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# FCPA Update

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## Fifth Circuit Reverses FCPA Dismissals, Holding Agency Allegations Sufficient Without Reaching Secondary Liability Issue of *Hoskins*

In a much-awaited ruling, the U.S Court of Appeals for the Fifth Circuit declined to join the Second Circuit in rejecting the application of conspiracy or aiding and abetting liability to foreign non-issuers not otherwise covered by the FCPA. In *United States v. Rafoi*, the Fifth Circuit reversed two district court rulings dismissing FCPA indictments due to a lack of showing that foreign non-issuers were "agents" of a domestic concern.[1] The Fifth Circuit did not rule on whether the defendants could be tried as co-conspirators (the Second Circuit's ruling in *Hoskins I*) on the ground that the issue had not been addressed by the district court. The Fifth Circuit also rejected the district court's dismissal of the FCPA indictments on the ground

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1. *United States v. Rafoi*, No. 21-20658 consolidated with No. 22-20377, 2023 WL 1811921 (5th Cir. Feb. 8, 2023).

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that the term "agent" was unconstitutionally vague. The Fifth Circuit held that the DOJ need only use the language of the FCPA (*i.e.*, "agent") in an indictment to invoke subject-matter jurisdiction and that the issue of whether the statute covered the defendants was a "merits question." Although the Fifth Circuit's ruling does not create a circuit split, it does signal that the application of conspiracy liability and the appropriate definition of an "agent" under the FCPA remain open outside the Second Circuit.

## I. Background

*Rafoi* stems from an alleged kickback scheme in which U.S. companies bribed Venezuelan officials for preferential payment of invoices by Petróleos de Venezuela, S.A., the Venezuelan state-owned and -controlled oil company.[2] Daisy Teresa Rafoi Bleuler ("Rafoi") is a Swiss partner of a Swiss wealth management company, and Paulo Jorge Da Costa Casquerio Murta ("Murta") is a Swiss and Portuguese employee of a different Swiss wealth management company. They are alleged to have aided other co-defendants execute the bribery and money laundering scheme by, among other things, opening foreign bank accounts in the co-defendants' names for the purpose of hiding the illegal proceeds. Rafoi is not alleged to have committed any of the alleged corrupt acts in the United States; Murta allegedly travelled to Miami once to meet with a co-defendant. Both were charged with conspiracy to violate the FCPA and money laundering.[3] The indictment alleged that Rafoi and Murta were "agents" of their U.S. co-defendants and that Murta committed a corrupt act while on U.S. territory.[4]

Rafoi and Murta moved separately to dismiss the indictment. Both argued that the court lacked "subject-matter jurisdiction" on the conspiracy to violate the FCPA charge because the indictment failed to demonstrate that they belonged to any of the categories of defendants to which the FCPA applies. Both asserted that the indictment did not sufficiently plead that either was in an agency relationship with the U.S. co-defendants.[5] Rafoi claimed that the services provided by her wealth management company were pursuant to a professional, not an agency, relationship.[6]

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2. *Rafoi*, at *1; *United States v. Rafoi-Bleuler*, No. 4:17-CR-0514-7, 2021 WL 9884704, at *1-2 (S.D. Tex. Nov. 10, 2021), *rev'd and remanded sub nom. United States v. Rafoi*, No. 21-20658 consolidated with No. 22-20377, 2023 WL 1811921 (5th Cir. Feb. 8, 2023).

3. Superseding Indictment at 12, 38, 48, 53, 65, 73, *United States v. Rafoi-Bleuler*, No. 4:17-CR-0514-7, 2021 WL 9884704 (S.D. Tex. Nov. 10, 2021), *United States v. Leon-Perez*, No. 4:17-CR-00514, 2022 WL 4002321 (S.D. Tex. July 11, 2022).

4. The FCPA forbids corruptly offering, giving, promising to give, or authorizing the giving of anything of value to a foreign official for the purpose of obtaining, retaining, or directing business. The statute applies to three classes of defendants and their officers, directors, employees, stockholders, and agents acting on their behalf: "issuers" of securities, "domestic concerns" (*i.e.*, U.S.-based companies, citizens or residents), and any other person or entity "while in the territory of the United States." 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

5. *Rafoi-Bleuler*, at *3; *United States v. Leon-Perez*, No. 4:17-CR-00514, 2022 WL 4002321, at *3 (S.D. Tex. July 11, 2022), *rev'd and remanded sub nom. United States v. Rafoi*, No. 21-20658 consolidated with No. 22-20377, 2023 WL 1811921 (5th Cir. Feb. 8, 2023).

6. *Rafoi-Bleuler*, at *3.

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And unsurprisingly, Rafoi and Murta also asserted that the term "agent" was unconstitutionally vague.[7]

In separate opinions, Judge Kenneth M. Hoyt of the Southern District of Texas dismissed the FCPA conspiracy charges as to Rafoi and Murta. In a November 10, 2021 opinion granting Rafoi's motion to dismiss the indictment, the court held that a defendant can only be an agent of a domestic concern if the agency relationship exists in the United States. The court articulated the principle that when the government charges a non-U.S. defendant as an agent of a domestic concern but does not allege that the defendant committed an unlawful act in the United States, the government must establish *in the indictment* that there was an agency relationship *in the United States* with "undisputed evidence of mutual assent" to invoke subject matter jurisdiction.[8] The district court found that the government did not "present direct evidence that the defendant was an agent," and thus "no agency relationship [was] established in the United States."[9]

"[T]he Fifth Circuit's ruling… does signal that the application of conspiracy liability and the appropriate definition of an 'agent' under the FCPA remain open outside the Second Circuit."

In a July 11, 2022 opinion granting Murta's motion to dismiss the indictment, the district court similarly held that it lacked jurisdiction because the indictment only alleged Murta's conduct abroad to establish the agency relationship and therefore failed to show that Murta was in an agency relationship in the United States.[10] And the district court also found that the term "agent" as applied to Rafoi and Murta was unconstitutionally vague.[11] The court noted that the application of the term "agent" as a basis for jurisdiction was "such a novel application that no court has interpreted the statute or rendered a judicial decision that fairly discloses" how the term should be applied to establish jurisdiction.[12] The DOJ appealed both dismissals.

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7. *Rafoi-Bleuler*, at *3; *Leon-Perez*, at *3.
8. *Rafoi-Bleuler*, at *6.
9. *Id.*
10. *Leon-Perez*, at *3.
11. *Rafoi-Bleuler*, at *9; *Leon-Perez*, at *3.
12. *Rafoi-Bleuler*, at *9.

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## II. The Fifth Circuit's Decision

In a unanimous opinion written by Judge Kurt D. Engelhardt, the Fifth Circuit reversed the district court's dismissal of the Superseding Indictment as to Rafoi and Murta on every ground. As an initial matter, the opinion noted that a court's "subject matter jurisdiction" is a separate question from whether a statute covers a particular defendant.[13] Subject matter jurisdiction (permitting a federal court to hear a case) exists where the indictment alleges a violation of the laws of the United States. "[W]hether a statute reaches extraterritorial acts" (*i.e.*, whether the defendants or their conduct are covered by the FCPA) is a question on the merits.[14] Regarding the conspiracy to commit FCPA charges, the Fifth Circuit rebuffed the district court's imposition of heightened pleading requirements at the commencement of a case and explained that simply alleging "agency" is sufficient for an indictment. The court noted that the purpose of an indictment is to put defendants on notice of a charge. As the indictment "specifically allege[d] that both Rafoi and Murta acted as 'agent[s] of a domestic concern,'" it met the "minimal constitutional standards" of putting the defendants "on notice of the charge."[15] As a result, the court declined to rule on the issue of whether the defendants could be charged with conspiracy even if they were not agents. The Fifth Circuit instructed the district court to address those issues on remand.[16] In a footnote, the court clarified that it "neither accepts nor rejects the theory that an individual who falls outside of the actors enumerated in the FCPA can be held liable as a conspirator under a secondary-liability theory."[17]

The Fifth Circuit applied the same logic to Murta's claim and found that the indictment sufficiently linked his presence in the United States to a corrupt act. Because of the Superseding Indictment's "express characterization of his status as a person acting while in the United States," the court noted that the indictment was sufficient to put him "on notice of the charge asserted against him such that he may prepare a defense."[18] The court rejected Murta's argument that the government had to show "a sufficient nexus between the conduct condemned and the United States" to satisfy due process because he was a non-U.S. citizen.[19] The court explained that there were no due process concerns because Murta had "fair warning" that his alleged

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13. *United States v. Rafoi*, No. 21-20658 consolidated with No. 22-20377, 2023 WL 1811921, at *2 (5th Cir. Feb. 8, 2023).
14. *Id.*
15. *Id.* at *3.
16. *Id.* at *4. Although the Fifth Circuit stated that the district court did not rule on whether conspiracy liability could apply to individuals not otherwise covered by the statute, the district court discussed the issue and cited *Hoskins I* as authority. *See Rafoi*, at *4; *Rafoi-Bleuler*, at *7 (citing *United States v. Hoskins*, 902 F.3d 69, 78 (2d Cir. 2018)); *Leon-Perez*, at *3 n.10 (citing *Hoskins I*, at 97).
17. *Id.* at *4 n.6.
18. *Id.* at *4.
19. *Id.*

activities – unlawfully transmitting money through the United States to foreign bank accounts and committing bribery and money laundering – are "universally condemned by law-abiding nations" and could result in criminal charges.[20]

Finally, the Fifth Circuit rejected the district court's argument that the term "agent" was unconstitutionally vague as applied to Rafoi and Murta. The court explained that even though the FCPA does not define the term "agent," the term is governed by the common-law definition and therefore not vague. The court did not expand on what that common law definition was, as a statute is only unconstitutionally vague if it does not define the "criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[21] According to the Fifth Circuit, a "person of common intelligence" would have understood that setting up bank accounts for other people so that they could hide the proceeds of a bribery scheme was "treading close to a reasonably-defined line of illegality under an agency theory."[22]

## III. The Status of *Hoskins* Outside the Second Circuit

*Rafoi* is procedurally distinct from the various rulings that made up the *Hoskins* saga.[23] In *Hoskins*, the district court initially found that because Hoskins did not belong to one of the categories of defendants enumerated in the FCPA, he could not be charged with conspiracy or aiding-and-abetting. The Second Circuit agreed with that legal conclusion (*Hoskins I*), but noted that Hoskins would fall within the statute if he were an "agent" of a domestic concern.[24] On remand that issue was tried before a jury. After trial, the district court found as a matter of law that Hoskins did not meet the common-law definition of agency, a ruling that the Second Circuit affirmed on appeal (*Hoskins II*).[25] In *Rafoi*, the Fifth Circuit stated that the district court started with the question of agency in evaluating the indictment (something not addressed in *Hoskins* until after trial) and then reasoned from there. As there

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20. *Id.*
21. *Id.* at *5 (internal quotation omitted).
22. *Id.* at *5-6 (internal quotation omitted).
23. For prior analysis of the *Hoskins* case, see Kara Brockmeyer, Andrew M. Levine, Philip Rohlik et al., *End of the* Hoskins *Saga: Implications for the Future*, FCPA Update, Vol. 14, No. 4 (Nov. 2022), https://www.debevoise.com/insights/publications/2022/11/fcpa-update-november-2022; Andrew M. Levine, Winston M. Paes, Philip Rohlik et al., *Revisiting* Hoskins: *Second Circuit Holds Foreign Non-Issuers not Present in the United States are not Subject to the FCPA Absent Common Law Agency Relationship*, FCPA Update, Vol. 14, No. 1 (Aug. 2022), https://www.debevoise.com/insights/publications/2022/08/fcpa-update-august-2022; Kara Brockmeyer, Colby A. Smith, Bruce E. Yannett et al., *Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery,* FCPA Update, Vol. 10, No. 1 (Aug. 2018), https://www.debevoise.com/-/media/files/insights/publications/2018/08/fcpa-update_august-2018_v2.pdf?rev=9c17028eb1604fbf8982cabbaf7d1ec6.
24. *United States v. Hoskins*, 902 F.3d 69, 97-98 (2d Cir. 2018).
25. *United States v. Hoskins*, 44 F.4th 140, 150 (2d Cir. 2022).

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was no reason to question whether defendants were "agents" of domestic concerns at the indictment stage of a proceeding, *Rafoi* is consistent with *Hoskins I* (which likewise held that an agent was covered by the FCPA and could be charged with conspiracy to violate the FCPA). That said, the Fifth Circuit expressly left open the question, addressed in *Hoskins I*, of whether conspiracy liability could apply to defendants who were otherwise outside the scope of the FCPA.[26]

Similarly, the Fifth Circuit only addressed the question of agency at the indictment stage and its holding is not inconsistent with *Hoskins II*, which addressed the question after trial and on the merits. That said, *Hoskins II* involved a careful, even technical, consideration of the elements of common law agency.[27] The Fifth Circuit noted that "setting up accounts on behalf of others to obfuscate the source of monies knowingly derived from an illegal bribery scheme" was not an unconstitutionally vague description of agency.[28] While the Fifth Circuit did not address whether setting up bank accounts at another's direction would constitute agency on the merits, its description of agency is closer to the "fact based" approach put forward by the DOJ in *Hoskins II* than it is to the district court's careful parsing of the common law post-trial that was upheld by the Second Circuit.

In conclusion, although the *Hoskins* cases have likely caused DOJ to pause and evaluate even more closely its evidence prior to charging foreign non-issuers not otherwise covered by the FCPA, *Rafoi* demonstrates that any court-imposed limitations only come into play after the government has been put to its burden of proof and not at the indictment stage. And although individuals are more likely to put the government to its burden of proof than corporations, doing so is a long and unpleasant experience for which the *Hoskins* cases provide little relief.

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26. *Rafoi*, at *4 n.6.
27. *Hoskins II*, at 150-51.
28. *Rafoi*, at *6.

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

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. 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.[1] 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. 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.

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1. Debevoise & Plimpton LLP, "DOJ Offers New Incentives in Revised Corporate Enforcement Policy" (Jan. 24, 2023), https://www.debevoise.com/insights/publications/2023/01/doj-offers-new-incentives-in-revised.

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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:

- 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.

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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 (Jan. 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* Debevoise & Plimpton LLP, "French DPAs – First CJIP Guidelines Published" (July 9, 2019), https://www.debevoise.com/insights/publications/2019/07/french-cjip-guidelines.
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).
6. For the small and medium companies that are not legally obliged to have one.

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**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]

"The stated objective [of the revised guidelines] is to bring more transparency and predictability to the negotiation process, and encourage companies to come forward, cooperate and possibly help identify individual wrongdoers."

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").

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7. "L'outil de justice négociée nous a hissés au même niveau que les Etats-Unis," *Les Echos* (Jan. 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.

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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 maximum increase or reduction percentage to be applied to the restitutive portion of the fine:

| **Aggravating Factors**<br>***New Factors*** | **Cap** | **Mitigating Factors**<br>***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% |
| 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).

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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.

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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 is 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* (Jan. 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.

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