

French DPAs—First CJIP Guidelines Published

July 9, 2019

On June 27, 2019, the French Financial National Prosecutor¹ (commonly referred to as the “PNF”) and the French Anticorruption Agency (the “AFA”) published their first joint guidelines on the use of the French-style deferred prosecution agreement (known as the “CJIP”) in cases of domestic and transnational corruption or influence peddling. The stated purpose of these guidelines is to encourage cooperation of corporate wrongdoers by providing clearer and more reliable procedures to develop the facts and circumstances relevant to the PNF in considering whether to enter into a CJIP and on which terms.

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Background. The Sapin II Law of December 9, 2016 created the CJIP procedure, which provides prosecutors (such as the PNF but not the AFA)² with the power to offer a company suspected of having committed corruption, influence peddling, tax fraud or laundering of the proceeds of tax fraud to settle the case without formal prosecution. The company must agree to pay a fine proportionate to the benefit derived from the misconduct up to 30 percent of the company’s average annual turnover during the previous three years. The company may also be required to compensate the victims and/or agree to implement an enhanced compliance program under the supervision of the AFA for a period up to three years. A CJIP may only be finalized with approval of a judge following a public hearing. The judge’s role is to verify that the statutory requirements for a CJIP have been met. The company does not have to acknowledge any guilt, and the judge’s approval order does not have the effect of a conviction.

On January 31, 2018, the French Ministry of Justice issued a circular to French prosecutors providing guidance on how to implement a CJIP. This circular, however, did not provide much by way of guidance to companies that discover misconduct and might wonder whether they could be eligible for a CJIP. The June 27, 2019 guidelines provide welcome clarifications as to the PNF’s and AFA’s approach to this question. The key features of these guidelines can be summarized as follows.

¹ Formally *le Procureur de la République Financier*.

² The AFA’s role is mainly to ensure that entities required to adopt anticorruption compliance programs under the Sapin II Law have done so and to supervise the implementation of anticorruption compliance programs imposed in a CJIP.

Conditions to enter into a CJIP. The PNF and other prosecutors offices have discretion to propose resolution of a case through a CJIP. The guidelines list factors that will be weighed by the PNF before deciding to do so:

- **Self-reporting.** The guidelines state that self-reporting within a reasonable time following the discovery of misconduct is a positive but not necessary factor. The PNF accepts the view that it is proper for a company to conduct an internal investigation to evaluate the relevant facts and form a view on whether self-reporting is warranted (all within a reasonable time following discovery).
- **Cooperation.** The guidelines mention the degree of cooperation with prosecution authorities as a key factor to any CJIP resolution. In this context, cooperation primarily means conducting a thorough internal investigation resulting in a report made available to the PNF along with all relevant documents and testimonies.

The guidelines make clear that any internal investigation made before the involvement of authorities must ensure the preservation of evidence and the integrity of witness testimony. Internal investigations conducted in parallel with a prosecutor's own investigation should be conducted in coordination with the prosecutor. Importantly, the CJIP procedure is not available for individuals, and guidelines make it clear that any internal investigation should help establish the responsibility of individuals.

- **Approach to privilege.** If a company wishes to assert the French attorney-client privilege (*secret professionnel*) as a basis to refuse to share any material with the PNF, the PNF says that it will assess whether this refusal seems justified. In the event that it considers the assertion unjustified, the PNF will consider the extent to which any continued refusal should negatively affect the entity's cooperation credit. However, acknowledging the thorny problem of differing rules for professional privileges, the guidelines state that prosecutors will take into consideration the impact that a waiver of any foreign privilege as a result of sharing the material with the PNF may have on the company's position.
- **Sufficiency of evidence.** The PNF takes the view that there should be no discussion of a possible CJIP unless the investigation has brought to light evidence sufficient to justify a prosecution with respect to the wrongdoings for which a CJIP may be available. Consequently, the PNF will only offer a CJIP in relation to matters that it could prosecute should the CJIP negotiation fail. This should be compared with the equivalent joint guidance from the United Kingdom's Serious Fraud Office and Crown Prosecution Service under which a DPA can be offered not only where there

is evidence sufficient to prosecute, but alternatively where the prosecuting authority is satisfied that sufficient evidence would be forthcoming if further investigations were pursued.

- **Corporation's past history.** A prior penalty imposed by French or foreign authorities against the entity, one of its subsidiaries, or even one of its executives, for facts amounting to a lack of probity will usually prevent any CJIP resolution. The same will be true if the entity already reached a settlement with a foreign authority. However, mitigating factors can be found where these past resolutions date back a significant number of years or relate to a different scope of activities.
- **Compliance program and corrective measures.** The lack of an effective anticorruption compliance program imposed on medium and large companies by the Sapin II Law will be viewed negatively when deciding whether to offer a CJIP. However, the voluntary implementation of such a program by companies outside the scope of the Sapin II Law, as well as the implementation of corrective measures upon discovery of the facts, will be viewed positively.
- **Compensation of victims.** Voluntary compensation of victims before any CJIP offer will be viewed as a plus.

Calculating the fine. The statute provides that the fine agreed to in a CJIP must be proportionate to the benefit derived through the misconduct, up to a limit of 30 percent of the entity's average annual turnover during the previous three years. The PNF now indicates it will first calculate the direct and indirect improper benefit secured by the entity and then apply a multiplier based on relevant aggravating and mitigating factors.

- **Starting point: the improper benefit.** When possible, the benefit derived through the misconduct will be determined on the basis of the revenue generated by the improper contract after the deduction of direct costs of sales. Nonfinancial gains (such as market share, visibility increase, etc.) and profit not yet perceived in the accounts will also be taken into account by the PNF when determining the benefit.
- **Aggravating factors.** The guidelines list the following examples of aggravating factors that will be applied by prosecutors: corruption of a public official; the suspect company had a duty to have an anticorruption compliance program under the Sapin II Law; the company failed to implement a robust anticorruption compliance program; the company has a history of corruption-related offenses in France or abroad; the company used its resources to conceal the alleged corruption; repetitive or systemic nature of the alleged corruption.

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- **Mitigating factors.** The guidelines also list examples of mitigating factors, which are all factors previously mentioned as positive indicators of eligibility for a CJIP: self-reporting in a timely fashion; excellent cooperation; full and effective internal investigation; effective anticorruption compliance program; implementation of corrective measures and changes in the organization; and voluntary implementation of a compliance program for entities having no statutory obligation to do so.

The guidelines make no mention of how the fine under a CJIP should relate to the fine that could be imposed if the case went to court, and the company was found guilty. However, the guidelines do point out that for a company, the benefit of being offered a CJIP includes the absence of a number of ancillary penalties that are available post-conviction including confiscation of the proceeds of the offense, the prohibition to conduct certain activities, the closure of one or more business sites or the prohibition to offer securities on regulated markets.

For transnational investigations, the guidelines note that the amount of the fine under a CJIP may be discussed with foreign prosecution authorities investigating the same conduct in order to take a holistic view of the fines and other sanctions imposed on the company.

Post-CJIP compliance program. As part of a CJIP, the company may have to agree to implement an enhanced compliance program under the supervision of the AFA for a period of up to three years. According to the guidelines, the PNF may decide not to impose such an obligation if the AFA already recently performed an audit of that company's compliance program or if a foreign authority has already imposed robust anticorruption compliance obligations on that entity.

If foreign authorities are also involved, a single monitoring body shall be appointed, which the guidelines suggest should be the AFA if the entity has its registered office or effective headquarters in France or conducts most of its business in France.

The guidelines also indicate that AFA's supervision will last at least two years (and maximum three as per the statute) so as to ensure the effectiveness and robustness of the implemented measures. The AFA will report to the PNF at least every year.

Key Takeaways. As indicated above, the guidelines apply to domestic and transnational cases of corruption and influence peddling. A literal reading would suggest that these guidelines do not apply to matters concerning tax fraud and laundering of the proceeds of tax fraud; however, we believe that the PNF will probably apply similar principles in such matters. While the PNF is not the sole French prosecutorial office to use the CJIP procedure (in fact, three of the six CJIPs entered into to date were entered into by prosecutors in Nanterre), its guidelines will no doubt set the tone among prosecutors.

The guidelines in essence amount to an invitation to French (and other) corporations and their attorneys to engage in discussions that would lead to a negotiated outcome in France, such has been the norm in the United States for years, and more recently in the United Kingdom. While these first guidelines represent a welcome clarification, it remains to be seen whether French corporations and their attorneys will find the CJIP procedure to be sufficiently attractive to effect a real change in corporate defensive strategy.

Among other things, making a true “self-report” to a prosecutor not already aware of corporate wrongdoing is not a tradition in criminal justice in France. The absence of specific sentencing guidelines for cases going to courts means that it is still quite challenging to estimate how much a prospective defendant may gain in a CJIP compared to a potential court-imposed penalty; the monetary benefit of self-reporting therefore remains less evident in France than it may be in the United States or the United Kingdom. Insofar as the PNF has publicly expressed its desire to use CJIP as frequently as possible, future clarifications may come from CJIPs themselves.

Another variable is whether a French CJIP will be considered sufficiently “adequate” by prosecutors in other countries, notably the United States, so as to forestall parallel or successive prosecutions. At a minimum, the guidelines should be seen as a clear attempt by prosecutors in France to obtain flexibility of action and powers more comparable with those of their U.S. and U.K. counterparts.

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With a team of whitecollar lawyers based in Paris, we are well positioned to assist clients on these and other issues. Please do not hesitate to contact us with any questions.

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