*Sherpa

FRANCE

VICTIMS OF CORRUPTION: DAMAGE REPARATION AND LEGAL STANDING

INTERNATIONAL DATABASE 2022

SOURCE: SHERPA

VICTIMS OF CORRUPTION WORKING GROUP

CIVIL SOCIETY UNCAC Coalition

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Year 2022

1. Legal Standing

1.1 Legal standing for civil society organisations and/or citizens in corruption-related cases

Ciivil society organisations and citizens have legal standing in corruption-related cases.

1.2 Type of Cases

- Criminal
- Civil

1.3 Legal basis under which citizens have legal standing

Under French law, the prosecution of offenses (action publique) is set in motion and exercised by the Public Prosecutor, who decides whether to prosecute perpetrators, in accordance with the "principle of opportunity" (Article 1 of the French Code of Criminal Procedure, hereinafter "CCP").
The prosecution may, however also be triggered by the injured party, through the introduction of a civil claim (Articles 1 and 2 CCP). The victim of a crime or misdemeanour may indeed bring a civil claim to obtain reparation for the harm caused by the offence, but also to initiate prosecution by means of a complaint with a civil party petition (plainte avec constitution de partie civile), lodged directly before an investigating judge, or by means of a direct summons.
The victim must demonstrate direct and personal harm caused by the offence.
French courts have thus declared admissible as "victims" in corruption cases:

- A locality (Cass. crim., 14 mars 2007, n° 06-81.010)
- The State (Cass. crim., 10 mars 2004, n° 02-85.285 and n° 99-83.509) ;
- An employer (Cass. crim., 14 janv. 2015, n° 13-86.604)

Civil society organisations (associations) may also introduce the civil claim normally granted to the victim, pending that they meet certain conditions (Articles 2-1 and following CCP).
Regarding corruption cases, until 2013, anti-corruption organisations could be declared admissible as a civil party by a judge in corruption cases based on article 2 CCP, if their statutory object was specific enough and aimed at fighting

corruption ("because of the specificity of the purpose and object of its mission" Cass. Crim. 9 nov. 2010 n° 09.88272).
However, since the introduction of article 2-23 CCP in 2013 [1], anti-corruption organisations may only act against a specific set of corruption and probity offences and must obtain a prior administrative approval (agrément) from the Ministry of Justice. To be granted such approval, the association must demonstrate[2]:

- Five years of legal existence;
- During these 5 years, an effective and public activity to combat corruption and attacks on public probity (assessed in light of the allocation of its resources to that purpose, publications, organisation of events);
- A sufficient number of members;
- The disinterested and independent nature of its activities (assessed in light of the origin of its resources);
- A regular functioning, in line with its statutes, guaranteeing the information of its members and their effective participation in its governance.

The admissibility of anti-corruption organisations thus depends not merely on a court decision but on a government decision. The administrative approval must be renewed every 3 years.
Regarding constitutional protection: in France, any party to a civil, criminal, or administrative lawsuit may argue that a legislative provision applied in this lawsuit infringes the rights and freedoms guaranteed by the Constitution by means of a “priority question of constitutionality” (question prioritaire de constitutionnalité). This constitutional claim is introduced before the judicial or administrative judge (article 61-1 of the French Constitution).
Pending that the question meets certain criteria (the provision is applicable to the lawsuit, it has not yet been validated by the constitutional court, the question is new), the highest court of the judicial or administrative order will then refer the question to the Constitutional court. The latter, after hearing the parties, will rule on the constitutionality of the provision and, if necessary, repeal the provision.

[1] Loi n° 2013-1117 du 6 décembre 2013 *relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière*
[2] Décret n° 2014-327 du 12 mars 2014 relatif aux conditions d'agrément des associations de lutte contre la corruption en vue de l'exercice des droits reconnus à la partie civile, article 1er

This means that any person with standing in a criminal, civil or administrative case will incidentally have "standing" to bring a "priority question of constitutionality" in that same case. If that case involves legal provisions on corruption, any party to the case may try to argue that the provision infringes constitutional rights and freedoms. But there is no autonomous ground for persons (citizens nor NGOs) to stand before the Constitutional court: their admissibility is always conditioned to their admissibility in the civil or criminal case at stake.

1.4 Citizens and/or civil society's intervention in corruption cases in other capacities (e.g. third party contributors, expert input, etc)

There is no possibility for citizens and/or civil society to intervene in other capacities in corruption cases.

1.5 State's entitlement to represent the citizens collectively in corruption cases and whether its intervention excludes direct intervention by citizens

The answer quite depends on the meaning given to the notion of "representing the citizens collectively".
In France, the public prosecutor is the sole entity representing and defending the interests of society before criminal courts. He is the only entity able to both trigger and exercise prosecution in accordance with the principle of opportunity (see above).
However, it should be noted that the French public prosecutor is not fully independent from the government, thus putting into question its ability to effectively represent the interests of society at large, in particular in corruption cases with strong political, diplomatic, and economic implications.
Indeed, in France, public prosecutors are placed under the hierarchical authority of the Ministry of Justice. As a consequence, the European Court of Human Rights (ECtHR) considers that the French public prosecutor is not a genuine judicial authority within the meaning of Article 5 of the Convention (ECHR 29 March 2010, Medvedyev and a. c/ France, no. 3394/03; ECHR 23 Nov. 2010, Moulin c/ France, no. 37104/06). The Court of Cassation, France's highest judicial court, also recognized that the public prosecutor is not a judicial authority within the meaning of Article

5, § 3 of the Convention, as it fails to offer proper guarantees of independence and impartiality (Crim. 15 Dec. 2010, no. 10-83.674).
France's Monitoring Reports under the OECD Anti-Bribery Convention regularly underline how this situation may weigh negatively on the fight against corruption in France (see, for instance, France's Phase 4 Monitoring Report, p. 59).
Thankfully, the intervention (or lack thereof) of the public prosecutor does not prevent citizens nor civil society organisations from introducing a civil claim and triggering prosecution (see above).
Therefore civil claims brought by victims and civil society organisations are of utmost importance in corruption cases. They balance the risks affiliated with the lack of independence of the public prosecutor and his discretionary powers to prosecute “in opportunity”.

1.6 Legal standing of any foreign government or foreign-based non-governmental institution to bring corruption cases on behalf of this country’s citizens

Foreign governments or foreign-based non-governmental institutions have legal standing to bring corruption cases on behalf of this country’s citizens.

Under French law, any legal or natural person may introduce a civil claim pending that it demonstrates direct and personal harm caused by the offence (see above, explanations on article 2 CCP). Several States have thus been declared admissible as a civil party in corruption cases in France.

However, it is difficult to infer that these civil claims are systematically introduced on behalf, or in the interest, of the citizens of that country, given the variety of constitutional and institutional structures these countries may adopt (see for example in the “ill-gotten gains'' cases presented below). This difficulty is evidenced by the changing nature of the jurisprudence concerning civil claims introduced by foreign States, with the courts either admitting or refusing to declare a State admissible, with little clarity on the criterias of the decision.

2. Cases

2.1 Existence of corruption-related cases brought to Court by civil society organisations, journalists, or citizens

Ill-gotten gains cases

Equatorial Guinea, Gabon, Congo: Sherpa filed the first complaints in 2007, concerning suspicions of concealment of embezzle-ment of public funds by members of the ruling families of Gabon, Congo and Equatorial Guinea. After the cases were dismissed, Transparency International France filed a new complaint. One of these cases resulted in an unprecedented conviction of Teodorin Obiang, son of the President of Equatorial Guinea.
https://www.asso-sherpa.org/harsher-sentence-in-appeal-for-teodoro-obiang-jr-france-is-no-longer-a-welcoming-country-for-the-proceeds-of-laundered-and-dirty-money

Syria: In February 6th 2014, Sherpa filed a complaint with a civil party petition against Rifaat Al Assad, uncle of Bashar Al Assad, which lead to the opening of a judicial investigation and then his indictment in June 2016. Following this complaint, his assets in France were seized for a total of 90 million Euros. On September 7th, 2022, France's highest court upheld the sentencing of Rifaat al-Assad to four years in prison for fraudulently building up in France an estate valued at 90 million euros.
For more information: https://www.asso-sherpa.org/10606-2
https://www.asso-sherpa.org/ill-gotten-gains-rifaat-al-assad-uncle-of-the-syrian-president-convicted-in-france-for-laundering-to-the-detriment-of-the-syrian-people
https://www.asso-sherpa.org/ill-gotten-gains-the-rifaat-al-assad-case-interview-with-laura-rousseau

Uzbekistan: In June 2014, Sherpa filed a complaint against Gulnara Karimova, the eldest daughter of the President of the Republic of Uzbekistan, who allegedly purchased properties in France with the proceeds of corruption. In September 2014, these properties were seized. On 26 June 2019, after seven years of proceedings, the Uzbek case of the "ill-gotten gains" was closed by a guilty plea

decided between the parties. A trial in open court was replaced by a closed-door negotiation between the French judicial authorities, the legal representative of the three civil real estate companies that had acquired real estate properties on behalf of G. Karimova, and the Uzbek state. This guilty plea provides for the restitution of these illicitly acquired properties - worth tens of millions of euros - to Uzbekistan.
https://www.asso-sherpa.org/a-missed-opportunity-frances-return-of-gulnara-karimovas-illegally-acquired-assets

Other corruption and money laundering cases

Rafales: Sherpa filed a first complaint before the French National Financial Prosecutor's Office (PNF), on October 26th, 2018, regarding alleged corruption, favoritism and various financial offenses likely to have occurred in the context of the sale of 36 combat aircrafts produced by Dassault Aviation and sold to India in 2016. According to articles published by investigative journalists, no serious investigation was carried out by the PNF, except for an informal interview with the lawyer of Dassault Aviation. The complaint was nonetheless dismissed in June 2019, leading Sherpa to file a new complaint with a civil party petition triggering the opening of a judicial investigation. The judicial investigation is ongoing.
https://www.asso-sherpa.org/sherpa-requests-the-opening-of-a-judicial-investigation-with-the-status-of-civil-claimant-in-the-case-of-indias-rafale-deal

3. Collective Damage

3.1 Legal instruments that enable claiming reparation, compensation, or restoration of collective damages in any field (environmental damages, human rights, corruption, among others)

As a general principle, under French law, a legal or natural person may only bring a claim for damages if it demonstrates that the harm is direct and personal,

hereby excluding collective damages from the scope of liability actions (article 1240 of the French Civil Code).

However, case law and legislation have progressively evolved and now enable claiming reparation of some forms of collective damages.

- Admissibility of civil society organisations and trade unions in liability actions: beyond the introduction of civil claims before criminal jurisdictions, French civil courts may grant reparation to legal persons such as civil society organisations or trade unions whenever a harm was caused to their missions ("even without legislative authorization, and in the absence of express statutory provision as to the use of legal channels, an association may take legal action in the name of collective interests as soon as they fall within its corporate purpose" Cass. 1re civ., Sept. 18, 2008, no. 06-22.038).
- Recognition of environmental prejudice: in 2016, the French legislature introduced a new chapter in the civil code (Articles 1246 and following) recognizing the notion of environmental harm and providing the conditions under which such harm may be repaired.

3.2 Procedures for advancing class-actions

The French legislature introduced a class-action mechanism in relation to consumer and competition law breaches in 2014[3]. The mechanism has since been extended to health products liability claims, environmental liability, discrimination, and data protection claims[4]. It is generally available where "several persons in a similar situation suffer damage caused by the same person, having as a common cause a failure of that person to comply with its legal or contractual obligations". Indeed, the law sets out a general procedural framework applicable to all class actions, with variations depending on the area of law to which a claim relates. The general framework relies on a two-step procedure:

- First, the collective action is introduced by an association or a trade unions before the competent tribunal, which decides on the admissibility of the action, on the alleged breaches and, in case of liability, on the scope of the

[3] Loi n° 2014-344 du 17 mars 2014 relative à la consommation, dite loi « Hamon »
[4] Loi n° 2016-41 du 26 janvier 2016 de modernisation de notre système de santé and Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle

group and on the calculation of damages that will be awarded; it also orders the defendant to take the necessary measures to inform any person that could be part of the group previously defined and sets a deadline to join said group (opt-in mechanism);

- Second, once all remedies against that decision have been exhausted, any person that joined the group may request compensation, based on the judgement, directly to the defendant, or to the claimant organisation that may act on their behalf.

This mechanism is however seldom used: it is rather limited in scope, complex and relies largely on actors with limited resources (associations and trade unions), which together, are bound to restrict the number of cases.

More info on class action and cases in French law: https://uk.practicallaw.thomsonreuters.com/1-618-0240?transitionType=Default&contextData=(sc.Default)

4. The Role of the victims of corruption

4.1 Definition of victims of corruption or common definition used by the courts in this country

There is no definition of victims of corruption. See above on article 2 CCP.

4.2 Cases that recognize the role of victims

There are no cases that recognize the role of victims. See above.

4.3 Corruption-related court cases (criminal, civil, administrative) that awarded compensation to individuals or to identifiable or non-identifiable groups of victims to repair the damage caused by the corruption offense

Please see above on artcile 2.

4.4 Innovative or effective mechanisms that can be considered good practice regarding the recognition and compensation of victims in corruption-related cases

There are no innovative or effective mechanisms that can be considered good practice regarding the recognition and compensation of victims in corruption-related cases.

In 2021, France adopted a new law introducing a general framework for asset restitution.[5] The law establishes a general principle of restitution of ill-gotten gains and specifies that confiscated assets will be returned "in accordance with the principles of transparency and accountability, and ensuring the association of organisations of civil society".

However, the scope of the text is limited to cases where the origin State does not actively seek prosecution nor restitution through a civil claim before French jurisdictions. The legislature failed to either seek to define the victims of corruption and/or question the conditions for admitting civil claims of foreign States.

5. Available Information

5.1 Information published by enforcement authorities (including control agencies) about corruption enforcement actions

Information is published by enforcement authorities
Type of Information:

- The initiation of investigations
- The conclusion of investigations whether the investigated person has been acquitted or not
- The enactment of sanctions
- Settlements
- The grounds for sanctioning or acquitting (the case)

[5] LOI n° 2021-1031 du 4 août 2021 de programmation relative au développement solidaire et à la lutte contre les inégalités mondiales

5.2 Feasible access to information on ongoing or concluded cases

Publication of information on corruption cases in France varies depending on the type and stages of the procedure.

Publicity is a fundamental principle of the functioning of justice, enshrined in article 6-1 of the ECHR. In French criminal law, articles 306, 400, and 535 of the CCP provide that judicial debates and the issuing of judgments must be public. Indeed, as justice is being rendered "in the name of the people", citizens must be able to control its daily exercise and courtrooms must be accessible to all, subject to the peaceful conduct of the proceedings. The publicity of criminal hearings has been recognized as a constitutional principle back in 2017 (Conseil constitutionnel, 21 juillet 2017, QPC n° 2017-645 QPC).

The publicity of the pronouncement of the decision suffers no exception, whether it is done by reading at the hearing or by deposit at the registry. In all cases, third parties may obtain a copy of the decision free of charge.
Furthermore, all court decisions are progressively being made accessible online.

Settlements concluded by companies (convention judiciaire d'intérêt public) are also published, as well as the court's decisions homologating the settlement.

The French national anti-corruption agency publishes yearly statistics on the treatment of corruption cases by the courts.

However, not all stages of criminal proceedings are public. In particular, the investigation phase will not be made public. Indeed, whether the inquiry is led by a public prosecutor (enquête préliminaire) or an investigating judge (instruction), the procedure is secret (article 11 CCP).

The public prosecutor may sometimes deem it necessary to inform the public of the initiation of an inquiry and of its developments, but this is done on a discretionary basis (article 11 CCP "In order to avoid the dissemination of fragmented or inaccurate information or to put an end to a disturbance of public

order or when any other imperative of public interest justifies it, the public prosecutor may, ex officio and at the request of the investigating court or the parties, directly or through a judicial police officer acting with his agreement and under his control, make public objective elements drawn from the procedure which do not include any assessment of the relevance of the charges against the persons implicated"). Press releases about ongoing investigations into allegations of corruption can thus be found for example on the website of the Financial Prosecutor's Office (PNF).

In the case of a judicial inquiry, the parties, including civil claimants such as organisations, may have access to a copy of the case file (article 114 CCP) but they will then have to comply with the secrecy of the investigation (article 114-1 CCP).

Furthermore, the hearing is not systematically public. The judge may decide on a closed hearing if there is a threat to the order or serenity of the debates, the dignity of the parties or the interests of a third party (article 400 CCP).

5.3 Ways for citizens or civil society organisations to gather information on whether corruption cases are being investigated or trialed.

Please see above.

6. Supplementary information

6.1 Main identified barriers that prevent CSOs, citizens, and journalists from standing as victims of corruption cases.

In its most recent decisions, the Court of Cassation unequivocally confirmed that an organisation cannot be admissible as a civil party in any criminal case solely based on the collective interests it aims to protect. Unless it is the direct victim of the offence (article 2 CCP), an association can only trigger or join proceedings as a civil party to defend its statutory mission for a limitative set of offences and under strict conditions, set forth in article 2-1 to 2-24 of the CCP (Cass. crim., 7 September 2021, n° 19-87.031).

This jurisprudential interpretation prevents access to criminal justice in defence of their statutory object for many associations and limits their scope of action to a small number of offences. Far from enshrining the key role of associations in the realisation of the rule of law, this solution endorses a form of control of their action.

The risks and shortcomings of this solution are obvious in the case of anti-corruption associations. As explained above, since the introduction of article 2-23 CCP, anti-corruption organisations may only act against a specific set of corruption and probity offences and must obtain prior administrative approval (agrément) from the Ministry of Justice.

The admissibility of anti-corruption associations, therefore, depends not on an independent court decision, but on a government decision, based on vague criteria when filing a civil claim should precisely mitigate the risks attached to the hierarchical submission of prosecutors to the executive.

As a consequence, out of the three anti-corruption associations currently approved in France, the two most active in litigation have encountered significant hurdles when renewing their approval, which was finally issued several months late.

This situation generates a significant risk of arbitrariness, undermines the legal certainty of organisations, and jeopardises the continuity of their activities. In addition, the anti-corruption approval is issued for a limited period of three years, unsuited to judicial time, particularly in matters of international corruption.

Furthermore, rules on legal costs may also constitute a serious hindrance to NGOs and victims' access to justice in corruption cases. Following the introduction of a civil claim through a complaint with a civil party petition (plainte avec constitution de partie civile), the investigating judge may require the complainant to deposit a sum of money (consignation). The amount of the deposit should be determined in accordance with the complainant's income, and it must be paid within a time limit set by the judge, failing which the complaint will be dismissed (article 80 CCP). This sum is meant to guarantee the payment of a fine in the event the complaint proves abusive. However, if the amount is set too high, this deposit may prove dissuasive.

6.2 Other aspects, issues, provisions, or practices linked to the role, recognition, and compensation of victims of corruption.

N/A