

France Moves to Boost Its White Collar Enforcement

July 13, 2021

On July 7, 2021, a French National Assembly Committee led by MPs Raphaël Gauvain and Olivier Marleix, published a long-awaited 180-page [evaluation report](#) about France's anti-corruption law of December 9, 2016 (the so-called "Sapin II Law")¹. While recognizing the significant progress made by France in its fight against corruption and tax fraud over the last five years, MPs suggest further strengthening the existing legal framework. Their 50 recommendations cover various topics, including the French-style deferred prosecution agreement; the self-reporting of corporate crimes; corporate criminal liability criteria; the introduction of a new pre-trial guilty plea; French extra-territorial enforcement of corruption crimes; and the role of the French anti-corruption agency. We provide below the main highlights of the report.

Expanding the Use of the French-Style DPA. The Sapin II Law created the French-style deferred prosecution agreement (known as "CJIP"), which provides prosecutors with the ability to offer companies, whether or not under formal investigation, to enter into pretrial settlements involving criminal violations of anti-corruption and tax legislations. A company must agree to pay a fine proportionate to the benefit derived from the misconduct, up to 30 percent of its average annual turnover over the past three years. The company may also be required to compensate the victims and/or agree to implement an enhanced compliance program. 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.

With 12 CJIP resolutions in about four years, for a total recovery of EUR 3 billion, the report characterizes this new mechanism as an effective tool to resolve cases of financial misconduct. Given that success, MPs say expanding the scope of CJIP to additional corporate crimes should now be considered. They also make various recommendations to make CJIP resolutions even more appealing, which are discussed below.

¹ Rapport d'information n° 4325 sur l'évaluation de l'impact de la 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, dite "loi Sapin 2". https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b4325_rapport-information.

Encouraging Self-Reporting and Cooperation. Self-reporting a crime to enforcement authorities is not common practice in France. Back in June 2020, the French Ministry of Justice stated that self-reporting corruption appears to be in companies' best interest as it may help to have the case resolved through a CJIP, rather than at trial. The Ministry, however, acknowledged that France still has to adopt a practical approach to encourage companies to actually self-report.

Drawing on this, MPs make several recommendations including the need to provide better guarantees to companies that a CJIP resolution will be offered if they self-report and fully cooperate. In line with the U.S. practice, they also recommend the publication of sentencing guidelines for companies to better anticipate the benefits of self-reporting and cooperation.

The report also calls for a better protection of the documents and information provided by the company *prior* to any CJIP discussions so that companies are better encouraged to self-report and cooperate with enforcement authorities without fear that they would use the documents in court if settlement talks break at some stage.

Loosening Corporate Criminal Liability. Under French criminal law, legal entities can only be held criminally liable for offenses committed *on their behalf* by their *organs or representatives*. According to the report, these legal requirements would make it too difficult for criminal courts to find companies guilty of corruption. Hence their recommendation to loosen these statutory conditions. The rationale is that companies will be more willing to self-report and enter into CJIP resolutions if they face more peril at trial.

It remains to be seen if France will actually review its corporate criminal liability regime in force since 1994. Especially since French criminal courts do make their own loosened interpretation of the existing statutory conditions, including in corruption cases. Recently, for instance, the Court of Cassation affirmed that a holding company could be found guilty of corruption committed by its subsidiary's executives.²

Introducing a New Pretrial Guilty Plea for Individuals. The CJIP resolution is available to legal entities only. Individuals may enter a pre-trial guilty plea ("CRPC") that also has to be approved by a judge. But contrary to what exists for CJIPs, French law gives the judge some room to dismiss a CRPC deal. For instance when "the facts" or "the public interest" warrant a full criminal trial.

² French Court of Cassation, June 16, 2021, No 20-83.098, https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/768_16_47307.html

That lack of procedural alignment between legal entities and individuals creates a host of issues including the difficulty to reach coordinated resolutions for both companies and their executives. The recent [Bolloré case](#) is a good illustration, where the judge approved the CJIP between the PNF and the corporate defendants, but dismissed the CRPC between the PNF and the executives, who may now have to face trial.

The report highlights the risk that executives would have very little appetite to self-report corporate crimes and to cooperate if they can't be part of a coordinated resolution. MPs therefore recommend the creation of a new CRPC mechanism, where judges would have less flexibility to dismiss the pre-trial guilty plea deal, but that would apply only where the individual defendants self-reported and fully cooperated.

Boosting Extraterritorial Enforcement. The Sapin II Law provides for the extraterritorial jurisdiction of French enforcement authorities over acts of corruption committed abroad by “someone conducting, in whole or in part, business in France.” The French Ministry of Justice explained that this should cover at least foreign companies having a subsidiary, branches, commercial offices, or other establishments in France, even if those entities in France have no distinct legal personhood.³

In their report, MPs regret that despite such a far-reaching extra-territorial jurisdiction, French enforcement authorities rarely go after foreign companies conducting part of their business in France. As a result, they call for a better detection of corruption acts committed abroad by such foreign entities. In particular, they ask for better information sharing among French embassies networks, judicial authorities and intelligence services.

Other Recommendations. The report includes various other recommendations, such as: (i) the introduction of some statutory framework for the conduct of internal investigations; (ii) the transfer of anticorruption compliance obligations enforcement from the French anti-corruption agency to another French enforcement agency entity known as *Haute Autorité pour la Transparence de la Vie Publique* (HATVP); and (iii) upgrades of the existing French whistleblower protection rules and of the lobbying activities framework.

This important evaluation report makes a number of recommendations that go into the right direction of strengthening the French white collar enforcement landscape. It now remains to be seen what the French government will actually make of it. Some of the 50 recommendations represent significant changes that likely won't be actively handled before the presidential and parliamentary elections of mid-2022. But some of the recommendations may find their way into the whistleblower protection bill that will be

³ Circular No. JUSD2007407 on criminal justice policy in the fight against international corruption (June 2, 2020), <https://www.legifrance.gouv.fr/download/pdf/circ?id=44989>.

debated in the fall. And some others may simply be introduced through new guidelines from the French Ministry of Justice or the PNF.

Please do not hesitate to contact us with any questions.

PARIS



Antoine F. Kirry
akirry@debevoise.com



Alexandre Bisch
abisch@debevoise.com



Aymeric D. Dumoulin
addumoulin@debevoise.com

LONDON



Fanny Gauthier
fgauthier@debevoise.com



Karolos Seeger
kseeger@debevoise.com