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International Corruption: Issuance of a circular on France's criminal policy

On June 2, 2020, the French Minister of Justice sent to all competent public prosecutors a circular for immediate application specifying France's "*criminal justice policy in the fight against international corruption*".

This circular sets out guidelines for legal action at all stages of criminal proceedings, from the information gathering stage to the determination of the mode of prosecution.

Firstly, the circular recalls the fundamental role of the National Financial Prosecutor's Office (*Parquet National Financier* or "PNF") in the fight against corruption.

The PNF, which is already a privileged interlocutor for international organizations (in particular the OECD and World Bank) and foreign judicial authorities (the "Department Of Justice" in the United States of America and the "Serious Fraud Office" in the United Kingdom, for example), is called upon to deal with all international corruption cases.

In this respect, the circular specifies that "*as soon as credible suspicions of international corruption are brought to the attention of a public prosecutor's office, or appear in the course of the proceedings*", the PNF must be "*systematically informed of these cases, without distinction according to the stage of the proceedings, the level of responsibility of the persons involved or the financial dimension of the case*".

Having recalled the role of the PNF, the circular sets out a series of recommendations applicable from the gathering of information to the determination of the appropriate mode of prosecution.

The collection of information and the use of reporting

The circular recalls the various authorities and services of the French State which are competent to detect acts of international corruption involving economic operators. In particular, the circular stresses the already existing collaboration between the PNF and the French Anti-Corruption Agency (*Agence française*

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anticorruption or "AFA"), which may become aware of acts of corruption when controlling anti-corruption programs made compulsory for certain companies by the Sapin II Law.

The circular insists notably on the possibility for companies to voluntarily disclose acts of corruption committed in connection with their international business operations, thereby recalling the possibility for companies to conclude Judicial Public Interest Agreements (*Convention Judiciaire d'Intérêt Public* or "CJIP", i.e. a pleading guilty "*à la française*"). This being said, it should be specified that while this procedure may be of interest to the legal entity itself, it does not necessarily protect the individual employees/officers working for it as the proceedings against them may be maintained.

Generally speaking, the circular calls on the PNF to be proactive in exploiting sources of information, specifying that it will not only be responsible for exploiting the information exchanged within the framework of the OECD Working Group on Bribery, but also for focusing on the business sectors which are particularly exposed according to the OECD and the European Union (construction, extractive industries, transport, energy, etc.) but also to pay particular attention to "*national and foreign press articles which are likely, when credible and detailed facts are reported, to justify in-depth checks with a view to the possible launch of a criminal investigation*".

The circular further specifies that the PNF must systematically verify "*whether an economic operator involved in an international corruption scheme is likely to fall within its jurisdiction*", recalling that French criminal law is applicable to acts of corruption and influence peddling committed abroad by persons "*habitually residing or exercising all or part of* [their] *business activity on the territory*", including, but not limited to, subsidiaries, branches and commercial offices of foreign companies (Articles 435-6-2 and 435-11-2 of the French Criminal Code).

The investigation strategy to identify patterns of corruption

The circular specifies that "*the objectives to be achieved should aim at identifying the financial circuit of remuneration and at identifying in an exhaustive manner all the natural persons involved in the corruption scheme and their respective degree of involvement*", hence identifying acts of both active and passive corruption.

The circular then draws up an inventory of the applicable classification of criminal offences, including in particular those of active and/or passive bribery of foreign public officials, influence peddling of foreign public officials, money laundering, concealment and misappropriation of corporate assets.

The French Central Office for the Fight against Corruption and Financial and Fiscal Offenses (*Office central de lutte contre la corruption et les infractions financières et fiscales* or "OCLCIFF"), which has proven experience in the field of financial crime in particular, remains the preferred investigation body, it being specified, however, that other investigation services may be called upon wherever the case has a specificity (geopolitical context, business sector, etc.). The circular recalls that special investigation techniques are applicable during the preliminary investigation in corruption and influence peddling matters (including, wiretapping of facilities

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and infiltrations).

The circular also underlines that as international bribery is an economic offence, seizure and bail arrangements may be implemented, possibly within the framework of international mutual assistance procedures.

Determination of the appropriate mode of prosecution

The circular recalls that bringing prosecution against both legal entities and natural persons must be considered.

It points out that insofar as intermediaries are involved in 75% of international bribery cases, prosecution must be envisaged against employees involved in the corruption scheme, but also against corporate officers/managers and external natural persons involved in the perpetration of the offence. A procedure for prior recognition of guilt (i.e. a guilty plea) or a referral to the criminal court may be envisaged.

With regard to legal entities, the circular recalls France's international commitments to ensure that "*holding legal entities criminally liable must make it possible to put an end to the existence of commercial strategies based on the habitual use of these unlawful practices*".

In this respect, it stresses that once the conditions for liability to be incurred have been met, the most appropriate criminal response must be determined.

In particular, the appropriateness of concluding a CJIP could be considered in the light of the absence of prior offenses committee by the legal entity, the voluntary disclosure of the facts and the degree of cooperation with the judicial authority. Should a CJIP be concluded, the circular specifies that the compliance program imposed and the fine proposed in accordance with the provisions of the Sapin II Law will have to be carefully considered.

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