



GUIDELINES ON THE IMPLEMENTATION OF THE CONVENTION JUDICIAIRE D'INTERET PUBLIC (Judicial Public Interest Agreement)

The fight against corruption, since the 2000s, has become a major challenge for Europe and France. This type of crime, often having international ramifications, is a threat to the democratic pact and harmful to the proper functioning of the economy. Corruption tends to consolidate non-democratic regimes and weakens States where the rule of law applies. It entails a considerable loss of revenue and is a misappropriation of public resources for the benefit of a few private interests. It hinders the setting up of policies for growth and sustainable development, particularly by discouraging foreign investments.

Corruption is damaging to the social bond and people's trust in public authorities. It encourages tax evasion and fraud and may finance other forms of crime.

From the criminal justice perspective, the fight against transnational corruption presents particular challenges:

- transnational corruption is harder to detect as all or some of the offenses are committed outside French territory;
- investigations are longer and more complex, and so more costly, as financial flows follow opaque circuits sometimes across a number of jurisdictions;
- a number of countries may consider themselves as competent to prosecute the perpetrators of foreign corrupt practices, thus involved companies could be subject to piling-on.

In order to contain corruption, several countries have developed more appropriate legal procedures, in particular plea-bargaining arrangements between the national prosecution authority and a company.

In the majority of transnational corruption cases, sanctions are now applied to companies via a non-trial resolution¹. This transactional justice enables public authorities to reconcile two objectives: sanctioning with severity and without delays companies committing such offenses while allowing their business to continue

Article 22 of Law no 2016-1691 of 9 December 2016 on “transparency, combatting corruption and modernization of economic life” (commonly called “Sapin II Law”) introduced into French criminal law a new transactional procedure instrument, the Judicial Public Interest Agreement (“convention judiciaire d'intérêt public”, CJIP).

The conditions for the application of CJIP were specified by the Circular of 31 January 2018² and the Instructions of 21 March 2019 from the Directorate of Criminal Affairs and Pardons (Direction des

¹ See in particular OECD, Resolving foreign bribery with non-trial resolutions, 2019

² Circular JUSD 1802971 C of 31 January 2018, on the presentation and implementation of the penal provisions laid down by Law no 1102016-1691 of 9 December 2016 on transparency, combatting corruption and modernization of economic life

affaires criminelles et des grâces – DACG)³ which includes in particular as an annex a “Guide to the Judicial Public Interest Agreement”, to which should be used as a reference.

The reasons for PRF-AFA common guidelines

The present guidelines are intended to apply to the implementation of CJIPs in cases dealing with offenses of corruption and influence peddling committed in a national or international context.

The French National Financial Prosecutor’s Office (procureur de la République financier - PRF) and the French Anti-Corruption Agency (Agence française anticorruption - AFA) wished to draw up and distribute common guidelines.

By specifying and setting out procedures for implementing CJIPs, they aim to encourage legal persons to adopt a cooperative approach towards the judicial authorities, as well as with the AFA. For economic operators and foreign judicial authorities, the guidelines are intended to constitute an element of predictability and a factor of legal certainty.

The commitment of the PRF and the AFA to implement the guidelines is only based on their respective powers.

The PRF

The powers and competences of the French National Financial Prosecutor’s Office are set by Law no 2013-1117 of 6 December 2013 on tax fraud and economic and financial crime.

Under Article 705 of the Code of Criminal Procedure, the Prosecutor has concurrent jurisdiction with other prosecution offices with regard to offenses against probity (corruption, influence peddling, misappropriation of public funds, unlawful taking of interest, favoritism...) and, with regard to the laundering of the proceeds of these offenses or conspiracy to commit them, when the offenses appear to be highly complex.

The Prosecutor is competent to establish jurisdiction over offenses committed across the entire national territory.

The guidelines specify the principles and conditions for implementation of the CJIP by the PRF in light of the criminal law policy defined by the circular cited above and the circumstances that determine how prosecution is carried out.

The AFA

The AFA, created by Law no 2016-1691 of 9 December 2016, is an agency with national competence placed under the joint authority of the Minister of Justice and the Minister of Budget. Its mission is to assist the competent authorities and persons involved in preventing and detecting acts of corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favoritism.

To this end, the AFA may, on the one hand, advise and support legal persons under private law or public law to prevent offenses against probity and, on the other hand, in conditions determined by law, oversee the quality and efficiency of the anti-corruption compliance measures implemented by some operators.

³ Presentation Dispatch 2019/F/0419/FAI of 21 March 2019 giving procedures for exchanges between prosecution offices and the French Anti-Corruption Agency

Moreover, at the request of the Prime Minister, the AFA is tasked with ensuring observance of Law no 68-678 of 26 July 1968⁴, in the context of corporate compliance program obligations imposed on French companies by foreign authorities.

1. Presentation of the CJIP

The legal regime of the CJIP is outlined in Articles 41-1-2, 180-2 and R. 15-33-60-1 et seq. of the Code of Criminal Procedure.

An agreement may be proposed by the National Financial Prosecutor to a legal person under suspicion or investigation for one or more of the following offenses and any related offense⁵

- active corruption (Article 433-1) and influence peddling (Article 433-2) committed by a private individual;⁶
- active corruption (Article 435-3) and influence peddling regarding a foreign public official (Article 435-4 :);
- corruption of a member of a foreign judicial institution (Article 435-9);
- influence peddling regarding a member of a foreign judicial institution (Article 435-10);
- active and passive private corruption (Article 445-1, Article 445-2 :);
- active and passive corruption in sport (Article 445-1-1) (Article 445-2-1);
- active corruption of a member of a judicial institution (penultimate subparagraph of Article 434-9);
- active influence peddling regarding a member of the judicial institution (second subparagraph of Article 434-9-1).

The agreement may include one or more of the following obligations:

- the payment of a public interest fine, the amount of which may not exceed 30 percent of average annual turnover, calculated by reference to the previous three years;
- the implementation, under the supervision of the AFA, of a corporate compliance program for prevention and detection of corruption, for a maximum period of three years;
- the compensation for the harm caused to the victims when victims could be identified.

When agreed to by the legal person, the CJIP is subject to validation by the President of the Court. The President grants (or refuses to grant) a validation order following a public hearing.

If validated, the agreement and the validation order are published on the website of the AFA and a press release is issued by the National Financial Prosecutor.

If the validation is refused or, if the legal person withdraws its consent or fails to fulfil the obligations of the agreement within the time allowed, the National Financial Prosecutor activates the prosecution procedure, unless there are new elements.

⁴ Law on the communication of documents and information of an economic, commercial, industrial, financial or technical nature to foreign natural or legal persons.

⁵ In accordance with the definition of Article 203 of the Code of Criminal Procedure, offenses are related where they were committed at the same time by several persons together, or where they were committed by different persons, even at different times and various places, but by common accord between them beforehand, or where the guilty parties some offenses to procure the means to commit the others, to facilitate, proceed to execution or to achieve impunity, or where items removed, misappropriated or obtained through crime or an offense were, wholly or in part, concealed

⁶ The articles referred to in this paragraph are those of the Criminal Code

The CJIP does not entail a declaration of guilt and has neither the nature nor effects of a conviction. It is therefore not entered on the Bulletin n°1 of the criminal record of the legal person.

When proposed in the course of an investigation carried out by an investigative judge (“information judiciaire”), the National Financial Prosecutor and the legal person concerned have a period of three months starting on the date of the notice sent by the investigative judge so as to agree on a proposal for an agreement. This notification requires the prior agreement of the National Financial Prosecutor, admission of the offenses, and acceptance of the penal classification by the legal person under investigation.

Value of the CJIP for the legal person

The main effect of a CJIP is to bring an end to prosecution proceedings against the legal person.

This person thus avoids being ordered to pay a fine that could be of up to five times that for which natural persons would be liable (for an offense of active corruption for example, the maximum fine that could be incurred is 5,000,000 Euros or an amount equivalent to twice the proceeds arising from the offense).

Furthermore, the additional penalties that could be faced in a criminal court cannot be provided for in the CJIP, in particular:

- confiscation of the proceeds or the object of the offense, an automatic penalty and, in cases of offenses against probity, may be the amount of the fraudulently obtained contract; or, in cases of offenses against probity that are liable to a sentence of imprisonment of 5 years or more, confiscation of all goods belonging to the convicted persons or freely available to them, subject to the rights of third parties of good faith⁷
- prohibition on carrying on certain activities;
- closure of one or more establishments;
- inability to seek or compete for public contracts;
- prohibition on making a public offering of or introducing financial securities in negotiations on a regulated market.

Under a CJIP, the compliance obligation period is for a maximum of three years, instead of five years of additional penalty⁸ that can be imposed in the event of legal proceedings.

As a CJIP does not require a declaration of guilt, it does not entail debarment of the legal person from national public contracts⁹. There being no conviction also makes it possible, in the majority of cases, to continue to respond to calls for tenders related to international public contracts¹⁰.

⁷ Art. 131-21 of the Criminal Code.

⁸ Art. 131-39-2 of the Criminal Code

⁹ In accordance with Article L. 2141-1 of the Public Procurement Code, only a person with a final conviction for offenses against probity may be debarred from a public contract procedure.

¹⁰ In point of fact, in the European Union, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement states in Article 57: “Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons: b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (33) and Article 2(1) of Council Framework Decision 2003/568/JHA (34) as well as corruption as defined in the national law of the contracting authority or the economic operator.”

In the United States, a violation of the FCPA may also entail heavy related sanctions. For example, the mere fact of a company being charged with a violation of the FCPA may exclude it from being awarded public contracts in the United States and enjoyment of certain benefits granted by the public authorities (for example with regard to financing) and triggers suspension of authorizations for export of goods and services intended for defense. See 10 U.S.C. P408 (forbidding the use in the defense sector of persons convicted of offenses relating to a public contract); 48 CER. Subpt. 9.4 (exclusion of any company convicted of an offense concerning fraudulent practice or showing a lack of integrity); exclusion

The frequently very lengthy duration of proceedings and their aleatory nature are destabilizing for a legal person, and for its image and governance, with a long-term distraction from management of its business. Implementing negotiated proceedings speeds up the handling of the criminal proceedings and mitigates the randomness of their outcome. A CJIP in this respect offers the legal person the advantage of making provision of the sums relating to the public interest fine and to keep informed its shareholders.

The speed of the proceedings, reinforced by the cooperation of the legal person in the investigation, mitigates the damage to the reputation of the company. It also limits the negative effect of criminal proceedings on the financing capacity of the legal person, and on its business relations, in particular when third-party due-diligence measures are being carried out by its co-contractors.

When the legal person agrees to a compliance program, the CJIP also helps appease the social environment of the company by demonstrating the commitment of its top executives with regard to prevention and detection of offenses against.

Lastly, where the legal person is the subject of simultaneous prosecutions by several authorities, a CJIP (or its equivalent in foreign law) facilitates coordination among these authorities and allows for the simultaneous acceptance of parallel resolution agreements¹¹ (see below 5. International coordination).

Acceptance of a CJIP by the executives of the legal person who are not being prosecuted, when, for example, a change of governance has occurred since the offenses were committed, manifests their ethical commitment and transparent management of the new management team. It makes it possible to consign to the past earlier practices and promotes the adoption of corrective measures so as to prevent new offenses from being committed.

Value of the CJIP for natural persons (individuals)

Under Article 41-1-2 of the Code of Criminal Procedure, a CJIP is only available for legal persons. Subparagraph 7 specifies that the legal representatives of the legal person facing charges remain liable as natural persons. They are informed, once the proposal is made by the National Financial Prosecutor, that they may be assisted by a lawyer before agreeing to the proposed agreement.

For the natural persons under investigation, including top executives and employees (or former top executives and employees) of the legal person entering into a CJIP, the PRF makes a case-by-case assessment of what further action is to be taken with regard to their situation.

2. Prerequisites for a CJIP

Under Article 41-1-2 of the Code of Criminal Procedure, only the National Financial Prosecutor may propose a CJIP. He makes a case-by-case assessment of how appropriate it is to make use of such a measure.

The proposal for a CJIP may be made so long as prosecution proceedings have not been initiated. As is specified by the DACG Circular of 31 January 2018, a CJIP is an alternative to prosecution. Entering into a CJIP may be proposed by the Prosecutions Office at any time in the course of the criminal investigations, or at all events before the case is brought before the Criminal Court. A proposal for a

from various public program, for example guarantees awarded for investments abroad. See in particular Foreign Assistance Act of 1961 237(1) (Overseas Private Investment Corporation); 7 C.F.R. 1493.270 (Commodity Credit Corporation). Source OECD examination report on application of the Convention and the 1997 Recommendation by the United States.

Moreover, the World Bank may temporarily, by way of sanction, exclude from its financing projects companies that have committed offenses of corruption.

¹¹ To this end see the Judicial Public Interest Agreement signed on 24 May 2018 by the National Financial Prosecutions Office and the Société générale, at the same time as a deferred prosecution agreement with the Department of Justice of the United States and the federal district attorney for East New York.

CJIP may also be made in the course of an investigation carried out by an investigative judge (“information judiciaire”) in accordance with the specific procedure outlined in Article 180-2 of the Code of Criminal Procedure.

Whether in the course of an investigation carried out by National Financial Prosecutor’s Office (“enquêtes préliminaires”) or by an investigative judge (“information judiciaire”), a CJIP proposal could be made if a number of criteria are met. As this measure makes it possible for a company to avoid a conviction in court and the consequences arising from this, it must be reserved for situations in which it appears in line with the public interest not to initiate a criminal prosecution.

Besides the legal conditions, the DACG Circular of 31 January 2018 shows that consideration is to be given to other factual criteria (such as the criminal records of the legal person, self-reporting of the offense by the company, the degree of cooperation with the judicial authorities) with a view to assessing how appropriate it is to implement this measure.

The use of a CJIP is in line with the public interest when it makes it possible to considerably reduce the length of the investigation, to ensure an effective and firm legal response to misconduct, to provide compensation for harm done to the victim and advances the prevention of recidivism by putting in place robust corporate compliance programs for detection of offenses against probity.

In accordance with Article 41-1-2 of the Code of Criminal Procedure, the use of a CJIP should retain the option of instigating criminal proceedings against natural persons, in particular the top executives of the legal person, when they are the perpetrators or accomplices of the offenses covered by the CJIP.

Proposal of a CJIP and prior discussion

If, according to the law, only prosecutors may propose a CJIP in the course of an investigation, in practice the legal representative of the legal person or its counsel may advise the PRF of their wish to benefit from this resolution mechanism.

In such a case, the representative or the counsel of the legal person approaches the PRF for a discussion on this matter.

The DACG Circular of 31 January 2018 encourages the initiation of informal preliminary talks even before the formalization of any proposal for a CJIP and informing the victim.

No written form is required to initiate these prior discussions that aim to assess if it is possible to reach an agreement with the legal person on the essential terms of the agreement to be considered (in particular the legal criteria chosen, the amount of the public interest fine and the arrangements for its payment, the application and length of the compliance program obligation and the compensation of any victims).

Sufficient evidence of offenses of corruption or influence peddling

It is apparent from Article 41-1 -2 of the Code of Criminal Procedure that if the proposal for a CJIP is not validated by the President of the Court, or if the legal person avails itself of its right of retraction or if it fails to fulfil all the obligations set out in the CJIP, the National Prosecutor “instigates prosecution, unless there are new elements”.

Usage of the CJIP therefore requires that one or more of the offenses referred to in Article 41-1-2 of the Code of Criminal Procedure be identified.

Before initiating any discussion on entering into a CJIP, the PRF assesses the evidence assembled during the investigation so as to be sure that it is sufficient to identify one of the offenses referred to in

Article 41-1-2 of the Code of Criminal Procedure ¹² and that, should the CJIP fail, it will be possible to effectively instigate prosecution proceedings.

Through an examination of the charges laid against the legal person, the PRF also makes sure that the investigation has allowed an assessment of the extent of the offenses against probity that may have been committed by the legal person during the period of time under investigation. A sufficiently in-depth investigation, enabling the manifestation of the most significant offenses is a prerequisite for any discussion on entering into a CJIP.

Absence of a prior sanction for offenses of corruption or influence peddling

The fact of the legal person or one of its subsidiaries, or even one of its top executives, being sanctioned at an earlier date for offenses that might be classified as offenses against probity, whether by a French court or by a foreign authority, is in principle an obstacle to the implementation of a CJIP.

This also applies when the legal person has previously been granted a CJIP or a resolution agreement entered into with a foreign authority for offenses against probity.

The assessment made of the existence of such earlier offenses may however be mitigated by taking into account other factors, such as the scope of or the time that has elapsed since the offenses for which sanctions were imposed against the legal person. If offenses not covered by an earlier CJIP are revealed at a later date, the prosecutor may take into account the good faith of the representatives of the legal person to assess if it is possible to enter into a new CJIP.

Implementation of an efficient compliance program

The Law of 9 December 2016 requires the executive managers of legal persons referred to in point 3 of Article 3 and Article 17 to adopt measures and procedures aimed at the prevention and detection of offenses against probity. This obligation came into effect on 1 June 2017.

Failure by the legal person to implement an effective compliance program to meet the obligation under Article 17 may be regarded as an aggravating circumstance when considering procedural options or determining the public interest fine.

As regards legal persons excluded from the scope of Article 17, voluntary implementation of an effective compliance program is a favorable indicator for being granted a CJIP.

It is the responsibility of the executive management of the legal person, once made aware of offenses of corruption or influence peddling committed inside their organization, to take the necessary corrective measures to strengthen the effectiveness of the compliance program. This matter will be carefully examined by prosecutors when considering the possibility of entering into a CJIP.

Should the legal person not have already been audited at the initiative of the AFA¹², the PRF may seek its expertise so as to have an in-depth analysis of the measures and procedures for prevention and detection of offenses against probity and the corrective measures actually implemented.

¹² If an audit was carried out, the prosecutor may request the French Anti-Corruption Agency to forward its report pursuant to Article 77-1-1 of the Code of Criminal Procedure.

Cooperation in the criminal investigation and implementation of internal investigations

The cooperation of the legal person in the criminal investigation is a prerequisite for entering into a CJIP.

The quality of this cooperation will be a decisive factor regarding the abandonment of prosecution proceedings and use of a CJIP. It will also be taken into account in determining the amount of the public interest fine (by application of a mitigating factor).

- Voluntary self-reporting of the offenses by the legal person

Voluntary self-reporting of the offenses to prosecutors, if timely made, is taken into account favorably, both as regards the choice of the CJIP procedure and as a factor reducing the amount of the public interest fine. Assessment of reasonable time by prosecutors takes into account the time that has elapsed between when the top executives of the legal person became aware of the offenses and when the latter were disclosed. Prosecutors endeavor to verify the impact on the progress of the investigations and the outcome of the investigation (in particular in the light of the preservation of evidence and collusion risks).

Disclosure of the offenses must be made in detail to allow prosecutors to take a sufficiently accurate view of the offenses of which they were not previously aware.

- Implementation of an internal investigation

Prosecutors expect the legal person wishing to be granted a CJIP to have itself actively taken part in revealing the truth by means of an internal investigation or an in-depth audit on the offenses and the malfunctioning of the compliance system that facilitated offenses. The conclusions of this investigation must be reported to prosecutors within a period compatible with the imperatives of the criminal investigation.

The internal investigation may be carried out in full before being disclosed to prosecutors, or alongside theirs, if the extent of the investigations to be carried out is such that their completion in full would not allow the PRF to be advised in reasonable time.

Should the internal investigations precede the disclosure of the offenses to prosecutors and the initiation of a criminal investigation, these investigations must be carried out so as to ensure preservation of the evidence and in particular the authenticity of witness accounts.

Should prosecutors have initiated the criminal investigation without the offenses being disclosed to them by the legal person, that person retains the option of cooperating with the criminal investigation by conducting its own investigations or forwarding to prosecutors the relevant documents and information held by it.

The legal person must take measures necessary for its internal investigations not to hinder the progress of the criminal investigation. Where the internal and criminal investigations run in parallel, regular exchanges between prosecutors and the counsel of the legal person must make it possible to ensure proper coordination.

The internal investigation must result in a report drawn up and presented to prosecutors describing the offenses with the greatest possible accuracy.

As is outlined in Article 41-1-2 of the Code of Criminal Procedure, notwithstanding the entering into a CJIP, the legal representatives of the legal person under investigation remain personally liable. The public interest demands that such action to prosecute be taken whenever legal conditions allow. The initial investigations carried out by the company must also help establish individual liabilities.

The principal witnesses must be identified and the relevant documents in the possession of the company must be forwarded to prosecutors¹³.

¹³ Subject to the rules applying to lawyers' professional confidentiality

If interviews have been carried out by the company or its counsel with witnesses or persons that might be involved in the offenses, the reports of these interviews are made available to the prosecutors, as well as all the documents on which they rely.

- Counsel's professional confidentiality

Where the internal investigations are conducted by a lawyer, it is the responsibility of the company and its counsel to determine which documents they wish to make available to prosecutors to be included in the case file of the criminal investigation. Not all the evidence appearing in the report of the internal investigation are necessarily covered by lawyers' professional confidentiality. While professional confidentiality is required from lawyers in their relations with clients, clients themselves are not bound by it.

Should the company refuse to forward certain documents, it is for the prosecutors to determine if this refusal appears justified in the light of rules applicable to this confidentiality. Where there is a disagreement, prosecutors assess if the failure to pass on the documents concerned has an unfavorable effect on the level of cooperation of the company. This assessment takes account, as may be appropriate, of the legal consequences that might be entailed by waiving professional confidentiality under foreign law.

- Confidentiality of evidence from the internal investigation

Compliance with Article 11 of the Code of Criminal Procedure ensures the confidentiality of all the evidence submitted by the company to prosecutors in the course of the criminal investigations.

Furthermore, the second subparagraph of point 3 of Article 41-1-2 of the Code of Criminal Procedure states that "if the president of the court does not validate the proposal of an agreement or if the legal person avails itself of its right of retraction, the National Financial Prosecutor may not submit to the investigating judge or to the trial court declarations made or documents passed on by the legal person in the course of the procedure described this article."

This provision concerns documents and information forwarded to prosecutors after formalization of a proposal for a CJIP, which in particular makes it possible to finalize the setting of the amount of the fine and to specify the outline of the compliance program obligation that will be binding on the legal person. This also concerns exchanges in writing in which the legal person states that it accepts the legal classification of the offenses, and those used to support the negotiation on the terms of the proposal for a CJIP.

However, Article 41-1-2 of the Code of Criminal Procedure does not affect the prosecutors' ability to make use of documents and information passed on by the company or its counsel at the criminal investigation stage, which is necessarily prior to the formalization of a proposal for a CJIP and therefore to the procedure described in Article 41-1-2 of the Code of Criminal Procedure.

In the course of its investigation, and in particular so as to ensure proper coordination of its investigations with those carried out by the company, prosecutors may communicate to the company the information that they consider necessary pursuant to point II of Article 77-2 of the Code of Criminal Procedure.

In any case and at the latest when prosecutors deem their investigations completed, they communicate the case file to the legal person and its counsel.

Compensation of victims

An initiative by the company to compensate the victims even before the proposal to enter into a CJIP is also considered as a positive factor.

At the end of the informal exchanges with the legal person, if the possibility of entering into a CJIP is confirmed, prosecutors notify the victims using the notice described in Article 41-1-2 of the Code of Criminal Procedure. This notification is given even when the company proves that it has already fully compensated for the harm caused to the victim.

As far as is possible, this notice is accompanied by the draft CJIP with an obligation for the victim to guarantee its confidentiality.

The notification given to the victim does not constitute a request for approval of the proposal for a CJIP.

In its notice to victims, prosecutors call on them to advise them of the existence and extent of any residual harm.

It is the responsibility of prosecutors, when drawing up the proposal for a CJIP, to set, if appropriate, the amount of damages to be paid to the victim by the legal person facing charges.

The victim may present observations on the amount set at the hearing in which the President of the Court examines the request for the purpose of validation of the CJIP. The entering into and validation of the CJIP does not remove the right of victims to bring a case before the civil courts.

3. Calculating the amount of the public interest fine

Assessment of the benefits derived through the misconduct

Article 41-1-2 1, 1 of the Code of Criminal Procedure states that “*the amount of this fine is set in proportion to the benefits derived through the misconduct, up to a limit of 30 percent of the average annual turnover calculated by reference to the previous three annual turnovers known on the date on which the misconduct was recorded.*”.

Reference is made to DACG Circular of 31 January 2018 which sets out the principles and specifies the criteria chosen by prosecutors to calculate the amount of the public interest fine.

On the basis of this and of the experience derived from the negotiation and the signing of the first CJIPs, the following principles emerge.

- Determination of the financial benefit

Where accounting data is available, the financial benefit to the legal person from performance of the contract affected by the offenses of corruption.

The profit is then calculated on the basis of the turnover generated by the impugned contract, after deduction of expenses directly attributable to the project. Deduction may only be made from turnover of those expenses directly related to the contract under consideration. Particular exclusions from this deduction are:

- overheads (salaries, buildings) not exclusively related to the project;
- research and development costs;
- provision for depreciation and amortization;
- most frequently, expenses arising from the application of an apportionment formula, unless it proves that they were incurred independently of the signing of the contract;

- remunerations or benefits (“bribes”) granted by the legal person in the context of offenses of corruption or influence peddling.

The gross operating profit (GOP) or earnings before interest, taxes, depreciation, and amortization (EBITDA) may form a basis on which is determined, after making the deductions presented above, the financial benefit derived through the misconduct.

The legal person is requested to provide the cost accounting statements and any forecast documents relating to the contracts signed. These documents make it possible to assess in particular the profit that was expected from the project in question and to make a consistency check with the amount of unlawful profit that the company considers should be used.

These documents must also make it possible to assess the non-financial benefits that may have accrued to the company through the recorded misconduct. The benefit derived from the recorded misconduct is also to be assessed in the light of market share won or the higher profile and amortization of fixed unit production costs, even if in accounting terms the contract in question was loss-making or generated a low profit.

Where a CJIP is proposed when all the expected gains have not as yet been received by the legal person (as with contracts with staggered or deferred performance, or where the investigations take place when the contract has not been carried out in full), sums not so far accounted for in income of the company are incorporated in the calculation of the unlawful profit. With regard to contracts including sales with purchase options, a multiplier may be applied to take account of the probability of the concerned contracts being converted into firm sales or on the contrary cancelled, depending on the usual practice of the contract under consideration. These points undergo specific discussion, on a case-by-case basis, with the legal person.

Calculating the amount of the fine

The amount of the fine may not exceed 30 percent of the average annual turnover calculated by reference to the previous three annual turnovers known on the date on which the misconduct was recorded. As stated in the DACG Circular of 31 January 2018, this date is that on which the prosecutors propose the CJIP.

In accordance with Article 41-1-2 of the Code of Criminal Procedure, the fine must be in proportion to the gravity of the recorded misconduct.

The public interest fine includes a dimension of restoration of unlawful profit and a punitive dimension in the application of a multiplier calculated according to the application of a number of criteria set out below.

- **Restoration of unlawful profit**

The public interest fine is at least of the same amount as the unlawful profit determined as shown above.

- **Punitive dimension**

The gravity of the recorded misconduct is assessed by the prosecutors taking account in particular of the following aggravating and mitigating factors:

Aggravating factors	Mitigating factors
Corruption of a public official	Self-reporting of the offenses to prosecutors before the start of any criminal investigation
Legal person covered within the scope of Articles 3 (3°) and 17 of the Law of 9 December 2016	Excellent cooperation and complete and effective internal investigation
Legal person previously convicted/sanctioned in France or abroad for corruption-related offenses	Effective compliance program / implementation of corrective measures and changes in the organization
Use of resources of the legal person to conceal corruption-related offenses	Voluntary implementation of a compliance program by a legal person having no statutory obligation to do so
Repeated or systemic nature of the corruption-related offenses	

4. The compliance programme obligation under the CJIP

The compliance program obligation, for the legal person, requires the implementation of the measures and procedures defined in Article 131-39-2 of the Criminal Code¹⁴. The AFA is responsible for supervising, over a maximum of three years, the implementation of this program.

To carry out its supervision, the AFA may resort to experts or persons or authorities qualified to assist it in conducting legal, financial, fiscal and accounting analyses¹⁵. The related expenses are to be borne by the legal person up to a cap set by the CJIP.

This obligation, correctly fulfilled, must better equip the legal person to effectively prevent corruption.

¹⁴ These measures listed are as follows: 1) a **code of conduct** defining and illustrating the different types of behavior to be prohibited as being likely to be classified as offenses of corruption or influence peddling; 2) an **internal reporting system** designed to enable the collection of reports from employees relating to the existence of conduct or situations contrary to the code of conduct of the legal person; 3) a **risk map** taking the form of documentation regularly updated and designed to identify, analyze and rank risks of exposure of the legal person to external solicitations for purposes of corruption, in particular according to the business sectors and geographic zones in which the legal person carries on its business; 4) **assessment procedures of the situation of clients**, first-tier suppliers and intermediaries in the light of the risk map; 5) **accounting oversight procedures, internal or external**, for ensuring that the ledgers, registers and accounts are not used to mask offenses of corruption or influence peddling. These checks may be carried out by the legal person's own accounting and finance oversight departments or by use of an outside auditor when carrying out the account certification audits laid down in Article L.823-9 of the Code of Commerce; 6) a **training system** for the executives and personnel most exposed to risks of corruption and influence peddling ;7) **disciplinary rules** allowing the sanctioning of employees of the legal person in the event of violation of the code of conduct of the legal person,

¹⁵ Article 41-1-2 of the Code of Criminal Procedure.

✓ **The relevance of the compliance programme obligations and the determination of its scope and maximum amount of expert monitoring fees**

The PRF examines how relevant it is to impose such an obligation taking account of the following, after consulting the AFA, as the case may be.

1) the measures and procedures of the program to be included in the agreement

PRF will take into account, if applicable, the conclusions of a preliminary audit carried out beforehand by the AFA on the basis of Article 17 of the Law of 9 December 2016, provided the audit is sufficiently recent.

An anti-corruption compliance obligation imposed by a foreign authority, provided that its content is close to the provisions of Article 41-1-2 of the Code of Criminal Procedure, could be taken into account.

2) the length of the program

The length of the compliance program is set at a minimum of two years to allow the AFA to be assured of the effectiveness and robustness of the measures implemented.

3) the maximum amount of expert monitoring fees

The AFA carries out an assessment of the maximum amount of these fees on the basis of the relevant information and documents and answers to a questionnaire sent to it by the company via the prosecution office¹⁶.

This estimate is based on the number of hours required for monitoring the compliance program. It makes a distinction between the costs inherent to the design of the program and those for monitoring its implementation.

It is set taking into account in particular the following elements:

- the content and length of the compliance program obligation defined in the CJIP; and
- the specific characteristics of the legal person. They may affect:
 - the scope of supervision by the AFA on account of the variety of its business lines, the number of subsidiaries, in France and abroad, the type and number of clients, first-tier suppliers and intermediaries, etc.
 - the intensity of supervision, in accordance with the specific risk profile of the monitored entity which could be related to particularly exposed business sectors, its interactions with public authorities, and its international development

The CJIP also stipulates the commitment of the legal person to deposit the amount of the expert monitoring fees by transfer to the account of the appropriate designated controller within a timeframe determined with the AFA.

The AFA advises the National Financial Prosecutor's Office of any difficulty encountered in the payment of the provision for covering the expert monitoring fees.

¹⁶ Calculation questionnaire on fees, annexes 2 and 2a, to the Circular of the Directorate of Criminal Affairs and Pardons of 31 January 2018

Failure to pay may constitute a cause of non-performance of the agreement putting the legal person at a resumption of prosecution proceedings.

✓ **The conditions of supervision by the AFA**

The supervision by the AFA of the performance of this measure follows five stages (cf. annex 1 the Operations to monitor the performance of the CJIP).

The PRF is informed at least once a year of the implementation of the compliance program obligations and of any difficulty in performance by the AFA or by the legal person.

5. International coordination

The CJIP allows the prosecution authorities of different countries, dealing with the same offenses, to coordinate their desired penal response.

In this eventuality, the determination of the amount of the public interest fine may be discussed with the foreign prosecuting authorities in order to allow an assessment of all the fines and penalties paid by par the legal person.

If a compliance program obligation is considered, it is preferable to appoint only one monitoring body. Should the legal person facing charges have its registered office or operating base in France or carry on all or part of its economic activities on French territory, the appointment of the AFA to monitor this measure is required pursuant to Article 41-1-2 of the Code of Criminal Procedure.

This measure is then carried out under the supervision of the PRF which informs as may be appropriate the foreign prosecution authorities of the progress of the measure in compliance with the rules on international mutual assistance in criminal matters.

6. Compliance with Law no 68-678 of 26 July 1968

Article 1 of Law no 68-678 of 26 July 1968, known as “the blocking statute” forbids, subject to international treaties or agreements, any natural person of French nationality or normally resident on French territory and any executive, representative, agent or employee of a legal person that has a registered office or establishment there, to communicate, to foreign public authorities information of an economic, commercial, industrial, financial or technical nature when such communication may, in particular harm the essential economic interests of France.

Article 1 bis forbids any person from requesting, seeking or communicating, in writing, by word of mouth or any other form, documents or information of an economic, commercial, industrial, financial or technical nature for gathering evidence for foreign legal or administrative proceedings or in such a context.

Where a French company is subject to an anti-corruption compliance program ordered by a foreign authority, this authority may receive various information communicated by the company itself (if tasked with self-assessment), or a third party appointed as a “monitoring body”, assigned to ensure the implementation of the measure.

Pursuant to Article 3, 5° of the Law of 9 December 2016, the AFA is tasked with ensuring that the information sent to the foreign authority does not contravene the provisions of the Law of 26 July 1968.

In a single case, the PRF and a foreign prosecuting authority may agree that the compliance program obligations be covered in the CJIP alone. If the resolution reached by the company with a foreign

authority however includes an obligation to inform that authority of the progress of compliance measures, the AFA ensures the company is in observance of the provisions of the blocking statute.

Lastly, it is apparent from the combined provisions of the Law of 26 July 1968 and Article 3, 5° of the Law of 9 December 2016 that when a company suspects or detects the commission of offenses of transnational corruption within itself in the course of performing a resolution imposed on it by a foreign authority, it must inform the AFA of this before communicating this information to the foreign authority.

The AFA assesses if such a communication might be a violation of the provisions of the law of 26 July 1968. The AFA informs the PRF of the progress of the disclosure procedure to the foreign authority to allow the PRF to assess if the offenses detected fall within its field of competence.

Signed in Paris on 26 June 2019

The French National Financial Prosecutor

Eliane HOULETTE

The Director of the French Anti-Corruption
Agency

Charles DUCHAINE

Annex 1: Process to monitor the performance of the CJIP

After validation of the CJIP and the end of the ten-day retraction period, the CJIP Agreement and the validation order are published on the AFA website. Following this publication, the AFA sends to the legal person a notice, accompanied by a questionnaire and a list of documents to be provided within fifteen days. A first meeting is organized in order to discuss the monitoring methodology and explain the content of the questionnaire and the list of documents to be supplied.

The control process includes five stages:

Stage 1 (Indicative length: 0 to 3 months): initial audit carried out by the officials of the AFA to assess the current situation and draft an inventory of potential measures for prevention and detection of corruption within the legal person.

Stage 2 (Indicative length: 0 to 6 months): definition of an action plan by the legal person, using the recommendations of the initial audit report,

Stage 3 (Indicative length: 0 to 1 month): validation of the action plan by the AFA.

Stage 4 (Indicative length: 0 to 2 years): validation by the AFA of the main tools of the anti-corruption system of the entity and performance of targeted audits in the departments and subsidiaries of the legal person. The AFA sends an annual report to the prosecution office.

Stage 5 (Indicative length: 0 to 3 months): final audit carried out by the officials of the AFA and submission of the final report to the prosecution office.

For more information: <https://www.agence-francaise-anticorruption.gouv.fr/fr/controleslafa/controles-des-mesures-judiciaires>