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Fighting foreign bribery: The OECD Working Group's Phase 4 report on France distributes good and bad marks

The Working Group on the Implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted the France Phase 4 report on December 9, 2021.

This is an opportunity to recall the origin of this Convention before briefly presenting the good and bad marks distributed by the monitoring team in charge of assessing France's progress in the fight against foreign bribery and underlining its key role in the defense of the values of the civilized world.

There was a time when foreign bribery was tolerated and even regulated. The tax deductibility of "bribes" to foreign public officials was a recognized practice in many countries including France. It was sufficient to declare these hidden payments to an office of the French Ministry of Economy and Finance to benefit from this regime.

Such practices not only distorted international competitive conditions. They also had a devastating impact on the economic development of the most exposed countries and financed authoritarian regimes often linked to mafia-type organizations.

The first country to legislate against foreign bribery was the United States with the adoption of the Foreign Corrupt Practices Act (FCPA) in 1977, under President Jimmy Carter.

However, the fight against corruption on an international scale could only be effective if a large number of countries adopted the same rules in a coordinated manner.

The first steps were taken at the regional level by the Organization of American States and the European Union before converging under the auspices of the Organization for Economic Cooperation and Development (OECD).

The OECD was created on December 4, 1960 by 20 countries and it has today 38 members, including most of the Member States of the European Union, the United States, Canada, Japan and Korea.

The initiation of discussions within the OECD on a convention to combat foreign bribery was a Franco-German initiative.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions^[1] was signed in Paris on December 17, 1997 by representatives of 33 countries, soon joined by 5 new members and 6 non-OECD countries.

The originality of this Convention is its brevity and simplicity.

It includes: a very broad definition of the offence of bribery; the need to establish the liability of legal persons; the establishment of effective and dissuasive criminal penalties against the briber and those considered as accomplices and of jurisdictional rules allowing for prosecution; the principle that investigations and prosecution will not be influenced by considerations of national economic interest, the potential effects upon relations with another state or the identity of the natural or legal persons involved; compliance with accounting standards to combat bribery of foreign public officials effectively.

It advocates prompt and effective mutual legal assistance, states that bribery of a foreign public official is deemed to be an extraditable offence regardless of the internal extradition rules of each signatory Party, and provides that each Party shall designate one or more authorities responsible for sending and receiving requests.

But the main originality of the OECD Anti-Bribery Convention is the implementation of a program of systematic follow-up to monitor and promote its full implementation.

As recalled in the introduction of the Phase 4 report, the monitoring of the implementation and enforcement of the Convention takes place in successive phases through a rigorous peer-review system (the evaluation team for France's Phase 4 evaluation was composed of examiners from Canada and Switzerland, as well as members of the OECD Anti-Corruption Division).

Before issuing its report, the evaluation team met with the competent authorities and representatives from the civil society and the private sector.

I was fortunate to be part of the panel of experts who answered questions from the examiners during a

meeting organized at the Ministry of Justice as part of the first assessment of France.

The resulting Phase 1 report noted that a Law of June 30, 2000 allowed for the punishment of individuals and companies guilty of bribery of public officials in international business transactions.

The stumbling block at the time, and a source of concern for the OECD Working Group, was the principle of prosecutorial discretion enshrined in the French Code of Criminal Procedure: The public prosecutor's office has the discretionary power to decide not to prosecute, even a fact that has all the characteristics of an offence.

Although French authorities have asserted that the initiation of prosecution cannot be influenced by considerations of national economic, political or other interest, the Working Group and the evaluation team "however" noted that Article 692-2 of the French Code of Criminal Procedure (which has been repealed since then) provided that *"judicial authorities that receive a request for mutual legal assistance with regard to international criminal matters and that consider that to act upon it could be prejudicial to the nation's security, public order or other vital interest of the country, may take the necessary steps to enable the competent authorities to determine the follow-up to be given to the request"*.

The Phase 1 Report did note, on the other hand, that French tax legislation had been modified to remove the deductibility of bribes paid to foreign public officials in order to take into account the application of the provisions of the OECD Convention on the national territory (except New Caledonia, French Polynesia and the territorial collectivity of Mayotte).

Like all other signatory Parties, France was then subject to several evaluations with recommendations that resulted in a Phase 2 Report in 2004, a Follow-up on Phase 2 Report in 2006, a Phase 3 Report in 2012, a Follow-up on Phase 3 Report in 2014, and finally the Phase 4 Report of December 9, 2021^[2].

In its 237-page Phase 4 Report, including annexes, the Working Group highlights France's notable achievements in the fight against foreign bribery since Phase 3 in 2012.

These include, in no particular order: The creation in 2013 of the National Financial Prosecutor's Office (*Parquet National Financier* or PNF) whose major role of which in the fight against foreign bribery was highlighted by the Belloubet circular of June 2, 2020^[3], and the creation of a specialized criminal investigation department dedicated to combating economic and financial crime (*Office central de lutte contre la corruption et les infractions financières et fiscales* or OCLCIFI); the adoption in 2016 of the Sapin II law on transparency, the fight against corruption and the modernization of the economy^[4], and the creation of the French Anti-Corruption Agency (*Agence française anticorruption* or AFA)^[5]; the extension of the statute of limitations and the reinforcement of the means and techniques of investigation in the fight against bribery of foreign officials ; the possibility for accredited anti-bribery associations to bring civil complaints, etc...

On the other hand, the Working Group is concerned about the low proportion of cases resolved due to structural resource issues that impact the entire criminal justice system and about several reforms underway, such as the limitation of the time-line for preliminary investigations to two or three years or the reorganization

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of the AFA and its missions. The recurrent questioning of the PNF and its action in the public debate is also pointed out.

Finally, the so-called “blocking statute” intended to protect companies against the extraterritorial jurisdiction of American courts, the various professional secrecy rules that can hinder an investigation and the threat to public order and the fundamental interests of the Nation under Article 694-4 of the French Code of Criminal Procedure (the successor to former Article 692-2), and the fact that reform projects to strengthen guarantees of prosecutorial independence remain unimplemented (the principle of discretionary prosecution remains a source of concern for the Working Group) are once again mentioned.

[1] https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf

[2] <https://www.oecd.org/daf/anti-bribery/France-Phase-4-Report-EN.pdf>

[3] See article entitled [International Corruption: Issuance of a circular on France’s criminal policy](#) published on our Blog in June 2020

[4] See article entitled [Adoption of the “Sapin II Law”: Strengthened anti-corruption enforcement arsenal and changes to the rules governing business relationships](#) published on our Blog in November 2016

[5] See *inter alia* article entitled [Compliance implications in M&A transactions](#) published on our Blog in February 2022, article entitled [Infographic on the key figures of the audit activities of the French Anticorruption Agency published in its 2020 annual report](#) published on our Blog in April 2021, article entitled [The French Anticorruption Agency publishes its new guidelines](#) published on our Blog in February 2021, and article entitled [The French Anti-Corruption Agency publishes guidance on “anti-corruption checks in M&A transactions”](#) published on our Blog in February 2020

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