instruments.

This aspect necessitates close analysis of the international approach to a complex criminal phenomenon, likewise transnational.

In a global approach to corruption systems, legal action can be reoriented in light of the evidence collected. Several investigations can be conducted at the same time, and the findings of those investigations may be useful in supporting various aspects of a case.

The French legal system, rooted in the French Revolution and given form by Napoleon, served as a model for numerous other legal systems, particularly in Europe. A particularity of the system, sometimes arousing Britons' envy, is the examining magistrate. As a rule, the criminal justice system is composed of judges and the services of the Public Prosecutor (181 throughout France, under the authority of 33 Prosecutors General) subordinated to the Ministry of Justice. Commonly, the Public Prosecutor institutes and conducts criminal proceedings and supports the indictment at trials. The judge's role is to apply and interpret the law, reach a verdict and set the sentence.

Criminal offences are broken down into three categories: *crimes* or felonies (the most serious tried by a *Cour d'Assises* composed of professional judges and a jury), *délits* or misdemeanours (punishable by imprisonment for not more than ten years and tried by the *tribunal correctionnel* or magistrates' court), and *contraventions* or petty offences (the least serious may be tried by the *tribunal de police* or police court).

The code of criminal procedure provides that felony cases (the most serious) must commence with a preliminary examination by an independent *magistrat du siège* or "judge of the bench". The code also provides that the Public Prosecutor may request an examination in criminal cases of a serious, or above all, particularly complex nature.

The examining magistrate has broad powers: search, seizure, appointment of expert witnesses, placement under judicial examination, filing of formal charges—i.e. delivery of evidence, issuance of warrants, particularly arrest warrants, and detention orders against defendants. Since 1 January 2000, the magistrate is no longer empowered to place a defendant in pre-trial detention, but is competent to refer the case to another magistrate, the *juge des libertés et de la détention*, who can order imprisonment.

Contested by some, the examining magistrate has come to the fore as a full-fledged jurisdiction, essential and particularly effective in handling cases of corruption. One of the most telling examples in recent years was the *Elf Aquitaine* case, which led to the conviction of several senior executives and managers after a corruption system was uncovered. A distinctive feature of this case was the probe into the acquisition of a refinery in Germany. The French trial clearly revealed acts of influence peddling to Germany, but the enquiry in that country did not uncover any facts proving the allegations.

Over the last five years, an average of roughly 150 cases a year have been tried in France for acts of corruption or in the same category. Some acts are committed in a local context, others on a national scale and still others involve international transactions.

The grounds for conviction were generally the following offences (see above):

- Improper demands or exemptions in relation to taxes: article 432-10 of the penal code;
- Active and passive corruption: articles 432-11, 433-1 of the penal code; articles 435-1, 435-2, 435-3 and 435-4 for foreign public agents or members of public international organizations; article 445-1 of

- the penal code for corruption of persons not performing a public function;
- Influence peddling: articles 432-12 and 433-1 of the penal code;
- Unlawful taking of interest: article 432-12 of the penal code;
- Offence against freedom of access and equality for candidates in respect of tenders for public service and delegation of public service (favouritism); article 432-14 of the penal code;
- Unlawful taking of interest by a former civil servant: article 433-13 of the penal code;
- Misappropriation of public funds: article 432-15 of the penal code;

Most of these offences are punishable by imprisonment for 10 years and a fine of €375,000, to which are naturally added any compensatory damages that may be awarded to injured parties for the loss suffered. The idea is that the corrupted party's wrong is at least equal to that of the corruptor.

These provisions were gradually amended for transposition into French law of the principles established by the European Union's Convention on the Fight against Corruption of 26 May 1997, the Council of Europe's Criminal Law Convention on Corruption of 21 January 1999 and of course the United Nations Convention against Corruption, adopted on 31 October 2003.

Adopted in the national law, this international system harmonizes legislation, thereby facilitating judicial co-operation between States. Such co-operation is a vital factor in combating corruption. In economic and financial areas as well, the entry into force of particularly effective international instruments helped broaden co-operation. These forms of co-operation are fully consistent with the French anti-corruption system.

#### **A. Structuring of Anti-Corruption Implementation by French Judicial Authorities: Specialization and Centralization**

Corruption and connected offences are considered relevant to the economic and financial sphere. Since 1994, efforts have been made for the specialization of judges. In each court of appeal at least one court has jurisdiction to hear economic and financial cases. Where that jurisdiction is concurrent with that of geographically competent courts, regionally-based poles of expertise are established. In 1999, the *Tribunal de Grande Instance de Paris* (court of major jurisdiction) set up an economic and financial pole which deals through separate sections with serious financial crime, including corruption, and has national jurisdiction for certain misdemeanours such as insider trading, stock-exchange related offences, *délinquance astucieuse* or "smart crime", public health cases, and, more recently, counterfeiting cases.

The members of these sections are examining magistrates and specialists from the Public Prosecutor's office in each of the various branches. The working methods in the poles led to the development of *co-saisine* or "joint referral", enabling several judges to work together on the same case. Even judges specializing in different areas co-operate at times on the same case. Today, we are confronted with more and more cases of counterfeit drug networks that are highly structured, from production sites, transport and distribution channels, especially over the Internet, to the recycling of profits. To combat these networks, a whole range of legal and operational resources have to be implemented which different judges can share with each other.

The law also made provisions for specialized assistants to work with the judges and provide technical expertise in analysing cases or preparing important documents (to commission experts' reports, carry out questioning). They are typically civil servants seconded from other administrations. As a result, officials from such services as taxation, customs, fraud control or Banque de France, as well as doctors, veterinarians and pharmacists are all found in specialized poles.

As part of the fight against corruption, it is often necessary to conduct technical analyses of contracts concluded with an administration. They focus at once on a contract's content, utility, terms and conditions of performance and control and on compliance with award procedures. This long and painstaking task is carried out efficiently by specialized assistants.

In carrying out investigations, the participation of criminal police officers (police officials or gendarmes) is of course necessary. Here again, specialization of investigators is essential. In each regional service, one unit specializes in the economic and financial field and can deal with corruption cases. In 2002, *Groupes d'Intervention Régionaux* (regional task forces) comprising agents from other administrations (taxation,

customs, labour inspectorate, etc.) were set up under the authority of criminal police officers in order to pool investigative and analytical know-how.

In Paris, one of the sub-directorates (*sous-direction*) of the *Police Judiciaire* (criminal investigation department) at the *Préfecture de Police* (police headquarters) has jurisdiction in economic and financial affairs. It is subdivided into several *brigades* or squads, one of which has specific jurisdiction for corruption.

To combat serious financial crime, the Ministry of the Interior created the *Office Central de Lutte Contre la Grande Délinquance Financière* as well as the *Division Nationale des Investigations Financières*, which has its own anti-corruption unit, the *Brigade Centrale de Lutte contre la Corruption*. Lastly, a unit called the *Plate-forme d'Identification des Avoirs Criminels* (PIAC) assists with in-depth investigations to establish the extent of assets held by a person, directly or indirectly, in France and abroad.

As for the organization of the judicial system, the specialization of the chambers charged with trying economic and financial cases is an essential factor in well-ordered proceedings. Once again, judges presiding over these chambers can be aided by specialized assistants.

Finally, the *Service Central de Prévention de la Corruption* can also be empowered to provide expertise or technical support in investigations. Although its members do not have actual investigative powers, they advise judges and investigators on investigative management, options and methods and on analysis of evidence collected.

The examining magistrate prepares cases for trial. Specifically, this involves collecting information, first, to determine whether or not the charges are sufficient for a person to be tried at court and, second, to send the court all evidence on the case necessary for adversarial debate and judgment. The magistrate can also issue or have warrants drawn up to seize assets or block bank accounts. The court deciding on the merits of the case can then permanently confiscate the assets.

Due to his or her role, prerogatives and central positioning in proceedings, he or she can evaluate which options to pursue in the investigation and proceedings, adopt an appropriate overall investigation strategy and co-ordinate the various procedures, especially if he or she plans to appeal to international mutual assistance.

## **B. Interlinkage of the Fight Against Corruption Systems**

Generally the most difficult aspect of combating corruption systems is to identify and characterize a corruption pact. Such a pact rarely has a formal structure, and the protagonists have little inclination to disclose its content. The only way to paint a picture as broad and yet detailed as possible is through a multi-axial approach and analysis. The latter presupposes an ability to collect information and process it systematically. Here the poles of expertise are especially justified.

Take an unusual financial transaction, which may be detected by the tax administration, the bank where the account is held or perhaps by the accounting or legal professional involved in setting it up. The receipt of funds in a person's account from a company with which that person has no contractual relationship may be an indication. The tax services may also detect an unusual book entry and check out the reasons. This is how a case of bribery and favouritism was uncovered in Paris. However, an accounting misstatement and the absence of apparent economic reason for the transaction do not suffice to characterize an offence.

Investigative methodology follows several avenues. The relationships between individuals have to be examined, the financial transactions between various contractors pinpointed and the content of the acts themselves analysed. An example: investigation established that a number of contractors and intermediaries had habitual relations with an administration official. The first clue: they often had meals together, but it was impossible to discover who paid. Procurement contracts were periodically awarded for a large construction project. Some of these contracts had no real reason for existing, in others the specifications were not adapted to the administration's requirements or were for excessive amounts. In some cases the contracts lacked strict control and, worse still, poor performance was not penalized by the administration. Lastly, it was established that "cover" or "courtesy" quotations were drawn up by third party companies as evidence of genuinely competitive bidding.

The sole explanation for such anomalies is the existence of a corruption system. Investigation will help not only put a stop to these practices but bring the actors in these systems to court by characterizing offences of favouritism, interference with public procurement rules, misappropriation of public funds, forgery and forgery uttering (invoices), and bribery.

In the case mentioned, four contractors, an officials, two service providers (engineering firms), an employee and an “intermediary” were convicted by the Paris correctional court.

Civil servants themselves sometimes report acts of corruption, graft or bribery. Very often, however, the information disclosed is insufficient to characterize a corruption pact. The first step is to assess the reliability of the information and determine a broader scope of investigation.

The next step is to examine the contracts or awards issued by an administration - all of them or, if too numerous, a sample representative of the amounts involved. It is then worth looking for recurring factors such as more frequent co-contractors. Trends in contracts or the significance of their underlying principle must be explored. Thereafter, economic and financial investigations are conducted to understand the environment surrounding the administration’s partners, examine the financial, accounting and economic situation, and then cross-check information. It is frequently found that some of those co-contractors for the administration have contacts with each other.

The existence of cross-subcontracting phenomena is often an indication of anti-competitive arrangements. If so the analysis should be refined by examining the contents of invoicing between entities and verifying evidence of the counterpart supplied (provision of goods or services). Outsourcing by the administration of such services as consulting, auditing or training, raises the risk of misappropriation. It is difficult to criticize the contents or quality of the deliverables supplied. However, statements by agents having allegedly received them often shed invaluable light on the matter.

In a more general respect, attempts to gain unlawful advantage through corruption often imply several different offences including: misappropriation of funds to illegally extract the money and create a “slush fund”; document forgery and irregular recording of accounts to justify the alleged financial transactions; and the use of concentration accounts held in offshore banks by close friends or relatives, typical of a money-laundering process. All of these offences must be dealt with in order to penalize acts of corruption even when the pact is not characterized.

At the end of the 1990s, for instance, a local authority relied heavily on a consulting firm to manage the switch to the 35-hour workweek. To get around the rules governing assistance contract awarding, the contracts were divided up between contractor A and other contractors invoiced by contractor A on a subcontracting basis, minus a commission of around 5 to 10%. The principal was not notified of the subcontracting agreements, which had no formal existence. The heads of several companies acknowledged having agreed to take part in the scheme in order to overcome temporary financial difficulties. Such acts, described as forgery, forgery uttering or granting undue advantage, characterize a corruption system. The case was tried at the Nanterre court of major jurisdiction in December 2007.

Another instance was uncovered in the course of an affair known as the *European VAT fraud*. During the examination phase, the magistrate received an anonymous letter implicating the main protagonist in the affair and a gendarme. The information was sent on to the investigators, a service of the gendarmerie (military police force) near where the suspected police officer was implicated. Precautionary measures were taken to avoid the risk of leaks. First a wiretap was ordered on a person possibly in contact with the gendarme, apparently also implicated in the fraud. Phone conversations were intercepted showing that gendarme passed on confidential information. With the judge’s consent, he in turn was wiretapped and his work space placed under video surveillance. The investigators established that he rendered very numerous “services” to criminals and sold information on enquiries in progress, in addition to other illicit activities. It also appeared that he accessed army databases for no legitimate reason. After he was apprehended, placed under judicial examination for charges including passive corruption, and imprisoned, he admitted to having received amounts averaging more than €50,000 a year in that way, far more than his official income. In this affair, it was found that the gendarme had been serving in the same unit for many years and never applied for a transfer.

The more international in scale affairs of corruption become, the greater the complexity of the cases involved.

### **C. Challenges at Stake and Prospects in International Co-operation**

In 1996, magistrates across the European Union, and notably in Switzerland, launched the Geneva Appeal to alert public opinion and government authorities about shortcomings of mutual assistance in criminal matters and the lack of co-operation in criminal matters between the Member States.

Eleven years went by, and meanwhile the face of the world was transformed as information circulated faster and faster and means of communication expanded. Criminal organizations took advantage of these transformations. The transnational reach of criminal activities seemed even more evident in terrorist acts, drug trafficking, trafficking in human beings, illicit arms trafficking or money laundering. Corruption is very often a key instrument at the heart of such activities.

The legal framework has changed.

Innovations in the law have picked up speed: increasing numbers of instruments devised by various institutions; ever more technical, complex standards; the rise of international criminal courts. The way they function prompts us to think about mechanisms to achieve more effective justice while respecting the loftiest fundamental principles of the European Convention on Human Rights.

There have been operational transformations as well: co-operation has developed between judicial and police authorities, co-operation networks have been set up, the European Arrest Warrant (EAW) has revolutionized the handling of procedures, and the best practices review was put in place and should come into general use.

These changes bring into view a range of prospects. All the new instruments have to be digested and rendered compatible with the differing legal cultures of the Member States' judicial authorities. The principle of mutual recognition must come into broader application to serve as a sound basis for operations. A pan-European outlook and the principles underlying these changes must be promoted in third countries, especially the European Union's neighbours. Efforts must be made to enhance the effectiveness of procedures by allowing any national court to which a case is referred to be fully vested with the quality of "European judge". The formulation of European criminal law by means of instruments and through its practical implementation, in particular by the mechanism of communitization under the Third Pillar, constitutes an instrument of sovereignty.

The disclosure of corruption systems on an international scale reveals that the phenomenon to be combated is both serious and complex, and that it is a fact at all levels in governments and international organizations.

What makes this phenomenon all the more serious is that it affects the EU's institutions right at the core of their operations, destabilizes relations between actors and discredits the institutions in the eyes of citizens and economic operators. Corruption tends to dissuade contractors from bidding, weakening the quality of the goods and services supplied to the institutions.

What makes the phenomenon complex is that the victims are often unaware that they have been victimized, given the perpetrators' discretion and the paucity of evidence. This type of behaviour has to be approached by analysing the other phenomena to reveal indications of corruption. In other words, schemes such as misappropriation of corporate assets to fill slush funds with hidden money must be analysed as extensively as possible. The conditions under which public contracts are awarded must be scrutinized. Lastly, the relationships between contractors and public agents, conflicts of interest, must be dealt with attentively.

The centralization of European institutions and the lack of independent investigation and prosecution services can impede protection of the Union's financial interests against the threat of corruption.

The French courts have jurisdiction, but to the extent that the functions are exercised in Brussels, most proceedings are dealt with in Belgium. Nevertheless, French courts and in particular the Paris economic and financial pole may be solicited to handle requests for mutual assistance.

The issue of international mutual assistance in criminal matters was for years subject to the principle of reciprocity and extremely general bilateral or multilateral conventions. The references were the Council of Europe Conventions of 13 December 1957 on extradition and of 20 April 1959 on mutual assistance in criminal matters.

Thanks to significant progress made with respect to European integration and the commitment to forging an area of freedom, security and justice defined in Tampere in 1999, an ambitious programme was conceived and developed for judicial co-operation founded on the principle of mutual recognition. Meanwhile, with the aggravation of terrorism and organized crime, sophisticated texts were adopted giving judges access to appreciably more effective investigative means and tools for co-operation. Co-operation also became more flexible with the 1990 convention implementing the Schengen Agreement, which authorizes a judicial authority to transmit any requests directly to another judicial authority.

The list of such international instruments is long. The most important are the United Nations Convention against Transnational Organized Crime of 15 November 2000 and the United Nations Convention against Corruption of 31 October 2003, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 and its Additional Protocol of 16 October 2001. The Convention on the Protection of the European Communities' Financial Interests of 26 July 1995 is a counterpart to the Schengen Agreement of 19 June 1995, which organized police and judicial co-operation between EU Member States. It was followed by the European Union's Convention on the Fight against Corruption of 26 May 1997. The Council of Europe's Criminal Law Convention on Corruption of 21 January 1999 incorporates the main points of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Alongside these major Conventions, other noteworthy instruments concern the fight against money laundering, seizure, freezing and confiscation of criminal assets. They are an effective complement to the anti-corruption arsenal, enabling penal authorities to strike at the heart of organized criminal structures. If States co-operate under good conditions, it becomes feasible to identify assets located abroad rapidly and request that they be frozen pending possible confiscation in the future.

In the *Elf* case discussed earlier, with the Swiss authorities' efficient aid under mutual assistance, enough information was collected to track down the concentration accounts used to pay multiple intermediaries secret commissions. Transactions could also be traced back to offshore bank accounts, an arrangement unmasking their fraudulent nature.

Last but not least, the European Union Framework Decision of 13 June 2002 on the European Arrest Warrant was a genuine revolution in the field of judicial co-operation. Since then, the average time limit for surrender of a person sought is less than 60 days, whereas in France it is 26 days.

The European Arrest Warrant gives new impetus to criminal proceedings initiated because it ensures that persons sought will be surrendered rapidly - often faster now than it takes to find elements of proof - as soon as they are located.

#### 1. Example One

In 2003, Belgian police officials uncovered unusual links between European public officials and companies in which confidential information was disclosed in exchange for various advantages. The Belgian authorities referred the matter to France on 13 May 2006. By 7 June 2006, the records noted and evidentiary items seized as requested were made available to the Belgian authorities. This example illustrates the speed of the reaction.

#### 2. Example Two

In 1999, a member of the European Parliament lodged a complaint in Belgium and made allegations of

misappropriations committed within the framework of a Community programme. Some individuals had allegedly benefited from fictitious jobs and reimbursement of expenses unrelated to any activity in the Commission's interest. A former prime minister and former commissioner was accused of acts of corruption and misappropriation of Commission funds. At the request (one of several) of Belgian authorities, that person was heard in France. The request was submitted on 6 June 2002 and then executed and returned in January 2003. Here again, the response to the requesting authorities was particularly swift.

### 3. Example Three

On 19 March 2003, OLAF transmitted a report to the Paris Public Prosecutor on the operation of company X which worked with one of the Commission Directorates. On 4 April 2003, a judicial investigation was opened, and the European Commission instituted civil action for damages on grounds of breach of trust.

The facts concerned sales activities developed since 1996 with "retail outlets" located in several EU countries, some of which had corporate existence and others not. Conventions were signed between the Directorate and the various retail outlets, without a financial audit. The end result was that the Directorate subcontracted the sale of information to companies and ad hoc structures.

"Flush funds" were apparently set up to siphon off Community budget revenue. In this manner, the use of fictitious invoices could be characterized. The amounts embezzled totalled several million euros.

For the trial, letters rogatory were issued to Luxembourg, Italy and Spain. The variable times of response to these requests considerably delayed the progression of the proceedings. The facts gathered did, however, highlight the existence of a system of embezzlement of Community funds which could only have been accomplished through a corruption system, in other words, with the acquiescence of high-ranking Community officials.

## III. CONCLUSION

Mutual judicial assistance must henceforth be considered a common undertaking. In the biggest cases, work accomplished in either a requesting or requested State must be available to ensure a sufficiently broad scope. Work carried out at the request of a third State can be used to expose the existence of new corruption systems in the requested State. Certain information in the possession of the requesting State may be useful in instituting separate legal proceedings in the requested State.

For more dynamic co-operation, direct exchanges are necessary and must be encouraged. Networks have been established, especially at European level, and for more than fifteen years France has been a host country for liaison magistrates, who facilitate information exchange, ensure that requests are appropriately formulated and assist in their proper execution.

The fight against corruption calls for constant awareness and vigilance, as well as an unfailing commitment to suppression. It requires procedural competency-building and adaptation of the national and international anticrime tools to respond to changes in organized crime and to the challenges posed by globalization of trade and its counterpart, globalization of law.