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# The Legal 500 Country Comparative Guides

## France

# BRIBERY & CORRUPTION

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This country-specific Q&A provides an overview of bribery & corruption laws and regulations applicable in France.

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## FRANCE

# BRIBERY & CORRUPTION



### 1. What is the legal framework (legislation/regulations) governing bribery and corruption in your jurisdiction?

In France, the French Criminal Code provides for the legal framework applicable to corruption (as well as influence peddling) and bribery.

In addition, the 2016 Sapin II anticorruption Act provides for various obligations with respect to the prevention of corruption e.g. the implementation of an anti-corruption program for businesses of a certain size which consists for instance in setting out a code of conduct, an internal whistleblowing mechanism, a corruption risk-mapping system, etc.

### 2. Which authorities have jurisdiction to investigate and prosecute bribery in your jurisdiction?

Several authorities may investigate and prosecute bribery:

- The French Financial Prosecution Office ("*Parquet National Financier*" or "PNF") which is a national Prosecution Office in charge of prosecuting notably corruption and influence peddling.
- Investigating judges when judicial information ("*information judiciaire*") is open.

Moreover, the French Anti-Corruption Agency ("AFA") which is an administrative body which controls companies and public administrations with respect to corruption and influence peddling. The AFA has many powers e.g. it can carry out its own investigations, monitor the correct implementation and execution of anti-corruption programs, etc.

### 3. How is bribery defined?

The French Criminal Code distinguishes:

- The offence of corruption, which is defined as the fact of unduly proposing, at any time, directly or indirectly, offers, promises, gifts, presents, or any advantage, to a person, for the benefit of that person or a third party, so that this person accomplishes or abstains from accomplishing, or because he or she has accomplished or abstained from accomplishing, an act in the course of his or her office, mission or mandate, or facilitated by his or her office, mission or mandate; and
- The offence of influence peddling, which is defined as making offers, promises, etc. in the same circumstances, so that a person abuses, or because this person has abused, of his or her real or supposed influence, so as to obtain from a public authority or administration, distinctions, jobs, markets, or any other favorable decision.

French law also incriminates corruption and influence peddling in the passive way (i.e. the act of requesting or accepting a bribe).

### 4. Does the law distinguish between bribery of a public official and bribery of private persons? If so, how is 'public official' defined? Are there different definitions for bribery of a public official and bribery of a private person?

French law distinguishes between bribery of a public official and a private person.

French law distinguishes provisions applicable to bribery of French public officials and foreign public officials:

- Art. 432-11, 433-1 and 433-2 of the French Criminal Code are the main provisions relating to the prohibition of bribery of French public officials.
- Art. 435-1, 435-2, 435-3 and 435-4 of the French Criminal Code are the main provisions

relating to the prohibition of bribery of foreign public officials.

Under this legal framework, a public official can be:

- A person in charge of the public authority: the person has a power of decision and constraint, permanent or temporary;
- A holder of a public elective mandate: covers elected officials in the broadest sense;
- A person in charge of a public service: the person who pursues a mission of general interest but without having, as such, a power of decision or constraint of their own.

Moreover, the French Criminal Code specifically provides for bribery offences in relation to French or foreign legal professionals such as judges, jurors, or clerks.

Articles 445-1 to 445-4 of the French Criminal Code are applicable to bribery of a private person.

## 5. What are the civil consequences of bribery in your jurisdiction?

Under French law, a person may claim damages if the person has personally suffered a loss directly caused by the offence of bribery, whether it is a natural person or a legal entity.

Associations and foundations may also claim damages when they are constituted since more than 5 five years and the purpose of the entity is to fight against corruption (Art. 2-23 of the French Code of Criminal Procedure).

## 6. What are the criminal consequences of bribery in your jurisdiction?

Bribery of public officials:

- Individuals who are convicted for active or passive bribery face (Articles 433- 1, 1; 433-22 and 433-23; 432-11, 1; and 432-17):
  - Up to 10 years in jail.
  - Fines of up to EUR 1 million (alternatively, the amount of the fine may also be set at twice the proceeds of the offense).
  - Prohibition (for up to ten years) from exercising a public function or from exercising the activity within which the offense was committed.
  - Prohibition (for up to 15 years or permanently) from exercising a

commercial or industrial profession, or to direct or control, directly or indirectly, an industrial or commercial company.

- Publication of the decision.
- Confiscation of the object that was used in or intended for use in committing the offense, or the proceeds of the offense.
- For foreigners, prohibition (for up to 10 years or permanently) from staying on French territory.
- Legal entities which are convicted of active bribery may face (Article 435-15 of the French Criminal Code):
  - Fines of up to EUR 5 million (alternatively, the amount of the fine may also be set at double of the proceeds of the offense).
  - Prohibition (for up to five years) from operating, directly or indirectly, one or several professional or social activities within which the offense was committed.
  - Being placed under judicial supervision (for up to five years).
  - Closing (for up to five years) of the establishment that was used to commit the offense.
  - Debarment from public procurement (for up to five years).
  - Prohibition (for up to five years) from proceeding to with a public tender offer or from making an initial public offering.
  - Confiscation of the object that has been used in or intended for use in committing the offense, or the proceeds of the offense.
  - Publication of the decision.
  - Implementation of a compliance program

under the supervision of the AFA.

As to bribery of private persons, the convicted person faces the same kind of sentences but reduced, for example:

- Individuals face up to five years in jail and a maximum fine of EUR 500,000, or up to twice the proceeds.
- Legal entities face a maximum fine up to EUR 2,5million, or up to twice the proceeds.

It is worth noting that except for private corruption, when the defendant reported the offence to competent authorities, thus making it stop, or enabling the identification of other perpetrators or accomplices, imprisonment may be reduced by half.

Besides the sanctions provided by the French Criminal Code, there is also an automatic administrative sanction when a criminal sanction for bribery is pronounced. Accordingly, the condemned person will be bar from public procurement.

### **7. Does the law place any restrictions on hospitality, travel and entertainment expenses? Are there specific regulations restricting such expenses for foreign public officials?**

French law does not provide for specific restrictions on hospitality, travel and entertainment expenses. However, they should not fall within the scope of bribery regulations.

On 11 September 2020, the AFA published guidelines relating to gifts and hospitality expenses. The AFA asks companies to implement an internal gift and hospitality policy and to articulate such policy with other risk prevention tools.

### **8. Are political contributions regulated?**

France has increasingly regulated political contributions.

With respect to the financing of political parties, individuals may contribute and donate up to EUR 7,500 per year. However, French law prohibits corporate donations.

As per the financing of political campaigns, individuals may contribute and donate up to EUR 4,600 per campaign. Similarly, legal entities cannot contribute to election campaigns.

A breach of these rules may lead to the cancellation of the election by administrative courts.

### **9. Are facilitation payments regulated? If not, what is the general approach to such payments?**

French law does not provide for specific definition or regime applicable to facilitation payments. Like hospitality and entertainment expenses, facilitation payments can be considered forbidden bribes and as such lead to a criminal conviction.

It should be noted that in a non-binding short presentation on facilitation payments, published in September 2018, the AFA provides several tips and to-dos for companies to adopt when faced with requests of facilitation payments.

### **10. Are there any defences available?**

French law does not provide for specific defence regarding the offence of bribery as such. A good corporate practice might be to implement a delegation of authority scheme to protect corporate executives. When the delegate has the means, the authority and the skills necessary to fulfil the entrusted mission, such delegation might have an effect on the company's executives criminal liability.

However, under French law, legal entities are entitled to profit from a settlement procedure (the "*convention judiciaire d'intérêt public*" or "CJIP"). This settlement procedure allows companies suspected of, among other things, bribery or certain related offenses to avoid prosecution by entering into an out-of-court settlement agreement proposed by the public prosecutor and validated by a French court. The agreement will require either or both of the following:

- payment of a fine (limited to 30% of the company's average annual turnover over three years and determined on the basis of the proceeds of the offense), plus damages paid to the victim and certain costs incurred by the AFA in carrying out its mission.
- The implementation of an internal compliance program to be supervised by the AFA for three years.

This fine and/or compliance program must be approved by a judge in a public hearing. The settlement agreement and the amount of the fine must be published on the website of the AFA. In exchange, the charges will be dropped, the company will not be

required to admit liability and the sanction will not be mentioned in the company's criminal record.

These settlement agreements are reserved for legal entities, while individual offenders remain subject to criminal sanctions even if the company enters into a CJIP.

### **11. Are compliance programs a mitigating factor to reduce/eliminate liability for bribery offences in your jurisdiction?**

The French Criminal Code does not specifically recognize a compliance program as an instrument to mitigate or eliminate the liability of legal entities.

Nevertheless, the PNF and the AFA published joint guidelines on 26 June 2019 which provide that the implementation of an effective compliance program is demanded or strongly appreciated, depending on the type of company concerned, when concluding a CJIP with the public prosecutor.

In practice, the existence of a robust compliance program can be taken into account by French authorities when appreciating criminal liability and/or sanctions, for example:

- On 29th January 2020, the PNF and Airbus SE concluded a CJIP which expressly mentions that the implementation of corrective compliance measures by Airbus to prevent reoccurrence of the wrongdoings was taken into account by judicial authorities to mitigate the fine.
- On 12nd July 2021, the PNF and Systra concluded a CJIP in which the PNF specifically mentions that the implementation of a compliance program since 2011 has been taken into account to mitigate the public fine.

### **12. Who may be held liable for bribery? Only individuals, or also corporate entities?**

Both individuals and legal entities may be held liable for bribery offences, notably as accomplices (see 6.).

### **13. Has the government published any guidance advising how to comply with anti-corruption and bribery laws in your jurisdiction? If so, what are the elements of an effective corporate compliance**

#### **program?**

The Sapin II Act imposes a various obligation to actively manage corruption risks for companies with at least 500 employees (or companies belonging to a group of companies whose parent company is headquartered in France and whose workforce includes at least 500 employees) and with consolidated revenues in excess of EUR 100 million.

The Sapin II Act provides for diverse measures which may be implemented:

- A map of predominant corruption risks, designed by each company;
- A code of conduct shaped by senior management; An internal whistleblowing system;
- Third-party due diligence procedures;
- Accounting controls;
- Anticorruption training for employees;
- Internal monitoring and assessment systems to ensure the effectiveness of the measures put in place.

The AFA regularly publishes guidelines to designed to help public and private entities to prevent and detect corruption and influence peddling. The last version of the recommendations, dated 4 December 2020, were published on 12 January 2021 on the AFA's website, with a view to clarifying and complementing the items listed above in the Sapin II Act.

The AFA also issues specific guidelines for given sectors or corporate functions (e.g. charter for public sector stakeholders, guidelines on the corporate compliance function, guidelines on mergers and acquisitions). On March 2022, the AFA published draft guidelines relating to the conduct of internal investigations regarding suspicions of corruption.

### **14. Does the law provide protection to whistle-blowers?**

Whistle-blowers are protected under French law. On 21 March 2022, a new act has been enacted to improve this protection. This regulation implements the 23 October 2019 EU Directive. The AFA also provides some generic recommendations on the implementation of internal procedures in its guidelines, updated in 2021.

Under the 21 March 2022 Act, a whistle-blower is defined as a natural person who reports or discloses, without direct financial consideration and in good faith, information, or attempts to hide such information, concerning a crime, a misdemeanor, or a breach of a

regulation in force in France (whether national or supranational).

audits, 23 thematic audits and 16 follow-up audits.

If a person falls under this definition, it profits from several guarantees:

To date, two decisions have been issued by the AFA Sanction Commission:

- Confidential nature of the procedure;
- Protection from retaliatory measures (e.g. dismissal is void); and
- Exemption from civil and criminal liability relating to the revealed information.
- From now on, whistle-blowers can choose between internal reporting, i.e. within the company, and external reporting to the attention of the competent authority, the “*Défenseur des droits*”, the courts or a European body.

- French Anti-Corruption Agency, Sanctions Commission, Société S. SAS and Ms. C., July 4, 2019, 19-01
- French Anti-Corruption Agency, Sanctions Commission, Company I. and Mr. C. K., February 7, 2020, 19-02

The public alert can only be made in certain cases:

- In the absence of treatment following an external alert within a certain period of time;
- If there is a risk of retaliation or if the alert has no chance of success; or
- In case of “serious and imminent danger” or for information obtained in a professional context in case of “imminent or obvious danger for the general interest”.

### 15. How common are government authority investigations into allegations of bribery?

French authorities have been increasingly investigated bribery allegations, especially since the adoption of the Sapin II Act in 2016. As an indication the French public prosecutors have processed almost 873 cases of probity misconduct and the courts have rendered almost 200 decisions relating to bribery in 2019.

In 2020, the AFA undertook 30 new audits, including:

- 1 compliance remediation programme audit under the terms of the deferred prosecution agreement between Airbus SE and the National Financial Public Prosecutor’s Office,
- 29 audits initiated by the Agency.

Since the AFA’s creation in 2017, it has conducted 125 audits and examinations, including:

- 84 audits and examinations of business entities and 41 audits of public sector entities.
- 11 audits and examinations relating to the execution of remediation measures and settlement agreements and 114 audits at AFA’s initiative, including 75 comprehensive

### 16. What are the recent and emerging trends in investigations and enforcement in your jurisdiction? Has the Covid-19 pandemic had any impact and, if so, what?

A major trend in enforcement is that of negotiated proceedings, which are still relatively new to French criminal proceedings. The possibility for a company to enter a settlement with the prosecutor, without having to admit guilt, was introduced by the Sapin II Act and rendered effective in the past few years. Since 2018, eight such agreements or “CJIPs” have been entered in bribery related cases (and 14 in total).

Another trend revolves around international cooperation between French enforcement authorities and their foreign counterparts. In the past, French enforcement authorities have been criticized for not prosecuting bribery cases involving French companies or nationals, thus abandoning them to foreign authorities (e.g. Alstom case). French authorities have thus taken a more proactive approach towards corruption, as set out above, while strengthening international cooperation

The complete lock-down imposed in France in March 2020 due to the Covid 19 pandemic naturally affected criminal procedures on a broad level. Indeed, as in most parts of the world, very few judicial authorities were still operating, and most investigations were put on hold for a few months. The investigations have however since resumed and it seems, at this stage, too early to precisely define the specific consequences the Covid 19 pandemic may have had on corruption related investigations and enforcement.

It must be noted that between March 12, 2020 and July 10, 2020 included, the statute of limitations for public action was suspended until the expiration of a period of one month from the date of cessation of the state of health emergency.



### 17. Is there a process of judicial review for challenging government authority action and decisions?

Under French law, the process which comes closest to the Anglo-Saxon “judicial review” is referred to as “abuse of power recourse” (“*recours en excès de pouvoir*”) and is to be brought before administrative courts. It does allow for judicial review of administrative action and decision. However, this administrative mechanism is not particularly relevant in relation to bribery, given that decisions and actions in that respect are mostly taken by police and judicial authorities, and can be challenged, before courts.

### 18. Are there any planned developments or reforms of bribery and anti-corruption laws in your jurisdiction?

On December 16, 2020, the Law Commission of the National Assembly had entrusted deputies with the mission to draw up an in-depth assessment of the main contributions of the Sapin II Act and, if necessary, to propose avenues for improvement.

The report presented on July 7, 2021, formulates 50 suggestions, including:

- Transferring the support and control missions of the French Anti-Corruption Agency (AFA) to the High Authority for Transparency in Public Life (HATVP) to create a single authority, the High Authority for Probity;
- Encouraging the spontaneous disclosure of corruption by better involving the legal entity in the negotiation of the judicial agreement of public interest (CJIP); and
- the creation of a specific procedure of appearance on prior recognition of guilt (CRPC) which could only be proposed in case of spontaneous disclosure of facts and full cooperation with the investigations.

The French presidential election being now over, the Sapin III Act might see the light of day in the coming months.

### 19. To which international anti-corruption conventions is your country party?

At the international level, France is party to two conventions:

- The OECD Convention on Combating Bribery

of Foreign Officials in International Business Transactions (17 December 1997), ratified by France on 31 July 2000;

- The United Nations Convention Against Corruption (31 October 2003), ratified by France on 11 July 2005.

At the European level, France is party to several instruments:

- The European Union (EU) Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of the EU Member States, adopted by the Act of the Council of the EU on 26 May 1997;
- The Criminal Law Convention on Corruption (27 January 1999), ratified by France on 25 April 2008;
- The Civil Law Convention on Corruption (4 November 1999), ratified by France on 25 April 2008.

### 20. Do you have a concept of legal privilege in your jurisdiction which applies to lawyer-led investigations? If so, please provide details on the extent of that protection.

Professional secrecy covers all confidences that a lawyer may have received by reason of his status or profession, whether in the field of advice or in that of defence. This includes not only the client’s confidences, but also information received from third parties in the context of the case concerning client, but also anything that he may have observed, discovered or deduced from his professional his professional activity

Since the internal investigation falls within the scope of the company’s assistance and advice and involves the definition of its defence strategy, all exchanges between the lawyer and his client in this context are covered by legal privilege. In all cases, the lawyer is bound by this obligation and may not break it, if necessary, except for the “strict requirements of his own defense before any court”. It will be up to the lawyer, mandated to conduct an internal investigation, to advise his client on the documents and elements that he wishes to transmit to the judicial authorities, if necessary, as such communication would then withdraw the benefit of this protection.

In France, legal privilege does not apply to in-house counsels.

On 2 July 2020 France’s National Bar Council published guidelines intended for lawyers leading internal

investigations, through which are developed several recommendations regarding notably actions to take in order to preserve legal privilege (in particular in relation with the conduct of interviews and the drafting and broadcasting of the final investigation report).

However, the joint guidelines published by the PNF and the AFA on 26 June 2019 underline that all the elements of the internal investigation put in place in the frame of discussions with the French authorities in view of reaching a potential CJIP settlement are “not necessarily covered by legal privilege”. On 7 March 2022, the PNF and the AFA published new draft joint guidelines.

For now, French courts have not yet litigated on this question of privilege in the context of lawyer-led investigations.

## **21. How much importance does your government place on tackling bribery and corruption? How do you think your jurisdiction’s approach to anti-bribery and corruption compares on an international scale?**

Since 2016 and the enactment of the Sapin II Act, France has increased its efforts on tackling bribery and corruption. The text created the AFA which has numerous missions and a wide-range of prerogatives for the detection, prevention and coordination of anti-corruption activities.

Other measures include:

- The obligation for companies to prevent corruption risks;
- The creation of the offence of influence peddling by foreign public officials;
- The creation of an additional compliance penalty for companies convicted of corruption or influence peddling.

The fifty propositions of the evaluation mission of the Law Commission of the National Assembly relating to a possible Sapin III Act shows France’s willingness to pursue and improve its fight against bribery and corruption.

Although more resources have been allocated to the investigation and prosecution of bribery cases in the past few years, they remain limited as compared to the efforts deployed by other jurisdictions, such as the US or the UK.

The 2021 Corruption Perception Index published by NGO

International Transparency ranks France at the 22nd position worldwide.

## **22. Generally how serious are organisations in your country about preventing bribery and corruption?**

French authorities are serious when it comes to fight and prevent bribery and corruption.

According to the 2020 AFA Activity Report published on 31 March 2021, Public Prosecutors’ Offices dealt with 813 corruption offenses in 2019. Among the 813 cases, 54.6 % of the perpetrators were not liable to prosecution, mainly for lack of evidence. Of the 574 perpetrators who were liable to prosecution: 44 (8 %) had the proceedings against them discontinued (inconclusive investigations, absence of plaintiff); 137 (24 %) benefited from an alternative to prosecution; 221 (38 %) had their case referred to an investigating magistrate; 172 (30 %) were prosecuted in criminal courts.

In 2019, 332 corruption offences resulted in individual convictions. Nine legal entities were convicted of corruption offences. The acquittal rate is particularly high in such cases: 21.3 %, compared to a 7.4 % acquittal rate in all cases.

The sentences most commonly handed down for individuals are custodial sentences (71 %), for an average prison term of 14.1 months, plus a fine (49 %), for an average amount of €196,715 (vs. €29,366 in 2018).

The average fine imposed on legal entities was €16.82m, compared to €242,000 in 2018.

Under article 41-1-2 of the Criminal Procedure Code, the amount of the fine is calculated in proportion to the benefits derived from the offence, capped at 30% of the company’s average annual turnover.

Consequently, the amount of the fine in a CJIP can be much higher than the criminal fine imposed by a tribunal at the end of a trial (see 6.). For instance, on 29 January 2020, the French company Airbus agreed to pay more than 2 billion euros to the French Tax Office to end investigations conducted by the PNF.

## **23. What are the biggest challenges enforcement agencies/regulators face when investigating and prosecuting cases**



## of bribery and corruption in your jurisdiction?

First, the biggest challenge for French authorities is to collect evidence. In 2019, among the 813 corruption offenses dealt by the Public Prosecutor's Office, which involved 1,263 perpetrators, including 242 legal entities, 54.6 % of these perpetrators were not liable to prosecution, mainly for lack of evidence.

Second, one major challenge for French authorities is the lack of resources. The PNF counts 18 magistrates which have to deal with a large variety of offences (tax fraud, corruption, stock-exchange offences, etc.). The AFA counts around 15 agents only. Large companies often devote large resources to their criminal defence when suspected corruption exists.

## 24. What are the biggest challenges businesses face when investigating bribery and corruption issues?

First, one of the challenges that companies face is the treatment of employment procedures regarding the employees that are suspected of having committed bribery or corruption facts.

Second, companies encounter difficulties when reviewing their relations with co-contractors related or not to the alleged bribery or corruption facts.

Third, another issue would be the conduct of internal investigation as such, notably:

- The respect of employees' defence rights, e.g. the information that should be given to employees when interviewed.
- The treatment of the data collected during internal investigations, especially in the light of French employment law and the General Data Protection Regulation (GDPR).

## 25. What do you consider will be the most significant corruption-related challenges posed to businesses in your jurisdiction over the next 18 months?

A variety of topics, such as the reform of the Sapin II Act, are on the compliance agenda. Among other things, the roles and prerogatives of the AFA, the High Authority for

Transparency in Public Life (HATVP), and the challenges of compliance in the public sector are being considered.

France has also finalized the implementation of the whistle-blower directive in enacting the 21 March 2022 Act (see 14) which implicates a change of companies' internal compliance programs.

Other proposals concerning the supervision of internal investigations or the broadening of the criteria for the criminal liability of companies in the event of insufficient supervision of employees who commit an offence should also be followed closely. The latter looks like the Anglo-Saxon "failure to prevent" but with a very broad scope of application, which may cause concern for companies.

## 26. How would you improve the legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption?

In my view, some of the propositions of the evaluation mission of the Law Commission of the National Assembly relating to a possible Sapin III Act are particularly important to improve the legal framework relating to preventing, investigating and prosecuting cases of bribery and corruption:

- Better target requests for information and documents, which must be proportionate to the nature of the controls conducted by the AFA, and modulated according to the type of control conducted.
- Ensure total confidentiality of proceedings before the AFA Sanction Commission, to avoid the negative consequences for a company's image.
- Extend the scope of the offences covered by the CJIP.
- Increase to 5 years the maximum 3-year period provided by law for compliance by companies subject to AFA inspection.
- Create a negotiated procedure specific to acts of corruption for natural persons, which could only be offered in the event of spontaneous disclosure of the facts and full cooperation of the individual in the investigations.
- Encourage the use of internal investigations, by providing a better framework for their use and offering more guarantees to individuals.

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