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## France’s National Financial Prosecutor and Anti-Corruption Agency Issue Joint Guidelines on Corporate Settlement Mechanisms

### I. Introduction

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On June 28, 2019, the French National Financial Prosecutor’s Office (*Parquet National Financier*) (“PNF”)<sup>1</sup> and the French Anti-Corruption Agency (*Agence Française Anticorruption*) (“AFA”)<sup>2</sup> published guidelines on the relatively new corporate settlement mechanism in France known as a Judicial Public Interest Agreement, or *Convention Judiciaire d’Intérêt Public* (“CJIP”). It marks the first time that the PNF and the AFA have issued joint guidelines on CJIP agreements. The new settlement mechanism was introduced into the French Criminal Code and Code of Criminal Procedure, respectively, when France reformed its anti-corruption framework in December 2016.<sup>3</sup> The country’s new anti-corruption legislation, which is commonly referred to as *Loi Sapin 2*, or the “Sapin 2 Law” (named after Michel Sapin, France’s Minister of Economy and Finance at the time of the law’s passage), has caught the attention of companies and practitioners subject to the law. Indeed, French authorities have concluded several CJIPs with companies since the December 2016 reforms took effect. Since entering into the first-ever CJIP in December 2017, French authorities have concluded a handful of CJIPs with companies of various sizes, including one agreement with global penalties in excess of USD 1 billion. The PNF has quickly understood the importance of cooperating closely with its foreign partners—such as the United States Department of Justice—to further multijurisdictional enforcement measures and settlements. One of the most striking examples of its increased activity in enforcing foreign bribery can be seen in statistics recently shared by the PNF itself: In 2018, the PNF submitted 103 requests for mutual legal assistance and extradition to its foreign counterparts, a stark contrast with only fourteen such requests in 2014.<sup>4</sup>

The new joint PNF-AFA guidelines on CJIPs provide insight going forward for compliance officers, entities, and individuals subject to the enforcement actions by the PNF and the AFA.<sup>5</sup> The two entities intend for the CJIP guidelines

<sup>1</sup> Created by Law No. 2013-1117 of 6 December 2013 (Law on the Fight against Financial Fraud and Serious Economic and Financial Acts), the National Financial Prosecutor’s Office (*Parquet National Financier*) (“PNF”) has jurisdiction to prosecute three types of offenses: (1) integrity offenses (corruption, trafficking in influence, embezzlement of public funds, etc.); (2) serious financial fraud, money laundering, and tax evasion; (3) offenses involving financial markets (insider trading, price/rate manipulation, sharing false/misleading information, etc.).

<sup>2</sup> The French Anti-Corruption Agency (*Agence Française Anticorruption*) (“AFA”) was established by France’s recently enacted (December 2016) Law No. 2016-1691 relating to Transparency, the Fight against Corruption, and Modernisation of Economic Life (*Loi No. 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*) also known as the “Sapin 2 Law.” The AFA operates under the umbrella of France’s Ministers of Justice and of the Budget and is charged with assisting relevant authorities and officials in the prevention and detection of acts of corruption, trafficking in influence, graft, undue advantage, and embezzlement or misappropriation of public funds.

<sup>3</sup> The PNF is charged with enforcing provisions of the French Criminal Code (such as corruption, trafficking in influence, graft, and so forth). The AFA, on the other hand, is an administrative entity that is in charge of, among other activities, monitoring compliance with Article 17 of the Sapin 2 Law. As part of its oversight mandate, the AFA may submit violations of Article 17 to the AFA Sanctions Commission in order for it to initiate administrative proceedings into alleged misconduct relating to corruption that could result in administrative penalties and sanctions under the Sapin 2 Law.

<sup>4</sup> *Parquet National Financier, Bilan et Activité 2018 du Parquet National Financier* (January 2019), available at [https://www.tribunal-de-paris.justice.fr/sites/default/files/2019-01/PNF\\_synthese%202018.pdf](https://www.tribunal-de-paris.justice.fr/sites/default/files/2019-01/PNF_synthese%202018.pdf); UNODC, *Lessons Learned from Investigating Cases of Corruption involving Vast Quantities of Assets and Bringing Them to Justice* (Presentation by PNF’s Deputy Prosecutor Noémie Davody), available at [https://www.unodc.org/documents/corruption/meetings/OsloEGM2019/Presentations/2\\_Noemie\\_Davody\\_France.pdf](https://www.unodc.org/documents/corruption/meetings/OsloEGM2019/Presentations/2_Noemie_Davody_France.pdf).

<sup>5</sup> The AFA imposes only sanctions that are administrative in nature, unlike the PNF, which is responsible for criminal enforcement. The AFA has a six-person Sanctions Commission, which receives reports of anti-corruption violations from the AFA Director. The

to “incentivize companies to adopt a cooperative approach with judicial authorities such as the AFA” and serve to provide predictability and legal certainty. Because CJIPs are discretionary and therefore not necessarily available in every situation, companies would do well to take a closer look at the joint PNF-AFA guidelines to become familiar with the factors and circumstances the PNF and AFA consider when determining whether and how to enter into CJIPs with companies.

In this alert, Ropes & Gray provides an overview of the guidelines’ substance and highlights important aspects that companies should be aware of when interfacing with French enforcement authorities for purposes of securing a CJIP.

## II. CJIPs Generally

The CJIP is a first of its kind in the French legal system. Before the introduction of CJIPs in France, cooperation between French prosecutors and companies for the purpose of criminal settlements or plea agreements was non-existent in France. Under Article 41-1-2 of the French Code of Criminal Procedure (“FCCP”), CJIPs do not require an admission of liability or guilt by the company involved, nor do they have the legal effect of a final judgment or conviction.<sup>6</sup> The existence of a CJIP also does not relieve natural persons who may have engaged in wrongdoing of administrative or criminal liability. The PNF may enter into CJIPs with companies accused of the following violations of the French Criminal Code (“FCC”):

- Active corruption and trafficking in influence committed by a private individual (Articles 433-1 and 433-2 FCC, respectively);
- Active corruption and trafficking in influence of a foreign public official (Articles 435-3 and 435-4 FCC, respectively);
- Corrupt acts involving a member of a foreign judicial institution (Article 435-9 FCC);
- Active and passive private corruption (Articles 445-1 and 445-2 FCC, respectively);
- Active and passive corruption relating to sports (Articles 445-1 and 445-2 FCC, respectively); and,
- Active corruption and active trafficking in influence of a member of a judicial institution (Article 434-9 FCC).

The following sanctions and penalties are available under CJIP:

- Payment of a monetary fine to the government, which shall not exceed 30% of the company’s annual turnover (calculated based on the last three fiscal years and according to principle of proportionality);
- The implementation of a compliance program to prevent and detect corruption, subject to monitoring by the AFA for a maximum period of three years; and
- Payment of damages/restitution to victims of the relevant criminal conduct.

By agreeing to the terms of a CJIP, a company may avoid both hefty criminal penalties (maximum penalty of EUR 5 million) for violations of Article 17 of the Sapin 2 Law and possible administrative sanctions from the AFA’s Sanctions Commission. However, entering into a CJIP does not foreclose the ability of enforcement authorities to seek sanctions of

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Sanctions Commission presides over hearings that include the accused company or individual, agents of the AFA, and experts (from both the AFA and the accused). These hearing proceedings are public (and include testimony from the relevant AFA *rapporteur* and when necessary, the AFA director, followed by the accused party or its legal representative) and may result in the Sanctions Commission applying the following administrative penalties provided for in Articles 17.4 and 17.5 of the Sapin 2 Law: (i) issuance of an order to the company to adopt compliance measures and internal controls within less than a three-year period; and (ii) imposition of a monetary fine equal to or less than EUR 200,000 and EUR 1 million, for natural persons and legal persons, respectively.

<sup>6</sup> French Code of Criminal Procedure, Article 41-1-2(II).

a different nature, such as confiscation of criminal proceeds, closure of some company sites, and a prohibition on certain types of business activity.

### III. Overview of PNF-AFA CJIP Guidelines

The PNF-AFA CJIP Guidelines cover the following areas: (1) conditions required to enter into a CJIP; (2) the determination of fines; (3) compliance programs; (4) international coordination; and (5) compliance with the French blocking statute.

#### a. Conditions Required to Enter into a CJIP

This section of the guidelines provides useful insight to companies regarding how to interact with the PNF when a company is seriously considering the possibility of entering into a CJIP. The guidelines state that while the PNF is the only entity able to propose a CJIP during a preliminary investigation, a company's legal representative(s) should take the initiative of approaching the PNF and clearly state the desire of the company to enter into a CJIP. This stage involves talks (rather than written communications) regarding what each party might entertain as possible CJIP terms (e.g., specific criminal acts committed, amount of fines and methods of payment, duration of compliance program oversight, and compensation to be paid to victims).

##### *i. Sufficient Evidence Collected During Investigation*

The guidelines provide that before engaging in discussions with a company regarding a possible CJIP, the PNF must ensure that a sufficient amount of evidence has been collected during the investigation. The evidence gathered should provide a strong basis to support that a criminal act (defined in Article 41-1-2 of the FCCP) has been committed and that "if a CJIP is unsuccessful, the PNF would be able to bring a criminal action." In doing so, the PNF's investigation must have been sufficiently wide in scope so as to cover all relevant wrongdoing carried out by the company.

##### *ii. Absence of Prior Convictions for Acts of Corruption and Trafficking in Influence*

A company which has, either on its own or through its subsidiaries, been convicted for acts of corruption or trafficking in influence either in France or overseas may not be able to avail itself of the benefits of a CJIP. In making its determination, the PNF will also consider situations where a company was not convicted or did not admit guilt, such as having previously been party to a CJIP in France or to a foreign settlement agreement (e.g., deferred prosecution agreement in the United States or a leniency agreement in Brazil).

##### *iii. Company Cooperation with PNF Investigation*

In order to be eligible for a CJIP, a company must cooperate with the PNF's investigation into the company's alleged wrongdoing. According to the guidelines, the extent to which a company cooperates and the quality of its cooperation will be "decisive" factors in the PNF's decision to halt criminal proceedings against the company and enter into a CJIP. French authorities will also take such cooperation into consideration later when determining the applicable fines the company will pay pursuant to the CJIP. Cooperation factors the PNF will be mindful of include the following:

- *Spontaneous Sharing of Evidence:* A company that shares evidence or information with the PNF increases the likelihood that the PNF would consider a CJIP when determining an eventual fine. In making its assessment, the PNF considers the amount of time that has lapsed between the date on which the company became aware of the facts and when it shared the information with the PNF. The evidence or information shared should, to some extent, include facts of which the PNF was previously unaware.
- *Internal Investigation:* Companies that wish to enter into a CJIP should conduct a proactive and comprehensive internal investigation and should make an effort to understand the compliance program gaps that enabled the

relevant wrongdoing. The guidelines state that companies should share the results of the investigation with the PNF through a detailed report (including summaries of witness interviews carried out by the company).

- *Professional Secrecy*: When a lawyer is in charge of carrying out the company’s internal investigation, the company is responsible for determining which documents should be shared with the PNF. If the company refuses to provide certain documents, the PNF will evaluate whether such a refusal is justified by the rules of professional secrecy and may also consider the effects that such disclosure would have for the company in foreign jurisdictions.
- *Confidentiality of Evidence Collected during Internal Investigation*: Article 11 of the FCCP guarantees the confidentiality of evidence and information that a company shares with prosecutors during an investigation. In addition, Article 41-1-2 of the FCCP stipulates that if a judge does not approve a CJIP or if the company later retracts its desire to participate in the CJIP, the PNF may not use the evidence or information shared by the company against the company. However, because the decision to maintain confidentiality appears to be subject to some discretion and in light of the fact that there are few practical instances of how confidentiality is interpreted, including potentially sharing with other regulators, companies should be cautious when determining the types of information to share with enforcement authorities. Sharing this information also presents concerns where companies desire to maintain legal privilege over their investigation findings and analysis.

*iv. Compensation to Victims*

The guidelines provide that the PNF will consider favorably a company’s efforts to compensate victims of its wrongdoing before the conclusion of a CJIP. The PNF also invites victims to share information regarding the extent and scope of damages suffered as a result of the wrongdoing. However, the PNF is ultimately responsible for determining the amount of damages that the company pays to the victim. Nonetheless, victims may make submissions to the court during the CJIP hearing (where the settlement agreement is evaluated and approved by the judge), including presenting observations regarding the amount of damages proposed by the PNF. Victims who are dissatisfied with the level of compensation received may seek to recover remaining damages in civil proceedings.

**b. Determining Fine Amounts under CJIPs**

When determining the fine amount a company should pay pursuant to a CJIP, the PNF considers the financial advantage received by the company with regard to the contract or business activity connected to the corrupt acts. In this regard, the PNF expects the company in question to furnish documents of a financial and accounting nature that help shed light on the benefit or advantage the company expected to gain from the corrupt contract or business activity. The PNF considers not only the concrete financial gains received by the company but also gains in market share and increases in business visibility. Fines must be proportionate to the gravity of the alleged violations, and their purpose is two fold: they on one hand are focused on disgorging illicit profits received, and on the other, serve a punitive purpose by applying a calculated multiplier based on the factors listed in the chart below.

Aggravating Factors	Mitigating Factors
Corrupt act involving public official	Spontaneous sharing of information and evidence with PNF before the opening of a criminal investigation
Company falls under categories listed in Article 3(3) and Article 17 of the Sapin 2 Law (e.g., companies with more than 500 employees and with an annual turnover of at least EUR 100 million)	Excellent cooperation with PNF and comprehensive and effective internal investigation

Aggravating Factors	Mitigating Factors
Company was previously sanctioned/convicted in France or abroad for corrupt acts	Effective compliance program and implementation of remediation measures and internal changes within the organization
Company used corporate resources to conceal corrupt acts	Spontaneous implementation of a compliance program by a company that is not under a legal obligation to do so
Repeated and/or systemic acts of corruption	

### c. Compliance Programs

When considering whether to require the implementation of a compliance program pursuant to a CJIP, the PNF shall consult the AFA regarding program requirements and oversight measures. The PNF may consider compliance obligations related to the same conduct that foreign enforcement authorities have imposed on the company in question, as long as such requirements are similar or close to those provided in Article 41-1-2 of the FCCP.

The guidelines provide that a company whose compliance program implementation is undergoing monitoring and evaluation by the AFA pursuant to a CJIP shall be responsible for reimbursing the French government for said monitoring activity. Such costs will depend on the content and duration of the compliance oversight period (2-3 years), the extent and scope of the AFA’s evaluation, and the company’s operations (e.g., *inter alia*, nature and number of customers, interactions with government entities, number of subsidiaries, number of third-party intermediaries). A company’s failure to make timely payments for the costs incurred by the AFA may constitute a breach of the CJIP by the company, which would enable the PNF to institute criminal proceedings against the company.

### d. International Coordination

When negotiating a CJIP with a company that allegedly engaged in wrongdoing, French authorities will seek to coordinate their response with foreign authorities investigating the same conduct. Such coordination includes exchanges between the French and foreign authorities regarding the fine amounts that the company would be expected to pay in each jurisdiction. For example, in a recent CJIP, authorities in the United States awarded the financial institution credit for fines it paid to the PNF. Learning from this, the PNF and AFA sought to introduce this principle (although in non-binding form) in their own guidelines. This section of the guidelines also provides that where the wrongdoing spans across different jurisdictions and the CJIP contains a compliance program requirement, one corporate compliance monitor is preferable. Lastly, the PNF, and not the AFA, shall serve as the relevant point of contact for international legal cooperation efforts (e.g., mutual legal assistance and extradition).

### e. Compliance with French Blocking Statute

The guidelines also refer to the French blocking statute (Law No. 68-678 of 26 July 1968), which prohibits natural persons and legal persons from sharing information of an economic, commercial, industrial, financial or technical character with foreign authorities when doing so would affect or violate France’s essential economic interest. Such a prohibition applies in particular with regard to evidence gathering relating to foreign judicial or administrative proceedings. The French blocking statute provides exceptions to this prohibition when the sharing or exchange of information is provided by international treaty or agreement. The PNF-AFA guidelines allow a French company subject



to a monitorship imposed by a foreign enforcement authority (e.g., USDOJ) to share information with said authority. The guidelines also recall that Article 3(5) of the Sapin 2 law vests the AFA with the authority to ensure that the sharing of such information with foreign authorities does not violate the French blocking statute (the AFA is also responsible for overseeing such sharing of information in the context of a CJIP concluded by the PNF and a foreign authority).

## IV. Key Takeaways

While the joint PNF-AFA guidelines are a welcome development, they are imprecise in many parts and do not offer much new insight on the CJIP mechanism that was not already addressed in previous guidance or in the Sapin 2 law itself and its related legislation.

Nonetheless, there are some takeaways worth noting, which include the following:

- *Previous Guidance Regarding Anti-Corruption Compliance.* These guidelines are part of a larger effort by the AFA and the PNF to disseminate guidance and insight into how French authorities investigate and prosecute acts of corruption and enforce France's Sapin 2 Law. The guidelines came after other resources and instruments shared previously by the AFA and the PNF that companies subject to enforcement in France should consult and consider. Such documents include, among others: (i) AFA Recommendations for Legal Persons on the Prevention and Detection of Corruption;<sup>7</sup> (ii) Ministry of Justice Circular on the Implementation of Certain Provisions of the Sapin 2 Law;<sup>8</sup> (iii) AFA-PNF Cooperation Protocol;<sup>9</sup> and (iv) Guidance on Implementing Whistleblower Protections under the Sapin 2 Law.<sup>10</sup>
- *Disclosure of Results of Internal Investigation.* The guidelines provide that if a company wishes to be considered for a CJIP, a company must share the results of its internal investigation with the PNF through a detailed report (including summaries of witness interviews carried out by the company). The guidelines seek to reassure companies that in the event a CJIP is not agreed to or ultimately granted by the PNF or approved by the presiding judge, Article 41-1-2 of the FCCP stipulates that the PNF may not use the evidence or information shared by the company against the company. However, the guidelines are silent on whether the AFA may use such evidence in the context of administrative proceedings relating to the same conduct. Additionally, the PNF may use the information shared to initiate criminal proceedings against the individuals involved in the alleged misconduct or share the information with foreign enforcement authorities (e.g., USDOJ, UKSFO, etc.). Although the guidelines refer to a prohibition on the use of shared evidence described above in Article 41-1-2 of the FCCP, they also contain contradictory statements by stipulating that "all elements included in a company's internal investigation report are not necessarily covered by legal privilege." This creates confusion as to whether a company that voluntarily shares evidence would be able to assert legal privilege. Given uncertainties such as these, companies should be particularly prudent in such situations and carefully consider the likelihood of such risks before sharing sensitive information with French and foreign authorities .

<sup>7</sup> French Anti-Corruption Agency (Agence Française Anticorruption), Recommendations to Help Companies Prevent and Detect Corruption, Trafficking in Influence, Embezzlement of Public Funds, and Favoritism (December 2017) (*Recommandations destinées à aider les personnes morales de droit public et de droit privé à prévenir et à détecter les faits de corruption, de trafic d'influence, de concussion, de prise illégale d'intérêt, de détournement de fonds publics et de favoritisme*), available at <https://www.agence-francaise-anticorruption.gouv.fr/fr/recommandations>.

<sup>8</sup> French Ministry of Justice, *Circulaire relative à la présentation et la mise en oeuvre des dispositions pénales prévues par 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*, JUSD1802971C (31 January 2018), available at <http://circulaire.legifrance.gouv.fr/index.php?action=afficherCirculaire&hit=1&r=43109>.

<sup>9</sup> Protocol agreement signed between AFA and PNF on 28 March 2018.

<sup>10</sup> French Anti-Corruption Agency (Agence Française Anticorruption), Charter in Support of Economic Actors (September 2018) (*Charte d'appui aux acteurs économiques*), available at <https://www.agence-francaise-anticorruption.gouv.fr/fr/lafa-lance-charte-dappui-aux-entreprises>.

- *Relationship between Corporate Compliance Monitor and AFA's Post-CJIP Evaluation and Oversight Activity.* The guidelines provide that where the PNF enters into a CJIP with a company stemming from conduct involving multiple jurisdictions, one corporate compliance monitor is preferable. Given the AFA's heavy focus on monitoring and evaluating corporate implementation of anti-corruption compliance programs, a company agreeing to an independent corporate compliance monitor as part of a CJIP settlement is likely to face the heavy burden of meeting not only the monitor's expectations and review requirements but also those of the AFA. This could prove to be an overwhelming undertaking and is something that companies subject to multijurisdictional enforcement with a French component should prepare for going forward.
- *Effect of French Blocking Statute Remains to Be Seen.* Since its enactment fifty years ago, the French blocking statute has rarely, if at all, been enforced. However, this is likely to change given that the Sapin 2 Law explicitly charges the AFA with ensuring compliance with the blocking statute. Given the level of anti-corruption enforcement activity carried out by jurisdictions outside of France (e.g., the United States, the United Kingdom, Brazil, etc.), it would not be surprising to see the AFA target companies who violate the law by choosing to cooperate with foreign authorities (through voluntary disclosures, pre-trial discovery, etc.). What is more, recent proposed reforms to the statute would establish monumental criminal penalties for violations of the statute. For example, a report drafted by Raphaël Gauvain – a member of French Parliament tasked with proposing legislative reforms – recommended increasing applicable criminal sanctions from imprisonment of up to six months and/or a maximum penalty of EUR 18,000 to imprisonment of up to two years and maximum penalties of EUR 2 million and EUR 10 million, respectively, for individuals and companies.<sup>11</sup> Companies may soon find themselves being forced to choose between complying with foreign anti-corruption authorities' demands or violating French law. Because of this, companies should monitor current efforts in France to reform the antiquated piece of legislation.

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<sup>11</sup> James Thomas, *Proposed Reforms to French Blocking Statute Would Still Leave Companies "Stuck Between Two Evils,"* Global Investigations Review, 18 April 2019, available at <https://globalinvestigationsreview.com/article/1190325/proposed-reforms-to-french-blocking-statute-would-still-leave-companies-%E2%80%9Cstuck-between-two-evils%E2%80%9D>.