

# Client Update

## First French DPAs for Corruption Offences

On March 5, 2018, French prosecutors published two Judicial Conventions of Public Interest (“CJIPs” or “French DPAs”) approved by the President of the High Court of Nanterre on February 23. The CJIPs, entered into between prosecutors and two sub-contractors to state-owned utility EDF, SAS Kaefer Wanner (“KW”) and SAS SET Environnement (“SET”), allege that these companies had ceded to solicitations to pay bribes to an EDF procurement manager, and that this behaviour amounted to corruption by them of an individual charged with a public service. KW and SET admitted these facts and their legal qualification<sup>1</sup>, and agreed to pay financial penalties of €2,710,000 and €800,000 respectively and compensation to EDF of €30,000 each. In addition, they agreed to submit to monitoring by the French Anti-corruption Agency (“AFA”) for, respectively, 18 and 24 months.

The KW and SET CJIPs are the first to be concluded in respect of corruption offences. Helpfully, they provide (1) detail on the financial incentive of entering into a French DPA for companies with potential exposure for corruption-related offences in France, (2) clarification that co-operation and remediation can significantly reduce the financial penalty, as well as (3) the first examples of monitorships to be supervised by the AFA. However, the crucial question of how a company can qualify for a French DPA remains largely unanswered.

### INTRODUCTION – FACTUAL BACKGROUND

In July 2011, EDF informed the police that one of its procurement managers solicited bribes from companies that tendered for EDF contracts, based on information received from one of its service providers<sup>2</sup>. The police’s investigation revealed that bribes had been paid on behalf of a number of companies to the EDF employee in return for EDF contracts. It has been reported that 47 individuals and seven companies ended up being charged, including KW and SET.

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<sup>1</sup> This does not amount to a formal admission of guilt and a CJIP does not amount to a conviction.

<sup>2</sup> Neither KW nor SET.

KW is a sub-contractor principally to the manufacturing, construction, nuclear, and marine sectors. It employs some 1,800 staff and has annual revenues approaching €200m. It was found that between 2004 and 2011, KW had provided the EDF employee with approximately €75,000 worth of cash and benefits annually, in return for EDF thermal plant maintenance contracts worth €33m.

SET is a pollution clean-up company, employing 125 staff and with annual revenues of approximately €18m. The investigation found that between 2009 and 2012, SET had provided cash and benefits worth €136,621.28 to the EDF employee in return for EDF contracts worth €5m.

KW and SET were charged in May and June 2015 with bribing a person charged with a public service under Article 433-1 of the French Criminal Code. In mid-November 2017, the CJIP procedure was started, leading to their conclusion in mid-February 2018.

### CONFIRMATION OF THE FINANCIAL INCENTIVE TO ENTER INTO A FRENCH DPA

The financial penalty under a CJIP should be an amount “proportionate to the benefits obtained from the established misconduct”<sup>3</sup>. In these cases, the CJIPs applied as their starting point the gross profits made by KW and SET from the contracts obtained through corruption, calculated as €3.3m for KW and €680,000 for SET. These amounts were designated payable by way of restitution of unlawful gains, and used as the starting point for the calculation of the financial penalty (see further below).

Under French criminal law at the time of the commission of the offenses in question, corporate corruption offences attracted a maximum fine of €750,000. This was the paltry fine imposed on oil major Total following its February 2016 conviction of large scale corruption of Iraqi government officials between 2000 and 2002 in the context of the “oil-for-food” program.<sup>4</sup> The starting points for the calculation of the penalties under a CJIP for both KW and SET were therefore multiples above the maximum penalty they would have faced following a conviction.

However, the CJIPs make it clear that in addition to the fine, following a conviction KW and SET would have been liable for confiscation of the value of the total income obtained from the corruption, *i.e.* up to the full €33m and €5m respectively.

Given that the CJIP regime does not provide for confiscation, in corruption cases the total financial penalty that can be imposed under a CJIP will almost always be materially lower than

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<sup>3</sup> Article 41-1-2 of the French Code of Criminal Procedure. The financial penalty under a CJIP cannot exceed 30% of the corporate entity’s average gross turnover in the last three financial years.

<sup>4</sup> The conviction by the Paris Court of Appeal has been appealed to the Supreme Court and a ruling is expected in the middle of March 2018.

what it would be following a conviction.<sup>5</sup> This is particularly so for cases where the conduct occurred after December 6, 2013 when the maximum fine for corporate corruption offences increased to ten times the profits derived from the corruptly obtained business.

The KW and SET CJIPs also provide guidance on the factors taken into account in fixing the financial penalty. These further reinforce the financial incentive for companies with potential exposure in France for corruption-related offences to seek to enter into a CJIP.

### **CO-OPERATION AND REMEDIATION CAN REDUCE THE FINANCIAL PENALTY TO BELOW THE GROSS PROFITS DERIVED FROM THE CORRUPT BUSINESS**

From the starting point of the gross profits from the corruptly obtained contracts, the financial penalties actually imposed on KW and SET were fixed taking into account a series of aggravating and mitigating circumstances.

In respect of both companies, the aggravating circumstances were said to be, (1) the duration of the corrupt conduct (eight and four years), and (2) the fact that it concerned corruption of a provider of a public service. Notably absent from this list is the involvement of senior staff, in particular for SET where the chairman, secretary-general, and CFO were all directly implicated.

It is, however, the mitigating circumstances which are most noteworthy. In respect of KW, the prosecutors noted that although the company had not self-reported, it should be given credit for co-operating with the investigation following the search of its premises. KW was also given credit for an extensive remediation program started in 2012. This program included training of staff, significant governance and policy reforms, a risk assessment, and the provision of a whistleblowing framework.

The weighing of the aggravating and mitigating circumstances resulted in a KW's financial penalty being set at €2,710,000, *i.e.* almost €600,000 less than KW's gross profit from the corruptly obtained contracts.<sup>6</sup>

For SET, the mitigating circumstances retained were the departure or dismissal of the implicated chairman, secretary-general and CFO. Following a January 2014 buy-out, there was therefore both new ownership and management untainted by the corrupt conduct.

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<sup>5</sup> For the sake of clarity, the facts in Total preceded even the reinforcement of the confiscation regime and so a value-based confiscation order could not be imposed.

<sup>6</sup> As of June 1, 2017, the law referred to as "Sapin II" obliges large companies to have in place corruption prevention and detection programs. For large companies it is therefore doubtful that the type of remediation program which benefited KW will weigh as heavily in mitigation.

The combination of aggravating and mitigating circumstances in SET's case led to the imposition of an additional penalty of €120,000 on top of the €680,000 gross profit, resulting in a financial penalty of €800,000.

The KW and SET CJIPs therefore provide a helpful indication that self-reporting, co-operation, and remediation may serve to reduce the financial penalty imposed, sometimes to even below the gross profits derived from the corruptly obtained business.

### **AFA-SUPERVISED MONITORSHIPS**

In addition to the financial penalties (and the €30,000 in compensation for EDF), both KW and SET will be subject to AFA-supervised monitorships for 18 and 24 months respectively. The costs, borne by the companies monitored, are capped at €290,000 for KW and €200,000 for SET. For KW, the express objective of the monitorship is to ensure compliance of its existing anticorruption program with the obligatory requirements for an anticorruption program set out in Article 17 of Sapin II.

### **CONCLUSION – THE CRITERIA TO QUALIFY FOR A FRENCH DPA REMAIN UNCLEAR**

Despite providing welcome clarifications on the application of the CJIP regime, the KW and SET CJIPs fail to address the issue of most concern to companies facing corruption-related issues in France: what are the criteria used by authorities to decide whether to offer a company to conclude a French DPA? From the three CJIPs<sup>7</sup> to date, it would appear that neither self-reporting nor cooperation is a prerequisite, but that they do serve as mitigating factor for the calculation of the financial penalty.

A Ministry of Justice Circular to prosecutors dated January 31, 2018<sup>8</sup>, but apparently only distributed on March 1, 2018, states that when deciding whether to offer a CJIP, prosecutors may wish to take into account (1) the company's antecedents, (2) whether it voluntarily disclosed the relevant facts, and (3) whether it cooperated with the investigation. The only firm guidance in the Circular is that, in most cases, a company would not be offered a second CJIP.

Companies and their advisers therefore still await reliable guidance from French prosecutors and courts on the circumstances where an offer to conclude a CJIP is likely to be made.

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Please do not hesitate to contact us with any questions.

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<sup>7</sup> The first was concluded on October 30, 2017 between the National Financial Prosecutor's Office and HSBC Private Bank (Suisse) S.A.

<sup>8</sup> Circular N° CRIM/2018-01/G3-31.01.2018.

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