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France's New Guidelines on Deferred Prosecution Agreement Offer Welcome Clarity

The guidelines provide useful insights into the mechanism of settlement agreements in criminal cases, and supersede previous guidelines published on June 26, 2019.

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).

Five years after the CJIP's enactment, practitioners now consider this mechanism as an efficient tool of transactional justice whose scope — originally limited to corruption, influence peddling, and tax evasion — extended to environmental crime. To date, 22 CJIPs related to financial matters have been signed (of which 12 are related to international or national corruption and eight are related to tax evasion). Among those CJIPs, 15 involved the PNF (not including eight CJIPs related to environmental crime that did not involve the PNF). The penalties imposed so far within the framework of CJIPs range from €5,000 to €2 billion.

The French National Financial Prosecutor (PNF) — the leading prosecution authority in this matter -- published guidelines on January 16, 2023 (CJIP Guidelines).

What Is the CJIP?

The CJIP is a procedure that allows corporate entities to enter into a settlement agreement in criminal matters for offenses such as corruption, influence peddling, tax evasion, and money laundering of proceeds of these offenses, as well as in environmental crime. Recent CJIPs¹ have clarified that this procedure can be used as long as one of the offenses targeted by the procedure is among the above, even if other offenses (such as misappropriation of corporate assets, fraud, or misappropriation of public assets, etc.) are also targeted.

This procedure is comparable to the DPA in US and UK laws, as it entails no admission of guilt, no criminal conviction, and, therefore, no exclusion from public procurements. After a settlement is reached with the prosecution, the CJIP must be approved by a judge; according to publicly available information, no judge has refused to approve a CJIP to date.

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

The CJIP can include (i) payment of a fine (*amende d'intérêt public*) 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 French Anti-Corruption Agency (AFA); and when relevant (iii) the indemnification of identified victims for the harm suffered.

Before the Sapin 2 Law's enactment, the only type of pretrial settlement available for criminal offenses in France was the guilty plea agreement (*comparution sur reconnaissance préalable de culpabilité* or CRPC), enabling companies and individuals to acknowledge the facts while "negotiating" a sentence with the public prosecutor. Contrary to the CJIP, the CRPC entails an admission of guilt and is not limited to corporate entities.

The CJIP Guidelines provide relevant information on the following issues:

- Confidentiality and status of information exchanged between corporate entities and the PNF during a CJIP negotiation
- Good-faith criteria for accepting a CJIP
- Calculation of the financial penalty, with a list of increasing and decreasing factors (indicating for each factor the maximum rate of increase or decrease of the punitive penalty)
- Status of individuals (suspects) within the CJIP procedure
- Status of victims during the CJIP signing process
- Implementation of a compliance program within a CJIP
- International cooperation between the PNF and foreign authorities

Confidentiality and Exchange of Information in the CJIP negotiation

First contacts

- A CJIP can only be signed after some evidence of crime has been gathered through investigations; thus, the PNF can continue its investigations during the negotiations, without any obligation for the PNF to suspend them.
- Under the Sapin 2 Law, the CJIP is theoretically an initiative from the prosecution, not from the company under investigation. However, the CJIP Guidelines clarify that the first contact may come from the company, bearing in mind that the PNF indicates that it does not wish to impose any prerequisite for entering into a CJIP negotiation.
- First contacts between the company and the PNF can be oral (no written statement is required).
- First contacts and discussions — up until formal negotiations get started — are covered by court secrecy (*foi du Palais*); the PNF undertakes not to use or mention these elements in further prosecution.

- The purpose of this first contact is to reach an informal agreement on the scope of the CJIP as to the time, place, and facts of offenses covered; then, the PNF opens formal negotiations.
- The confidentiality of these exchanges between the company and the PNF is all the more important since the CJIP negotiations may eventually fail; the company clearly does not want to communicate elements to the PNF which could then be part of the criminal case file.

Formal negotiations

- Once formal negotiations have started, exchanges can take place between the company and the PNF both verbally and in writing; in particular, the company may freely provide the PNF with information, including information gathered within the framework of internal investigations.
- Oral exchanges between the company and the PNF are confidential and cannot be used for further prosecution or during a subsequent trial in case negotiations fail.
- Evidence gathered by the PNF (through search and seizures, formal requests, witness and suspect interviews) is part of the criminal file and can be used for further prosecution or during a subsequent trial.
- When the status of the proceedings does not allow the company to access the criminal case file the PNF may freely decide to give the company access to all or part of the criminal case file during formal negotiations.
- Subject to the company's agreement, written information (emails, accounting documentation, presentations, etc.) provided by the company to the PNF can be added to the criminal file (and thus, used for further prosecution or during a subsequent trial).

Good-Faith Criteria for Signing a CJIP

Criteria related to the company's behavior

- Self-reporting by the company is considered proof of good-faith, especially when (i) done sufficiently quickly after the company discovers the facts, and (ii) if it reveals previously unknown facts to the PNF.
- The company is encouraged to launch internal investigations related to (i) the facts, (ii) the persons implicated, and (iii) when applicable, reasons for failure of the compliance program.

Internal investigations will be more favorably considered when the results are shared with the PNF. The PNF will pay special attention to the timely sharing of such results and the quality of evidence preserved.

- Internal investigations must not interfere with judicial investigations. The company is encouraged to keep the prosecution informed of the measures taken during internal investigations, in particular as to conduct of internal interviews.
- The existence of a compliance program (when not made compulsory by Sapin 2 Law) is also proof of good faith; such a program must be adapted to risks that the company faces, and adjusted when offenses have been committed.

- Prior indemnification of victims is taken into account.

Criteria related to the reparation of the offense

- In corruption cases, non-compliance with compulsory measures under the Sapin 2 Law for companies is an unfavorable factor for accepting a CJIP. Moreover, the PNF can request the AFA to assess the quality of the existing compliance program or even to perform a proper control targeting the company during the CJIP negotiation process.
- In tax evasion cases, the company's must settle its tax issue with the tax administration before or, at the latest, at the time of the CJIP signing.

Calculation of Financial Penalty

Nature and elements of financial penalty

- Financial penalty under the CJIP Guidelines consists of two parts: the restitutive penalty (dimension restitutive) and the punitive penalty (dimension afflictive).
- The restitutive penalty is equal to the amount of the proceeds obtained from committing the offense. The restitutive penalty may not apply if no proceeds were obtained.

In tax evasion cases, the amount of the proceeds obtained (equal to the amount of tax evaded) is recovered directly by the tax administration, and thus the retributive penalty does not apply.

- The punitive penalty is also calculated on the basis of the amount of the proceeds obtained from committing the offense, with increasing and decreasing factors applied in the form of percentages.
- In tax evasion cases, criminal and tax penalties cannot cumulate, which means that the combination of criminal and tax penalties may not exceed the higher amount of the two penalties incurred; thus, the punitive penalty in tax evasion cases cannot cumulate with tax penalties, which are usually 80% of tax evaded.

Calculation of retributive penalty (advantages drawn from the offense)

- The amount of proceeds obtained from the offense is calculated jointly by the company and the PNF.

The company can give its own estimate but must provide the PNF with all elements necessary to assess the company's calculation, including all accounting documents, internal management reports, and certification by an auditor or a specially-appointed expert.

- Proceeds are calculated by reference to the company's situation at the time of the offense.
- The calculation of proceeds includes:
 - net profits made by the company from the offense;
 - expected future earnings;
 - non-financial advantages (reputation, market shares, goodwill); and
 - in the case of an attempted offense, chances of obtaining expected future earnings.

- For example, in a corruption matter, the proceeds correspond to the turnover made through corruption after deduction of expenses, but some expenses are considered non-deductible and reintegrated to the profit (structure costs, amortizing and depreciation not exclusively related to the project, R&D, or illicit payments).

Calculation of punitive penalty (increasing and decreasing factors)

- Punitive penalty is calculated on the basis of the amount of the proceeds from the offense with the application of increasing and decreasing factors; the PNF has some leeway in determining the application of such factors.

Below is a table of increasing and decreasing factors, indicating for each factor the maximum rate of increase or decrease of the punitive penalty.

Increasing factors	Max rate	Decreasing factors	Max rate
Any form of obstruction	30%	Self-reporting	50%
Large company	20%	Isolated act	10%
Insufficient compliance program when made compulsory by Sapin 2 Law	20%	Relevance of internal investigations	20%
Repeated acts	50%	Active cooperation	30%
Criminal, tax, or regulatory record	20%	Corrective measures	20%
Use of company resources to dissimulate	20%	Efficiency of internal reporting system	10%
Creation of tools for dissimulation	30%	Non-ambiguous acknowledgement of facts	20%
Implication of a public agent	30%	Prior indemnification of victims	40%
Serious harm to public order	50%		

- When the acts have been repeated over a period of time, the company and PNF may exceptionally agree that, within a defined period of time and a defined territory, all similar acts — including those not yet uncovered at the time of the CJIP — will be included in the CJIP, as long as they have not been willingly concealed; in such a situation, an undefined increasing factor will be applied.

- When the company can demonstrate specific economic difficulties, the financial penalty can be decreased; in such a case, the undiminished amount will nevertheless be mentioned in the CJIP.
- Finally, 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 the accounts have been consolidated at the group level, the CJIP Guidelines specify that the relevant turnover for the determination of the financial penalty is the consolidated turnover.

Status of Individuals (Suspects) Within the CJIP Procedure

Status of individuals during the negotiations

- When individuals suspected of involvement in the offenses are still managing the company, the CJIP Guidelines suggest that a specific representative of the company be appointed for the purpose of CJIP negotiations.
- For the same reasons, the CJIP Guidelines suggest that the company and individuals be represented by different lawyers to avoid any conflicts of interest.
- Uncovering individuals' role in the offenses (notably through internal investigations) is part of the company's cooperation and will be considered as such within the CJIP procedure.

Status of individuals within and after the CJIP signing

- Individuals are not supposed to be named in a CJIP, unless this mention is not be unfavorable to such individual.
- When possible, the PNF prefers to deal with individuals' situation at the same time than the CJIP; however, in any case, the PNF keeps all options opened (whether prosecution by summon before criminal court or plea guilty, dismissal or continuing investigations) towards individuals after the signing of the CJIP.
- During the negotiation of the CJIP, the PNF assesses the good faith and cooperation of the corporation in particular through the identification (within the framework of its internal investigation) of the individuals involved in the facts and the disclosure.

Status of Victims During the CJIP Process

Legal rules concerning victims

- When victims have been identified, the CJIP provides for the amount of their indemnification; such indemnification must be done within a year.
- Victims can neither oppose the signing of a CJIP nor appeal the approval order.
- However, the signing of a CJIP still allows victims to summon perpetrators before a civil court to obtain indemnification of their damage, even if an indemnification has already been provided for in the CJIP.

- In tax evasion cases, as the company's tax situation must be cleared with the tax administration before or at the time of the signing of the CJIP, no indemnification is provided.

However, a specific and separate indemnification can be provided for in the CJIP for the laundering of the proceeds of tax evasion.

Identification and prior indemnification of victims

- Within the CJIP negotiation process, the company is expected to help identify victims.
- Prior indemnification of victims is a good-faith criteria that the PNF takes into account in accepting a CJIP.

Determining the amount of indemnification to victims

- Once victims have been identified, the PNF informs them of the decision to enter into a CJIP with the company and gives a delay to file all observations on indemnification.
- The PNF determines the amount of indemnification on the basis of full reparation of damages done on the date of the CJIP signing; if needed, the PNF can ask for an expert opinion.
- Victims are informed of the date of the approval hearing and can comment during this hearing, including on the amount of indemnification decided by the PNF; however, this amount cannot be modified by the judge, who can only approve or reject the CJIP.

Compliance Program

- The CJIP may include the obligation for the company to implement a compliance program, monitored by the AFA for a maximum of three years; the CJIP may provide that the company's situation will be assessed after two years and that the program may end at that time if all obligations have been fulfilled.
- Before such program is implemented, the AFA may examine the company to assess its compliance procedures, taking into account, in particular, the existence of other monitoring programs imposed by foreign or international authorities.
- The AFA must file at least an annual and final report to the PNF on the implementation of the compliance program; the PNF will also meet at least once a year with the company's representatives to discuss the implementation of the compliance program.
- In addition to the obligation to set up a compliance program, a company may voluntarily undertake to:
 - accept regular inspections from the AFA during a certain period of time and cover the costs of such inspections²;
 - conduct a compliance audit at regular intervals; and
 - create or strengthen the compliance officer function and compliance team.

International Cooperation

- The PNF acknowledges that, in an international context, the principle *ne bis in idem* is nuanced in its application; thus, the PNF endeavors to coordinate CJIP negotiations with foreign authorities investigating the facts, whether national (US Department of Justice, UK Serious Fraud Office), or international (World Bank).
- If the implementation of a monitored compliance program seems necessary, a unique monitoring mechanism is preferred; if French authorities are chosen to implement this program, the Sapin 2 Law makes it compulsory to entrust it to the AFA.
- After a CJIP has been signed, the PNF may condition its answer to later requests for mutual assistance in criminal matters to the absence of any prosecution from foreign authorities of the acts targeted in the CJIP.

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Endnotes

¹ See for example, CJIP dated 17 January 2022 ; CJIP dated 15 December 2021.

² See for example, CJIP dated 29 January 2020.