

Unclassified

DAF/COMP/GF/WD(2014)52

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

20-Feb-2014

English - Or. French

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

## **Global Forum on Competition**

### **FIGHTING CORRUPTION AND PROMOTING COMPETITION**

#### **Contribution from France**

-- Session I --

*This contribution is submitted by France under Session I of the Global Forum on Competition to be held on 27-28 February 2014.*

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**JT03352883**

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## FIGHTING CORRUPTION AND PROMOTING COMPETITION

### -- France --

1. Corruption and anti-competitive behaviour converge where they have the effect of reducing the economic performance of both business and governments.

2. Indeed, both in the context of public procurement contracts and international commercial transactions, both corruption and anti-competitive behaviour create a distortion of competition and constitute hindrances to the efficient mobilisation of resources and means for sustainable economic development.

3. Although collusion and corruption may in the short term convince companies that they are gaining a temporary advantage, enabling them to achieve commercial success, they act as a trap for these companies by harming their long-term competitiveness (**see point I**). Today the increasing effectiveness of detection and prosecution tools, as well as companies taking on board the rules and risks associated with their violation, is encouraging the opposite trend, in which stakeholders are striving to achieve compliance. This is particularly the case for those developing business abroad by adapting to local customs and legal specificities. (**See point II**)

#### **1. Public procurement contracts: The crossover point between fighting corruption and fighting collusion**

4. Competition law and rules for fighting corruption in France overlap in the area of the award of public procurement contracts (1.1), which is the subject of an extensive decisional practice by the Autorité (1.2). Procedural interactions and links between fighting corruption and fighting collusion increase the effectiveness of enforcement processes (1.3).

##### ***1.1 Instruments used to fight collusion and corruption in public procurement contracts***

5. There are three types of legal tools in the area of public procurement contracts, which together enable both corruption and collusion practices to be identified and penalised.

6. Firstly, competition law penalises cartel practices in the area of public procurement contracts. It has both a deterrent and an enforcement function, and occupies a useful role amongst the formal rules relating to public procurement contracts – the breach of which is punished in administrative law by the annulment of said contracts – liability proceedings and criminal penalties.

7. In the domain of public procurement, the Autorité de la concurrence (which replaced the Conseil de la concurrence) almost exclusively focuses on the practices of tenderers, leaving the administrative, financial and criminal courts (see below) to examine the behaviour of the originators of public procurement contracts. However, independently of any administrative or even criminal liability, contracting authorities that have actively contributed to the setting up of a cartel by providing resources and which perform an economic activity on a market can be punished for an anti-competitive cartel agreement in the same way as

companies<sup>1</sup>. Parties assisting the contracting authority or any professional who assists in creating the cartel may also be singled out as being liable for such cartel. This was the situation for a prime contracting support company in case no. 07-D-15 of 9 May 2007, related to practices implemented for public procurement contracts linked to secondary schools in the *Ile de France* region, which was confirmed by the Paris Court of Appeal (*Cour d'Appel*) ruling of 3 July 2008<sup>2</sup>.

8. Secondly, although the Autorité de la concurrence has jurisdiction, as regards competition rules, to assess the practices implemented by companies trying to distort the tender process, it does not have jurisdiction to assess the legality of a call for tenders or a delegation of a public service, which must be referred to the competent administrative judge.

9. Indeed the administrative courts, whose role consists in assessing the legality of administrative acts, must also deal with disputes related to anti-competitive practices. Therefore, administrative judges have a duty to monitor administrative actions, which must comply with the legal framework in which they are required to be implemented. Moreover, competition law and specifically the provisions linked to anti-competitive practices form part of a legal unit: competition rules are binding on the public authorities not only when they are providing economic services, but also when they are overseeing the organisation of these services.

10. Thirdly and finally, this type of behaviour is also addressed by the provisions of the French Criminal Code. Three offences in particular can be cited:

- The crime of anti-competitive practice: Article L. 420-6 of the French Criminal Code (code pénal) states that: "Any natural person who fraudulently occupies a personal and determining role in the development, organisation or implementation of the practices set out by Articles L. 420-1 and L. 420-2 shall be punished by four years of imprisonment and a fine of 75,000 euros". This option to incriminate natural persons constitutes a crucial addition to the powers of the Autorité de la concurrence, which can only impose penalties on companies.
- The crime of favouritism: The crime of 'granting an unfair advantage', better known as 'favouritism', which was established in 1991<sup>3</sup> and is punishable under Article 432-14 of the French Criminal Code, is today essential to criminal disputes in public procurement contracts. This is an offence specific to public procurement law that penalises infringements of competition law, particularly by public procurers. It may constitute for example the granting of special information to a tenderer<sup>4</sup> or the insertion of technical clauses into the specifications that can only be fulfilled by one company.
- The crime of corruption: This offence is traditionally penalised by the French Criminal Code by way of the crimes of passive corruption, active corruption<sup>5</sup> and influence peddling<sup>6</sup>. Corruption is therefore a crime of a two-pronged nature. Firstly there is passive corruption by the corrupted party, i.e. the party that holds the power and accepts or seeks a donation or any type of advantage in return for an action that is part of its duties and that it completes in favour of the corrupting

<sup>1</sup> See Conseil de la concurrence (*Competition Council*), decision no. 05-D-61 of 9 November 2005.

<sup>2</sup> Also see Court of First Instance of the European Communities, 8 July 2008, Treuhand AG, T-99/04.

<sup>3</sup> Act no. 91-3 of 3 January 1991

<sup>4</sup> Ruling of the Criminal Division of the Court of Cassation, 23 May 2007, no. 06-87.898,

<sup>5</sup> Article 433-1 of the French Criminal Code.

<sup>6</sup> Article 432-11 of the French Criminal Code.

party, and secondly active corruption by the corrupter who issues or offers the donation or advantage in exchange for a service provided by the civil servant, politician or manager. Influence peddling, on the other hand, has a different purpose. Its perpetrator abuses their true or assumed influence in order to obtain a contract. They therefore present themselves as an intermediary between the potential beneficiary and the recipient of the abusive action.

11. Complex cartels may sometimes involve a combination of several criminal offences, and violations of competition law in public procurement contracts do not always systematically cross-check the elements constituting such offences. Consequently criminal law cannot be applied on a case-by-case basis.

## **1.2 Work of the Autorité regarding collusion in public procurement contracts**

12. As reiterated above, the Autorité de la concurrence has jurisdiction to act based on Article L.420-1 of the French Commercial Code (*code de commerce*) and 101 of the TFEU in order to penalise collusion practices between competitors. The Autorité's work in the area of public procurement contracts is significant, with more than 70 penalty decisions issued regarding call for tender procedures since 2004.

13. The Autorité's work shows that as far as cartels in public procurement contracts are concerned, all public administrative services may be affected including central Government administration, regional authorities and social security funds, and that the construction and public work contracts sector is the most greatly affected. As these practices come at a cost for the authority in question and cause real damage to the economy<sup>7</sup>, the Autorité is determined to investigate and penalise this type of behaviour. Practices that are penalised by the Autorité may take several forms.

14. Firstly, **the exchange of information**, whatever the extent to which it is formalised and structured, constitutes the first (and sometimes the only) phase of the implementation of a cartel, and can have a serious impact on the fairness of a call for tenders and distort competition. It may also constitute the only indication of a cartel, as evidence of the sharing out of contracts may be lacking. The Autorité de la concurrence thus highlighted the following point from a case related to the tram network in the city of Marseille: "*on several occasions, the Conseil de la concurrence reiterated that as regards public procurement contracts put out to tender, the fact that companies have entered into a cartel is proven as soon as evidence is collected either that they have agreed to coordinate their tenders, or that they have exchanged information prior to the date on which the result of the call for tenders is known or can be known*"<sup>8</sup>.

15. While certain practices may clearly have the objective of setting price levels at which tenders will be submitted, or of designating the successful bidder in advance by making them appear to be the lowest bidder, "*simple exchanges of information pertaining to the existence of competitors, their name, size, staff*

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<sup>7</sup> The Autorité indeed noted a major reduction in prices (of around 20%) for services offered by the companies in question once the cartel had been dismantled in a case linked to catering for historic sites. See decision no. 11-D-02 of 26 January 2011.

<sup>8</sup> Decision no. 11-D-13 of 5 October 2011 regarding practices uncovered in the electrification and electrical installations sectors in the Midi-Pyrénées, Languedoc-Roussillon, Auvergne and neighbouring regions. Also see Decision no. 09-D-18 of 2 June 2009 regarding practices implemented during the setting up of an RTM-Veolia joint venture with a view to submitting an application for the CUMPM's public service delegation to operate the tram network in the city of Marseille, and Decision no. 09-D-34 of 18 November 2009 regarding public works contracts for electricity and public lighting in Corsica

*or equipment resources, their interest or lack of interest in the contract in question, or the prices that they plan to offer, also alter free competition by limiting the independence of tenders"*<sup>9</sup>.

16. Secondly, the practices of **cover tenders** (simulating competition by submitting tenders written in such a way as to be dismissed in favour of the cover tender) **and market-sharing agreements** which are often linked, constitute the most successful forms of anti-competitive behaviour. Particularly in the case of complex calls for tender, the cartel cannot be set up without a **structured consultation** which requires meetings and mediation. Evidence may be collected by way of a body of clues. These are elements that alone do not constitute evidence, yet their severity, accuracy, accumulation and consistency enable the practice to be considered as proven.

17. Major cases can be brought to light in this manner. In a decision from 2006 regarding practices implemented in the public works sector in the Ile-de-France region, the Conseil de la concurrence fined 34 construction and public works companies 48 million euros for widespread cartels within Ile-de-France public procurement contracts, a decision that was confirmed by the Court of Appeal and the Court of Cassation<sup>10</sup>.

18. In this case, between 1991 and 1997 the main companies in the sector made an agreement to share the Ile-de-France public works contracts between themselves or their subsidiaries, taking many other companies with them. In total, calls for tender were misrepresented for approximately 40 contracts. In the context of this widespread cartel, the main companies in the sector divided forthcoming works between the companies in their group by holding 'round tables', i.e. meetings in which the company managers set out their stall for future construction work as well as monitoring planned allocations. Market sharing worked for a long time and was based on a highly sophisticated distribution system. Its implementation was characterised by a regular flow of information exchanges and by the practice of cover tenders.

19. Thirdly, companies may also agree not to respond to a call for tenders, with the **exchanges of information in this case aimed at abstention from tendering**. The Conseil thus imposed a fine of 2.6 million euros on five companies selling implantable cardioverter defibrillators for having made an agreement not to respond to a national call for tenders launched in 2001 by 17 hospitals who had formed a group in order to buy their defibrillators under the best pricing and service conditions.<sup>11</sup> The companies met on several occasions, from just after the group call for tenders project had been announced, up to two weeks prior to the deadline for the submission of tenders, and defined their common strategy which consisted of not responding to the call for tenders, writing to the contracting authority to raise technical points and individually explaining their lack of response. The cartel undermined the new group purchase procedure and deterred those involved from using this procedure in the future for medical devices. The decision was confirmed by the Court of Appeal<sup>12</sup>.

20. Finally, the Autorité has on several occasions reiterated the vigilance required from contracting authorities, as well as their role in stimulating competition, particularly as regards calls for group tenders and the creation of work packages. They have the option of rejecting a group tender based solely on a suspicion that its purpose is anti-competitive, and "*always have the possibility of dividing the proposed*

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<sup>9</sup> Decision no, 09-D-25 of 29 July 2009 regarding the practices of companies specialising in railway track works

<sup>10</sup> Decision 06-D-07 of 21 March 2006 regarding practices implemented in the public works sector in the Ile-de-France region, Paris Court of Appeal, ruling of 24 June 2008 (company France Travaux), Court of Cassation (*Cour de cassation*) ruling of 13 October 2009.

<sup>11</sup> Decision 07-D-49 of 19 December 2007

<sup>12</sup> Ruling of 8 April 2009

*contract and setting out the rules for calls for tender by creating work packages so that the highest possible number of companies can individually compete, and by conserving the option of refusing in principle to allow companies to group together, according to criteria that they assess*"<sup>13</sup>.

21. The awarding authority is also responsible for ensuring that tenderers have equal access to the information available (particularly in the case of a contract renewal or a delegation, so that the outgoing company does not have too great a comparative advantage), and for drafting the specifications in such a way that certain companies are not given an advantage, particularly by choosing technical specifications that favour their products or services<sup>14</sup> or even due to a lack of clarity in the tender regulations that lends itself to discrimination between the competitors<sup>15</sup>.

### **1.3 The interaction between criminal and administrative proceedings**

22. Although the Autorité has jurisdiction in matters related to competition law, there are a certain number of procedural mechanisms in French law that strengthen the interaction between criminal proceedings and administrative proceedings implemented by the Autorité, thus enabling the enforcement policy against behaviour that aims to distort the organisation of the market to be more efficient.

23. Firstly, Article L.463-5 of the French Commercial Code states that "Examining and penal courts may, at the request of the Autorité de la concurrence, provide it with reports, inquiry reports or other exhibits from the criminal investigation that are directly linked to the events that the Autorité is dealing with". This procedure enables the Autorité de la concurrence to hold an inquiry and institute an investigation into cases that were originally part of a criminal inquiry. The Autorité has applied this process on several occasions under the supervision of the Paris Court of Appeal and the Court of Cassation, which have interpreted the terms of Article L.463-5 with some room for manoeuvre rendering the process very efficient for the Autorité.

24. Two recent cases demonstrate this process. In decision no. 10-D-39 of 22 December 2010, in which the Autorité issued a penalty of 52 million euros against eight companies for having entered into agreements between 1997 and 2006 on the sharing out of contracts for vertical road signage (metal signs) and on pricing, at the Autorité's request the Nantes Public Prosecutor's office provided it with items from a criminal case, enabling it to carry out its investigation more effectively.

25. In another case, after being informed of the existence of criminal proceedings instituted before the Rouen Court of First Instance (*Tribunal de grande instance*) against company managers for participating in cartels in the catering sector for historic sites, in 2007 the Autorité intervened of its own accord in the competition component of the case. This process resulted in decision no. 11-D-02 of 26 January 2011, in which the Autorité de la concurrence fined 14 companies 10 million euros for having shared out between themselves almost all of the public procurement contracts for restoration at historic sites in the Lower Normandy, Upper Normandy and Picardy regions.

26. Finally, in addition to this option of accessing the criminal case, the consumer bill currently being debated by Parliament plans to introduce the option for officers of the Autorité de la concurrence to directly obtain a letter rogatory from the judge for cases with a criminal component.

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<sup>13</sup> Decisions 05-D-19, 05-D-26 and 05-D-70.

<sup>14</sup> Decision 92-D-62; Paris Court of Appeal, 7 May 1997 and Court of Cassation, 18 May 1999: Biwater case

<sup>15</sup> Decision 03-MC-01

27. Secondly, the Autorité de la concurrence provides opinions to criminal courts on the practices referred to them, pursuant to Article L. 462-3 of the French Commercial Code. As demonstrated above, criminal offences centre around practices of forming cartels and abusing a dominant position as set out by the French Commercial Code. Therefore such a link is welcomed, and although the Autorité's opinion is not binding on courts, in practice they tend to take it into account.

28. Thirdly, Article L.462-6 paragraph 2 of the French Commercial Code states that should the Autorité deem events to be of a nature to justify the application of Article L.420-6, it shall send the case to the Public Prosecutor, with such transfer suspending the time limit for court action. This provision has been applied moderately, with 10 cases having been sent to the Public Prosecutor's office since 1994, although there has been a definite increase since 2000. Most of these cases are related to cartels for public procurement contracts or pricing cartels.

29. Thus in a decision of 3 December 2008, the Conseil de la concurrence penalised companies for having submitted separate tenders during the award of several public procurement contracts for woodwork and lock maintenance, even though they were part of the same group and prepared their tenders centrally. After discovering that the President of both of the companies in question, having worked with public procurement contracts for a long time, was fully aware of the applicable competition rules, and that he had therefore deliberately ignored such rules, the Conseil decided that these acts required criminal status pursuant to Article L. 420-6 of the French Commercial Code, and sent the whole case to the Public Prosecutor.<sup>16</sup>

30. The consequences of such transfers are the responsibility of the Public Prosecutor's office in question. Nevertheless sending a case to the Public Prosecutor's office provides the Autorité with a deterrent due to the publicity that such a transfer receives, and enables it to highly stigmatise the most serious practices and make its analysis known, even though the Public Prosecutor's office has the ability to prosecute in any case and the judge is not bound by the decisions of the Autorité.

31. Lastly, although the existence of criminal penalties for natural persons may constitute a major deterrent and enforcement tool for the most serious offences, it should however be reconciled and linked with the actions of the authorities which, like the Autorité de la concurrence, impose administrative penalties on companies.

32. And yet the introduction of a leniency programme has not immediately led to the development of links between the two categories of action. Thus, the exemption from penalties that the Autorité de la concurrence may grant to companies under the leniency programme does not guarantee natural persons immunity from penalties imposed by a criminal judge, which may deter the parties in question from using the programme.

33. Of course, the consequences of this situation must be put into perspective, as *de facto* no cases of criminal prosecutions have been reported following a leniency request to the Autorité. In addition, the Conseil and then the Autorité's policy has been not to send cases to the Prosecutor for which parties being granted leniency might be subject to criminal penalties.

34. And yet, a review seems to be required in order to enable company managers that have provided crucial items enabling them to gain the benefits of the leniency programme to in turn benefit from a provision exempting them from a sentence by the criminal judge, or reducing such sentence.

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<sup>16</sup> Decision 08-D-29 of 3 December 2008 regarding practices discovered in the sector of public procurement contracts for woodwork, metalwork and lock maintenance

## 2. **Beyond cases of collusion: More extensive requirements and more efficient tools to combat corruption**

### 2.1 ***Strengthening the French anti-corruption legislative toolkit***

35. In the area of corruption, since 2007 France has progressively equipped itself with a comprehensive legislative toolkit as a result of the transposition of the various international anti-corruption conventions that it has ratified into national law.

36. Firstly, anti-corruption Act no. 2007-1598 of 13 November 2007, which essentially comprises criminal provisions, has created eight new crimes in the area of corruption, extended four existing criminal offences (including influence peddling), and authorised special inquiry techniques in corruption matters. As previously highlighted (see point I.1), the French criminal justice system sets out notably the legal definition of active corruption committed by natural persons (Article 433-1 of the French Criminal Code) and, since 2004, by legal entities, together with passive corruption committed by national public officials (Article 432-11). Corruption in an international context is also penalised by Articles 435-3 and 435-1 of the French Criminal Code.

37. Also note that Decree no. 2012-557 of 24 April 2012 regarding companies' transparency obligations in corporate and environmental matters mentions for the first time "the actions initiated to prevent corruption" as part of the information that must be included in the annual management reports of listed companies.

38. Very recently, France again significantly strengthened its legal toolkit to combat all forms of corruption and improve the effectiveness of criminal prosecutions in this area.

39. Firstly, Institutional Act no. 2013-1115 of 6 December 2013 regarding the financial Public Prosecutor formalised the creation of a financial Public Prosecutor with national jurisdiction, with the objective of improving the effectiveness of criminal prosecutions in corruption and tax evasion matters. The processing of complex cases can henceforth be entrusted to this Public Prosecutor with national jurisdiction and their own resources exclusively dedicated for this purpose. The financial Public Prosecutor's field of expertise solely comprises crimes set out by the French Monetary and Financial Code (*code monétaire et financier*) (insider trading, market manipulation, the dissemination of false information, together with tactics aimed at hindering the normal running of a regulated market or multilateral trading facility). Secondly, if proceedings appear to be very complex, the financial Public Prosecutor holds jurisdiction concurrently with that of the regional prosecutors for infringements of integrity that include corruption, influence peddling, collusion, revolving door, favouritism, the embezzlement of public funds and crimes of illegally obtaining votes in electoral matters, as well as offences involving the bribery of a foreign public official.

40. Thirdly, Act no. 2013-1117 of 6 December 2013 regarding the fight against tax evasion and serious economic and financial crime sets out new provisions that aim to improve the fight against corruption.

41. Anti-corruption associations now have the option of filing a civil action. Accredited anticorruption associations that have been registered for over five years may file a civil action before the criminal courts, particularly on counts of corruption. France is also becoming fully compliant with the general recommendations of international anti-corruption conventions (conventions of the Organisation for Economic Cooperation and Development (OECD), the Group of States against Corruption within the Council of Europe (GRECO) and the United Nations organisation (UNCAC)) by removing the provisions relating to the monopoly of the Public Prosecutor's office as regards prosecutions for the bribery of foreign public officials (Articles 435-6 and 435-11 of the French Code of Criminal Procedure - CPP). This is however without prejudice to the provisions of Article 113-8 of the French Criminal Code, which

stipulates that if the acts have been committed abroad in full, an application by the Public Prosecution Service is still required for the purposes of prosecuting the offence.

42. In addition, fines set out for infringements of integrity have notably become more severe both for natural persons and legal entities, in response to the OECD's recommendations to ensure that the applicable penalties are proportionate, effective and that they act as a deterrent. For example, for the offence of bribery of a foreign public official or bribery of the staff of a foreign or international court, the potential penalties for natural persons have increased from an 150,000 euro fine to a fine of one million euros. This amount can be increased to double the profits gained from the offence (in addition to 10 years imprisonment). For legal entities, the potential fines for the same offences can reach five times these amounts.

43. The law also now affords greater protection to whistleblowers. For both employees and civil servants, the law extends this protection to any disclosures made in good faith for any offence to the judicial or administrative authorities, and also to the press.

44. In this context, the law has entrusted the Central Service for the Prevention of Corruption (*Service Central de Prévention de la Corruption* - SCPC) with a new duty by stipulating that "anyone who reports an offence or crime committed in his/her company or administrative service shall, at his/her request, be put in contact with the Central Service for the Prevention of Corruption if the offence reported is covered by the Service's field of expertise".

45. In addition, the 'repentance' mechanism, which is reminiscent of the leniency programmes implemented to combat anti-competitive practices, has been extended to a number of financial offences, including corruption. This mechanism provides for the potential custodial sentence being reduced by half if, by warning the administrative or judicial authority, the perpetrator has enabled the offence to be stopped or other perpetrators or accomplices to be identified.

46. The use of special inquiry techniques has been extended to a number of financial offences (and to the laundering of these offences) including corruption, while these special powers of investigation, established in 2004, were originally allotted to organised crime investigations and comprise surveillance, infiltration, 96-hour custody periods, interceptions of telephone communications at the inquiry stage, recordings and image capture of certain locations and vehicles, the capture of computer data, and attachment.

47. The law has created new Article 324-1-1 of the French Criminal Code which states that "for the application of Article 324-1, the assets or income are presumed to be the direct or indirect profit of a serious offence or crime if the tangible, legal or financial conditions of the investment, concealment or conversion operation can have no justification other than to conceal the source or actual beneficiary of such assets or income". Therefore a reversal of the burden of proof has been established in laundering matters whenever the conditions of the fulfilment of an operation cannot be explained other than by a willingness to conceal the source of assets or income, such assets or income therefore being presumed to be the profit of a serious offence or crime. It aims to gain a better understanding of legal and financial arrangements that are devoid of any economic rationality and whose complexity is clearly just a means of avoiding traceability of flows and concealing their source.

48. Finally, France has recently developed and extended rapid penalty procedures for anti-corruption matters.

49. Act no. 2011-1862 of 13 December 2011 regarding the allocation of disputes and the easing of certain legal proceedings (Article 27) extends the use of appearance following prior acknowledgment of guilt (*comparution sur reconnaissance préalable de culpabilité* - CRPC) to crimes punished by a 10-year custodial sentence, whereas originally only offences punished by a sentence of less than five years were

covered. It has thereby become applicable by law to corruption offences, and particularly corruption in international commercial transactions.

50. Inspired by the plea bargaining system in English-speaking countries, from which however it differs substantially (notably in the lack of a proper negotiation between the lawyer and the Prosecutor), CRPC aims from a practical point-of-view to free up criminal courts by making use of a simple and fast procedure. On this basis, the system is innovative in French law in that it is based on the confession and conduct of the prosecuted party to 'self-incriminate' him/herself before the prosecuting body.

51. From a technical point-of-view, the CRPC process applies to parties that "acknowledge the acts of which they are accused" (Article 495-7 of the French Code of Criminal Procedure), and both to adult natural persons and legal entities.

52. The process can also now be used by an examining magistrate assigned to such acts following a judicial inquiry, in the context of an order for reference to the Public Prosecutor to implement the CRPC, where the natural person or legal entity being investigated acknowledges the acts of which they are accused, with the agreement of the latter party, the Public Prosecutor's office and the civil party (new Article 180-1 of the Code of the French Code of Criminal Procedure). The CRPC can therefore be used to prosecute the crime of bribery of foreign public officials following a preliminary inquiry or judicial inquiry. The decision in the form of an approval judgment, belongs to a sitting judge, i.e. the remand judge (*juge des libertés et de la détention*), ruling in a public hearing.

53. The Public Prosecutor is always responsible for initiating process, and is free to select the penalties that he/she wishes to propose to the perpetrator of the acts. However the latter party or his/her lawyer may also ask to use the process. The statements by which the person or entity acknowledges the acts are collated by the Public Prosecutor, who is the only party able to propose a penalty.

54. Currently, it appears that no national or international corruption charges have yet been ruled on using CRPC.

## **2.2 *Anti-corruption action required by companies***

55. Companies must put in place an operational and efficient system of compliance with anti-corruption rules, based where relevant on certification. This system constitutes a catalyst for performance on which companies must capitalise.

56. Companies' best interests are served by setting up an internal corruption prevention system.

57. Preventing corruption firstly enables companies to avoid wasting their resources by paying bribes and/or heavy fines. Although companies may be tempted in the short term to engage in corrupt practices, hoping for economic gain that they consider to be beyond their reach if they comply with merit-based competition by adhering to anti-corruption rules, the dispersal and misuse of their resources will in reality weaken their economic performance.

58. In a context in which, as explained above, anti-corruption legislation is being reinforced, the potential for conviction and the costs arising therefrom (court costs, lawyers' fees and even communication costs) are increasing, and the subsequent penalties have major economic repercussions (both direct and indirect), including: costs linked to legal proceedings, the settlement of financial penalties where relevant, secondary legal action emanating in particular from shareholders, etc. In addition, French companies can be prosecuted under criminal and civil charges in third countries in which the anti-corruption legislation has an extraterritorial effect, which is the case in the United States (Foreign Corrupt Practices Act - FCPA) and the United Kingdom (Bribery Act).

59. Moreover, companies engaging in corrupt practices are risking their reputation. The prevention of corrupt practices also enables companies to guard against blackmail by those who are aware of such practices (clients, employees etc.), and to retain the trust of investors and other partners. Indeed, although building a good reputation is a lengthy task, one scandal is enough to destroy it, at a time when the emerging economies represent a potential customer-base for companies' commercial development. The costs linked to a company's damaged reputation should also be taken into account, such as public relations costs or the costs of rebuilding its corporate image.

60. Finally, companies that conduct international commercial transactions marred by corruption also expose themselves to a significant commercial risk.

61. In addition to the loss of contracts likely to result from any conviction, they must also consider the existence of blacklists created by various bodies of companies with whom it is inadvisable or even forbidden to deal. One of these bodies is the World Bank which regularly updates its blacklist, and for a period of two to five years bans the companies listed from accessing public procurement for the contracts that it finances in whole or in part (the debarment process).

62. Nowadays companies are increasingly aware of all of these concerns and view engaging in corrupt practices as a major risk, resulting in a shift from combatting corruption to prevention of such practices and the management of these risks by the companies themselves. This shift is boosted by the fact that the foreign legislative systems mentioned above require companies to implement compliance programmes.

63. For companies, primarily those active at an international level, it is absolutely crucial to guard against corrupt practices, and the implementation of a compliance programme is now a must. This allows them not only to protect the company and its assets from the risks of criminal and civil penalties, as well as collective claims arising therefrom which now ensue with a certain degree of predictability, but also to prevent their managers from being held personally and criminally liable.

64. Having been gradually persuaded to equip themselves with corruption prevention mechanisms, companies are setting up effective compliance programmes. Such programmes represent the first crucial step and a precious tool for the prevention of illegal activity, but also a means of mitigating the consequences of tough criminal and civil measures taken by governments.

65. The anti-corruption system put in place by companies must be relevant and efficient. Although mechanisms vary in form with regard to the size and structure of the company and the sectors concerned, their relevance consists of their basis in the most demanding legal requirements in the field.

66. Firstly, the commitment of managers is key. It is of crucial importance and is characterised both internally and outside the company by a clear statement on a zero tolerance approach to corruption. In practice this means that managers are obliged to act clearly and credibly in this area, which is not necessarily associated with high costs. This commitment must be accompanied by clear instructions from managers on preventing corruption. This involves for example the drafting of a code of conduct, which must be applied notably through mandatory training, monitoring and penalties, it also being understood that the emphasis should be on the issue of conflicts of interest on a national and international level (declaration of interests by employees and decision-makers, selection of financial and commercial intermediaries, etc.).

67. In addition, there should be employee training and a periodic examination of guidelines to ensure that the message has been understood and that the programme is "dynamic and continually evolving". Indeed, simply conducting internal inquiries and investigations is not sufficient. In order to constitute an acceptable ground of defence for the company, compliance policies must meet a number of principles and provide evidence that they are actually being applied.

68. The role of implementing compliance must be allocated to a person with high-level management authority, and with responsibility and freedom to act, it being further understood that internal and external verifiers must ensure compliance and apply the required revisions to the company's compliance programme.

69. Finally, the company's compliance programme must be extended beyond the company itself to include foreign business partners, including sub-contractors, representatives, distributors, resellers and partners. In this respect, some companies have removed performance payments for sale representatives unless partners can prove that this is common practice.

70. It is encouraging to note that the majority of the large French companies, particularly those on the CAC 40 stock market index, have followed these recommendations and initiated ambitious corruption prevention processes in particular involving the highest level of management, their staff and their stakeholders, and by implementing thorough prevention and inspection measures. Since 2012, the Central Service for the Prevention of Corruption (SCPC) has revealed in its annual report the corruption prevention strategies implemented by the CAC 40 companies.

71. Nevertheless, even though the major groups have a crucial role to play given their powerful influence, such a role can only be fully exercised in an international context in which all companies are subject to the same rules, and in which the main stakeholders, particularly the public stakeholders, are fully committed to combatting corruption.

72. To this end, during the most recent conference of the states that are party to the United Nations Convention against Corruption (UNCAC), held in Panama in November 2013, the resolution put forward by France to develop application of the provisions of Article 15 and 16 of the UNCAC on the bribery of national and foreign public officials, specifically in order to more efficiently combat the solicitations to which companies are subjected in the context of certain international transactions, was adopted with the endorsement of several countries including those of the European Union and the United States.

### ***2.3 Routes to explore in order to strengthen anti-corruption measures***

73. Both anti-competitive behaviour and corrupt practices continue, despite resolute action by public authorities at a national and international level. In this context, preventative action by companies, particularly by implementing effective compliance programmes, seems to be one of the most appropriate solutions to prevent this phenomenon. One of the goals of competition regulations and anti-corruption measures is for economic stakeholders to fully take on board the ways in which they can shape their behaviour by meeting standards, and by incorporating them into their internal processes from the outset, while retaining the ability to freely determine their strategy.

74. Means of making improvements should also be sought, particularly as regards enforcement. Thus in its 2012 Report, the Central Service for the Prevention of Corruption (SCPC) mentions routes for reform, such as in particular the introduction of a compliance obligation for companies, and extraterritorial jurisdiction to enable France to extend prosecutions for international corruption, as well as establishing the SCPC's role as a 'corruption prevention' advisor for companies, a role that it already holds for judicial and administrative authorities. In this context, and while continuing to implement the OECD's recommendations contained in its October 2012 France assessment report, the SCPC is creating ties with the world of business, which requires an approachable public authority with an advisory role in the area of corruption prevention, particularly in the context of the company-dedicated working group that it set up two years ago.

75. On a wider scale, the damaging effects of corruption on the economy are a concern to the European Union and were featured extensively in the European Commission report published on 3 February 2014.