

OPERATIONS TO AUDIT
THE EXECUTION OF JUDICIAL MEASURES



Control Division

April 2019

1 OPERATIONS TO AUDIT THE EXECUTION OF THE COMPLIANCE REMEDIATION PROGRAMME PROVIDED FOR BY THE JUDICIAL PUBLIC INTEREST AGREEMENT (“CJIP”)

Prior to a judicial measure, the public prosecutor’s office consults AFA in order to define the cap on the consulting expenses that will be stipulated in the Judicial Public Interest Agreement.

Once the judicial authority has approved the Judicial Public Interest Agreement and the ten-day withdrawal period has expired, the Judicial Public Interest Agreement is published on the AFA website. This publication triggers the issuance of the engagement letter for the audit team and of the audit notice for the attention of the audited entity.

After the audited entity has appointed its representative, said representative is sent a questionnaire and a request to disclose documents, to which an answer must be provided within 15 days. Concurrently, an initial meeting is scheduled to discuss the audit methodology and, as necessary, to clarify the contents of the questionnaire and of the request to disclose documents.

1.1 The five phases of an AFA audit

There are five phases in an AFA audit:

1.1.1 Phase 1 (indicative duration: 0 to 3 months):

- The initial audit is conducted by AFA employees and/or by one or more external specialists who assist AFA: this audit is designed to provide an overview of the anti-corruption system within the entity and, among other things, a process map. This initial audit, which may be supplemented by specialised sub-audits, must make it possible for the audit team to assess the existing system, and provide it with an in-depth understanding of the methodologies used, the managers of the undertaking’s various processes, the rules governing how process-related decisions are made, and the planned timetable for implementation. This audit is expected to give the audit team comprehensive knowledge of the entity’s environment and processes.
- The AFA report, which contains recommendations, is delivered to the audited entity.

1.1.2 Phase 2 (indicative duration: 0 to 6 months):

- The audited entity defines an action plan, which includes the recommendations contained in the initial audit report.
- The audited entity delivers the action plan to AFA.

1.1.3 Phase 3 (indicative duration: 0 to 1 month):

- Feedback is provided to the audited entity concerning the action plan, following review and approval by AFA.

1.1.4 Phase 4 (indicative duration: 0 to 2 years):

- The audited entity implements the action plan.
- AFA approves the framework policies, as illustrated below.

- During implementation of the action plan, targeted audits are conducted within the business lines, departments, branches and subsidiaries of the audited entity by AFA and/or the external specialists who are assisting AFA.
- The audited entity and/or the specialists who are working on site send AFA quarterly reports on the progress of the work to implement the action plan.
- AFA sends an annual report to the public prosecutor's office.

1.1.5 Phase 5 (indicative duration: 0 to 3 months):

- The final audit is conducted by AFA staff and/or by one or more external specialists who are assisting AFA.
- The final report is sent to the public prosecutor's office, and states whether or not the targets defined by AFA during the initial audit have been attained, pursuant to the deferred prosecution agreement.

1.2 The framework policies to be approved

The framework policies to be approved by the audit team include the following:

1.2.1 The bribery and influence peddling risks map

The framework methodological procedure must specify the following points:

- The project manager: a person who has the autonomy and expertise needed to implement the project within the Group, subsidiaries, branches, departments and business lines.
- Identification of the risks: definition of the scope of the bribery and influence peddling risks map, the chosen method (by scenario and/or by process), and general definition of the identification methodology (documents, interviews, etc.).
- Assessment of the risks: methodology for calculating the gross risk and net risk, in particular the chosen variables and the assessment matrix for the “quantitative” section.
- Updating: the process for updating the risks map.

1.2.2 The code of conduct

The framework code of conduct (for the scope of the audited entity, as necessary at the level of the group) includes the rules, the definitions and the illustrations of the audited entity's risks. It is written in the form of a framework methodology, which, over and above definitions, sets out the practical aspects of communication and updates. If there are codes of conduct that are specific to certain countries/subsidiaries, they must comply with the methodology of the framework code of conduct by adapting it to their specificities and/or risks (specific regulations, adapted illustrations, etc.).

1.2.3 Ancillary procedures (for gifts/hospitality/travel/sponsorship/lobbying/management of conflicts of interest/authorisations, and similar matters)

The framework procedure incorporates the comprehensive definitions, the framework rules and/or prohibitions, the general framework for audits and the reporting methods, in particular in the dedicated information system.

The specific procedures that result therefrom must respect the fundamental points through adaptations to the specificities, regulations and specific risks.

1.2.4 Training

The training plan will define the minimum mandatory frequency of training sessions, how training is updated, second level controls and the rules on reporting, as well as the principles that could be used to orient the rollout of specific training sessions.

1.2.5 Third-party due diligence procedures

The framework methodological procedure must specify the following points:

- The guiding principles, in particular the scope of application, the prohibited relationships and the general characteristics.
- The definition of the risk, according to the third parties, the products, the transactions, the amounts, etc.
- The division of duties: the person who has responsibility for carrying out the due diligence procedure, the associated services, etc.
- The process, in particular, the initiation, the updating or the termination of, or the refusal to enter into, a relationship.
- The assessment of the risks, through certain documents, the information to be collected to assess the risk and the calculation system.
- The approval process, in particular the decision-making rules.
- The treatment of specific cases.
- The control, the reporting and the storage of data.

As a general rule, the local third-party due diligence procedure will be confined to adapting the guiding principles of the framework procedure to the local organisation and its specific risks, by adjusting the specific variables accordingly.

1.2.6 The whistleblowing system

As a rule of thumb, it is common to all the components of the audited entity. If there is a system that is specific to a country and/or a subsidiary, that system must ensure that the staff benefit from the same requirement level.

1.2.7 Procedures for accounting audits

The framework procedures for accounting audits must present the general system with, in particular:

- the department(s) in charge,
- the guiding principles for the first and second level accounting controls, as well as the accounting audits, in particular the rules on identifying and approving the specific control points for detecting bribery and influence peddling,

- the reporting methods (handling of incidents, feedback).

1.2.8 The disciplinary system

The disciplinary system incorporates the framework rules, definitions and methodology. The disciplinary systems that are specific to certain countries or subsidiaries must, in addition to complying with local regulations, ensure that they uphold the spirit and the requirement level of the framework disciplinary system.

1.2.9 The control system

It should be noted that this item does not appear in the list of points that must obligatorily be included in the compliance remediation programmes that are linked to Judicial Public Interest Agreement and court-ordered compliance remediation plans (PPMC). Nevertheless, it is still vital for ensuring the effectiveness of the system.

The audit team will pay particular attention to this, by scrutinising the organisation of the audit department and the associated methodology, including the audit departments and methodologies that are specific to certain countries and/or subsidiaries.

The organisation of the department that is responsible for the second level controls of the anti-corruption system is defined in a framework procedure, which identifies, among other things, the department that is responsible and the generic control plan, which must be adapted specifically to the level of the subsidiaries and/or business lines according to their risks.

A generic control plan, which defines all the controls to be performed during the year on an item such as the prevention and detection of bribery and influence peddling, will, among other things, provide for the annual control of gifts/hospitality received/given, the third-party due diligence system, etc. The control points will be accompanied by a brief definition. Each department/business line/subsidiary will then have to adapt the framework control plan to its own risks, by defining its own control plan.

1.3 Circumstances under which AFA reports to the public prosecutor's office¹

1.3.1 At the request of the public prosecutor's office and at least once a year

AFA reports to the public prosecutor at his/her request and at least once a year.

As a minimum requirement, the audit team prepares an annual report for the relevant public prosecutor's office, so that this office can review the implementation of the compliance remediation programme.

1.3.2 In the event of difficulties

AFA informs the public prosecutor's office (and the legal entity) of any difficulties.

The legal entity for its part can also inform the public prosecutor of any difficulty in the execution of the judicial measure.

¹ Article R.15-33-60-7 of the Code of Criminal Procedure.

1.3.3 Upon completion of the measure

AFA submits a report to the public prosecutor's office at the end of the timeframe for the execution of the measure.

The "report on the end of the Judicial Public Interest Agreement measure" is prepared by the audit team and sent to the public prosecutor's office by registered letter with acknowledgment of receipt. There are no provisions of law that require this report to be submitted to the legal entity concerned.

1.4 The reopening of criminal proceedings in the event of non-execution or improper execution

If the legal entity does not provide evidence of having fulfilled all its obligations, subparagraph 17 of Article 41-1-2 of the Code of Criminal Procedure provides that the public prosecutor's office must "*under penalty of invalidity, inform the implicated legal entity of the suspension of performance of the agreement*".

If the implicated legal entity refuses to pay the expenses provided for by subparagraph 4 of section I of Article 41-1-2 of the Code of Criminal Procedure that may be incurred by AFA calling on specialists or on qualified persons or authorities, in order to assist it in carrying out the legal, financial, tax and accounting analyses that are necessary for its audit assignment, this may constitute failure to perform the agreement under subparagraph 17 of the aforementioned Article 41-1-2.

Moreover, failure to pay these expenses ahead of time (within the limit of the cap set in the deferred prosecution agreement) can constitute said failure to perform, if this obligation is included in the agreement.

Article R.15-33-60-10 of the Code of Criminal Procedure specifies that this notice must be sent to the implicated legal entity via registered letter with acknowledgment of receipt and to the victim, via any means.

Pursuant to subparagraph 17 of Article 41-1-2 of the Code of Criminal Procedure, this decision to suspend performance of the agreement takes effect immediately. In this case, subparagraph 17 of Article 41-1-2 provides that "*this decision shall, as of right, lead to the public interest fine that was paid to the Treasury being refunded*".

Article R.15-33-60-10 of the Code of Criminal Procedure, which was introduced by Decree no. 2017-660 of 27 April 2017 specifies that "*if monies were paid in respect of the public interest fine, the public prosecutor shall disclose the letter that notified the suspension of performance of the agreement to the collection officer who received the payment, so that said payment can be refunded.*"

The expenses incurred for the auditing of compliance by AFA will not be refunded. Subparagraph 17 of section I of Article 41-1-2 of the Code of Criminal Procedure specifies in this regard that the suspension of the Judicial Public Interest Agreement does not lead to the refunding of any expenses paid by the legal entity that were incurred by AFA calling on specialists or on qualified persons or authorities, in order to assist it in carrying out the legal, financial, tax and accounting analyses that are necessary for its audit assignment.

2 OPERATIONS TO AUDIT THE EXECUTION OF THE COURT-ORDERED COMPLIANCE REMEDIATION PLAN (“PPMC”)

Article 18 added a new Article 131-39-2 to the Criminal Code, which provides that, for certain offences, legal entities can be sanctioned by an obligation to implement a compliance remediation plan, under AFA’s oversight, for a maximum of five years.

The contents of the compliance remediation plan provided for by Article 131-39-2 of the Criminal Code are the same as those of the compliance remediation programme provided for by a Judicial Public Interest Agreement.

2.1 Cost of the compliance remediation plan audit programme

In the same way as for the Judicial Public Interest Agreement, the law provides for the possibility of AFA calling on specialists or qualified persons to assist it in carrying out legal, financial, tax and accounting analyses. As for the Judicial Public Interest Agreement, these expenses are paid by the legal entity. Not paying these expenses would constitute the offence of failing to comply with obligations.

2.2 Operations to audit the execution of the compliance remediation plan

2.2.1 AFA is informed by the public prosecutor's office

When the decision that orders a compliance remediation plan was handed down by a court, **the relevant public prosecutor's office notifies the enforceable decision to AFA.**

2.2.2 Audit procedures

The procedures for auditing execution of the compliance remediation plan are identical to those for auditing the compliance remediation programmes contained in Judicial Public Interest Agreement.

2.3 Circumstances under which AFA reports to the public prosecutor's office

2.3.1 In the event of difficulties

Subparagraph 1 of Article 764-44 of the Code of Criminal Procedure provides that AFA must inform the public prosecutor of *“any difficulty in designing or implementing the compliance remediation programme.”*

As soon as a difficulty arises in auditing the compliance remediation programme (refusal to disclose documents, hindrance of a field audit of the systems, objection to interviewing persons whose cooperation appears to be necessary for AFA, etc.), this difficulty is notified to the public prosecutor in the form of a report.

It is up to the public prosecutor to decide on the appropriate follow-up to this report. The public prosecutor may initiate an investigation on the grounds of failure to execute the sentence.

The legal entity for its part can also inform the public prosecutor of any difficulty in the execution of the sentence.

2.3.2 Provision of information once a year

Article 764-44 of the Code of Criminal Procedure specifies that AFA must report *“to the public prosecutor at least once a year on the implementation of the sentence.”*

As Article 764-44 subparagraph 5 mentions *“the various reports submitted to the public prosecutor by AFA”*, it should be inferred that the information to be provided once a year takes the form of a report written by AFA that is submitted to the public prosecutor.

- After one year and prior to the expiration of the deadline for executing the sentence, in the event of compliance remediation

The sentence may also be curtailed after a minimum one-year timeframe. Article 764-44 of the Code of Criminal Procedure provides for the conditions under which the sentence may be curtailed.

Article 764-44 subparagraph 5 states that *“when the sentence was executed for at least one year, and when the reports submitted to the public prosecutor show that the convicted legal entity has implemented appropriate measures and procedures to prevent and detect instances of bribery and influence peddling and that monitoring no longer appears to be necessary, the public prosecutor may refer the matter to the sentencing judge in order for the sentence to be curtailed, pursuant to an argued judgment in accordance with Article 712-6 of this Code.”*

It is also specified that when this sentence was handed down against a company mentioned in section I of Article 17 of Law no. 2016-1691 of 9 December 2016, in the execution of the sentence, measures and procedures that were already implemented pursuant to section II of said Article 17 are taken into account.

AFA will submit a specific report to the public prosecutor on this matter.

According to Article 712-6 of the Code of Criminal Procedure, the judgment will be handed down following an *inter partes* hearing in chambers before the penalty enforcement judge and subparagraph 2 of that text provides that the enforcement judge may render his/her judgment without holding an *inter partes* hearing, with the consent of the convicted party and the public prosecutor.

- Upon expiration of the execution of the sentence

At the end of the sentence’s term, which can last for a maximum of five years, Article 764-44 subparagraph 1 provides that AFA must send a report to the public prosecutor.

2.4 Penalties in the event of failure to comply with the programme

Failure by a convicted party to comply with its obligations under a compliance remediation programme constitutes an offence.

Non-compliance is defined as failure to follow the compliance remediation programme, and also failure to pay the expenses incurred by AFA for the services of specialists.

Article 434-43-1 of the Criminal Code provides that the persons responsible are *“the bodies or representatives”* of the legal entity that is sentenced to follow a compliance remediation programme.

Article 434-43-1 of the Criminal Code provides that failing to implement measures recommended by AFA or hindering the proper fulfilment of the obligations that result from the compliance remediation programme is *“an offence punishable by a two-year prison sentence and a fine of €50,000”*.

For legal entities that are found guilty of this offence, the fine may be increased to the amount of the fine incurred in respect of the offence of which they were originally convicted. They also incur the other penalties associated with said offence.

Moreover, in the event of failure to comply with the compliance remediation plan, legal entities and individuals incur a penalty of public display or publication of the decision handed down. In this case, the AFA report that is submitted to the public prosecutor's office could trigger criminal Procedure.