

France's Revised Guidelines for Deferred Prosecution Agreements Promote Voluntary Self-Disclosure

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On January 16, 2023, the French Financial National Prosecutor (the “PNF”) published revised guidelines on the use of the French-style deferred prosecution agreements (“CJIP” or “*Convention Judiciaire d’Intérêt Public*”) in cases of corruption, tax fraud and influence peddling.¹ The stated objective is to bring more transparency and predictability to the negotiation process and encourage companies to come forward, cooperate and possibly help identify individual wrongdoers.

Interestingly, the very next day, the U.S. Department of Justice issued a new version of its Corporate Enforcement Policy (now titled the Corporate Enforcement and Voluntary Self-Disclosure Policy) that significantly increases the potential benefits for both companies that self-disclose and those that do not, as long as they engage in exemplary cooperation and remediation (see our recent [update](#)). The near-simultaneous guidance from French and U.S. authorities, although not coordinated, reflects a shared interest in incentivizing companies to be more proactive in disclosing potential wrongdoing and cooperating with government investigations.

Background

The Sapin II Law of December 9, 2016 created the CJIP procedure, which provides prosecutors (such as the PNF) with the power to offer a company suspected of having committed certain specific financial crimes—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 and of 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 French Anticorruption Agency (the “AFA”) for a period up to three years. A CJIP may only be finalized with approval of a judge following a public hearing.

¹ Guidelines on the implementation of the CJIP, January 16, 2023, <https://www.tribunal-de-paris.justice.fr/75/actualites-mensuelles-parquet-national-financier>.

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.

In 2018, the French Ministry of Justice issued a memorandum to French prosecutors providing the first guidance on how to implement a CJIP.² It did not, however, provide much by way of guidance to companies that discover misconduct and might wonder whether they could be eligible for a CJIP. In 2019, the PNF thus published its first guidelines providing circumstances relevant to this prosecutorial office in considering whether to enter into a CJIP and on what terms.³ In 2020, the French Ministry of Justice issued another memorandum on enforcement against international corruption, calling on the PNF to better promote voluntary self-disclosures.⁴

In that context, the PNF now has published revamped guidelines, building on its experience from the 15 CJIPs concluded by this office so far.⁵ These new guidelines provide companies with more predictability about the CJIP negotiation and its potential outcome. They outline criteria considered by the PNF before offering/accepting a CJIP negotiation. They also list 17 aggravating/mitigating factors considered by the PNF when calculating the fine. For the first time, the PNF now provides for each factor a maximum percentage of reduction/increase.

Conditions to Enter into a CJIP

The PNF has discretion to propose resolution of a case through a CJIP. The guidelines list criteria weighed by the PNF before deciding to do so, elevating the principle of “cooperation in good faith” as a general condition:

² Memorandum JUSD1802971C on the presentation and implementation of the criminal provisions provided for by Law no. 2016-1691 of December 9, 2016 on transparency, the fight against corruption and the modernization of economic life, no. CRIM/2018-01/G3-31.01.2018, January 31, 2018, <https://www.legifrance.gouv.fr/circulaire/id/43109>.

³ Guidelines on the implementation of the CJIP, June 26, 2019, <https://www.agence-francaise-anticorruption.gouv.fr/files/files/Lignes%20directrices%20PNF%20CJIP.pdf>. See also our previous [update](#).

⁴ Memorandum JUSD2007407C of criminal policy regarding the fight against international corruption, no. CRIM202009G3/11.03.2020, June 2, 2020, <https://www.legifrance.gouv.fr/circulaire/id/44989>.

⁵ A total of 22 CJIPs have been concluded and approved in France so far, including 15 by the PNF (eight in international corruption cases; and seven in tax fraud or tax fraud-related cases).

- Self-disclosure to the PNF “within a reasonable timeframe”—such a timeframe being assessed with regard to the time elapsed between the discovery of the misconduct by the company and its disclosure to the PNF.
- Willingness to conduct an active internal investigation to help identify misconduct, key involved individuals and potential deficiencies in the compliance program. Communication of an internal investigation report to the PNF and the quality of evidence retention are viewed as a plus.
- The voluntary establishment of an anticorruption compliance program,⁶ swift implementation of corrective measures, reshuffling of the management team and compensation of victims will also be viewed as pluses.

Confidentiality of Information Shared During the Negotiation

Interestingly, the new guidelines clarify the PNF’s willingness to keep information voluntarily transmitted by the company during the CJIP negotiation confidential. If negotiations eventually fail, the PNF will not use such information. This new clarification is important and may encourage companies to engage into negotiations with the PNF.

Calculating the Fine

Under the Sapin II Law, the CJIP fine must be proportionate to the benefit derived from the misconduct and can be up to 30 percent of the company’s average annual turnover during the previous three years. In its memorandum of January 2018, the French Ministry of Justice explained that the turnover of the *only legal entity actually negotiating the CJIP* should be taken into account.

In its updated guidelines, however, the PNF now considers that when applicable, the turnover of the company *group* should be taken into account. In a recent interview, the PNF explained that this interpretation aims at “avoiding that groups of companies concentrate all their potential criminal liability on the company with the lower annual turnover.”⁷

⁶ For the small and medium companies that are not legally obliged to have one.

⁷ “L’outil de justice négociée nous a hissés au même niveau que les Etats-Unis,” *Les Echos*, January 16, 2023, <https://www.lesechos.fr/economie-france/budget-fiscalite/jean->

It remains to be seen whether the potential for higher fines will actually encourage voluntary self-disclosure. It also remains to be seen whether bench judges will approve CJIPs if the fine agreed between the PNF and the company happens to be higher than the maximum provided for by the statute—that is, up to 30% of the company’s average turnover.

That maximum CJIP fine is composed of two elements: a disgorgement (the so-called “restitutive portion”), and a penalty (the so-called “punitive portion”).

The restitutive portion (the “RP”) is calculated in proportion to the direct and indirect improper benefit derived from the misconduct. The punitive portion (the “PP”) is calculated on the basis of the restitutive portion to which is applied a multiplier based on a balance between aggravating factors (“AF”) and mitigating factors (“MF”):

$$Fine = RP + [RP * (1 + (AF - MF))]$$

The guidelines contain a total of 17 factors: nine aggravating factors and eight mitigating factors. Most of these factors were already mentioned in the previous guidelines. But for the first time, each factor is now associated with a maximum increase or reduction percentage to be applied to the restitutive portion of the fine:

Aggravating Factors New Factors	Cap	Mitigating Factors New Factors	Cap
Obstruction to the investigation	30%	Voluntary self-disclosure	50%
Large companies ⁸	20%	One-time occurrence	10%
Deficiencies of the compliance program (for companies subject to a mandatory program under Spain II Law)	20%	Relevance of internal investigations	20%

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⁸ During a conference on January 16, 2023, the PNF explained that “large company” will generally refer to companies employing at least 500 employees and/or with an average annual turnover over 1.5 billion euros—noting that they may apply this aggravating factor to smaller companies, for instance if they are listed and have a significant international footprint.

Aggravating Factors New Factors	Cap	Mitigating Factors New Factors	Cap
Repetitive nature of the issues	50%	Active cooperation	30%
Judicial, fiscal, regulatory history	20%	Corrective measures	20%
Use of the company's resources to conceal the alleged misconduct	20%	Efficiency of internal reporting system	10%
Creation of specific tools to conceal the alleged misconduct	30%	Non-equivocal admission of the facts	20%
Involvement of a public official	30%	Prior indemnification of victims	40%
Serious trouble to public order	50%		

The PNF made the choice to provide minimal details about the scope of the factors, sometimes even removing details that were mentioned in the previous version of the guidelines.

This absence of details falls short of bringing the intended predictability to corporate players, but it could bring useful flexibility during fine negotiations. It remains to be seen whether future CJIPs will provide more detail about these various factors; especially the vague ones carrying a potentially important aggravation of the fine, such as the “serious trouble to public order” (+50% increase).

Notwithstanding this lack of detail, the PNF’s guidelines indicate that it is ready to offer important potential reductions to the fine in the case of “voluntary self-disclosure” (50% reduction) and “active cooperation” (30% reduction). These potential reductions, and the corresponding incentives for companies to self-disclose and cooperate, are comparable to those provided by the U.S. Department of Justice in its updated guidance: discounts of up to 75% if a company voluntarily self-discloses, fully cooperates and effectively remediates, and discounts of up to 50% even if a company does not voluntarily self-disclose (as long as it still fully cooperates and effectively remediates). However, unlike the U.S. authorities, who provided new and reasonably detailed guidance on the meaning of “full” cooperation, the PNF has offered little indication of what steps a company should take in order to qualify for the “active cooperation” reduction. Instead,

the PNF simply reemphasized the importance of voluntary disclosure of potential wrongdoing. As the PNF recently put it: “We want to encourage companies to voluntarily self-disclose the facts that they would have detected internally. This message was not so strong before. Here, we are clearly saying that there is a premium for self-disclosure”⁹ It remains to be seen if this is enough to convince companies that voluntarily self-disclosing to French prosecutors is a sound decision.

Conclusion

The logic of these new guidelines echoes what exists in the United States: offering carrots to companies that come forward, cooperate and remediate—especially if they help identify bad apples. In drawing its inspiration from the other side of the Atlantic, the PNF intends to provide more predictability to foreign authorities about the potential outcome of a CJIP proceeding (including the level of the fine) and therefore confirm that the PNF as a key enforcement authority on the international stage, able to take the driver’s seat in multijurisdictional investigations.

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⁹ “L’outil de justice négociée nous a hissés au même niveau que les Etats-Unis”, *Les Echos*, January 16, 2023, <https://www.lesechos.fr/economie-france/budget-fiscalite/jean-francois-bohnert-loutil-de-justice-negociee-nous-a-hisses-au-meme-niveau-que-les-etats-unis-1897443>.