

FIRST GUIDELINES ON CJIP

The *Convention judiciaire d'intérêt public* ("**CJIP**") is the French equivalent to the *Deferred Prosecution Agreement* ("**DPA**"), allowing prosecutors to enter into out of court settlements with corporate entities in complex criminal cases. It was introduced into law in December 2016, prompting a procedural revolution for white-collar crime practitioners in France. On 27 June 2019, financial crime enforcement agency, the *Parquet National Financier* ("**PNF**"), and the anticorruption regulator tasked with controlling compliance programs, the *Agence Française Anticorruption* ("**AFA**"), jointly published their first guidelines on the CJIP (the "**Guidelines**").

Prior to the publication of the Guidelines, the high-level instructions issued by the Ministry of Justice in a Circular released on 31 January 2018, viewed alongside the discrepancies in approach and outcome between the five first settlements, had not signalled a clear or settled policy on the part of the French authorities, most importantly as regards eligibility and calculation of the fine (see Annex for an overview of the five CJIP concluded to date).

The Guidelines reflect the influence of practices adopted by other foreign enforcement authorities, such as the SFO and the DoJ, and address technical issues that have arisen in the context of ongoing cross-border investigations.

Although the Guidelines focus on CJIP entered into in relation to corruption, they are likely to be of equal application to other forms of misconduct that can lead to a CJIP (e.g. money laundering, tax fraud). Only the guidance on calculation of the fine appears to be specifically tailored to acts of corruption.

Key issues

- France aligns with international standards on requirements for allowing corporate entities to enter into a DPA in criminal matters
- PNF (French financial crime enforcement agency) has high expectations with regards to (i) cooperation and (ii) fine negotiation
- To what extent these guidelines will be strictly binding on the PNF (or other French prosecuting authorities) remains uncertain
- The AFA (French anticorruption agency in charge of controlling corporate compliance programmes) will act as a compliance expert to assess the effectiveness of the compliance programme and/or will fulfil the role of a monitor
- The PNF and the AFA anticipate they will enter into joint settlements with foreign authorities and clearly wish to appoint the AFA as a monitor when a French company is involved

CONDITIONS OF ELIGIBILITY FOR A CJIP

Absence of prior convictions

Prior conviction, either in France or in another country, would ordinarily be an obstacle to the opening of CJIP negotiations (even if not presented as an absolute bar). It is of note, however, that this was not a factor emphasized in the CJIP that have already been concluded.

Cooperation

The Guidelines refer to cooperation as a "*necessary pre-requirement*". In this regard, the PNF expects the corporate entities to launch internal investigations to investigate allegations of fraudulent behaviours. Such internal investigation can occur before any judicial investigation is launched or in parallel.

In order to be considered satisfactory and indicative of a true commitment to cooperation, an internal investigation must:

- Ensure the integrity of evidence and truthfulness of testimonies;
- Take place without jeopardizing the judicial process;
- Be conducted in coordination with the PNF when a judicial investigation is being carried out in parallel, offering a dialogue between the PNF and the corporate entity's legal representatives;
- Lead to the drafting of a detailed report to be shared with the PNF;
- Facilitate an assessment of the personal responsibility of individuals within the corporate entity and, ultimately, enable the prosecution of individuals to take place where appropriate;
- Result in the provision to the PNF of a list of key witnesses, transcripts of interviews and relevant documentation.

Self-reporting

Self-reporting is considered a factor in favour of a CJIP, but is not a pre-requisite.

Implementation of a compliance program

Corporates are obliged by Article 17 of Law No. 2016-1691 on transparency, the fight against bribery and the modernisation of economic activity (the so-called "*Sapin II Law*") to put in place a compliance programme. Failure to do so will have a negative impact on the PNF's decision whether to enter into a CJIP with a corporate entity, but is not considered an absolute bar.

Conversely, if a company to which the Sapin II Law does not apply, has spontaneously implemented a compliance program, that step will be considered as a factor favouring a CJIP.

The PNF considers the corporate entity and its management responsible for implementing any appropriate remediation measures to strengthen their compliance programme in the light of identified misconduct. This responsibility will be carefully monitored and the PNF can request the AFA to audit the compliance programme of the corporate entity (save where such an audit has already taken place).

Legal privilege and/or professional secrecy

The Guidelines confirm the PNF's current policy on professional secrecy (*secret professionnel*). They consider that only external lawyers are bound by professional secrecy, and it is up to the corporate entity to decide whether to share attorney work-product or not; an implicit encouragement to corporate entities to waive attorney-client privilege. They indicate that they will evaluate, most likely on a document-by-document basis, whether claims to professional secrecy are legitimate or not. No indication is given as to how this evaluation will be carried out in a manner that preserves the privilege. As part of this assessment, the PNF will take into consideration whether providing documents covered by the professional secrecy may create a risk of a waiver of privilege in other jurisdictions. Such an approach is innovative for a French enforcement authority and takes into account the risks of waivers in other jurisdictions such as the UK or the US.

CONFIDENTIALITY OF DOCUMENTS HANDED OVER IN THE CONTEXT OF CJIP DISCUSSIONS

The French Code of Criminal Procedure provides that when the CJIP is not approved by the court or if the corporate entity exercises its right of withdrawal within 10 days from the court's approval, "*documents handed over by the corporate entity in the context of the [negotiation]*" cannot be used by the enforcement authorities against the corporate entity in the investigation file or before judicial authorities.

The Guidelines specify that this guarantee of confidentiality only relates to documents transmitted "*once a CJIP proposition was formalised*" which leaves open three issues:

- Does the protection offered by the French Code of Criminal Procedure apply when CJIP discussions fail (currently the law provides for a protection only when the agreed CJIP is not approved by the court or if the corporate entity exercises its right of withdrawal within 10 days from the court's approval)?
- Does the protection also apply when a CJIP is successful?
- What is the starting point of the protection where the corporate will have self-disclosed with a view to enter into a CJIP before the actual formal proposition to enter into a CJIP is made by the enforcement authority?

CALCULATION METHOD FOR THE PUBLIC INTEREST FINE

Restitution of illegal profits and determination of the "financial advantage"

Within the maximum set by the law (namely 30% of the average turnover within a 3-year period), the public interest fine must at least amount to the illegal profits generated by the misconduct.

In order to quantify such profits, also referred to as "financial advantage", the PNF expects the concerned corporate entity to provide all relevant financial and accounting documentation necessary for the purposes of the calculation. Deductions may only be made in respect of costs directly relating to the tainted contract; for example, R&D expenses are expressly excluded. The corporate entity's EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization) can serve as a basis for calculation.

It is of note that the Guidelines emphasise that anticipated future benefits from ongoing transactions are to be taken into account in the calculation of the financial advantage, even if not yet booked in the accounting records.

Punitive aspect

The PNF's approach also consists in weighing up aggravating factors (e.g. the involvement of public officials, any prior convictions, whether the fraudulent behaviour was systemic, any use of the corporate entity's resources to conceal bribes, etc.) as against mitigating factors (e.g. spontaneous disclosure, excellent cooperation, an effective compliance programme and appropriate remediation actions).

Legal provisions on the amount of the public interest fine

Article 41-1-2 I, 1° of the French Code of criminal procedure provides that "*the amount of the [public interest] fine is calculated in proportion to the benefits from the infringement, within a maximum of 30% of the average annual turnover based on the three most recent annual filings prior to the date of the observation of the infringement*".

Free translation of "*le montant de cette amende est fixé de manière proportionnée aux avantages tirés des manquements constatés, dans la limite de 30% du chiffre d'affaires moyen annuel calculé sur les trois derniers chiffres d'affaires annuels connus à la date du constat de ces manquements*".

MONITORING

This aspect of the CJIP sees the involvement of the AFA. As a complement to the public interest fine, the corporate entity may have to be monitored by the AFA for a period of up to three years.

In order to carry out a monitoring exercise, the AFA may rely on experts and outside counsel to evaluate the appropriateness of the compliance programme under consideration, to define its scope and to set the maximum amount of expert fees which may be incurred.

A theoretical timeline setting out the different steps of the monitoring exercise is attached to the Guidelines as an Annex. In this document, the AFA describe a 5-stage process:

- Initial audit,
- Proposal of an action plan by the corporate entity,
- Approval of the action plan by the AFA,
- Targeted audits on specific items of the compliance programme and the preparation of annual reports,
- Final audit by the AFA agent and transmission of its report to the PNF.

The authorities expect this process to take up to 2 years, 3 years being the maximum set by law.

INTERNATIONAL COOPERATION AND FRENCH BLOCKING STATUTE

Coordination with foreign authorities

When the same misconduct is likely to be prosecuted in several countries, coordination among authorities is possible and indeed encouraged by the French enforcement agencies. The terms of the settlement will be discussed in coordination with foreign enforcement authorities in order to facilitate an overall assessment of the fines and penalties. The PNF has already demonstrated its willingness to take this approach in the *Société Générale* case, leading to a joint settlement with the US authorities.

French *Blocking Statute*

Compliance with the French Blocking Statute is often an issue in the context of cross-border investigations. The Guidelines are silent as to the French authorities' policy on compliance with the blocking statute when foreign authorities expect full cooperation.

The Guidelines specify that when a French company is subject to monitoring obligations ordered by another state, the AFA is responsible for verifying that there is no violation of the Blocking Statute. This suggests that when the PNF negotiates a joint settlement in coordination with other authorities, it will tend to propose the AFA as a monitor in order to avoid any such violation.

Focus on the French Blocking Statute

Article 1 of Law No. 68-678 dated 26 July 1968 aims at blocking the transmission of sensitive information and/or documentation from French corporate entities to foreign public authorities including judicial authorities.

Cooperating with a foreign authority and voluntarily disclosing sensitive information, including business information, are prohibited under the French Blocking Statute unless the information is obtained using prescribed international procedures. The French Blocking Statute explicitly seeks to channel the production of evidence to foreign courts through formal legal procedures, such as the Hague Conventions or those outlined in a mutual legal assistance treaty ("**MLAT**"). The objective of the law is not to prohibit the transfer of evidence located in France, but to oblige those who request it to go through the channels of an MLAT.

Since the enactment of the Sapin II Law, the AFA, among its other responsibilities, is notably tasked with ensuring compliance with the French Blocking Statute.

Annex – Overview of past CJIP*

	HSBC Private Bank	SET ENVIRONNEMENT	KAEFER WANNER	POUJAUD	SOCIETE GENERALE
Date	30 October 2017	14 February 2018	15 February 2018	4 May 2018	24 May 2018
Procedural status	Formal investigation	Formal investigation	Formal investigation	Formal investigation	Preliminary investigation
Prosecuting office	PNF	Nanterre Prosecutor	Nanterre Prosecutor	Nanterre Prosecutor	PNF
Offences	Aggravated money laundering of the proceeds of tax evasion Unlawful banking or financial soliciting of prospects residing on the French territory and/or French nationals	Bribery of public officials	Bribery of public officials	Bribery of public officials	Bribery of public officials
Facts	Offering and helping French citizens to evade sums due to the tax authorities	Bribery of French public officials in connection with the award of public contracts	Bribery of French public officials in connection with the award of public contracts	Bribery of French public officials in connection with the award of public contracts	Bribery of Libyan public officials in connection with the award of public contracts
Total amount of the penalty	EUR 300 million • Restitution of profits: 86.4 million • Penalty: 71.6 million • Damages: 142 million	EUR 830,000 • Restitution of profits: 680,000 • Penalty: 120,000 • Damages: 30,000	EUR 2.74 million • Penalty: 2.71 million • Damages: 30,000	EUR 450,000 • Restitution of profits: 240,000 • Penalty: 180,000 • Damages: 30,000	EUR 500 million (shared equally between French and US authorities) • Restitution of profits: 334.9 million • Penalty: 165.4 million
Other penalties	N/A	Implementation of a compliance program	Implementation of a compliance program	Implementation of a compliance program	Implementation of a compliance program
Cooperation	Minimal cooperation but the commencement of proceedings pre-dated the CJIP so no legal framework in place encouraging cooperation	Not mentioned	Actual cooperation taken into consideration to decrease the total amount of the penalty	No cooperation	Extensive cooperation with the French and US authorities
Self-reporting	No	No	No	No	No

* Note that we do not cover the latest CJIP entered into on 28 June 2019 by the French investment fund Carmignac for tax fraud, as it has not yet been published, and the withdrawal period has not yet expired.

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