

Much-Awaited Clarifications on the French Deferred Prosecution Agreement

The French National Financial Prosecutor and the French Anticorruption Agency have released guidelines on the French deferred prosecution agreement, that offers a few welcome clarifications.

After years of debate on the compatibility of transactional mechanisms with the French culture of criminal prosecution, Article 22 of Law No. 2016-1691 of December 9, 2016 (Sapin 2 Law) introduced a procedure called *Convention Judiciaire d'Intérêt Public* (CJIP), a French version of the deferred prosecution agreement (DPA). Since the implementation of the Sapin 2 Law, six CJIPs have been signed and published. Four of them relate to matters of international or national corruption, whereas the other two concern money laundering and tax evasion cases.¹

On June 26, 2019, the French National Financial Prosecutor (PNF) and the French Anticorruption Agency (AFA) published common guidelines aimed at offering better predictability of the conditions of conclusion and execution of a CJIP (the PNF-AFA Guidelines).

The PNF and the AFA specified that these guidelines are limited to acts of bribery and corruption committed in France or abroad, and do not extend to other areas of business crimes, especially tax evasion, that can also be subject to a CJIP.

The PNF-AFA Guidelines follow two other related publications: an instruction to public prosecutors issued on January 31, 2018, by the French Ministry of Justice (Circulaire),² as well as a Dispatch of the Directorate of Criminal Affairs and Pardons issued on March 21, 2019 (Dépêche), that provides a guide on the CJIP.

What Is the CJIP?

The CJIP is a procedure that allows corporate entities to enter into a **settlement agreement in criminal matters** for offences such as corruption, influence peddling, and money laundering of proceeds of tax evasion.

This procedure is comparable to the DPA under US and UK laws, as it entails no admission of guilt, no criminal conviction, and, therefore, no exclusion from public procurements.

The CJIP is restricted to **corporate entities** and cannot benefit to individuals.

The CJIP can include (i) the payment of a fine of up to 30% of the company's average annual turnover over the past three years; **and/or** (ii) the implementation of an anti-corruption compliance program aimed at preventing and detecting acts of corruption for three years, under the control of the AFA; **and when relevant** (iii) the indemnification of identified victims for the harm suffered, within a one-year period.

To date, six CJIPs have been concluded. Three of them were concluded with the PNF and four of them relate to acts of bribery of public officials.

Before the enactment of the Sapin 2 Law, the only type of pretrial settlement available for criminal offenses was the guilty plea agreement (*Comparution sur reconnaissance préalable de culpabilité* or CRPC), enabling companies and individuals to plead guilty in exchange for terminating a prosecution. Contrary to the CJIP, the CRPC entails a recognition of guilt and is not limited to corporate entities.

Clarifications on the Conditions to Enter Into a CJIP

A framework for negotiation

- Under the Sapin 2 Law, the CJIP is theoretically **an initiative from the prosecution**, not from the company under investigation.
- As the CJIP is an alternative to prosecution, it is subject to an assessment by the prosecution on the **sufficiency of evidence** gathered to launch prosecution if the CJIP is refused or wrongly executed by the company — which implies that some investigations will have to be concluded before any attempts at concluding a CJIP.
- However, in practice, the company under investigation can also reach the prosecutor and express its willingness to enter into a CJIP.
- Thus, the PNF-AFA Guidelines have set this practice in writing, allowing a company — either under investigation or within the framework of self-reporting — **to enter into informal discussions with the prosecutor**, not necessarily in writing, in order to begin discussions on the CJIP as early as possible.

A flexible analysis of a company's past record and current behavior toward compliance

- The PNF-AFA Guidelines invite the prosecutor to consider the company's general behavior toward bribery and corruption in its decision to enter into discussions about a CJIP, both in terms of any past criminal record and existing compliance program.
- As of **criminal record**:
 - The existence of a criminal history for bribery and corruption within the company is a deterrent to the conclusion of a CJIP.
 - The existence of a previous CJIP is assimilated to criminal history for the purposes of this appreciation.
 - Moreover, the prosecutor is invited to consider, as criminal history, not only the company's criminal record as a corporate body, but also the criminal record of its subsidiaries and managers.
 - However, the prosecutor is also invited to adopt a flexible approach, taking into account the scope and the time passed since conviction, theoretically allowing for the conclusion of a CJIP with a previously sentenced company.
- As of the existence of a compliance program:
 - When a company is required by law to have a compliance program (see Latham's [previous Client Alert](#)), effectively presenting a valid and efficient compliance program at the time of the investigations in order to benefit from a CJIP will be of the utmost importance.
 - When a company is not required by law to have a compliance program, the prosecutor will favorably consider discussions of a CJIP if the company has nevertheless implemented such a program.

An incentive for self-reporting and cooperation

- The PNF-AFA Guidelines make clear that, when deciding whether to offer a CJIP, public prosecutors will favorably take into account whether the company voluntarily disclosed the relevant facts within a "reasonable time."
- They also state that public prosecutors will apply a "reduced coefficient" on the amount of the fine in case the company has self-reported and/or cooperated.
- The speed with which the wrongful conduct has been reported and the details given by the company to the prosecution within the framework of this self-report are therefore of the utmost importance.
- The reasonable time frame during which the self-report has to be made is appreciated as from the date when the wrongful conduct became known to the CEO of the relevant company.

Specifications on internal investigations

- A large portion of the PNF-AFA Guidelines is devoted to indications on the necessity, the execution, and the conditions of internal investigations, and particularly to their articulation with judicial investigations.

- First, a company willing to benefit from a CJIP will have to participate in the investigations through **an internal investigation (or audit) on the facts and on the failures within the compliance system having led to the facts**. The PNF-AFA Guidelines impose that the conclusions of such internal investigations be communicated to the prosecutor:
 - In a timely manner
 - Under a specific format, namely a report to the prosecutor, including:
 - A description of the findings
 - The identification of the main relevant witnesses
 - All relevant documents
 - When interviews have been conducted, all transcripts of such interviews and all documents on which the interviews have been based
 - Including not only an assessment of the company's liability, but also an assessment of individual liabilities
- Second, a company conducting internal investigations will have to be careful on their **articulation and interference with judicial investigations**.
 - In case of self-reporting:
 - The investigations conducted before self-reporting must preserve the integrity of evidence and sincerity of testimonies.
 - The internal investigations are logically conducted before the start of judicial investigations; however, if internal investigations seem destined to be wide and lengthy, the PNF-AFA Guidelines invite the company to disclose the facts to the prosecutor before their completion, and pursue its internal investigations in parallel of judicial investigations.
 - In case of concomitance between internal and judicial investigations, internal investigations must not interfere with judicial investigations, which implies continuous exchanges and cooperation between the prosecutor and the investigated company's counsels according to the PNF-AFA Guidelines.
- Third, the PNF-AFA Guidelines provide indications on the prosecutor's appreciation of **legal (attorney-client) privilege** when opposed during an internal investigation.
 - When the investigation is conducted by an attorney, it is covered by legal privilege; however the PNF-AFA Guidelines recall that:
 - All documents arising from the investigation may not be covered by legal privilege.
 - The attorney cannot breach legal privilege, but the client may choose to communicate privileged documents.

- In case of disagreement between the prosecutor and the company as to the application of legal privilege, the prosecutor will appreciate if a refusal to communicate documents based on legal privilege should be considered as a lack of cooperation.
- It is worth noting that in this appreciation, the prosecutor will take into account the possible implication of a waving of legal privilege, especially with regards to the recognition of such privilege by foreign jurisdictions.
- Fourth, the PNF-AFA Guidelines recall legal provisions on the possibility for the prosecutor to **use documents communicated by the company** — arising from internal investigations performed within the framework of discussions on a CJIP — **within subsequent prosecution in case of failure of the CJIP process**.
 - Documents communicated after a proposition of CJIP has been made by the prosecutor cannot be used for subsequent prosecution in case of failure.
 - However, documents communicated before a proposition has been made — which will often include the vast majority of the key documents arising from internal investigations, as those will be communicated in order to argue for the possibility of a CJIP — are not protected by this provision and can therefore be used by the prosecutor in further prosecution according to the Guidelines.
 - Unresolved questions remain as to the possibility for the prosecutor to potentially make use of documents communicated by a company under a successful CJIP against third parties.

Clarifications on the Content of a CJIP

The determination of the financial penalty

- As provided by the Sapin 2 Law, the financial penalty will be proportionate to the benefit resulting from the identified facts, which can reach up to 30% of the legal entity's average turnover calculated over the previous three years.
- When accounting data are available, the illicit financial benefit should be calculated on the basis of **the profit generated by the disputed/corrupt contracts**, after deducting expenses directly related to the project. The gross operating surplus or the earnings before interest, taxes, depreciation, and amortization (EBITDA) may serve as a basis for the assessment of the illicit financial benefit.
- The PNF-AFA Guidelines expressly state **that a company subject to a CJIP procedure should communicate its cost accounting as well as all documentation relating to the deals concluded**, in order to allow prosecution to assess the benefit expected by the company from the relevant deal and carry out a consistency check with the financial penalty proposed.
- This documentation should also allow the prosecution to assess the non-accounting benefits that result from the identified wrongful conduct (*i.e.*, gains in market shares, increased visibility, amortization unit production fixed costs).
- If a CJIP procedure is proposed while all financial benefits have not been perceived by the company, the profits expected (but not yet entered in the accounts) will be included in the calculation of the financial penalty.

What are mitigating and aggravating factors for the determination of the financial penalty?

- The PNF-AFA Guidelines recall that the financial penalty has a restorative dimension (leading to the refund of the illicit proceeds of the wrongful conduct) as well as a punitive dimension (by the application of a reduced or increased coefficient).
- **Aggravating factors** are:
 - Corruption of a public agent
 - Existence of an obligation for the company to have an anti-corruption compliance program under the Sapin 2 Law and failure to implement such a program
 - Company already convicted in France or abroad for corruption facts
 - Use of the company's resources to dissimulate corruption facts
 - Repeated nature of the corruption facts
- **Mitigating factors** are:
 - Self-report from the company prior to the opening of a criminal investigation and in a timely manner
 - "Excellent" cooperation and efficient and complete internal investigation
 - Existence of an efficient compliance program; implementation of corrective measures and adapting of internal organization
 - Self-implementation of a compliance program within a company that is not under obligation to do so

The implementation of an anti-corruption compliance program

- As mentioned above, the CJIP may include not only a financial penalty, but also an obligation for the company to implement a compliance program.
- The PNF-AFA Guidelines explain that the compliance program implemented in execution of a CJIP:
 - Can be implemented within a company not subject to Sapin 2 Law obligations
 - Can complement previous compliance measures implemented by the company
 - Is supervised by the AFA all along its implementation (see the Exhibit attached to the PNF-AFA Guidelines detailing the five steps of AFA's supervision)
- The AFA takes into account any existing compliance program implemented pursuant to the Sapin 2 Law, or any compliance obligations previously imposed by a foreign anticorruption authority, in its definition of the compliance program provided for in the CJIP.

- **The prosecutor is informed** at least once a year on the implementation of the compliance program and on any difficulties by the AFA or the company. Failure to implement the program may lead to a rescinding of the CJIP.

Compensation of victims

- The PNF-AFA Guidelines recall that the prosecutor is required to consider the harm to victims; thus:
 - In case the victims are identified, the prosecutor will require the company to compensate them as part of the CJIP.
 - The prosecutor will consider favorably an offer by the company to compensate victims before an agreement on a CJIP has been reached.
- If a CJIP is concluded, it will eventually be the prosecutor's role to determine the amount of the compensation due to victims. The victims will have the right to submit observations on such compensation during the public adversarial hearing approving or declining the CJIP.

A CJIP does not preclude victims to bring civil proceedings against the company, in order to obtain a superior amount of damages.

CJIP and International Cooperation

What are the incidences of multijurisdictional procedures on the content of a CJIP?

- The CJIP allows prosecuting authorities from different countries, investigating the same facts, to coordinate their criminal judicial responses.
- In this respect:
 - The determination of the financial penalty can be discussed between the PNF and foreign prosecuting authorities in order to reach an overall assessment of the fines and penalties paid by the company.
 - In case the implementation of a compliance program is imposed, only one monitoring authority should be appointed if the company, or all or part of its business activities, are based in France:
 - The AFA should be the monitoring authority, pursuant to Article 41-1-2 of the French Code of criminal procedure.
 - In such a case, the PNF will control and keep the other foreign prosecuting authorities informed on the implementation of the compliance program, in accordance with the rules of international legal assistance in criminal matters.

How is the French blocking statute taken into account within the framework of a multijurisdictional compliance program?

- In an attempt to protect French nationals against US discovery proceedings, France enacted a 1968 law usually called the "French blocking statute," making in particular a criminal offense the communication, under certain conditions, of documents and information to foreign judicial and administrative authorities.

- When a company implementing a compliance program pursuant to a CJIP agreed with a foreign prosecuting authority to keep this authority informed of the implementation of such a measure, the AFA is responsible for ensuring that the information transmitted to the foreign authority does not violate the French blocking statute.
- Finally, the PNF-AFA Guidelines state that when the commission of transnational acts of corruption are detected or suspected by a French company during the implementation of a compliance program imposed by a foreign authority, the company should first inform the AFA of such facts, prior to any communication to the foreign authority, in order to assess whether such a communication is likely to violate the French blocking statute.
- The AFA will then inform the PNF of the progress of the report of such facts to the foreign authority to allow the PNF to assess whether these facts fall under its competence.

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Endnotes

¹ <https://www.agence-francaise-anticorruption.gouv.fr/fr/convention-judiciaire-dinteret-public>

² <http://circulaire.legifrance.gouv.fr/index.php?action=afficherCirculaire&hit=1&r=43109>