GOUVERNEMENT
Liberté
Égalité
Fraternité

PUBLIC PROCUREMENT GUIDE

MANAGING CORRUPTION RISK IN THE PUBLIC PROCUREMENT CYCLE

JUNE 2020

Development and content:
French Anti-Corruption Agency
Department for Public Procurement

Graphisme :
CMM

Michel GRÉVOUL
Director, Department for Public Procurement

Charles DUCHAINE
Director, French Anti-Corruption Agency

Public procurement is a major part of the economy. As such, all in the process must act with probity at all times.

Anti-corruption efforts are vital to building a trust-based society, helping to maintain ethical standards in public life and integrity in economic transactions. The Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016 is designed with this very aim in mind: to promote transparency and irreproachable conduct by bringing French law in line with the very highest European and global anti-corruption standards.

This practical guide to managing corruption risk in the public procurement cycle is a joint publication by the Department for Public Procurement (DAE) and the French Anti-Corruption Agency (AFA), developed with input from a specially convened group of ethics and procurement practitioners.

It is intended to help public entities design, develop and deploy a corruption prevention system.

This publication contains practical guidance on dealing with risky situations. It also encourages all internal parties in the public procurement cycle to draw up an entity-specific anti-corruption framework and, in doing so, to help foster balanced relationships with their business partners.

In that sense, this guide is not a list of do's and don'ts, but rather an important resource for raising standards and promoting professionalism in public procurement.

CONTENTS

INTRODUCTION

MANAGING CORRUPTION RISK

Almost all forms of corruption – corruption, favouritism, unlawful taking of interest, misappropriation of public funds and more – are possible in the public procurement cycle. Yet they are not inevitable. Public entities can anticipate, prevent and manage criminal risk with an effective anti-corruption programme.

Anti-corruption measures already feature prominently in various aspects of public procurement law, as well as in legislation governing the rights and obligations of public officials and in data transparency rules. But an anti-corruption programme that covers every aspect of the procurement process gives contracting authorities[1] an added layer of protection against corruption.

More generally, anti-corruption measures are an integral part of sound procurement practices. They ensure that both parties to the process – economic operators and public entities – carry out their duties responsibly and ethically. And they give citizens, public-service users and wider society added assurance that their government and its leaders are acting with probity and integrity at all times.

The Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016[2] imposed new obligations on public and private entities to prevent and detect corruption.

PURPOSE AND SCOPE OF THIS GUIDE

This guide was compiled by the Department for Public Procurement (DAE), the French Anti-Corruption Agency (AFA) and a multidisciplinary team of experts from all three branches of the French civil service. It contains practical guidance on preventing and detecting corruption for anyone involved in the public procurement cycle: buyers, specifiers, decision-makers and procurement officers.

It should also prove useful to anyone whose duties involve preventing corruption, including internal auditors and controllers, ethics officers, whistleblowing officers, senior leaders and human resources officers within contracting authorities.

More broadly, the practical recommendations contained in this guide may be of interest to businesses tendering for public contracts, as well as to concerned citizens wishing to scrutinise the public procurement process.

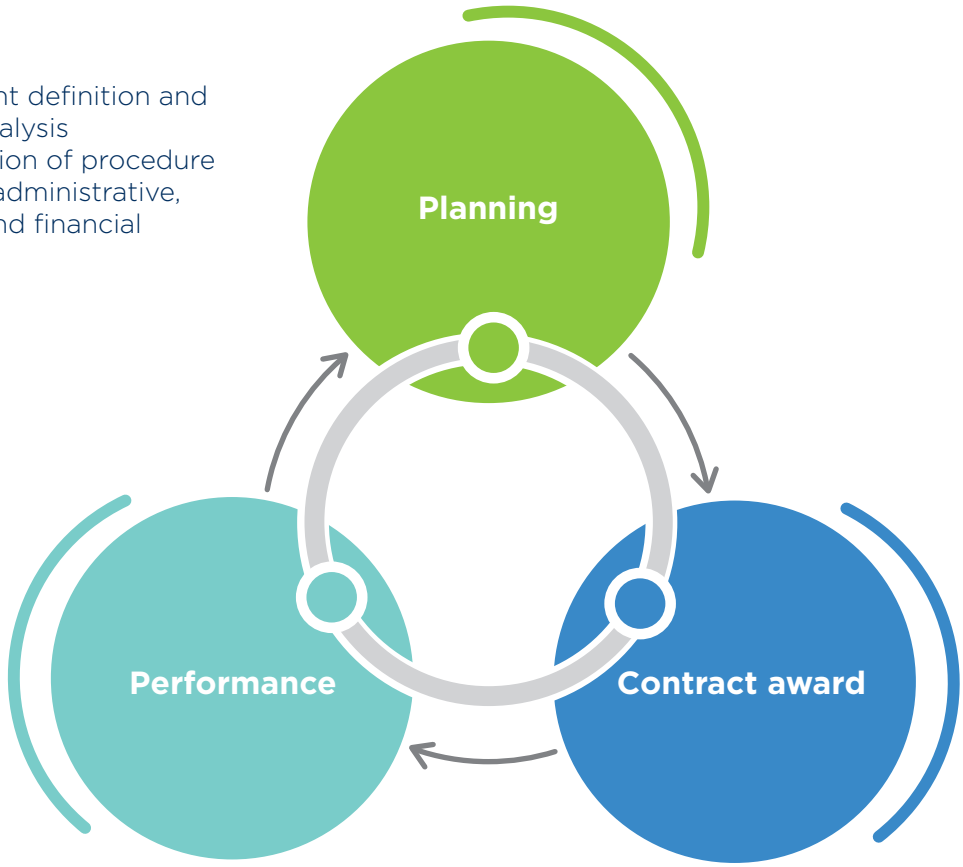
This guide deals specifically with public procurement as defined in and regulated by the French Public Procurement Code. It does not cover partnership contracts, delegated public service contracts, public property occupancy permits, and other types of public contract.

It addresses every part of the cycle, from procurement planning through to contract performance. For the sake of simplicity, the term “procurement cycle” may be used to refer to the entire public procurement cycle.

[1] The term “contracting authority” is used throughout this guide, but the content applies equally to contracting entities.
[2] The Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016.

Public procurement cycle

- Sourcing
- Requirement definition and financial analysis
- Determination of procedure
- Writing of administrative, technical and financial documents



- Financial monitoring
- Disputes
- Performance review
- Acceptance/sign-off of work
- Adjustment

- Publication
- communication with economic operators
- Evaluation
- Contract award or abandonment
- In-contract amendments

Source :
AFA and DAE

CORRUPTION RISK IN THE PUBLIC PROCUREMENT CYCLE

The primary objective of public procurement is to enable a public entity[3] to obtain the goods and services necessary to accomplish its mission in a timely, economical and efficient manner[4]. In 2018, French public procurement spending stood at €101 billion across 153,324 contracts[5].

According to the Organisation for Economic Co-operation and Development (OECD): "*[P]ublic procurement is a key economic activity of governments that is particularly vulnerable to mismanagement, fraud and corruption*". These vulnerabilities arise when individuals or groups abuse public procurement processes for personal gain, diverting them from their intended purpose, i.e. to serve the public interest.

In its broadest sense, the word "corruption" covers a range of offences established by the French Criminal Code. A summary of these offences is given below:

[3] Contracting authority or contracting entity.
[4] OECD, OECD Recommendation of the Council on Public Procurement, 2015.
[5] French Economic Observatory of Public Procurement (OECP), 2018 figures.

SUMMARY OF CORRUPTION OFFENCES UNDER THE FRENCH CRIMINAL CODE[6]

Corruption

An act whereby a person with a public-service mission solicits or accepts **any advantage in return** for carrying out or abstaining from carrying out an act relating to his or her office. The offence of corruption is established by Articles 433-1(1) and 432-11(1) of the French Criminal Code.

Influence peddling

An act whereby a person with a public-service mission solicits or accepts an advantage in return for **using their influence** to obtain a favourable decision from a public body or administration. The offence of influence peddling is established by Articles 433-1(2) and 432-11(2) of the French Criminal Code.

Favouritism

An act whereby a person with a public-service mission obtains or attempts to obtain an unjustified advantage for a company by **breaching the rules on freedom of access to public procurement and equal treatment of candidates**. The offence of favouritism is established by Article 432-14 of the French Criminal Code.

Unlawful taking of interest

The **taking, receiving or keeping of a personal interest** in a business or business operation by a person with a public-service mission who at the time in question has the duty of ensuring its supervision, management, liquidation or payment. The offence of unlawful taking of interest is established by Articles 432-12 and 432-13 of the French Criminal Code.

Misappropriation of public funds

The **destruction, misappropriation or purloining, by a person with a public-service mission, of public funds or assets** entrusted to them as part of their function or tasks. The offence of misappropriation of public funds is established by Articles 432-15, 432-16 and 433-4 of the French Criminal Code.

Extortion by public officials

An act whereby a person with a public-service mission profits from his or her position by **accepting payment of a sum known not to be due or by abstaining from accepting payment of a sum known to be due**. The offence of extortion by public officials is established by Article 432-10 of the French Criminal Code.

The common feature of these offences is that they involve internal parties in the public procurement cycle failing to discharge their tasks and duties with integrity.

[6] See pp.112-128 (Appendix 1) for a fuller definition of these offences.
The precise meaning of "person with a public-service mission" in the list given here differs depending on the offence in question. This blanket term includes persons holding public authority (such as public officials), persons discharging a public-service mission (including some private operators participating in the procurement cycle) and persons holding a public electoral mandate.

CORRUPTION IN FRANCE: KEY FIGURES

In 2018, there were 390 persons prosecuted for corruption offences in France[7].

In the same year, there were 286 convictions for these offences, including 131 for corruption, 52 for misappropriation of public funds, 38 for unlawful taking of interest and 29 for favouritism.

Research has also shown that buyers – in both the public and private sectors – are particularly vulnerable to corruption, with 16% of procurement managers and 25% of chief procurement officers reportedly experiencing at least one corruption attempt at some point in their careers[8].

For comparison, 16% of French people say they know someone who takes or has taken bribes[9].

PUBLIC PROCUREMENT: A LEGAL FRAMEWORK GEARED TOWARDS PREVENTING CORRUPTION

Article L.3 of the French Public Procurement Code sets out the three fundamental principles that apply to all stages of the procurement cycle:

- freedom of access to public procurement;
- equal treatment of candidates;
- transparency of procedures.

As such, the legal framework governing public procurement is by its very nature geared towards preventing **corruption**, since any contravention of these rules is likely – at the very least – to amount to favouritism. Corruption offences may be committed by any internal parties in the public procurement cycle.

[7] Source: French Ministry of Justice (Directorate for Criminal Affairs and Pardons, Criminal Policy Evaluation Unit), Manquements à la probité : éléments statistiques, 2019.
[8] AgileBuyer and Groupement Achats HEC, Les priorités des services achats en 2015, ou la manière dont seront gérés les sous-traitants en 2015, 1 December 2014.
[9] European Commission, Special Eurobarometer 470: Corruption, December 2017, p.71.

INTERNAL PARTIES IN THE PUBLIC PROCUREMENT CYCLE

This guide is intended for anyone with an interest in preventing corruption in the public procurement cycle.
It covers the role of the various internal parties in the cycle, outlines the risks to which these parties could be exposed, and explains how they should respond and what preventive measures can be taken.
The guide focuses in particular on individuals holding the following four roles:

Specifier (defines the requirement)

The specifier:

- defines the exact requirement;
- assists the buyer by:
  - supporting technology and business intelligence activities;
  - recommending cost efficiencies and other improvements in the procurement cycle;
  - helping to write tender documents;
  - participating in bid review;
  - reviewing procurement performance.

Buyer (oversees the procurement process)

The buyer:

- develops and implements procurement strategy;
- analyses supplier markets (sourcing) and market prices;
- sets procurement performance objectives and steers efforts to attain them;
- coordinates the requirement definition phase;
- manages the supplier relationship;
- reviews applications and bids.

Decision-maker (awards and signs the contract and acts as the contracting authority's legal representative)

The decision-maker:

- awards the public contract based on the outcome of the internal bid review process;
- acts as the legal representative of the contracting authority or entity;
- signs public contracts and, therefore, enters into legally binding commitments on behalf of the contracting authority;
- as a member of the top management team, promotes ethical practices and measures to prevent corruption in the procurement cycle.

Procurement officer (executes the purchase)

The procurement officer:

- manages supplier relationships within his or her scope of work;
- checks that contracts are in place;
- collates and groups requirements and identifies relevant categories of goods;
- initiates purchase requisitions;
- confirms service delivery;
- monitors contract performance (spend, disputes, penalties, etc.).

Beyond these "internal" internal parties, the procurement cycle includes economic operators fulfilling various roles (candidates, tenderers, contractors and subcontractors) as well as other businesses and organisations participating in the procurement or performance phases (project-owner assistants, project managers and consultancy firms).

Contracting authorities are also audited by supervisory bodies, public accountants, inspectorates and other external bodies.

IMPARTIALITY, PROBITY AND INTEGRITY: ETHICAL REQUIREMENTS FOR ALL INTERNAL PARTIES IN THE PUBLIC PROCUREMENT CYCLE

In France, public officials are required by law to carry out their duties with impartiality, probity, integrity and dignity, and to prevent conflicts of interest or bring them to an immediate end[10]. This principle applies to all public officials, including permanent civil servants (and those seconded to government-funded institutions) and contract civil servants working in all three branches of the civil service[11].

Public officials are entitled to consult an ethics officer[12] for advice and guidance[13] on fulfilling their ethical obligations.

The Charter for Local Elected Representatives[14] sets out the principles to which local elected representatives must adhere when performing their duties:

1. Local elected representatives shall perform their duties with diligence, dignity, probity and integrity.
2. In the performance of their duties, local elected representatives shall pursue the public interest to the exclusion of any other direct or indirect personal interest, or of any other individual interest.

Any constituted authority, public officer or civil servant who, in the performance of his duties, gains knowledge of the existence of a crime or offence must report the matter forthwith to the public prosecutor[15].

NEW CORRUPTION-PREVENTION REQUIREMENTS INTRODUCED BY ACT 2016-1691 OF 9 DECEMBER 2016[16]

Act 2016-1691 of 9 December 2016 aimed to strengthen protections against corruption by introducing a requirement for public entities and some companies to implement prevention and detection measures, as recommended by various international organisations[17]. The Act also created the French Anti-Corruption Agency (AFA), which is tasked with assisting individuals exposed to corruption risk, and with auditing organisations to ensure they have implemented effective corruption-prevention measures.

[10] Articles 25 and 26 of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983; Article 1 of the Transparency in Public Life Act 2013-907 of 11 October 2013 (for persons holding a public electoral mandate and discharging a public-service mission).
[11] In addition, all civil servants must demonstrate professional discretion and refrain from expressing personal opinions, while some are also required to observe professional secrecy (Article 26 of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983).
[12] The Civil Servant Ethics and Rights and Obligations Act 2016-483 of 20 April 2016 introduced the right for public officials to seek advice from a ethics officer.
[13] Article 28 bis of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.
[14] Article L.1111-1-1 of the French Local Authority Code.
[15] Pursuant to Article 40(2) of the French Code of Criminal Proceedings.
[16] The Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016.
[17] See p.138 (Appendix 4) for details of international organisations' recommendations on preventing corruption in public procurement.

Article 17 of the Act sets out eight measures and procedures that entities must implement, including preparing a risk map, in order to obtain reasonable assurance that corruption risk is under control. The provisions of Article 17 apply to large companies and public establishments of an industrial and commercial nature (EPICs) with more than 500 employees and turnover in excess of €100 million.

The Act does not lay down a specific framework for public entities (such as central government bodies, local authorities and government-funded institutions), or for non-profits and foundations recognised as public-interest entities. However, the AFA's Charter of Rights and Duties[18] states that **the rules for large companies and EPICs should apply equally to public entities and to non-profits and foundations recognised as public-interest entities, which are expected to implement an anti-corruption programme and to adapt the eight measures and procedures to their specific needs**.

One of the AFA's first tasks was to draw up guidelines on the content of these preventive measures. These were published in the Official Journal of the French Republic on 22 December 2017.

The document provides useful tools and guidance to help organisations develop an anti-corruption programme as part of their broader strategy for managing risk (including reputation risk, operational risk, labour-relations risk, and economic and financial risk).

The Agency provides clarity as to the scope of its guidelines:

"*These anti-corruption Guidelines are a coherent and indivisible policy framework applicable to all organisations, regardless of size, legal structure, business area, revenue or number of employees.*

However, organisations must still adjust and adapt these standards according to their own risks, business models and issues."

As such, the guidelines are intended to help both public and private entities understand what corruption-prevention measures they are expected to put in place (as per Articles 3 and 17 respectively of Act 2016-1691 of 9 December 2016).

[18] The Charter of Rights and Duties of Internal Parties Involved in Auditing the Entities Covered by Article 17 sets out the audit and control procedures performed by the Agency. See Appendix 3 of this guide for a full description of the AFA's remit.

ADOPTING AN ANTI-CORRUPTION PROGRAMME: A NEW LEGAL REQUIREMENT

Act 2016-1691 of 9 December 2016 introduced two new sets of legal requirements:

	For companies and EPICs (Article 17)	For public entities, and for non-profits and foundations recognised as public-interest entities (Article 3).
Scope	he Act requires **the managers of companies, groups of companies and government-funded institutions with 500 or more employees and turnover in excess of €100 million** to implement measures to prevent and detect corruption and influence-peddling.	The Act requires **central government bodies, local authorities, local government-funded institutions, semi-public companies, and non-profits and foundations recognised as public-interest entities** to adopt procedures for preventing and detecting corruption, influence-peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism.
Framework	The Act sets out **eight measures and procedures** that entities coming under its scope must implement: - a code of conduct; - an internal whistleblowing system; - a risk map; - third-party due diligence procedures; - accounting control procedures; - a training programme; - disciplinary rules; - an internal monitoring and assessment system.	The Act **does not lay down a specific framework** for public entities. However, the AFA's Charter of Rights and Duties states that the rules for large companies and EPICs **should apply equally to public entities and to non-profits and foundations recognised as public-interest entities, which are expected to implement an anti-corruption programme and to adapt the eight measures and procedures to their specific needs.**
Consequences of an AFA audit	Following an AFA audit, the Agency draws up an audit report and forwards a copy to the entity's representatives and, if applicable, to the authority that commissioned the audit. Individuals who are found to have breached the rules may face a fine of up to €200,000. For entities, the maximum fine is €1,000,000.	Following an AFA audit, the Agency draws up an audit report and forwards a copy to the entity's representatives and, if applicable, to the authority that commissioned the audit.

The provisions of Articles 3 and 17 of Act 2016-1691 of 9 December 2016 are not mutually exclusive. This means that EPICs and semi-public companies that meet the thresholds in Article 17(I) of the Act[19] may be audited by the AFA **under the terms of both Article 3(3)[20] and Article 17(III).**

[19] 500 or more employees and turnover in excess of €100 million.

[20] Article 3(3): "The French Anti-Corruption Agency: 3. Audits, on its own initiative, the quality and effectiveness of the procedures adopted by central government bodies, local authorities, local government-funded institutions, semi-public companies, and non-profits and foundations recognised as public-interest entities for preventing and detecting corruption, influence-peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism. It also verifies whether the same entities have complied with the measures set out in Article 17(II)."

WHY SHOULD CONTRACTING AUTHORITIES ADOPT AN ANTI-CORRUPTION PROGRAMME?

> An anti-corruption programme covers everything that a public entity does, from managing its human resources and awarding grants and permits, to delivering public services. This guide focuses specifically on anti-corruption measures as they apply to the procurement cycle, where vulnerability to corruption risk is particularly acute. It is important to stress, however, that an anti-corruption programme should not be restricted to this process alone. It should span all of an entity's activities and procedures.

The legal framework governing public procurement is the main point of reference for public-sector procurement departments. Any contravention of these rules is likely to amount to favouritism. However, given that public procurement involves large sums of money, public-sector buyers are also vulnerable to corruption and misappropriation of public funds. Likewise, buyers who fail to deal adequately with conflicts of interest could face prosecution for unlawful taking of interest.

Offences such as these can have lasting adverse consequences for a public entity. A summary of the potential risks is given below:

Criminal risk	Economic and financial risk	Reputation and image risk	Human resource risk
•Criminal convictions • Additional penalties	• Budgetary constraints • Mistrust among business partners • Limited interest in tenders • Potential cancellation of the contract	• Sustained and negative press coverage • Mistrust among citizens • Loss of faith in senior managers	• Poor labour relations • Difficulty attracting new hires • Disciplinary action for employees • High staff turnover

For some contracting authorities, existing legal frameworks provide at last partial protection against these risks. Examples include rules on:

- preventing conflicts of interest, including those laid down in the French Civil Service Code (which requires civil servants to act with impartiality, integrity and probity, contains rules on multiple job-holding, provides protection for whistleblowers, and requires some individuals to declare their interests and assets);
- public procurement, including the associated fundamental principles and exclusion grounds;
- public accounting;
- detection and reporting procedures (internal budget audits and accounting controls, duty to report contraventions to the public prosecutor).

Yet these legal frameworks do not fully protect contracting authorities against corruption risk because they are poorly coordinated, often overly generic, and fail to capture the real risks to which the entity or buyer in question is exposed.

An anti-corruption programme, however, provides reasonable assurance that these risks are under control, giving an added layer of certainty to both individual buyers and public authorities as a whole. Entities can implement their own anti-corruption programme, taking account of their size and specific risk exposures.

Chapter I

ROBUST PROCUREMENT PROCESSES: AN ESSENTIAL PRECONDITION

Section n° 1

ESTABLISHING ROBUST, TRANSPARENT PROCUREMENT PROCESSES

In brief

Before it can establish and implement its procurement policy, a public entity first needs to know exactly what it is buying, and how.

With a clear view of its likely tender time frames, market characteristics and the types of purchases it will be making, the entity can then identify potential sources of risk.

A multi-year procurement plan allows the entity to foresee busy periods and, where relevant, pool procurement between departments.

Once it has established its procurement requirements – in qualitative and quantitative terms – the entity can then publish certain details, and share its multi-year procurement plan with its suppliers. Publishing essential data in this way is all part of the wider drive for transparency in public procurement.

Moreover, a well-organised procurement function, with internal rules and procedures known to all members of the procurement community, will serve as a solid foundation on which to build an anti-corruption programme.

Sub-sections

1. Understanding the procurement cycle and anticipating risk
2. Planning ahead to improve procurement performance
3. Sharing information to widen access to public procurement and ensure equal treatment
4. Maintaining a transparent audit trail
5. Organising the procurement function

Refer to the toolbox for **further guidance:**
• Anti-corruption best practices in the procurement cycle (pp.82-94).
• Practical guidance for internal parties in the procurement cycle (p.95).
• Practical guidance for heads of department (p.105).

Sub-section 1

Understanding the procurement cycle and anticipating risk

Entities that have developed a firm understanding of the procurement cycle – what they are purchasing, how and from whom – are able to identify where they need to improve, and where risks could arise. During the review exercise, entities can also examine whether all suppliers enjoy equal access to public procurement (supplier rotation), whether they are overly dependent on a small number of key suppliers, and whether there are any gaps in their procedures that need closing to reduce the risk of favouritism.

With a clear picture of their procurement practices, entities will find it easier to identify vulnerabilities (such as heavy reliance on one or more suppliers, or pressure from client departments to bypass standard procedures) and pinpoint weaknesses that could give rise to favouritism (either through deliberate action or ignorance of the fundamental principles of public procurement).

Detecting risk in the procurement cycle: suggested areas for review

Where to look	What to look for	How review reduces risk of favouritism (equal treatment, transparency and freedom of access)
Procurement arrangements and procedures	Map procedures by amount and level of publication.	Highlights unjustified splitting of contracts, if any.
	Identify strategic contracts.	Pinpoints strategic contracts where rules are more likely to be bypassed to safeguard supply. Ensures that the proper procurement procedure has been followed, and that any waivers are justified.
Suppliers	Measure share of procurement spend per supplier.	Indicates how dependent the entity is on certain suppliers, and vice-versa.
Access to public procurement	Calculate average number of bids per contract and per category, assess deviations from the average, and investigate the reason for these deviations.	Indicates: • whether suppliers have equal access to tender notices published by the entity; • which suppliers the entity's procurement plan is reaching (audience); • whether the entity's buyer profile is relevant (e.g. audience).
	Review complaints and appeals filed by economic operators (if any).	Helps the public entity manage legal risk. Pinpoints potential shortcomings in public procurement procedures (e.g. failure to inform economic operators).
	Identify number and type of unsuccessful procedures.	Highlights the most common sources of unsuccessful procedures (purchase types and client departments) and why the procedures were unsuccessful.
Contract performance	Assess how often addenda are used, and the amounts involved.	Highlights the most common sources of addenda (purchase types and client departments) and why addenda were used in these cases.
	Review enforcement of contractual penalties.	Indicates whether contractual terms are actually being enforced. Highlights where penalties are applied most frequently and least often (purchase types and client department) and why they were applied in these cases.
	Review the use of pre-litigation settlements, if any.	Highlights the most common sources of settlements (purchase types and client departments) and why they were entered into. Uncovers potential abuse of settlements and the mediation process.

Sub-section 2

Planning ahead to improve procurement performance

Poor forward planning and under-resourcing, coupled with operational, financial and other pressures on client departments and decision-makers, can cause public entities to adopt inadequate procurement procedures. These mistakes – such as underestimating requirements and erroneously selecting a fast-track procedure, or incorrectly using a negotiated procedure without a prior call for competition – carry a heightened risk of favouritism.

Entities are advised to prepare and publish multi-year procurement plans – running to the most distant contract renewal date – and to make these plans available free of charge. The benefits of this approach include:

- being able to plan future workload (for buyers and specifiers) and foresee busy periods;
- having the time to group procedures, which helps to limit unjustified splitting of contracts and increase efficiency;
- selecting appropriate procedures using objective criteria.

The multi-year plan should be prepared in an easily accessible format (such as a spreadsheet) and shared beyond the procurement department (e.g. with client departments and the legal department). As a minimum, it should state the following information for each contract:

- the requirement;
- an estimate of the financial value of the contract;
- the term of the contract;
- the client department (name and other relevant details);
- the sourcing arrangements (whether sourcing is required);
- the current contractor;
- the expiry date of the current contract, and the date on which the new or one-off requirement will become relevant;
- the procurement classification code (e.g. the government classification code for the goods in question), for threshold calculation purposes.

Sub-section 3

Sharing information to widen access to public procurement and ensure equal treatment

Once the entity has analysed its requirements and correctly planned its procedures, it should share this information widely. The benefits of doing so are two-fold: it strengthens the transparency of the entity's procurement procedures, and it widens access to future contracts beyond the entity's current suppliers.

The French government publishes its multi-year procurement plan for 2018-2021

In October 2018, the DAE published the government's non-defence and non-security procurement plan for October 2018 to end-2021.
The plan sets out over €14 billion of potential government procurement spending in the period – by the DAE, the 13 regional procurement centres and almost all central government departments – along with the terms of the relevant contracts. Other details include the products and services in question, the portion and duration of the provisional amount, the geographical and organisational scope of each contract, and the likely publication dates of the tender notices (on PLACE) and award notices.
For further details, go to: https://www.economie.gouv.fr/dae/programmation-des-achats-letat (page available in French only).

Sub-section 4

Maintaining a transparent audit trail

Publishing procurement-related information in open-data format allows concerned citizens and other external parties to scrutinise this aspect of government business. Fostering greater transparency in the public procurement cycle therefore makes it easier to prevent and detect favouritism and other forms of corruption, as well as building trust in public institutions.

Stricter rules on publishing public procurement data

The data publication requirements were tightened on 1 January 2020. Two sets of rules now apply:

• **Essential data on non-defence and non-security public procurement contracts worth €40,000 (excluding VAT) or more** must be published on online buyer profiles (e.g. PLACE, France's national public procurement platform).

As a minimum, contracting authorities must publish details of the tender or procurement procedure used, the content of the contract, and information relating to contract performance and any in-contract amendments. In the interest of transparency, buyers may also publish additional information, for instance via the forthcoming "extended" data repository format[21].

The data must be published within two months of notification of contract award[22].

• For non-defence and non-security **public procurement contracts worth between €25,000 (excluding VAT) and €39,999.99 (excluding VAT),** buyers have two options:
- follow the rules that apply to contracts worth €40,000 (excluding VAT) or more on a voluntary basis; or
- publish, in the first quarter of each year and in a format of their choosing, a list of contracts awarded in the previous year (Article R.2196-1 of the French Public Procurement Code).

[21] See Directorate for Legal Affairs of the French Economy and Finance Ministries, *La publication des données essentielles de la commande public* (section 1: *Obligations juridiques*) (available in French only). The movement towards open government data is, however, subject to certain limits (non-publication of sensitive information such as personal data and business secrets).
[22] Annex 15, Article 4 of the French Public Procurement Code.

ESSENTIAL DATA ON PUBLIC PROCUREMENT: WHAT DOES IT MEAN, AND WHAT DOES IT COVER?

Public procurement contracts worth €25,000 (excluding VAT) or more but less than €40,000 (excluding VAT)
Buyers can choose to publish just five pieces of information relating to the initial contract:

- the subject-matter of the contract;
- the value of the contract (excluding VAT);
- the contract award date;
- the name of the contractor;
- the contractor's postcode (if its principal place of business is in France) or the country of its principal place of business (if outside France).

Public procurement contracts worth €40,000 (excluding VAT) or more
Buyers are required to publish 16 pieces of information relating to the initial contract[23]:

- the contract's unique identifier;
- the date of notification of contract award;
- the date on which the essential data were published;
- the name of the buyer or agent (for consortia);
- the SIRET number of the buyer or agent (for consortia);
- the nature of the contract;
- the subject-matter of the contract;
- the Common Procurement Vocabulary (CPV) code;
- the award procedure used;
- the place of performance;
- the identifier of the principal place of performance;
- the initial term of the contract (in months);
- the value of the contract, excluding VAT (lump sum or estimated maximum value), in euros;
- the price type (firm price, fluctuating firm price, revisable price);
- the name(s) of the contractor(s);
- for each contractor: its identifier in the Register of Companies and Establishments (SIRENE) or, failing that, its VAT registration number (if its registered office is located in a European Union Member State other than France) or, failing that, its relevant registration number in the country in which its registered office is located (if outside the European Union).

Buyers must publish seven additional pieces of information if the contract is amended:

- the date on which the essential data relating to amendments to the initial contract were published;
- the subject-matter of the amendments to the initial contract;
- the amended term of the contract;
- the amended value of the contract (excluding VAT, in euros);
- the name of the new contractor (if relevant);
- the new contractor's unique identifier (if relevant);
- the date on which the buyer published the contract amendment notice.

[23] Annex 15, Article 1(II) of the French Public Procurement Code

WHO BENEFITS FROM THE PUBLICATION OF ESSENTIAL DATA, AND HOW?

Who benefits?	Intérêt des données ouvertes sur l'achat public
Buyers	• Track procurement performance (indicators) • Enhance their trustworthiness • Provide added guarantees of transparency and control
Businesses	• Gain a clearer picture of the entity's procurement practices • Better understand the buyer's needs • Have access to public data they can reuse • Know in advance when contracts will come up for renewal
Concerned citizens and other external parties	• Understand how taxpayers' money is being spent • Analyse data and ask questions • Scrutinise procurement practices from the outside • Uncover irregularities

SUB-SECTION 5

Organising the procurement function

Establishing clear rules and harmonised procurement procedures

Having a set of entity-wide public procurement rules is an essential precondition for preventing favouritism and other forms of corruption. Entities should ensure that:

- internal procurement rules and procedures are documented in a guide or compendium, are kept up to date, and are known to all internal parties in the procurement cycle;
- the working procedures of any procurement committees (tender committee, bid review committee or other ad-hoc committee) are properly documented, and that such committees make decisions collectively;
- there are no gaps or weaknesses in organisational arrangements and procedures that could undermine the internal control system (e.g. individuals, functions or sectors that fall outside the entity's rules and procedures).

Keep signing authorities under regular review

Routinely review the upper limits of signing authorities, along with the types of product and service they cover.
Check that the relevant forms have been properly completed and signed, and that they have been published (and are therefore binding on third parties).

Forming an internal procurement community

Buyers and specifiers often find themselves under pressure, facing risky situations and subject to attempted corruption. Forming an internal procurement community can help to break down silos and give everyone involved in the procurement cycle an opportunity to share best practices on handling these situations appropriately.

How a procurement community can help to minimise risk

A procurement community is a type of internal network that brings together everyone involved in the procurement cycle. Members can share insights and experiences on a range of issues, including:

- what risky situations they face and how to handle them;
- how the anti-corruption code of conduct applies in practice in their line of work;
- how to apply and adapt the entity-wide rules;
- what further training they require.

Community members can also review the latest legislative and case-law developments in public procurement as part of their continuing professional development, and to help prevent favouritism and other forms of corruption.

Key messages

Entities should develop a clear understanding of their procurement cycle and requirements so they can plan ahead and avoid foreseeable emergencies.

Public entities should publish their procurement plan in order to widen access to their contracts. Publishing essential data on public procurement, as required by law, also helps to strengthen the transparency of the entity's procedures.

A well-organised procurement function, with documented rules and procedures known to all internal parties in the procurement cycle, serves as a solid foundation on which to build an anti-corruption programme.

Legal framework

- Article R.2196-1 of the French Public Procurement Code.
- Annex 15 of the French Public Procurement Code (essential data on public procurement).

Chapter II

DEVELOPING AN ANTI-CORRUPTION PROGRAMME

Section 1

TOP MANAGEMENT'S COMMITMENT TO PREVENTING AND DETECTING CORRUPTION

In brief

Top management's commitment to adopting an anti-corruption programme demonstrates a public entity's determination to ensure and promote behaviour that meets strict integrity rules.

The AFA recommends that top management's commitment be based on four pillars: adopting a zero-tolerance policy towards corruption risk, mainstreaming anti-corruption measures in policies and procedures, ensuring governance of the anti-corruption programme at the highest level of the organisation, and adopting an appropriate internal and external communication policy.

Adopting an anti-corruption programme involves first assessing corruption risk and then establishing prevention, detection and organisational measures to manage this risk.

Sub-sections

Sub-section 1

Top management's commitment: fundamental to an effective anti-corruption programme

Top management's clear, unequivocal commitment to promoting behaviour that meets strict integrity rules is fundamental to a department's or entity's anti-corruption programme.

In the case of public procurement, the term "top management" refers to the organisation's most senior representatives and to its collective leadership body, whether elected or appointed.

> **Who constitutes top management?**
>
> - **Central government bodies:** minister, secretary-general, department director, prefect (*département* or region), head of devolved government department.
> - **Government-funded institutions, semi-public companies, and non-profits and foundations recognised as public-interest entities:** chair of the board of directors, chief executive.
> - **Local authorities:** mayor, president of a government-funded intercommunal cooperation institution (EPCI), president of a *département* or regional council, members of a municipal, *département* or regional council, members of the tender committee, and the authority's general services manager.
> - **Public healthcare institutions:** chief executive, executive board, supervisory board.

Top management's commitment should be based on four pillars:

1. **Adopting an explicit zero-tolerance policy towards behaviour that breaches the duty of probity and integrity and that contravenes the anti-corruption code of conduct.** Top management should regularly remind employees of this policy, share it with third parties, and consistently and proportionately use the disciplinary measures available to them. By writing a foreword to the entity's code of conduct, and ensuring it is widely circulated, top management can also signal their official support for and endorsement of the code. They may also request that details of any disciplinary action taken be published, in anonymous format.

2. **Mainstreaming anti-corruption measures in the organisation's policies and procedures.** Public procurement is particularly vulnerable to corruption. Breaches of the applicable rules may often amount to favouritism. Moreover, the very nature of public procurement – an activity that involves handling taxpayers' money and dealing extensively with the private sector – carries specific risks (selecting suppliers, committing funds, etc.).

   Top management should counter these risks by advocating for a procurement-specific prevention policy – covering both the procurement department and client departments – so as to reconcile two imperatives: delivering responsive, dependable public services while ensuring that public officials carry out their duties with probity and integrity, as required by law. This mainstreaming objective can be achieved, for example, by writing rules on professional ethics into job descriptions, and by making a discussion on managing conflicts of interest part of the performance appraisal process.

3. **Ensuring governance of the anti-corruption programme at the highest level of the organisation.** Top management should appoint an anti-corruption program manager. The designated individual must enjoy genuine independence and be vested with the authority necessary to perform his or her duties. He or she must be known to all internal parties in the procurement cycle, not least since the programme manager's role or functional position will likely vary from one organisation to the next (e.g. project manager, or member of the audit, risk management, legal, procurement or human resources department).

   An anti-corruption program also needs to be properly staffed and resourced. For instance, top management may need to ensure that members of the procurement department tasked with mapping risks or performing internal controls are given sufficient time to carry out these duties, or that buyers are able to work in pairs where required by the entity's internal procedures. An effective whistleblowing system must also be available to all employees.

4. **Adopting an appropriate internal and external communication policy.** The entity should publish details of its anti-corruption measures as they apply to public procurement. For instance, as well as establishing an internal whistleblowing system (see p.69 for more details), top management should also communicate about the system internally to make sure employees know that it exists and how to use it.

   Contracting authorities could also share details of their anti-corruption code of conduct – and the section relating to gifts and invitations in particular – with tenderers. As a further measure, entities may wish to publish key facts about their anti-corruption programme on their website, such as information relating to training programmes, or details that contractual partners may find useful for third-party due diligence purposes[24].

Preventing and detecting corruption is therefore a priority for all public entities – and for procurement departments in particular – for two reasons: to guarantee the sound use of taxpayers' money, and to ensure that public officials act with probity and integrity at all times, as required by law.

Top management also have a duty to lead by example and to help embed a culture of integrity across the organisation through their personal conduct – for instance by never accepting inappropriate gifts and invitations or misusing departmental resources.

Top management who model probity and integrity in this way demonstrate their commitment to transparency and accountability – a principle in public administration that dates back to 1789 and Article 15 of the Declaration of the Rights of Man and of the Citizen[25].

The four pillars of top management's commitment

Source : AFA

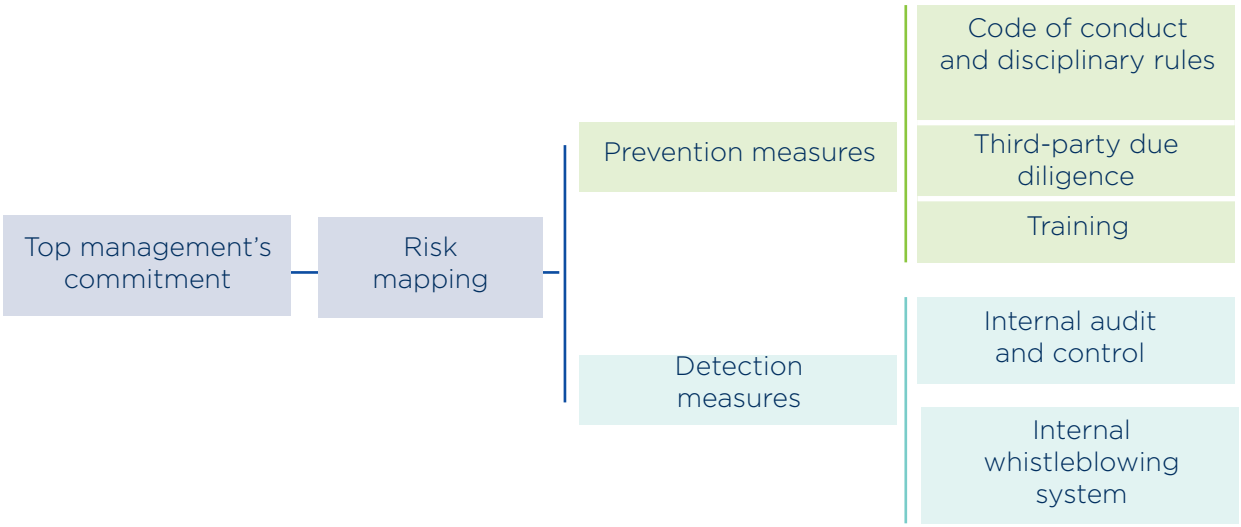
[24] Such as the entity's managers and budget, key organisational information, a notice to the effect that the entity has an anti-corruption programme along with the name of its programme manager, details of certain aspects of its programme (e.g. its code of conduct – or at the very least the section on dealings with third parties – and its internal whistleblowing system), and links to articles demonstrating top management's commitment.

[25] "Society has the right to require of every public agent an account of his administration."

Sub-section 2

What does an anti-corruption programme involve?

An anti-corruption programme should be initiated by top management. The first step in the process is to draw up a risk map. This exercise involves reviewing all processes related to the entity's activities (recruitment, public procurement, awarding grants and permits, etc.) and assessing corruption risk exposure for each of these activities, including those connected to the procurement cycle.



An anti-corruption programme is therefore a coherent set of measures that draws together the various legal requirements for preventing corruption mentioned elsewhere in this guide, such as rules on preventing conflicts of interest, public accounting rules, and the duty to report contraventions to the public prosecutor.

Although an anti-corruption programme cannot always prevent isolated acts, it provides public entities with an added layer of protection against corruption in two ways: by reducing their likelihood, and by allowing the entity to detect them more quickly, thereby limiting their impact.

More generally, an anti-corruption programme helps to embed a culture of probity within a department and makes officials more attentive to risky situations. Likewise, entities that have adopted such a programme have a clearer picture of their internal processes and are therefore better able to prevent corruption.

Did you know?

The Charter for Responsible Supplier Relations was launched by the Business Mediation Service and the French Purchasing Association (CNA) in 2010. Businesses and public entities that sign up to the Charter pledge to be more responsible in their dealings with their suppliers, including preventing conflicts of interest.

The Label for Responsible Supplier Relations and Sustainable Procurement, which builds on the commitments set out in the Charter, is awarded to businesses and public entities with a proven commitment to fair, sustainable supplier relations. Commitments 8 and 9 in the Charter concern fighting corruption and call for "procedures and processes to prevent conflicts of interest, active or passive corruption in the procurement process, including bribes, extortion, fraud and rules on gifts and invitations".

Some government entities have signed the Charter and/or been awarded the Label.
Source : http://www.rfar.fr

Key messages

Top management's commitment is fundamental to an anti-corruption programme and should be based on four pillars:

- adopting a zero-tolerance policy towards behaviour that breaches strict integrity rules;
- mainstreaming anti-corruption measures in the organisation's policies and procedures, including those relating to the procurement cycle;
- appointing an anti-corruption programme manager who enjoys genuine independence and is vested with the necessary authority;
- adopting an appropriate internal and external communication policy.

The first step in developing an anti-corruption programme is to draw up a corruption risk map. The programme includes a series of prevention measures: a code of conduct, third-party due diligence and training for employees exposed to corruption risk.

It also includes detection measures: internal audit and control procedures and an internal whistleblowing system.

Section 2
CORRUPTION RISK MAPPING

In brief

Organisations use corruption risk mapping to identify, assess and prioritise corruption risks inherent in their activities, so that these risks can be managed effectively.

The Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016 defines a risk map as "*a regularly updated document that identifies, analyses and prioritises the company's exposure to solicitations for corrupt purposes, including on the basis of the geographical area where the company is doing business and the business sector in which it operates*"[26].

Once the mapping exercise is complete, the organisation draws up an action plan to mitigate the identified risks.

Sub-sections

1. Clarifying roles and responsibilities for elaborating, implementing and updating the risk map
2. Identifying risks that are inherent in the entity's activities
3. Assessing exposure to corruption risks: identifying gross risk exposure
4. Assessing the adequacy and effectiveness of the means for managing these risks: computing net (or residual) risk exposure
5. Prioritising and addressing net (or residual) risks: implementing an action plan
6. Formalising and updating the risk map

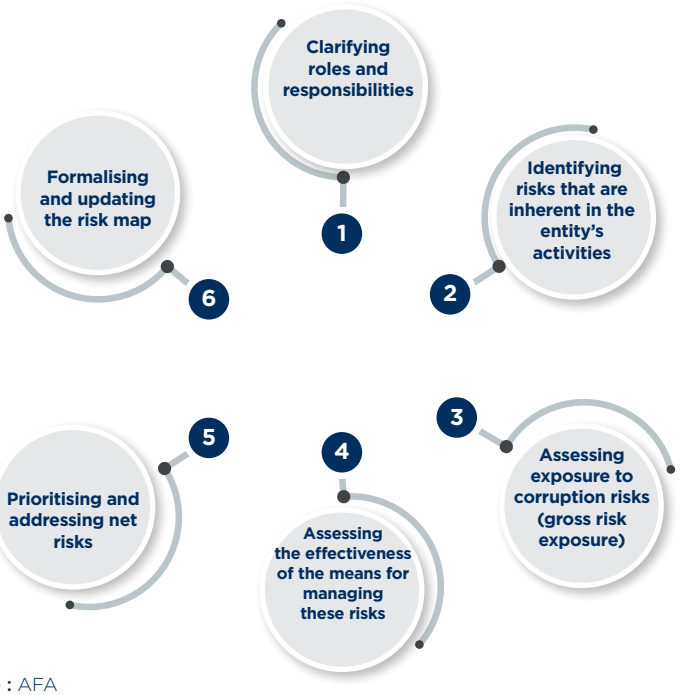
Refer to the toolbox for **further guidance**:
- Step-by-step guide to mapping corruption risk (p.76).
- Anti-corruption best practices in the procurement cycle (pp.82-94), which provides further examples of potential risks.

[26] Article 17(II)(3) of Act 2016-1691 of 9 December 2016.

The risk map constitutes the foundation of the entity's corruption risk management strategy.

The AFA recommends following a **six-step** method.

Corruption risk mapping: a six-step method



Source : AFA

Sub-section 1

Clarifying roles and responsibilities for elaborating, implementing and updating the risk map

Who does what?

Top management should be solely responsible for the entity's decision to undertake action to fight corruption risks. Top management initiates and oversees the risk-mapping exercise and ensures that human and financial resources allocated to fighting corruption are proportionate to the risk.

The anti-corruption programme manager should be appointed by top management. He or she charts the deployment, implementation, evaluation and updating of the anti-corruption programme. The manager oversees the elaboration of the risk map, by supporting each department's audit of its functions and processes, its identification of the risks incurred and its implementation of the appropriate preventive and improvement measures. He or she may be assisted by an outside service provider as long as the mapping exercise is subject to internal oversight and the resulting map is approved by the entity.

Heads of operational and support departments should report on the specific risks in their areas of responsibility to support risk identification and rating**.**

Employees may support the risk-mapping exercise by reporting situations that are specific to their functions so that probabilities, impacts and risk ratings can be assessed.

Making corruption risk mapping an inclusive exercise

Top management and the risk-mapping project manager should present the aims and objectives of the exercise to all relevant employees and departments. These discussions are an opportunity to:

- explain what the process involves, in practical terms, and secure buy-in from all internal parties;
- make employees aware of their duties as they pertain to preventing and detecting corruption;
- invite input on potential areas for improvement (training needs, deficient procedures, etc.).

Sub-section 2

Identifying risks that are inherent in the entity's activities

What risk exposure does the entity incur in its activities?

This step aims to **establish the classification of risks that the entity incurs** based on the review of its processes.

The entity should interview individuals with expertise in each stage of the procurement cycle (sourcing, application and bid review, contract performance, etc.) in order to identify corruption risk inherent in these activities. Alternatively, the entity could seek feedback via questionnaires. In this case, the questions should be sufficiently open-ended to gather detailed input.

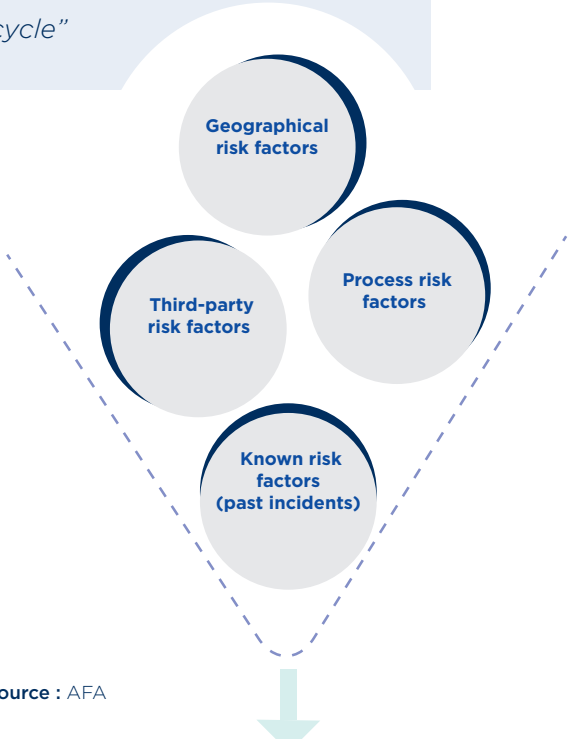
Below are some examples of risks inherent in the procurement cycle:

- inside information could be shared with some (but not all) candidates (e.g. details of the estimated cost or amount of work could be disclosed at the sourcing or negotiation stage);
- contracts could be split illegally;
- in-contract amendments (such as addenda) could, for instance, change the economic balance of the contract.

Refer to "Anti-corruption best practices in the procurement cycle" in the toolbox for more examples.

Assessing risk factors: information sources

When developing its risk map, the entity should interview individuals with **deep knowledge of the organisation and the roles within it, as well as a detailed understanding of its processes.** These individuals should be involved in procurement operations on a day-to-day basis and therefore able to provide clear insights into their risk exposures. All risky situations identified and reported by interviewees should be recorded. No filters should be applied at this stage.



Source : AFA

Information sources could include:
- **known risk factors**: disciplinary records, matters referred to the ethics officer (anonymised), breaches of the code of conduct, review of case law involving similar entities, commentary published by the government audit offices (central and regional), lessons learned from past legality checks, etc.
- **process risk factors**;
- **third-party risk factors**: corruption risk in relationships with key contractors, such as conflicts of interest that could give rise to unlawful taking of interest, or risks stemming from the role of the outgoing supplier during contract renewal (see "Third-party due diligence", p.48).

Sub-section 3

Assessing exposure to corruption risks: identifying gross risk exposure

Discounting existing prevention measures, how vulnerable is the entity to each corruption risk identified in the previous step?

This part of the exercise involves identifying the entity's **gross risks**, i.e. its risk exposure resulting from its activities **BEFORE this exposure is adjusted for existing prevention measures.**

> **This step seeks to assess the entity's objective vulnerability** to each corruption risk identified in the previous step.
>
> It is important to stress that **every entity should develop its own corruption-risk assessment method**, taking account of the nature of its activities and its wider institutional setting.

This vulnerability should be assessed using two indicators:

1. *Impact (severity)*

If the identified risks – operational, human or organisational – were to occur, they could harm the entity's financial situation or reputation, or even have legal implications. The entity should assign these risks a severity score using a risk rating matrix.

2. *Likelihood (frequency)*

This indicator measures how often the identified risks could occur. Here again, these risks are **assigned a likelihood score using a risk rating matrix** (see the toolbox for an example, p.79). Likelihood should be determined using information specific to the entity (e.g. past incidents, high-risk business sectors, frequency of activity, examples of incidents in comparable departments, etc.).
The gross risk score is calculated as the product of the severity and likelihood scores.

> **Gross risk score = impact score x likelihood score**

The entity may then adjust its risk score to take account of business-sector or geographical factors (e.g. limited competition, high-risk countries, local business-friendly policy, etc.).

Sub-section 4

Assessing the adequacy and effectiveness of the means for managing these risks: computing net (or residual) risk exposure

How does the entity manage risk? Do its measures work and do they go far enough?

This step involves adjusting the gross risk exposure in consideration of existing prevention measures (such as processes, procedures, controls, training and organisational arrangements) to compute the net (or residual) risk exposure.
The entity will then be in a position to form a view as to the **acceptability of the net risk and take appropriate corrective action.**

Sub-section 5

Prioritising and addressing net (or residual) risks: implementing an action plan

Remedying the shortcomings of the prevention system

Once the net corruption risks have been determined, they should be prioritised, distinguishing between risks for which the level of internal control is deemed to provide reasonable assurance that the risk is under control, and risks that management would like to manage better.

The entity can then decide what action to take in order to remedy these shortcomings, such as:
- tightening security around procedures;
- introducing enhanced internal controls;
- reassigning individual officials, managers or elected representatives;
- limiting the number of people allowed to access computerised records;
- assessing the integrity of contractual and other partners;
- introducing stricter checks around contact award and performance.

An action plan should be developed on this basis. For each high-priority risk, top management should decide:

- what level of risk is acceptable;
- what means and resources will be allocated;
- what preventive or corrective measures should be taken (tightening security around procedures, providing training, etc.);
- who will be responsible for each action;
- when each point in the plan will be actioned (timeline);
- what aspects of the action plan will be checked by internal control (see "Internal audit and control", p.62).

Sub-section 6

Formalising and updating the risk map

The risk map should be a **STRUCTURED WRITTEN** document.

It should include:

- a methodology note;
- the risk rating matrices (impact and likelihood);
- a separate document detailing all gross and net risk exposures;
- a risk sheet per process group.

The findings should be presented to top management in **SUMMARY** form for **approval of the risk map, the associated action plan and the necessary resources.**

Beyond preparing the initial risk map, entities are advised to:

- structure the risk map in a way that facilitates its use as a TOOL to MANAGE corruption risks;
- organise the document by business line and by process;
- assess the need for an update of the risk map at least once a year, and to account for any changes in activities or the wider environment (e.g. public policy developments, merging of departments, change of remit, etc.);
- keep the entity's vulnerability to the identified risks under constant review (upward or downward change in risk score for each risk) so that appropriate corrective action can be taken.

Key messages

Risk mapping is a fundamental part of an anti-corruption programme, giving the entity a picture of the risks inherent in its activities, including in its procurement cycle.

Once the entity has identified, assessed and classified its risk exposures, it should develop an action plan containing measures to build its resilience to these risks by mitigating their impact or lessening their likelihood.

Legal framework

• **Risk mapping** : Article 17(II)(3) of Act 2016-1691 of 9 December 2016.
"II. -The persons mentioned in sub-section (I) shall implement the following measures and procedures: 3. Risk mapping in the form of a regularly updated document that identifies, analyses and prioritises the company's exposure to solicitations for corrupt purposes, including on the basis of the geographical area where the company is doing business and the business sector in which it operates."

Chapter III
PREVENTING CORRUPTION

Section I

RULES ON PROFESSIONAL ETHICS AND THE ANTI-CORRUPTION CODE OF CONDUCT

In brief

Officials involved in the public procurement cycle are governed by various **rules on professional ethics**, some of which are legally binding. Although the precise rules differ according to the official's function and status, they all have one feature in common: they help to prevent officials falling foul of the rules on unlawful taking of interest and other offences, and they assist entities in managing breach of the duty of probity risk.

Act 2016-1691 of 9 December 2016 also requires public entities to adopt an **anti-corruption code of conduct**[27]. This document (no matter what the entity decides to call it in practice) should set out employees' duties as they pertain to preventing and detecting corruption, and should define and illustrate the various types of improper conduct that could constitute corruption.

The code of conduct is intended for all of the entity's internal parties (employees and top management team).

It should also specify the disciplinary action and criminal sanctions that anyone who breaches the code of conduct or other anti-corruption rules could face.

Sub-sections

1. Rules on professional ethics
2. Anti-corruption code of conduct

Refer to the toolbox for **further guidance**: "Indicative content of an anti-corruption code of conduct" (p.107)

[27] Article 17(II)(1) of Act 2016-1691 of 9 December 2016.

Sub-section 1

Rules on professional ethics

This sub-section sets out the main rules on professional ethics as they apply to public officials.

Proper and appropriate application of this framework can help to prevent corruption. For instance, by following the rules on managing conflicts of interest, public officials can avoid committing the offence of unlawful taking of interest.

Any breach of these rules could result in disciplinary action and, in some cases, criminal prosecution.

The extent to which internal parties in the procurement cycle are bound by these rules depends on their status and function. They do not apply equally to all officials. Conversely, some internal parties may be governed by specific rules on professional ethics (such as officials working in healthcare procurement, who are subject to Act 2011-2022 of 29 December 2011 on the safety of drugs and healthcare products). This sub-section does not therefore provide an exhaustive overview of all applicable legal texts.

1

Abiding by the rules on professional ethics

Public officials operating in the procurement cycle are bound by the provisions of Article 25 of Act 83-634 of 13 July 1983, which states that "civil servants shall fulfil their duties with dignity, impartiality, integrity and probity".

Public officials are entitled to consult their **ethics officer** for advice and guidance on fulfilling their ethical obligations in their everyday work.

Members of the government, elected representatives and persons discharging a public-service mission must also carry out their duties with dignity, probity and integrity and must prevent conflicts of interest or bring them to an immediate end.

2

Preventing conflicts of interest

> **What is a conflict of interest?**
>
> A conflict of interest is defined as "*any situation of interaction between a public interest and public or private interests that could influence or appear to influence the independent, impartial and objective performance of a duty*" (Article 2 of the Transparency in Public Life Act 2013-907 of 11 October 2013, and Article 2 of the Civil Servant Ethics and Rights and Obligations Act 2016-483 of 20 April 2016).

By law, civil servants are required to "*ensure that conflict of interest situations in which they find themselves or could find themselves are immediately ended or prevented*" (Article 25 of the Civil Servant Rights and Obligations Act 83-634 of 13 July 1983).[28].

Public officials and their superiors must remain on their guard against potential conflicts of interest at all times so as to avoid committing criminal offences such as unlawful taking of interest. They may seek advice and guidance from the designated ethics officer[29] where necessary.

[28] This legal requirement also applies to local elected representatives: "Local elected representatives shall ensure that conflicts of interest are prevented or immediately ended. Where a matter in which a local elected representative has a personal interest is brought before a legislative body of which he is a member, the representative shall declare such interest prior to the debate and vote." (Article L.1111-1-1 of the French Local Authority Code).
[29] Article 28 bis of Act 83-634 of 13 July 1983.

Situations that could create a conflict of interest: (non-exhaustive list)

- ✓ An official or member of the tender committee is related to a candidate or tenderer.
- ✓ An official holds a financial interest in a company with which he or she is doing business.
- ✓ An official holds a job or other role, directly or indirectly, outside the course of his or her normal duties.
- ✓ An official has a direct or indirect link with a candidate or tenderer that could influence the preparation, award or performance of a public contract.

The existence of such ties does not, on its own, constitute a conflict of interest. The relationship must be such that it influences or could influence the independent, impartial and objective performance of the official's duties.

Each case is judged on its merits, taking into account circumstances specific to the official's situation. Factors likely to influence the court's decision include whether the interest was direct (between the official and a candidate or tenderer) or indirect (involving a relative of the official), whether the interest existed at the time the procurement operation took place, and whether the interest was permanent or temporary[30].

When assessing whether a contract has been awarded lawfully, the administrative courts have ruled that ignorance of the principle of impartiality in public procurement constitutes a conflict of interest (Administrative Court of Pontoise, Passavant Impianti, 6 November 2018).
The courts take the same approach to the award of development concession agreements (Conseil d'Etat, SAGEM, 15 March 2019).

Conversely, the courts have ruled that a contractor hiring someone previously employed by the project-owner assistant does not automatically constitute a conflict of interest unless it can be demonstrated that the relationship has influenced the procedure (Conseil d'Etat, 12 September 2018, case no. 420454).

Detecting conflicts of interest

When starting a new role or taking on new responsibilities, officials should sit down with their superior to discuss any conflicts of interest that could arise in the performance of their duties. The matter should be kept under constant review throughout their career. New conflicts of interest could arise if, for instance, the official's spouse changes occupation or if he or she invests in a business. Officials should therefore be made aware of this ongoing obligation.

In case of doubt, officials can approach their superior or ethics officer for guidance on whether their situation amounts to a conflict of interest.

[30] The French Supreme Court of Appeal (Criminal Division, case no. 14-88.382, 13 January 2016) upheld the conviction of an official working in a mayor's office for unlawful taking of interest. The facts of the case were as follows: the official wrote the special technical terms and conditions for the tender and submitted the report to the bid review committee. It came to light that the same official was friends with the manager of the company that was awarded the contract (both had worked together previously at various companies, the official had passed on the customers of his former business to his friend's company, both companies were registered at the same address, the two individuals had spoken on the phone regularly during the preparation period, and they were friends on Facebook). In a later case, however, the same court (case no. 17-86.548, 13 March 2018) overturned the conviction of another official for unlawful taking of interest. In this instance, a mayor had granted a production company permission to film on municipal premises without paying a fee. Although the company's majority shareholder was one of the mayor's deputies, and the two individuals had attended official events together, they were not friends and did not share business or non-profit interests. Refer to pp.120-123 of this guide for further case-law examples of officials being convicted of unlawful taking of interest as a result of a conflict of interest.

Some buyers, specifiers and decision-makers may be required to declare their interests or assets.

Declaration of interests[31] *(prevention of conflicts of interest)*

Individuals subject to this requirement must declare all their activities, duties, offices and shareholdings, including details of any family, personal, business and financial relationships.

Declaration of assets[32] *(detection of unjust enrichment)*

The declaration of assets provides a snapshot of an individual's financial situation.

The following central government civil servants are required to declare their assets: managers of regional government procurement centres[33], and certain officials whose roles appear on a list laid down by decree and who have the authority to sign contracts covered by the French Public Procurement Code.

The requirement to declare assets also extends to procurement managers in central government departments and public administrative institutions[34], as well as to general officers and colonels in the armed forces with specific responsibility for procurement matters.[35].

Note: In some cases, specifiers and decision-makers may also be required by law to declare their assets because of the nature of their duties.

Handling conflicts of interest

In order to prevent conflict-of-interest risk, **public officials are advised to consider recusing themselves from examining or reviewing bids** if they have family or personal ties with the tenderer that could influence their judgement or would likely affect the decision-making process. Where officials cannot recuse themselves from the process or delegate authority to someone else (such as in smaller organisations where nobody else has the requisite expertise), other parties should be included in the process and a decision arrived at collectively. As a precautionary measure, the decision to resort to collective decision-making in the absence of a viable alternative should be documented.

Recusal involves an official or elected representative abstaining or withdrawing from any situation in which he or she is judged to have a conflict of interest. The public entity's legal representative may document the recusal in a formal notice or decision.

[31] Articles 25 ter and 25 nonies of Act 83-634 of 13 July 1983.
[32] Articles 25 quinquies and 25 nonies of Act 83-634 of 13 July 1983.
[33] Decree 2019-1594 of 31 December 2019 on central government employment.
[34] Decree 2016-1968 of 28 December 2016 on the requirement to file a declaration of assets pursuant to Article 25 quinquies of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.
[35] Article R.4122-42 of the French Defence Code.

Handling conflicts of interest
Article 25 bis of the Civil Servants Rights and Obligations Act 83-634 of 13 July

- ☑ Officials who are under the authority of a hierarchical superior must give notice of their intent to recuse themselves to their superior.
- ☑ Officials vested with signing authority must refrain from using it.
- ☑ Officials who sit on a collective decision-making body must abstain from discussing or deliberating the issue in question, even where the body is merely giving an opinion or would likely reach a unanimous decision.
- ☑ Officials vested with delegated authority must delegate that authority to another official and refrain from giving instructions to the delegatee.

The following rules on conflicts of interest apply to elected representatives:

1. To avoid committing the offence of unlawful taking of interest, all elected representatives must abstain from participating in a decision of the legislative body of which they are a member, either in person or by proxy, relating to the individual or organisation with which they are connected. The elected representative must leave the room immediately before the deliberation or vote takes place, and his or her departure must be recorded in the minutes. The elected representative must also refrain from participating in related preparatory work (giving an opinion, attending prior committee or working group meetings, etc.).

2. Articles 5 and 6 of Decree 2014-90 of 31 January 2014 set out the recusal procedures that apply to local government officials with executive powers and officials with signing authority.

3. Where a mayor's interests conflict with the municipality's interests on a specific matter, Article L.2122-26 of the French Local Authority Code states that the municipal council should appoint another member as its legal or contractual representative in respect of that matter.

3

Post-public employment and multiple job-holding

Post-public employment

ermanent and contract civil servants who leave their post temporarily or permanently and wish to take up employment in the private sector must first seek authorisation from their superior.

The civil servant's superior should examine the ethical and legal implications of the change of employment before deciding whether to give qualified approval or to decline the request. The superior should raise any specific concerns with the relevant ethics officer. If doubts persist, the matter should be referred to the High Authority for Transparency in Public Life (HATVP) for final decision.

Requests from officials who, by virtue of their post, are required to file a declaration of interests must be referred to the HATVP.

The same rule applies to any subsequent change-of-employment requests within three years of the official leaving the civil service.
Officials who fail to comply with the decision of the HATVP may face disciplinary action or, if they are retired, may have their pension docked. Contract civil servants will have their contract of employment terminated on the date the decision is issued and will be barred from working for the government for a period of three years thereafter.

Example of a high-risk situation

A public official leaves the civil service to work for a private company that could subsequently bid for contracts awarded by his or her former employer.

Multiple job-holding

As a matter of principle, public officials are expected to devote themselves exclusively to their public duties. They may be permitted to combine public employment with supplementary work in the public or private sectors, provided that:[36] :

- ☑ they seek and obtain authorisation from their superior for any work other than a voluntary role with a public or private non-profit. The superior may seek further guidance from the ethics officer[37]. If doubts persist or if the official is required to file a declaration of interests, the matter must be referred to the HATVP;
- ☑ the supplementary work does not prejudice the normal operation, independence or neutrality of the department, and does not constitute unlawful taking of interest;
- ☑ the supplementary work falls into a permitted category (such as consultancy work, teaching and training, sports and cultural activities, or minor domestic jobs);
- ☑ the official performs the supplementary work outside his or her contracted working hours.

Officials who obtain authorisation:

- ☑ must comply with any qualifications;
- ☑ must submit a new request if their supplementary work arrangements or income change;
- ☑ should be aware that the authorisation can be withdrawn at any time if deemed justified in the interests of the department.

Special exemptions apply to officials holding certain posts, to those who wish to start up or take over a business, and to those on part-time contracts.

Example of a high-risk situation

A public official starts up a freelance business in a competitive sector and could potentially bid for contracts awarded by his or her employer (e.g. a public procurement legal expert who also runs a public procurement training business).

[36] Decree 2020-69 of 30 January 2020 on ethical controls in the civil service.
[37] Article 25 septies of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.

Sub-section 2

Anti-corruption code of conduct

An anti-corruption code of conduct is a document intended for all of the entity's internal parties. It should **set out employees' duties as they pertain to preventing and detecting corruption**.

The code of conduct should explain the entity's rules on professional ethics and corruption, as determined by its risk mapping. It should outline best practices, provide guidance on how internal parties in the procurement cycle should proceed if they encounter risky situations, and define and illustrate the various types of improper behaviour. It should also specify the disciplinary action and criminal sanctions that anyone who breaches the code of conduct or anti-corruption rules could face.

1

Developing an anti-corruption code of conduct: a collective process

An anti-corruption code of conduct should be developed with input from all internal parties in the procurement cycle. Top management may wish to set up a dedicated writing committee to prepare the document.

This commitment from the very highest level of the organisation has two benefits: it clearly demonstrates the entity's determination to prevent and detect corruption, and it ensures that the preparation work is properly coordinated. It is important to remember that an anti-corruption code of conduct is an **action-oriented document that should align with the entity's activities and institutional setting**. For this reason, individuals who were involved in the corruption risk mapping exercise should be appointed to the writing committee.

2

Clarifying the legal position and listing types of behaviour that could constitute corruption

The anti-corruption code of conduct should be a clear-cut document that addresses the risks identified in the entity's risk mapping, translating general ethical principles into specific guidance and containing a set of rules on how public officials should conduct themselves in specific, everyday situations.

An anti-corruption code of conduct should:
- include a foreword by top management;
- explain what steps the entity has taken to comply with the applicable rules on professional ethics (appointing an ethics officer, preventing conflicts of interest, establishing rules and procedures for post-public employment and multiple job-holding);
- clarify what gifts and invitations officials can and cannot accept;
- outline existing whistleblowing and reporting systems;
- specify the sanctions employees could face for breaching the rules.

See "*Indicative content of an anti-corruption code of conduct*" (Appendix 7, p.107)

The anti-corruption code of conduct should not to be confused with the Charter for Local Representatives[38]. Nor should it merely recap the rules on professional ethics as they apply to civil servants.

If a department already has a generic code of ethics, it could use this as a useful starting point for developing an anti-corruption code of conduct once it has completed a risk mapping exercise.

[38] Created by Act 2015-366 of 31 March 2015 and codified in Article L.1111-1-1 of the French Local Authority Code.

3

Circulating the code of conduct and training intended users

The anti-corruption code of conduct should be widely circulated once it has been adopted, and whenever it is updated. Below are some channels through which entities can publish and share their code of conduct:

Internally	Externally
✓ Letter or other formal communication to all officials	✓ Website*
✓ Intranet	✓ Events for economic operators, users and other external partners
✓ Internal newsletter	✓ Press release
✓ Staff meeting, training or induction session	
✓ Explainer video by top management	

** The entity may wish to provide translations of its code of conduct on its website (in English, and possibly in other languages depending on the nature of its activities)*

Everyone within the organisation – employees, managers and top management – will need to be made aware of the issues raised in the code of conduct. **The entity should arrange specific, in-depth training for employees who are most exposed to corruption risk** (see "Training", p.57).

4

Applying and enforcing the code of conduct

The code of conduct should contain a series of binding rules, **with disciplinary action for employees who breach these rules:**

- If the entity is required to adopt or has voluntarily adopted employment regulations, the code of conduct should be incorporated into these regulations once the proper procedure has been followed (e.g. once employee representative bodies have been informed/consulted), and officials who breach the rules should face disciplinary action.
- If the entity has not adopted employment regulations, officials should be made aware that the code of conduct draws on the general ethical principles that apply to the civil service (including dignity, impartiality, integrity and probity). Here again, officials who breach these principles (on which the code is based) should face disciplinary action.

The entity could also track **specific indicators** to measure **uptake and application** of the code of conduct.

Possible indicators

- Circulation of the code of conduct, and associated communication and training activities (initial training and follow-up training on updates).
- Uptake of associated tools such as the internal whistleblowing system (awareness of the system, tracking and escalation of disclosures);
- Enforcement of disciplinary measures for breaches of the code.

The entity could use the insights gleaned from tracking these indicators, plus input from internal controls and reviews, to develop action plans (e.g. providing training, improving communication or updating the code).

5

Updating the code of conduct

An anti-corruption code of conduct should be a living document. It should be updated to reflect any material changes to the entity's risk mapping (such as internal restructuring or an expanded remit), following an external audit by an administrative authority, or in the course of regular review.

The entity should manage updates centrally and keep documented records.

Any procedures that are liable to regular change and updating could be detailed in separate appendices.

The version date should appear on the updated code.

Key messages

Some internal parties in the procurement cycle may be subject to rules on professional ethics intended to prevent corruption. Proper application of these rules is essential for managing corruption risk. The rules should be set out in an anti-corruption code of conduct.

An anti-corruption code of conduct is intended for all internal parties in the procurement cycle. It should provide guidance on specific corruption risks that officials could face in their everyday work, and how to prevent these risks. It outlines the applicable rules on professional ethics and how these are applied and enforced in practice, and explains how the main risks identified in the risk map are managed. It sets out the entity's policy on gifts, invitations and other advantages.

The code of conduct should also detail whistleblowing and reporting arrangements and specify the disciplinary action and criminal sanctions that anyone who breaches the code of conduct or anti-corruption rules could face.

Legal framework

Rules on professional ethics

- Civil Servants Rights and Obligations Act 83-634 of 13 July 1983 (Articles 25 and 26 in particular).
- Article 1 of the Transparency in Public Life Act 2013-907 of 11 October 2013.

Conflicts of interest (other than in specific sectors)

- **Definition**: Article 2 of the Transparency in Public Life Act 2013-907 of 11 October 2013, and Article 25 bis of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.
- **Recusal**: Article 25 bis of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983, Articles 5 and 6 of Decree 2014-90 of 31 January 2014, Article L.2122-26 of the French Local Authority Code, and Article 2 of the Transparency in Public Life Act 2013-907 of 11 October 2013.
- **Declaration of interests**: Transparency in Public Life Act 2013-907 of 11 October 2013 (requirement to file declarations of interests with the High Authority for Transparency in Public Life (HATVP)); Article 25 ter of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983, and Decree 2020-27 of 22 January 2020 amending Decree 2016-1967 of 28 December 2016 on the requirement to file a declaration of interests pursuant to Article 25 ter of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.
- **Declaration of assets**: Transparency in Public Life Act 2013-907 of 11 October 2013; Article 25 quinquies of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983, and Decree 2016-1968 of 28 December 2016 on the requirement to file a declaration of assets pursuant to Article 25 quinquies of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.

Multiple job-holding

- Civil Service Transformation Act 2019-828 of 6 August 2019, and in particular Article 34 amending Article 25 octies of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.
- Article 25 septies of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.
- Decree 2020-69 of 30 January 2020 on ethical controls in the civil service.

Anti-corruption code of conduct

- **Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016 (Article 17(II)(1) and (7)).**

  "II. -The persons mentioned in sub-section (I) shall implement the following measures and procedures:

  1° A code of conduct defining and illustrating various types of improper behaviour that could constitute corruption or influence-peddling. This code of conduct shall be incorporated into the company's regulations and shall therefore be subject to the employee consultation procedure laid down in Article L.1321-4 of the French Labour Code;"

  "7. A disciplinary system for penalising employees who breach the company's code of conduct;"

- **Ethics officer**
  - Article 28 bis of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.
  - Decree 2017-519 of 10 April 2017 on civil service ethics officers.

- **Internal whistleblowing system**
  - Articles 6 to 15 of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016.
  - Decree 2017-564 of 19 April 2017 on whistleblowing systems and procedures in public entities, private entities and central government bodies.
  - Circular of 19 July 2018 on whistleblowing reports filed by public officials pursuant to Articles 6 to 15 of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016, and on the protections and guarantees afforded to whistleblowers in the civil service.

- **Reporting to the public prosecutor:** Article 40 of the French Code of Criminal Proceedings.

Section 2
THIRD-PARTY DUE DILIGENCE

In brief

As it applies to public procurement, third-party due diligence is the process by which a public entity vets current and potential suppliers and their subcontractors against the mandatory exclusion grounds provided for in the French Public Procurement Code, and performs ongoing due-diligence assessments throughout the procurement cycle.

Sub-sections

Sub-section 1
Purpose of third-party due diligence

1
Why carry out third-party due diligence?

Article 17(II)(4) of Act 2016-1691 of 9 December 2016 requires organisations to carry out third-party due diligence. Public entities are also required to vet economic operators against the exclusion grounds set out in the French Public Procurement Code.

The aims of third-party due diligence are therefore two-fold:

1. To check whether an economic operator (candidate, tenderer, contractor, co-contractor or subcontractor)[39] **meets the criteria for mandatory exclusion**[40] provided for in public procurement law, **either during the procurement procedure or during performance of the contract.**

Exclusion grounds for public procurement

Economic operators convicted of specified offences or wrongdoing by an authority or external body (criminal court, commercial court, labour inspectorate, tax and social security authority, etc.) are subject to **mandatory exclusion**[41]. For the sake of clarity, this sub-section will only address corruption offences, although the scope of mandatory exclusion grounds is wider.

Economic operators that fall foul of entity-specific exclusion grounds may be subject to **discretionary exclusion**[42].

[39] Subcontractors of defence and security contracts are considered third parties of the public entity and therefore come under the scope of third-party due diligence (Article L.2393-1 and following and R.2393-1 and following of the French Public Procurement Code).
[40] Article R.2144-7 of the French Public Procurement Code (Article R.2344-4 for defence and security contracts).
[41] Articles L.2141-1 to L.2141-5 of the French Public Procurement Code (Articles L.2341-1 to L.2341-3 for defence and security contracts).
[42] Articles L.2141-7 to L.2141-11 of the French Public Procurement Code (Article L.2341-5 for defence and security contracts).

Public entities should vet candidates against these exclusion grounds to decide whether to invite them to bid or allow them to continue bidding for a contract, whether to award them a contract, and whether to continue any ongoing contractual relationship with them. Likewise, the public entity can arrange for the recusal[43] of an elected representative, a public official or an economic operator acting on its behalf (e.g. as project-owner assistant or project manager) if any conflicts of interest arise.

2. **To help the contracting authority prevent corruption risk,** as required by Act 2016-1691 of 9 December 2016**, by taking appropriate organisational measures throughout the procurement cycle and during the course of its relationship with the third party.** Any such organisational measures should adhere to the principle of equal treatment of candidates in public procurement.

Third-party due diligence therefore allows a public entity to:
- guard against reputation risk;
- protect public officials against corruption risk (corruption, unlawful taking of interest, favouritism and misappropriation of public funds);
- protect managers against corruption risk (including unlawful taking of interest);
- arrange for recusal where a conflict of interest is identified;
- manage the supplier relationship during performance of the contract, adjust its processes and arrangements where necessary, and safeguard supply.

2

Whom should the entity vet?

1) Who are the entity's "third parties"?

For the purpose of third-party due diligence in public procurement, a public entity's **economic operators** include **candidates, tenderers, contractors and subcontractors**.

2) Whom should the entity vet?

- **Vetting against the exclusion grounds set out in the French Public Procurement Code (procurement and performance phases)**

In the procurement phase, the entity should **only vet the candidate to which it intends to award the contract, as well as any co-contractors and/or subcontractors**, against the mandatory exclusion grounds. Where the entity shortlists candidates for the next stage of the procedure, it should vet **all shortlisted candidates (and any co-contractors and/or subcontractors)[44].**

In the performance phase, the entity should vet its contractors and any co-contractors (if part of a consortium) and subcontractors.

- **Entity-specific third-party due diligence**

The entity should assess its potential or actual risk exposure as arising from relationships with its **contractors (or co-contractors) and likely subcontractors. This does not mean, however, third-party due diligence should be a blanket exercise.**

Each entity should develop its own vetting strategy, based on its risk mapping, with **priority and enhanced vetting for those third parties that pose the greatest risk** (see "Third-party due diligence methodology" below).

[43] Refer to the glossary for a definition of "recusal".
[44] Refer to Article R.2344-2 of the French Public Procurement Code for the rules that apply to defence and security contracts.

Did you know?

A public entity may also act as a third party to economic operators with which it has a contractual or other business relationship. If the economic operator in question is required to assess corruption risk when bidding for or performing a public contract, it may send the entity a third-party due diligence questionnaire to complete.

For the sake of **transparency, and to lighten the workload involved in responding to such questionnaires, the public entity should publish key disclosures** including details of its anti-corruption programme. The entity may wish to make this information available on its website, for instance.

This recommendation on publishing key disclosures is entirely separate from the publication of essential data on public procurement, which is a requirement under Articles L.2196-2 and R.2196-1 of the French Public Procurement Code (see p.21).

Sub-section 2

Third-party due diligence methodology

1

Mandatory exclusion grounds (as set out in the French Public Procurement Code)

1) Vetting against corruption-specific mandatory exclusion grounds

In this instance, the public entity has no **discretionary power**. If the documentation supplied by a third party indicates that it falls foul of one or more mandatory exclusion grounds, and there is no evidence of appropriate self-remedial action (where this is possible), the entity must exclude the economic operator automatically.

A sworn statement from the third party certifying that it is not subject to mandatory exclusion for corruption offences constitutes sufficient proof[46].

The **ESPD** (European Single Procurement Document)[47] or **forms DC1 (letter of application), DC4 (subcontracting statement) and ATTRI2 (special subcontracting agreement)**[48] can be used for this purpose. However, there is nothing stopping the public entity from performing these checks itself if it has access to the economic operator's criminal record[49], and especially **if it has serious concerns about the sincerity of the sworn statement or if the contract is particularly high-risk as determined by the entity's risk mapping.**

The public entity **cannot carry out any checks other than those provided for by law** (such as requiring third parties to produce non-standard evidence or vetting persons falling outside the scope of the statutory checks). **Breaching this rule could render the procedure unlawful**.

[45] Article 17(I) and (II)(4) of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016.
[46] Article R.2143-6 of the French Public Procurement Code (Article R.2343-8 for defence and security contracts). For defence and security contracts (unlike conventional public procurement contracts), the economic operator's criminal record still constitutes sufficient proof (Article R.2343-8 of the French Public Procurement Code).
[47] European Single Procurement Document: Part III of the form as set out in Commission Implementing Regulation (EU) 2016/7 of 5 January 2016.
[48] The DC1, DC4 and ATTRI2 forms are available on the Directorate for Legal Affairs (DAJ) website: https://www.economie.gouv.fr/daj/formulaires-declaration-du-candidat (page and forms available in French only).
[49] For further information, refer to the DAJ technical guidance on reviewing applications available here: https://www.economie.gouv.fr/daj/examen-candidatures-2019 (available in French only).

Economic operators convicted of the following corruption offences (with no further right of appeal) are subject to mandatory exclusion:

- Extortion by public officials (Article 432-10 of the French Criminal Code).
- Passive corruption and influence peddling by persons holding public office (Article 432-11 of the French Criminal Code).
- Unlawful taking of interest (Article 432-12 of the French Criminal Code).
- Active corruption and influence peddling by natural persons (Articles 433-1 and 433-2 of the French Criminal Code).
- Interference with public administration or with the administration of justice through corruption, active influence peddling or abuse of alleged influence (Articles 435-3, 435-4, 435-9 and 435-10 of the French Criminal Code).
- Passive and active corruption involving persons not holding public office, including bribing a person involved in a sporting competition on which bets are placed with the purpose of altering, by action or omission, the normal and fair course of the sporting event or competition (Articles 445-1 to 445-2-1 of the French Criminal Code).

2) Discretionary exclusion grounds

Discretionary exclusion grounds may apply, based first and foremost on the public entity's judgement and whether or not it deems the evidence available to it to be satisfactory.

Exclusion from public procurement on this basis is not automatic. The economic operator must first be given an opportunity to demonstrate, within a reasonable time frame and by any means, that there are no outstanding concerns as to its professionalism and reliability and, where relevant, that there is no risk of its participation in the procurement procedure undermining the principle of equal treatment of candidates[50].

Once this adversarial procedure is complete, the public entity should decide – using its judgement and based on the evidence available to it – whether excluding the economic operator is both justified and proportionate.

Public entities may also exclude third parties on other, non-corruption-related discretionary grounds, such as for colluding with other economic operators. In the interest of clarity, a full list of exclusion grounds is given below.

Discretionary exclusion grounds

Defective performance of one or more previous contracts (Article L.2141-7 of the French Public Procurement Code).	Applies to any person who "*in the past three years, has been ordered to pay damages, has had a contract terminated or has been subject to a comparable penalty for seriously or persistently breaching its obligations in the performance of a previous public contract*". **Duty on the public entity:** The public entity must review the facts of the case and the circumstances of the breach or breaches to determine whether they constitute justifiable grounds for exclusion. The public entity may only exclude the economic operator if two tests are met: first, it must have been penalised for the breach or breaches and second, it must first be given an opportunity, via an adversarial procedure, to demonstrate objectively and by any means that it has taken steps to remedy the breach or breaches and that such circumstances would not arise again were it to be awarded the contract in question.

[50] Article L.2141-11 of the French Public Procurement Code (Article L.2341-5 for defence and security contracts).

Attempt to influence the decision or obtain confidential information (Article L.2141-8(1) of the French Public Procurement Code).	Applies to any person who "has attempted to unduly influence the buyer's decision-making process or to obtain confidential information that could result in an undue advantage during the procurement procedure, or who has supplied misleading information that could have a decisive influence on exclusion, selection or award decisions". **Duty on the public entity:** Review correspondence and dealings with third parties in order to establish whether an attempt to influence the decision was made (contacts, requests made during the procedure or during previous procedures, involvement of outside parties, etc.). The adversarial procedure may only begin once the public entity has gathered sufficiently detailed evidence. Conduct of this nature may also constitute grounds for reporting the economic operator to the public prosecutor.
Distortion of competition (Article L.2141-8(2) of the French Public Procurement Code).	Applies to persons who "*through their prior direct or indirect participation in preparing the procurement procedure, had access to information that could distort competition with regard to other candidates, where such a situation cannot be remedied by other means*". **Duty on the public entity:** Prior participation is not, in itself, automatic grounds for excluding a company from a tender. Buyers should review the circumstances and decide, based on objective evidence, whether or not such prior participation gives the economic operator in question a competitive advantage over other candidates. In the interest of fair competition, the public entity should then take steps to address any information asymmetry between candidates (such as by sharing the information to which the economic operator in question was party, and that could give that operator a competitive advantage, with all other candidates). The public entity should also extend the application or tender submission deadline so as to give all candidates enough time to review the information.
Collusion (Article L.2141-9 of the French Public Procurement Code).	Collusion refers to deliberate practices by which economic operators prevent, restrict or distort normal competition. **Duty on the public entity:** The public entity must have "*sufficiently compelling proof, or a body of solid, reliable and consistent evidence sufficient to demonstrate*" that the economic operator "*colluded with other economic operators with a view to distorting competition"*. If the entity has specific concerns, these can be raised with the Directorate General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF).
Conflict of interest (Article L.2141-10 of the French Public Procurement Code).	This applies to persons who "*through their application create a conflict of interest that cannot be remedied by other means. A conflict of interest is defined as any situation in which a person participating in the public procurement procedure or who could affect its outcome has a direct or indirect financial, economic or other personal interest that could compromise his impartiality or independence in the context of such procedure*". **Duty on the public entity:** The public entity must take extra care to ensure that decisions are made impartially where there is a connection between internal parties in the procurement cycle (or an external provider acting on its behalf, such as the project-owner assistant) and a candidate or subcontractor. Third-party due diligence allows the entity to detect conflicts of interest and, where relevant, to remedy the situation by arranging for the parties in question to recuse themselves from the decision-making process (see p.51).

2

Entity-specific third-party due diligence

Third-party due diligence does not necessarily need to be a blanket exercise. Public entities should prioritise higher-risk third parties as consistent with their risk mapping.

The entity should set its review strategy using a set of interrelated and **objective criteria**, such as the size of the economic operator, the financial value or operational importance of the contract, the degree of competition in the sector and the scale of reputation risk. It may also opt to include third parties that it has reviewed previously (e.g. via random sampling).

Once the entity has decided on its strategy, it may wish to review some or all of the following aspects:

Sector or industry	Public contract	Economic operator
• Market concentration • Sensitivity of the sector or industry	• Subject-matter • Financial value • In-contract amendments • Performance-related penalties or sanctions	• Identity of any co-contractors or subcontractors • Legal structure and authorised signatories • Payment methods and streams (bank account) • In-contract review of technical, professional, economic and financial capacities • Whether the organisation has a corruption prevention and detection system • Conduct and degree of cooperation (including during previous contractual relationships)

The review could include both objective information (such as sanctions applied within a reasonable past time frame) and qualitative aspects (such as degree of cooperation).

Operational and support departments should contribute to the due diligence review, including the entity's public procurement department if it has one. In any event, the review process should remain **aligned with the principles of efficient tender management and effective service delivery**, and should adhere to data protection law.

The time and resources allocated to third-party due diligence should be **proportionate to the identified risks** and consistent with the entity's capabilities.

Public entities can gather information on third parties from various sources:

Application forms

- These forms will provide details such as the economic operator's identity, its legal structure, and its economic, financial, technical and professional capacities.
- Potential sources include the ESPD, DC1 and DC2 forms.

Ethics review

- Entities are encouraged to carry out a so-called "ethics review" in addition to the standard performance review.
- Potential sources include feedback from officials dealing with the contract at the performance stage and their supervisors, records of gifts, whistleblowing reports and in-contract amendments and penalties, or a qualitative assessment of the parties' overall attitude towards professional ethics.

Questionnaire

The entity could **ask the third party to complete a questionnaire** about its corruption prevention and detection system.

Publicly available information

- Potential sources include press articles, open-source databases and search engine results.
- Data gathered from these sources should be treated with caution, and the entity should seek objective evidence to back up any claims or information it finds.

Sub-section 3

Consequences of third-party due diligence

1

Mandatory exclusion grounds (as set out in the French Public Procurement Code)

1) Prior to contract award, a candidate that falls foul of any of the public procurement exclusion grounds will have its application deemed inadmissible and will be disqualified from the procedure[51].

2) At the performance stage, a contractor that falls foul of one of the exclusion grounds set out in the French Public Procurement Code must immediately notify the public entity, which may terminate the contract on that basis[52].

An economic operator that falls foul of one of the exclusion grounds is also barred from becoming or remaining a subcontractor (i.e. the same arrangements apply to subcontractors as to candidates and contractors).

Where a conflict of interest is identified prior to contract award, the public entity must arrange for the person in question to recuse himself or herself from the procedure in order to guarantee that the decision-making process is impartial and/or to avert the risk of the economic operator in question being excluded. Recusal can also be used during contract performance as a way to guarantee impartiality and effective delivery or monitoring of the services.

2

Entity-specific third-party due diligence

Public entities should use due diligence reviews as a way to adapt their relationships with high-risk third parties.

1) During the preparation phase, the entity could:

- introduce collective sourcing arrangements (such as requiring buyers and specifiers to work in pairs) for particularly high-risk sectors;
- involve more people in writing and approving the specifications;
- set up special internal control arrangements (cross-review of documents, involvement of a neutral party, higher approval requirements);
- provide enhanced training and awareness programmes for officials involved in the preparation phase, where the procedure involves high-risk third parties or particularly sensitive sectors as identified in the entity's risk mapping;
- watch out for potential conflicts of interest and make recusal arrangements where appropriate.

2) During the procurement phase, the entity could:

- take additional steps to ensure that all economic operators have equal access to information (e.g. by circulating feedback from previous contracts);
- bolster the negotiation team and keep enhanced records of all correspondence (for negotiated procedures);
- introduce collective bid review and decision-making processes;
- increase the level of signing authority for the contract, where possible.

[51] Article R.2144-7 of the French Public Procurement Code (Article R.2344-4 for defence and security contracts).
[52] Article L.2195-4 of the French Public Procurement Code (Article L.2395-2 for defence and security contracts).

- provide enhanced training and awareness programmes for officials involved in preparing contracts with high-risk third parties or in particularly sensitive sectors as identified in the entity's risk mapping;
- watch out for potential conflicts of interest and, where appropriate, arrange for both public officials and outside organisations involved in the procurement process (for instance, the contract with a private company acting as project-owner assistant could include a clause requiring the company to report any connections with potential candidates to the contracting authority on request).

3) During the performance phase, the entity could:

- adjust its arrangements for placing orders (e.g. by requiring orders to be approved by a more senior official);
- conduct more frequent service delivery checks, use sample or spot checking, or have checks carried out at a more senior level;
- provide enhanced training and awareness programmes for officials involved in monitoring contracts with high-risk third parties;
- adjust the terms of the relationship (e.g. officials working in pairs, staff rotation, enhanced line management checks);
- arrange for recusal where a conflict of interest arises (for instance, the contract with a private company acting as project-owner assistant could include a clause requiring the company to report any connections with the contractor or any subcontractors to the contracting authority on request);
- adjust the term of the contract (for contracts with optional renewal);
- explain the rationale behind contractual penalties;
- document any discretionary exclusion grounds for future tenders. d'exclusion laissée à l'appréciation de l'acheteur lors d'une prochaine consultation...

All internal parties in the procurement cycle should document any problems encountered in the performance phase.

Third-party due diligence: summary of consequences

	Exclusion grounds (Articles L.2141-1 to L.2141-11 of the French Public Procurement Code)	Entity-specific third-party due diligence (high-risk third parties during contract performance)
Preparation	N/A	• Special organisational arrangements put in place. • Enhanced oversight introduced (consistent with the fundamental principles of public procurement, and with equal treatment of candidates in particular).
Procurement	• Application deemed inadmissible and candidate disqualified. • Proposed subcontractor rejected. • Recusal arranged for where a conflict of interest arises.	• Special organisational arrangements put in place. • Enhanced oversight introduced (consistent with the fundamental principles of public procurement, and with equal treatment of candidates in particular).
Performance	• Contract terminated. • Proposed or existing subcontractor rejected. • Recusal arranged for where a conflict of interest arises.	• Terms of the relationship adjusted (arrangements for order placement and service delivery checks adjusted, audits carried out, etc.). • Special organisational arrangements put in place (officials working in pairs, extra training, higher approval requirements, etc.).

Key messages

Third-party due diligence is based on the French Public Procurement Code and Act 2016-1691 of 9 December 2016.

Public entities do not have to carry out due diligence for all third parties.

Applications may only be deemed inadmissible, and contracts may only be terminated, if one of the exclusion grounds set out in the French Public Procurement Code applies.

Public entities should carry out due diligence reviews throughout the procurement cycle and adapt the terms of their relationships with high-risk third parties accordingly.

Legal framework

- **Third-party due diligence procedure**: Article 17(II)(4) of Act 2016-1691 of 9 December 2016. "*II. -The persons mentioned in sub-section (I) shall implement the following measures and procedures: 4. Due diligence reviews for customers, first-tier suppliers and intermediaries as relevant to their risk mapping.*"

- **Review of applications (vetting candidates against exclusion grounds)**: Article R.2144-7 of the French Public Procurement Code (Article R.2344-4 for defence and security contracts).

- **Mandatory exclusion**: Articles L.2141-1 to L.2141-5 of the French Public Procurement Code (Articles L.2341-1 to L.2341-3 for defence and security contracts).

- **Discretionary exclusion**: Articles L.2141-7 to L.2141-11 of the French Public Procurement Code (Article L.2341-5 for defence and security contracts).

Section 3
CORRUPTION RISK TRAINING

In brief

A robust, appropriately designed internal training system is an effective way to embed a culture of integrity across an organisation. It helps spread the message about top management's pledge to stamp out corruption, brings employees on board, and creates a common body of knowledge across all staff exposed to corruption risk.

Training is intended to equip staff (such as public-sector buyers) with the knowledge and technical skills they need to perform their duties.

Awareness-raising helps to ensure that staff are informed about and mindful of the importance of preventing corruption.

Sub-sections

Sub-section 1

Why do internal parties in the public procurement cycle need training?

Since public procurement is considered a high-risk process, all internal parties should receive anti-corruption training.

Corruption risk training ensures that internal parties in the procurement cycle understand why they need to take extra care in the performance of their duties, how to do so, and how to conduct themselves in risky situations. Appropriate training therefore helps to **embed a culture of integrity** and, in the long term, **mitigate the corruption risks identified in the organisation's risk mapping.**

Entities should use the content of their risk map to develop **a training plan, with differentiated provision** according to officials' tasks and duties and to their degree and frequency of corruption risk exposure.

Sub-section 2

Who should receive training and what should it entail?

The entity should identify which staff are most exposed to corruption risk, as determined by its risk mapping. These individuals should then receive targeted training to help them:

- **assimilate the entity's anti-corruption system**;
- **prevent and detect corruption risks** to which they may be exposed.

Awareness programmes should be arranged for staff who are less exposed to corruption risk.

Training

- top management's commitment and the entity's code of conduct;
- the corruption risk exposures identified in the entity's risk mapping, and the associated prevention and detection measures;
- how to deal with corruption when it happens (requests, gifts, etc.);
- what the law says about corruption (anti-corruption law, public procurement law, civil servants' rights and obligations, etc.);
- the anti-corruption programme;
- specific aspects of the environment in which the entity's suppliers operate.

Individuals who might benefit from specialist training:

Public-sector buyers, specifiers, procurement officers and decision-makers

Awareness-raising

- top management's commitment and the entity's code of conduct;
- corruption risk in general;
- how to deal with corruption when it happens (requests, gifts, etc.).

Individuals who might benefit from a general awareness programme:

Officials working in accounts, finance and other support departments.

Training should be **pragmatic and instructive**.

As with the code of conduct, it should draw on **case studies and practical examples that are meaningful to the target audience and align with the entity's corruption risk exposures.**

In order to keep the content relevant and focused, other officials could be brought in to talk about their experiences and to discuss their reactions and thoughts on the matter.

> **Corruption prevention in the certified buyer programme from the DAE and the Institute for Public Management and Economic Development (IGPDE)**
>
> The DAE and the Institute for Public Management and Economic Development (IGPDE) have developed a continuing professional development programme for public-sector buyers. The course, which leads to a recognised qualification, includes content on ethics and integrity in public procurement, and on corruption risks that procurement professionals might face in the course of their duties.
>
> The first module, entitled "The Fundamentals of Procurement", looks in detail at what preventing corruption involves and, to help embed learning, ends with a quiz in which participants have to choose the right response in a series of role-plays involving grey areas and corruption exposure.

Sub-section 3

How should the training be delivered?

The entity may opt to **deliver the training itself** or award a contract to an **external provider**. Where the entity buys in training, it should retain a hand in programme design and delivery to ensure that the content is relevant, focused and aligned with its anti-corruption policy (the programme should cover aspects of the entity's code of conduct, be consistent with its risk mapping, etc.).

Ideally, training for most exposed staff should be delivered in person. E-learning modules could be used to raise awareness of the issues among officials who are less exposed to corruption risk.

Corruption could also be included in training covering other topics, such as public procurement law, procurement practice or management, or in targeted programmes for officials taking on additional responsibilities.

Sub-section 4

Training oversight

Entities are advised to develop a set of indicators to track and measure training provision, including where training is outsourced.

Typical indicators could include:

- target population coverage rate;
- number of hours of anti-corruption training delivered;
- training quality (post-training evaluation by participants).

Key messages

Public entities should deliver training to officials who are most exposed to corruption risk, including buyers, specifiers, procurement officers and decision-makers, as part of a wider drive to embed a culture of integrity across the organisation.

General awareness programmes could be developed for less exposed staff, such as officials working in accounts, finance and other support departments.

Training programmes should be designed so that participants assimilate the entity's anti-corruption system (including its code of conduct) and are actively engaged in preventing and detecting corruption.

Legal framework

- **Corruption risk training**: Article 17(II)(6) of Act 2016-1691 of 9 December 2016.
"*II. -The persons mentioned in sub-section (I) shall implement the following measures and procedures: 6. A training programme for managers and employees most exposed to risks of corruption and influence peddling.*"

- **Entitlement to continuing professional development**: Article 22 of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.

Chapter IV
DETECTING CORRUPTION

Section 1
INTERNAL AUDIT AND CONTROL

In brief

Internal audit and control is the process by which an entity checks that its corruption risk management measures and procedures are sufficiently robust. Internal audit refers to occasional checks, while internal control is a regular, ongoing process.

Sub-sections

1. Internal control
2. Internal audit

Refer to the toolbox for **further guidance**, including "*Anti-corruption best practices in the procurement cycle*", which contains examples of aspects to check and a section on the main warning signs (pp.82-94).

Sub-section 1:
Internal control

1
Definition

In central government bodies, internal control is defined as "a set of documented, permanent systems [...] for managing risks associated with the achievement of each ministry's objectives"[53].

Below are some examples of internal control procedures **as they apply to the procurement cycle:**

Types of internal control	Examples
Self-checking by individuals within a department (procurement, operational and/or client departments)	• Self-checking using automatically generated computerised reports.
Control and prevention mechanisms within the team	• Checking (and/or cross-checking) by a peer. • Collective decision-making.
Line management checks	• Systematic checks for higher-risk transactions and procedures. • Random and sample checks.

[53] Article 1 of Decree 2011-775 of 28 June 2011 on internal audit in the administration.

Internal control is an ongoing process carried out at every stage of the procurement cycle.

What makes an effective internal control system?

- Internal control procedures should be documented in a guide, which explains:
  - who is responsible for what (segregation of duties, signing authorities, etc.);
  - when checks are carried out, by whom and in what form.

- Internal control should be guided by the risks identified in the entity's risk mapping.

- The risk map should be updated in light of the findings of internal control.

- All staff, and especially managers, should be properly trained so that internal control becomes second nature.

- The entity should have computer systems that:
  - perform automated checks;
  - automatically generate reports to support checking and self-checking;
  - restrict access permissions according to users' roles and responsibilities.

2

Spotlight on: How internal accounting control helps manage corruption risk

"*The purpose of internal accounting control is to manage risks arising in the pursuit of quality accounting records, from the event linked to the transaction to its finalisation*[54]*.*" In central government, internal accounting controls ensure that accounting records *"meet standards for faithfulness, justification, presentation and full disclosure, sincerity, accuracy, exhaustiveness, non-netting, bookkeeping and recording in the correct accounting period and the correct financial year*[55]".

Broadly speaking, internal accounting control can help to mitigate certain types of corruption risk (such as misappropriation of public funds), although it does not go far enough to prevent favouritism or unlawful taking of interest.

- **In the procurement cycle**, authorising officers and public accountants should carry out internal accounting control, as relevant to the identified risks, throughout the performance phase.

Detecting corruption through internal accounting control Illustrations		
The managing officer seeks out substantive evidence that the corresponding goods or services were actually delivered.	**How this helps detect corruption** →	The managing officer can identify invoices issued for goods or services not delivered (misappropriation of public funds or corruption).
The public accountant checks the supporting evidence.		The public accountant can detect instances of overcharging for goods or services (misappropriation of public funds or corruption).
Physical and accounting inventory records are properly maintained.		Missing physical assets can be identified during reconciliation (misappropriation of public assets).

[54] Articles 170 and 215 of Decree 2012-1246 of 7 November 2012 on budget management and public accounting.
[55] Articles 170 of Decree 2012-1246 of 7 November 2012.

Sub-section 2

Internal audit

1

Definition

Internal audits are "independent, objective assessments intended to provide the organisation with assurance that it is managing its operations properly, to advise on improvements, and to ensure that internal control procedures are sufficiently robust"[56].

Internal audit is an occasional, retrospective exercise. Public bodies above a certain size will have an internal audit function (either a dedicated internal audit department or division, or an inspectorate)[57].

The purpose of internal audit is to ensure that the public entity in question (central government body, devolved government department, local authority or government-funded institution) has an effective and efficient internal control system. The auditors carry out their work independently and impartially and make internal recommendations[58].

- A public body's annual audit programme may include one or more audits **focusing specifically on the procurement cycle**[59].

2

Possible audit areas in the procurement cycle

Phases of the procurement cycle	• Sourcing, bid review, negotiation, etc.
Internal parties in procurement cycle	• Public procurement division, procurement department, operational/client department. • Links between internal parties. • Buyer training policy.
Key aspects of the public procurement cycle	• Use of negotiated procedures. • Enforcement of late delivery penalties. • Payment terms.
Contracts (individually or in groups)	• Compliance with anti-corruption rules in the relevant procedures.
General organisation of the procurement function	• Management of corruption risk, with a specific focus on coordination between internal parties in the procurement cycle.

[56] Source: Central Government Internal Audit Harmonisation Committee, Normes de qualification et de fonctionnement du cadre de référence de l'audit interne dans l'administration de l'État, 2013.
[57] In some cases, audits may be carried out by an external body such as the French Government Audit Office, a Local Government Audit Office or the French Anti-Corruption Agency.
[58] See, for instance, Decree 2011-497 of 5 May 2011 on risk management and internal audit in ministries with responsibility for social affairs.
[59] See Central Government Internal Audit Harmonisation Committee, Guide d'audit de la fonction achat, April 2014.

What makes an effective internal audit system?

- Audits of the procurement function should be scheduled at regular intervals.
- The internal audit programme should be guided by the risks identified in the entity's risk mapping.
- All internal parties in the procurement cycle should cooperate with the auditors.
- The entity should action the recommendations made in the audit report.
- The risk map should be updated in light of the auditors' findings.

Internal audit and control share a common aim: to provide reasonable assurance that the entity is managing corruption risk in the procurement cycle. Both exercises also help to detect corruption.

Key messages

Internal control, as it applies to public procurement, is a set of documented, permanent systems for managing corruption risk. These systems include self-checking, peer checking, sample checks by line management, and accounting and financial control.

Internal audit, meanwhile, is an occasional exercise performed by a standalone department. The auditors may, for instance, focus on a specific phase of the procurement cycle, particular internal parties, or key aspects of the procurement process.

Legal framework

- **Internal audit in central government bodies**
  - Decree 2011-775 of 28 June 2011 on internal audit in the administration.
  - Prime ministerial circular 5540/SG of 30 June 2011 on internal audit in the administration.

- **Internal accounting control**
  - Decree 2012-1246 of 7 November 2012 on budget management and public accounting.

Section 2

WHISTLEBLOWING AND REPORTING SYSTEMS

In brief

A whistleblowing and reporting system is designed to gather disclosures about conduct or situations, at any stage of the procurement cycle, that could potentially breach the entity's anti-corruption code of conduct or constitute an offence. There are at least three variants of this type of system.

Sub-sections

1. Whistleblower report and protection system
2. Internal whistleblowing system
3. Duty to report contraventions to the public prosecutor

For further guidance, see "*Detailed overview of whistleblowing and reporting systems*" (Appendix 2, p.129).

Sub-section 1

Whistleblower report and protection system
(Articles 6 to 15 of Act 2016-1691 of 9 December 2016)

Entities must set up a dedicated whistleblower report and protection system [60].

1

Which entities must set up a whistleblower report and protection system[61] ?

- public and private legal entities with more than 50 employees;
- central government bodies, independent administrative authorities and independent public authorities;
- local authorities (including municipalities with a population in excess of 10,000 people) and their local government-funded institutions;
- government-funded inter-municipal cooperation institutions with tax-levying powers containing at least one municipality with a population in excess of 10,000 people.

[60] Article 8 of Act 2016-1691 of 9 December 2016..
[61] Article 8 of Act 2016-1691 of 9 December 2016 and Decree 2017-564 of 19 April 2017.

2

What is a whistleblower?

A whistleblower is **any individual** who has a **working relationship** with the entity (employee, civil servant, public official, external and occasional staff, trainee or apprentice).

Further conditions apply, **all of which must be met**:

- the whistleblower must be disinterested (no personal or financial interest in the matter) and must act in good faith (no intent to cause harm);
- the whistleblower must have personal knowledge of the matters disclosed;
- the matters disclosed must be serious.

Corruption offences fall within the scope of this definition.

Whistleblowers are afforded enhanced protection provided that they meet these conditions and follow the three-step process[62] set out in Act 2016-1691 of 9 December 2016.

Seeking guidance from the French Ombudsman

Anyone may submit their disclosure to the French Ombudsman to be directed to the appropriate body. The Ombudsman does not have the authority to address the matter to which the disclosure pertains, but can take action if the whistleblower faces discrimination or retaliatory measures for having made the disclosure.
https://www.defenseurdesdroits.fr/

Sub-section 2

Internal whistleblowing system

(Articles 3(3) and 17(II)(2) of Act 2016-1691 of 9 December 2016)

An internal whistleblowing system is a procedure that officials and employees can use to report conduct or situations to which they have been witness that could potentially breach the entity's anti-corruption code of conduct.

The system is designed to detect inappropriate conduct that could amount to corruption (corruption, unlawful taking of interest, misappropriation of public funds, etc.).

Entities to which both requirements apply (having a whistleblower report and protection system and an internal whistleblowing system for reporting breaches of the anti-corruption code of conduct) **can combine both procedures into a single system**.

1

Which entities must set up an internal whistleblowing system?

Any entity that is required by law to establish an anti-corruption programme must also set up an internal whistleblowing system.

[62] Step 1: The individual reports the matter to his or her direct or indirect superior or to the designated whistleblowing officer.
Step 2: The individual reports the matter directly to the relevant judicial or administrative authority or professional body.
Step 3: The individual makes the disclosure public.

2

What is an internal whistleblowing system for, and what does it entail?

These systems have a dual purpose: to gather disclosures relating to breaches of the code of conduct, and to provide guidance to staff who are unsure how to act in risky situations. **The AFA recommends that the system should specify the role of the whistleblower's superior and that the entity should appoint a dedicated whistleblowing officer.**

The system must also make clear how whistleblowers should file disclosures, and include measures for ensuring their anonymity.
The whistleblower must be kept informed of the progress of his or her report at each stage of the process.

Sub-section 3

Duty to report contraventions to the public prosecutor

(Article 40(2) of the French Code of Criminal Proceedings)

Unlike the previous two whistleblowing systems, this duty is mandatory and specific to public officials.

Article 40 of the French Code of Criminal Proceedings requires public officials who, in the performance of their duties, gain knowledge of a crime or offence to report the matter "forthwith" to the public prosecutor, and to transmit to the prosecutor "any relevant information, official reports or documents".

To whom does the duty apply?

- any constituted authority;
- any public officer;
- any civil servant.

This duty implies that public-sector buyers who, in the performance of their duties, gain personal knowledge of any corruption-related crime or offence must immediately report the matter to the public prosecutor. For instance, a buyer may detect misappropriation of public funds when carrying out service delivery checks, uncover evidence of passive corruption or a corrupt pact between a company and internal parties in the procurement cycle, or become aware of unlawful taking of interest by an internal party who has a personal interest in a contractor.

The duty to report the matter to the public prosecutor remains even if the official in question has already filed an internal whistleblowing report. The individual in question will enjoy protection under the rules designed to protect civil servants and public officials in the performance of their duties.

Ethics officer

Article 28 bis of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983 requires public entities to appoint a dedicated ethics officer. Public officials are entitled to consult this officer for advice and guidance on fulfilling their ethical obligations or on the appropriate course of action in risky situations.

Key messages

Internal parties in the procurement cycle have three options for reporting risky situations. Where relevant, they may use more than one of these channels:

- the whistleblower report and protection system, under which they are afforded specific protections provided that they first report the matter to their superior and follow the procedure set out by law;
- an internal whistleblowing system for breaches of the anti-corruption code of conduct (if the entity for which they work has such as a system);
- a legal duty, as public officials, to report corruption offences of which they become aware in the performance of their duties to the public prosecutor (provided that they have sufficient evidence of the offence).

Legal framework

- Articles 25, 26 and 28 of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.
- Article 2 of the Civil Servant Ethics and Rights and Obligations Act 2016-483 of 20 April 2016 (definition of conflict of interest).
- Articles 3(3), 6 to 15, and 17(2) of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016.
- Article L.151-8(2) of the French Commercial Code.
- Decree 2017-564 of 19 April 2017 on whistleblowing systems and procedures in public entities, private entities and central government bodies.
- Department General for Administration and the Civil Service (DGAFP) circular of 19 July 2018 on whistleblowing reports filed by public officials pursuant to Articles 6 to 15 of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016.
- Ministry of Justice circular of 31 January 2018 on the application of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016.
- French Data Protection Authority (CNIL) deliberation 2019-139 of 18 July 2019 (published in the Official Journal of the French Republic on 10 December 2019).
- Article 40(2) of the French Code of Criminal Proceedings.

Chapter V

DEPLOYING AN ANTI-CORRUPTION PROGRAMME

Section 1
DEPLOYING AN ANTI-CORRUPTION PROGRAMME

In brief

This sub-section contains guidance and best practices to help public entities deploy the prevention and detection measures necessary for an effective anti-corruption programme. The examples given here are not prescriptive, since the programme will need to be designed in a way that takes account of the entity's organisation and history, as well as its specific risk exposures.

Sub-sections

SUB-SECTION 1
Getting started

Top management's commitment is the starting point for any anti-corruption programme. The top management team should signal its commitment by communicating about the programme and appointing an ethics officer or committee (see "*Top management's commitment to preventing and detecting corruption*", p.25).

A self-assessment exercise is also a useful way to determine the entity's degree of maturity in relation to the various constituent elements of an anti-corruption programme.

Possible questions could include:
- Has the entity already mapped its risks (budgetary and accounting risks, operational risks, etc.)?
- Does the entity have an internal charter of ethics?
- Has the entity set up an incident reporting procedure (e.g. a dedicated email address)?
- How mature is the entity's internal control system?
- Do internal training programmes cover ethics and corruption?

The answers to these questions will help the entity to determine which aspects of its anti-corruption programme it needs to deploy first. The exercise will also identify areas in which the entity has existing expertise, and highlight overlap with existing processes and procedures.

Sub-section 2

Deploying the programme

Risk mapping is a fundamental part of an anti-corruption programme, giving the entity a detailed picture of the risks inherent in its activities.

Risk mapping can, however, be a time-consuming process, especially if the entity has not previously documented its procedures and activities and needs to start the exercise from scratch.

Entities are therefore advised to begin deploying other corruption prevention and detection measures in the interim, and to review and update them once the first version of the risk map is complete.

By introducing temporary measures in this way, the entity will be able to start mitigating corruption risk faster than would otherwise be possible.

Sub-section 3

Reviewing and updating the measures

Deploying an anti-corruption programme should be an ongoing process.

The risk mapping exercise allows the entity to design and fine-tune the constituent measures of its anti-corruption programme according to the identified risks. For instance, an entity could use the findings of its risk assessment to:

- develop its training plan, including targeted provision for employees who are most exposed to corruption risk;
- develop its internal audit programme;
- set its third-party due diligence strategy.

More broadly, the various components of an anti-corruption programme should feed into one another. An entity could, for example, periodically review internal whistleblowing reports and records of disciplinary action and update its risk mapping or anti-corruption code of conduct accordingly.

Act 2016-1691 of 9 December 2016 also requires entities to implement an "*internal monitoring and assessment system of the measures implemented*"[63] under their anti-corruption programme, in order to ensure that these measures are both effective and consistent.

Entities should review and update the various aspects of their anti-corruption programme (such as their risk mapping, code of conduct, training plan and internal control system) to ensure they remain sufficiently robust, and to help counter new threats. Involving officials in the review process and circulating copies of the updated processes and procedures also helps to promote wider uptake and buy-in.

An example of what the deployment of an anti-corruption programme in a public entity might look like is given below.

Sur quel mot, je dois indiquer la légende 8 ?

[63] Article 17(II)(8) of Act 2016-1691 of 9 December 2016: "II. -The persons mentioned in sub-section (I) shall implement the following measures and procedures: [...]
[8] An internal monitoring and assessment system of the measures implemented.

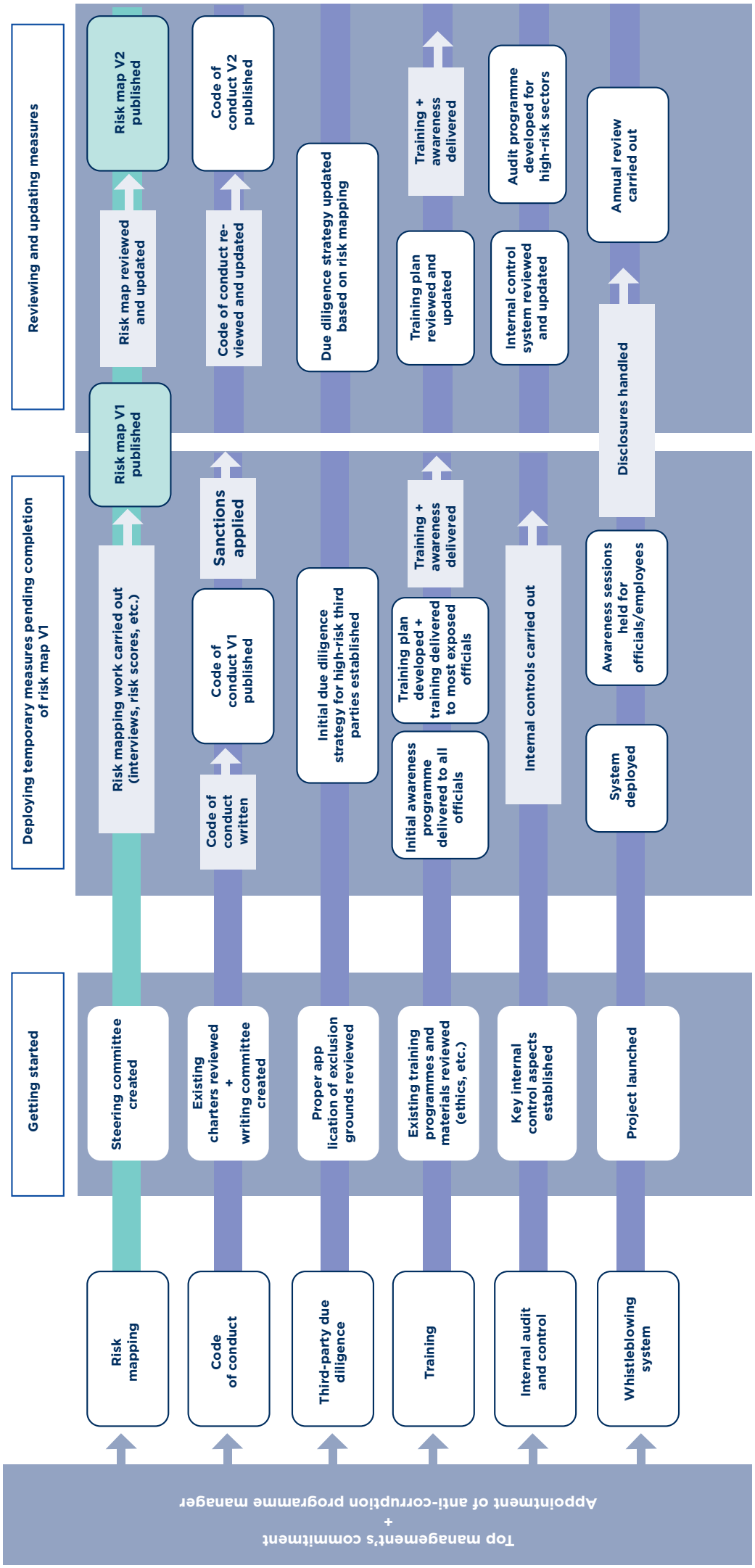
Key messages

Risk mapping is a fundamental part of an anti-corruption programme.

Since risk mapping is a time-consuming process, entities are advised to begin deploying other corruption prevention and detection measures in the interim, i.e. before the first version of the risk map is complete.

The measures should be regularly reviewed and should feed into one another so that the entity strengthens its management of corruption risk over time.

Deployment of an anti-corruption programme: example



Source :
AFA and DAE

TOOLBOX CONTENTS

1 STEP-BY-STEP GUIDE TO MAPPING CORRUPTION RISK

Note on methodology

The example below illustrates one possible approach to risk mapping. It is not prescriptive. Entities are at liberty to choose the approach that suits them best.

This example is both fictional and by nature incomplete, since it covers just one process (procurement) and only some of the risks inherent in that process. Likewise, the explanations given for each risk score are not based on interviews with officials and are therefore less detailed than would be necessary in a real-life case (something that it is not possible in this particular format).

Assessing the entity's degree of vulnerability

1
Identifying risk exposures

This example will focus on three risk factors that could arise in the "requirement definition and financial analysis" process, which forms part of the preparation phase (see "Anti-corruption best practices in the procurement cycle", p.83):

- R1 - "Favouritism: [...] deliberate underestimation of requirements in order to permit the use of a negotiated procedure without prior publication, thereby favouring a particular company."
- R2 - "The offence of corruption: request or acceptance of a gift or invitation (trip, etc.) in order to influence the definition of the requirement."
- R3 - "Unlawful taking of interest: involvement of a buyer who has a pre-existing relationship (interest) with one of the sourced suppliers, and who subsequently exercises influence over the preparation phase."

Reminder: a risk (e.g. favouritism) could arise in one or more sets of circumstances.

2
Calculating gross risk exposure

Based on the indicators detailed earlier in this guide (see p.33), the entity draws up risk rating matrices to calculate the impact and likelihood of the identified risks.

The nature of the impact will vary from one entity to the next. The sub-criteria and respective scores shown below are mutually independent. For instance, a "medium" impact score does not necessarily imply negative coverage in the regional press, cancellation of the contract and a strong feeling of discontent within the entity.

Table 1: Sample impact rating matrix for identified risks (fictional examples)

Impact	Score	Nature of impact (non-exhaustive list of sub-criteria)				
		Financial	**Reputation**	**Legal**	**Operational**	**Human**
Low	1	Financial loss or cost overrun of less than X%	Local rumours	Order to pay damages	Delay insufficient to jeopardise delivery or performance of the service	Feeling of discontent among some officials in a single department
Medium	2	Financial loss or cost overrun of between X% and X%, impacting other areas of public expenditure	Short-term negative coverage in the regional press. Reaction by suppliers, partners and users.	Cancellation of the contract	Defective performance of a service causing discontent among users	Strong feeling of discontent within the entity (beyond the department in question)
High	3	Financial loss or cost overrun of more than X%, with a lasting adverse impact on the public entity's budget	Sustained negative coverage in the regional press. Dissatisfaction among partners, suppliers and the wider public. Opposition pressure on the minister or elected representative.	Criminal prosecution of an elected representative and/or official	Delayed performance or non-performance of the services, temporarily disrupting public service delivery	Breakdown of labour relations within the entity
Very high	4	Financial loss or cost overrun of more than X%, jeopardising the public entity's budget	Sustained negative coverage in the national press. Dissatisfaction among partners, suppliers and the wider public. Potential resignation of the top management team.	Criminal prosecution of an elected representative and/or official, and potentially the entity	Delayed performance or non-performance of the services, causing long-term disruption to public service delivery	Low staff morale, difficulty retaining existing staff and filling vacancies

Table 2: Sample likelihood rating matrix for identified risks

Likelihood	Score	Description	Frequency
Unlikely	1	Event that could potentially occur in exceptional circumstances	Less than once in X years
Possible	2	Event that could potentially occur at some point	Once or more once in X years
Likely	3	Event that has a strong chance of occurring at some point	Once or more once in X years
Highly likely	4	Event that is likely to occur in the near future	Once or more once in X years

The gross risk score is then calculated as the product of the impact and likelihood scores:

Gross risk score = impact score x likelihood score

There are several ways to calculate the impact and likelihood scores for a given risk. These include:

- **Assigning an overall score** for impact and likelihood then using sub-criteria (financial, reputation, legal, etc.) to inform further consideration -> this is the approach used in the example below.

- **Assigning a separate score to each sub-criterion** then taking the average of these separate scores as the overall impact score. This method allows the entity to weight the sub-criteria (if it wishes to assign greater or lesser importance to, say, financial and reputation impacts).

Worked example: the entity decides to apply a coefficient of 2 to financial impact and 1 to all other sub-criteria. The scores for each sub-criterion are as follows:

- financial: 3/4 (coefficient: 2)
- reputation: 4/4 (coefficient: 1)
- legal: 3/4 (coefficient: 1)
- operational: 1/4 (coefficient: 1)
- human: 3/4 (coefficient: 1)

The overall impact score is calculated as the weighted average of these scores: **2.8 (rounded up to 3).**

There is no preferred or recommended scoring method. Entities are free to choose the approach that best suits their needs, but should append an explanatory note to the final risk map detailing the method used.

Gross risk scores calculated using impact and likelihood risk rating matrices: worked example

Public procurement risks	Impact	Likelihood	Gross risk score
R1 - Favouritism: [...] deliberate underestimation of requirements in order to permit the use of a negotiated procedure without prior publication, thereby favouring a particular company.	**Score: 3** *Rationale:* - cancellation of contracts and losses, with a lasting adverse impact on the budget; - negative coverage in the regional press; - criminal prosecution of the official; - long-term disruption to public service delivery; - low staff morale.	**Note : 4** *Rationale:* - past evidence of reluctance among some departments to follow public procurement rules, making this type of practice highly likely to reoccur; - previous incident in which disciplinary action was taken.	**Overall score: 12**
R2 – The offence of corruption: request or acceptance of a gift or invitation (trip, etc.) in order to influence the determination of the requirement.	**Score: 4** *Rationale:* - cancellation of contracts and losses, with a lasting adverse impact on the budget; - negative coverage in the national press and resignation of the top management team; - criminal prosecution of the official and the public entity; - defective (delayed) performance of the service causing discontent among users; - low staff morale.	**Note : 2** *Rationale:* - no previous instances of attempted corruption in the entity, or known cases in the entity's areas of activity.	**Overall score: 8**
R3 - Unlawful taking of interest: involvement of a buyer who has a pre-existing relationship (interest) with one of the sourced suppliers, and who subsequently exercises influence over the preparation phase.	**Score: 3** *Rationale:* - cancellation of contracts and losses, with a lasting adverse impact on the budget; - short-term negative coverage in the regional press; - criminal prosecution of the official; - temporary disruption to public service delivery; - breakdown of labour relations within the entity, psychosocial risk factors.	**Note : 3** *Rationale:* - no known previous cases, but contract staff from the private sector make up a large share of the procurement department's workforce.	**Overall score: 9**

3

Calculating net risk exposure by assessing the effectiveness of the entity's risk management measures

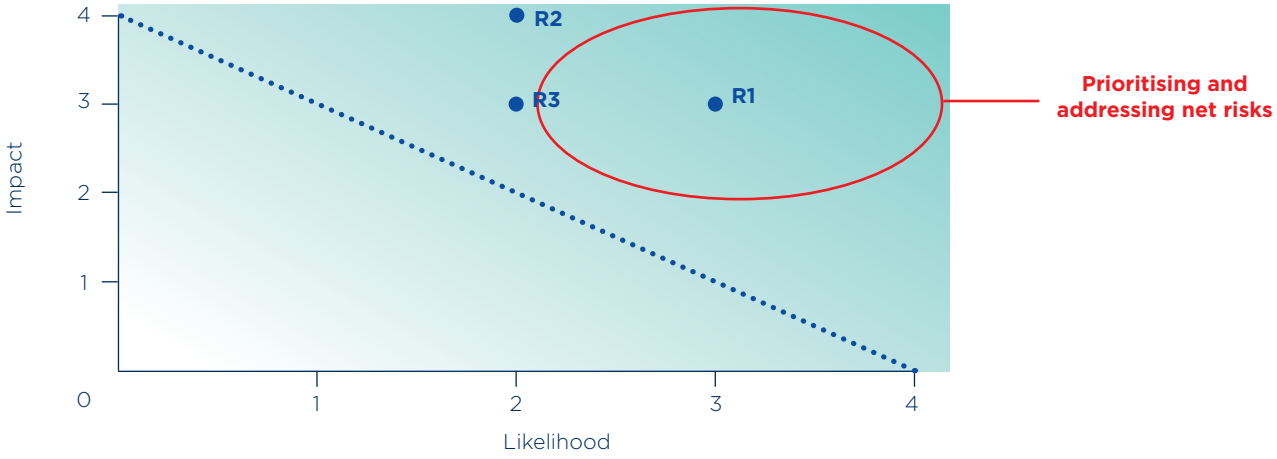
The next step is for the entity to compute its net (or residual) risk exposure by adjusting its gross risk exposure in consideration of existing risk prevention measures.

Computing net risk exposure from gross risk exposure: worked example

Gross risk exposure			Net risk exposure		
Identified risk	**Indicators**	**Gross risk score**	**Prevention measures**	**Indicators**	**Net risk score**
R1 - Favouritism: [...] deliberate underestimation of requirements in order to permit the use of a negotiated procedure without prior publication, thereby favouring a particular company.	Impact: high Impact score: 3 Likelihood: highly likely Likelihood score: 4	12	• The entity has a procedure for collective review of sourcing results and circulation of the relevant information to project participants, to ensure that the statement of requirements matches available suppliers (report, supplier interview form, etc.). **Impact of existing prevention measures** →	Impact: high Impact score: 3 Likelihood: likely Likelihood score: 3	9
R2 – The offence of corruption: request or acceptance of a gift or invitation (trip, etc.) in order to influence the determination of the requirement.	Impact: very high Impact score: 4 Likelihood: possible Likelihood score: 2	8	• No existing measures in place. **Impact of existing prevention measures** →	Impact: very high Impact score: 4 Likelihood: possible Likelihood score: 2	8
R3 - Unlawful taking of interest: involvement of a buyer who has a pre-existing relationship (interest) with one of the sourced suppliers, and who subsequently exercises influence over the preparation phase.	Impact: high Impact score: 3 Likelihood: likely Likelihood score: 3	9	•All new buyers complete an onboarding interview where they are required to declare their conflicts of interest. **Impact des mesures de prévention préexistantes** →	Impact: high Impact score: 3 Likelihood: possible Likelihood score: 2	6

Once the entity has computed its net risks, these can be plotted on a chart.

Sample net risk exposure chart



Having determined its net risks, the entity can rank them by level of priority:

- **priority level 1 = risk 1 (score: 9);**
- **priority level 2 = risk 2 (score: 8);**
- **priority level 3 = risk 3 (score: 6).**

4

Developing an action plan

Once the entity has computed and prioritised its net risks, it will be in a position to form as view as to the acceptability of these risks and take appropriate action. The entity may wish to review progress of the resulting action plan through its internal control and internal monitoring and assessment systems.

Sample action plan developed in light of risk mapping

Risk	Planned corrective measures	Expected benefit	Time scale	Person responsible
R1 - Favouritism: [...] deliberate underestimation of requirements in order to permit the use of a negotiated procedure without prior publication, thereby favouring a particular company.	Systematically check that the procurement procedure is consistent with the financial analysis (whether use of negotiated procedures is justified).	Reduces the likelihood of the risk.	6 months	Mr X
R2 – The offence of corruption: request or acceptance of a gift or invitation (trip, etc.) in order to influence the determination of the requirement.	Short-term measure: require all officials to seek authorisation from their superior before accepting gifts, and keep a register of gifts.	Reduces the likelihood of the risk.	6 months	Mrs Y
	Medium-term measure: prepare and circulate an anti-corruption code of conduct, including guidance on how to deal with requests and offers of gifts/invitations.	Reduces the likelihood of the risk.	18 months	Dedicated writing committee chaired by Mrs Y
R3 - Unlawful taking of interest: involvement of a buyer who has a pre-existing relationship (interest) with one of the sourced suppliers, and who subsequently exercises influence over the preparation phase.	Train all buyers on conflicts of interest and on the appropriate course of action.	Reduces the likelihood of the risk.	1 year	Mrs Z

The entity should re-compute its risk scores once the action plan has been implemented.

2 ANTI-CORRUPTION BEST PRACTICES IN THE PROCUREMENT CYCLE: PREPARATION PHASE

Note: Some of the best practices are relevant to more than one phase in the procurement cycle and therefore appear more than once in the tables below.

In brief

The following table provides, for each step in the preparation phase:
1. indicative examples of corruption risks;
2. best-practice organisational and control measures to mitigate these risks;
3. the warning signs to look out for in each step[64].

Sourcing	
1. Examples of corruption risks	**Favouritism** • A candidate receives inside information about the buyer's requirements, or details of the cost or amount of work involved (risk of information asymmetry between candidates). **Corruption** • An official requests or accepts a gift or invitation (trip, invitation to a trade show) in return for exercising influence over the preparation phase. **Unlawful taking of interest** • A buyer who has a pre-existing relationship (interest) with one of the sourced suppliers is involved in, and exercises influence over, the preparation phase.
2. Best practices	**Establish robust sourcing practices** • Be transparent and consistent in sharing information about the contracting authority's requirements (arrange meetings to share details of future procurement needs and publish the entity's multi-year procurement plan). • Plan ahead and carry out sourcing at an early stage. • Draw potential suppliers from as broad a pool as possible (companies of different sizes, industry leaders, emerging businesses and innovative firms) and reach out to intermediaries such as professional bodies, industry federations and chambers of commerce and industry. • Set up a formal invitation process (send invitations directly to economic operators, randomise the running order). • Make sourcing a collective process: - Hold internal meetings before writing the specifications and, where relevant, invite input from neutral parties. - Have buyers and specifiers work in pairs wherever possible (if, for instance, the involvement of a particular official could pose a risk) and provided that doing so would not undermine sourcing arrangements. • Clearly define who does what in the sourcing process (e.g. establish clear rules on the involvement of a project-owner assistant). • Define what information economic operators will receive in advance of interviews and how long the interviews will last, and prepare an interview form or questionnaire.

[64] The warning signals come primarily from Guide d'audit de la fonction achat, published by the Central Government Internal Audit Harmonisation Committee and available online (in French only) here: https://www.economie.gouv.fr/files/files/directions_services/chaie/guide-audit-fonction-achat.pdf.

Sourcing	
3. Best practices	• Keep detailed and transparent records of all correspondence (minutes of meetings or completed interview forms) and check that information is circulated internally to the relevant parties. • Maintain transparency: - Publish the multi-year procurement plan, calls for experts, etc. - Keep detailed internal records of sourcing-related meetings between buyers (minutes, etc.). • Establish rules and procedures for attendance at trade shows, visits to production facilities (invitations must be relevant to the procurement procedure), invitations (business meals, recreational activities during working hours), gifts, etc. • Establish rules and procedures for accepting so-called "freebies" (computer hardware or other products). **Establish robust control systems** Ensure that records of meetings are properly documented and exhaustive, and apply the same rule to all information shared.
4. Main warning signs	• Supplier rotation is extremely limited and the entity tends to source repeatedly from the same suppliers, including in highly competitive sectors. • The supplier database contains a high number of duplicates, which could skew the results of supplier checks.
Requirement definition and financial analysis	
5. Examples of corruption risks	**Favouritism** • An economic operator is directly involved in writing the tender documents and uses the inside information it gains to win the contract. • The technical specifications are deliberately written in a way that excludes all but one candidate. • The requirements are deliberately underestimated in order to permit the use of a negotiated procedure without prior publication, thereby favouring a particular company. **Corruption** • An official requests or accepts a gift or invitation (trip, invitation to a trade show) in return for influencing the definition of the requirement. **Misappropriation of public funds** • The requirements are deliberately overestimated in the specifications and the company awarded the contract pays the difference in value to the official (the official could also deliberately miscalculate the estimated cost of the contract or the margin of error in order to generate a similar windfall). **Unlawful taking of interest** • A buyer who has a pre-existing relationship (interest) with one of the sourced suppliers is involved in, and exercises influence over, the preparation phase.
6. Best practices	**Build objectivity into requirement definition and financial analysis** • Establish a procedure for collective use of sourcing results and circulation of the relevant information to project participants, to ensure that the statement of requirements matches available suppliers (report, supplier interview form, etc.). • Encourage benchmarking against the same purchase types made by similar entities, to ensure that requirements are determined objectively rather than being based on suggestions from sourced suppliers alone. • Where possible, word the statement of requirements in terms of performance or functional requirements. • Establish a process for managing low-value purchases, including an obligation to produce an initial statement of requirements.

Requirement definition and financial analysis	
7. Best practices	**Establish robust control systems** • Check that the stated requirements are consistent with and proportionate to: - the technical, professional, economic and financial capacities that economic operators are required to demonstrate, if any; - the award criteria (to avoid a situation in which the requirements are geared in favour of a particular potential supplier). • Check that the technical and/or functional specifications adhere to the principle of neutrality (including where an outside entity is brought in to assist with requirement definition). • Systematically check that the project and the financial analysis are consistent (with reference to sourcing in particular).
8. Main warning signs	• The number of abandoned procedures is high (which could indicate inadequate definition of the initial requirements). • The number of disputes for inadequate requirement definition is increasing. • Contracts are often amended at the post-award stage to include new services. • The number of orders drops suddenly so as to avoid exceeding procurement thresholds (which could indicate inadequate requirement definition and/or financial analysis). • Emergency purchase requisitions make up a substantial share of total purchases, pointing to inadequate planning and shortcomings in prior decision-making procedures. • Many purchases are made without contracts. • Suppliers routinely issue invoices before receiving a purchase order.
Determination of procedure	
9. Examples of corruption risks	**Favouritism** • Procedural rules are not followed (contracts are not published or put out to tender in contravention of the rules, negotiated and competitive-dialogue procedures are used improperly, etc.). • Contracts (especially low-value contracts) are artificially split (a practice known as "salami-slicing") in a way that benefits a particular supplier. • Where lotting is used, the lots are improperly or erroneously defined in order to allow a preselected company to bid. • Emergency procurement procedures are used without justification. • A fake competitive tendering procedure is organised in order to cover up the fact that the contract has already been awarded and performed **Unlawful taking of interest** • A potential candidate (project-owner assistant or project manager) is directly involved in writing the tender documents.
10. Best practices	**Explain the choice of procedure** • Ensure that the choice of procedure is arrived at collectively, in the interest of transparency (especially where contracts are not published or put out to tender, or where negotiated and competitive-dialogue procedures are used). • Keep detailed records explaining why the procedure was chosen (such as the presentation report, if required). • Establish a process for notifying relevant internal parties (superior, public procurement department, decision-making body, etc.) of the choice of procedure and obtaining their approval, and a process for managing low-value purchases. • For devolved government departments, explore opportunities for pooled procurement with regional government procurement centres.

Determination of procedure	
11. Best practices	**Establish robust control systems** **Check how thresholds are calculated** (procurement classification codes, planning, procurement mapping, etc.): • Monitor procurement centrally so that thresholds can be checked: - Check whether the entity's computer systems calculate thresholds correctly and support real-time tracking of order totals, so that threshold overruns can be identified; - Central government bodies should monitor total spending per procurement category and check threshold calculations in Chorus. • Establish a formal procedure for monitoring low-value purchases (e.g. using a dedicated form or by reviewing computerised accounting records). • Where relevant, require an annual review of all contracts below each threshold. • Ensure that the procurement classification system divides products and services into uniform categories. Buyers who split contracts must be able to justify the decision (the separate parts relate to different requirements, or splitting was necessary in light of the structure of the supplier market). **Check the choice of procedure** • Check for the existence of documented procedures for arriving at the choice of procedure. • Check that the department has a table summarising the thresholds, and that special care is taken over the publication format where this is not defined by law. • Check that the entity has a documented procedure for deciding between adapted and formal procurement procedures. • Check that sufficient internal controls are in place to avoid unauthorised use or deliberate misuse of negotiated procedures. • Check that contract award criteria (such as sustainability performance, employment of disabled workers or people from disadvantaged backgrounds, or environmental accreditation) are justified and relevant and that such criteria are not being misused. • Review records in instances where the entity: - resorted to a negotiated procedure after a formal tender received no admissible or satisfactory bids; - awarded a contract without publication or competitive tender, and check whether the decision was arrived at collectively. **Check the procurement plan** • Review standardisation opportunities (similar requirements), paying special attention to off-plan purchases and procurement decision-making procedures. • Check for inconsistencies between budget and procurement planning, identify significant discrepancies and review records to determine the reasons for these discrepancies. • Review records relating to the use of non-standard procedures (e.g. systematic use of emergency procurement procedures due to inadequate forward planning). **Carry out enhanced checks for the following contracts:** • Contracts awarded without publication or competitive tender (extreme urgency, exclusive rights, etc.). • Contracts awarded at financial year-end, in the Christmas period or at other key points in the year: check, for instance, that the contract was put out to tender and that the service was actually delivered before year-end. • Off-contract purchases (no contract number). • Contracts in sectors characterised by monopolistic competition. • Contracts awarded following an unusually brief procurement procedure.

Determination of procedure	
12. Main warning signs	• The procurement classification system uses non-uniform categories (this could allow artificial splitting of contracts, potentially indicating a desire to bypass legal requirements). • The classification system is not used properly, resulting in excessive splitting of contracts. • Certain suppliers are used repeatedly in a given procurement category (which could suggest that thresholds are calculated in a way that excludes other suppliers). • One supplier is awarded multiple lots of the same contract (which could indicate improper application of lotting rules, thereby excluding other suppliers). • Choices of procedure are not arrived at collectively. • Emergency purchase requisitions make up a substantial share of total purchases, pointing to inadequate planning and shortcomings in prior decision-making procedures. • Many purchases are made without contracts. • Suppliers routinely issue invoices before receiving a purchase order.
Content of administrative, technical and financial documents	
13. Examples of corruption risks	**Favouritism** • Social and environmental criteria are deliberately misused, typically in order to exclude non-local operators. • The terms and specifications are deliberately geared in favour of a particular economic operator (unjustified accreditation or certification requirements, onerous technical specifications or spurious performance terms). • The technical, professional and financial capacities that economic operators are required to demonstrate are disproportionate. • Criteria are weighted in a way that unduly favours a particular candidate.
14. Best practices	**Establish robust document writing and review procedures** • Ensure that tender documents are written and reviewed collectively. • Exclude economic operators (other than project-owner assistants and project managers) from being involved in writing or reviewing the specifications. • Refer to the entity's anti-corruption policy in the tender documents (e.g. include a link to the relevant page on the entity's website). • Use standardised templates wherever possible, and use tender-writing software. • Develop a best-practice guide on selecting award criteria. **Aspects to check** • Check that the administrative, technical and financial documents are consistent and free from bias (review accreditation and certification requirements, candidate and bid selection criteria, price schedules, breakdown of the lump-sum price, etc.). • Check that the candidate and bid selection criteria are clear. • Check that the use of provisional pricing is lawful (this type of pricing should be reserved for exceptional circumstances). • Check that candidates at the competitive tender stage received at least the same level of information as potential suppliers at the sourcing stage. • Retrospectively review the quality of the tender documents using indicators (e.g. percentage of bids that were incomplete, inadmissible or unsatisfactory, extent to which bids satisfied the stated requirement).
15. Main warning signs	• Supplier rotation is limited in a competitive sector. • The entity has had decisions challenged and disputed and/or the number of challenges and disputes is on the rise. • Records show a year-on-year increase in the number of inadmissible bids.

3 ANTI-CORRUPTION BEST PRACTICES IN THE PROCUREMENT CYCLE: PROCUREMENT PHASE

Note: Some of the best practices are relevant to more than one phase in the procurement cycle and therefore appear more than once in the tables below.

In brief

The following table provides, for each step in the procurement phase:
1. indicative examples of corruption risks;
2. best-practice organisational and control measures to mitigate these risks;
3. the warning signs to look out for in each step.[65]

Publication and bid submission measures	
1. Examples of corruption risks	**Favouritism** • Procedures are deliberately engineered to be unsuccessful (excessively tight publication time scales, use of publication formats with low audiences). • A bid submitted after the deadline is accepted (favouring the preferred candidate).
2. Best practices	**Establish robust publication procedures** • Draw up a procurement plan to avoid tenders being organised at times of the year when competition could be artificially restricted (holidays or especially busy periods). • Ensure that tender notices reach the widest possible audience, especially where publication arrangements are left to the buyer's discretion (select an appropriate format, seek multiple quotes for low-value purchases, etc.). • Establish a centralised procedure for sending out tender notices and receiving hard-copy bids (back-up copy, submission of prototypes, etc.) in order to harmonise practices and ensure equal treatment of economic operators. • Inform candidates of avenues for challenging and disputing the contract award decision. **Establish robust control systems** • Check that publication measures are effective, looking in particular at: - the number of candidates obtaining copies of the tender documents; - the length of the publication period (should be appropriate to the complexity of the requirement and the expected bids); - the information available to the outgoing contractor (which has access to more information than other candidates). • Check that the bid submission deadline is properly enforced, ensure that incoming bids are recorded (logged) and are not tampered with, and check the online buyer profile (e.g. PLACE) to make sure all procedure-related dates are adhered to.
3. Main warning signs	• The number of inadmissible or unsatisfactory bids is high. • The number of unsuccessful procedures is high. • Few candidates obtain copies of the tender documents and/or the number of bids received per contract is low. • Candidates regularly challenge or dispute publication measures.

[65] The warning signals come primarily from Guide d'audit de la fonction achat, published by the Central Government Internal Audit Harmonisation Committee (in French only).

Communication and correspondence during the procurement phase	
4. Examples of corruption risks	**Favouritism** • Inside information is shared with an economic operator during the procurement phase in order help that operator win the contract.
5. Best practices	**Establish robust correspondence procedures** • Have all correspondence handled centrally by a designated unit (e.g. public procurement department or division) and using the same system (online buyer profile). • Establish rules and procedures for corresponding with economic operators (clarification requests to be submitted via the online buyer profile, no contacts beyond what is set out in the tender documents). The entity could establish special rules governing, for instance, buyer site visits during the publication period or competitive dialogue interviews. • Maintain records of correspondence and share these with economic operators (e.g. questions and answers during the publication period). • Ensure all economic operators have equal access to information (e.g. clarification requests, sit visits, negotiations). • Take steps to avoid information asymmetry between the current contractor and other candidates. • Communicate transparently with unsuccessful candidates (rejection letters, information requests from candidates and tenderers) and those involved in abandoned procedures. **Aspects to check** • Check that questions and clarification requests from candidates are published on the online buyer profile, especially where a contract is being renewed (to avoid potential information asymmetry that could favour the current contractor). • Check that correspondence actually took place, and that it adhered to the principles of neutrality and transparency (records on the online buyer profile, minutes of negotiation meetings, etc.).
6. Main warning signs	• The number of challenges and disputes relating to information asymmetry between economic operators is increasing. • The contracting authority (public procurement department or division) does not routinely check the information shared with economic operators (candidates and tenderers). • The number of complaints filed with the Commission for Access to Administrative Documents (CADA) for failure to share information is increasing.
Application review	
7. Examples of corruption risks	**Favouritism** • Suitably qualified candidates are excluded without justification (technical, professional, economic and financial capacities not fully reviewed). • Established candidate selection criteria are bypassed in order to favour a particular candidate (criteria added or removed during the review process). **Corruption** • A public official receives an advantage in return for affording a particular candidate special treatment (extra time to submit a bid, unduly lenient review of criteria, etc.) **Unlawful taking of interest** • A public official who has a conflict of interest with a candidate is involved in reviewing applications. • A person who works for the project-owner assistant and was previously employed by one of the candidates is involved in reviewing applications.
8. Best practices	**Establish robust review procedures** • Ensure that applications are reviewed collectively and cross-checked, and establish an associated approval process (dialogue between specifier and buyer). • Where necessary, anonymise applications before they are forwarded to the relevant department for review. • Maintain detailed records of checks performed and documents requested (check documents requested in the tender rules and additional documents supplied by candidates). • Maintain detailed records of the application review process and the reasoning behind decisions (especially for rejected applications).

[77] Un guide de l'achat public relatif à l'analyse des offres est à la disposition des acheteurs de l'État et de ses établissements publics via le lien : https://dae.alize.finances.rie.gouv.fr/sites/sae/accueil/documentation--outils/guides-et-fiches-pratiques/9tb9_gem_guides-des-gem.html (intranet sécurisé)

9. Best practices	**Aspects to check** • Have the application review report checked by a second pair of eyes. • Vet any proposed subcontractors (potential links with the buyer, project-owner assistant, project manager, etc.). • Check that the entity has an evaluation matrix and pre-formatted criteria tables (i.e. that cannot be altered after the fact).
10. Main warning signs	• There are no documented application review procedures, which could indicate that applications are not actually reviewed (even if candidates are eliminated at this stage). • Candidates are never eliminated at this stage. • Inadmissible candidates are allowed to proceed to the next stage (e.g. candidates that fall foul of mandatory or discretionary exclusion grounds).
Bid review	
11. Examples of corruption risks	**Favouritism** The bid review report is amended without good reason in order to favour a particular tenderer. • The scores are tampered with in order to unduly advantage a particular tenderer. • The criteria weightings are altered during the bid review process. • Bids are not kept confidential and the proper procedure is not followed (confidential information is shared with a particular operator). **Influence peddling** • An elected representative applies undue pressure on buyers on behalf of a particular tenderer at the bid review stage. **Unlawful taking of interest** • A public official who has a personal and/or business relationship with one of the tenderers is involved in the contract award decision, and the company in question is ultimately awarded the contract.
12. Best practices	**Establish robust review procedures** Ensure that bids are reviewed and evaluated collectively and that cross-checking takes place (dialogue between specifiers and buyers), and establish an associated approval process. • Where necessary, anonymise bids before they are forwarded to the relevant department for review. • Maintain detailed records of the bid review process (how scores are awarded, how irregularities and abnormally low bids are handled, etc.). • Include a list of key dates in the bid review report to ensure that deadlines are adhered to. • Have the financial review and technical review performed separately. • Establish rules and procedures for negotiation, where permitted (record-keeping, non-disclosure of competing bids, management of shared and shareable information, etc.). • Prepare a document outlining the tender examination and review phases for each type of procedure (e.g. bid review report). • Check that the presentation report is present (if required by law). **Aspects to check** • Have the bid review report checked by a second pair of eyes. • Vet any proposed subcontractors (potential links with the buyer, project-owner assistant, project manager, etc.). • Check that the entity has an evaluation matrix and pre-formatted criteria tables (i.e. that cannot be altered after the fact). • If a negotiated procedure is used, check that the arrangements adhere to the principle of equal treatment (same time limits for all tenderers, minutes of negotiation meetings produced, etc.). • Check that negotiations actually took place and what was discussed (adequate recording-keeping, such as minutes of negotiation meetings). • Check that the price is appropriate by: - referring to guidance on reviewing abnormally low bids (DAJ guidance, internal documents, etc.): check that the bid is legally compliant and that the evidence provided by the tenderer to support the price is properly reviewed; - reviewing studies, practical guides and other sources to ascertain prevailing market prices (especially where prices vary substantially between bids and/or from the buyer's estimate); - benchmarking prices across different buyers.

13. Main warning signs	• Supplier rotation is limited or a particular supplier is consistently awarded contracts. • Tenderers regularly challenge or dispute bid review and negotiation procedures. • The number of unsuccessful procedures is high. • A buyer or specifier has a close relationship with an economic operator in a high-risk sector. • Review processes are not properly documented, minutes of negotiation meetings are not routinely recorded. • Contracts are awarded to tenderers submitting inadmissible, unacceptable or inappropriate bids.
Contract award or abandonment	
14. Examples of corruption risks	**Favouritism** • A procedure is abandoned without good reason and a second procedure is launched with the intent of awarding the contract to a preferred supplier. • The contract award committee clearly favours one economic operator over the others. • A contract is awarded despite the tenderer submitting an inadmissible, unacceptable or abnormally low bid, or falling foul of one or more exclusion grounds. • The ranking in the bid review report is altered in a way that favours a particular tenderer. **Unlawful taking of interest** • An elected representative with an interest in a company (e.g. manager) sits on the bid review committee that awards the contract to the company in question.
15. Best practices	**Establish transparent decision-making procedures** • Ensure that decisions to award contracts and abandon procedures are made collectively. • Maintain detailed records of decisions to award contracts and abandon procedures (minutes of meetings, report explaining why a procedure was abandoned, etc.). • Make sure that decision-making bodies (bid review committee, ad-hoc committee, etc.) are kept fully informed of ongoing tenders. • If there are any serious concerns, check the winning tenderer's criminal record (applies to both individuals and legal entities). • Retain and archive documents so that unsuccessful bids, review records and committee decisions can be accessed in future. **Aspects to check** • If the entity does not have a contract award committee, check that the award decision was made collectively, that details of the decision were shared appropriately, and that proper reasons were given if a procedure was abandoned. • Check that adequate controls are in place to ensure compliance with legal time limits (for contract award, award notification and publication of the award notice), and review a sample of previous contracts (computerised records) to check whether time limits were adhered to.
16. Main warning signs	• The number of complaints, challenges and appeals is high. • There is a mismatch between applications submitted and reviewed. • There are no records of some applications.
Adjustment and signature of the contract	
17. Examples of corruption risks	**Favouritism** • Material aspects of the bid or contract are altered at the adjustment stage, leading to unlawful negotiation with the winning tenderer (alteration of the price or nature of the services amounting to a material change to the bid). **Unlawful taking of interest** • The person signing the contract has not previously been involved in the procedure and has not been vetted for conflicts of interest.
18. Best practices	**Establish a transparent process** • Maintain detailed records showing why adjustment was deemed necessary. • Ensure that the person signing the adjusted terms (subject matter and impact) and the contract itself is kept fully informed (the person should receive copies of review records, a summary of the procedure, etc.) • Prepare periodic contract award reports for internal transparency purpo

19. Best practices	**Aspects to check** • Check that post-award adjustment was justified and what aspects of the contract were adjusted. • Check that the appropriate signature procedure was followed (adjustment and contract). • Check that essential data on public procurement was published as required. • Routinely review signing authorities for validity and relevance.
20. Main warning signs	• The adjusted terms or contract were signed by an unauthorised person.

4 ANTI-CORRUPTION BEST PRACTICES IN THE PROCUREMENT CYCLE: PERFORMANCE PHASE

Note: Some of the best practices are relevant to more than one phase in the procurement cycle and therefore appear more than once in the tables below.

In brief

The following table provides, for each step in the performance phase:
1. indicative examples of corruption risks;
2. best-practice organisational and control measures to mitigate these risks;
3. the warning signs to look out for in each step.[66]

In-contract amendments	
1. Examples of corruption risks	**Favouritism** • Material changes are made to the services covered by the contract, in a way that benefits the contractor, without putting the contract back out to tender. **Unlawful taking of interest** • The contractor carries out additional work not covered by the initial contract at the request and on behalf of an official or elected representative.
2. Best practices	**Establish a robust decision-making process** • Ensure that decisions relating to in-contract amendments are made transparently and collectively. **Aspects to check** • Establish a system for checking and approving amendments and additional work and services (check the specifications and records of correspondence for evidence that the amendments were relevant and justified, review their scope and value, etc.). • Check that essential data was published (where required). • Where relevant, forward or present a list of addenda to each contract to the bid review committee or contract award committee. • Carry out checks between the date the work order is issued and the date the addendum is signed (especially where the addendum changes the service delivery date, which can have a substantial financial impact).
3. Main warning signs	• In-contract amendments (addenda) are used as a matter of routine. • Addenda with substantial financial impacts are detected. • Essential data relating to addenda is not published.
Service delivery checks	
4. Examples of corruption risks	**Favouritism** • A co-contractor and the official tasked with supervising the work engage in collusion. **Misappropriation of public funds** • A contractor performs services for a representative of the contracting authority and, in return, bills more than the initially agreed price (fake invoices). **Unlawful taking of interest** • A company awarded a contract by a municipality subcontracts part of the work to a company managed by the local mayor.

[66] The warning signals come primarily from Guide d'audit de la fonction achat, published by the Central Government Internal Audit Harmonisation Committee and available online (in French only) here: https://www.economie.gouv.fr/files/files/directions_services/chaie/guide-audit-fonction-achat.pdf.

5. Examples of corruption risks	**Corruption** • An official waives late-delivery penalties or signs off inadequate or incomplete work in return for kick-back payments.
6. Best practices	**Establish robust service delivery checks** • Consider, in advance, what types of checks are appropriate to the services in question and to the entity's technical and administrative arrangements (refer to the general administrative terms and conditions, consider specific processes, etc.). **Aspects to check** • Ensure that checks are in place and that they are consistent with the service as set out in the specifications (written records, proper enforcement of contractual penalties, etc.). • Carry out an audit of service delivery checks: - ensure proper segregation of duties between order and receipt, check that purchase orders and delivery notes match, ensure that certificates of delivery are properly documented (audit trail and supporting evidence). Potential risk: fake certificates of delivery. - audit a sample of orders (looking at purchase orders, delivery notes, delivery receipts, certificates of delivery sent to the client department, payment settlement records). • Review the use of subcontractors (potential links with the buyer, project-owner assistant, project manager, etc.). • Establish internal rules and procedures for supervising and approving purchase requisitions and supply orders.
7. Main warning signs	• The entire procedure (from requirement definition to order placement) is overseen by the same person, and there is no system for approving purchase requisitions and supply orders. • The invoice rejection rate is high because services are not properly monitored and delivery certificates are either absent or inaccurate.
Financial monitoring (price revision, adherence to procurement thresholds and order value limits, etc.)	
8. Examples of corruption risks	**Misappropriation of public funds** • Officials place duplicate orders in return for kick-back payments. • Payments are made to fake suppliers.
9. Best practices	**Establish robust monitoring procedures** • Ensure proper segregation of duties (e.g. between the person signing the purchase order and the official carrying out service delivery checks). • Establish a process for monitoring procurement thresholds. • Check that purchase orders and invoices match. • Establish a whistleblowing system, where relevant. • Maintain regular dialogue between the operational department and the support department (which issues purchase orders and records the commitment in the accounting system), and between the buyer and the accounting officer responsible for processing payments. • Ensure that the accounting officer responsible for processing payments receives appropriate awareness training. **Aspects to check** • Routinely check that physical inventory is consistent with recorded expenditures. • Check that certificates of delivery relate to services actually delivered. • Review a statistically representative sample of payments to check that prices are accurate. • Carry out detailed checks of purchases made using acquisition cards and involving non-cash vouchers (coupons, fuel vouchers, meal vouchers, etc.). • Where late-delivery penalties have been waived: - check that written records are kept in all cases; - check for whom the penalties were waived; - check whether waiving penalties appears to be common practice; - review cases where the supplier did not specifically request that penalties be waived; - check that the waived penalty was not offset against late-payment interest due to the supplier; - carry out a test of details on a sample of contracts where problems have arisen at the performance stage.
10. Main warning signs	• Price revision clauses are applied sparingly or improperly. • The entity frequently comes close to exceeding procurement thresholds and framework agreement value limits.

Disputes (pre-litigation settlements, out-of-court settlements, etc.)	
11. Examples of corruption risks	**Misappropriation of public funds** • A pre-litigation settlement is signed without proper checks and on terms that strongly favour the contractor (risk of negligent misappropriation of public funds due to improper justification of the settlement figure).
12. Best practices	**In-contract disputes** • Establish rules and procedures on the use of alternative dispute resolution mechanisms: - mediators (Business Mediation Department, internal mediator); - alternative dispute resolution advisory committees; - ministerial settlement committee (for central government); - settlement; - arbitration. • Ensure that the decision to use alternative dispute resolution mechanisms is made collectively. **Aspects to check** • Check the process for reviewing and approving pre-litigation settlements (basis, scope, etc.).
13. Main warning signs	• Disputes often arise at the performance stage. • The entity is using more pre-litigation settlements than it has done in the past.
Performance review (physical and financial)	
14. Examples of corruption risks	**Favouritism** • The entity shares inside information about a forthcoming tender (budget, timings, requirements, etc.).
15. Best practices	**Establish a robust performance review process** • Carry out a performance review (addenda, penalties, etc.), potentially including a review of ethical practices as relevant to the contract, on an annual or multi-year basis. • Ensure that the performance review is a collective process involving all relevant internal parties (buyer, specifier, operational staff, etc.). • Maintain detailed records of the performance review (especially where the contract has been performed improperly or rules on professional ethics have been breached). • Where a contract is up for renewal in the near future, ensure that the current contractor is not party to inside information. • Include performance reviews in the supplier database (if the entity has one). **Aspects to check** • Ensure that performance reviews are shared with the relevant internal parties (top management, audit department, etc.). • Set up an evaluation procedure and learn lessons from the exercise. • Measure user satisfaction for a sample of contracts (including inter-ministerial contracts in central government).
16. Main warning signs	• A review of procurement practices over a given period reveals multiple contracts for the same product type, including some awarded by negotiated procedure without publication or prior call for competition. • Levels of under-spending and sourcing from “non-standard” suppliers are much higher than observed in inter-ministerial and central government procurement.

5 PRACTICAL GUIDANCE FOR INTERNAL PARTIES IN THE PROCUREMENT CYCLE

This section contains guidance for internal parties in the procurement cycle on dealing appropriately with economic operators and handling common risky situations.

Sub-sections

1

Adhering to the fundamental principles of public procurement

All internal parties in the procurement cycle are bound by the provisions of Article 25 of Act 83-634 of 13 July 1983, which states that "*civil servants shall fulfil their duties with dignity, impartiality, integrity and probity*".

They must also adhere to the three fundamental principles of public procurement, as defined in Article L.3 of the French Public Procurement Code:

- equal treatment of candidates;
- freedom of access;
- transparency of procedures.

By following these principles, officials contribute to effective public procurement and sound use of taxpayers' money.

2

Treating economic operators equally

At every stage of the procurement process, specifiers must treat their suppliers fairly, equally and transparently, and records of all correspondence must be kept: [67] :

[67] See, for instance, Les premiers pas du prescripteur dans l'achat public, a booklet published (in French only) by the Secretariat General for the Ministry for Primary and Secondary Education and the Ministry for Higher Education, Department for Government Action, Strategic Planning and Resources (SAAM)-Procurement Task Force, Office for Legal Expertise and Buyer Professionalisation, July 2018.

1) During the sourcing phase[68]

- ✓ Set up a formal invitation process (send invitations directly to economic operators, randomise the running order).
- ✓ Make sourcing a collective process.
- ✓ Clearly define who does what in the sourcing process (e.g. establish clear rules on the involvement of a project-owner assistant).
- ✓ Define what information economic operators will receive in advance of interviews, what the interviews will involve and how long they will last, and prepare an interview form or questionnaire.
- ✓ Keep detailed and transparent records of all correspondence (minutes of meetings or completed interview forms) and check that information is circulated internally to the relevant parties.
- ✓ Establish rules and procedures for attendance at trade shows, visits to production facilities (invitations must be relevant to the procurement procedure), invitations (business meals, recreational activities during working hours), gifts, etc.
- ✓ Establish rules and procedures for accepting so-called "freebies" (computer hardware or other products).

2) During the procurement phase

- ✓ Follow publication rules as relevant to the estimated value of the contract and ensure the tender notice reaches the widest possible audience (especially where publication arrangements are left to the buyer's discretion).
- ✓ Do not share confidential information (such as internal working documents) or business secrets relating to a candidate.
- ✓ Always answer questions from tenderers in writing (never over the phone), publish answers on the online buyer profile so they are available to all tenderers, and ensure where possible that answers likely to interest all economic operators are prepared collectively.
- ✓ Make written answers available to all potential candidates.
- ✓ Share the same information with all economic operators visiting a site before submitting a bid (e.g. for a cleaning contract).
- ✓ Maintain detailed records of negotiations (and, where relevant, refer to them in the presentation report). Do not gear the award criteria in favour of a particular bid or alter them part-way through the tender process.

3) During the performance phase

- ✓ Never issue a purchase order without a contract.
- ✓ Check that the service has been delivered and that it meets the contractual requirements (quality, timing, etc.).
- ✓ Always enforce contractual penalties for improper performance.
- ✓ Any amendments to the contract must be set out in an addendum or similar written document.

[68] For further guidance, refer to Guide de l'achat public: Le sourcing opérationnel, available online (in French only) here: https://www.economie.gouv.fr/files/files/directions_services/dae/doc/Guide_sourcing.pdf.

Paperless procurement workflow

On 1 October 2018, a new rule came into force for contracts with an estimated value of €40,000 (excluding VAT) or more. All correspondence relating to these contracts during the procurement phase must now be paperless[69]. In practice, this rule introduced an online-only workflow for:

- publishing tender documents;
- submitting applications and bids at every stage of the procedure;
- submitting questions (from candidates/tenderers) and publishing answers (from buyers), requesting information or clarification, and managing negotiation-related correspondence;
- publishing decisions and associated notices (rejection letters, etc.).

Public procurement law requires all tender documents to be published via the online buyer profile (other than for defence and security contracts). The online buyer profile can also be used for other types of correspondence, although the law permits alternative means of communication as long as the method chosen is tamper-proof and all correspondence is time-stamped.

A paperless procurement and correspondence workflow has a number of benefits: it improves record-keeping, eliminates the risks associated with handling hard-copy documents and makes it easier to circulate information during the procedure, thereby helping to ensure equal access to public procurement (as required by law).

3

Preventing conflicts of interest

> **What is a conflict of interest?**
>
> A conflict of interest is defined as "any situation of interaction between a public interest and public or private interests that could influence or appear to influence the independent, impartial and objective performance of a duty" (Article 2 of the Transparency in Public Life Act 2013-907 of 11 October 2013, and Article 2 of the Civil Servant Ethics and Rights and Obligations Act 2016-483 of 20 April 2016).

Key principle: "Civil servants shall ensure that conflict of interest situations in which they find themselves or could find themselves are immediately ended or prevented" (Article 25 bis of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983)[70].

Public officials and their superiors must remain on their guard against potential conflicts of interest at all times so as to avoid committing criminal offences such as unlawful taking of interest. They may seek advice and guidance from the designated ethics officer[71] where necessary.

[69] Other than in the exceptional cases provided for by Article R.2132-12 of the French Public Procurement Code, and excluding defence and security contracts.
[70] This legal requirement also applies to local elected representatives: "Local elected representatives shall ensure that conflicts of interest are prevented or immediately ended. Where a matter in which a local elected representative has a personal interest is brought before a legislative body of which he is a member, the representative shall declare such interest prior to the debate and vote." (Article L.1111-1-1 of the French Local Authority Code).
[71] Article 28 bis of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.

Situations that could create a conflict of interest:
(non-exhaustive list)

- ☑ An official or member of the tender committee is related to a candidate or tenderer.
- ☑ An official holds a financial interest in a company with which he or she is doing business.
- ☑ An official holds a job or other role, directly or indirectly, outside the course of his or her normal duties.
- ☑ An official has a direct or indirect link with a candidate or tenderer that could influence the preparation, award or performance of a public contract.

The existence of such ties does not, on its own, constitute a conflict of interest. The relationship must be such that it influences or could influence the independent, impartial and objective performance of the official's duties.

Each case is judged on its merits, taking into account circumstances specific to the official's situation. Factors likely to influence the court's decision include **whether the interest was direct (between the official and a candidate or tenderer) or indirect (involving a relative of the official), whether the interest existed at the time the procurement operation took place, and whether the interest was permanent or temporary[72].**

When assessing whether a contract has been awarded lawfully, the administrative courts have ruled that ignorance of the principle of impartiality in public procurement constitutes a conflict of interest (Administrative Court of Pontoise, Passavant Impianti, 6 November 2018). The courts take the same approach to the award of development concession agreements (*Conseil d'État*, SAGEM, 15 March 2019).

Conversely, the courts have ruled that a contractor hiring someone previously employed by the project-owner assistant does not automatically constitute a conflict of interest unless it can be demonstrated that the relationship has influenced the procedure (*Conseil d'État*, 12 September 2018, case no. 420454).

1) Detecting conflicts of interest

When starting a new role or taking on new responsibilities, officials should sit down with their superior to discuss any conflicts of interest that could arise in the performance of their duties. The matter should be kept under constant review throughout their career. New conflicts of interest could arise if, for instance, the official's spouse changes occupation or if he or she invests in a business. Officials should therefore be made aware of this ongoing obligation.

In case of doubt, officials can approach their superior or ethics officer for guidance on whether their situation amounts to a conflict of interest.

[72] The French Supreme Court of Appeal (Criminal Division, case no. 14-88.382, 13 January 2016) upheld the conviction of an official working in a mayor's office for unlawful taking of interest. The facts of the case were as follows: the official wrote the special technical terms and conditions for the tender and submitted the report to the bid review committee. It came to light that the same official was friends with the manager of the company that was awarded the contract (both had worked together previously at various companies, the official had passed on the customers of his former business to his friend's company, both companies were registered at the same address, the two individuals had spoken on the phone regularly during the preparation period, and they were friends on Facebook). In a later case, however, the same court (case no. 17-86.548, 13 March 2018) overturned the conviction of another official for unlawful taking of interest. In this instance, a mayor had granted a production company permission to film on municipal premises without paying a fee. Although the company's majority shareholder was one of the mayor's deputies, and the two individuals had attended official events together, they were not friends and did not share business or non-profit interests. Refer to p.120-123 of this guide for further case-law examples of officials being convicted of unlawful taking of interest as a result of a conflict of interest.

Some buyers, specifiers and decision-makers may be required to declare their interests or assets.

Declaration of interests[73] *(prevention of conflicts of interest)*

Individuals subject to this requirement must declare all their activities, duties, offices and shareholdings, including details of any family, personal, business and financial relationships.

Declaration of assets[74] (detection of unjust enrichment)

The declaration of assets provides a snapshot of an individual's financial situation. The following central government civil servants are required to declare their assets: managers of regional government procurement centres[75], and certain officials whose roles appear on a list laid down by decree and who have the authority to sign contracts covered by the French Public Procurement Code.

The requirement to declare assets also extends to procurement managers in central government departments and public administrative institutions[76], as well as to general officers and colonels in the armed forces with specific responsibility for procurement matters[77].

Note: In some cases, specifiers and decision-makers may also be required by law to declare their assets because of the nature of their duties.

2) Handling conflicts of interest

In order to prevent conflict-of-interest risk, **public officials are advised to consider recusing themselves from examining or reviewing bids** if they have family or personal ties with the tenderer that could influence their judgement or would likely affect the decision-making process. Where officials cannot recuse themselves from the process or delegate authority to someone else (such as in smaller organisations where nobody else has the requisite expertise), other parties should be included in the process and a decision arrived at collectively. As a precautionary measure, the decision to resort to collective decision-making in the absence of a viable alternative should be documented.

Recusal involves an official or abstaining or withdrawing from any situation in which he or she is judged to have a conflict of interest. The public entity's legal representative may document the recusal in a formal statement or decision.

.

[73] Article 25 ter and nonies of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983; Decree 2017-547 of 13 April 2017 on the management of financial instruments held by civil servants or officials performing certain civilian occupations.
[74] Decree 2020-37 of 22 January 2020 amending Decree 2016-1967 of 28 December 2016 on the requirement to file a declaration of interests pursuant to Article 25 ter of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.
[75] Decree 2019-1594 of 31 December 2019 on central government employment.
[76] Decree 2016-1968 of 28 December 2016 on the requirement to file a declaration of assets pursuant to Article 25 quinquies of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.
[77] Article R.4122-42 of the French Defence Code.

Handling conflicts of interest
Article 25 bis of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983

- ☑ Officials who are under the authority of a hierarchical superior must give notice of their intent to recuse themselves to their superior.
- ☑ Officials vested with signing authority must refrain from using it.
- ☑ Officials who sit on a collective decision-making body must abstain from discussing or deliberating the issue in question, even where the body is merely giving an opinion or would likely reach a unanimous decision.
- ☑ Officials vested with delegated authority must delegate that authority to another official and refrain from giving instructions to the delegatee.

The following rules apply to elected representatives and conflicts of interest:

- **To avoid committing the offence of unlawful taking of interest, all elected representatives** must abstain from participating in a decision of the legislative body of which they are a member, either in person or by proxy, relating to the individual or organisation with which they are connected. The elected representative must leave the room immediately before the deliberation or vote takes place, and his or her departure must be recorded in the minutes. The elected representative must also refrain from participating in related preparatory work (giving an opinion, attending prior committee or working group meetings, etc.).
- **The recusal procedures that apply to local government officials with executive powers and officials with signing authority** are set out in Articles 5 and 6 of Decree 2014-90 of 31 January 2014 implementing Article 3 of the Transparency in Public Life Act 2013-907 of 11 October 2013.
- Where a **mayor's** interests conflict with the municipality's interests on a specific matter, Article L.2122-26 of the French Local Authority Code states that the municipal council should appoint another member as its legal or contractual representative in respect of that matter.

4

Exercising caution when accepting gifts and invitations

French law does not have any general rules stating what gifts and invitations public officials can and cannot accept from suppliers or members of the public. Officials should nevertheless exercise caution in this regard, keeping in mind the ethical principles by which they are bound as public servants (integrity, impartiality and probity).

The course of action that buyers should take varies across different phases of the procurement cycle.

1) During the procurement phase

Buyers should outright decline all gifts and invitations offered by a candidate.

2) During the preparation and performance phases, buyers should follow the relevant guidance below

☐ **Invitations to business meals**

Before accepting the invitation, the official should consider whether, by doing so, he or she would feel indebted to the individual or company in question.

Risky situations in which the official should decline the invitation:

- Invitations that are unrelated to the business being conducted (such as shows, concerts or sporting events).
- Invitations from a company made at the same time as, or shortly after, the entity publishes a tender for which it could potentially bid.

Entities are advised to draw up their own rules on accepting gifts and invitations to help officials make the right call. These rules could, for example:

- ✓ require officials to report any offers of gifts or invitations to their superior;
- ✓ prohibit officials from accepting meal invitations in the evenings or at weekends;
- ✓ limit the number of meal invitations officials can accept in a given time period (e.g. one meal per year);
- ✓ prohibit meals at expensive venues and set a cap on the price of the meal.

Officials are also **advised to pay for their own meal** to avoid potential problems.

☐ **Invitations to trade shows**

Si la participation à ces salons doit être encouragée dans le cadre du sourcing ou de la veille stratégique, l'entité peut néanmoins les encadrer en précisant qu'elles doivent être soumises à autorisation hiérarchique, et que cette participation ne saurait favoriser directement ou indirectement un fournisseur (ex : veiller à ne pas favoriser systématiquement une manifestation au profit d'une autre par routine).

☐ **Gifts**

When it comes to gifts, officials should keep the following rule in mind: **under no circumstances may a public official accept personal cash payments in return for carrying out an act relating to his or her office.**

Given the sensitive nature of public procurement, officials **are advised to decline gifts of any type offered to themselves, their relatives or their acquaintances**. Entities may, however, wish to set separate rules for promotional gifts intended for business use (such as promotional giveaways, which may be authorised subject to conditions), and high-value gifts (such as trips and expensive meals, which should be declined as a matter of principle).

The entity's policy on gifts could, for instance:

- require officials to refer all offers of gifts to their superior for a second opinion;
- require officials to record any gifts they accept in a dedicated register;
- set limits on the number of gifts an official can accept;
- set limits on the value of individual gifts an official can accept.

Officials who have concerns about a gift or invitation can always decline on the basis that they are bound by rules on professional ethics or by their organisation's anti-corruption code of conduct.

☐ **Officials should treat certain types of advantage with extreme caution:**

- Officials must never gain personally from a discount or rebate offered by their department to a supplier.
- Officials should be wary of advantages offered to a relative (e.g. a supplier offering a family member an internship), since such arrangements constitute indirect advantages.
- Buyers should proceed with caution if a potential supplier offers users and/or specifiers goods or equipment (such as software programs) on a free-trial basis, since the same users or specifiers could later put pressure on the buyer to write the specifications in a way that favours the company in question. Buyers can circumvent this problem by allowing users and/or specifiers to try out goods or services from more than one potential supplier, and by limiting the duration of the free trial.

5

Knowing the rules on post-public employment and multiple job-holding

1) Post-public employment

Permanent and contract civil servants who leave their post temporarily or permanently and wish to take up employment in the private sector must first seek authorisation from their superior.

The civil servant's superior should examine the ethical and legal implications of the change of employment before deciding whether to authorise the request, give qualified approval or decline the request. The superior should raise any specific concerns with the relevant ethics officer. If doubts persist, the matter should be referred to the High Authority for Transparency in Public Life (HATVP) for final decision.

Requests from officials who, by virtue of their post, are required to file a declaration of interests must be referred to the HATVP.

The same rule applies to any subsequent change-of-employment requests within three years of the official leaving office.

Officials who fail to comply with the decision of the HATVP may face disciplinary action or, if they are retired, may have their pension docked. Contract civil servants will have their contract of employment terminated on the date the decision is issued and will be barred from working for the government for a period of three years thereafter.

Example of a high-risk situation

A public official leaves the civil service to work for a private company that could subsequently bid for contracts awarded by his or her former employer

2) Multiple job-holding

As a matter of principle, public officials are expected to devote themselves exclusively to their public duties.

They may be permitted to combine public employment with supplementary work in the public or private sectors, provided that[78]:

- ✓ they seek and obtain authorisation from their superior for any work other than a voluntary role with a public or private non-profit. The superior may seek further guidance from the ethics officer. If doubts persist or if the official is required to file a declaration of interests, the matter must be referred to the HATVP;
- ✓ the supplementary work does not prejudice the normal operation, independence or neutrality of the department, and does not constitute unlawful taking of interest;
- ✓ the supplementary work falls into a permitted category (such as consultancy work, teaching and training, sports and cultural activities, or minor domestic jobs);
- ✓ the official performs the supplementary work outside his or her contracted working hours.

Officials who obtain authorisation:

- ✓ must comply with any qualifications;
- ✓ must submit a new request if their supplementary work arrangements or income change;
- ✓ should be aware that the authorisation can be withdrawn at any time if deemed justified in the interests of the department.

Special exemptions apply to officials holding certain posts, to those who wish to start up or take over a business, and to those on part-time contracts.

Example of a high-risk situation

A public official starts up a freelance business in a competitive sector and could potentially bid for contracts awarded by his or her employer (e.g. a public procurement legal expert who also runs a public procurement training business).

6

Seeking advice and guidance and reporting contraventions

Internal parties in the procurement cycle sometimes face circumstances that challenge their professional probity and integrity. Individuals who find themselves in such situations can seek **advice and guidance** on the right course of action from:

- ✓ their **superior**: public officials have a duty to act in good faith, and this includes reporting any ethical concerns that arise in the performance of their duties to their superior;
- ✓ their **ethics officer.**

Officials who **witness potential corruption** (where no offence has been committed or the official is uncertain whether the conduct amounts to an offence), **but are neither the perpetrator nor a victim of the act in question:**

- ✓ can report the matter to their superior;
- ✓ can report the matter to the entity's whistleblowing officer via the internal whistleblowing system;
- ✓ may be entitled to the special protections afforded to whistleblowers (provided certain conditions are met).

[78] Decree 2020-69 of 30 January 2020 on ethical controls in the civil service.

Officials who **gain knowledge of corrupt practices** (known offences or instances where sufficient evidence exists) in the performance of their duties are required by law to report the matter to the public prosecutor without delay or face disciplinary action.

Officials who are **victims of corrupt practices** that are likely to constitute an offence (such as blackmail or abuse of office) can report the matter directly to the police, the gendarmerie or the public prosecutor. They may be entitled to protection under the rules designed to protect civil servants and public officials in the performance of their duties (known as "functional protection")[79].

7

Test your knowledge

1. You receive information about an economic operator bidding for a tender. Can you disclose this information to other candidates?

- ☐ Yes
- ☐ No

2. Is it your superior's job to tell you if you have a conflict of interest?

- ☐ Yes
- ☐ No

3. Can you accept an invitation to attend a sporting event (such as a football match) during the procurement phase?

- ☐ Yes
- ☐ No

4. Are you allowed to hold another paid job outside your job as a buyer?

- ☐ Yes
- ☐ No

Solution: 1 – No; 2 – No; 3 – No; 4 – Yes, subject to conditions (see p.104)

[79] "Functional protection" refers to the protection and support to which public officials are entitled if they are victims of an offence in the performance of their duties or if they are prosecuted for an offence for which they are not personally liable. Officials' family members are also entitled to the same protection and support.

6 PRACTICAL GUIDANCE FOR HEADS OF DEPARTMENT

Eight tips

Every member of an organisation has a part to play in preventing corruption. But managers and heads of department – in both procurement and client departments – have a special responsibility in this regard.

As civil servants, heads of department in the public sector are required by law to "*ensure that these principles are upheld in the departments under their authority*". They may "*after consulting employee representatives, devise a set of department-specific ethical principles that apply to all officials under their authority*" (Article 25(5) of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983).

Heads of department may likewise implement measures and practices designed to help prevent and anticipate corruption risk.

1
Foster a culture of conversation about corruption

- Make preventing corruption a regular topic of discussion within the department and across the organisation.
- Build a climate of trust within the department by encouraging officials to raise and discuss ethical concerns.

2
Train officials

- Make corruption training a top priority, schedule regular sessions on corruption risk and the anti-corruption code of conduct, and make sure an appropriate training plan is in place.
- Make sure all officials in the department (current staff and new hires) are aware of and familiar with the anti-corruption code of conduct.

3
Strengthen the anti-corruption system through effective human resource management

- Check how long officials in procurement-related departments have been in post (average length of service) and encourage regular staff mobility (including between procurement categories).
- Provide support for officials taking up new duties.
- Assess the degree of specialisation among buyers, review replacement arrangements, and check whether buyers and specifiers work effectively in pairs (where this is possible – if, for instance, the involvement of a particular official could pose a risk – and provided that doing so would not undermine sourcing arrangements).

4
Establish a robust system for managing conflicts of interest

- Have officials consider and talk through potential conflicts of interest (e.g. at a dedicated interview), and assist staff in dealing appropriately with complex situations (with support from the ethics officer if required).
- Take whatever steps are necessary to prevent disruption to public service delivery if an official discloses a conflict of interest (where appropriate, have the official recuse himself or herself from the procedure and publish the corresponding recusal notice).

5
Set a clear policy on gifts and invitations

- Make sure the entity's anti-corruption code of conduct is properly applied in the department, and help officials assimilate its content.
- Set clear rules and establish supporting tools (e.g. require all officials to seek approval from their superior before accepting gifts, and keep a register of gifts).

6
Make sure officials know the rules on post-public employment and multiple job-holding

- Inform officials of the procedure for post-public employment. Make sure matters that fall within the scope of the new rules introduced on 1 February 2020 are referred to the official's superior or to the High Authority for Transparency in Public Life (HATVP): if the official intends to start or take over business, or to leave his or her post temporarily or permanently to take up a paid job in the private sector, or if the entity plans to rehire a former civil servant or hire a contract civil servant.
- Inform officials of the procedure for multiple job-holding, ensure line management authorisations are properly tracked, and make officials aware of the conflict-of-interest risks associated with multiple job-holding.

7
Penalise officials who break the rules

- Adopt a zero-tolerance policy towards opaque practices and situations in which an official's probity could be called into question.
- Ensure that disciplinary action is proportionate to the nature of the breach (where the head of department has the authority to take disciplinary action against an official under his or her authority).

8
Lead by example

- Set an example for others by following the rules on professional ethics and preventing corruption to the letter.

7 INDICATIVE CONTENT OF AN ANTI-CORRUPTION CODE OF CONDUCT

The example given below is not prescriptive. Entities are free to adapt the structure to suit their specific requirements. Likewise, while the subjects covered here are not exhaustive, they include some of the key points that an anti-corruption code of conduct should address.

1 Foreword

The foreword testifies to top management's commitment. It could:

- ☑ provide background information to the anti-corruption code of conduct and include a reminder of the entity's zero-tolerance policy towards corruption;
- ☑ contain a paragraph confirming the entity's commitment to promoting a culture of compliance, ethics and integrity;
- ☑ make reference to the entity's employee regulations and previous codes of ethics, while stressing the material differences between these two documents (in terms of detail, practical illustrations, enforceability, etc.);
- ☑ be signed by top management (minister, local authority executive, institution president or director, etc.), thereby signalling a commitment from the very highest level of the organisation.

2 Rules on professional ethics (what rules apply and to whom, and how they are enforced)

1) Conflicts of interest

The anti-corruption code of conduct should set out the applicable rules on preventing conflicts of interest and on recusal (See "Rules on professional ethics", p.38) and explain how these rules are enforced in the entity.

Example
The code of conduct explains how officials should proceed if they intend to recuse themselves from a decision or situation because they have a conflict of interest.

2) Multiple job-holding and post-public employment

The code of conduct should set out the entity's authorisation policy.

Example
The code of conduct explains the entity's policy on authorising multi job-holding requests, including objective criteria.

3

Policy on gifts, invitations and other advantages

French law does not have any general rules stating what gifts and invitations public officials can and cannot accept from suppliers or members of the public (beyond specific rules for officials working in healthcare, the security forces and certain other occupations). Officials should nevertheless exercise caution in this regard, keeping in mind the ethical principles and legal requirements by which they are bound as public servants (integrity, impartiality and probity in the performance of their duties).

The course of action that buyers should take varies across different phases of the procurement cycle.

1) During the procurement phase:

Buyers should outright decline all gifts and invitations offered by a candidate.

2) During the preparation and performance phases, buyers should follow the relevant guidance below:

- **Invitations to business meals**

Before accepting the invitation, the official should consider whether, by doing so, he or she would feel indebted to the individual or company in question. Officials are also advised to pay for their own meal to avoid potential problems.

Example

Risky situations in which the official should decline the invitation:

- Invitations that are unrelated to the business being conducted (such as shows, concerts or sporting events).
- Invitations from a company made at the same time as, or shortly after, the entity publishes a tender for which it could potentially bid.

Entities are advised to draw up their own rules on accepting gifts and invitations to help officials make the right call. These rules could, for example:

- ☑ require officials to report any offers of gifts or invitations to their superior;
- ☑ prohibit officials from accepting meal invitations in the evenings or at weekends;
- ☑ limit the number of meal invitations officials can accept in a given time period (e.g. one meal per year);
- ☑ prohibit meals at expensive venues and set a cap on the price of the meal.

- **Invitations to trade shows**

Officials should be encouraged to attend trade shows as a way to source potential new suppliers and understand wider market trends. Entities may nevertheless choose to set rules. For instance, officials could be required to obtain authorisation from their superior, and to ensure that their attendance does not directly or indirectly favour a particular supplier (e.g. officials should rotate events rather than attending the same one as a matter of routine).

- **Gifts**

  When it comes to gifts, officials should keep the following rule in mind: under no circumstances may a public official accept personal cash payments in return for carrying out an act relating to his or her office.

  Given the sensitive nature of public procurement, officials are advised to decline gifts of any type offered to themselves, their relatives or their acquaintances. Entities may, however, wish to set separate rules for promotional gifts intended for business use (such as promotional giveaways, which may be authorised subject to conditions), and high-value gifts (such as trips and expensive meals, which should be declined as a matter of principle).

Example

The entity's policy on gifts could, for instance:

- require officials to refer all offers of gifts to their superior for a second opinion;
- require officials to record any gifts they accept in a dedicated register;
- set limits on the number of gifts an official can accept;
- set limits on the value of individual gifts an official can accept.

Officials who have concerns about a gift or invitation can always decline on the basis that they are bound by rules on professional ethics or by their organisation's code of conduct.

- **Officials should treat certain types of advantage with extreme caution:**

  ☑ officials must never gain personally from a discount or rebate offered by their department to a supplier;

  ☑ officials should be wary of advantages offered to a relative (e.g. a supplier offering a family member an internship), since such arrangements constitute indirect advantages;

  ☑ buyers should proceed with caution if a potential supplier offers users and/or specifiers goods or equipment (such as software programs) on a free-trial basis, since the same users or specifiers could later put pressure on the buyer to write the specifications in a way that favours the company in question. Buyers can circumvent this problem by allowing users and/or specifiers to try out goods or services from more than one potential supplier, and by limiting the duration of the free trial.

4

Whistleblowing and reporting systems and protections

Internal parties in the procurement cycle sometimes face circumstances that challenge their professional probity and integrity. Individuals who find themselves in such situations can seek advice and guidance on the right course of action from:

☑ their **superior**: public officials have a duty to act in good faith, and this includes reporting any ethical concerns that arise in the performance of their duties to their superior;

☑ their **ethics officer**.

Officials who **witness potential corruption** (where no offence has been committed or the official is uncertain whether the conduct amounts to an offence), **but are neither the perpetrator nor a victim of the act in question:**

- ☑ can report the matter to their superior;
- ☑ can report the matter to the entity's whistleblowing officer via the internal whistleblowing system;
- ☑ may be entitled to the special protections afforded to whistleblowers (provided certain conditions are met).

See "Whistleblowing and reporting systems", p.67

Officials who **gain knowledge of corrupt practices** (known offences or instances where sufficient evidence exists) **in the performance of their duties:**

- ☑ are required by law to report the matter to the public prosecutor without delay pursuant to Article 40 of the French Code of Criminal Proceedings (or face disciplinary action);
- ☑ can report the matter directly to the police, the gendarmerie or the public prosecutor if they themselves are victims of corrupt practices that are likely to constitute an offence (such as blackmail or abuse of office). They may be entitled to protection under the rules designed to protect civil servants and public officials in the performance of their duties (known as "functional protection")[80].

5

Disciplinary action and criminal sanctions for breaches of the code of conduct

The code of conduct should make clear the disciplinary action and criminal sanctions that anyone who breaches these principles could face. It should also contain an undertaking by superiors to take disciplinary action in such cases, and to propose a sanction commensurate with the entity's zero-tolerance policy on corruption.

6

Glossary

The code of conduct should include a glossary containing definitions and illustrations of various corruption offences.

[80] Protection and support to which officials (and their spouses, children and parents) are entitled if they are victims of an offence in the performance of or by reason of their duties (Article 11 of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983).

Appendices

Appendix 1 Les infractions d'atteinte à la probité

- The offence of corruption – French public officials
- Influence peddling – French public officials
- Favouritism
- Unlawful taking of interest – serving public officials
- Unlawful taking of interest – former public officials (post-public employment)
- Misappropriation of public funds or assets
- Extortion by public officials

Appendix 2 Detailed overview of whistleblowing and reporting systems

Appendix 3 Role of the French Anti-Corruption Agency

Appendix 4 International organisations' recommendations on preventing corruption in public procurement

Appendix 1 Corruption offences

CORRUPTION– FRENCH PUBLIC OFFICIALS

Summary

This section deals with corruption involving French public officials. The term "corruption" also covers offences involving other parties, such as foreign public officials, private individuals, judges and international civil servants. These cases are not addressed here.
Corruption of French public officials involves promising or offering a public official an advantage to carry out, or to abstain from carrying out, an act relating to his or her office. Active corruption refers to the bribe-giver, and passive corruption refers to the bribe-taker.

Constituent elements of the offence

1) Preconditions

Persons who may commit this offence

Passive corruption

- Persons holding public authority: any person vested by delegation from a public authority with decision-making and enforcement powers, and who exercises these powers on a permanent or temporary basis. Examples include civil servants in all three branches of the civil service (central government, local government and public hospitals), public officers and law officials, police officers and military personnel.
- Persons discharging a public-service mission: any person who is not vested by delegation from a public authority with decision-making and enforcement powers, but who nevertheless performs a public-service mission. Examples include some employees of government-funded institutions, public service concession-holders, and members of committees or other bodies providing an advisory service to a public authority.
- Persons holding a public electoral mandate: national and local elected representatives.

Active corruption may be committed by any individual or entity.

2) Objective element

Regardless of the person who initiates the proposal, active corruption is the offence committed by the person offering the advantage (the bribe-giver) and passive corruption is the offence committed by the person receiving the advantage (the bribe-taker).

Active corruption

- The bribe-giver must have offered an advantage, of whatever nature, to the public official. The offer does not necessarily have to be made before the bribe-taker actually receives the advantage. Moreover, the bribe-taker does not necessarily have to receive the advantage, since the offence extends to making offers and promises. The advantage may be direct (gift, money, loan, kick-back, performing work for the official without charge) or indirect (paying off a debt, hiring a relative).
- The briber-giver must offer the advantage in order to induce the bribe-taker to carry out an act relating to his or her office. Examples include unduly awarding a grant or planning permission, allocating social housing or awarding a public contract in return for payment, appointing or hiring a friend or relative, or failing to pursue a debt owed to the public sector.

Passive corruption

- The constituent elements of this offence are similar to active corruption. In this case, the objective element involves a public official directly or indirectly requesting or accepting, without right and at any time, advantages for himself or herself, or for another person, in return for carrying out an act relating to his or her office.

3) Subjective element

- Corruption is an intentional offence, meaning that the person in question intentionally committed the act in order to cause a particular result. In this case, the bribe-giver's intention is to induce the public official to carry out, or to abstain from carrying out, an act relating to his or her function, while the bribe-taker agrees to carry out, or to abstain from carrying out, an act relating to his or her function in return for the bribe.

Penalties

- This offence carries a penalty of 10 years' imprisonment and a fine of €1,000,000 or up to double the proceeds of the offence.
- Additional penalties for individuals: forfeiture of civic, civil and family rights; ban on exercising a public office or undertaking the social or professional activity in the course of which or on the occasion of which the offence was committed (this prohibition is not applicable to the holding of an electoral mandate or union stewardship); ban on engaging in a commercial or industrial occupation or on managing a commercial or industrial undertaking; public display or dissemination of the decision; and confiscation of the funds or articles unlawfully received by the offender, with the exception of articles subject to restitution (Articles 432-17, 433-22 and 433-23 of the French Criminal Code). Individuals convicted of this offence also automatically disqualified from standing for election (Article 131-26-2 of the French Criminal Code).
- Additional penalties for entities incurring criminal liability for this offence: public display or dissemination of the decision; confiscation; prohibition to undertake certain activities in the course of which or on the occasion of which the offence was committed; placement under judicial supervision; business closure; exclusion from public procurement; ban on offering securities to the public; and partial ban on the use of certain means of payment (Articles 433-25 and 433-26 of the French Criminal Code). The entity is also required to engage in an AFA-supervised programme to bring its corruption prevention and detection measures up to standard (Article 131-39-2 of the French Criminal Code).

Examples of the offence of corruption in the procurement cycle

French Supreme Court of Appeal, Criminal Division, 20 April 2005 (case no. 04-84619)
A company offered cash and trips to the head of a procurement department in the French Navy. In return, the officer awarded the company contracts to supply ship parts worth several million francs. The officer was sentenced to 18 months' imprisonment (suspended and conditional) and handed an additional penalty of five years' forfeiture of civic, civil and family rights.

French Supreme Court of Appeal, Criminal Division, 20 May 2009 (case no. 08-87354)
A mayor placed a 3 million francs order, via the municipality, with a company to supply 15 photocopiers. In return, the director of the company paid the mayor a kick-back via his mistress. The mayor was fined €8,000, his mistress was fined €3,000, and the company director (the bribe-giver) was fined €6,000.

French Supreme Court of Appeal, Criminal Division, 16 May 2001 (case no. 99-83.467)
The vice-president of a *département* council, who also chaired the council's tender committee, asked tenderers to cover his personal expenditure and contribute to the cost of promoting ski resorts in return for renewing their contracts.

Criminal Court of Nanterre, 2 April 2015
A civil servant working for a *département* council routinely shared inside information on the council's computer hardware procurement contracts with a candidate in return for undue advantages. The official was convicted of various offences, including passive corruption, and was sentenced to five years' imprisonment (two years suspended) and banned from holding public office for five years.

Relevant legislative provisions

- **Article 432-11(1) of the French Criminal Code defines passive corruption of a public official** as: "The direct or indirect request or acceptance without right and at any time of offers, promises, donations, gifts or advantages for oneself or others, when done by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate [...] to carry out or abstain from carrying out an act relating to his office, duty, or mandate, or facilitated by his office, duty or mandate".

- **Article 433-1(1) of the French Criminal Code defines active corruption** as: "Unlawfully proffering, at any time, directly or indirectly, any offer, promise, donation, gift or reward, in order to induce a person holding public authority, discharging a public service mission, or vested with a public electoral mandate [...] to carry out or abstain from carrying out an act relating to his office, duty, or mandate, or facilitated by his office, duty or mandate".

INFLUENCE PEDDLING FRENCH PUBLIC OFFICIALS

Summary

This section deals with influence peddling involving French public officials. The term "influence peddling" also covers offences involving other parties, such as foreign public officials, private individuals, judges and international civil servants. These cases are not addressed here.
Influence peddling, as it pertains to French public officials, involves promising or offering a public official an advantage to carry out, or to abstain from carrying out, an act relating to his or her office. Active influence peddling is an offence committed by the person offering the advantage, while passive influence peddling relates to the public official receiving the advantage. The offence is similar to corruption, except that it involves an intermediary who uses his or her influence in government to obtain preferential treatment for another party in return for payment.

Constituent elements of the offence

1) Preconditions

Persons who may commit this offence

Passive influence peddling

- Persons holding public authority: any person vested by delegation from a public authority with decision-making and enforcement powers, and who exercises these powers on a permanent or temporary basis. Examples include civil servants in all three branches of the civil service (central government, local government and public hospitals), public officers and law officials, police officers and military personnel.
- Persons discharging a public-service mission: any person who is not vested by delegation from a public authority with decision-making and enforcement powers, but who nevertheless performs a public-service mission. Examples include some employees of government-funded institutions, public service concession-holders, and members of committees or other bodies providing an advisory service to a public authority.
- Persons holding a public electoral mandate: national and local elected representatives.

Active influence peddling may be committed by any individual or entity.

2) Objective element

Active influence peddling

- As with corruption, the offender must have offered an advantage, of whatever nature, to the public official. The offer does not necessarily have to be made before the recipient actually receives the advantage. Moreover, the recipient does not necessarily have to receive the advantage, since the offence extends to making offers and promises. The advantage may be direct (gift, money, loan, kick-back, performing work for the official without charge) or indirect (paying off a debt, hiring a relative).

- Despite these similarities with corruption, the intention behind these acts is different. The purpose of the offer must be to induce the public official to use his or her influence to obtain a favourable decision from a third party who holds public office. There is no requirement to establish the existence of this influence – it may be real or alleged. Unlike corruption, the offender does not carry out an act relating to his or her office but merely acts as an intermediary.
- In terms of the favour that the intermediary seeks to obtain in return for payment, the law gives a broad definition: "distinctions, employments, contracts or any other favourable decision". Examples could include dismissing or dropping a case, lifting an arrest warrant, obtaining a passport or granting planning permission.

Passive influence peddling

- The constituent elements of this offence are similar to active influence peddling. In this case, the objective element involves a public official directly or indirectly requesting or accepting, without right and at any time, advantages for himself or herself, or for another person, in return for using his or her influence to obtain a favourable decision from a public authority.

3) Subjective element

- Influence peddling is an intentional offence, meaning that the person in question intentionally committed the act in order to cause a particular result.

Penalties

- Influence peddling (both active and passive) carries a penalty of 10 years' imprisonment and a fine of €1,000,000 or up to double the proceeds of the offence.
- Additional penalties for individuals: forfeiture of civic, civil and family rights; ban on exercising a public office or undertaking the social or professional activity in the course of which or on the occasion of which the offence was committed (this prohibition is not applicable to the holding of an electoral mandate or union stewardship); ban on engaging in a commercial or industrial occupation or on managing a commercial or industrial undertaking; public display or dissemination of the decision; and confiscation of the funds or articles unlawfully received by the offender, with the exception of articles subject to restitution (Articles 432-17, 433-22 and 433-23 of the French Criminal Code). Individuals convicted of this offence also automatically disqualified from standing for election (Article 131-26-2 of the French Criminal Code).
- Additional penalties for entities incurring criminal liability for this offence: public display or dissemination of the decision; confiscation; prohibition to undertake certain activities in the course of which or on the occasion of which the offence was committed; placement under judicial supervision; business closure; exclusion from public procurement; ban on offering securities to the public; and partial ban on the use of certain means of payment (Articles 433-25 and 433-26 of the French Criminal Code). The entity is also required to engage in an AFA-supervised programme to bring its corruption prevention and detection measures up to standard (Article 131-39-2 of the French Criminal Code).

Relevant legislative provisions

- **Article 432-11(2) of the French Criminal Code defines passive influence peddling involving a public official** as: "The direct or indirect request or acceptance without right and at any time of offers, promises, donations, gifts or advantages for oneself or others, when done by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate [...] to abuse his real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision".

- **Article 433-1(2) of the French Criminal Code defines active influence peddling** as: "Unlawfully proffering, at any time, directly or indirectly, any offer, promise, donation, gift or reward, in order to induce a person holding public authority, discharging a public service mission, or vested with a public electoral mandate [...] to abuse his real or alleged influence with a view to obtaining distinctions, employments, contracts or any other favourable decision from a public authority or the government".

Examples of influence peddling in the procurement cycle

French Supreme Court of Appeal, Criminal Division, 18 January 1993 (case no. 92-80152)
The director of an autonomous port received regular payments from companies, via an intermediary, in order to use his influence to obtain decisions in favour of these companies from the port's contract award committee. He was sentenced to five years' imprisonment (two years suspended), fined 15 million CFP francs and banned from exercising public office.

French Supreme Court of Appeal, Criminal Division, 6 October 2006 (case no. 04-81939)
A grade C civil servant was working in the procurement department at a département department for agriculture and forestry. As part of his duties, he was involved in selecting applicants and recommending suppliers for non-tender contracts. His recommendations were often followed. The civil servant was found to have received undue advantages from candidates. He was sentenced to 18 months' imprisonment (12 months suspended), fined €4,500 and permanently banned from holding public office or working in the public sector.

FAVOURITISM

Summary

Favouritism is the most common offence involving breaches public procurement law. It refers to an act whereby a person obtains or attempts to obtain an unjustified advantage for another party (in most cases a candidate) by breaching the statutory or regulatory provisions designed to ensure freedom of access, equal treatment of candidates and transparency of procedures in public procurement.

Constituent elements of the offence

1) Preconditions

Persons who may commit this offence:

- persons holding public authority, discharging a public service mission or holding a public electoral mandate;
- persons holding specific functions: representatives, administrators or agents of central government, local government, government-funded institutions, national semi-public companies discharging public-service missions and local semi-public companies;
- any person, including private persons, acting in a personal capacity.

2) Objective element

- First, the offence must involve a breach of a statutory or regulatory provision designed to ensure freedom of access, equal treatment of candidates and transparency of procedures (the fundamental principles of public procurement). Examples of such breaches include artificially splitting a contract in order to remain below thresholds for publication, deliberately writing the technical specifications in such a way that only one (preselected) candidate can meet the requirements, using emergency procurement procedures without justification, declaring the procedure unsuccessful without justification, and breaching publication rules.
- Second, the breach must give rise to an unjustified advantage for another party. A common advantage involves sharing inside information with a particular tenderer in order to ensure that it wins the contract, or to increase its chances of winning the contract.

3) Subjective element

- Favouritism is an intentional offence. In principle, this means that the offender must knowingly breach the above-mentioned rules.
- However, the courts operate on the presumption that the offender knew the rules, and there are few examples in case law of defendants being acquitted for ignorance of the law.
- Favouritism is an offence regardless of motive, even in absence of financial gain for the offender or harm to the public interest. .

Penalties

- This offence carries a penalty of two years' imprisonment and a fine of €200,000, or up to double the proceeds of the offence.
- Additional penalties: forfeiture of civic, civil and family rights; ban on exercising a public office or undertaking the social or professional activity in the course of which or on the occasion of which the offence was committed (this prohibition is not applicable to the holding of an electoral mandate or union stewardship); ban on engaging in a commercial or industrial occupation or on managing a commercial or industrial undertaking; and confiscation of the funds or articles unlawfully received by the offender, with the exception of articles subject to restitution (Article 432-17 of the French Criminal Code).

Relevant legislative provisions

- **Article 432-14 of the French Criminal Code defines favouritism** as: "An offence [...] committed by any person holding public authority or discharging a public service mission or holding a public electoral mandate or acting as a representative, administrator or agent of central government, local government, government-funded institutions, national semi-public companies discharging public service missions and local semi-public companies, or any person acting on behalf of any of the above-mentioned persons, who obtains or attempts to obtain for others an unjustified advantage by an act breaching the statutory or regulatory provisions designed to ensure freedom of access and equal treatment of candidates for public contracts and delegated public services".

Examples of favouritism in the procurement cycle

French Supreme Court of Appeal, Criminal Division, 30 May 2001 (case no. 00-85611)
A département council put a contract to supply road maintenance materials out to tender. The technical specifications were deliberately written in a way that favoured a consortium of civil engineering firms, since none of the other candidates were able to meet the requirements (supplying both asphalt and aggregates). The specifications were also later amended. The president of the département council was found to have accepted all-expenses-paid hunting trips abroad from one of the consortium members. He was convicted of concealment of the offence and favouritism, sentenced to one year's imprisonment (suspended) and fined €100,000.

French Supreme Court of Appeal, Criminal Division, 4 May 2006 (case no. 05-81743)
A director of the Commissariat de l'armée de terre (the commissariat branch of the French Army) artificially split a contract to supply furniture in order to avoid having to put it out to tender. The contractor supported the arrangement by providing the officer with a list of suppliers from which he could order furniture. In reality, all of these suppliers sourced their furniture from the contractor. The director was convicted of favouritism, sentenced to two years' imprisonment (suspended) and fined €15,000.

French Supreme Court of Appeal, Criminal Division, 20 May 2009 (case no. 08-87354)
A mayor placed orders for various supplies, via the municipality, with a company managed by one of his friends. Over the course of three years, the mayor repeatedly breached competition rules and deliberately wrote tender documents in a way that excluded other potential suppliers. He was convicted of favouritism and fined €8,000.

UNLAWFUL TAKING OF INTEREST SERVING PUBLIC OFFICIALS

Summary

Unlawful taking of interest is an offence intended to prevent the conflation of personal interests and the public interest in the management of public affairs. It applies to persons who, through their conduct, give the appearance of partiality and knowingly put themselves in a position where their personal interests could be construed as conflicting with the performance of their public duties.

Constituent elements of the offence

1) Preconditions

Persons who may commit this offence:

- persons holding a public electoral mandate;
  Article 432-12(2) to (5) provides exemptions for municipalities of no more than 3,500 inhabitants. These exemptions allow local mayors, their deputies and municipal councillors to contract with the municipality of which they are the elected representatives for the transfer of movable or immovable property and for the supply of services up to an annual limit of €16,000, and to acquire property belonging to the municipality for use as business premises or personal accommodation. Special procedural rules apply to these exemptions. For instance, the contract in question must be authorised by a reasoned decision from the municipal council, and the elected representative concerned must abstain from participating in the deliberation of the municipal council regarding the completion or approval of the contract.
- persons holding public authority;
- persons discharging a public service mission.

2) Objective element

Supervision of the business or business operation

- The above-mentioned persons must, at the time in question, have the duty of ensuring, in whole or in part, the supervision, management, liquidation or payment of a business operation or transaction. In case law, the scope of the offence extends to any person acting as an accessory to its commission. An elected representative can be convicted of unlawful taking of interest merely for participating in the deliberation on the matter in which he or she has an interest.

The interest taken, received or kept, directly or indirectly

- The interest in question may be direct (e.g. a mayor who awards a grant to a non-profit that he or she chairs).
- The interest may be indirect where it is taken, received or kept by a relative (e.g. a mayor awards a public contract to a company managed by his or her son-in law, or an elected representative allocates social housing to a family member).
- The person may even be convicted for a simple moral interest (e.g. where an official makes a decision that favours a company managed by a friend).

3) Subjective element

Unlawful taking of interest is an intentional offence. There is no requirement for the person to gain, financially or otherwise, from the offence.

Penalties

- Ce délit est puni de cinq ans d'emprisonnement et d'une amende de 500 000 euros, dont le montant peut être porté au double du produit tiré de l'infraction.
- Peines complémentaires prévues à l'article 432-17 du code pénal : l'interdiction des droits civils, civiques et de famille, l'interdiction d'exercer une fonction publique ou l'activité professionnelle ou sociale dans l'exercice ou à l'occasion de l'exercice de laquelle l'infraction a été commise (cette interdiction ne peut pas toucher le mandat électif ou les responsabilités syndicales), l'interdiction d'exercer une profession commerciale ou industrielle et de gérer une entreprise commerciale ou industrielle, la confiscation des sommes ou objets irrégulièrement reçus par l'auteur de l'infraction, à l'exception des objets susceptibles de restitution.

Relevant legislative provisions

• **Article 432-12 of the French Criminal Code defines unlawful taking of interest** as: "The taking, receiving or keeping of any interest in a business or business operation, either directly or indirectly, by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate who at the time in question has the duty of ensuring, in whole or in part, its supervision, management, liquidation or payment".

Examples of unlawful taking of interest in the procurement cycle

French Supreme Court of Appeal, Criminal Division, 10 April 2002 (case no. 01-84286)
At a municipal council meeting, a mayor voted on a proposal to purchase a private home and convert it into a regional costume and fashion museum. The purchase allowed the owner to pay off a loan on which the mayor stood as guarantor. The mayor was convicted of unlawful taking of interest, sentenced to nine months' imprisonment (suspended), fined 100,000 francs and handed an additional penalty of two years' forfeiture of civic and civil rights.

French Supreme Court of Appeal, Criminal Division, 6 April 2005 (case no. 00-80418)
A municipal mayor awarded a company a contract to build a seafront promenade without putting the contract out to tender. The company purchased the construction materials from several suppliers in which the mayor was a shareholder. The mayor was convicted of various offences including unlawful taking of interest, sentenced to 15 months' imprisonment (suspended), fined €50,000, and banned from voting, disqualified from standing for election and barred from exercising a judicial function and holding public office for five years.

Criminal Court of Narbonne, 15 September 2016
A mayor of a municipality with 2,000 inhabitants was prosecuted for various offences, including purchasing a 22 sq. m plot of land, through the municipality, to connect his son's property to the road on a housing development. The mayor was convicted of unlawful taking of interest and fined €10,000.

UNLAWFUL TAKING OF INTEREST FORMER PUBLIC OFFICIALS (POST-PUBLIC EMPLOYMENT)

Summary

This offence is intended to prevent public officials with responsibility for supervising and contracting with private companies giving such companies favourable treatment in the hope of being hired by, acquiring a stake in or providing consultancy services to such companies within three years of leaving office.

Constituent elements of the offence

1) Preconditions

Persons who may commit this offence:

- members of the government;
- local executive officers;
- members of an independent administrative authority or an independent public authority;
- civil servants;
- military personnel;
- public officials;
- employees of government-funded institutions, public undertakings, semi-public companies in which the State or public authorities hold, directly or indirectly, more than 50% of the capital, and the public operators mentioned in Act 90-568 of 2 July 1990 on the organisation of the public postal and telecommunications service.

2) Objective element

Responsibility for supervising or contracting with a private company

- A former civil servant may only be prosecuted for unlawful taking of interest under Article 432-13 of the French Criminal Code if, before leaving office, he or she was "entrusted with the supervision or control of any private undertaking, or with the conclusion of contracts of any type with a private undertaking or with giving an opinion on such contracts, or with directly informing the relevant authority of decisions taken in relation to the operations of a private undertaking or with giving an opinion on such decisions". Any public undertaking exercising its activity in a competitive sector and in accordance with the rules of private law counts as a private undertaking.
- The above-mentioned persons must, at the time in question, have the duty of ensuring, in whole or in part, the supervision, management, liquidation or payment of a business operation or transaction.
- In case law, the scope of the offence extends to any person acting as an accessory to its commission. An elected representative can be convicted of unlawful taking of interest merely for participating in the deliberation on the matter in which he or she has an interest.

Taking of interest

- he offence is committed by anyone who "by work, advice or investment takes or receives a participation" in an undertaking that he or she supervised or with which he or she has contracted.
- The French Criminal Code provides exemptions for "investment in the capital of companies listed on the stock market or where the capital is received by devolution under a succession".

Timing

- The offence applies to taking of an interest, as defined above, within three years of the person in question leaving office.

3) Subjective element

- Unlawful taking of interest is an intentional offence. In the eyes of the law, a person can be convicted for merely being aware that they were committing the offence.

Penalties

- This offence carries a penalty of three years' imprisonment and a fine of €200,000, or up to double the proceeds of the offence.
- Additional penalties: forfeiture of civic, civil and family rights; ban on exercising a public office or undertaking the social or professional activity in the course of which or on the occasion of which the offence was committed (this prohibition is not applicable to the holding of an electoral mandate or union stewardship); ban on engaging in a commercial or industrial occupation or on managing a commercial or industrial undertaking; and confiscation of the funds or articles unlawfully received by the offender, with the exception of articles subject to restitution (Article 432-17 of the French Criminal Code).

Relevant legislative provisions

Article 432-13 of the French Criminal Code defines unlawful taking of interest by former public officials as "an offence committed by a person who, in his capacity as a member of the government, an independent administrative authority or an independent public authority, a local executive officer, a civil servant, a member of the armed forces or a public official, and specifically by reason of his office, is entrusted with the supervision or control of any private undertaking, or with the conclusion of contracts of any type with a private undertaking or with giving an opinion on such contracts, or with directly informing the relevant authority of decisions taken in relation to the operations of a private undertaking or with giving an opinion on such decisions, and who by work, advice or investment takes or receives a participation in such an undertaking before the expiry of a period of three years following the end of his office".

Example of unlawful taking of interest by a former public official (outside the procurement cycle)

French Supreme Court of Appeal, Criminal Division, 16 December 2014 (case no. 14-B2815)
After leaving office, a professor of pharmacology and former member of the drug regulatory authority was appointed as a consultant by a pharmaceutical company to advise on candidate drug efficacy and business development strategy. The court ruled that his involvement with the company amounted to unlawful taking of interest.

MISAPPROPRIATION OF PUBLIC FUNDS OR ASSETS

Summary

Misappropriation of public funds or assets involves a breach of the duty of probity as it applies to civil servants in the performance of their public duties. By association, the offence is designed to prevent officials undermining public trust in representatives of the authorities, and to protect the State's financial interests.

Constituent elements of the offence

1) Preconditions

Persons who may commit this offence:

- public accountants and public depositories: any person who, by virtue of a legal rule, receives or handles public funds or assets;
- persons holding public authority or discharging a public service mission (including members of parliament);
- any other person (a different penalty applies in this case).

2) Objective element

Nature of the funds or assets

- Documents or securities (government paperwork, government contracts, unilateral legal acts).
- Public or private funds (coins and banknotes). The most common example of this offence is bogus employment, i.e. where a person receives money from central or local government despite not performing any actual work.
- Papers, documents or securities directly or indirectly representing such funds.
- "Any other object" (furniture, decorative items, etc.).

Misappropriation of funds or assets entrusted to the person as part of his or her function or tasks

The misappropriated funds or assets must be entrusted to the person in question "as part of his function or tasks". Establishing this fact requires an examination of the statutory or legal rules to determine what the person's function or tasks entail and, therefore, whether he or she has abused them.

Destruction or misappropriation

- "Destruction" refers to any act by which the person in question completely destroys the asset entrusted to him or her. Where he or she partially destroys the asset, this is classed as attempted destruction.

- "Misappropriation" refers to an act by which the person in question takes personal ownership of an asset entrusted to him or her as part of his or her function (similar in meaning to the offence of breach of trust). The definition also covers misuse of public funds, such as where the president of a département council awards funds intended to support people in financial hardship to elite athletes or non-profit organisations who do not meet the criteria for which the funds in question were earmarked.

3) Subjective element

Misappropriation of public funds or assets is an intentional offence, meaning that the offender must have been aware that he or she was misappropriating the funds entrusted to him or her. There is no requirement for the person to gain personally from the offence, or even to intend to appropriate the funds. The French Criminal Code provides for a separate offence of misappropriation of public funds or assets through negligence (Article 432-16).

Penalties

- This offence carries a penalty of 10 years' imprisonment and a fine of €1,000,000, or up to double the proceeds of the offence if the offence is committed by a public accountant, a public depositary, or a person holding public authority or discharging a public service mission (see above). If committed by any other person, it carries a sentence of seven years' imprisonment and a fine of €100,000.
- Additional penalties: forfeiture of civic, civil and family rights; ban on exercising a public office or undertaking the social or professional activity in the course of which or on the occasion of which the offence was committed (this prohibition is not applicable to the holding of an electoral mandate or union stewardship); ban on engaging in a commercial or industrial occupation or on managing a commercial or industrial undertaking; and confiscation of the funds or articles unlawfully received by the offender, with the exception of articles subject to restitution (Article 432-17 of the French Criminal Code).

Relevant legislative provisions

- **Article 432-15 of the French Criminal Code defines misappropriation of public funds or assets** as: "The destruction, misappropriation or purloining of a document or security, of private or public funds, papers, documents or securities representing such funds, or of any object entrusted to him as part of his function or tasks, committed by a person holding public authority or discharging a public service mission, a public accountant, a public depositary or one of his subordinates".

- **Article 432-16 of the French Criminal Code** provides for the offence of misappropriation of public funds or assets through negligence "where the destruction, misappropriation or purloining of assets referred to under Article 432-15 was committed by a third party as a result of the negligence of a person holding public authority or discharging a public service mission, a public accountant or a public depositary". In this case, the offence carries a sentence of one year's imprisonment and a fine of €15,000.

- **Article 433-4 of the French Criminal Code defines misappropriation of public funds or assets by any other person** as: "The destruction, misappropriation or purloining of a document or security, of private or public funds, of papers, documents or securities representing such funds, or of any other object entrusted to a person holding public authority or discharging a public service mission, or to a public accountant, to a public depositary or to one of his subordinates as part of his function or tasks". In this case, the offence carries a sentence of seven years' imprisonment and a fine of €100,000.

Examples of misappropriation of public funds or assets in the procurement cycle

French Supreme Court of Appeal, Criminal Division, 5 December 2012 (case no. 12-80032)
A municipal mayor in French Guiana purchased, via the municipality, cleaning products and households items worth hundreds of thousands of euros from four companies in mainland France run by a relative. The contracts were not put out to tender, and the products in question could have been sourced at a much lower cost from local suppliers. The mayor was convicted of misappropriation of public funds, sentenced to two years' imprisonment (suspended), fined €40,000 and handed an additional penalty of four years' forfeiture of civic, civil and family rights.

French Supreme Court of Appeal, Criminal Division, 20 April 2017 (case no. 15-87379)
A mayor also served as the town clerk of a nearby municipality. Playing on the confusion created by his dual role, he convinced suppliers of both authorities to issue fake invoices and took personal possession of machinery and tools purchased by the municipalities worth €258,000. The mayor was convicted of misappropriation of public funds, sentenced to five years' imprisonment (four years suspended), handed an additional penalty of five years' forfeiture of civic, civil and family rights, and permanently banned from holding public office.

French Supreme Court of Appeal, Criminal Division, 27 June 2018 (case no. 16-86256)
A mayor had the municipality purchase various works of art for his personal collection, enlisting the help of the authority's general services manager and the head of his private office. The case was dropped when the mayor died part-way through the trial

EXTORTION BY PUBLIC OFFICIALS

Summary

The offence of extortion by public officials is primarily intended to catch improper conduct by public accountants. It involves ordering the payment of duties, taxes or impositions known not to be due, or granting any exemption from such dues, in breach of statutory or regulatory rules.

Constituent elements of the offence

1) Preconditions

Persons who may commit this offence:

- persons holding public authority or discharging a public service mission.

Persons holding a public electoral mandate are excluded from the scope of the offence.

2) Objective element

- There are two forms of extortion by public officials: ordering the payment of an amount known not to be due, and granting an undue exoneration or exemption. Examples include a public official recovering an invalid debt, or exempting a civil servant from paying rent on his or her employer-provided accommodation.
- According to the French Criminal Code, the offence applies to "public duties, contributions, taxes or impositions". This definition includes civil servants' pay and benefits.

3) Subjective element

- Extortion by public officials is an intentional offence, meaning that the offender knew that payment he or she was requesting, or the exemption he or she was granting, was not due.

Penalties

- This offence carries a penalty of five years' imprisonment and a fine of €500,000, or up to double the proceeds of the offence.

- Additional penalties: forfeiture of civic, civil and family rights; ban on exercising a public office or undertaking the social or professional activity in the course of which or on the occasion of which the offence was committed (this prohibition is not applicable to the holding of an electoral mandate or union stewardship); ban on engaging in a commercial or industrial occupation or on managing a commercial or industrial undertaking; and confiscation of the funds or articles unlawfully received by the offender, with the exception of articles subject to restitution (Article 432-17 of the French Criminal Code).

Relevant legislative provisions

Article 432-10 of the French Criminal Code defines extortion by public officials as:

- "any acceptance, request or order to pay as public duties, contributions, taxes or impositions any sum known not to be due, or known to exceed what is due, committed by a person holding public authority or discharging a public service mission";
- "the granting by such persons, in any form and for any reason, of any exoneration or exemption from public duties, contributions, taxes or impositions in breach of statutory or regulatory rules".

Examples of extortion by public officials (outside the procurement cycle)

French Supreme Court of Appeal, Criminal Division, 16 May 2001 (case no. 99-83.467)
A mayor charged property developers and home-owners a fee for every house built in the local authority area. The funds were paid into a hidden account held by the local tourist office. These impositions, which were not provided for by law and had not been agreed by the municipal council, were accounted for manually outside the authority's normal channels. The offender, who was a qualified lawyer and could not have been unaware that the practice was illegal, knowingly imposed and collected revenue on behalf of a local government-funded institution.

Appendix 2 Detailed overview of whistleblowing and reporting systems

Officials have three options for reporting corruption:

1) Whistleblower report and protection system
Entities must set up a dedicated whistleblower report and protection system[81].

2) Internal whistleblowing system
An internal whistleblowing system is a procedure that officials can use to report conduct or situations to which they have been witness that could potentially breach the entity's anti-corruption code of conduct. The system is designed to detect inappropriate conduct and to provide guidance to staff who are unsure how to act in specific situations.

Entities to which both requirements apply (having a whistleblower report and protection system and an internal whistleblowing system for reporting breaches of the anti-corruption code of conduct) can combine both procedures into a single system.

3) Duty to report contraventions to the public prosecutor (Article 40(2) of the French Code of Criminal Proceedings)
This duty is specific to civil servants and public officials. Article 40 of the French Code of Criminal Proceedings requires civil servant officials who, in the performance of their duties, gain knowledge of a crime or offence to report the matter "forthwith" to the public prosecutor.

1 Protection for whistleblowers

A whistleblower report and protection system is a clearly defined internal or external procedure for disclosing serious concerns. Officials who use this system ("whistleblowers") are afforded enhanced protection.

Which entities must set up a whistleblower report and protection system?

Article 8 of Act 2016-1691 of 9 December 2016 and Decree 2017-564 of 19 April 2017 require the following entities to set up a whistleblower report and protection system:

- legal entities governed by public or private law with 50 or more employees;
- central government bodies, departments with national competence, devolved government departments, independent administrative authorities and independent public authorities with 50 or more employees;
- municipalities with a population in excess of 10,000 people, départements and regions;
- municipal, département and regional government-funded institutions, and government-funded inter-municipal cooperation institutions with tax-levying powers containing at least one municipality with a population in excess of 10,000 people.

[81] Article 8 of Act 2016-1691 of 9 December 2016.

What is a whistleblower?

A whistleblower is an **individual**[82] who has a working relationship with the entity (employee, civil servant, public official, external and occasional staff, intern or apprentice).

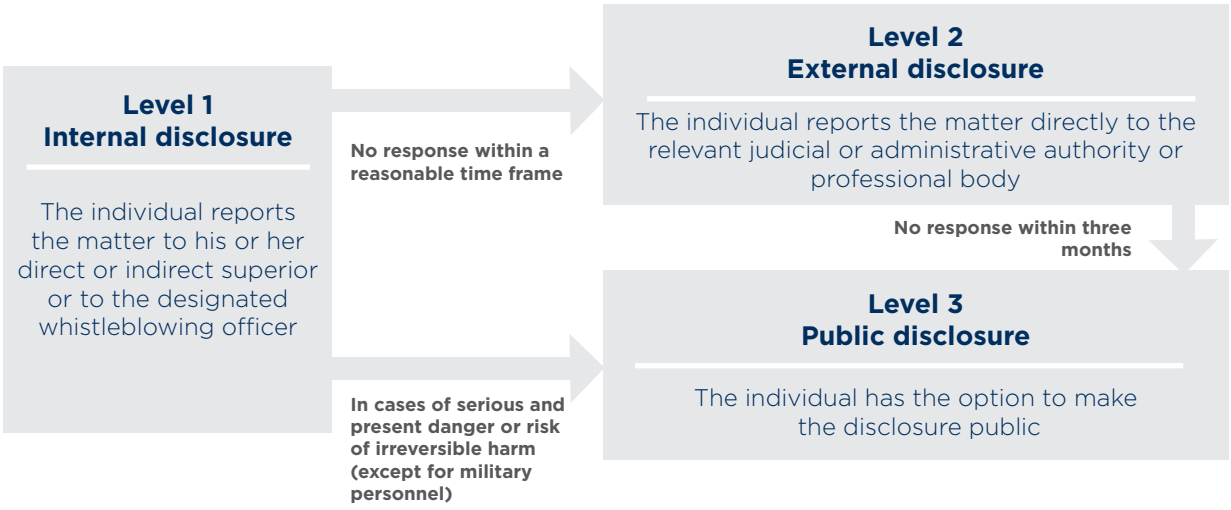
Further conditions apply, all of which must be met:

- the whistleblower must be **disinterested** (no personal or financial interest in the matter) and must **act in good faith** (no intent to cause harm);
- the whistleblower must have **personal knowledge of the matters disclosed**;
- the matters disclosed must be serious.

Corruption offences fall within the scope of this definition.

In order to be treated as a whistleblower and afforded the associated protections, the individual must follow a defined step-by-step process.

1) Filing a whistleblowing report: step-by-step process



Seeking guidance from the French Ombudsman

Anyone may submit their disclosure to the French Ombudsman to be directed to the appropriate body.
If a whistleblower faces retaliatory measures for having made the disclosure, the Ombudsman can review the facts of the case, check whether the measures in question amount to retaliation and, where necessary, take action to put a stop to such measures.

The Ombudsman does not, however, have the authority to address the matter to which the disclosure pertains.
The Ombudsman received a total of 84 complaints in 2018 – an 18.3% increase on the previous year.

https://www.defenseurdesdroits.fr/

Local authorities and government-funded institutions that are required to set up a whistleblower report and protection system must appoint a **whistleblowing officer** (see "Which entities must set up a whistleblower report and protection system?" above).

[82] Article 6 of Act 2016-1691 of 9 December 2016 defines a whistleblower as "a natural person who reveals or reports disinterestedly and in good faith, a crime or an offence, a clear and serious violation of an international commitment duly ratified or approved by France, of a unilateral act by an international organisation pursuant to such a commitment, or of laws and regulations, or a serious threat or damage to public interest, of which he or she has personal knowledge".

2) What happens next?

If the disclosure is admissible

The whistleblower is protected
- The whistleblower is afforded special protections. No sanctions or retaliatory measures are permitted against the individual for having filed the disclosure.
- The whistleblower is not criminally liable for breaching a secret protected by law if the disclosure was necessary and proportionate to safeguard the interests concerned.
- The burden of proof is lower.
- Strict rules on confidentiality apply: no identifying information about the whistleblower can be disclosed without his or her consent.

The disclosure is investigated and action is taken
- The matter is resolved internally or, failing that, referred to the relevant authorities.
- The person named in the disclosure is subject to disciplinary action and, where relevant, prosecution.

If the disclosure is inadmissible or baseless
- An official or civil servant who makes allegations that he or she knows to be false with intent to harm another official or the entity is liable to face disciplinary action.
- The official who made the false allegations is also liable to prosecution for malicious denunciation.
- Officials and civil servants who are victims of malicious denunciation are afforded special protections (functional protection).

> **Protection for officials who report conflicts of interest**
>
> Under Article 6 ter (A) of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983, civil servants who report a conflict of interest of which they become aware in the performance of their duties enjoy similar protections to those afforded to whistleblowers. In order to benefit from these protections, the civil servant must first report the matter to a superior or to the designated ethics officer.

2 Internal whistleblowing system

An internal whistleblowing system is a procedure that officials can use to report conduct or situations that breach the entity's anti-corruption code of conduct. The system is designed to detect inappropriate conduct and to provide guidance to staff who are unsure how to act in risky situations.

Which entities are required to set up an internal whistleblowing system?

Any entity that is required by law to establish an anti-corruption programme must also set up an internal system for reporting breaches of its code of conduct (Articles 3(3) and 17(II) of Act 2016-1691 of 9 December 2016):
- all central government bodies and related government-funded institutions;
- local authorities, local government-funded institutions and semi-public companies;
- non-profits and foundations recognised as public-interest entities;
- companies and public establishments of an industrial and commercial nature (EPICs) with 500 or more employees, or part of a group controlled by a parent company registered in France and employing 500 or more people, and with turnover in excess of €100 million.

What the system entails

The French Anti-Corruption Agency (AFA) recommends that the internal whistleblowing system should specify the following:

- the role of the whistleblower's superior;
- the person assigned the function of receiving whistleblowers' reports within the organisation;
- the measures taken to ensure whistleblowers' anonymity, the confidentiality of the disclosures and the persons named in them;
- the procedures for whistleblowers to provide any information or documents to back up their reports;
- provisions for notifying the whistleblower immediately of receipt of the disclosure and the time needed to examine its admissibility, as well as the measures taken to notify the whistleblower of the end of the proceedings, where appropriate;
- if no action is taken, the provisions taken to destroy items on file that may be used to identify the whistleblower and the persons named in the disclosure within two months of the end of the investigation;
- whether automated processing of disclosures is used, in accordance with data protection law;
- where appropriate, the policy on processing anonymous reports.

Setting up an internal whistleblowing system: recommendations and advice

1) Spread the message about the system

An internal whistleblowing system "protects" the entity because it provides a safe way for officials to report potential wrongdoing.

It also has the added benefit of helping the entity detect and prevent risks inherent in its activities. But such a system is only effective if the message is spread far and wide – to all individuals who come under its scope.

2) Refer to the system in the anti-corruption code of conduct

The anti-corruption code of conduct sets out how officials should proceed if they become aware of potentially corrupt practices. For this reason, it should also refer to the internal whistleblowing system and other reporting and disclosure channels.

3) Train officials

Internal parties in the procurement cycle have a major part to play in risk detection and prevention. They should be adequately trained in how to report the offence of corruption, favouritism and other corrupt practices, all of which can jeopardise procurement and contract performance. Training sessions should cover how to use the system, who receives the disclosures (the designated whistleblowing officer, for example) and what confidentiality rules apply.

4) Review disclosures annually

Entities should carry out an annual review of disclosures relating to breaches of the code of conduct and use the findings to update their risk mapping and, where necessary, clarify aspects of the code of conduct.

Entities to which both requirements apply (having a whistleblower report and protection system and an internal whistleblowing system for reporting breaches of the anti-corruption code of conduct) can combine both procedures into a single system.

3 Duty to report contraventions to the public prosecutor

Public officials are under no obligation to use their entity's internal whistleblowing system. However, both public officials and civil servants have a legal duty to report crimes or offences of which they become aware in the performance of their duties to the public prosecutor, without delay.

What does the duty entail?

Article 40(2) of the French Code of Criminal Proceedings states that any "constituted authority, public officer or civil servant who, in the performance of his duties, gains knowledge of the existence of a crime or offence must report the matter forthwith to the public prosecutor and transmit to this prosecutor any relevant information, official reports or documents".

In this instance, there is no requirement on officials to inform their direct or indirect superior that they have filed such a report. Although 40 of the French Code of Criminal Proceedings is silent on the reporting procedure, the courts have ruled that officials may report the matter to the public prosecutor via their superior, provided that the superior then files the report "in accordance with the requirements of Article 40 of the French Code of Criminal Proceedings"[83].

The duty to report the matter to the public prosecutor remains even if the official in question has already filed an internal whistleblowing report.

To whom does the duty apply?

- any constituted authority;
- any public officer;
- any civil servant.

This duty implies that public-sector buyers who, in the performance of their duties, gain personal knowledge of any corruption-related crime or offence must immediately report the matter to the public prosecutor. For instance, a buyer may detect misappropriation of public funds when carrying out service delivery checks, uncover evidence of passive corruption or a corrupt pact between a company and internal parties in the procurement cycle, or become aware of unlawful taking of interest by a intern who has a personal interest in a contractor.

Officials are strongly advised (although not obligated) to inform their superior so that immediate safeguarding measures can be put in place or disciplinary action taken against the official(s) or department(s) named in the report (suspension, internal audit, etc.).

How the procedure works

The circular of 19 July 2018[84] sets out a number of further conditions:

- sufficient evidence of the conduct must exist;
- the official must have become aware of the conduct in the performance of his or her duties;
- the conduct must be serious enough to constitute a crime or offence.

If these conditions are met, the official must report the matter to the public prosecutor without delay.

[83] French Supreme Court of Appeal, Criminal Division, 14 December 2000, case no. 00-86.595.
[84] Circular of 19 July 2018 on whistleblowing reports filed by public officials pursuant to Articles 6 to 15 of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016.

Whistleblowing and reporting systems: comparison

Type of disclosure	Disclosure under the whistle-blower report and protection system	Disclosure relating to the anti-corruption code of conduct	Report to the public prosecutor
Legal framework	Articles 6 to 15 of Act 2016-1691 of 9 December 2016	Articles 3(3) and 17(II)(2) of Act 2016-1691 of 9 December 2016	Article 40(2) of the French Code of Criminal Proceedings
Person making the disclosure	- Employee - Civil servant - Public official - Person or entity with an external or occasional working relationship with the entity (temporary staff member, intern, service provider, employee of a subcontractor, etc.)	- Employee/official of the entity *And more generally, any person to whom the entity's anti-corruption code of conduct applies*	- Any constituted authority - Any public officer - Any civil servant
Subject-matter of the disclosure	- Crime - Offence *Where sufficient evidence exists, the crime or offence must be reported to the public prosecutor. However, the person making the disclosure may also file a whistleblowing report in order to enjoy the protections afforded to whistleblowers.* - Clear and serious violation: - of laws and regulations - of an international commitment duly ratified or approved by France - Serious threat or damage to public interest. Exceptions: matters protected by national defence secrecy, medical confidentiality or lawyer-client confidentiality.	- Breach of the entity's anti-corruption code of conduct	- Crime - Offence *Officials are duty-bound to report the matter if they gain knowledge of it in the course of their duties and if sufficient evidence exists.*
Entities required to set up the system	- Public and private legal entities with more than 50 employees - Central government bodies, independent administrative authorities and independent public authorities - Local authorities (including municipalities with a population in excess of 10,000 people) - Local government-funded institutions and government-funded inter-municipal cooperation institutions with tax-levying powers containing at least one municipality with a population in excess of 10,000 people	- All central government bodies - Local authorities - Non-profits and foundations recognised as public-interest entities - Companies and public establishments of an industrial and commercial nature (EPICs) with more than 500 employees and turnover in excess of €100 million	Personal duty incumbent on the public official
Person receiving the disclosure	Whistleblowing officer (level 1 disclosures)	Designated ethics officer or superior	Public prosecutor
Obligation to disclose?	No	Yes, if required by the entity's anti-corruption code of conduct	Yes
Protections	Special protections afforded to whistleblowers	No specific protections (but the person making the disclosure is protected under the rules designed to protect civil servants and public officials, known as "functional protection")	Non-specific protection under the rules designed to protect civil servants and public officials ("functional protection"), but added protection under the rules applicable to whistleblowers if the official uses both channels simultaneously

Note : IIf an official has personal knowledge of a corruption offence, and if sufficient evidence exists, he or she is duty-bound to report the matter to the public prosecutor. Disclosing the matter to his or her superior does not relieve the official of this duty.

> **Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 (published in the Official Journal of the European Union on 26 November 2019)**
>
> Directive (EU) 2019/1937, which entered into force on 16 December 2019, sets common minimum standards ensuring that whistleblowers reporting breaches of Union law (including Union law on public procurement) are adequately protected. Member States must transpose the Directive into domestic law by 17 December 2021.
> décembre 2021.

Legal framework

- Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (published in the Official Journal of the European Union on 26 November 2019).
- Articles 25 and 26 of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.
- Article 2 of the Civil Servant Ethics and Rights and Obligations Act 2016-483 of 20 April 2016 (definition of conflict of interest).
- Article 6 ter (A) of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983.
- Articles 6 to 9 of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016.
- Article L.151-8(2) of the French Commercial Code.
- Decree 2017-564 of 19 April 2017 on whistleblowing systems and procedures in public entities, private entities and central government bodies.
- Circular of 19 July 2018 on whistleblowing reports filed by public officials pursuant to Articles 6 to 15 of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016.
- Ministry of Justice circular of 31 January 2018 on the application of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016.
- French Data Protection Authority (CNIL) deliberation 2019-139 of 18 July 2019 (published in the Official Journal of the French Republic on 10 December 2019).

Appendix 3 Role of the French Anti-Corruption Agency

The **French Anti-Corruption Agency** (AFA) was created by the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016. The agency has nationwide jurisdiction and is placed under the joint authority of the Minister with responsibility for the Budget and the Minister of Justice.

Its role is assist the competent authorities and persons involved in preventing and detecting the offence of corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism (Article 1 of Act 2016-1691 of 9 December 2016). These six offences are known collectively as breaches of the duty of probity.

The AFA's director is a senior judge appointed by the President of the Republic for a non-renewable term of six years. The director may not take or request instruction from any government or administrative authority in the performance of his audit duties.

Advice and assistance

The Agency **compiles and circulates information** useful for preventing and detecting corruption.

The Agency issues **guidelines and recommendations** to help public and private entities prevent and detect corruption.

The Agency **coordinates anti-corruption efforts** across government, at national level, by drawing up and monitoring implementation of a **national, multi-year plan to fight corruption**.

The Agency **assists** central government bodies, local authorities and other entities and individuals.

The Agency delivers **training and awareness sessions** and arranges opportunities to **share best practice.**

The Agency **publishes an annual report**.

International affairs

The Agency helps to **define the position of the French authorities on matters raised in international organisations** that fall within its areas of expertise. It **cooperates** with foreign authorities and offers **technical support and assistance**.

Audits

Private entities
(Article 17 of Act 2016-1691 of 9 December 2016)

Companies and public establishments of an industrial and commercial nature (EPICs) with 500 or more employees and turnover in excess of €100 million

Public entities
(Article 3 of Act 2016-1691 of 9 December 2016)

- Central government bodies
- Local authorities
- Government-funded institutions and semi-public companies
- Non-profits and foundations recognised as public-interest entities

The Agency audits the quality and effectiveness of procedures for preventing and detecting corruption, as required under Articles 3 and 17 of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016:
- anti-corruption code of conduct, internal whistleblowing system, risk mapping, third-party due diligence procedures, accounting control procedures, training programme, disciplinary rules, and internal monitoring and assessment system of the measures implemented.

Self-initiated and externally triggered audits
The Agency carries out audits at its own initiative.

It may also undertake audits:
- at the request of the president of the High Authority for Transparency in Public Life (HATVP), the Prime Minister or a government minister;
- at the request of the representative of the State for local authorities, local government-funded institutions and semi-public companies;
- after receiving a report from an authorised body pursuant to Article 2-23 of the French Code of Criminal Proceedings.

The Agency prepares an audit report outlining its findings and recommendations, if any.

Possible consequences of an AFA audit: private entities

The organisation may be **ordered** to review its internal compliance procedures

A **fine** may be imposed (up to €200,000 for individuals and up to €1,000,000 for legal entities)

Possible consequences of an AFA audit: public entities

An AFA audit does **not give rise to administrative sanctions**

The Agency may **forward the report** to the responsible authority

AFA audits are neither criminal investigations nor formal inspections. The Agency's remit is to verify that anti-corruption measures and procedures are in place, and that they meet the requisite standards for quality and effectiveness.

Impeding an AFA audit is an offence that carries a fine of €30,000.

For more information, visit: https://www.agence-francaise-anticorruption.gouv.fr/fr

Appendix 4 International organisations' recommendations on preventing corruption in public procurement

Addressing corruption in the public procurement cycle is a top priority for international organisations, many of which have adopted binding conventions or directives, or published guidelines and recommendations, in an effort to stamp out the practice and promote a culture of integrity.

1 Organisation for Economic Co-operation and Development (OECD)

OECD Recommendation of the Council on Public Integrity, 2017

The Recommendation provides policy makers with a vision for a public integrity strategy. It calls for measures to enhance public integrity, which it defines as a "shared mission and responsibility for all levels of government".

The Council recommends a "coherent and comprehensive integrity system" based on four pillars:

- demonstrate commitment at the highest political levels;
- clarify institutional responsibilities;
- develop a strategic approach aimed at mitigating public integrity risks;
- set high standards of conduct for public officials.

https://www.oecd.org/gov/ethics/OECD-Recommendation-Public-Integrity.pdf

In pursuit of these aims, the Council recommends cultivating a culture of public integrity, including by ensuring public officials are skilled and trained to apply integrity standards, establishing risk management, external control and reporting systems, sanctioning corruption, and instilling transparency.

OECD Recommendation of the Council on Public Procurement, 2015

The OECD Recommendation on Public Procurement is described as a reference for modernising procurement systems. It addresses the entire procurement cycle. The Recommendation builds upon the foundational principles of the 2008 OECD Recommendation on Enhancing Integrity in Public Procurement.

It gives a definition of public integrity[85] and recommends that Adherents preserve the integrity of the public procurement system through general standards and procurement-specific safeguards.

https://www.oecd.org/gov/ethics/OECD-Recommendation-on-Public-Procurement.pdf

The OECD Council recommends that Member countries should:

- require high standards of integrity for all internal parties in the procurement cycle (managing conflict of interest, standards of professional behaviour);
- implement general public sector integrity tools;
- develop integrity training programmes for the procurement workforce, both public and private;
- develop requirements for internal controls, compliance measures and anti-corruption programmes for suppliers;
- develop risk assessment tools and deploy risk management strategies;
- develop an internal audit and control system;
- develop a system of effective and enforceable sanctions;
- ensure that procurement officials meet high professional standards for knowledge, practical implementation and integrity.

OECD Public Procurement Toolbox

The OECD has published an online resource to help entities implement the OECD Recommendation of the Council on Public Procurement. The toolbox includes:

Details of the 12 principles on public procurement (transparency, integrity, access, balance, etc.), plus further discussion on their importance and access to country examples.

Case studies and examples of best practice taken from compendiums and information submitted by the Working Party of the Leading Practitioners on Public Procurement, arranged by country.

Details of the OECD Methodology for Assessing Procurement Systems (MAPS), along with evaluations and key performance indicators (KPIs).

Link: https://www.oecd.org/gov/public-procurement/

[85] "Integrity refers to the use of funds, resources, assets and authority, according to the intended official purposes and in a manner that is well informed, aligned with the public interest, and aligned with broader principles of good governance."

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997, ratified by France in 2000)

The OECD Anti-Corruption Convention is the first international anti-bribery instrument. It deals specifically with bribery in public procurement. Parties to the Convention agree to establish the bribery of foreign officials as a criminal offence under their laws.

The Convention recommends that Member countries apply procurement sanctions to companies convicted of violating laws against bribery.

The Convention also recommends that training of all staff involved directly in public procurement and oversight should go beyond the internal ethics regime, to include corruption risk identification, assessment and mitigation approaches.

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

2 Council of Europe

Congress of Local and Regional Authorities – Report CG33(2017)13 of 19 October 2017: Making public procurement transparent at local and regional levels.

In its report, the Congress of Local and Regional Authorities examines systematic problems in local and regional government procurement and invites local and regional authorities to:

- set up internal controls and evaluation mechanisms;
- enhance transparency by publishing data and procurement details at all stages of the process, in order to encourage public scrutiny;
- assess the different corruption risks involved in procurement;
- provide training to politicians and officials with oversight of procurement in the ethical risks associated with their conduct;
- develop clear rules about what constitutes a conflict of interest for officers and elected members involved in procurement in any way, which should at least require disclosure of conflicts and recusal from decision-making processes, and to regulate post-public employment;
- introduce codes of conduct for all those involved in the procurement process, to make clear the ethical standards expected of them. These would include, for example, a prohibition on accepting rewards, gifts and other advantages;
- define reporting procedures which ensure that reports are treated confidentially and that a person cannot be harmed for reporting suspicions of wrongdoing.

Link: https://rm.coe.int/making-public-procurement-transparent-at-local-and-regional-levels-gov/168074cf72

Criminal Law Convention on Corruption, 27 January 1999 (ratified by France in 2008)

The Criminal Law Convention on Corruption criminalises a large number of corrupt practices. Member States are required to provide for dissuasive sanctions and measures for various types of corruption, including bribery of domestic and foreign public officials. The Convention also provides for enhanced international cooperation in the investigation and prosecution of corruption offences.

Link: https://rm.coe.int/168007f3f5

Committee of Ministers Resolution 97 (24) on the twenty guiding principles for the fight against corruption (6 November 1997).

The Resolution sets out 20 guiding principles, building on the Declaration adopted at the Second Summit of Heads of State and Government in 1997, which established an Action Plan including a section on “Fighting corruption and organised crime”. Principle 14 calls for “appropriately transparent procedures for public procurement that promote fair competition and deter corruptors”. The Committee of Ministers also calls on national authorities to give effect to these principles by applying them “in their domestic legislation and practice”.

Link: https://rm.coe.int/16806cc17c

3 European Commission and European Parliament

Communication from the Commission: Making Public Procurement work in and for Europe (3 October 2017)

The Commission calls for the professionalisation of public buyers and greater transparency and integrity in public procurement in order to strengthen compliance with the 2014 EU public procurement directives.

Link: https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-572-F1-EN-MAIN-PART-1.PDF

Commission Recommendation (EU) 2017/1805 of 3 October 2017 on the professionalisation of public procurement

The Commission calls on Member States to "support and promote integrity, at individual and institutional level, as an intrinsic part of professional conduct, by providing tools to ensure compliance and transparency and guidance on prevention of irregularities". Recommendations include establishing codes of ethics, using data on irregularities, developing specific guidance and training, and establishing whistleblowing channels.

Link: https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:32017H1805&from=IT

Directives du Parlement européen et du Conseil sur la passation des marchés publics (2014)

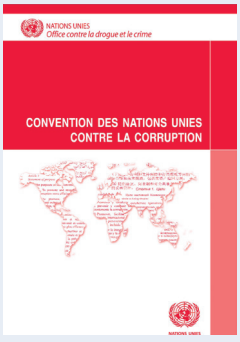
La passation des marchés publics et des concessions par les autorités des Etats membres doit être conforme aux principes du traité sur le fonctionnement de l'Union européenne. Ainsi, les procédures doivent prendre en compte le principe de transparence, duquel découle celui d'intégrité. La notion de corruption est directement visée, dans les textes, notamment dans le choix de la procédure et les motifs d'exclusion des participants. Les textes européens qualifient notamment d'irrégulière toute offre comportant des éléments manifestes de collusion ou de corruption.

Le document : https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32014L0024&from=FR

4 United Nations

United Nations Convention against Corruption recalling General Assembly resolution 58/4 of 31 October 2003 (ratified by France in 2005)

The stated aim of the Convention is to "promote and strengthen measures to prevent and combat corruption more efficiently and effectively". It calls on each State Party to ensure the existence of a "preventive anti-corruption body", and to apply "codes or standards of conduct" for public officials. Article 9 requires States Parties to "establish appropriate systems of procurement" that are effective in preventing corruption. It also calls for mutual legal assistance between States Parties "in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention".



https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

GLOSSARY

A

ANTI-CORRUPTION

A concept used to describe policies designed to stamp out corruption, i.e. all measures that an entity takes to prevent and punish corrupt practices. The Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016 introduced a requirement for public entities and some companies to implement an anti-corruption programme.

ANTI-CORRUPTION PROGRAMME

A set of corruption prevention and detection measures that large companies and public entities are required to implement under the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016. An anti-corruption programme is coherent set of measures, endorsed by top management, designed to manage corruption risk. These include risk mapping, an anti-corruption code of conduct, third-party due diligence procedures, a training programme, an internal whistleblowing system, internal audit and control, disciplinary rules, and an internal monitoring and assessment system. The programme follows the structure set out the French Ant-Corruption Agency guidelines.

ANTI-CORRUPTION SYSTEM

See *anti-corruption programme*

ANTI-CORRUPTION PROGRAMME

A set of measures and procedures for preventing and detecting corruption. The content of the programme is defined by Article 17 of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016, and further clarification is given in the recommendations and guidelines published by the French Anti-Corruption Agency (AFA). An anti-corruption programme contains eight measures and procedures:

- a code of conduct;
- an internal whistleblowing system;
- a risk map;
- third-party due diligence procedures;
- accounting control procedures;
- a training programme
- disciplinary rules;
- an internal monitoring and assessment system.

The AFA's Charter of Rights and Duties states that the rules for large companies and EPICs should apply equally to public entities and to non-profits and foundations recognised as public-interest entities, which are expected to implement an anti-corruption programme that includes the eight measures and procedures.

AWARD CRITERIA

A set of objective characteristics that a contracting authority looks for when evaluating tenders for a public contract. Article L.2152-7 of the French Public Procurement Code states that the contract should be awarded to the tenderer (or tenderers) submitting the tender offering the best value for money, as assessed against one or more objective, precise criteria relevant to the subject-matter of the contract or its performance terms.
(Source: Article L.2152-7 of the French Public Procurement Code)

B

BUYER PROFILE

An online portal where buyers can upload tender documents for economic operators to download, and where candidates and tenderers can submit application and bid documentation (e.g. PLACE, France's national public procurement platform).
(Source: Directorate for Legal Affairs (DAJ), Le guide très pratique de la DAJ sur de la dématérialisation des marchés publics)

C

CANDIDATE

An economic operator that requests or is invited to participate in a public procurement procedure.
(Source: Article L.1220-2 of the French Public Procurement Code)

CIVIL SERVANT

A person recruited through competitive exams (other than in certain cases, such as civil servants recruited at grade C) for a permanent post in central government, in a government-funded administrative institution or, in exceptional cases, in a public establishment of an industrial and commercial nature (EPIC).
Most civil servants are governed by the general civil service regulations laid down in the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983. Separate rules and frameworks apply to civil servants employed by parliament (Senate and National Assembly), to judges and to military personnel.
The French civil service is mainly made up of tenured civil servants working across three branches: central government, local government and public hospitals. The term "civil servant" also covers probationary officers who have not yet been granted tenure.
(Source: Definition given by the Department General for Administration and the Civil Service (DGAFP))

COMPLIANCE

Measures taken by an entity and its managers in order to comply with legal requirements, and with any other standard or framework where failure to meet or comply with the relevant obligations could have negative consequences for the entity and its managers, including financial loss, loss of reputation, and civil and criminal prosecution.
(*Adapted from the definition of "compliance" proposed by B. Fasterling, "Compliance – Vers une formalisation", in C. Roquilly, La contribution des juristes et du droit à la performance de l'entreprise, Joly éditions, 2011*)

CONFLICT OF INTEREST

Any situation of interaction between a public interest and public or private interests that could influence or appear to influence the independent, impartial and objective performance of a duty.
(*Source: Article 2 of the Transparency in Public Life Act 2013-907 of 11 October 2013, restated in the Civil Servant Ethics and Rights and Obligations Act 2016-483 of 20 April 2016*)

CONTRACTING AUTHORITY

Any entity subject to public procurement rules, including:

- public entities;
- private entities established specifically to meet a public-interest need of an industrial or commercial nature and that satisfy one of the following three criteria: (a) the entity's activity is financed, for the most part, by a contracting authority; or (b) the entity is subject to management supervision by a contracting authority; or (c) more than half of the members of the entity's administrative, management or supervisory body are appointed by a contracting authority;
- private bodies which are legal entities in their own right and are established by contracting authorities for the purpose of performing certain joint activities (this definition applies to the buyer as a legal person).

(Source: Article L.1211-1 of the French Public Procurement Code)

CONTRACTING ENTITY

All entities subject to public procurement rules, including:

1. contracting authorities performing a network operator activity;
2. public undertakings which are not contracting authorities but perform a network operator activity;
3. private entities which are not contracting authorities or public undertakings but which are legally vested with special or exclusive rights to perform these activities, such rights having the consequence of materially affecting the ability of other economic operators to perform these activities.

(See Article L.1212-1 of the French Public Procurement Code)

CONTRACTOR

An economic operator that signs a public contract for works, supplies or services with a contracting authority or entity.

CORRUPTION

A general term encompassing the following offences, as set out in Articles 432-10 to 432-17 of the French Criminal Code:

- extortion by public officials;
- the offence of corruption and influence-peddling;
- unlawful taking of interest, and unlawful taking of interest by former public officials (post-public employment);
- breaches of the statutory or regulatory provisions designed to ensure freedom of access and equal treatment of candidates for public contracts and delegated public services (favouritism);
- destruction and misappropriation of public funds or assets.

See pp.112-128 (Appendix 1) for a fuller definition

(THE OFFENCE OF) CORRUPTION

An act whereby a public official solicits or accepts any advantage in return for carrying out or abstaining from carrying out an act relating to their office. The offence of corruption is established by Articles 433-1(1) and 432-11(1) of the French Criminal Code. There are various types of corruption, involving a French public official, an employee of a private company, a foreign or international public official, or a judge. "Active" corruption refers to the actions of the bribe-giver, while "passive" corruption refers to the actions of the bribe-taker.
(See p.112 for a fuller definition)

D

DECISION-MAKER (IN THE PUBLIC PROCUREMENT CYCLE)

A public official or elected representative who:

- acts as the legal representative of the contracting authority or entity;
- has the authority to sign public contracts and, therefore, enter into legally binding commitments on behalf of the contracting authority or entity;
- as a member of the top management team, promotes ethical practices and measures to prevent corruption in the procurement cycle.

DECLARATION OF ASSETS

A document that provides a snapshot of an individual's financial situation at a given point in time. The Transparency in Public Life Act 2013-907 of 11 October 2013 extended the requirement to file a declaration of assets to certain elected officials and elected representatives. The requirement is also mentioned in the Civil Servant Ethics and Rights and Obligations Act 2016-483 of 20 April 2016. The declaration is filed twice: once when the official or representative takes office and again when he or she leaves office. It therefore shows how the individual's financial situation has changed while in office.
The assets that must be declared include property, transferable securities, life insurance policies, bank accounts, vehicles, loans and debts.
Failing to file a declaration or deliberately filing a misleading declaration is an offence that carries a sentence of three years' imprisonment, a fine of €45,000, plus additional discretionary penalties (disqualification from standing for election for 10 years and a ban on holding public office).

DECLARATION OF INTERESTS

A document in which an individual declares all his or her activities, duties, offices and shareholdings, including details of any family, personal, business and financial relationships. The Transparency in Public Life Act 2013-907 of 11 October 2013 introduced a requirement for certain elected officials and elected representatives to declare their interests. The requirement is also mentioned in the Civil Servant Ethics and Rights and Obligations Act 2016-483 of 20 April 2016. Failing to file a declaration or filing an incomplete declaration is an offence that carries a sentence of three years' imprisonment, a fine of €45,000, plus additional discretionary penalties (disqualification from standing for election for 10 years and a ban on holding public office).

DEFENCE AND SECURITY CONTRACTS

Contracts concluded by central government or a central government-funded institution for one of the following purposes:

- the supply of equipment, including any parts, components and sub-assemblies, specifically designed or adapted for military purposes and intended for use as arms, munitions or war material;
- the supply of equipment for security purposes, including any parts, components and sub-assemblies, involving, requiring or containing classified information;
- works, supplies and services relating directly to the equipment mentioned in (1) or (2), including the supply of specific tools, test facilities or support for the whole life cycle or part of the life cycle of the equipment. For the purpose of this paragraph, the life cycle of the equipment means all successive stages of the life of the equipment, i.e. research and development, industrial development, production, repair, modernisation, modification, maintenance, logistics, training, testing, withdrawal, dismantling and disposal.
- works and services specifically for military purposes, or works and services for security purposes involving, requiring or containing classified information.

(Source: Article L.1113-1 of the French Public Procurement Code)

DUE DILIGENCE

See *THIRD-PARTY DUE DILIGENCE*

E

ECONOMIC OPERATOR

Any public or private natural or legal person, or any group of persons endowed with legal personality or not, which offers on the market to execute works, supply products or provide services.
An economic operator that requests or is invited to participate in a public procurement procedure is known as a "candidate".
(Source: Article L.1220-1 of the French Public Procurement Code)

ETHICS OFFICER

An individual or committee appointed to provide advice and guidance to public officials on complying with the rules on professional ethics as laid down in the general civil service regulations, including the duty on civil servants to carry out their duties with impartiality, integrity and probity. Article 28 bis of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983 states that all public officials are entitled to consult a ethics officer. Any central government body, local authority or government-funded institution may appoint a ethics officer (individual or committee).

EXCLUSION GROUNDS

Valid reasons for a buyer to exclude a candidate from tendering for or performing a public contract. Exclusion grounds fall into two categories:

- mandatory exclusion grounds (Articles L.2141-1 to L.2141-6 of the French Public Procurement Code), which relate to specified offences or measures imposed by an external authority (such as criminal convictions, breaches of tax and social security obligations or court-ordered reorganisation proceedings);
- discretionary exclusion grounds (Articles L.2141-7 to L.2141-11 of the French Public Procurement Code), which concern practices or concerns uncovered by the buyer in charge of the procedure, or by another buyer in the course of a separate procedure.

(See "Third-party due diligence", p.50 onwards)

EXTORTION BY PUBLIC OFFICIALS

An act whereby a public official profits from his or her position by accepting payment of a sum known not to be due or by abstaining from accepting payment of a sum known to be due. The offence of extortion by public officials is established by Article 432-10 of the French Criminal Code.

(See p.127 (Appendix 1) for a fuller definition)

F

FAVOURITISM

An offence committed by a public official or elected representative who obtains or attempts to obtain an unjustified advantage for a company by an act breaching the rules on freedom of access to public procurement and equal treatment of candidates. The offence of favouritism is established by Article 432-14 of the French Criminal Code.

See p.118 for a fuller definition

FRENCH PUBLIC PROCUREMENT CODE

A codification of established law (ordinances and decrees) on public procurement and delegated public services. The code, which entered into force on 1 April 2019, is designed to simplify and unify existing statutory and regulatory provisions.

G

GRANTING OF AN UNJUSTIFIED ADVANTAGE

See *FAVOURITISM*

I

IMPARTIALITY

The general civil service regulations (Articles 25 to 28 of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983) require civil servants to carry out their duties with impartiality. In practice, this principle implies that public-sector decision-making must not intentionally favour one individual or entity (public or private) over another.

INFLUENCE PEDDLING

An act whereby a public official solicits or accepts an advantage in return for using their influence to obtain a favourable decision from a public body or administration. The offence of influence peddling is established by Articles 433-1(2) and 432-11(2) of the French Criminal Code.
(See p.115 for a fuller definition)

INTEGRITY

The general civil service regulations (Articles 25 to 28 of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983) require integrity in the public service. In practice, this principle implies that an entity's funds, resources, assets and authority must be used according to the intended official purposes and in a manner that is well informed, aligned with the public interest, and aligned with broader principles of good governance.
(Source: OECD Recommendation of the Council on Public Procurement)

INTERNAL AUDIT

Independent, objective assessments intended to provide the organisation with assurance that it is managing its operations properly, to advise on improvements, and to ensure that internal control procedures are sufficiently robust.
(Source: Central Government Internal Audit Harmonisation Committee, Normes de qualification et de fonctionnement du cadre de référence de l'audit interne dans l'administration de l'État; see "Internal audit and control", p.62)

INTERNAL CONTROL

In central government bodies, a set of documented, permanent systems for managing risks associated with the achievement of each ministry's objectives.
(Source: Article 1 of Decree 2011-775 of 28 June 2011 on internal audit in the administration. See "Internal audit and control", p.62)

INTERNAL WHISTLEBLOWING SYSTEM

A procedure by which officials can report breaches of an entity's anti-corruption code of conduct to their superior or to a designated officer. The system includes measures for detecting, addressing and ending such breaches, and for imposing sanctions where applicable.
(See "Whistleblowing and reporting systems", p.66)

M

MISAPPROPRIATION OF PUBLIC FUNDS OR ASSETS

The destruction, misappropriation or purloining, by a public official, of public funds or assets entrusted to them as part of their function or tasks. The offence of misappropriation of public funds is established by Articles 432-15, 432-16 and 433-4 of the French Criminal Code.
(See p.124 for a fuller definition)

MULTIPLE JOB-HOLDING

As a matter of principle, public officials (permanent and contract civil servants) are expected to devote themselves exclusively to their public duties. They may be authorised to hold another (paid or unpaid) job, provided that they meet certain conditions.

A list of jobs that officials may hold in addition to their public duties is given in Decree 2017-105 of 27 January 2017 on the holding of private-sector jobs by government employees and certain contract employees subject to private sector labour law after their government employment ends, on multiple job-holding and on the Civil Service Ethics Commission. The decree clarifies the role of the Civil Service Ethics Commission, which issues opinions and makes recommendations on multiple job-holding.

The Civil Service Transformation Act 2019-828 of 6 August 2019 amended Article 25 octies of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983 by transferring the duties previously entrusted to Civil Service Ethics Commission to the High Authority for Transparency in Public Life (HATVP) with effect from 1 February 2020. Under the new rules, any official intending to leave their post temporarily or permanently to take up a paid job must request authorisation from his or her superior, who will assess whether the job is compatible with the official's duties in the three years prior to the proposed start date. The superior should raise any specific concerns with the entity's ethics officer. If doubts persist, the superior must refer the matter to the HATVP. If the official in question holds a senior position or performs specific duties (as laid down in a Conseil d'Etat decree), the superior must refer the request to the HATVP for a decision. Failing that, the official may refer the matter directly to the HATVP. The HATVP now has the power to enforce its decisions.
(See "Practical guidance for internal parties in the procurement cycle", p.95)

N

NEGOTIATED PROCEDURE

A procedure in which one or more pre-selected economic operators are invited to submit initial tenders and to negotiate the terms of the public contract with the buyer. Contracting authorities are permitted to use negotiated procedures in certain limited circumstances set out in Article R.2124-3 of the French Public Procurement Code. There are strict rules governing the use of this type of procedure, and contracting authorities that do so must be able to prove that the relevant criteria are met.
(Source: Directorate for Legal Affairs (DAJ) technical guidance: La procédure avec négociation)

NEUTRALITY

The general civil service regulations (Articles 25 to 28 of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983) require civil servants to adhere to the principle of neutrality in the performance of their duties. In practice, this principle implies that all citizens must be treated equally regardless of sex, origin or religious or political beliefs, and that civil servants must refrain from expressing their personal opinions.
When applied to public procurement, neutrality implies that value for money should be the only objective guiding spending decisions in relation to a public contract.

NOTIFICATION OF CONTRACT AWARD

The process by which the contracting authority sends a copy of the signed contract to the winning tenderer, by any means allowing a specific date to be established. Notification of contract award is mandatory pursuant to Article R.2182-4 of the French Public Procurement Code. The contract becomes effective on the date of receipt.

O

OPEN DATA

Raw data that anyone can access, use or share, and that is published in a format governed by international standards.
In order to qualify as "open", data must be complete, primary, timely, accessible, machine-processable, non-discriminatory, non-proprietary, license-free, online, permanent and free.
In public procurement, these principles are reflected in the requirement to publish essential data.

P

PAPERLESS WORKFLOW

All correspondence relating to public contracts with an estimated value of €40,000 (excluding VAT) or more must now be paperless. Other than in the exceptional cases, this rule applies publishing tender documents, submitting applications and bids, submitting questions and publishing answers, and publishing decisions and associated notices. Defence and security contracts are exempt from the paperless workflow requirement.

PENALTY (IN PUBLIC PROCUREMENT)

A financial sanction written into a contract in order to dissuade the contractor from breaching the contractual terms.
A contractor may be required to pay a penalty for any breach of its obligations under a public contract. Penalties are expressed in lump-sum monetary value and apply instead and in place of damages.
(Source: Directorate for Legal Affairs (DAJ) technical guidance: Les pénalités dans les marchés publics)

PERFORMANCE REVIEW

A mid-contract or post-contract exercise that considers operations performed, examines deviations from the initial cost estimate and the reasons for such deviations, and reviews major events occurring during contract performance (addenda, penalties, etc.). The review may also examine ethical aspects. The review should be a collective exercise and detailed records should be kept.

PROBITY

The general civil service regulations (Articles 25 to 28 of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983) require civil servants to carry out their duties with impartiality. In practice, this principle implies that civil servants must at all times conduct themselves with propriety, fulfil their duties and comply with the law. This requirement supplements the obligation on civil servants to devote themselves exclusively to their public duties.
(See also: CORRUPTION*)*

PROCUREMENT CATEGORY

A group of related goods or services, as determined by the characteristics of the goods or services themselves and the supplier market. Contracting authorities and entities use categories to develop procurement classification systems, and as benchmarks for calculating thresholds and setting wider procurement strategies

PROJECT MANAGER

The project manager is the natural or legal person, public or private, that by reason of its technical expertise is commissioned by the project owner or its representative to oversee the performance of contracts for works, to propose payment for such works, and to assist the project owner during sign-off of the works and during the completion guarantee period.
(Source: Article 2 of the General Administrative Terms and Conditions applicable to Public Contracts for Works)

PROJECT OWNER

The person on whose behalf construction or other works are performed. In public procurement, the contracting authority typically acts as the project owner, although an economic operator may be appointed to fulfil the role for particularly complex contracts. The project owner's tasks and duties are set out in Article L.2421-1 of the French Public Procurement Code.

PROJECT-OWNER ASSISTANT

A public or private individual or entity providing consultancy services in support of a procurement procedure. The project-owner assistant's involvement in the preparation phase should not have the effect of distorting competition. In accordance with Article L.2141-8 of the French Public Procurement Code, a buyer may exclude from the procedure any person who "through their prior direct or indirect participation in preparing the procurement procedure, had access to information that could distort competition with regard to other candidates, where such a situation cannot be remedied by other means".

PUBLIC CONTRACT

A contract concluded by one or more buyers, subject to the French Public Procurement Code, with one or more economic operators, in order to satisfy a requirement for works, supplies or services, in return for a pecuniary or similar interest.
(Source: Article L.1111-1 of the French Public Procurement Code)

PUBLIC OFFICIAL

A person holding public office or performing public duties. A public official may fall into one of several categories (permanent civil servants, probationary officers and contract civil servants). All public officials are bound by rules on professional ethics and by the general civil service regulations.

PUBLIC PROCUREMENT

All purchases made (including through public contracts) by central government bodies, local authorities and local government-funded institutions, public entities, semi-public companies and social security bodies, in order to satisfy their requirements and the requirements of public service users and beneficiaries of public policy.

The term also refers to all contracts concluded for pecuniary interest by a buyer or contracting authority, for works, supplies and services, with one or more economic operators. Here, "contracts" covers public contracts and delegated public service contracts as defined in Part I, Book I of the French Public Procurement Code, irrespective of their designation. These contracts are governed by the code and, where relevant, by special provisions.
(See Article L.2 of the French Public Procurement Code)

PUBLIC PROCUREMENT CYCLE

A term designating the successive and/or interrelated phases of a procurement procedure, including:

- preparation: sourcing, benchmarking, requirement definition, procedure selection, tender writing;
- procurement: publication, application and bid review, contract award and notification of award;
- performance: monitoring of service delivery, in-contract amendments (if any), etc.

(See diagram of the public procurement cycle, p.7)

PUBLIC-SECTOR BUYER

For the purpose of this guide, a "public-sector buyer" is a person who defines and implements procurement strategies in order to satisfy internal qualitative and quantitative requirements and to improve procurement performance in accordance with public procurement law. Public-sector buyers lead procurement projects, monitor project execution and measure performance, and carry out business intelligence (including analysing supplier markets). They promote available markets to users and measure their level of satisfaction. They coordinate the requirement definition phase, working in tandem with specifiers and procurement officers. Where public-sector buyers are responsible for the contractualisation procedure, they write the tender documents, review bids, negotiate with tenderers (where relevant) and select the winning bids.
(Source: Guide de l'achat public: Le sourcing opérationnel *(available in French only))*

R

RECUSAL

The process by which a public official or elected representative who has a conflict of interest abstains from involvement in a situation or from carrying out certain acts relating to his or her office. The recusal rules and procedures as they apply to public officials are set out in Article 25 bis of the Civil Servants Rights and Obligations Act 83-634 of 13 July 1983, while the arrangements for elected representatives are provided for in Articles 5 and 6 of Decree 2014-90 of 31 January 2014 implementing Article 2 of the Transparency in Public Life Act 2013-907 of 11 October 2013.

RISK MAPPING

Risk mapping is the action of identifying, assessing, prioritising and managing risks that are inherent in an organisation's activities. Corruption risk mapping has two interrelated objectives. The first is to identify, assess, prioritise and manage corruption risks to ensure that the anti-corruption programme is effective and appropriate for the business models of the organisations concerned. The second is to inform top management and provide those responsible for compliance with the clear vision of risks needed to implement prevention and detection measures that are proportionate to the risks identified in the risk mapping exercise. Article 17 of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016 introduced a requirement for certain organisations to prepare a risk map, which it defines as "a regularly updated document that identifies, analyses and prioritises the entity's exposure to solicitations for corrupt purposes, including on the basis of the geographical area where the entity is doing business and the business sector in which it operates".
(Source: AFA recommendation: risk mapping. See "Risk mapping", p.30)

RULES ON PROFESSIONAL ETHICS

A framework setting out the rules, obligations and values governing the conduct of all members of a given profession, or of individuals performing a specific function.
Article 1 of the Civil Servant Ethics and Rights and Obligations Act 2016-483 of 20 April 2016, amending the provisions of Article 25 Civil Servants Rights and Obligations Act 83-634 of 13 July 1983, introduced into the general civil service regulations a requirement for officials to fulfil their duties with dignity, impartiality, integrity and probity, and to adhere to the principles of neutrality and secularism.
(Source: National Association of Directors and Deputy-Directors of Local Civil Service Management Centres, La déontologie dans la fonction public territoriale*)*

S

SOURCING

The process by which buyers review the supplier market. At the sourcing stage, buyers typically look at market structure (suppliers and degree of competition), cost structures and business models, methods and processes, innovation and market trends, as well as the subcontractors, component manufacturers and other businesses and organisations involved in the supply of a particular product or service.
After actively reviewing the market, buyers will contact potential suppliers for further information about the products or services they provide and to learn more about their methods and expertise. Sourcing is carried out before a contract is put out to tender.
(Source: Department for Public Procurement (DAE), Guide de l'achat public: Le sourcing opérationnel*)*

SPECIFICATIONS

A contractual document detailing the contracting authority's requirements and the terms and conditions that apply to a procurement procedure. In public procurement, these requirements, terms and conditions are typically set out in two documents: the special administrative terms and conditions and the special technical terms and conditions. In some cases, they may be combined into a single document (known simply as the special terms and conditions).

SPECIFIER

An official whose task is to determine the technical requirements of the contract, on his or her own behalf or on behalf of other persons. Specifiers often work in operational/client departments and may assist buyers by:

- helping to write tender documents;
- participating in bid review;
- supporting technology and business intelligence activities;
- recommending cost efficiencies and other improvements in the procurement cycle;
- contributing to procurement performance review.

SPLITTING

A practice by which procurement projects are artificially divided into smaller sub-projects in order to bypass stricter publication and competitive tendering requirements (also known as "salami-slicing").

SUBCONTRACTOR

An individual or legal entity to whom the execution of part of the obligations of a public contract is assigned. The contractor remains solely liable to the public entity for the performance of the services.
Proposed subcontractors and the associated payment arrangements must be submitted to the buyer for approval.
(Source: Glossary of the Official Bulletin of Publication of Public Procurement Notices (BOAMP))

SWORN STATEMENT

A document supplied by a candidate for a public contract certifying that it is not subject to one or more of the mandatory exclusion grounds mentioned in Articles L.2141-1 and L.2141-4(1) and (3) of the French Public Procurement Code, and that it is therefore eligible to bid for the contract.
Various templates are available for this purpose, such as forms DC1 and DC4, or the European Single Procurement Document (ESPD).
(See Articles R.2143-6 and R.2343-8 of the French Public Procurement Code)

T

TENDERER

An economic operator that bids for a public contract.
(Source: Article L.1220-3 of the French Public Procurement Code)

TENDER COMMITTEE

In local authorities and local government-funded institutions, the tender committee is a collective body of voting and, in some cases, non-voting members. The committee has authority to award public contracts. See, inter alia, Article L.1414-2 of the French Local Authority Code.

THIRD PARTY

A natural or legal person external to an entity. The entity (the contracting authority or entity in the case of public procurement) carries out third-party due diligence to assess the risk inherent in starting or continuing a business relationship with the third party.
For the purpose of third-party due diligence in public procurement, a public entity's economic operators include candidates, tenderers, contractors and subcontractors. Any economic operator that participates in the tender (such as a project-owner assistant, a project manager or a consultancy firm) is also considered a third party.
(See "Third-party due diligence", p.48)

THIRD-PARTY DUE DILIGENCE

A process by which an entity gathers information and documentation about a third party so as to identify and assess the corruption risk exposure that it incurs by initiating or continuing a relationship with the third party in question.
For the purpose of third-party due diligence in public procurement, a public entity's economic operators include candidates, tenderers, contractors and subcontractors. Due diligence may be carried out during the procurement phase (leading to potential disqualification of candidates) and throughout the procurement cycle (leading to an adjustment of the terms of the relationship with the third party).
(Source: AFA recommendation: Third-party due diligence procedures. See "Third-party due diligence", p.48)

TOP MANAGEMENT

An entity's most senior representatives and members of its collective leadership body, whether elected or appointed.
See "Top management's commitment to preventing and detecting corruption", p.25

TOP MANAGEMENT'S COMMITMENT

A decision by executives or elected representatives to promote a culture of integrity, transparency and compliance within an organisation, and to deploy an anti-corruption programme. One way for top management to signal this commitment is by endorsing the entity's corruption prevention and detection system. Top management should also:

- adopt and enforce a zero-tolerance policy towards corruption;
- mainstream anti-corruption measures in the entity's procedures;
- ensure that the resources allocated to preventing and detecting corruption are proportionate to the risks;
- adopt an appropriate communication policy.

(Source: AFA recommendation: Top management's commitment to preventing and detecting corruption. See "Top management's commitment to preventing and detecting", p.25)

U

UNLAWFUL TAKING OF INTEREST

The taking, receiving or keeping of a personal interest in a business or business operation by a public official who at the time in question has the duty of ensuring its supervision, management, liquidation or payment. The offence of unlawful taking of interest is established by Articles 432-12 and 432-13 of the French Criminal Code).
(See pp.120-123 (Appendix 1) for a fuller definition)

UNLAWFUL TAKING OF INTEREST BY FORMER PUBLIC OFFICIALS

A criminal offence by which a former public official who, in the performance of his or her duties, is entrusted with the supervision or control of a private undertaking, or with the conclusion of contracts with a private undertaking, or with giving an opinion on the operations of a private undertaking, and who by work, advice or investment takes or receives a participation in such an undertaking before the expiry of a period of three years following the end of his or her office. The offence of unlawful taking of interest by former public officials is established by Article 432-13 of the French Criminal Code.
(See p.122 (Appendix 1) for a fuller definition)

W

WHISTLEBLOWER

A natural person who reveals or reports disinterestedly and in good faith, a crime or an offence, a clear and serious violation of an international commitment duly ratified or approved by France, of a unilateral act by an international organisation pursuant to such a commitment, or of laws and regulations, or a serious threat or damage to public interest, of which he or she has personal knowledge.
(Source: Article 6 of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016)

GUIDE MANAGEMENT TEAM

GUIDE MANAGEMENT TEAM

Sandrine JARRY
Lead
Director, Public Sector Advisory
French Anti-Corruption Agency (AFA)

Pierre VILLENEUVE
Lead
Director, Brittany Regional Procurement Centre

Pierre-Mickaël DEBAIFFE
Project Manager, Public Procurement Guides
Department for Public Procurement (DAE)

PROJECT TEAM

Anne-Claire FOREAU
Lead Buyer
Department for Public Procurement (DAE)

Claire MOULIÉ
Head of Sector
French Anti-Corruption Agency (AFA)

Antoine JOCTEUR-MONROZIER
Deputy Director, Public Sector Advisory
French Anti-Corruption Agency (AFA)

Mario TORTORICI
Legal Expert, Ministry of Justice

Marjolaine GARONNAIRE
Trainee, Public Sector Advisory
French Anti-Corruption Agency (AFA)

Stéphane PETIT
Director, Quality, SMEs and Innovation
Ministry for the Armed Forces

Philippe MONDON-GUILHAUMON
Expert Adviser to the General Rapporteur of the Military Ethics Committee, and Ministerial Compliance and Whistleblowing Officer
Ministry for the Armed Forces

Karim TAKEZNOUNT
Director, Procurement Division
Ministry of Justice

Olivier BERARD
Senior Vice-President, Procurement and Innovation
French National Centre for Scientific Research (CNRS)

Julia LAVIGNE
Research Officer
Ile-de-France Regional Council

Sonia GIBON
Chief Procurement Officer
Yvelines Sud Regional Hospital Group

Interministerial procurement portal
(interministerial intranet)
https://dae.alize.finances.rie.gouv.fr/sites/sae/accueil.html

Website: http://www.economie.gouv.fr/dae

https://www.agence-francaise-anticorruption.gouv.fr

CONTACT
Department for Public Procurement
Immeuble Grégoire
59 Boulevard Vincent Auriol
Télédoc 033
75572 Paris Cedex 13
France

communication.dae@finances.gouv.fr

Retrouvez notre actualité sur :