CLIENT ALERT

France's New Corporate Enforcement Policy Is a Mixed Bag

Both Increasing and Decreasing Self-Disclosure Incentives

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The Judicial Convention of Public Interest ("CJIP"), introduced by the Sapin II Law (2016) as a new French equivalent to a U.S. Deferred Prosecution Agreement, is a settlement mechanism available for legal entities for bribery, tax fraud and environment-related offenses.[1] In 2018 and 2019, both the French Ministry of Justice[2] and the National Financial Prosecution Service ("PNF")[3] issued CJIP guidelines, which have governed the settlement of several high-profile cases.

On January 16, 2023, the day before the U.S. Department of Justice announced revisions to its Corporate Enforcement and Voluntary Self-Disclosure Policy,[4] the PNF updated its CJIP guidelines.[5] The PNF's stated goal is to further encourage

1 For further information regarding the French CJIP procedure, see G. Bertrou & H. Piguet, "Chapter 14: France's Anticorruption Legal Framework" (in particular, ¶14.05[E]) *in The Foreign Corrupt Practices Act: Compliance, Investigations and Enforcement* by M. Weinstein, R. Meyer and J. Clark *(Wolters Kluwer Legal & Regulatory U.S., 2022)*. Note that this is not applicable to individuals, including directors and officers.

2 Circular from the Directorate of Criminal Matters and Pardons (French Ministry of Justice) dated January 31, 2018 (CRIM/2018-01/G3-31.01.2018).

3 Guidelines on the implementation of the Judicial Convention of Public Interest (National Financial Prosecution Service together with the French Anticorruption Agency (AFA)) dated June 26, 2019.

4 *See* https://www.willkie.com/-/media/files/publications/2023/dojslatestincentivesforselfdisclosureanofferyoucan.pdf.

5 Guidelines on the implementation of the Judicial Convention of Public Interest (National Financial Prosecution Service) dated January 16, 2023.

companies to self-report malfeasance and cooperate with criminal authorities by making the prospect of a CJIP more attractive.

The four most important updated features of these new CJIP guidelines are analyzed below.

The Important New Provisions

1. The “Good Faith” Cooperation Requirement

The PNF now expressly states that the CJIP is available to companies who are “cooperating in good faith.” The announcement from the PNF indicates that cooperation will likely require (i) prompt self-reporting or (ii) the conduct of an internal investigation—if not both. The announced changes do not identify any other, more specific requirements for settlement, demonstrating to us that the PNF wants the discretion to be able to offer CJIPs to all companies acting in “good faith.”

However, as the PNF retains its discretionary power to enter into settlement negations, there is no guarantee that taking proactive actions, such as self-reporting or sharing an internal investigation report, will in fact lead to the avoidance of formal (non-negotiated) criminal proceedings. Any decisions in response to this new guidance (e.g., conducting an internal investigation or self-reporting to authorities) should therefore be carefully considered by companies and their counsel before any action is taken.

2. Confidentiality

The new guidelines also aim to provide clarity on the critical issue of the confidentiality of documents and information provided to the PNF as part of “pre-settlement” negotiations, and more specifically the risk for companies that such documents and information be used against them in subsequent (non-negotiated) criminal proceedings. Whether they actually provide that clarity remains an open question, as it appears that the confidentiality of the initial exchanges with the PNF (i.e., before a CJIP procedure is formally opened) will be handled on a case-by-case basis. Again, the decision to liaise with the PNF should therefore be carefully weighed by companies and their counsel before any action is taken.

3. Financial Penalty

First the good. Under these new guidelines, the PNF has announced—for the first time—specific discounts to the fines that a company must pay under a CJIP. There are now eight specific “mitigating circumstances” and corresponding discounts, including (i) voluntary disclosure of the illegal practices (up to 50% discount), (ii) effective cooperation (up to 30% discount) and (iii) completion of an effective internal investigation (up to 20% discount).[6]

Now for the not so good. The PNF explicitly interprets the CJIP regulations under the Sapin II Law, which provide for the payment of a fine capped at 30% of the “company’s average turnover” over the last three years, as being calculated on the basis of the consolidated turnover (if any) of the entire corporate structure (both the parent company and all subsidiaries), which can make an enormous difference for subsidiaries of large corporate conglomerates negotiating a settlement over their own actions.

Moreover, in addition to the above “mitigating circumstances”-based discounts, the PNF also now expressly provides for specifically quantified additional penalties based on nine “aggravating circumstances,” including the mere fact of existing as a “large company” (up to 20% penalty). Depending on a company’s structure and situation, the CJIP could become a very costly alternative to taking the risk of facing criminal proceedings.

4. Extended Scope of the CJIP

In its revised guidelines, the PNF confirms that, while a CJIP agreement only applies to the facts and actions described in the agreement, it is possible “on a very exceptional basis” to provide in the agreement that the CJIP also applies to all other acts of the same nature committed in a given territory and during a given time period that would be discovered afterwards. This feature, together with the capacity of the PNF to organize coordinated settlement agreements with foreign authorities (U.S. DOJ, U.K. Serious Fraud Office, etc.), is of the greatest utility for settling international “systemic corruption” cases.

Implications

All in all, these new guidelines are a welcome refining of several of the main CJIP features, demonstrating a desire to move towards a more cooperative corporate enforcement posture, similar to that utilized by the DOJ in the United States. That being said, companies and their counsel should still exercise caution and weigh implications of attempting to follow a negotiated path. No one should rush straight to the PNF just yet.

We will continue to monitor developments that might indicate that France’s moves are the start of a growing international trend.

6 There is also a 40% (max.) discount applicable if companies agree to compensate the victims of the offense (if any). While this sounds promising in theory, it could prove to be difficult for companies to meet such a requirement. First, identifying the “victims” of a bribery scheme can be a very difficult and costly endeavor, potentially offsetting the 40% (max.) discount benefit. Second, companies are often reticent to agree that a bribery scheme actually harmed their competitors and may disagree with any such classification.

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