

## ASSESSMENT OF FRANCE BY THE OECD WORKING GROUP ON INTERNATIONAL BRIBERY LIKELY TO RESULT IN INCREASED REPRESSION

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**July 2012** — France is currently the focus of an assessment by the OECD Working Group on Bribery to determine whether its preventive and repressive measures implemented to fight against international bribery and corruption are satisfactory and effective in light of the OECD's recommendations.

The French Ministry of Justice has recently insisted on the paucity of judgments handed down by French courts penalizing acts of international corruption<sup>1</sup> to encourage representatives of the Public Prosecutor's office to step up repression, including by seeking corporate criminal liability and applying for additional sentences such as the confiscation of the proceeds of corruption.

On December 17, 1997, the 29 Member States of the OECD<sup>2</sup> and 5 non member states, at the behest of the United States,<sup>3</sup> passed the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.

In order to ensure the efficiency of its anti bribery measures, the OECD set up a Working Group on Bribery responsible for overseeing the application and enforcement of the Convention of December 17, 1997, and the recommendations of the OECD based on a supervisory scheme composed of various evaluation phases.

France is currently subject to a new evaluation, by Italy and Switzerland, in the context of "Phase 3" of this process so as to determine the progress achieved on weaknesses identified in its prior evaluation, the issues raised by legislative amendments adopted, and the enforcement outcome of the repressive measures implemented following the adoption of the OECD Convention.

### FRANCE HAS ADOPTED A SEVERE LEGISLATIVE ARSENAL WHICH COMPLIES WITH INTERNATIONAL CONVENTIONS

Prior to the adoption of the OECD Convention by France, only "internal" active and passive bribery of public servants or representatives of the French State was penalized.

Various international conventions were incorporated into the French Criminal Code by the statutes of June 30, 2000 and November 13, 2007, which introduced the offences of passive and active bribery of foreign public officials or officials of an international organization (Articles 435-1 and 435-3 of the French Criminal Code) and that of active and passive influence peddling involving agents of a public international organization (Articles 435-2 and 435-4 of the French Criminal Code).

Finally, the statute of May 17, 2011 amended the French Criminal Code to remove the requirement of a prior "corruption pact". Indeed, there existed a controversy on whether the act of solicitation or delivery of a bribe should necessarily be prior to the act sought from the recipient of the bribe in his or her duties. Henceforth, the offence of bribery is committed even if the act of solicitation or the delivery of an advantage occurs after the act of the public official.

French law today provides for a 10 year prison sentence and a 150,000 € fine (750,000 € for legal persons) in connection with the act of proposing, directly or through a third party, any offer, gift or reward of any kind to a foreign public official to carry out or abstain from carrying out an act of his office, or facilitated by his office.

Likewise, is punishable by five year prison sentence and a 75,000 € fine (375,000 € for legal persons) the act of proposing or delivering an advantage, directly or indirectly, to an agent of a public international organization in order that the agent abuse or because he or she has abused of actual or purported influence in order to secure a decision favourable to the bribing party.

During “Phase 2” of the evaluation of France, the OECD Working Group on Bribery observed that the French legal mechanism complied with the requirements of the OECD Convention.

### THE EVALUATION OF FRANCE BY THE OECD IS LIKELY TO RESULT IN AN INCREASE OF PROSECUTIONS AND A HARDENING OF SANCTIONS

At the time of the evaluation of France in the context of “Phase 2”, the OECD Working Group on bribery invited France to:

- Encourage private enterprises to adopt internal control mechanisms, including the implementation of ethics committees or codes of behaviour relative to international bribery;
- Implement reinforced whistleblower protection for employees disclosing suspected acts of bribery;
- Facilitate the bringing of lawsuits by victims;
- Lengthen the statutory limitation periods applicable; and
- Seek the criminal liability of corporations (legal persons).

If, as notes the *Circulaire* of February 9, 2012 “relative to the evaluation of France by the OECD presenting new criminal provisions pertaining to international bribery and reinstating the orientations of criminal policy”, jurisprudence has evolved in keeping with such recommendations:

- By giving non governmental international organizations legal standing as civil parties in international bribery suits;<sup>4</sup>
- By postponing the starting point of the statute of limitation applicable to the offence of bribery to the date when the facts appeared and could be observed under conditions enabling for the exercise of public action<sup>5</sup> where they were concealed.

Nonetheless, in the *Circulaire* of February 9, 2012, the French Ministry of Justice underscores the paucity of judgments rendered under Articles 435-1 *et seq.* of the French Criminal Code. To date, only three findings of culpability have been handed down on the count of bribery of a foreign public official.

This is why the Ministry of Justice is encouraging the judiciary to give impetus to public action, to mission the Anti Corruption Brigade formed in February 2005 and to bring prosecutions, even against older cases.

It also invites the representatives of the office of the Public Prosecutor to:

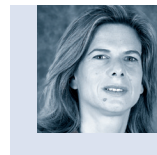
- Seek deterrent sentences, including harsh additional penalties (prohibition from practicing, exclusion from public markets, closing of establishments used to commit the offences, confiscation of property used to commit the offences, publication of judgments rendered...);
- Bring other proceedings if the sentences rendered are insufficient; and
- Systematically seek the liability of the corporations involved.

This being the case, the willingness of France to show to the OECD an earnest posture in connection with the fight against bribery could induce French authorities to follow in the footsteps of their American and British counterparts and reinforce penalties in this area.

Businesses operating in countries with a high corruption perception index should consider implementing efficient systems for preventing and fighting against corruption and bribery (ethics committee, code of ethical behaviour, compliance programs, employee training...) in order to evidence their good faith in the event they should be prosecuted by French authorities.

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- 1 *Circulaire* of February 9, 2012 on the evaluation of France by the OECD in 2012 [...], p. 5.
  - 2 The OECD today comprises 34 Member States.
  - 3 Argentina, Brazil, Bulgaria, Chile and the Slovak Republic.
  - 4 Cass. Crim., November 9, 2010, No. 09 88272
  - 5 Cass. Crim., May 6, 2009, Appeal No. 08 84104

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