



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

FRANCE: PHASE 2

**FOLLOW-UP REPORT ON THE IMPLEMENTATION
OF THE PHASE 2 RECOMMENDATIONS ON THE APPLICATION OF
THE CONVENTION AND THE 1997 RECOMMENDATION ON
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS**

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 30 March 2006.

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SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

a) Summary of findings

1. Since the evaluation of France in Phase 2, the French authorities have demonstrated their commitment to continue awareness-raising among businesses. These efforts have not only targeted major industrial groups – through new partnerships which allow such groups to benefit from the expertise of the Central Service of Corruption Prevention (SCPC/*Service central de prévention de la corruption*) such as advice on formulating anti-bribery provisions in their codes of ethics and awareness-raising sessions for their staff – but also SMEs - through French economic missions abroad and the anticipated launch in 2006 of an Internet portal destined for SMEs desiring to do business in international markets. One section of the site will be dedicated to bribery of foreign public officials (Recommendations 1 and 3).

2. France's efforts to encourage public officials to advise the Public Prosecutor's office promptly of any violation of its law which transposes the Convention (Recommendation 2), and its efforts to formalize and implement procedures whereby the staff of *COFACE* (the French export credit agency) and the French Development Agency (*Agence Française de Développement*) can alert the Public Prosecutor of credible evidence of bribery (Recommendation 4), will provide useful means of detection once fully implemented. Also helpful are the awareness-raising measures introduced for accounting professionals and the creation of the Supreme Council of Statutory Auditors (*Haut Conseil du Commissariat aux Comptes*). Mainly composed of government representatives, one of the Council's task is to take disciplinary action against statutory auditors who fail in their duty to report acts of bribery to the Public Prosecutor (Recommendation 6). In response to Recommendation 5, France reported that it had considered introducing new whistleblower provisions but had concluded that its existing framework for protecting whistleblowers offered adequate protection. Further, since December 2005, whistle-blowing mechanisms that reinforce protection for employees who report acts of bribery have been addressed within the French legal framework (Recommendation 5).

3. In addition to these measures, France has raised awareness of financial and professional organisations concerning their duty to declare any suspected money laundering linked to the bribery of foreign public officials, by virtue of the transposition of the Second European Anti-money Laundering Directive into French law on 11 February 2004. These efforts are backed up by regular monitoring of financial professionals by the supervisory authorities in respect of applicable anti-money laundering rules (Recommendation 7).

4. The Working Group noted the very positive development that prosecuting authorities have demonstrated their commitment to enforce the French law transposing the Convention: As of the date of the Phase 2 written follow-up, seven legal proceedings were underway in France on grounds of bribery of a foreign public official. By the second half of 2007, a new statistical tool will be made available to French magistrates showing how many proceedings lead to prosecution or closure, thereby enabling magistrates to assess and, where appropriate, to make changes to criminal policy in such area (Recommendation 12). Enforcement, combined with additional resources for investigations and prosecutions (Recommendation 10), circulars that urge public prosecutors to indict legal persons that may be criminally liable in cases of transnational bribery and to confiscate bribes and their proceeds (Recommendation 11) and the progressive

generalisation of the non-tax deductibility of bribes paid to foreign public officials in territories that enjoy special status (Recommendation 13) – should improve deterrence.

5. With a view to more effectively enforcing the offence of foreign bribery, new requirements have been introduced in the Public Prosecutor's office to facilitate the prosecution of cases brought by victims. As sole authority for prosecuting cases involving the bribery of foreign public officials not involving civil servants of the EU or a Member State, the Public Prosecutor's office was asked by the Minister of Justice in a 21 June 2004 circular to apply the same admissibility criteria for the intervention of a civil party in cases involving charges of bribery of French public officials to complaints lodged by bribery victims (Recommendation 8). The Working Group was informed of the binding nature of the requirement for the Public Prosecutor's office to examine very carefully any complaints filed by bribery victims and to take resolute action whenever the circumstances of the case show that the alleged injury may have occurred. The Working Group was also informed that the circular calls upon prosecutors to advise plaintiffs if cases are closed and to inform them of the reasons for this decision so they may file an appeal to a higher instance. The Working Group invites France to submit to the Group at its regular "tours de table" any additional information regarding difficulties encountered in respect of the practical application of the circular, particularly with regard to access by bribery victims to the procedure set forth therein.

6. In its Phase 2 evaluation of France, the Working Group was of the opinion that given the growing complexity of the techniques deployed to pay and conceal bribes, the statute of limitations did not, at that time, allow a reasonable period of time for investigation and prosecution and could therefore hinder the effective implementation of the law. Recent case law, however, concerning the date upon which the three-years statute of limitations begins to run and the grounds for its suspension may lead to more effective prosecution of acts of bribery of foreign public officials, even if they occurred a long time ago (Recommendation 9). Under this case law, the limitation period begins to run from the last act of bribery where a series of acts of bribery were committed and the limitation period is interrupted once an initial investigative act takes place without the need for an indictment. The Working Group, while recognising that this case law makes it possible to prosecute certain acts of bribery beyond the three-year limitation period, also observes that an extension is possible only if the last act of bribery was committed during such period; if the last act occurred after three years have elapsed, no prosecution is possible. In addition, the case law on fraudulent collusion is apposite only in instances of fraudulent collusion: it does not allow the limitation period to be extended in other cases, even though a single act of bribery may be just as serious as a series of acts, or even more so. The Group also recognises the advantage of interrupting the limitation period as soon as the investigation begins giving the authorities the necessary time to complete the investigation and bring charges; on the other hand, it does not extend the period required to detect the acts that justify opening an investigation. Consequently, it is still the Group's opinion that the excessively short statute of limitations identified in Phase 2 may in practice hinder the effective prosecution of certain acts of bribery. At the same time, it notes that, with regard to extradition, the statute of limitations has never been grounds for refusing to extradite a person charged with bribery.

b) Conclusions

7. On the basis of its findings with respect to France's implementation of the Phase 2 Recommendations, the Working Group has reached the overall conclusion that Recommendations 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12 and 13 have been implemented or dealt with in a satisfactory manner. Recommendation 9 has been partially implemented.

8. The French authorities agreed to report orally on the practical implementation of Recommendation 9 within one year, *i.e.* by 31 January 2007.

WRITTEN FOLLOW-UP TO PHASE 2 REPORT

Name of country: France

Date of approval of Phase 2 Report: 22 January 2004

Date of information: 6 January 2006

Part I: Recommendation for Action

Text of recommendation 1:

With respect to awareness raising actions to promote the implementation of the Act of 30 June 2000 amending the Criminal Code and the Code of Criminal Procedure with regard to the fight against corruption, the Working Group recommends that France:

-- Continue and strengthen its efforts vis-à-vis enterprises, including small and medium-sized enterprises that do business internationally, and encourage companies to develop and adopt internal control mechanisms, including putting in place ethics committees and warning systems for employees, as well as codes of conduct specifically addressing the issue of transnational bribery. [Revised Recommendation, Articles I and V.C.i]

Actions taken as of the date of the follow-up report to implement this recommendation:

► Enterprise awareness-raising and training

Raising the awareness of major enterprises and SMEs with regard to the provisions of the Convention remains a major concern of the French authorities. As part of this process, the Central Department for Corruption Prevention (SCPC/Service central de prévention de la corruption) has continued to make major efforts to inform, mobilise and train French enterprises.

In this respect, the SCPC has signed partnership agreements with a number of French enterprises in both the public and private sectors. These agreements provide for the sharing of information, subject to a mutual non-disclosure requirement, regarding the practical implementation of the enterprise's policy on bribery prevention. They are also designed to identify the problems encountered and possible ways of solving them. In addition, this tool enables enterprises to draw on the skills of the SCPC to improve the provisions of their ethical codes with regard to the fight against corruption. Lastly, these partnership agreements allow enterprises to benefit from the internal awareness-raising sessions organised by the SCPC for the employees of enterprises most heavily exposed to the risks of corruption (notably sales and marketing managers). The partnership agreements signed the most recently were with:

- ▲ Dassault Aviation on 21 July 2004;
- ▲ Accor group on 22 November 2004;

- La Française des Jeux on 2 June 2005;
- the Professional Football League on 2 December 2005.

Discussions are also currently under way with Spie.

Furthermore, the SCPC helped to redraft the ethical code of Veolia Environnement.

The SCPC has initiated collaboration with the National Committee of Foreign Trade Advisors (CNCCE/Comité National des Conseillers du Commerce extérieurs) and the French employers' federation (MEDEF/Mouvement des entreprises de France) to develop an internet gateway known as "*En avant l'export*" ("Taking exports forwards"), designed to help SMEs integrate into the international trade system. This gateway will go on-line in the first quarter of 2006. One section will be dedicated to the prevention of bribery and, in particular, will provide details of the implications of the OECD Convention. It is planned to provide hypertext links not only to SCPC's website but also to those of all other institutions involved in the fight against bribery (see the SCPC website at: <http://www.justice.gouv.fr/publicat/scpc.htm>).

► Professional alert system

The French authorities have encouraged the relevant French employers' organisations to look into ways of introducing an alert system based on the recommended procedures whereby employees can report any acts of bribery they might learn about in the course of their work. In June 2004, the MEDEF presented the results of its work in a report to the French Ministry of Economic Affairs, Finance and Industry.

Four recommendations were adopted and circulated to MEDEF members. They provide a ground plan for an ethical alert system designed to serve as a frame of reference for MEDEF members:

- the first recommendation is that codes of ethics should incorporate provisions which clearly state that employees have both a right and an obligation to report acts of bribery of a foreign public official to the appropriate bodies in the enterprise;
- the second recommendation is that the persons responsible for receiving such information should be formally identified;
- the third recommendation calls for the introduction of a mode of communication that will ensure confidentiality (without opting, however, for an anonymous procedure such as a toll-free telephone number, dedicated e-mail account or off-line in-box to avoid abusive or slanderous denunciations, thereby anticipating the decision by the French Data Protection Authority (CNIL/Commission nationale de l'informatique et des libertés , see below);
- the fourth and final recommendation formally introduces the principle of whistle-blower protection, whereby the latter cannot be subjected to disciplinary sanctions or dismissed (provided that they acted in good faith; should that not be the case, it is clearly stated that they expose themselves to disciplinary sanctions as well as legal action).

Because of the emphasis the latter recommendation places on the protection of whistle-blowers, the French authorities feel that— as matters stand at present — legislative action is not needed to broaden the scope of enhanced employee protection mechanisms (such as those for sexual harassment or bullying) to cover the denunciation of bribery, thereby complying with the fifth recommendation that had been made to France.

Due to the potential infringement of privacy and individual freedoms by whistle-blowing systems, the CNIL, which is an administrative authority that is independent of the government, has addressed the issue of internal alert system within enterprises and, on 10 November 2005, decided to publish guidelines setting out the conditions for the compliance of whistle-blowing systems with the 1978 Data Protection Act

(available on the CNIL website at the following address: <http://www.cnil.fr/fileadmin/documents/LaCNIL/actualité/CNIL-docori-10112005.Pdf>).

The CNIL felt that such mechanisms must be made subject to its approval given that it was responsible for organising the collection and processing of personal data. It decided to base its approval system on a declaration regime within the framework of a “single decision” authorisation procedure (Article 25.II of the 1978 Act). This is a simplified authorisation procedure which stipulates that approvals are granted immediately provided that the enterprise responsible for the system declares that it complies with the single authorisation text issued by the CNIL. This text was published by the CNIL’s services on 8 December 2005 (Official Journal of the French Republic of 4 January 2006).

The main lines of the whistle-blowing systems that can benefit from this single authorisation must meet the following requirements:

- they must have a restricted scope which covers, in addition to the areas of accountancy, banking and auditing, the **fight against bribery**. Whistle-blowing procedures in systems that, because of the area covered, have a broader scope, are subject to a more conventional authorisation regime which requires prior approval by the CNIL before the system can be put in place, in which case the latter is systematically audited beforehand by the CNIL (Article 25.I of the Law of 1978);
- they must not encourage anonymous denunciations;
- they must provide for the introduction of a special organisations in the enterprise to receive and deal with whistle-blowing;
- they must ensure that the person targeted by a whistle-blower is informed accordingly as soon as the denunciation has been made, but not until protective measures have been taken to prevent the destruction of evidence.

The CNIL has therefore officially organised the collection and protection of personal data within the framework of both domestic and transnational bribery reporting systems.

If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Not applicable.

Text of recommendation 2:

Regarding detection, the Working Group recommends that France:

-- Issue regular reminders, via inter-ministerial circulars or any other official channel, to all public officials, and particularly those working for agencies invested with supervisory powers, of their obligation to advise the Public Prosecutor promptly of any violation of the Act of 30 June 2000, pursuant to Article 40 sub-section 2 of the Code of Criminal Procedure, and that they be reminded, in this regard, of the disciplinary sanctions applicable in the event of non-compliance with this obligation, having regard in particular to the broad discretion that is granted to them in this area. [Revised Recommendation, Article I]

Actions taken as of the date of the follow-up report to implement this recommendation:

► **Regarding all civil servants**

A Civil Service Code is currently being prepared which will recapitulate the provisions of Article 40, sub-section 2, of the Code of Criminal Procedure in Book 1 Chapter II (guarantees and obligations for civil servants).

Civil servants working in inspection agencies are informed of the provisions of Article 40 during their initial training once they take up their duties.

Furthermore, a circular issued by the Chancellery, dated 21 June 2004 and addressed to Public and State Prosecutors, asks the latter to remind officials, notably in DGI, of the imperative nature of this obligation to denounce, the main legislative texts that make bribery an offence and their translation into accounting terms.

► **Regarding, in particular, civil servants working in the Ministry of Foreign Affairs**

A circular regarding Article 40 sub-section 2 of the Code of Criminal Procedure, setting out the obligation incumbent on every civil servant to report to the French judicial authorities any crimes and offences they learn about in the exercise of their duties, was placed on-line on 14 November 2005 on the website of the Ministry of Foreign Affairs. The circular specifies the scope of the obligation incumbent on civil servants to report crimes and offences they may learn about in the exercise of their duties. Officials must report such acts to the Public Prosecutor. There are no requirements with regard to the form in which the report is made, but it must be made promptly. The obligation to report is personally incumbent on the official. However, if the official so desires, he can ask his administration to report the facts on his behalf. In such cases, the official will then be personally informed of the follow-up actions taken in response to his observations. If the official personally reports the facts to the Public Prosecutor, he must advise the General Directorate of Administration of the Ministry of Foreign Affairs accordingly to ensure that government services function properly.

The circular also reminds officials that they are liable to disciplinary measures and that they may be prosecuted on the grounds of collusion should they fail to report an offence. Failure by the General-Directorate for Administration to report an offence, however, does not remove the obligation incumbent on an official to make a denunciation in that the obligation is personal.

After this internal memorandum was placed on line, a diplomatic telegram addressed to all diplomatic missions was issued on 17 November 2005 in which heads of station were asked to draw the attention of all officials under their authority to this note.

If no action has been taken to implement recommendation 2, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Not applicable.

Text of recommendation 3:

Regarding detection, the Working Group recommends that France:

-- Issue regular reminders to diplomatic missions of specific instructions concerning measures to be taken when there are presumptions that a French enterprise or individual has bribed or attempted to bribe a foreign public official, including reminders of their obligation to advise promptly the Public Prosecutor. [Revised Recommendation, Article I]

Actions taken as of the date of the follow-up report to implement this recommendation:

Further to the diplomatic telegram of March 2003 and the internal memorandum of June 2003 on bribery, the Ministry of Foreign Affairs, wanting to follow up on the Group's recommendations, decided to put on line a new internal memorandum dealing specifically with international bribery on its website on 14 November 2005. This memorandum supplements and clarifies the circular on Article 40 of the Code of Criminal Procedure and recalls the duties and obligations of the Ministry's officials with regard to the prevention, punishment and measurement of international corruption.

Accordingly, any official who learns of acts of bribery of a foreign public official involving persons of French nationality must report such acts to the Public Prosecutor. There are no requirements with regard to the form in which the report is made, but it must be made promptly.

This obligation to report is personally incumbent on the official; however, officials are recommended to forward their reports to the General Directorate of Administration of the Ministry of Foreign Affairs whose task is to centralise, for the attention of the judicial authorities, all information relating to the offences observed. The Directorate-General of Administration is in fact better placed to verify whether the facts reported fall within the scope of Articles 435-3 or 435-4 of the Criminal Code. The official will be personally informed of the follow-up actions taken in response to his report. If no denunciation is made or if a denunciation is continually deferred, the official must report the facts himself to the Public Prosecutor's office on pain of becoming liable to prosecution for failing to report an offence.

Stations are recommended to raise the awareness of enterprises, and more particularly SMEs, with regard to corruption issues and to inform them of the applicable legislation by making use of their networks of foreign trade advisors, NGOs, Transparency International in particular, and the ambassador responsible for combating organised crime.

The Circular expressly recalls Article 5 of the OECD Convention which provides that "Investigation and prosecution [...] shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

Lastly, officials are asked to inform the central administration of all instances of bribery they may become aware of, whether or not French companies are involved, so that the central administration can gain a clearer idea of the overall situation with regard to international bribery.

Going beyond the recommendation made by the Working Group to "regularly remind diplomatic missions", the Ministry of Foreign Affairs has decided to make this memorandum permanently available on its intranet so that all officials can at any time inform themselves about the actions to take should they learn of acts of bribery.

The above-mentioned telegram also expressly draws officials' attention to this memorandum.

In addition, the ambassador responsible for combating organised crime, when travelling abroad, raises the awareness of diplomatic missions and enterprises with regard to the issue of bribery.

If no action has been taken to implement recommendation 3, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Not applicable.

Text of recommendation 4:

Regarding detection, the Working Group recommends that France:

-- Establish procedures to be followed by employees of the Coface and the Agence Française de Développement for reporting credible evidence of the bribery of a foreign public official to the Public Prosecutor's office and encourage these agencies to set up policies to evaluate the eligibility of enterprises that have been found guilty in the past of acts of foreign bribery for financial assistance provided by these agencies. [Convention, Article 3; Revised Recommendation, Articles I and VI]

Actions taken as of the date of the follow-up report to implement this recommendation:

► **Introduction of procedures to alert the Public Prosecutor's office of credible evidence of bribery**

Since November 2004, the French Development Agency (AFD) has an internal professional ethics system which includes, as part of the group's ethical charter, a mechanism for reporting any violations of that charter (one section of which deals with the fight against bribery) to the Director-General via the advisor responsible for ethics.

In accordance with the law, it is the Director-General who actually reports a crime or offence to the Public Prosecutor's office. The Director-General of the AFD is subject, regardless of the previous statutory position, to the obligation to denounce an offence set out in Article 40 of the Code of Criminal Procedure (CCP), to the extent that, in terms of the case history of the State Council, the director of a public establishment of an industrial or commercial nature (EPIC) such as AFD always has the status of a civil servant.

Although the mid-term projects department of COFACE provides guarantees on behalf of the State, the duties of its director remain strictly within the private sector (the department is not autonomous vis-à-vis COFACE). He is therefore not subject to Article 40 of the CCP, nor are the employees of this department.

However, under current practice, officials working in the mid-term projects department of COFACE are already able to inform civil servants in the Directorate-General for the Treasury and Economic Policy (DGTPE) responsible for insurance credits of any evidence of bribery they might feel to be credible or any other anomaly encountered when working on cases, given that these civil servants are themselves subject to Article 40 of the CCP. In order to formalise this channel of information, the French authorities will ask COFACE to put in place in 2006 a formal mechanism for reporting information on credible evidence of bribery to the DGTPE.

► **Encouraging the implementation of policies to evaluate the eligibility of enterprises that have been found guilty in the past of acts of foreign bribery for assistance provided by the AFD and COFACE**

Evaluating the past legal record of an enterprise with regard to bribery in order to determine its eligibility for the assistance these two agencies are empowered to provide is an issue which the public authorities feel is important. This issue also seems to pose problems, particularly in legal and operational terms. It is precisely for this reason that discussions have been proceeding within the Export Credits Group at the OECD on the feasibility of such oversight, and the procedures that might apply to it, on the basis of detailed proposals put forward in the course of revision of the 2000 Statement of Action on export credits and bribery.

France intends to continue to participate actively in this forum, which is competent to deal with policies that clearly concern all public credit insurers at the OECD. In accordance with the principle of functional equivalence set out in the 1997 OECD Convention, it would appear to be necessary for the Export Credits Group to help with the development of a standard in this area. In order to play a full role in the discussions leading up to formalisation of this standard, France has started to study the legal viability, both for COFACE and the AFD, of implementing this type of policy.

If no action has been taken to implement recommendation 4, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Not applicable.

Text of recommendation 5:

Regarding detection, the Working Group recommends that France:

-- Consider introducing stronger protective measures for employees who report suspicious facts that may indicate bribery in order to encourage them to report such facts without retaliation in the form of dismissal. [Convention, Article V; Revised Recommendation, Article I]

Actions taken as of the date of the follow-up report to implement this recommendation:

Given the emphasis placed by the MEDEF in response to the above-mentioned recommendations (see reply to recommendation No. 1) on the protection of whistle-blowers, the French authorities feel that— as matters stand at present – legislative action is not needed to broaden the scope of enhanced employee protection mechanisms (such as those for sexual harassment or bullying) to cover the denunciation of bribery, thereby complying with the fifth recommendation that had been made to France..

Moreover, France considers that the framework for professional whistle-blowing systems established by the CNIL in its guidelines of 10 November 2005 and in its deliberation of 8 December 2005 (see replies to recommendation No. 1) enhances the protection of employees denouncing both domestic and transnational bribery as well as those who might be denounced. The single authorisation system provided for by the CNIL makes it possible to guarantee:

- the outcome of the processing of information forwarded;
- the procedures for processing the identity of the whistle-blower as well as the person denounced;
- the type of data likely to be recorded and the persons likely to receive such data;
- the period of time during which data are kept;
- the procedures for transferring data outside the European Union.

If no action has been taken to implement recommendation 4, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Not applicable.

Text of recommendation 6:

Regarding detection, the Working Group recommends that France:

-- Make use of the new Law on Financial Security to enhance the awareness of auditors and provide them with further training regarding the provisions of the Act of 30 June 2000, in connection with their obligation to report any illicit act to the Public Prosecutor's Office, and to subject those who fail to comply with that obligation to more severe disciplinary measures. [Convention, Article 8; Revised Recommendation, Article V]

Actions taken as of the date of the follow-up report to implement this recommendation:

► **Awareness and training**

Fully aware of the issues at stake, the National Company of Statutory Auditors (Compagnie nationale des commissaires aux comptes) – whose general mission at the national level is to ensure that the profession is properly exercised – has undertaken many actions to enhance the awareness of the profession. It has developed a seminar entitled “fraud and mistakes”, which addresses the disclosure of criminal acts and the declaration of suspicions to TRACFIN. The Compagnie nationale considers this seminar to be a priority action, and has therefore put in place special funding arrangements for it. Regularly updated, it has been attended by over 3 000 professionals since 2002. In addition, a two-hour conference dealing with the same theme has been organised for all regional auditors’ organisations.

Besides helping to design management training modules for employees subject to obligations with regard to the combat against bribery and funding of terrorism (e.g. Banks, Insurance Companies, Administrators and legal agents in 2004), TRACFIN develops theme-based training actions (by way of example, TRACFIN was called upon to make presentations at over 40 professional conferences in the course of 2004 organised by the various professional sectors subject to the requirements regarding the declaration of suspicion).

Furthermore, TRACFIN is developing awareness actions with regard to declaring professions, particularly those recently affiliated under the Act of 11 February 2004, including auditors (see replies to recommendation No. 7).

► **Detection system**

The Act on Financial Security (LSF) of 1 August 2003 introduced a corpus of strict and detailed rules designed to enhance the **independence of auditors** working on mission in enterprises, one of the most noteworthy measures being the strict separation of auditing and advisory services to prevent any conflict of interests. It should be stressed that **France is one of the few countries to have made it an offence for a person to perform both functions simultaneously.**

France has introduced a number of measures aimed at mobilising the instruments created by the Act on Financial Security in order to better integrate the accounting profession in the bribery detection system:

- ▶ under a decree dated 25 November 2003, a **High Council of Statutory Auditors (H3C)** was created. Its purpose is to oversee the profession (with the help of the Compagnie nationale des commissaires aux comptes, CNCC) and to ensure that the code of ethics is respected and that auditors remain independent. To this end, it has in particular been given the task of identifying and promoting good professional practices and maintaining discipline among auditors by acting as an appeals body for disciplinary decisions taken by the Regional Chambers of Regional Registration Commissions (Commission régionales d'inscription). One of its first missions was to draw up a **code of ethics** which was finalised in 2005 and approved on 16 November 2005 by the French Minister of Justice, which means that this document will therefore have regulatory value in law (see Decree No. 2005-1412 of 16 November 2005);
- ▶ Unlike Regional Registration Commissions, public authorities account for the bulk of **the membership of the H3C**. In fact, the institution is chaired by a magistrate from the court of appeals. In 2004 and 2005, 7 sanctions, including 5 temporary suspensions and 2 strikings-off were handed down by the Higher Council, and at least 28 sanctions by regional chambers.
- ▶ Furthermore, the Act of 11 February 2004 **has extended the obligation to declare a suspicion to TRACFIN under Article L 562-2 of the monetary and financial code (Article L 562-2, paragraph 11) to auditors, and has extended this obligation to transactions that might be linked to bribery.** These professionals are therefore now subject to the obligation to declare to TRACFIN any suspicious financial transaction that might be linked in particular to bribery. Since adoption of the Act of 11 February 2004, accounting professionals were responsible for 16 of the declarations of suspicion received by TRACFIN. This rate of participation in the declaration system might not appear to be significant, at first sight, compared with the overall volume of declarations received by TRACFIN in the course of 2004 (10 842 declarations). Given that these professionals have only recently started to participate in the suspicion declaration system, however, it needs to be viewed in relative terms. These professionals will undoubtedly play a more active part in the system, notably through the efforts that have been made to raise their awareness of the issues by both the public authorities (TRACFIN) and the Compagnie nationale des commissaires aux comptes (see below).

In conclusion, it should be noted that not only are auditors liable in both disciplinary and criminal terms in the event of failure to reveal to the Public Prosecutor any acts of bribery of which they may learn, they may also be subject to disciplinary measures should they fail to meet their obligation to declare any suspected acts of bribery to TRACFIN.

If no action has been taken to implement recommendation 5, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Not applicable.

Text of recommendation 7:

Regarding detection, the Working Group recommends that France:

-- In order to enhance the overall effectiveness of French measures to combat corruption, make financial and professional organisations which are subject to the obligation to declare suspicious transactions to TRACFIN (the financial intelligence unit) more aware of the provisions of the Act of 30 June 2000, and ensure that available sanctions are applied effectively to all those organisations and professions that are subject to this obligation. [Revised Recommendation, Article I]

Actions taken as of the date of the follow-up report to implement this recommendation:

In connection with transposition of the second European anti-money laundering directive by the Act of 11 February 2004, the scope for reporting suspicions to TRACFIN was explicitly extended to bribery (see response to Recommendation 6).

► Building awareness among professionals

The authorities deemed that extension of the scope for declaring suspicions to bribery called for efforts to make professionals more aware of their obligations in the fight against money laundering and of the risk situations they might encounter in this area, and for enhancing synergy between all of the units involved. As a result, a number of actions were taken.

The philosophy underlying French provisions for the declaration of suspicions is one of voluntary disclosure on the part of professionals, based on their experience and their analysis and assessment of a given transaction, and more generally familiarity with their clients. This explains and justifies the lack of a legal definition of “suspicion” and of pre-established and binding objective criteria.

Accordingly, TRACFIN attaches great importance to working with professionals to encourage their full involvement in the process. In addition to helping prepare staff training modules, the unit devotes much of its activity to on-site actions, at workshops, and to training (for more details, see the response to Recommendation 6). Such gatherings provide an opportunity to spell out TRACFIN’s role, to set forth its expectations regarding legal obligations and to heighten each participant’s awareness of the money-laundering or terrorist-financing typologies with which they might be confronted in their routine activities.

This “pedagogical” action is being refined with support from the other national players in the fight against bribery. For example, TRACFIN and the SCPC maintain a close partnership through such activities as annual training sessions for officials from both units, which are now resulting in greater sharing of information on the types of bribery detected. Cross-cutting information of this sort can prove highly useful in facilitating the identification and detection of specific methods of bribery, by both units within their respective areas of competence as well as by professionals bound by the mechanism for declaring suspicions.

Through an interministerial working group under the auspices of the Ministry for the Economy, Finance and Industry, both units are also helping to formulate a pedagogical model on the fight against bribery, the purpose of which is to consolidate and share the action and know-how of the various French administrations/departments in this area. This will give them a comprehensive reference resource, which

can be modulated to suit respective needs, for carrying out their training and awareness-building action in the realm of bribery, both nationally and internationally (technical assistance actions).

The process of heightening the awareness of professionals subject to declaration requirements is also taking shape within the “Liaison Committee of the Fight Against Laundering of the Proceeds of Crime”, which was instituted in 2001 and is co-chaired by TRACFIN and the Ministry of Justice. At present, this co-operative body for which the DGTPE acts as a Secretariat has 30 members representing professions subject to declaration requirements, supervisory authorities and various government agencies (Ministry for the Economy, Finance and Industry and the Ministries of Justice and of the Interior), and its purpose is to improve reciprocal information flows between its members and to propose ways of improving the national mechanism for fighting money laundering and terrorist financing. Discussions in this forum have confirmed the attention that professionals pay to the notion of “politically exposed persons”, who, given their special sensitivity and pursuant to the FATF recommendations incorporated into the third European directive on the prevention of money laundering and terrorist financing¹, warrant increased vigilance.

► The sanctions mechanism

1. The French provisions for combating money laundering and terrorist financing, in line with their underlying philosophy (see above), do not empower TRACFIN to impose sanctions for failing to declare a suspicion. It is TRACFIN’s duty to refer cases involving presumed acts of money laundering to the courts. Over the period 2003-2005 (as of 30 November 2005), TRACFIN referred to the courts seven case files involving presumptions that bribe money had been laundered, most of which in respect of politically exposed persons. This in no way precludes a larger number of declaration files ultimately leading to bribery charges, insofar as the presumed instances of money laundering that TRACFIN reports to the judicial authorities in connection with other underlying offences may enable the courts, at the conclusion of the judicial investigation phase, to uncover bribery offences as well.

2. The Banking Commission exercises supervisory authority over credit institutions, investment firms (excluding portfolio management companies) and bureaux de change. In this capacity, it monitors the compliance of financial bodies with all of the applicable legal rules and regulations in respect of the fight against money laundering and terrorist financing.

In 2004 and 2005, the Banking Commission respectively conducted 188 and 157 on-site investigations. Following those audits:

- 57 follow-up letters to institutions in 2004 contained at least one comment about the fight against money laundering; 59 letters did so in 2005.
- 19 disciplinary sanctions imposed in 2004 included at least one charge relating to the fight against money laundering, and six of them involved at least one failure to declare suspicion. In 2005, 11 sanctions were imposed in respect of money laundering, and once again six of them involved violations of the obligation to declare suspicions.

In addition to on-site inspections, the Banking Commission introduced an annual questionnaire in 2000 that it could use to check whether the credit institutions and investment firms under its supervision had adopted suitable procedures and instruments for detecting transactions, and whether they were performing audits of the system thus put in place. Through systematic analysis of the questionnaire, the Banking Commission can summon establishments whose procedures, instruments or controls are insufficient to take the necessary corrective actions. In 2004, 204 letters were sent out to establishments following analysis of the questionnaire, and 208 were sent out in 2005. The questionnaire requires establishments, *inter alia*, to

¹ Adopted on 20 September 2005 and published in the OJEU on 25 November 2005.

report the date on which their internal procedures were last updated. In this way, Banking Commission staff checked in 2004 that the internal procedures of the establishments concerned had in fact been updated subsequent to the Act of 11 February 2004, which explicitly included bribery amongst instances giving rise to an obligation to declare.

3. For its part, the Financial Markets Authority (AMF) regulates French financial markets. As part of its mission of monitoring compliance with French anti-money laundering provisions by management companies, to which the provisions have applied since November 2004, the AMF in 2005 audited the money-laundering records of all licensed management companies and conducted on-site laundering audits of 49 such companies. No sanction procedures were initiated for breaches in this area.

4. The supervisory authority for insurers and mutual societies (ACAM, formerly CCAMIP), which regulates that particular sector, conducted 12 on-site audits in 2004 and 2005.

One sanction was imposed (and published) by the CCAMIP over the two years 2004 and 2005. Taken on 13 October 2004, it gave rise to the following action: warning; a €300 000 fine; and publication of the sanction in the *Journal officiel de la République française*.

The firm involved did not appeal the sanction, which became final at the expiration of the two-month appeal period provided for by Article L 310-18 of the Insurance Code.

If no action has been taken to implement recommendation 7, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Not applicable

Recommendations for ensuring adequate mechanisms for the effective prosecution of offences of bribery of foreign public officials and related offences

Text of recommendation 8:

The Working Group recommends that France:

- given the current exceptional regime assigning to the Public Prosecutor the sole authority to prosecute cases involving the bribery of foreign public officials of States that are not Members of the European Union, and given the hierarchical structure of the Public Prosecutors' office which is by law subject to the executive, facilitate the prosecution based on complaints lodged by victims in cases involving the bribery of public officials of any foreign State, on the same basis as that provided for bribery of French public officials. [Convention, Article 5; Revised Recommendation, Article VI]

Actions taken as of the date of the follow-up report to implement this recommendation:

1. France is aware of no complaint that has triggered activation of this regime of prosecution.

In contrast, two recent – and widely publicised – cases have shown that even in the absence of a complaint

lodged by a victim or a State, a preliminary inquiry can lead to official action in the form of the opening of a judicial investigation.

2. In response to this recommendation, it was France's intent to facilitate prosecution in response to victims' complaints via a circular of the Minister of Justice that was sent out on 21 June 2004 to public prosecutors (*procureurs généraux* and *procureurs de la République*). By law (Article 30, paragraph 2 of the Code of Criminal Procedure), the Minister of Justice is empowered to give magistrates general instructions. Magistrates are bound by those instructions, and non-compliance can lead to disciplinary sanctions.

In this context and in this particular area, the circular restricts a prosecutor's ability not to pursue a case (the circular was published in the *Bulletin officiel du Ministère de la Justice*, No. 94 of 1 April - 30 June 2004 and may be consulted on the Internet at: <http://www.justice.gouv.fr/actua/bo/dacg94c.htm>).

The circular asks public prosecutors to deal with complaints by bribery victims using the same admissibility criteria as for cases submitted to investigating magistrates (*juges d'instruction*), which must be investigated, barring legal impossibility.

Under the circular, prosecutors must relinquish the power to close a case on discretionary grounds: for example, they may not refuse to conduct an investigation on the grounds that the alleged facts have been demonstrated insufficiently, or on grounds involving the national economic interest: they are required to investigate.

The circular asks prosecutors, in the event they feel a complaint has insufficient motivation, to hear the plaintiff and obtain further information about the complaint before taking any decision for closure.

Lastly, the circular calls upon prosecutors to advise plaintiffs if cases are closed and to advise them of the underlying legal or discretionary grounds so they may file a hierarchical appeal with the *procureur général* (early application of a provision entering into force at the end of 2007).

Insofar as the circular provides assurance that public prosecutors will deal with victims' complaints using the same admissibility criteria as complaints lodged with investigating magistrates, the French authorities consider that they have met the Working Group's recommendation.

If no action has been taken to implement recommendation 8, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Not applicable

Text of recommendation 9:

The Working Group recommends that France:

- take the necessary steps to extend to an appropriate period the statute of limitations applicable to the offence of bribery of foreign public officials so as to ensure the effective prosecution of the offence, and to facilitate responses to requests for extradition. [Convention, Article 6]

Actions taken as of the date of the follow-up report to implement this recommendation:

1. As noted in the draft mid-term study, statutes of limitation must be assessed with regard to:

- the length of the limitation period, but also:
- the starting point for the limitation period;
- grounds for suspending the limitation period and grounds for interrupting it;
- whether or not an “ultimate” time limit is applicable if there are grounds for suspending or interrupting the limitation period.

2. It would not appear necessary in France to extend the statute of limitation for the offence of bribing foreign public officials because:

- With regard to the starting point for the limitation period, the prosecution of bribery offences in France is governed by rules more favourable than those applicable to other offences;
- It was indicated in Phase I that the starting point was put off from the date when the bribery pact is concluded until the date of the last payment or final reception of consideration promised (Crim. 13 Dec. 1972, Bull. No. 391, Crim. 9 Nov. 1995): “consideration promised” must be construed to include both the illicit benefit given to the public official (the bribe) and the action of the public official that has been purchased (decision or abstention).

Since the Phase I and Phase II reports, the French supreme Court of Appeals (*Cour de cassation*) has put off even further the starting point of the limitation period in cases of fraudulent collusion: when successive pacts in respect of successive transactions are concluded between the briber and the person bribed in connection with the same fraudulent collusion, the deferral of the starting point for the limitation period to the date of the final payment of consideration promised in respect of the final transaction is valid for the first transaction as well (Crim. 8 October 2003).

- With regard to grounds for suspending the limitation period (the countdown stops with no loss of time already elapsed) and grounds for interrupting it (elapsed time is erased and a new limitation period begins), the rules governing the prosecution of offences, including bribery, are more favourable in France than in other States.

In its aforementioned ruling of 8 October 2003, the Court of Appeals validated the prosecution of bribery offences between 1983 and 1992, the initial investigative act, which interrupted the limitation period, having taken place in 1996: the briber – a banker – offered agents of the court (liquidators) reduced-rate loans (these being the proposed illicit benefit) in exchange for opening accounts in his establishment on behalf of companies placed under court administration (this being the purchased act). The Court of Appeals held that:

- The limitation period began on the date of the last payment, *i.e.* with the last monthly repayment of the reduced-rate loan.
- This deferral is applicable to the last loan, but also to the first in the series of loans.

The Minister of Justice stressed the advantages of this legal precedent in his circular of 21 June 2004. As stated earlier, the circular was sent out to all public prosecutors.

Similarly, in the highly publicised case of public procurement involving upper-secondary schools in

Greater Paris, the Paris Correctional Court, in a (non-definitive) ruling of 29 October 2005, found the defendants guilty of bribery offences in respect of successive procurement, the oldest dating back to 1990, the initial act of investigation, which set the limitation period back to zero, having taken place on 11 December 1996.

This trend in case law furthers the objective of appropriate extension of the statute of limitations and may be considered a “necessary step” within the meaning of Recommendation 9, bearing in mind that the Court of Appeals is the highest court in the French judicial system.

3. France should like to reiterate that in Phase I, the evaluation report noted that the statute-of-limitation issue constituted “a general problem calling for a comparative analysis of the legal situation in Member countries with a view to ensuring the coherent and effective implementation of the Convention.”

The evaluators thus considered, as France contends, that a statute of limitations must be assessed not only on the basis of the limitation period, but also on the basis of when that period begins and the grounds for interrupting or suspending it.

The mid-term study makes this comparative analysis, from which it emerges that:

- In most cases, the limitation period begins to run on the day when the offence was committed, as would seem to be the case with a bribery pact (§228); it has been seen, however, that in France this starting point is deferred.
- In some countries there are no grounds for suspending or interrupting a statute of limitation (unless the defendant is out of the country), and in certain other countries, investigative acts that are committed prior to notification of charges equivalent to *mise en examen* under French law do not cause the limitation period to be interrupted (§235); in France, as shown above, investigative acts cause the limitation period to be interrupted, even if they are conducted before a suspect is formally placed under investigation.
- There are “ultimate” limitation periods in many countries (§ 236), but none exist in France.

As a result, in view of all of the elements provided at the time of the Phase I and Phase II reviews, during the oral report and in this written report, the French authorities consider that this recommendation has been implemented satisfactorily via the circular of 21 June 2004, without any change in the law.

4. Lastly, in respect of extradition requests, to the best of our knowledge France has never invoked a statute of limitations as grounds for not extraditing a person charged with bribery. If an extradition request were in fact denied, it would likely be on account of the statute of limitation applicable in the requesting country, and not because of French rules, which as has been seen are favourable to prosecution.

In any event, since the Act of 9 March 2004 transposing the European arrest warrant, a statute of limitation under French law no longer constitutes grounds for refusing to execute an arrest warrant issued in respect of alleged acts over which France has no jurisdictional authority (Art. 695-22 of the Code of Criminal Procedure).

Text of recommendation 10:

The Working Group recommends that France:

- ensure that, within the framework of the reorganisation of the judiciary specialized in economic and financial offences, sufficient human and financial resources are allocated to investigations and legal proceedings in cases of bribery of foreign public officials, particularly in respect of the new central anti-bribery brigade, the economic and financial poles and specialized training for magistrates assigned to these poles, as well as the processing of requests for international mutual assistance. [Convention, Article 9; Revised Recommendation Articles I and VII; Annex to the Revised Recommendation, Paragraph 6]

Actions taken as of the date of the follow-up report to implement this recommendation:

The authorities have taken numerous steps to allocate more human and financial resources to investigations and legal proceedings.

► **With regard to the means of investigation**, the central anti-bribery brigade (BCLC) was set up in October 2004 within the Central Judicial Police Directorate (DCPJ) in the National Division for Financial Investigations. It is a multi-disciplinary body focusing specifically on this particular form of crime. Human resource allocation to the BCLC is increasing all the time. The ultimate aim is to create a team of 20. At the present time (December 2005), the brigade has a staff of 14 officials [11 from the police force, 2 from the gendarmerie (including one officer) and 1 tax inspector], compared with 8 in January 2005, at the end of the initial recruitment phase. 2006 will see the launch of a 3rd phase of recruitment, with the transfer of several more investigators to the brigade from the ranks of both the gendarmerie and the national police force.

A circular was sent out on 23 February 2005 informing all of the judicial authorities about the new brigade.

To support the ongoing increase in the work of TRACFIN since its launch, there has been a steady rise in the resources made available to the unit, in terms of both staff and technical resources for the processing of incoming information. In fact the number of staff employed by France's financial intelligence unit (a total of 52 at 1 January 2005) is soon to increase.

It is also worth noting that other structures reporting to the Paris police headquarters (Préfecture de police de Paris) may also have to deal with international bribery cases, namely:

- La Brigade de répression de la délinquance économique (BRDE), a brigade of 45 officials combating business-related crime;
- La Brigade financière, which employs a staff of 85.

Another body known as PIAC (plate-forme d'identification des avoirs criminels) assists investigators in identifying the proceeds of crime both in France and abroad (see recommendation 11).

► **With regard to judicial resources**, Act 2004-204 of 9 March 2004, adapting French law to developments in crime, establishes **inter-regional courts specialising in economic and financial cases**. Decree 2004-984 of 16 September 2004 specifies that there are to be **8** such courts, located in Paris, Lille, Bordeaux, Rennes, Nancy, Lyon, Marseille and Fort-de-France.

The legal proceedings or investigations undertaken by these courts into cases of bribery of foreign public

officials may benefit from the allocation of additional resources. Under the 2004 Finance Act, for instance, posts have been created for 77 magistrates, 18 of them for the interregional court of Paris alone, and 126 officials (81 clerks to the courts and 45 administrative staff). To date, 16 special assistants have also been appointed to these courts, including tax officials, customs officers, staff from the Financial Markets Authority and auditors from the private sector.

If no action has been taken to implement recommendation 10, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Not applicable

Text of recommendation 11:

The Working Group recommends that France:

- draw the attention of magistrates to the importance of applying effectively the criminal liability of legal persons in cases where enterprises are prosecuted for the bribery of foreign public officials and encourage them to impose, wherever possible, the penalty of confiscation and, to that end, to take the necessary steps to make them aware of the usefulness of such a penalty to sanction the offence of bribery of foreign public officials. [Convention , Articles 2 and 3]

Actions taken as of the date of the follow-up report to implement this recommendation:

► On the liability of legal persons

As on other points (see recommendation 8), the French authorities have chosen to follow up this recommendation with a circular addressed to all prosecuting authorities.

Thus the abovementioned circular of 21 June 2004 asks public prosecutors, in cases relating to the bribery of foreign public officials, to demand – either when the investigation opens or at a later date – the indictment of legal persons who might be held criminally liable. In this regard, it points out a tendency in the case law, noted in the Phase 2 Evaluation, to favour the assignment of criminal liability to legal persons.²

As this circular was sent out fairly recently, it has not been possible to provide the Working Group with

² Thus, the circular specifies that “the criminal liability of a legal person may be established either through the actions of a proxy (Criminal Chamber of the Cour de cassation – Judgement of 26 June 2001), such as the director of a foreign subsidiary, or, even if it has not been possible to identify the natural person who has committed the offence of bribery, provided that it is established that an offence has been committed by a body or representative (Criminal Chamber of the Cour de cassation – Judgement of 21 March 2000), irrespective of their identity. This would be the case, for instance, if it were established that the decision to bribe could only have been taken by the company director, given that company’s procedure for authorising expenditure”.

full information on the actual transposition of these guidelines into French judicial practice.

Evidence has been emerging, however, since the introduction of this provision into the Criminal Code in 1994 and going beyond the specific case of bribery, **of a very clear upward trend in the number of prosecutions against legal persons: after a steady increase, the number of prosecutions in 2003 stood at 500 (irrespective of the offence).**

This upward trend is expected to continue, particularly as from 1 January 2006, when the criminal liability of legal persons will be no longer specific but general: it will accordingly be possible to assign criminal liability to such persons for any criminal offence, without this being expressly provided for in the definition of that offence. Consequently, the prosecuting authority need no longer be in doubt as to whether criminal liability may be assigned for a given offence. This is bound to facilitate prosecution.

► On confiscation

The French authorities fully subscribe to the goal of seeing more systematic use made of confiscation in cases involving the bribery of foreign public officials. This is part of a broader aim, which is to enhance the tools which—upstream—enable the *identification* and *seizure* of the proceeds of crime.

1. Pointing out that confiscation is a penalty for both domestic bribery and the bribery of foreign public officials, the abovementioned circular of 21 June 2004 encourages public prosecutors to demand that it apply not only to secret commissions but to all of the proceeds derived from the offence.

It emphasises that government contracts obtained through bribes, for instance, may be confiscated as constituting the proceeds of crime. If they cannot be confiscated in kind, it points out the possibility of ordering a confiscation of their equivalent value, if necessary on the basis of an official evaluation.

2. With regard to tools that enable confiscation, France now has a central databank on assets held in banks, making it possible to identify all of the accounts held by an individual (FICOBA).

In September 2005, it set up an inter-ministerial “platform” for the identification of criminal assets (PIAC). The purpose of this structure, within the Ministry of the Interior (OCRGDF, or central office for fighting major financial crime), is to improve the identification of a criminal’s assets, with a view to developing seizure and subsequent confiscation, centralising all available data, and making the “financial approach” the rule among investigators. PIAC draws its staff from the national police force (5), the national gendarmerie (5), the Ministry of Finance [1 from the Direction générale des douanes et des droits indirects (Customs and Excise) and from the Direction générale des impôts (Inland Revenue)], and eventually should include officials from URSSAF (the social security contribution collection agency) and the Ministry of Labour. It also has correspondents in each of the regional judicial police services or directorates, and in each of the gendarmerie’s investigation units.

Within the framework of its relations with the Member States of the European Union, France has adopted Act No. 2005-750 of 4 July 2005, transposing into French legislation the Council Framework Decision of 22 July 2003 on the execution of orders freezing property or evidence. Discussions are currently under way in the Ministry of Justice on a reform of the legislation governing the seizure of the proceeds of crime, with a view to making it more effective.

Finally, it is worth noting that the Paris Criminal Court, in two (not final) judgements on 14 December

2005, passed the following sentences:

- In a case brought on the charge of trading in influence: in addition to fines of €150 000, the confiscation of sums amounting to €1 250 225 and €1 378 000;
- In another case relating to the payment of secret commissions, on the charge of receiving misused corporate assets: in addition to fines ranging from €150 000 to €250 000, the confiscation of sums amounting to €375 000 and €1 000 000.

If no action has been taken to implement recommendation 11, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Not applicable

Text of recommendation 12:

The Working Group recommends that France:

- compile statistics on the number of proceedings involving acts of transnational bribery that have resulted in prosecution or in the shelving of the proceedings, before or after investigation, in order to facilitate assessment and, where appropriate, encourage changes to the relevant criminal policy. [Revised Recommendation, Article I].

Actions taken as of the date of the follow-up report to implement this recommendation:

Seven court proceedings are currently under way in France on the charge of bribery of a foreign public official, including six judicial enquiries. A statistical tool known as CASSIOPEE, currently being developed at the Ministry of Justice, will provide at the national level all of the information mentioned in the recommendation. It is due to become operational in the second half of 2007.

If no action has been taken to implement recommendation 12, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Not applicable.

Text of recommendation 13:

The Working Group recommends that France:

- carry out the requisite consultations with a view to ensuring that appropriate fiscal provisions, in compliance with Article IV of the revised Recommendation of 1997 on the non-deductibility of bribes, are enacted as soon as possible in French territories that enjoy an autonomous tax status, taking into account the relative risk factors that are associated with them. [Revised Recommendation, Article IV; Phase I Evaluation]

Actions taken as of the date of the follow-up report to implement this recommendation:

Consultations have begun with the competent authorities in the territories concerned regarding the transposition of Article 39-2 bis of the General Tax Code (CGI), which makes bribes non-deductible.

Mayotte has transposed Article 39-2 bis of the CGI: Article 68 of Act No. 2001-616 of 11 July 2001, redefining the status of Mayotte, states that the provisions of the CGI will apply as from 1 January 2007.

New Caledonia recently did the same, as its own Act No. 2005-3 of 11 January 2005 (published in the Official Gazette of New Caledonia on 14 January 2005) supplements in particular Article 21 of the Caledonian Tax Code (on expenses) with the provisions of Article 39-2 bis of the CGI.

In **Wallis and Futuna**, Article 39-2 bis of the CGI is not applicable since corporate profits are not taxable in this French territory.

If no action has been taken to implement recommendation 13, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Not applicable.

Part II: Issues for follow-up by the Working Group

Text of issue for follow-up (as contained in the Phase 2 report):

The application of sanctions with a view to determining whether they are sufficiently effective, proportionate and dissuasive to prevent and punish the offence of transnational bribery, in particular, the practice of the courts with regard to the criminal liability of legal persons for the offence of active bribery of foreign public officials. [Convention, Articles 2 and 3]

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

It needs to be stressed that the above-mentioned circular of 21 June 2004 issues the necessary reminders:

- With regard to penalties, the Minister of Justice invites the prosecuting authorities to “call for effective, proportionate and dissuasive penalties”; he draws their “attention to the fact that the penal code provides for the additional penalty of confiscation which can apply both to the thing which served to commit the offence [“undisclosed commissions”] and to the proceeds thereof [a “contract, for example, the value of which can be ordered to be confiscated”];
- With regard to legal entities, he asks that “they be indicted, either in the introductory statement or in additional statements”

Because no natural person or legal entity has been condemned on a charge of bribery of a foreign public official, it is not possible to provide the Working Group with comprehensive information on the effective translation of these directives into the practice followed by the French legal authorities.

Text of issue for follow-up (as contained in the Phase 2 report):

Whether the current wording – notions of "without right", "at any time", and foreign public officials, and the case law concept of "corruption pact" – as well as the treatment given to the role played by the intermediary in the transmission of a bribe are sufficiently clear to allow effective prosecution of the offence of bribery of a foreign public official. [Convention, Article 1]

With regard to the issue identified above, describe any new case, law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

France considers that the expressions contained in the charge of bribery of a foreign public official and the legal concepts of a corruption pact, as well as the role of the intermediary in the transmission of bribes, are sufficiently clear to ensure effective proceedings against the offence of bribery of foreign public officials. With regard, for example, to the concepts of:

1) “without right”

Where foreign public officials are concerned, there have been no decisions regarding the means of defence which might be derived from the entitlement of a foreign official to receive advantages.

In a domestic bribery case, however, (decision of 26 October 2005 – not final – concerning school-building contracts in the Ile-de-France), this means of defence was used, the accused arguing that political parties were, at the time, entitled to be financed by companies. The court rejected this defence, however, arguing that this entitlement did not allow elected officials to give something in return for this financing, such as the award of a contract. The defendants were therefore found guilty of bribery.

2) “at any time” and the corruption pact concept

Where domestic corruption is concerned, the case law of the *Cour de Cassation* is consistent: in describing the offence, it is unimportant whether the gifts or presents were accepted after the act of bribery was committed, as long as the payments were made in accordance with a prior pact. Also, assuming the existence of relations lasting over a period of time and of successive contracts, the anteriority of the pact is sufficiently proven by the “repetition of advantages received” or their “regular and permanent nature”.

In its decision of 26 October 2005 already referred to (not final), the Paris *Tribunal Correctionnel* applied this case law: according to the accused, there was no proof that the payments made by the companies to the elected officials, which postdated the awarding of the contracts, were made in accordance with a prior pact. The court found them guilty, however, on the grounds that the proof of anteriority lay in the regular nature of the payments; in other words, while a given payment was no more than “thanks” for a first contract, it was also a payment with a view to the following contract.

3) concept of foreign public official

There have been no decisions in this connection.

It is necessary, however, to point out that this is a simple monitoring recommendation, the Group having concluded during the review of France under Phase 1 that “the French definition of a foreign public official covers the different categories identified in Article 1”.

4) role of the intermediary in transmitting the bribe

It is pointed out that, under Articles 435-3 and 435-4 of the Criminal Code, “offering directly or indirectly” constitutes an act of bribery.

So a businessman who asks his lawyer to intercede with a receiver indirectly (through the said public official’s lawyer) in order for his rights as a creditor to be recognized in exchange for unlawful advantages constitutes an act of bribery (Crim. 26 January 2005).

As in Phase 1, France maintains that it is unimportant whether the person to whom the offer was addressed was actually unaware of it because, for example, the intermediary did not act as planned.

The French delegation disputes the decision of the Appeals Court (Cass. Crim., 30 June 1999), as quoted in paragraph 109 of the Phase II report, which took the opposite view.

In this case it seems that the intermediary – a lawyer – wrongly informed his client, whose company was being put into receivership, that it was necessary to bribe the receiver. The courts therefore preferred to redefine the acts of aiding and abetting active corruption as fraud to the prejudice of the client. The above-quoted ruling by the Appeals Court in no rules out describing as active corruption the fact of asking a lawyer to bribe a public official when the said lawyer fails to convince the public official to commit the intended act. It does not pronounce on the accusation of corruption; it only verifies the conditions in which the judges redefined as fraud facts prosecuted initially on a charge of aiding and abetting active corruption.

Text of issue for follow-up (as contained in the Phase 2 report):

Whether the current basis of personal jurisdiction, which makes prosecution contingent on the prior lodging of a complaint by the victim or the official authorities, is an effective means of combating the

bribery of foreign public officials having regard to the type of offence in question and the reluctance that certain foreign authorities may have in reporting on the acts of their own public officials. [Convention, Article 4]

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

France considers that the personal jurisdiction of the French courts, which is conditional on the victim of the acts of bribery lodging a complaint or on an official denunciation by the state in which the bribery was committed, is effective in proceeding against acts of bribery committed abroad.

1. The Phase I and II reviews emphasized that the effective exercise of active or passive personal jurisdiction (the French person being the briber in the first case and the victim of bribery in the second) was limited because case law recognized as a victim of acts of bribery only the state or organisation to which the public official belonged, but not the company excluded from the procurement contract as a result of an act of bribery. Personal jurisdiction did not, therefore, appear to be an effective basis for undertaking proceedings.

In a judgement of 16 November 2005, however, the Appeals Court **went against case law, ruling that a company whose offers had been rejected as a result of a corruption pact between a competitor and a public official could** bring a civil party petition as part of the criminal proceeding.

Consequently, a **complaint lodged by an ousted competitor allows the personal jurisdiction of the French courts to be brought into play.**

2. It should be emphasized that the personal jurisdiction of the courts is a basis for jurisdiction which **supplements that based on the territorial criterion.** This criterion, however, is interpreted **more extensively in France than in other countries**, as the mid-term review stresses (§§ 161 to 169).

French law is applicable not only to offences committed on French territory, but also to offences “reputedly committed” on French territory, even if this is not the case – and without a complaint by the victim or official denunciation being necessary.

Reputedly committed on French territory are such offences as:

- Bribery committed abroad on instructions given in France (e.g. when the board of a company located abroad meets in France) or on behalf of a company located in France.
- Bribery committed entirely abroad which is linked to an offence committed in France (e.g. a forgery in France permitting bribery abroad).

The jurisdiction of French courts in all current cases of bribery of a foreign public official is based, therefore, on the territorial criterion, so this already appears on its own to be particularly effective.

Text of issue for follow-up (as contained in the Phase 2 report):

The effectiveness of existing mechanisms at the disposal of the tax administration to identify and reject as deductible expenses bribes paid for export contracts. [Revised Recommendation, Article IV]

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

In combating bribery, one of the most effective methods is the exchange of tax information between countries. France requires companies to declare fees and commissions (DAS 2). When this information concerns non-residents, it is then forwarded to other tax authorities. Such exchanges of information are on the increase; in 2003, for example, France sent its partners 99 716 crosschecks concerning fees and commissions paid by French companies to persons domiciled abroad, while in 2004 the figure was 128 125.

Also, France plays an active part in the work of the OECD's Working Party No. 8 on improving the exchange of information.

Text of issue for follow-up (as contained in the Phase 2 report):

The Working Group will furthermore follow up on the issue of provision of mutual legal assistance by France, to ensure that it is not influenced, in the context of the fight against bribery of foreign public officials, by economic considerations. [Convention, Article 9; Revised Recommendation, Article VII]

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The French authorities are not aware of any cases where mutual assistance might have been refused for this reason.

The impact of considerations of an economic nature on the implementation of requests for mutual legal assistance granted by France is closely monitored by the Working Group whenever everybody's views are canvassed.

The Working Group noted that France recently granted effective mutual legal assistance, to the British, Argentinean and Costa Rican authorities in particular, when it acceded to requests for assistance implicating large French companies in the context of major contracts involving sensitive technologies. In some of these cases, searches and custodial measures were used.

It is therefore clear that France grants full mutual legal assistance without any considerations of an economic nature taking away from its effectiveness.