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Working Group on Bribery in International Business Transactions (CIME)

**TRANSPARENCY INTERNATIONAL COMMENTS ON FRENCH
IMPLEMENTATION OF THE OECD CONVENTION**

These comments have been provided by Transparency International

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**CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS
(OECD)**

An evaluation of implementation by France

The present memorandum raises various issues concerning the implementation of the OECD's convention on combating bribery of foreign public officials (the "OECD Convention") in France. It has as its basis the OECD questionnaire for self evaluation but will mainly address such issues that may be considered as problematic.

The law implementing the OECD Convention is dated 30 June 2000. The instruments of ratification were deposited on 31 July 2000. The OECD Convention and the implementing law came into force on 30 September 2000.

● **Article 1**

The implementing law creates new articles (the most relevant being Article 435-3) in the criminal code ("*Code Pénal*"). The articles make explicit reference to the OECD Convention. The terms used are a combination of those of the OECD Convention and those of the criminal code incriminating internal corruption. Therefore, the definitions given by those new articles are very similar to the ones given by Article 1 of the OECD Convention. Still, the following issues may be raised:

- To offer, promise or give

In accordance with the traditional wording of the criminal code concerning internal corruption, Article 435-3 incriminates the simple offer or promise. Indeed, the French legislation always considered that the giving of a bribe was only the consequence of an anterior offer or promise.

On the basis that the giving of the bribe is not expressly mentioned in Article 435-3, some argue that payments made on the basis of contracts entered into before the entry into force of the implementing law would be legal.

No definite answer can be given on this issue, but French courts in matters relating to internal corruption and on the basis of fairly similar terms found that the giving of a bribe was to be considered as a renewal of the offense.

- Complicity

Complicity in the bribery of a foreign public official is punishable under French law.

It is debatable whether, under French law, a mere authorization of an act of bribery would be considered as an act of complicity.

- Attempt and conspiracy

Attempt and/or conspiracy to bribe a foreign public official are punishable under French law. The same sanctions apply to attempt whereas specific (although fairly similar) sanctions apply to conspiracy.

● Article 2 – Responsibility of legal persons

French law establishes criminal responsibility of legal persons for the bribery of foreign public officials.

The French State cannot be criminally liable and local authorities have a limited criminal liability.

The criminal liability of a legal person is not based on a strict liability concept. A culpable act by a representative of the company is necessary for the company to be considered liable.

Representatives are directors of a company or their delegates. Therefore, the act of a simple employee cannot engage the criminal liability of a legal person unless such employee is a delegate of a director.

In any case and even if its criminal liability is not engaged, the company will have to pay damages to the victims because of the acts of its employees.

● Article 3 – Sanctions

Sanctions on natural persons are the same as the sanctions for internal corruption and are, in our opinion, very persuasive. The same can be said about the sanctions applicable to legal persons.

Still, even if the criminal liability of the company is not engaged, its civil liability will be engaged.

● Article 4 – Jurisdiction

When the offense is committed in whole or in part in France, French courts have jurisdiction. French courts adopt a broad interpretation of the territorial basis for jurisdiction. It very easily considers that an offense was committed in part in its territory.

When the offense is committed abroad by a French national, French courts have jurisdiction only if a complaint is lodged by a victim or by the authorities where the act was committed. This rule is not specific to the bribery of foreign public officials. Still, such a limitation to the prosecution of French nationals might be considered as too restrictive.

● Article 5 – Enforcement – Specific rules

Contrary to what is provided for by Article 5 of the OECD Convention, special rules of prosecution have been provided for by the implementing law. It provides that criminal proceedings can only be initiated by the public prosecutor.

This rule is different from the normal French rules. Indeed, in France, criminal proceedings can be initiated by any victim¹.

As a consequence, in international corruption matters, there is no counterbalance to the discretion of the public prosecutor. Although public prosecutors are more resistant than they used to be to political or government bodies influence, such influence might always exist.

● Article 6 – Statute of limitations

¹ It must be noticed that this possibility given to victims is fairly specific to France.

The statute of limitations applicable to the offense of bribery is three years. This rule is not different from the rules governing similar offenses. But, it must be considered that such a statute of limitation does not allow an adequate period of time for the investigation and prosecution of such an offense.

This three-year period starts running from the last payment made on the basis of the bribery agreement ².

● **Article 7 – Money laundering**

French law complies with Article 7 of the OECD Convention.

● **Article 8 – Accounting**

French law on accounting complies with Article 8 of the OECD Convention.

- **Tax deductibility**

Since the entry into force of the OECD Convention on French territory, tax deductibility of bribes is not possible.

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² For some offenses that are generally difficult to uncover, the three-year period starts running from the day the offense became known to the victims but such rule has never applied to corruption matters.