

# 政治公众人物 政策 VS. 地区贪污

政治公众人物是合规问题中的一个常见主题。闲话少叙，我们直奔主题。随着合规专员的职责范围不断扩大，这个问题越发常见，令人不堪其扰。

首先，要制定一份既详尽又准确的“官方”政治公众人物名单并非易事。法国的监管机构似乎不愿公布该国的名单，但并不排斥接受外部情报机构提供的政治公众人物数据库。

其次，政治公众人物都非同一般。这些人涉及贪污犯罪的可能性较高，至少高于非政治公众人物。一旦确认后，所有汇报方都会对他们的财产、资产和财富进行调查<sup>1</sup>，以搜寻贪污的证据。据法律规定，任何政治公众人物相关的可疑活动均须汇报给国家有关部门。

## 政治公众人物概念的由来

政治公众人物这一概念起源于非洲，具体而言是 Abacha 事件。<sup>2</sup> 上世纪 90 年代末，尼日利亚独裁者 Sani Abach 将公共资金（其中包括开发援助资金）挪作私用。Abacha 在亲朋好友的帮助下实施了贪污。据说他在英国和瑞士两地银行的存款高达数十亿美元。

之后不久，尼日利亚政府启动国际司法调查，以收回 Sani Abach 在瑞士等欧洲国家的赃款。通过瑞士与 60 多家金融机构开展的互助行动，“政治公众人物”的概念浮出水面，并最终载入《联合国反腐败公约》（“公约”）。<sup>3</sup>

于 2003 年审议通过的公约中提到了公务人员的概念，强调与一般客户相比，金融机构在对待与贪污关联性更高的此类客户时，

应给予更多关注。公约几乎列出了政治公众人物的所有特征，这些特征随后纳入了金融行动特别工作组建议及之后的欧盟指令。

## 金融行动特别工作组及欧盟指令开始发挥作用

2003 年，金融行动特别工作组在其建议中提出了政治公众人物问题。

“政治公众人物指在其他国家被赋予重要公共职能的人物，如国家元首、资深政治家、高级政府官员、司法或军事官员、国有企业高管或重要政党官员。金融机构与政治公众人物的亲朋好友开展业务关系，也会面临与政治公众人物本人开展业务相同的声誉风险。当前 PEPs 的定义并不包括中等职位或职位等级更低的人士。”<sup>4</sup>

金融行动特别工作组在指南中明确指出：

“对于外国的政治公众人物（作为客户或受益所有人），除正常的客户尽职调查措施外，各国还应要求金融机构：(a) 建立适当的风险管理系统，以确定客户或其受益所有人是否为政治公众人物；(b) 获得高级管理层的批准方可建立（或维持现有）业务关系；(c) 采取合理措施确定其财产和资金来源；及 (d) 对这些业务关系采取强化的持续监测。”<sup>5</sup>

<sup>1</sup> 其中汇报方指金融行动特别工作组成员国。

<sup>2</sup> “Information report, by the foreign affairs Committee, on AML (anti money laundering)”, <http://www.assemblee-nationale.fr/14/rap-info/i1423.asp>

<sup>3</sup> 《联合国反腐败公约》，联合国毒品和犯罪问题办公室，2004 年，[https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf)

<sup>4</sup> “金融行动特别工作组 40 项建议”，金融行动特别工作组，2003 年 6 月 20 日，<http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf>

<sup>5</sup> 金融行动特别工作组《反洗钱、反恐融资与核武器扩散融资的国际标准》，金融行动特别工作组，2012 年 2 月，[http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf)



2005 年，欧盟《第三号反洗钱指令》<sup>6</sup> 也发布了与金融行动特别工作组 2003 年 10 月建议类似的内容，明确了相关概念，并发表了相应指南。欧盟《第四号反洗钱指令》<sup>7</sup> 通过在现有名单中增加国内政治公众人物的内容来进一步加强管控。

### 合规专员工作量增加

时至今日，政治公众人物给合规专员带来了更多的工作量和问题。一旦监测到政治

公众人物，就必须采取相应的风险应对措施。合规专员需识别并评估政治公众人物的风险，包括审查政治公众人物所涉及的行业、可能使用的企业服务提供商以及受托人、代名股东等。<sup>8</sup> 还须实施特定的尽职调查流程，评估风险并收集有关资金来源、操作目的以及与交易对手间关系的信息。此举旨在全面了解政治公众人物。不过，也无需对所有政治公众人物都投以同样程度的关注。比如，有一部分人就需

花费更多精力。当然，所有人都需要特别关注。

### 贪污堪比瘟疫

贪污现象似乎无处不在，无人能逃脱其如瘟疫一般的影响。根据国际透明组织的报告，在 2016 年对 176 个国家贪污情况的调查中，法国排名第 23 位。<sup>9</sup> 为衡量一国的清廉指数，国际透明组织审查了多项参数，包括政府透明度、新闻自由、公民自由

<sup>6</sup> “欧洲议会和欧洲委员会关于防范将金融系统用于洗钱或恐怖融资的欧盟第 2005/60/EC 号指令”，《欧盟官方杂志》，2005 年 10 月 26 日，<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0060&from=FR>

<sup>7</sup> “欧洲议会和欧洲委员会关于防范将金融系统用于洗钱或恐怖融资的欧盟第 2015/849/EC 号指令”，《欧盟官方杂志》，2015 年 5 月 20 日，<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&from=FR>

<sup>8</sup> 傀儡主人：腐败分子如何利用法律架构藏匿隐性资产及应对之策 (The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It)，世界银行和联合国毒品与犯罪问题办公室，2011 年，<https://star.worldbank.org/star/sites/star/files/puppetmastersv1.pdf>

<sup>9</sup> 国际透明组织，“清廉指数”，2018 年 1 月 6 日数据，<https://www.transparency.org/country/FRA>



和独立司法系统的作用。综合这些参数，2016 年，新西兰和北欧国家表现良好，领先其他国家。在法国，腐败问题出现在公共采购领域以及政界和商界发生交集的地方。《法国刑事法》(French Penal Code) 认定主动和被动贿赂均属犯罪行为。

## 如何通过政治公众人物政策杜绝贪污现象？

在法国公共部门，政治公众人物政策势必有助于降低贪污案件的发生，因为汇报方须时刻监控政治公众人物的账户，任何可疑活动都须向有关部门汇报。不过，合规专员开展的尽职调查只能解决部分问题，且仅涉及其所在金融机构账户。例如，合规专员可以通过审查在法国金融机构的银行账户，发现可疑资金，并汇报给当地金融情报机构。

众所周知，政治公众人物通常会将其非法所得拆分，藏进不愿发布金融信息的离岸司法管辖区。因此，如果账户开立于离岸司法管辖区或其他金融机构，常规的尽职调查则无法获得相关账户的金融信息。

此外，很多公务人员可以借助律师或相关授权签订采购合约。这些人不属于政治公众人物，因此其私人账户不会受到密切监控，

他们也有可能实施贪污。因此，如果不对这些开展针对政治公众人物类别的尽职调查，就无法发现他们的贪污行为。

此外，政治公众人物政策将无法监管法国的私营机构（除非涉及私营机构和公共部门的交易）。2015 年的一份报告显示，受访的法国私营机构采购部门负责人中，有 25% 的人曾成为贿赂对象（主要来自法国企业）。<sup>10</sup> 75% 的采购人员曾签署过公司反贪污章程。但一般来说，这些章程普遍不具备约束力。

## 法国制定全新的反贪污法规，弥补漏洞


如今在法国，政治公众人物问题已完全融入“了解您的客户”(KYC) 政策。这些政策包括开展增强尽职调查，并按照监管要求，将政治公众人物的可疑活动汇报给当地金融情报机构。一旦发生可疑活动，金融机构须终止与该政治公众人物的任何业务关系。政治公众人物政策涉及了法国存在的部分贪污问题，但并未覆盖所有方面。例如，私营机构的工作人员和非政治公众人物就不在当前政策的监管范围内。

而法国新出台的反贪污法律<sup>11</sup>和反贪污机构建议同时<sup>12</sup>要求公共和私营企业制定风险图，缓释贪污风险，此举将有效弥补

上述漏洞。新法律规定，对公司内部公认且由风险部门合理认定为贪污风险高的员工，须加以监控。尽管如此，如果贿赂通过其他金融机构和这些人的私人账户进行，合规专员仍无法监控其账户。

最后，如果我们考虑整个过程的起源，从 Abacha 案例开始，有人可能会提出疑问，认为这个流程并不适用于所有国家，并指出，尽管在非洲地区的政治经济环境下，这一流程十分有效且高效，但在另一个环境中却不见得一样有效。这是因为，在非洲地区，采购合同的签订方由政界领导决定；而在另外一个地区，采购合同归属的决定权不在政界领导手中，而在其下属手中。

打击贪污，长路漫漫。未来，政治公众人物政策势必会占据重要地位，因为离岸司法管辖区泄露的信息和金融机构间共享的信息数量都在不断增加。信息量增加必将有助于现行政治公众人物政策的实施，但仅依靠这一点也无法杜绝一切贪污案件。

政府可能需要审视当前的反贪污基础设施实施情况，填补现行政策的缺陷，确保能够有效打击贪污现象。 

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<sup>10</sup> AgileBuyer 与 HEC Groupement Achats, “Priorities of Procurement Departments in 2015 and the Way Suppliers Will Be Dealt with in 2015”, 2015 年, [http://www.agilebuyer.com/memo/presse/Enquete\\_AgileBuyer-HEC\\_Tendance\\_2015\\_150104\\_web.pdf](http://www.agilebuyer.com/memo/presse/Enquete_AgileBuyer-HEC_Tendance_2015_150104_web.pdf)

<sup>11</sup> LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (法语)。

<sup>12</sup> “Recommandations destinées à aider les personnes morales”, AFA, 2017 年, [https://www.economie.gouv.fr/files/files/directions\\_services/afa/2017\\_-\\_Recommandations\\_AFA.pdf](https://www.economie.gouv.fr/files/files/directions_services/afa/2017_-_Recommandations_AFA.pdf)

# POLITICALLY EXPOSED PERSONS POLICY VS. LOCAL CORRUPTION

**T**he politically exposed persons (PEPs) issue is a recurrent theme for the compliance community. Let us get straight to the point: In the ever-growing scope of a compliance officer's duties, the subject comes as often as a pain in the neck.

First, it seems very difficult to rely on an exhaustive, accurate and "official" PEP list. Regulators in France seem reluctant to publish such a list, even though they are ready to accept PEP databases that are provided by external intelligence services.

Second, PEPs are a big deal. They are supposed to be vulnerable to corruption, or at least more vulnerable than most non-PEPs. Once identified, their belongings, assets and wealth must be investigated by all reporting parties<sup>1</sup> in search of any trace of corruption. According to the law, any suspicious activity related to PEPs has to be reported to the national authorities in charge.

## The birth of the PEP concept

The PEP concept stems from Africa (more precisely from the Abacha case).<sup>2</sup> At the end of the 90s, Sani Abacha, a Nigerian dictator, diverted public funds, which consisted in part of development aid, for personal gain. He did this with the help of family members and close associates. The total amount at stake is said to have reached billions of dollars and was held in bank accounts in the U.K. and Switzerland.

Shortly after, the subsequent Nigerian government launched an international judicial inquiry in order to recover the funds from several European countries, including Switzerland. Within the frame of a mutual assistance process engaged by Switzerland with more than 60 financial institutions, the concept of PEPs emerged and finally materialized at the occasion of the U.N. Convention against Corruption.<sup>3</sup>

The U.N. Convention took place in 2003. It mentioned public officials and insisted on the care that should be taken when dealing with individuals who are more prone to be linked to corruption than

a standard customer. The convention listed nearly every characteristic that would later define PEPs and be integrated in the Financial Action Task Force (FATF) Recommendations and the subsequent EU directives.

## FATF and the EU directives take over

The PEP issue made its entry in the FATF Recommendations in 2003:

"Politically Exposed Persons (PEPs) are individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations [and] important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories."<sup>4</sup>

As far as guidelines are concerned, the FATF is clear:

"Financial institutions should be required, in relation to foreign politically exposed persons (PEPs) (whether as customer or beneficial owner), in addition to performing normal customer due diligence measures, to: (a) have appropriate risk-management systems to determine whether the customer or the beneficial owner is a politically exposed person; (b) obtain senior management approval for establishing (or continuing, for existing customers) such business relationships; (c) take reasonable measures to establish the source of wealth and source of funds; and (d) conduct enhanced ongoing monitoring of the business relationship."<sup>5</sup>

<sup>1</sup> Reporting parties are FATF member states.

<sup>2</sup> "Information report, by the foreign affairs Committee, on AML (anti money laundering)," <http://www.assemblee-nationale.fr/14/rap-info/i1423.asp>

<sup>3</sup> "United Nations Convention Against corruption," United Nations Office on Drugs and Crime, 2004, [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf)

<sup>4</sup> "FATF 40 Recommendations," FATF, June 20, 2003, <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf>

<sup>5</sup> "International Standards on Combating Money Laundering the Financing of Terrorism and Proliferation: The FATF Recommendations," FATF, February 2012, [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf)



In 2005, the Third EU Directive<sup>6</sup> echoed the FATF Recommendations from October 2003. It defined the concept and delivered guidelines. The Fourth EU Directive<sup>7</sup> enhanced them by adding national PEPs to the existing cohort.

### More work for the compliance officer

Fast forward to today, PEPs have created extra work and worries for compliance officers. Once a PEP is detected, a risk approach has to be deployed. Compliance professionals identify and assess the risks associated

with PEPs, including a review of the sector the PEP is involved in, the potential use of corporate service providers and trustees and the presence of nominee shareholders, to name a few.<sup>8</sup> Specific due diligence processes are required to assess the risk and to collect information on the origin of the funds, the purpose of the operation and the relations to the counterparties. The idea is to gain the entire picture of the individual. However, not all PEPs deserve the same attention. For instance, some require more dedication than others. Definitely, all of them need special treatment.

### Corruption is a plague

Corruption seems to be everywhere and no one is exempt from this plague. According to Transparency International, France ranked 23 out of 176 countries reviewed in 2016 for corruption.<sup>9</sup> To grant a corruption index to a country, Transparency International reviews parameters, such as the transparency of the government, press freedom, civil liberties and the presence of independent judicial systems. As far as these criteria are concerned, in 2016, New Zealand and the Nordics were the winners.

<sup>6</sup> "Directive 2005/60/EC of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing," *Official Journal of the European Union*, October 26, 2005, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0060&from=FR>

<sup>7</sup> "Directive 2015/849/EC of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing," *Official Journal of the European Union*, May 20, 2015, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&from=FR>

<sup>8</sup> "The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It," World Bank and UNODC, 2011, <https://star.worldbank.org/star/sites/star/files/puppetmastersv1.pdf>

<sup>9</sup> "Corruption Perception Index," Transparency International, Retrieved on January 6, 2018, <https://www.transparency.org/country/FRA>





In France, corruption is perceived to be a problem in the public procurement area and whenever business and politics overlap. The French Penal Code criminalizes active and passive bribery.

### A PEP policy to deter local corruption?

As far as the French public sector is concerned, a PEP policy certainly helps to deter bribery since reporting parties have to constantly monitor PEPs' accounts and report any suspicious activity to the authorities in charge. Nevertheless, the due diligence performed by compliance officers on these specific accounts can only be partial and focus exclusively on the account localized in the financial institution for which they work. For instance, the review of a bank account held by a French institution can lead a compliance officer to detect a suspicious amount of money and to report this suspicion to their local financial intelligence unit (FIU).

We know that PEPs very often structure their ill-gotten gains and hide them in offshore jurisdictions that are reluctant to release their financial information. Thus, if the account is maintained in an offshore jurisdiction or in another financial institution, the financial information will remain out of reach within the frame of a routine due diligence.

Furthermore, numerous civil servants can grant procurement contracts if they rely on a power of attorney or the right authorization. They are non-PEPs, so their private accounts

are not so closely monitored and they are prone to be corrupted. Therefore, any bribery received by this specific population will not be detected since they do not receive the PEP due diligence treatment.

Finally, the PEP policy has no influence on the French private sector (except when private/public deals are at stake). A 2015 report states that 25 percent of the executive buyers surveyed, who worked in the French private sector, were offered a bribe (mainly from French companies).<sup>10</sup> Seventy-four percent of the buyers from the study obviously signed a corporate anti-corruption charter. But, in general, these charters are not binding.

### A new French anti-corruption law to fill the gap


Today the PEP issue is fully integrated in the know your customer (KYC) policies in France. The policy includes the practice of enhanced due diligence and a regulatory requirement to report any suspicious activity from the PEP to the local FIU. Financial institutions must stop any relationship with a PEP if anything suspicious occurs. The PEP policy covers part of the corruption risk in France, but not all of it. For example, professionals of the private sector and non-PEP civil servants are not covered by the current policy.

The new French anti-corruption law<sup>11</sup> and the recommendations<sup>12</sup> of the anti-corruption agency might fill the gap since they require private and public companies to develop a risk map and to mitigate the

corruption risks they detect. Within the frame of this new law, employees considered as high risk (as far as corruption is concerned) and duly identified as such by their risk departments, could be monitored. Nevertheless, if bribery rests in other financial institutions and in the private accounts of these individuals, their accounts would remain out of reach for compliance officers once again.

Finally, if we consider the genesis of the whole process, starting from the Abacha case, we might raise the point that this process is not adapted to all countries and that what might be a very useful and efficient process in an African political and economic environment—with political leaders deciding who should receive procurement contracts—might turn out as not being so efficient in another framework, where decisions do not lie in the hands of political leaders, but in the hands of their subordinates.

The fight against corruption has a long way to go. The PEP policy will certainly gain prominence in the future, above all, thanks to a growing number of information leaks from offshore jurisdictions and more information sharing between financial institutions. Future leaks will surely sustain the existing PEP policy, but not all local corruption cases can be deterred by the means of the PEP policy as it is today.

Governments might need to audit their existing anti-corruption infrastructure and fill the gaps left by the PEP policy to ensure a real fight against corruption. 

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<sup>10</sup> "Priorities of Procurement Departments in 2015 and the Way Suppliers Will Be Dealt with in 2015," AgileBuyer and HEC Groupement Achats, 2015, [http://www.agilebuyer.com/memo/presse/Enquete\\_AgileBuyer-HEC\\_Tendance\\_2015\\_150104\\_web.pdf](http://www.agilebuyer.com/memo/presse/Enquete_AgileBuyer-HEC_Tendance_2015_150104_web.pdf)

<sup>11</sup> LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (in French).

<sup>12</sup> "Recommandations destinées à aider les personnes morales," AFA, 2017, [https://www.economie.gouv.fr/files/files/directions\\_services/afa/2017\\_-\\_Recommandations\\_AFA.pdf](https://www.economie.gouv.fr/files/files/directions_services/afa/2017_-_Recommandations_AFA.pdf)