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A decorative pattern of stylized, dark green leaves is scattered across the cover, primarily on the right side and bottom. The leaves vary in size and orientation, creating a natural, organic feel against the teal background.

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# Anti-Corruption

**France: Trends & Developments**

Emmanuel Daoud, Marie Perrault,  
Valentin Rigamonti and Hugo Partouche  
VIGO Cabinet d'avocats

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# 2021

## Trends and Developments

*Contributed by:*

*Emmanuel Daoud, Marie Perrault, Valentin Rigamonti  
and Hugo Partouche*

*VIGO Cabinet d'avocats see p.5*

Corruption remains a key concern in France, even more so in the midst of the current pandemic, as states and companies are subjected to new corruption schemes. Various institutions, such as the GRECO and the AFA, have indeed warned that corruption risks have increased due to the COVID-19 outbreak.

The last couple of years have seen the rise of transactional justice in criminal matters. In early 2020, Airbus SE entered into the largest *Convention Judiciaire d'Intérêt Public* (the CJIP) to date with the Parquet National Financier (the PNF), the Serious Fraud Office (the SFO), the Department of Justice (the DoJ) and the Department of State. Such a milestone agreement highlights the key role played by French authorities in recent years in the area of global anti-corruption.

The growth of the PNF in white-collar crime matters has allowed the French authorities not only to develop guidelines for CJIPs but also to assert French sovereignty in terms of extra-territoriality reach. Although it has been subject to politically driven criticism in 2020, the PNF has undoubtedly established its position.

### **Extraterritoriality Enforcement**

Recent debates in France have focused on how to assert French sovereignty to respond to growing critics of the reach of the Foreign Corrupt Practice Act (the FCPA) and other foreign regulations. Indeed, dispositions of foreign anti-corruption regulations enable foreign authorities to act outside their territory to prosecute allegations of corruption using currency or other nexus to characterise the grounds for extraterritoriality.

Confronted with this judicial interventionism, France was considered by some to be particularly powerless to protect its economic actors. In early 2019, the government requested an analysis on the status of French defence mechanisms with regard to extraterritoriality of foreign legislations. The report, published in June 2019, identified two main areas of improvement: the confidentiality of legal opinions in companies, and the enforcement of the so-called "Blocking Statute" dated 26 July 1968 regulating the disclosure of information to foreign authorities.

Despite it having been in place since 1968, the French authorities have rarely enforced the Blocking Statute in previous years. The creation of the PNF in 2013 and the introduction of the CJIP in December 2016 illustrate the renewed interest of the French authorities in enforcing this type of legislation.

The proposed improvements mentioned in the report are two-fold: (i) to implement stronger French legal privilege by recognising in-house counsel as lawyers; and (ii) to introduce new dispositions such as stricter and wider penalties. Such amendments would give the companies stronger legal grounds to refuse disclosure to foreign authorities.

The proposals have yet to be implemented. The status of in-house counsels recently made the headlines as the new Minister of Justice, Eric Dupont-Moretti, mentioned its potential implementation during a discussion on the yearly Justice budget with Parliament in early November.

Companies carrying out economic activities on French territory would be well-advised to monitor closely the developments of the above-mentioned amendments as they would likely impact the use of legal privilege in litigations. For example, in the event of a disclosure request by a foreign authority, companies should determine the scope of their obligations and seek legal advice accordingly. A comprehensive analysis of potentially privileged documents must be conducted.

### **New Anti-corruption Governmental Publication**

On 2 June 2020, the Ministry of Justice issued a new governmental publication formalising the proactive approach taken by the PNF in its enforcement of anti-corruption laws, especially Sapin II. After recalling the now-predominant role of the PNF, its growing expertise and resources, the governmental publication encourages the PNF to use all tools at its disposal to start investigations.

The governmental publication indicates that co-operation between the PNF and administrations must be enhanced, in particular with the tax services, the intelligence unit known as TRACFIN, and the *Agence Française Anti-corruption* (the AFA). The development of such a reinforced dialogue would result in a global anti-corruption strategy amongst all French services. Services could detect the offences early on and share findings on

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a regular basis with the PNF, leading to an increase in investigations and potential prosecutions.

The governmental publication also encourages the PNF to seek any potential French nexus contained in a disclosure request by a foreign authority triggering the Blocking Statute, and if found, to open a “mirror investigation”. Such a recommendation highlights France’s will to assert the extraterritoriality dispositions of French anti-corruption laws.

The PNF is therefore likely to open a preliminary investigation for corruption or influence-peddling as soon as an economic actor is implicated in potential wrongdoings with a French nexus. The governmental publication states that, based on the extraterritorial reach of French anti-corruption laws, French jurisdiction can be triggered for “at the very least, foreign legal persons having in France a subsidiary, branches, commercial offices or other establishments, even if they do not have their own corporate personality”.

Hence, French law enforcement will resort more often to the Blocking Statute, especially in the context of cross-border transactional procedures. The opening of mirror proceedings, and thus of potential co-operation between authorities, will certainly favour the use of CJIPs, as these procedures offer a particularly suitable framework for global co-operation.

The US authorities have issued a “non-piling on” memo stating that, as long as local authorities investigate allegations of corruption and co-operation is achieved between authorities when a nexus is identified, the US will not launch a separate investigation into the misconduct. The memo effectively marks the start of a more global enforcement of anti-corruption laws and asserts the central place now occupied by the PNF.

Yet, in a number of sectors, this recent institutional arrangement is about to be reshaped by the activities of a new and major player that is the European Public Prosecutor’s Office (EPPO). Notably, the EPPO will be competent to investigate and prosecute various misappropriations that affect the European Union’s financial interests (which includes large-scale public tenders). In that context, the PNF shall without undue delay report to the EPPO any criminal conduct in respect of which it could exercise its competence, and France’s ability to expand the spatial scope of its investigations may be limited in these areas.

## **Overall Success of the CJIP**

The PNF and the AFA have made a strong start in anti-corruption enforcement, with 11 CJIPs entered into since December 2016.

On 31 January 2020, Airbus SE agreed to pay a record fine of over EUR3.6 billion (USD4 billion) in total penalties to the French, UK and US authorities.

In the Airbus case, the French, US and UK courts approved a global resolution related to an investigation led by the PNF, the SFO, the DoJ, and the US Department of State into allegations of bribery and corruption, as well as inaccuracies in filings made with the US Department of State pursuant to the US International Traffic in Arms Regulations (ITAR).

The CJIP underlines Airbus’ “clear commitment to co-operate fully” and qualified the overall co-operation in this case as “exemplary”. As set by the joint PNF/AFA guidelines published in June 2019, such a co-operation was taken into account as a mitigating factor in the calculation of the overall fine. Other mitigating factors were the conduct of a thorough internal investigation in co-ordination with the investigation, and the implementation of remediation compliance measures to prevent reoccurrence of the conduct.

Co-operation, self-reporting, robust compliance programmes and internal investigations are thus the cornerstones of the PNF’s expectations in its interactions with the investigated companies.

Based on the above considerations, it is therefore essential for companies to ensure that their compliance culture and internal policies are implemented throughout all departments, sectors and activities. With the recent publication of several guides by the AFA on gifts and hospitality, mergers and acquisitions and public procurement, the companies can expect higher requirements from the French authorities.

Companies have to be particularly vigilant in the design and implementation of their compliance programmes, especially since the governmental publication of 2 June 2020 encouraging the AFA to disclose any “suspicious facts” it may have discovered during its monitoring of anti-corruption programmes.

Historically, financial corruption cases used to grow from other areas of law, antitrust, for example. Due to the new expertise of the PNF and as set out by the recent governmental publication, corruption has become a very active field of enforcement. With the recent fines imposed through CJIPs, France is now looking to expand this transactional proceeding to other areas of law such as environmental law.

## **Whistle-Blowing Status – European Directive**

France is set to transpose a European directive on whistle-blowers' protection by 17 December 2021.

Companies must be very attentive to this legislative development as it could impact the number of alerts received, the confidentiality requirements and the measures to be implemented internally.

The directive grants the reporting person certain protections against retaliation as well as access to free information and advice against any legal actions taken against them. The directive also mentions that, unless the information accessed was obtained fraudulently, the whistle-blower cannot be held liable. Under the directive, corporations and associations will also be granted whistle-blower status and could therefore benefit from the enhanced protection.

## **Conclusion**

Based on the June 2020 government publication, prosecutions by the French authorities of foreign economic actors should be more frequent. Transactional proceedings, such as the CJIP, should continue to be favoured by both the PNF and companies.

In the event of a procedure conducted by a foreign judicial authority, any economic operator engaging in business activities on French territory with a subsidiary, or even a simple branch, must consider whether French law could be applicable. An assessment of the criminal risks under French law must be conducted to prepare for potential investigations and to determine whether self-reporting could be an advisable option.

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**VIGO Cabinet d'avocats** is widely regarded as one of the best criminal law firms in Paris, with wide-ranging experience in white-collar crime and compliance, as well as traditional criminal defence both in France and abroad. The team is composed of 14 associates and four partners. The firm also distinguishes itself by handling several major pro bono cases. The firm also specialises in sports-related litigation, and keeps expanding in cybercrime, and integrated compliance work, including CSR.

VIGO assists both individuals and companies in all aspects of criminal proceedings. The strength of the department lies in its strong criminal law background combined with the expertise developed by the team in the highly specialised areas detailed above. In recent years, VIGO has been especially active in the fields of internal investigations, complex corruption and embezzlement cases, as well as cybercrime and employment law involving a potential criminal liability.

## Authors



**Emmanuel Daoud** is a recognised expert in white-collar crime and criminal law. He has extensive and practical experience of advising individuals, organisations, boards and public officials on how to respond and manage criminal prosecution. Emmanuel Daoud uses his experience of criminal proceedings and investigations to maintain an active and comprehensive compliance and advisory practice. His unique skill set and experience allows him to be particularly active in international criminal law and human rights, as well as in corporate social responsibility. Emmanuel Daoud also provides advice in cybercrime, data protection and sports law.



**Valentin Rigamonti** focuses his practice on criminal litigation matters, with particular emphasis on white-collar crime. He also handles commercial and civil litigations. Valentin Rigamonti advises both organisations and individuals on investigations and prosecutions. He has been a member of the Paris Bar since 2017 and holds a Master's degree, and a DJCE (Diplôme de Juriste Conseil d'Entreprise) from Université Lyon 3. Prior to joining Vigo, Valentin Rigamonti was an associate at Lombard Baratelli & associés.



**Marie Perrault** specialises in white-collar crime and compliance. She is admitted to the New York State Bar, the roll of solicitors of England and Wales and the Paris Bar. Prior to joining Vigo, Marie Perrault worked in the litigation departments of international firms in London and Paris. She assists clients in matters related to compliance, risk management, Sapin II and internal investigations. She was seconded to the compliance department of a major French company for five months. Marie Perrault also focuses on complex cross-border investigations involving international fraud, corruption and money laundering involving the Parquet National Financier, the Serious Fraud Office in the United Kingdom and the Department of Justice in the United States.



**Hugo Partouche** is a criminal law and white-collar crime attorney in Paris, with a specific interest in crimes committed by or against public bodies, elected officials, and civil servants. He joined the law firm Vigo in 2017, where he is also involved in environmental law and human rights litigation. Prior to joining the Paris Bar, he trained in public affairs at a utilities company. Hugo Partouche holds a BA from Yale University (2012), an MSc in management from ESSEC Business School (2015), and degrees in Public and Criminal Law from Paris 1 – Panthéon Sorbonne University (2016).

### **VIGO Cabinet d'avocats**

9 rue Boissy d'Anglas  
75008 Paris  
France

Tel: +33 1 55 27 93 93  
Fax: +33 1 55 27 93 94  
Email: [perrault@vigo-avocats.com](mailto:perrault@vigo-avocats.com)  
Web: [www.vigo-avocats.com](http://www.vigo-avocats.com)

