France's increasing power over multiple jurisdiction prosecutions in corruption cases

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In the context of the adoption of the Sapin II law in December 2016, providing for the implementation of new national mechanisms to fight corruption, the recent decision of the French Supreme Court (*Cour de cassation*) in the *Oil for Food case I*stands out.[1]

In its 14 March 2018 decision, the French Supreme Court ruled that the *ne bis in idem* principle could not be considered as a valid argument by companies trying to avoid criminal proceedings in France after having signed a guilty plea in the United States.

Overview of the *Oil for Food case I* proceedings

The *Oil for Food case I* relates to the United Nations *Oil for Food* programme which enabled Iraq (under embargo) to sell oil in exchange for humanitarian supplies for its population from 1996 to 2003, and the subsequent prosecutions of the oil company Vitol for bribery allegations. On 20 November 2007, Vitol entered into a guilty plea in the New York State court for 'grand larceny' under New York criminal law.[2]

Facing prosecutions in France for the same facts, the defendant claimed that the guilty plea shielded the company from further prosecution under French law *ne bis in idem* principle.

On 8 July 2013, the Paris Criminal Court[3] held that the plea deal entered into with the US authorities prevented prosecutions in France and that Article 14(7) of the 1966 International Covenant on Civil and Political Rights (ICCPR)[4], guaranteeing *ne bis in idem* protection, was not limited to 'domestic' sentencing decisions but extended to multiple jurisdiction prosecutions wherever the events took place.

On 26 February 2016, the Paris Court of Appeal[5] confirmed the application of Article 14(7) of the ICCPR to cases where the decisions of foreign criminal courts relate to acts committed in France. The Court of Appeal, however, interpreted the ICCPR to require not only the facts of the offence to be identical, but also that the state interest – as shown by the characterisation of the offence – be the same. Noting that the criminal offence was not the same between the US ('grand larceny') and France ('bribery of foreign public officials'), the Paris Court of Appeal denied *ne bis in idem* protection.

The decision of the French Supreme Court

The French Supreme Court on 14 March 2018 confirmed the exclusion of the application of the principle*ne bis in idem*, adopting a new reasoning and rejecting *ne bis in idem* protection whenever the offences prosecuted could fall within the scope of French territorial jurisdiction.

Under French criminal law, the combination of Articles 113-6,[6] 113-7[7] and 113-9[8] of the Criminal Code provides that the *ne bis in idem* principle only applies to the prosecution of offences entirely committed abroad. The French Supreme Court therefore adopted a broad interpretation of the concept of French territorial jurisdiction under Article 113-2 of the Criminal Code[9] to exclude *ne bis in idem* protection in the *Vitol* case.

The French Supreme Court held that 'French Courts have jurisdiction over bribery of foreign officials when the commission of the offense has been decided and organised on French territory, where the amounts of the remuneration due were paid'.[10]

The facts of the case reveal weak links between France and the prosecuted facts. French jurisdiction was triggered by the fact that one of the defendants had its 'economic and financial interest centre' in Paris, and that Vitol organised the commercialisation of oil endowments and the payment of surcharges owed in relation to these endowments in Paris.

This broad appreciation of the concept of territorial jurisdiction, which is the result of a developing jurisprudence,[11] suggests that France is determined to participate in a more effective way to the fight against corruption.

The French Supreme Court went even further and held that Article 4 of Protocol No 7 to the European Convention on Human Rights and Article 14(7) of the ICCPR, guaranteeing the *ne bis in idem* principle, 'prevented double prosecutions for single acts' and 'only applied where both proceedings were initiated on the territory of the same State'.[12]

The application of this reasoning to any arguments pertaining to the identity of facts, of criminal offences or of protected interests as developed by Vitol to support the application of the *ne bis in idem* principle was defeated.

Practical implications of the *Vitol* decision

The Paris Criminal Court decision of 2013 showed a lack of interest from French authorities to prosecute bribery of foreign officials.

However, the rising number of French companies convicted by the US authorities[13] (not all target of Foreign Corrupt Practices Act violations) and the high amount of the fines imposed on them has driven France to reconsider the question of its jurisdiction, and to find all possible ways to sanction corruptive practices likely to fall – at least in part – under its jurisdiction.

The French Supreme Court's firm decision highlighted French authorities' strong determination to compete with US authorities which do not grant *res judicata* effect to foreign decisions when they can have jurisdiction over potential misconducts.[14]

This new jurisprudential stance followed recent efforts to develop and enhance the French anti-corruption framework, with the enactment of the Sapin II law and the new possibility for prosecuted companies to resort to a *convention judiciaire d'intérêt public* (CJIP) (the French equivalent to a DPA), recently agreed to by three companies in France.

If US authorities decide that a given behaviour covered by a CJIP falls within their jurisdiction, they will likely review the CJIP and take action if they consider the penalty to be too weak (eg, no disgorgement of profits).[15]

Shortly before the *Vitol case*, the French Supreme Court rendered another landmark decision over multiple jurisdiction prosecutions in cases of corruption (*Jeffrey Tesler* case[16]), by which the Court similarly rejected the argument drawn from the *ne bis in idem* principle and held that foreign decisions had not become *res judicata* in France. The Supreme Court ruled that French courts had jurisdiction considering that 'the Court of appeal found that the facts, grounds for the prosecution, were committed even partially on French territory'.

Another noteworthy aspect of this decision arises from the fact that the French Supreme Court found that:

> 'the accused, whose appearance before the French criminal court is not addressed by the provisions of the agreement he entered into on March 11, 2011 with the Department of Criminal Affairs of the United States Department of Justice, is free not to incriminate himself and to exercise all his defence rights'.

Therefore, if companies and individuals cannot refer to a plea agreement signed with the US authorities to benefit from *ne bis in idem* protection (when at least part of the offence is committed in France), they are likewise not bound in the exercise of their defence rights before French courts by such guilty plea, which normally triggers the waiving of the right to claim one's innocence before other courts regarding the same offence.

Such consistency was essential. Indeed, companies and individuals prosecuted in France after signing such agreements would otherwise have been unable to refer to a plea to claim protection from the *ne bis in idem* principle, but at the same time bound to respect the strict provisions of such plea limiting their defence rights.

However, one may note that such ruling materially puts companies and individuals in a somewhat inextricable situation under US law. Indeed, pleading not guilty before French courts would still constitute a breach of their plea pursuant to 'muzzle' clauses included in resolution agreements and prohibiting individuals, companies or anyone

associated with companies from making any statement inconsistent with the US Department of Justice's (DoJ) version of the facts or its enforcement theories.

Then, if the DoJ believes, *in its sole discretion*, that a public statement (to which a public defence before foreign jurisdictions may be assimilated) has been made contradicting its version of the facts or its enforcement theories, the DoJ may bring new enforcement. Furthermore, the defence of companies and individuals prosecuted in France after signing such agreements would be severely weakened by the publicity made over the content of their plea, and the potential implementation of monitorships in the US.

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[1] Cour de cassation, Criminal division, 14 March 2018, n°16-82.117.

[2] 20 November 2007, Plea Agreement.

[3] Paris Criminal Court, 8 July 2013, *Oil for Food case I*.

[4] Article 14-7 of the 1966 International Covenant on Civil and Political Rights: 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and criminal procedure of each country'.

[5] Paris Court of Appeal, 2016, No 13/09208 – *Oil for Food case I*.

[6] Article 113-6 of the Criminal Code: 'French criminal law is applicable to any crime committed by a French national outside the territory of the Republic. It is applicable to offences committed by French nationals outside the territory of the Republic if the acts are punishable under the legislation of the country where they were committed...'

[7] Article 113-7 of the Criminal Code: 'French criminal law is applicable to any crime, as well as to any offence punishable by imprisonment, committed by a French national or by a foreigner outside the territory of the Republic when the victim is a French national at the time of the offence.'

[8] Article 113-9 of the Criminal Code: 'In the cases provided for in Articles 113-6 and 113-7, no prosecution may be initiated against a person who establishes that he was subject to a final decision abroad for the same offense and, in the event of conviction, that the sentence has been served or prescribed.'

[9] Article 113-2 of the Criminal Code: 'French criminal law is applicable to offences committed on the territory of the Republic. The offence shall be deemed to have been committed on the territory of the Republic if one of its constituent elements took place on that territory.'

[10] Cour de cassation, Criminal division, 14 March 2018, No 16-82.117.

[11] Cour de Cassation, Criminal division, 11 October 2017. The French Supreme Court held that French jurisdiction over a case of bribery of foreign officials was namely

justified by the fact that the different offenses prosecuted were indivisible so that the offenses deemed to have been committed on French territory were indivisible from the offenses which could have been committed abroad.

[12] Cour de cassation, Criminal division, 14 March 2018, No 16-82.117. The French Supreme Court pointed out that with regards to the scope of Article 14(7) of the ICCPR, the United Nations Committee held in 1987 that this article was only applicable to double prosecutions initiated in the same state.

[13] For instance, in 2015, BNPP paid $8.9 billion to settle criminal charges that it violated US sanctions against Sudan, Cuba and Iran. Crédit Agricole Corporate and Investment bank agreed to forfeit $312 million to resolve claims that it violated New York state law by falsifying the records of New York financial institutions. Some examples include as well other industries than banks. Alstom, Total and Technip respectively paid €683m, €217m and €212m fines to US authorities to settle anti-corruption enforcement actions.

[14] Matthew Stephenson, 'Further developments on French law regarding anti-bribery prosecutions by multiple States', The global anticorruption blog, 19 April 2018.

[15] Antoine Kirry and Robin Lööf, *French DPAs lack crucial disgorgement tool,* GIR, 27 February 2018.

[16] Cour de cassation, Criminal division, 17 January 2018, No 16-86.491.