

France

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1. INTRODUCTION

In France, according to a recent survey, 55 per cent of interviewed companies have identified at least one case of fraud in 2014 (PwC 2014 report 'La fraude en entreprise'; see also KPMG 2013 report 'Global Profiles of the Fraudster').

Fraud as such is not a separately defined criminal offence under French law and can be part of various criminal provisions under the French Criminal Code which relate to fraudulent activities, such as misappropriation of corporate assets, bribery, extortion, money laundering, abuse of a position of confidence and trafficking of influence. There can be many reasons why a company would conduct internal investigations.

Every day, a growing number of corporations are committed or compelled to undertake internal investigations to address allegations of potential or suspected wrongdoing. An internal investigation can meet several objectives: for example, to inform the board about a particular event or issue, to identify possible wrongdoings committed by employees, to enable the company to state publicly that it has investigated the matter and save its reputation, to establish what happened in response to a complaint from a client, or to preclude or minimise the likelihood of a formal investigation being instituted by one or more regulators.

Even though French law does not provide for statutory laws specifically regulating internal investigations, companies still face a multiplicity of legal provisions to comply with during the course of the investigation, ranging from questions of data protection compliance to respect of privacy at the workplace. Done correctly, an internal investigation can solve a problem, prevent it from reoccurring or expanding, and prevent substantial legal and financial costs.

2. MANAGING THE INTERNAL INVESTIGATION

Distinction between civil and criminal proceedings

When conducting an internal investigation, the main pitfall to avoid is the inadmissibility of the evidence gathered, which would render useless the investigation conducted.

In this regard, it must be stressed that the rules for evidence of admissibility greatly differ between criminal and civil courts. Whereas the criminal chamber of the French Supreme Court decides that '*criminal judges may not disregard evidence produced by a party on the sole basis that it has been illicitly or unfairly obtained*' (Crim. 6 April 1994, No. 93-82717), the civil and

labour chambers of the French Supreme Court apply a principle of loyalty in the production of evidence which, if violated, render inadmissible the evidence produced (Ass. Plén. 7 January 2011, Nos 09-14316 and 09-14667). However, the practical value of this distinction must be tempered.

Indeed, in a criminal trial, the means employed for gathering evidence will be limited by the probative force of the evidence itself (because such force may derive from the means employed to gather it). It is therefore preferable to involve neutral people, such as staff representatives or bailiffs, with the investigatory measure in order to make the evidence produced unchallengeable.

Also, because it might be necessary to take disciplinary sanctions against an employee who has participated in the commission of a criminal offence and because such sanction, eg in the case of dismissal, may be challenged before labour courts which apply the loyalty principle, such principle should be complied with when possible.

Finally, the civil or criminal nature of the fraud may be unknown at the stage of the investigation or may have a dual nature (eg market abuses such as insider trading and market manipulation are both regulatory infringements and misdemeanours).

Caution therefore dictates compliance with the civil law rules.

Limitations under the employee's right to privacy at the workplace

When coupled with the right of employees to privacy, the loyalty principle greatly impacts the internal investigation since a violation of the former may constitute a violation of the latter.

The existence of a right to privacy is well established (Article 9 of the French Civil Code, Article 8 of the European Convention on Human Rights, Article 7 of the EU Charter of Fundamental Rights), and its role played in the workplace has long been discussed. In the 2001 *Nikon* case (Soc. 2 October 2001, No. 99-42942), the French Supreme Court clearly stated that the worker is entitled to respect for his/her private life – including the right to the secrecy of correspondence – on the work premises and during working hours. This landmark decision followed the decision of the ECHR (*Niemietz v Germany*, 16 December 1992), in which the court considered that *'there appears ... to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature'*.

The legislator has decided to operate a balance between privacy and the disciplinary powers of the employer (which were given a constitutional ground in jurisprudence, the freedom of free enterprise – Soc. 13 July 2004, No. 02-15142). This balance is illustrated by Article L. 1121-1 of the French Labour Code, which states that *'no one may restrict individual or collective rights if such restriction is not justified by the nature of the task or proportional to the objective sought'*. The administrative courts have adopted a similar reasoning when reviewing internal rules (*règlement intérieur*) (CE, 12 June 1987, No. 81252).

As a consequence, when conducting an internal investigation, the employer should always keep in mind that the measures taken must be justified and proportionate to the seriousness of the suspected fraud.

It is also a principle that the employee must be made aware of the investigatory measure, the use of clandestine measures being illicit (Soc. 14 March 2000, No. 98-42090).

Limitations under data protection law

Because conducting an internal investigation will require the collection and preservation of evidence basically constituted of contracts, supporting documentation, emails or contacts that will necessarily contain personal data, data privacy issues are also likely to arise in such context.

In France, the principal law regulating data protection is Law No. 78-17 of 6 January 1978 (the French DPA), which was amended in particular by Law No. 2004-801 of 6 August 2004 to implement the 95/46/EC European Directive.

The definition of 'personal data' is very broad, and it is highly likely that most corporate emails and documents contain personal data. 'Processing' includes collecting, hosting, organising, transmitting and interrogating, and basically covers any operation that may be performed on personal data.

When personal data is processed through automated means, the company must inform the French data protection authority (CNIL) thereof and declare (and in certain circumstances seek authorisation for) any processing of information that has been carried out. The CNIL strictly controls the purpose of this processing.

To be licit, the processing of personal data also requires the consent of the data subject or needs to fall into certain situations, including complying with a legal obligation or pursuing a legitimate interest. The CNIL considers that it is unlikely that in most cases consent would provide a good basis for processing where the subject data is an employee. Valid consent means that the data subject must have a real opportunity to withhold his/her consent without suffering any penalty, or to withdraw it subsequently if he/she changes his/her mind. This is why it may be problematic when it is the employee's consent that is being sought.

Individuals must also receive detailed notice regarding the data processing at stake. Employees must be informed of:

- the identity of the data controller and of the purpose of the processing;
- whether it is mandatory or not to provide their data and of any consequences of refusal to provide mandatory data;
- recipients or categories of recipients of their data;
- the existence of a transfer outside the EU; and
- his/her right to access and rectify the personal data.

In practice, such information is given by the employer through the issuance of an information notice.

Furthermore, several principles define the manner in which personal data needs to be processed, including, *inter alia*, lawfulness and fairness, purpose limitation, proportionality, data accuracy, individuals' identification and

data security, and the principle that retention should not be longer than necessary for the purposes at stake.

Difficulties may arise when the company elects to transfer personal data outside the EU to a member of the corporate group or third parties. A transfer of personal data to a recipient outside the EU is only permitted under certain circumstances, including if:

- the country has been recognised by the European Commission as having an adequate level of protection of personal data;
- the transfer is based on the European Commission's standard contractual clauses;
- the transfer is based on binding corporate rules (only for companies belonging to the same group); or
- the recipient company has adhered to the US safe harbour principles.

Depending on the legal ground chosen for the transfer outside the EU, an approval for the transfer may be needed from the CNIL. However, where the transfer of personal data is likely to be a single transfer of all relevant information, then there would be a possible ground for processing under Article 69 of the French DPA where it is necessary or legally required for the establishment, exercise or defence of legal claims.

Although it does not directly govern data privacy, it should be noted in the present context that the French Blocking Statute can also complicate investigations when data needs to be transferred outside of France within the context of foreign judicial or administrative proceedings. Indeed, the French Blocking Statute, codified as Law No. 80-538 of 16 July 1980, makes it a criminal offence to look at and/or transfer information for the purposes of legal and administrative proceedings abroad when it is not done through an applicable treaty providing for mutual assistance. To be licit under the French Blocking Statute, the search, collection and review of documents for the purposes of a US discovery in a civil procedure must be done through the auspices of the Hague Evidence Convention.

Failure to comply with the French DPA may trigger the issuance of criminal sanctions (up to five years of imprisonment and/or a fine of up to a maximum of EUR 1.5 million for legal entities) and/or civil damages.

In addition, the CNIL can:

- issue a warning;
- serve a legal notice;
- pronounce a financial penalty of up to EUR 150,000 for the first breach (and up to EUR 300,000 in the event of a second breach within five years from the date on which the preceding financial penalty becomes definitive); or
- issue an injunction to cease the processing or cause the withdrawal of the authorisation given.

The CNIL and/or the court may also order the publicity of the sanctions pronounced.

2.1 Hard copy documents

Hard copy documents found in the workplace are deemed to be of a professional nature and can therefore be accessed without the employee's presence, authorisation or prior notice (Soc. 18 October 2006, No. 04-48025).

However, obtaining hard copy documents will sometimes require an intrusion into a location or item provided by the employer for the use of one particular employee, such as a drawer or a locker.

In such a case, and unless facing a particular risk or event (on the notion of particular risk and event, see below), the intrusion into this location or item requires:

- the presence of the employee or his/her due prior notification; and
- the respect of the internal rules (Soc. 11 December 2001, No. 99-43030).

If the employee is not present despite prior notification of the investigatory measure, the presence of staff representatives should be sought and proof of such notification kept for evidence purposes.

Obtaining hard copy documents may also require a personal search on an employee.

A systematic search of all employees' bags, even for a limited time, should be particularly justified by exceptional circumstances (such as a terrorist threat – Soc. 3 April 2001, No. 98-45818), which are unlikely to apply to fraud and asset tracing.

In the absence of such circumstances, the search of one employee's bag in particular can only be conducted with his/her consent, and on the condition that the employee is made aware of the possibility to refuse the search and to request the presence of a witness (Soc. 11 February 2009, No. 07-42068).

Finally, emails in hard copy documents are protected by the secrecy of correspondence (see below).

2.2 Electronic documents

An employer, while conducting an internal investigation, may choose *ex ante* to monitor and log the activities of the employees, or, *ex post*, to review their electronic files.

Monitoring devices

The use of monitoring devices is strictly circumscribed because they induce a permanent control of the employees' activities.

First, as previously stated, the use of a monitoring device should be justified by the nature of the task or proportional to the objective sought (Articles 9 of the French Civil Code and L. 1121-1 of the French Labour Code).

For example, the CNIL (the French data protection regulator) stated that the use of keylogger software (which monitors and logs everything an employee does on his computer – even typing and clicking) is forbidden unless justified, for the employee(s) or the category of employees concerned, by strong security imperatives (such as risks of disclosure of industrial secrets).

Secondly, employers are required to inform employees individually about the processing of their personal data, eg by means of a privacy clause in the employee's employment contract or an email sent to the employee (Article L. 1224-1 of the French Labour Code). Employees must also be aware that disciplinary sanctions may be adopted against them on the basis of such data (eg via a charter or the company's internal rules).

In addition to informing each employee individually, the employer must inform the Works Council (*Comité d'entreprise*) and, as the case may be, the Health and Safety Committee before 'any means used to monitor employee activity' is implemented within the company (Article L. 2323-32 of the French Labour Code).

Finally, pursuant to the French DPA, prior formalities should be filed with the CNIL when the employer is willing to set up an individual monitoring of the employees.

Emails and electronic files review

The French Supreme Court has ruled that an internal audit, the purpose of which is to assess the organisation of a service, does not constitute a means of control within the meaning of Article L. 2323-32 of the French Labour Code, the consequence being that the employer does not need to inform the workers' committee of such a measure (Soc. 12 July 2010, No. 09-66339). *A priori*, even though the courts have not decided this issue yet, the same could be said of an internal investigation.

The real issue at stake is the professional or personal nature of the files. As a general rule, an employer cannot access electronic files marked as 'private' stored on the hard drive of a company-owned computer without the employee's presence or informing the employee, unless there is 'a particular risk or event' for the company (Soc. 17 May 2005, No. 03-40017). Though this notion of 'particular risk or event' has not been defined in case law, it is nevertheless clear that it should be understood restrictively.

Indeed, the French Supreme Court has ruled, for example, that the fact that someone had sent to a company's management anonymous letters proving he had access to very confidential and restricted information of the company does not justify the search of a dozen employees' work computers in their absence (Soc. 17 June 2009, No. 08-40274).

The identification of a personal email has given rise in France to abundant case law. The basic principle is that its personal character must result from its title or from the title of the folder containing it, not from its content. Also, the personal nature of the email must be explicit: the initials of an employee (Soc. 21 October 2009, No. 07-43877) or the title 'my documents' do not demonstrate the private nature of the file (Soc. 10 May 2012, No. 11-13884).

Emails that are identified as private are considered to be private correspondence. Pursuant to Article 226-15 of the French Criminal Code, the violation of the secrecy of correspondence is criminally sanctioned by a maximum of one year's imprisonment and a fine of up to EUR 45,000 (or, for legal persons, by a fine of up to EUR 225,000).

More generally, the violation of any of the above rules will result in the inadmissibility before civil courts of the evidence gathered.

2.3 Obtaining oral evidence from employees

Under French law, an employer is free to conduct an internal investigation and notably to interview his employees and no specific rule exists as to the conditions in which such interviews must be conducted. However, it should be kept in mind that the probative force of this oral evidence will greatly depend on the circumstances of the interview.

The main pitfall to avoid in conducting such interviews is the confusion between an interview conducted within the frame of an internal investigation and a preliminary interview conducted within the frame of a disciplinary sanction. Confusion between the two may make it impossible to adopt a disciplinary sanction (by reason of the non-compliance with the above time limit).

Indeed, the French Labour Code provides for specific procedural guarantees concerning the preliminary interview conducted within the frame of a disciplinary sanction, such as the possibility for the employee to request the assistance of another employee, the right to be informed of the grievances directed at him and the impossibility of adopting a disciplinary sanction before a period of two days following the interview and after a period of one month (Article L. 1332-2 of the French Labour Code).

In order to avoid such confusion, it is preferable to adopt a very neutral tone during the interview, exclusive of any accusations or grievances, to limit the number of persons present during the interview and to have the interview conducted by someone who is not a superior of the interviewed employee and not the person likely to adopt a disciplinary sanction *a posteriori*.

More importantly, if statements made during such interviews are admissible before the courts, their probative force will be challenged on the basis that the employees are likely to be pressured by their employer.

Even though this can be said of any oral evidence gathered from employees, it is preferable to have employees willing to testify reiterate their statement in a formal witness statement (*attestation*) addressed to the judge. This witness statement complies with certain rules (Articles 200 *et seq.* of the French Code of Civil Procedure) intended to make its content less challengeable (eg it must be handwritten and state that it is made to be produced in a court, it must disclose any link between the witness and a party, and it must state that the author is aware that he/she shall face penalties for any false statement on his/her behalf – Article 202 of the French Code of Civil Procedure).

Whistleblowing

Whistleblowing systems are procedures enabling employees to report alleged violation of the law – or corporate policy – which would constitute a threat to the public or to the company's interests.

In France, a whistleblowing scheme must be authorised by either:

- self-certifying that the whistleblowing hotline complies with the predefined set of rules recognised by the CNIL in its guidelines initially issued on 8 December 2005 (Authorisation AU-004); or
- obtaining specific prior approval from the CNIL (when the whistleblowing scheme does not fall within the scope of the simplified authorisation).

Whistleblowing hotlines cannot be used for general and unlimited purposes since this would be considered disproportionate to the intended purpose. The scope of the whistleblowing covers the processing of personal data for reports made in the fields of finance, accounting, banking, the fight against corruption and antitrust law. On 30 January 2014, the CNIL finalised amendments to these guidelines expanding the scope of the topics to harassment, fight against discrimination, safety in the workplace, hygiene and environmental protection.

2.4 Legal privilege

In France, attorneys (*avocats*) – as opposed to in-house lawyers – are subject to an obligation of absolute professional secrecy.

Professional secrecy is a general obligation not to disclose secrets, imposed on all persons who have access to such secrets due to their professional status. It is an obligation of public order and deontology, sanctioned by criminal law (Article 226-13 of the French Criminal Code) and by disciplinary measures.

A principle of confidentiality also exists alongside professional secrecy, according to which attorneys can exchange correspondence which cannot be disclosed to third parties and cannot be used as evidence in court, except for those identified as ‘official’ (Article 3 of the RIN). A breach may lead to disciplinary measures by the Bar Association.

Who can invoke and who can waive professional secrecy?

In France, the attorney must keep strictly confidential any document and any information that he/she considers as being covered by professional secrecy.

Professional secrecy can be opposed by the attorney or his/her client to public, judicial and administrative authorities. They can also decline to testify on such confidential information.

In contrast, in-house lawyers (*juristes d'entreprise*) enjoy none of the legal privilege rights that are applicable to attorneys. As a consequence, communications between in-house lawyer and employees, officers or directors of a company that are aimed at obtaining legal opinions on subjects related to their work are not covered by legal privilege. In addition, in-house lawyer can be called to testify or to provide evidence against the company they work for.

Clients (companies and/or individuals) are not bound by the professional secrecy obligation and thus may freely transmit any communication exchanged with their attorneys to third parties and to the court. In such case, the client will no longer be entitled to claim the benefit of professional

secrecy to protect the information that he/she has disclosed in the first place (Com. 6 June 2001, No. 98-18577). Also, an essential difference with 'legal privilege', as this concept is known in common law countries, is that professional secrecy does not belong to the client, who cannot therefore release the attorney from his/her obligation.

However, though attorneys are bound by an absolute obligation of confidentiality resulting from professional secrecy, one case has been recognised by the French Supreme Court in which a breach of professional secrecy can be excused: when the attorney defends himself/herself against accusations made against him/her by his/her client.

Documents covered by the professional secrecy

In the framework of civil proceedings, French legal privilege is applicable in all matters, in case of both consulting and litigation, whatever the support, either material or immaterial (paper, fax, email, etc), including:

- opinions/advice addressed by an attorney to his client or intended for his client;
- correspondences between an attorney and his client;
- meeting notes; and
- more generally, all the elements of the files and all information given to the attorney at the occasion of his profession.

As to criminal proceedings, the Criminal Chamber of the French Supreme Court has for a long time considered that a distinction must be drawn between advice given by the attorney in his capacity as defender of the client and advice given in his capacity as advisor, with only advice given in the first capacity being protected by professional secrecy in criminal matters (Crim. 5 July 1993, No. 93-81275).

On two occasions, both in 1997, the legislator amended Law No. 71-1130 of 31 December 1971 in order to make clear that professional secrecy should apply to both situations.

However, despite clear wording of the law, the criminal chamber of the French Supreme Court sometimes still distinguishes between defence and advisory documents (Crim. 1 March 2006, No. 05-87252) the consequence being that, in the context of criminal proceedings, professional secrecy covers all of the advice given by an attorney in his capacity as defender, but is applied on a case-by-case approach to advice given in his capacity as advisor.

Generally speaking, the search for increased transparency, in particular in economic and tax matters, has weakened professional secrecy over the last years.

Seizure of documents in the premises of an attorney

Articles 56 and 56-1 of the French Code of Criminal Procedure allow the search of professional offices or private homes of attorneys when the attorney appears to be involved in a criminal offence or to be in possession of documents, information or articles pertaining to a criminal offence, and when the offence is such that evidence of it may be collected by seizing

papers, documents, electronic data or other articles in the possession of the attorney.

Such search is strictly controlled, as it must be conducted by the investigating judge (*juge d'instruction*) in the presence of the chairperson of the Bar Association (*bâtonnier*) or his/her representative. The presence of the *bâtonnier* is important, as he/she and the investigating judge are the only ones authorised to have access to the documents prior to their potential seizure. The *bâtonnier* may disagree with the seizure of a document when he/she deems that this seizure would be irregular (eg does not relate to the offence that is under the investigation). Recourse before the liberty and custody judge (*juge des libertés et de la détention*) is available to obtain that documents seized that are covered by professional secrecy be excluded from the procedure and returned to the attorney.

3. DISCLOSURE FROM THIRD PARTIES

Civil procedure

In the context of civil proceedings, French law permits no 'discovery', as this concept is known in common law countries. The general rule is the spontaneous disclosure of the relevant documents by the parties and their ability to support their claim without the need for general investigations. This principle is set out by Article 9 of the French Code of Civil Procedure, which states that '*each party must prove, according to the law, the facts necessary for the success of their claim*'. Article 132 of the French Code of Civil Procedure, in the section related to the disclosure of evidences, specifies that '*the party who relies on a document is bound to disclose it to the other party to the proceeding. Service of documents must be spontaneous*'.

However, if there is no general obligation to disclose documents which support the other party's case, the judge may still order the disclosure of specific documents at the request of a party. Such orders can be issued prior to the initiation of the proceedings (Article 145 of the French Code of Civil Procedure) or during the proceedings (Article 138 of the French Code of Civil Procedure). Forced disclosure may concern the opposing party or even a third party (eg Article 10 of the French Civil Code provides for a civil fine in the event one refuses to '*collaborate with the court so that truth may come out*').

When introducing a pre-action procedure on the grounds of Article 145 (*référé in futurum*) – either as part of an *ex parte* request or in the context of summary proceedings (see below) – a party seeks an order from the judge granting him/her the right to send a bailiff to seize or obtain copies of specific evidence or documents held by a future adverse party or even by a third party (for the possibility to request documents from a third party without giving any notice to the intended wrongdoer, see Civ. 2nd, 15 December 2005, No. 03-20.081 and Civ. 2nd, 26 May 2011, No. 10-20.048).

However, recourse to this process is subject to the following conditions:

- the proceedings as to the merits of the case have not yet commenced;
- there is a legitimate reason to preserve or to establish the evidence of the facts upon which the resolution of the dispute depends; and

- preparatory inquiries to be ordered are legally permissible.

Third parties can be excused from producing the requested documents if they can make the case that they are under a legitimate impediment not to disclose them (eg the requested documents are protected by the attorney–client privilege; see above). If bank secrecy cannot be raised against a court acting within the scope of criminal proceedings (Article L. 511-33 of the French Monetary and Financial Code), bank secrecy may be considered as a legitimate impediment not to disclose information in the context of a civil dispute (Com. 16 January 2001, No. 98-11744 and Com. 25 February 2003, No. 00-21184). However, in the particular circumstances where the claimant requesting the seizure of such documents is the party against whom the bank is seeking to recover a debt, the French Supreme Court refused to consider bank secrecy as a legitimate impediment to refuse the production of such evidence (Com. 16 December 2008, No. 07-19777).

Criminal procedure

Under French law, the commission of a criminal offence gives rise to two separate actions:

- the public action which has for its end both a deterrent and a punitive purpose; and
- the civil action based on tort or contractual breach, the purpose of which is to compensate the victim for the damage caused by the offence.

Although these actions arise from the same set of facts, they are completely separate and distinct and may be tried simultaneously or separately.

In the context of fraud and eventual criminal offences, it may be preferable for private parties to adjoin their claim for damages to criminal proceedings initiated by the public prosecutor (*Procureur*), in order to benefit from any evidence recovered in the course of the criminal investigations, including evidence obtained from the alleged wrongdoer or from third parties whose premises (office, home, car etc) can be searched by the police (*plainte avec constitution de partie civile par voie d'intervention*). A party can do so at any time during the criminal investigations, but such initiative can be challenged by other parties or by the public prosecutor (Article 87 of the French Code of Criminal Procedure).

In the event that the public prosecutor did not initiate any criminal proceedings under his/her own initiative, the victim can file a complaint to the office of the public prosecutor, who will decide whether or not an investigation should be started (*plainte simple*). If the public prosecutor remains silent for three months or refuse to investigate, the victim can still file a complaint directly before the competent investigating judge in order to force the investigation (*plainte avec constitution de partie civile par voie d'action*, Article 85 of the French Code of Criminal Procedure).

Finally, the last option available for the victim is to directly summon the defendant before the Court in order to have him/her stand trial (Articles 390 *et seq.* of the French Code of Criminal Procedure). However, the advantage of

such an action is limited, since it does not allow any criminal investigation to be carried out.

4. STEPS TO PRESERVE ASSETS OR DOCUMENTS

Civil procedure

Ex parte orders (*ordonnances sur requête*) and summary orders (*ordonnances de référé*) are two procedural means that can be used to take pre-emptive measures and preserve assets and documents.

An *ex parte* order is a provisional order given without trial in cases where the petitioner has good reason for not summoning the opposing party (Article 493 *et seq.* of the French Code of Civil Procedure). The competent court to issue such order is either the court that will be competent to hear the case on the merits or the court located where the measure is to be enforced. When granted, *ex parte* orders must state the grounds adopted by the judge, and a copy of the decision must be communicated to the concerned parties in order to be enforced. Any party concerned by the *ex parte* order can suspend the execution of the measures by introducing a request for retraction (*référé rétractation*) on the grounds of Articles 496 and 497 of the French Code of Civil Procedure, according to which the President of the Court (*juge des référés*) who drafted the initial order has the power to modify or retract his/her order. This new decision by the President of the Court can be appealed by all the parties.

A summary order is also a provisional order given by the President of the Court; however, the contradicting party is summoned to the hearing to discuss the opportunity of the measure to be ordered (Article 484 *et seq.* of the French Code of Civil Procedure). The hearing may intervene at very short notice, if necessary (*référé heure à heure*).

Different forms of summary orders exist under the French Code of Civil Procedure, each having specific legal prerequisites. In all cases of urgency, the President of the Court may order in a summary procedure all measures that do not encounter a serious challenge or which the existence of the dispute justifies (Article 808 of the French Code of Civil Procedure). More specific forms of summary orders allow the obtaining of measures such as:

- the disclosure and preservation of evidences on the grounds of Article 145 of the French Code of Civil Procedure (see above);
- protective or restorative remedies necessary either to prevent imminent harm or to put an end to manifestly excessive nuisance (Articles 809, paragraph 1 and 873, paragraph 1 of the French Code of Civil Procedure); or
- an order to make a deposit or to perform an obligation (Articles 809, paragraph 2 and 873, paragraph 2 of the French Code of Civil Procedure).

Conservatory attachments (*saisie-conservatoire*) can also be requested via an *ex parte* or interim order to render an asset held by the alleged wrongdoer unavailable (Articles L. 511-1 *et seq.* and R. 511-1 *et seq.* of the French Code for the Execution of Civil Measures (CPC Ex.)). In order to obtain such order, the applicant must prove that it has a *prima facie* and valid debt and that the

recovery of such debt is threatened. According to Article R. 511-2 of the CPC Ex., the location of the debtor grounds the competence of the judge that will allow such measure.

In the event of an international dispute, the French jurisdictions will consider themselves competent to order pre-emptive measures that will be enforceable in France notwithstanding the existence of an exclusive jurisdiction clause in favour of the courts of a foreign jurisdiction. However, should the exclusive jurisdiction clause provide that the foreign court shall also have jurisdiction to rule on interim measures, the French jurisdictions decline their competence to grant such measures (Civ. 1st, 17 December 1985, No. 84-16338).

Pre-emptive measures may also be granted in the event of arbitral proceedings to the strict condition that the arbitral tribunal has not yet been constituted (Article 1449 of the French Code of Civil Procedure and Civ. 1st, 14 March 1984, No. 82-15619).

Criminal procedure

Prior to court hearings and depending on the nature and the complexity of the case, evidence is gathered either by the public prosecutor through the police (*enquête de préliminaire ou de flagrance*) or by the investigating judge, who instructs the police (*commission rogatoire*).

In case of a significant fraud, it is likely that the gathering of evidence will be handled by the investigating judge, who will have extensive powers to order any kind of investigation concerning the facts for which he was seized (by the prosecutor or the victim), such as the audition of any relevant person, search warrant, expertise, phone-tapping, asset freezing or the confiscation of travel documents, if he considers such orders are necessary to the investigation.

In the course of the investigation, the parties may file with the investigating judge a written and reasoned application in order to be heard or interrogated, to hear a witness, for a confrontation or an inspection of the scene of the offence, to order one of them to disclose an element useful for the investigation, or for any other step to be taken which seems to them necessary for the discovery of the truth (Article 82-1 of the French Code of Criminal Procedure). However, the investigating judge can dismiss such request. In the event of a dismissal, it is possible to appeal the investigating judge's decision before the Investigation Chamber (*chambre de l'instruction*). Article 82-2 of the French Code of Criminal Procedure also provides that the parties can require that their lawyers assist to such investigation.

All the results of the investigation, including the depositions of witnesses and testimony of the defendants, are reduced to writing and compose the dossier of the case (which is covered by the investigation secrecy). It is upon this record that the investigating judge will ground its decision as to whether the defendant shall be held for trial.

On quite rare occasions, the court may still order any further investigative step it deems useful if the investigations appear to be incomplete, or if

further matters have come to light since they were concluded (Article 283 and 463 of the French Code of Criminal Procedure).

5. CIVIL PROCEEDINGS

As discussed above, French law offers two procedural means by which victims of a fraud may seek compensation:

- by adjoining a claim for damages to criminal proceedings (see above); or
- by filing a separate claim on the grounds of a tort or breach of contract before the civil jurisdictions.

In both procedural options, it is possible to seek for damages on the grounds of a contractual claim or a tort claim. French civil law does not offer a set of specific torts. In order to obtain damages on the grounds of a tort or breach of contract, the claimant must establish the existence of:

- a loss;
- a fault/breach committed by the wrongdoer; and
- a causal link between the fault/breach and the loss.

Of course, the existence of a fault/breach will always be easier to establish if a criminal conviction has been pronounced. For this reason, in the event of a fraud, most cases are usually handled through an adjunction to criminal proceedings rather than pure civil proceedings.

Damages may consist in an actual loss, a loss of profits or even a loss of chance. However, French law does not allow punitive damages. Concerning the indemnification for a contractual breach, Article 1149 of the French Civil Code provides that *'damages due to a creditor are, as a rule, for the loss which he has suffered and the profit which he has been deprived of, subject to the exceptions and modifications below'*. The appreciation of the loss of profits may be hard to determine: the damage has to be certain, direct and personal. The loss of chance will always consist in a portion of the estimated profits or loss suffered. This principle also applies to tort claims.

Finally, it is worth underlining that the 'Loi Hamon' No. 2014-344 of 17 March 2014 introduced the mechanism of class actions in France, giving powers to identified associations to seek recovery for individual economic losses sustained by similarly situated consumers. This type of action can only be brought for material damages sustained by consumers as a result of one or more professional's breach of its/their legal or contractual obligations. Compensation through the class action process thus excludes non-pecuniary damages, such as for moral and bodily injuries (which claimants can still recover individually).

6. ANTI-BRIBERY/ANTI-CORRUPTION LEGISLATION

Anti-corruption provisions are scattered throughout different sections of the French Criminal Code and were recently updated by Law No. 2013-1117 of 6 December 2013, amending the existing French laws on domestic and foreign bribery (mainly Law No. 2000-595 of 30 June 2000 and Law No. 2007-1598 of 13 November 2007). As a signatory to international anti-corruption conventions, additional provisions regarding foreign bribery

were implemented in the French Criminal Code in 2007, enlarging the prohibition of international bribery.

The French Criminal Code addresses separately the bribery or corruption of domestic public officials (Articles 432-11, 433-1 and 433-2 of the French Criminal Code), foreign bribery (Articles 435-1 *et seq.* of the French Criminal Code) and private commercial bribery (Articles 445-1 *et seq.* of the French Criminal Code).

Domestic bribery of public officials

Domestic bribery laws criminalise both the solicitation and the acceptance of a bribe (passive corruption), and the offering or the giving of a bribe (active corruption) by/to domestic public officials (ie 'Domestic public officials' are persons who (i) have public authority in France, (ii) discharge a public service function in France or (iii) hold a public electoral mandate in France). An act of corruption can occur between parties whether or not an agreement has been made between them before the act took place. The mere soliciting or offering of a bribe constitutes an act of corruption regardless of whether the bribe has actually been paid. Trafficking of influence (*trafic d'influence*) is a specific criminal offence that consists in active or passive bribery in order to induce a public official to abuse his/her real or apparent influence in order to obtain distinctions, employments, contracts or any other favourable decision from a public administration or authority.

Foreign bribery

The OECD Anti-Bribery Convention (OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, 17 December 1997, ratified by France on 31 July 2000) and the Convention on European Officials (Convention on the Fight against Corruption Involving Officials of the European Union or Officials of Member States of the European Union, 26 May 1997) have been incorporated into French law. Since Law No. 2007-1598 of 13 November 2007, international anti-corruption conventions are no longer specifically listed in the French Criminal Code, with the result that the prohibition of international bribery is now broader.

The provisions relating to foreign bribery criminalise the passive and active corruption of a person holding public office or discharging a public service function, or an electoral mandate in a foreign state or within a public international organisation. However, there is no specific definition of 'public international organisation' in the context of bribery laws in the French Criminal Code. It is generally assumed that it comprises at least the UN, UNESCO, the WTO and the IMF. In addition, Article 435-5 provides that organisations created pursuant to the EU Treaty are considered as public international organisations for the implementation of this Article.

Private commercial bribery

French criminal law also prohibits acts of corruption towards any person who holds a management position or job other than that of public official:

'a person who, not being a public official or charged with a public service mission, holds or occupies, within the scope of his professional or social activity, a management position or any occupation for any person, whether natural or legal, or any other body' (Article 445-1 of the French Criminal Code).

Both active and passive private commercial bribery are criminal offences. Their conditions and characterisation are the same as those applying to the bribery of a public official.

Territorial application

As a general principle, a criminal offence is deemed to have been committed in France whenever part of the offence was carried out in the territory of the French Republic.

French criminal law is also applicable to crimes committed outside the territory of the French Republic, either by French nationals or by entities incorporated in France, if the acts are punishable under the law of the country in which they were committed. Moreover, French criminal law is applicable to any activity where the victim is either a French national or an entity incorporated in France even if it is committed wholly outside the territory of the French Republic.

When the perpetrator of certain foreign corruption practices is physically present in France, he/she can be tried in France in accordance with certain procedural rules, even if the practices took place wholly outside France.

Limitation

The criminal offences related to bribery and corruption are subject to a three-year limitation period in which to bring a prosecution. This period begins at the time the agreement was made between the briber and the bribee, and is renewed on each occasion that the agreement is acted upon. Accordingly, the commencement of the limitation period is moved forward from the day the agreement to bribe was made to the day of the final payment or the last day of receipt of the advantage that was promised. The starting point of the limitation period is also delayed for certain types of offence. This is the case for the misuse of company assets, where the commencement of the limitation period starts from the date when the misuse is made known to the parties who are in a position to prosecute, or in case of breach of trust, where the limitation period starts to run from the date on which the victim knew or ought to have known of the breach.

Enforcement

There is no specific government agency in France responsible for the enforcement of anti-bribery and corruption laws, and, in practice, bribery laws are mainly enforced in France through criminal procedures.

Enforcement is conducted by the public prosecutor, who might be informed of corruption-related irregularities by government agencies such as the *Traitement du Renseignement et Action contre les Circuits Financiers clandestins* agency, the French financial intelligence unit responsible for collecting information on suspicious financial operations and money

laundering, or the *Service Central de la Prévention de la Corruption*, another French governmental unit.

Public prosecutors can also be informed of corruption-related irregularities by independent auditors of companies. Private parties may further report corruption cases and claim for damages in the course of criminal proceedings as civil parties (*parties civiles*). In addition, any approved association registered for at least five years from the date on which the civil parties issued their claims, the purpose of which, as per its statutes, is to fight corruption, may exercise the rights granted to the civil parties with regard to offences of corruption and trafficking in influence.

On 1 February 2014, the office of Financial Public Prosecutor was created in France. This office is headed by the Financial Public Prosecutor Eliane Houlette, under the authority of the Prosecutor General of the Paris Court of Appeal. It has been granted exclusive competence to investigate and pursue offences related to stock market activities, and it shares concurrent jurisdiction with the public prosecutors regarding offences involving corruption, misappropriation of corporate assets, bribery, trafficking of influence, tax fraud, etc, and any related money laundering activities. All cases to be investigated and pursued by the financial public prosecutor are of a particular complexity.

The Paris Public Prosecutor, the Financial Public Prosecutor, the investigating judge and the Paris court are empowered to exercise their jurisdiction in connection with international corruption offences wherever such offences are committed (pursuant to Article 706-1 of the French Code of Criminal Procedure).

Penalties

Sanctions imposed on individuals for public bribery are the same whether the bribery is domestic or foreign. For bribery offences, individuals face a prison sentence of up to 10 years and/or a fine of up to EUR 1 million but which can also be set to twice the amount of the benefit resulting from the offence. For the offence of trafficking in influence, individuals face a prison sentence of up to five years and/or a fine of up to EUR 500,000 but which can be set to twice the amount of the benefit resulting from the offence. Pursuant to Article 5 of Law No. 2013-1117 of 6 December 2013, the imprisonment sentence applicable to individuals for public bribery or trafficking in influence can be reduced by half for the offender or his/her accomplice if, by warning the judicial or administrative authorities, he/she has enabled the termination of the infringement or identified the other offenders or accomplices, if any.

Regarding private bribery offences, individuals face a prison sentence of up to five years and/or a fine of up to EUR 500,000 but which can be set to twice the amount of the benefit resulting from the offence.

Additional penalties may be incurred by each of these criminal offences, including, *inter alia*:

- forfeiture of civil, civic and family rights;

- prohibition to hold public office or to undertake the professional activity in the course of which the offence was committed;
- public displaying or dissemination of the decision; or
- confiscation of the sums or objects unlawfully received.

Criminal liability for companies is a general principle under French criminal law, and companies which violate bribery laws are liable for a fine of up to five times the amount of the fine individuals are liable for, ie up to EUR 5 million/EUR 2.5 million or five times twice the amount of the benefit resulting from the offence.

Additional penalties may also be imposed on companies, such as (for up to five years) prohibition from undertaking, either directly or indirectly, one or more professional or social activity, placement under judicial control, closure of the branch or one of the branches of the company used to commit the offence, and disqualification from public tenders. Companies may also be prohibited, either permanently or for a maximum period of five years, from making a public appeal for funds, and items used for the commission of the offence or the product of an offence may be confiscated. The court may also order public displaying or dissemination of the decision.