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Guidelines on the implementation of the judicial public interest agreement (CJIP)

*Free translation of the original French document
for information purposes*

January 16, 2023

Article 22 of Law No. 2016-1691 of December 9, 2016 on transparency, combating corruption and modernization of economic life (known as Sapin 2 Law) has introduced into French criminal law a transactional procedure instrument applicable to public or private entities referred to in this document as "the company" or "companies": the judicial public interest agreement ("convention judiciaire d'intérêt public", CJIP).

Law No. 2018-898 of October 23, 2018 on combating fraud has extended its scope of application to tax fraud¹.

Law n° 2020-1672 of December 24, 2020 on the European Public Prosecutor's Office, environmental justice and specialized criminal justice adds their laundering to the other offences provided for in Article 41-1-2 of the code of criminal procedure concerning the CJIP.

The decrees n° 2017-660 of April 27, 2017² and n° 2021-1045 of August 4, 2021³, the circular ("circulaire") of January 31, 2018⁴, the dispatch of March 21, 2019⁵ of the Directorate of Criminal Affairs and Pardons ("Direction des affaires criminelles et des grâces", DACG) and the Belloubet circular of June 2, 2020⁶ have specified the conditions of application of the law.

These guidelines are an update of the guidelines on the implementation of the judicial public interest agreement ("Lignes directrices sur la mise en oeuvre de la convention judiciaire d'intérêt public") published jointly by the National Financial Prosecutor's Office (PNF) and the French Anti-Corruption Agency (AFA) on June 26, 2019.

They are drawn up by the PNF, which is the lead judicial authority in matters of international corruption according to the Belloubet circular of June 2, 2020, and is responsible for dealing with the most complex cases of tax fraud and laundering of this offence according to the circular of October 4, 2021.

They are built on learnings from the CJIPs concluded and executed over the last five years; they are intended to apply to agreements implemented by the PNF in matters of corruption, influence peddling, tax fraud and laundering of these offences⁷.

By setting out procedures for implementing CJIPs, these guidelines set up an instrument of predictability and a factor of legal certainty for economic operators as well as for foreign judicial authorities. They aim at enhancing cooperation between companies and judicial authorities.

1 Law No. 2018-898 of October 23, 2018 on combating fraud adds to article 41-1-2 of the code of criminal procedure ("code de procédure pénale") the offenses provided for in articles 1741 and 1743 of the general tax code ("code général des impôts").

2 Decree JUSD1704570D No. 2017-660 of April 27, 2017 on the judicial public interest agreement and the judicial bond.

3 Decree JUSD2115586D No. 2021-1045 of August 4, 2021 adapting and simplifying the procedure applicable to the judicial public interest agreement and relating to the assignment of specialized assistants.

4 Circular JUSD1802971C of January 31, 2018, on presentation and implementation of the criminal provisions provided for by Law n°2016-1691 of December 9, 2016 on transparency, combating corruption and modernization of economic life.

5 Dispatch 2019/F/0419/FA1 of March 21, 2019 on presentation of the French Anti-Corruption Agency and terms of exchange between public prosecutors' offices and the French Anti-Corruption Agency.

6 Circular JUSD2007407 of June 2, 2020 on criminal law policy in combating international corruption.

7 Outside the scope of the PNF, the CJIP concerning environmental offenses, provided for by law n°2020-1672 of December 24, 2020 relating to the European Public Prosecutor's Office, environmental justice and specialized criminal justice in article 41-1-3 of the code of criminal procedure, is not covered by this update of the guidelines.

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1 FRAMEWORK OF THE CJIP

1.1 Purpose of the agreement

The CJIP may be proposed by the PNF to any company involved in a preliminary investigation (“enquête préliminaire”) or judicial investigation (“information judiciaire”) for active and passive acts of corruption or influence peddling, tax fraud, as well as for their laundering or any related offence (“infraction connexe”).

It may impose on the company the payment of a public interest fine⁸, the implementation of a compliance program⁹ under the control of the AFA and the reparation of the damage¹⁰ caused to identified victims.

The public prosecutor's office has sole authority to negotiate and sign the CJIP. Once accepted by the company, the CJIP is submitted to the President of the court for validation during a public hearing, before being published.

1.1.1 Public interest

The CJIP as a legal instrument aims at reinforcing the effectiveness of criminal justice.

First, it is effective because it leads to a quick sanction. In the international and often hidden context of the alleged criminal conduct, the cooperation of the company in the investigations and in the definition of the agreement makes it possible to achieve a criminal response with reduced costs, delays and risks.

The execution of the sanction is also effective. By being formalized in an agreement and meeting a proportionality requirement, the sanction is accepted by the company. The CJIP implies the effective and prompt payment of a fine as well as the compensation, where appropriate, of identified victims. It may require immediate action to bring the company into compliance.

Lastly, it is effective in preventing repetition of offences. While the CJIP is punitive because of the amount of the fine that can be set and the publicity given to the facts, it also contributes to prevent recidivism by its requirements of progress in the company's compliance, before and after the signature of the agreement.

Moreover, by expanding the possibilities for action by the French prosecuting authority and by promoting coordination of the PNF with foreign authorities, the CJIP strengthens France's criminal and economic sovereignty.

⁸ Cf. *infra* 3.1.

⁹ Cf. *infra* 3.2. Please refer to the joint AFA - PNF guide on compliance programmes (publication 2023).

¹⁰ Cf. *infra* 3.3.

1.1.2 The interest of the company

Because it is part of the public interest, the company's interest is also taken into account. The CJIP enables the continuity of economic activity.

The execution of a CJIP terminates indeed prosecution against the company without generating the effects of a court conviction on the continuity of its economic activity. It avoids exclusion from public procurement procedures¹¹ and does not structurally affect its financing capacities and the quality of its third parties assessments.

The following additional penalties, usually incurred before a criminal court, cannot be applied in a CJIP:

- Mandatory confiscation of the proceeds or object of the offence ; or, in the event of a related money laundering offence, confiscation of all property belonging to the convicted person or of which he has free disposal, subject to the rights of a bona fide third party¹²;
- prohibition to carry out certain activities;
- closure of one or more establishments;
- exclusion from public contracts;
- prohibition to offer to the public or to have financial securities admitted to trading on a regulated market.

The speed of the settlement procedure, reinforced by the company's cooperation in the investigations, mitigates the harm resulting from the damage to the company's reputation.

The use of a CJIP gives the company an active role in the legal proceedings and allows better management of the financial uncertainty of its outcome.

It gives the company the opportunity to show its determination to break with past practices, its willingness to a judicial resolution to settle the past and its commitment to a reinforced preventive approach, potentially, with a monitored compliance program. The publicity of the agreement shows a transparency willingness of the company with regard to its stakeholders.

The acceptance of a CJIP by the company is likely to contribute to the quality of the social climate, by demonstrating the management's commitment to prevent, detect and deal with crimes.

Finally, when the company is subject to simultaneous investigations by several authorities, the PNF is eager to propose a CJIP to allow coordination with other authorities, which encourages simultaneous conclusion of coherent agreements and the implementation of a unique monitored compliance program¹³.

¹¹ Pursuant to article 57 of directive 2014/24/EU of the European Parliament and of the Council of 26 February on public procurement, article L. 2141-1 of the public procurement code stipulates that persons who have been the subject of a final conviction for offences against probity or tax fraud are excluded from participating in a public procurement procedure

¹² Article 131-21 of the criminal code.

¹³ Please refer to the joint AFA - PNF guide on compliance programmes (publication 2023).

1.2 Legal regime of the agreement

The legal regime of the CJIP is set forth in articles 41-1-2, 180-2 and R. 15-33-60-1 et seq. of the French code of criminal procedure¹⁴.

The agreement may be proposed by the public prosecutor or, with his or her agreement, by the investigating judge ("juge d'instruction") to any company accused of one or more of the following offences, for their laundering, and for any related offences¹⁵:

- corruption and influence peddling of a public official (article 433-1 and 433-2 of the criminal code);
- corruption and influence peddling on a member of a judicial institution (penultimate paragraph of article 434-9 and second paragraph of article 434-9-1 of the criminal code);
- private corruption (articles 445-1 and 445-2 of the criminal code)
- corruption in sport (article 445-1-1 and 445-2-1 of the criminal code);
- corruption and influence peddling of a foreign official (articles 435-3 and 435-4 of the criminal code)
- corruption and influence peddling on a member of a foreign judicial institution (article 435-9 and 435-10 of the criminal code)
- tax fraud (articles 1741 and 1743 of the general tax code).

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

- payment of a public interest fine, the amount of which may not exceed 30% of the annual turnover, calculated on the average of the last three financial years known at the date of establishing the breaches;
- implementation, under the supervision of the AFA, of a program to bring into compliance its procedures for preventing and detecting corruption¹⁶, for a maximum period of three years;
- compensation for the damage caused to the victim when identified.

The company may also make unilateral commitments. For example, the company may commit to report to the PNF any finding of further violation during the period of the monitored compliance program.

Once accepted by the company, the CJIP is then subject to validation by the President of the court, who decides following a public hearing.

Once validated, the agreement and the validation order ("ordonnance de validation") are published on the websites of both Ministries of Justice and Budget, and in a press release issued by the PNF. As part of its mission provided for in article 3 of the Law of December 9, 2016 to

¹⁴ Specified by the DACG circular of January 31, 2018, the dispatch of March 21, 2019 and the circular of June 2, 2020.

¹⁵ According to article 203 of the code of criminal procedure, "*offences are related either when they have been committed at the same time by several persons together, or when they have been committed by different persons, even at different times and in different places, but as a result of a concert formed in advance between them, or when the guilty parties have committed some of them in order to obtain the means to commit the others, to facilitate them, to carry them out or to ensure their impunity, or when things taken, misappropriated or obtained with the help of a crime or an offense have been, in whole or in part, concealed.*" (free translation).

¹⁶ As detailed in II of article 131-39-2 of the criminal code.

centralize the information, decisions rendered in matters of breach of probity, whether or not they are accompanied by a monitored compliance program, are also communicated to the AFA.

The CJIP does not imply a guilt declaration and has neither the nature nor the effects of a conviction. It is therefore not registered in the company's criminal record.

If the agreement is not validated or if the company fails to comply with its obligations during the preset period, the public prosecutor shall, except new element, initiate prosecution.

When the CJIP is proposed in the course of a judicial investigation ("information judiciaire"), the public prosecutor and the company need to reach an agreement on a CJIP proposal within three months. If the agreement is not reached, the public prosecutor shall issue a request to restart the judicial investigation ("information judiciaire").

In accordance with article 41-1-2 of the code of criminal procedure, the public prosecutor retains the right to initiate criminal proceedings against individuals, notably the company's managers, who are perpetrators of or accomplices to the offences listed in the CJIP.

2 IMPLEMENTATION OF THE CJIP

2.1 Start of negotiations

2.1.1 Proposal to negotiate a CJIP and informal talks

According to articles 41-1-2 and 180-2 of the code of criminal procedure, solely the public prosecutor's office may propose a CJIP to the company. However, in practice, the legal representative of the company or its lawyer can inform the PNF of their wish to enter into such a judicial agreement. The legal representative or the company's lawyer should contact the PNF accordingly.

Except in case of serious injury to individuals, the PNF is keen to having informal discussions.

No writing is required to initiate prior discussions that would consider the possibility of recourse to the CJIP, such exchanges being covered by "La foi du Palais"¹⁷.

It is up to the prosecutor to assess the appropriateness of resorting to it on a case-by-case basis. Insofar as it enables companies to avoid a court conviction and its consequences, it should be reserved for situations in which it appears to be in the public interest not to initiate criminal proceedings.

Since the CJIP is an alternative to prosecution, it can be proposed at any time during the investigation at the initiative of the public prosecutor's office¹⁸. It may also be proposed at any time during the course of a judicial investigation ("information judiciaire") at the request or with the agreement of the public prosecutor's office¹⁹.

2.1.2 Existence of a prior judicial inquiry

A CJIP can be implemented only if sufficient evidence likely to demonstrate the offences referred to in the agreement has been gathered.

It follows indeed from article 41-1-2 of the code of criminal procedure that if the CJIP proposal fails (for lack of validation by the President of the court, for lack of fulfillment of its obligations by the company, or if it exercises its right of withdrawal), the public prosecutor "*shall initiate prosecution, unless there are new elements*".

Judicial inquiries are therefore carried out by the PNF before any determination of the material and temporal scope of the CJIP. For tax offences, the inquiries are led in coordination with the tax authorities.

¹⁷ Unwritten rule based on mutual trust between public prosecutors and lawyers protecting confidentiality of oral informal discussions.

¹⁸ Article 41-1-2, I° of the code of criminal procedure.

¹⁹ Article 180-2 of the code of criminal procedure.

2.1.3 Conditions of good faith required

Although the PNF does not wish to impose any *a priori* conditions to access to the CJIP the good faith cooperation of the company is required on top of legal conditions.

Spontaneous disclosure of the facts to the public prosecutor's office by the company is a sign of good faith, when it occurs within a reasonable timeframe. The period is assessed with regard to the time elapsed between the company's knowledge of the facts and their disclosure to the public prosecutor's office. It is even more indicative of the company's good faith when it relates to facts of which the public prosecutor's office was not yet aware.

The public prosecutor expects the company to have actively taken part or to wish to take part in revealing the truth by means of an internal investigation into the facts, into the persons involved and, where applicable, into the failure of the compliance organization which facilitated the commission of the acts²⁰. It is also in the company's interest to have full knowledge of the facts in order to be able to include, in the scope of the CJIP, all past breaches.

The submission of the internal investigation report or the communication of its detailed content within a timeframe compatible with the requirements of the judicial inquiry is considered as an indication of its willingness to cooperate and the quality of the preservation of evidence as a sign of good faith.

Internal investigation acts carried out during judicial proceedings are usefully submitted to the attention of the public prosecutor's office in order to ensure that they do not interfere with the judicial inquiry, in particular with regard to interviews with individuals, witnesses, stakeholders²¹ and access to digital information.

The spontaneous implementation of a compliance program for companies outside the scope of article 17 of the Law of December 9, 2016, the prompt adoption of corrective measures to strengthen the quality and effectiveness of the compliance program, the adaptation of the group's strategy to the identified risks, the possible change of its management team, and prior compensation of victims are also considered as evidence of good faith.

These criteria demonstrate the sincerity of the company's approach. Some of them may also be considered as factors reducing the amount of the fine.

²⁰ It is useful to refer to the AFA-PNF practical guide on internal anti-corruption investigations (2023 publication).

²¹ Among others, reports of interviews with witnesses or persons potentially involved in the offenses, together with all the documents on which they are based.

2.1.4 Assessment of prior existence of measures and procedures to prevent corruption

Since June 1, 2017, the Law of December 9, 2016 has required the management of companies referred to in 3° of article 3 and article 17²² to adopt measures and procedures aimed at preventing and detecting breaches of probity. It is also the responsibility of the management of the company to take, as soon as they become aware of acts of corruption or influence peddling committed within their structure, the corrective measures necessary to enhance the effectiveness of the program for the prevention and detection of breaches of probity.

If the company has not already been targeted by a control decided by the AFA²³, the PNF may request AFA's expertise at any time for help in assessing the existence of the compliance program and the corrective measures presented to it.

Failure of the company to implement a compliance program that meets the provisions of article 17 of the Law of December 9, 2016, as well as absence of corrective measures following the observation of breaches, may be considered as obstacles preventing from signing a CJIP.

2.1.5 Prior or concomitant tax settlement of the company in the event of a tax fraud CJIP

In most tax fraud cases, the recovery of avoided duties, late interests and penalties imposed by the tax authorities is a condition for the conclusion of a CJIP.

An agreement with the tax administration must be found before or simultaneously with the CJIP agreement. This may happen through an express acceptance of the proposed adjustments, a tax settlement, a global settlement or the filing of declarations correcting the previous or current tax situation.

2.2 Negotiation procedures

The company and the PNF must first and foremost agree on the material and temporal scope of the facts covered by the CJIP.

If a judicial investigation ("information judiciaire") has been launched and the company has been "indicted" ("mis en examen") or qualified as "assisted witness" ("témoin assisté"), the material and temporal scope is determined by the content of the notice for indictment ("les qualifications des convocations aux fins de mise en examen").

In accordance with article 180-2 of the code of criminal procedure, when a judicial investigation ("information judiciaire") has been launched, the CJIP agreement must be reached within three months from the date the investigating judge (juge d'instruction) has transmitted the procedure to the public prosecutor's office for that purpose. If it fails, the public prosecutor sends back the procedure to the investigating judge ("juge d'instruction"), together with a request to resume the judicial investigation ("information judiciaire").

²² For companies with at least five hundred employees, or belonging to a group of companies whose parent company is headquartered in France and whose workforce includes at least five hundred employees, and whose sales or consolidated sales exceed 100 million euros.

²³ If an inspection has been carried out, the PNF may request that the AFA transmit its report pursuant to article 77-1-1 of the code of criminal procedure.

The public prosecutor's office keeps all of its prerogatives during the negotiation period. In particular, requisitions, searches and seizures may be carried out and remain in the proceedings, especially for the purposes of the inquiries relating to individuals.

Similarly, the judicial investigation ("information judiciaire") continues with respect to third parties during the negotiation period.

2.2.1 Confidentiality of exchanges

Article 11 of the code of criminal procedure ensures confidentiality of all information provided by the company to the public prosecutor's office during the judicial inquiry.

The PNF pays particular attention to the digital security of the information received. The documents stored on the court's server are only accessible to persons owing access rights.

In accordance with article 41-1-2 of the code of criminal procedure, if the President of the court refuses to validate the CJIP, or if the company withdraws the CJIP, the public prosecutor cannot refer to the statements made nor to the documents handed over by the company before the investigating or trial court²⁴.

This legal provision does not apply to documents submitted to the proceedings with the consent of the company during the negotiations and prior to the formal proposal of the agreement. It does not affect the ability for the public prosecutor's office to use documents and information obtained through judicial inquiry's acts.

In practice, the public prosecutor's office agrees with the company on the date from which the CJIP proposal is formalized. It then specifies, on a case-by-case basis, with the company and its representatives, how exchanges will be conducted and in which extent they will be enforceable or confidential:

- oral exchanges are made under the seal of confidentiality and under "La foi du Palais";
- evidence remain admissible in the proceedings when it is obtained by requisition or seizure;
- unless otherwise agreed by the company, documents submitted during the negotiation, such as e-mails, accounting documents, digital data extractions, lawyers' presentations and notes, are not included in the proceedings.

2.2.2 Access to the file

Except in cases where the law requires it pursuant to article 77-2 of the code of criminal procedure²⁵, the public prosecutor's office assesses on a case-by-case basis whether it is appropriate to make available to the lawyers of the company, in whole or in parts, a copy of

²⁴ Article 41-1-2 III^e § 2 of the code of criminal procedure.

²⁵ In this respect, article 77-2 of the code of criminal procedure, as amended by Law No. 2021-1729 of 22 December 2021, in that it introduces into positive law a right for a person who has been placed in police custody ("garde à vue"), interviewed as a free suspect ("suspect libre") or subjected to a search, one year afterwards, to review the proceedings file in order to provide comments may only apply only to investigations begun after the publication of this law, i.e. on 24 December 2021, in accordance with Article 59(I) of the said law. The same applies to the right of access to the case file for a person who believes that his or her presumption of innocence has been violated by a means of communication to the public.

the proceeding file. It will particularly pay attention to the risk of undermining the effectiveness of the investigations.

For CJIPs negotiated in the course of a judicial investigation ("information judiciaire"), the "indicted" parties (mises en examen) and the parties qualified as assisted witness ("témoin assisté") have access to the proceedings file in accordance with article 114 of the code of criminal procedure.

When the file is made available to the company or its legal representatives, they are entitled to a copy.

2.2.3 Failure of negotiations

If the discussions between the PNF and the company do not lead to an agreement, the preliminary investigation ("enquête préliminaire") or judicial investigation ("information judiciaire") continues.

Information and documents brought to the attention of the public prosecutor's office from the date negotiations have started follow the regime described in paragraph 2.2.1 *supra*.

2.3 Recognition of facts

2.3.1 Description of the materiality of facts

The statement of facts must expose precisely what the company is accused of. It also should enable the judge to decide if he validates the agreement.

Straightforward acknowledgement of the facts by the company at the various stages of the investigations shows cooperation and remission and may potentially induce a reduction in the amount of the fine.

Challenging systematically the facts would show that the company does not agree and could lead the PNF to decline signature of the CJIP.

2.3.2 Qualifications potentially retained

According to relevant legal provisions, criminal qualifications potentially applying to the facts are disclosed in the agreement.

Executing the CJIP in good faith assumes that the company does not denigrate these potential qualifications.

3 OBLIGATIONS ARISING FROM THE CJIP

3.1 **Fine**

In accordance with article 41-1-2 of the code of criminal procedure, *"the amount of this [public interest] fine shall be set in proportion to the benefits derived from the misconduct"*.

The public interest fine is divided into two components:

- the first one as a disgorgement, equal to benefits derived from the misconduct ;
- the second one as a penalty, calculated on the basis of the amount of benefits resulting from the misconduct, to which increasing and lowering factors are applied.

Restitution and penalty parts are summed up and constitute the public interest fine.

Aggravating and mitigating factors applied in the penalty's calculation are determined on a case-by-case basis according to some twenty criteria.

Regarding tax fraud CJIPs, the avoided duties are recovered by the tax administration. Unless otherwise specified, the public interest fine may only include the penalty.

In cases where the misconduct did not result in company's benefits²⁶, the public interest fine may only include the penalty component.

Finally, in accordance with article 800-1 of the code of criminal procedure, legal expenses ("frais de justice") incurred during the procedure are charged to the company, unless the court decides otherwise. They are not included in the calculation of the public interest fine or within the applicable maximum fine.

3.1.1 **Calculation of the maximum fine**

In accordance with article 41-1-2 of the code of criminal procedure, the amount of the fine cannot exceed *"30% of average annual turnover calculated by reference to the last three annual turnovers known at the date when the misconduct was recorded"*.

If the companies' financial statements are included in consolidated financial statements under applicable accounting regulations, turnover for the purpose of the abovementioned calculation is the consolidated turnover as presented in the consolidated financial statements of the group they belong to.

In tax matters, in accordance with the constant case law of the Constitutional council ("Conseil constitutionnel"), when companies have been subject to tax collection, the criminal and tax penalties' aggregate charged shall not exceed the highest of the two penalties incurred. In the context of CJIPs, and unless otherwise specified, maximum tax penalties incurred for tax fraud are assessed to 80% of avoided tax.

²⁶ For example in some specific cases of attempt or complicity.

3.1.2 Assessment of the benefits derived from the misconduct

The amount of the benefits derived from the misconduct is assessed by the public prosecutor's office at the date of the CJIP.

It is up to the company to provide all relevant information and elements necessary to the assessment. The public prosecutor's office may request any information or document from the company in order to gain an understanding of the facts and of the economic context.

In particularly complex cases or if difficulties are noted in gathering readable and reliable financial information, a financial expert may be requested.

(a) As a first step, the public prosecutor's office **sets up a list** along with the company **of all direct and indirect benefits** resulting from the misconducts and falling within the material and temporal scope of the CJIP:

- benefits are listed in view of the situation of the company at the time of the misconducts;
- direct benefits generally correspond to the marginal profit generated by the misconducts (profits derived from a license or contract obtained fraudulently, profits derived from the receipt or use of laundered funds, taxes and duties avoided fraudulently, tax credits and refunds obtained fraudulently , etc.);
- direct and indirect benefits may include future expected gains. For example, when a CJIP is proposed but all expected gains have not been received (or not yet received, in case of contract with partial, staggered or delayed execution, long-term contracts such as concessions, or contracts with purchase options or structural investments), benefits not yet received or accounted for are included in the calculation, in proportion to their likelihood;
- In case of an attempt, the benefits derived from the misconduct includes the chance to succeed in the attempt ;
- the benefits derived from the misconduct by the accomplice correspond to the benefits derived from the misconduct by the principal perpetrator weighted by his or her involvement in the offence;
- indirect benefits include other benefits such as gains in market share, in know-how, in visibility, which may be unrecorded in the company's financial statements. They also may include the treasury benefits resulting from the cash flows derived from the misconducts.

(b) **The valuation principles and methods of direct and indirect benefits** are discussed with the company. They may be specified according to the nature of the facts, their features and the business. For example:

- in case of corruption or influence peddling in obtaining or executing commercial contracts, the direct benefits derived from the misconducts are estimated on the basis of the turnover generated by the disputed contract, decreased by the amount of the variable costs directly attributable to the project²⁷;

Among others, the following costs are not deducted:

- structural costs (salaries, buildings) not solely relating to the project;
 - research and development costs;
 - provisions for risks,
 - depreciations, unless they relate to fully dedicated fixed assets;
 - costs allocated in percentage, if it appears that they would have been incurred independently from the contract's conclusion;
 - remuneration or benefits ("bribes") granted by the company as part of corruption or influence peddling;
- where applicable, the discount rate applicable to future cash flows as well as the capitalization rate of past cash flows are specified;
 - in the case of an attempt, the expected benefit is weighted by the coefficient of likelihood of the expected gain at the date of the misconducts;

(c) The public prosecutor's office agrees with the company what **information available** will enable the company to propose an estimate of the benefits and **how the proposed estimate will be verified**.

It is easier for the company, which owns the information systems, to propose an estimate of the benefits derived from the misconducts. However, the public prosecutor's office must be able to appreciate the consistency and reliability of the figures provided to him.

In particular, consistency checking is requested or required between the profit that was expected at the date of the breaches and the estimate proposed by the company.

The evidence provided may not only consist in accounting documentation. Following data is generally provided:

- accounting schedules supporting the main economic flows (contracts, invoices, proof of payment);
- extracts from the company's accounting ledgers or from the management accounting system being reconciled with audited accounts;
- the company's procedures, management's forecasts and performance reporting relating to the facts.

²⁷ Gross operating surplus ("Excédent Brut d'Exploitation" "EBE") or earnings before interest, taxes, depreciation, and amortization ("EBITDA") as calculated by the company may be used, subject to the adjustments described thereafter.

Discussions with the financial managers of the company and its statutory auditors may be requested or required.

It may be requested that the documents and information used by the company to prepare the estimate be attested for concordance or subject to agreed upon procedures by the company's statutory auditor. They also may be verified by a specialized expert.

If the company does not provide supporting information or if it appears incomplete or insufficiently reliable, the public prosecutor's office may have to rely on the data available to it.

3.1.3 Assessment of the penalty part of the public interest fine

The public prosecutor's office appreciates the seriousness of the misconduct and the level of the cooperation of the company according to a set of criteria that may increase or decrease the amount of the fine.

The criteria relevant to the case translated into increasing or mitigating factors within the limit of its ceiling.

Increasing factors	Ceiling	Mitigating factors	Ceiling
any form of obstruction in the investigations	30%	spontaneous disclosure	50%
large company	20%	single occurrence	10%
deficiencies of the compliance program (company subject to article 17 of the law of December 9, 2016)	20%	relevance of internal investigations	20%
repetitiveness of the acts	50%	active cooperation	30%
judicial, tax or regulatory history	20%	corrective measures	20%
use of the company 's resources to conceal	20%	effectiveness of the internal alert system	10%
creation of tools to conceal	30%	straightforward recognition of the facts	20%
involvement of a public official	30%	prior compensation of the victims	40%
serious disturbance of public order	50%		

The sum of the increasing factors (IF) and mitigating factors (MF) determines the coefficient applied to the basis for calculation of the penalty equal to the amount of the benefits derived from the misconduct ("avantages tires des manquements" "ATM") as follows:

$$\text{Penalty part of the fine} = \text{ATM} * (1 + \text{IF} - \text{MF})$$

If there is a significant difference between the assessment of the benefits derived from the misconduct at the date of the CJIP and their forecasted assessment at the date of the misconduct, the public prosecutor's office may decide to calculate the penalty on the basis of the forecasted assessment.

The use of the clause described in paragraph 4.3 *infra* induces an increase in the amount of the fine because of the systemic nature of the acts, which weights necessarily higher than the mitigating factors resulting from the quality of the cooperation²⁸.

²⁸In these exceptional cases, the maximum of the increasing factor for the repeated nature of the acts may be exceeded.

In case of inability to pay supported by evidentiary documentation prepared by the company, a reduction in the overall amount of the public interest fine may exceptionally be granted. This reduction is then expressly applied to the amount of the fine initially determined.

3.1.4 Payment schedule

The fine must be paid to the accountant of the Public Treasury within 10 days after the agreement is definitive. Depending on the situation of the company, it may be agreed to split the payment over a maximum period of one year²⁹.

The company must provide proofs of payment to the National Financial Prosecutor within the timeframe specified in the agreement.

3.2 Compliance program³⁰

In accordance with article 41-1-2 of the code of criminal procedure, the CJIP may require to be submitted, for a maximum period of three years, and under the supervision of the AFA, to a compliance program designed to ensure the existence and implementation within the company of the measures and procedures listed in II of article 131-39-2³¹ of the criminal code.

The AFA, created by Law No. 2016-1691 of December 9, 2016, is a national agency sponsored by the Ministry of Justice and the Ministry of the Budget. Its mission is to help the competent authorities and their stakeholders to prevent and detect acts of corruption, influence peddling, unlawful conflict of interest, misappropriation of public funds and favoritism.

In addition, at the request of the Prime Minister, the AFA is responsible for ensuring compliance with Law no. 68-678 of July 26, 1968³² known as " the blocking status", in the context of the enforcement of decisions by foreign authorities requiring a French company to upgrade its internal procedures for preventing and detecting corruption.

²⁹ Article 41-1-2 of the code of criminal procedure.

³⁰ It is useful to refer to the joint AFA - PNF guide on compliance programs (publication 2023).

³¹ The measures and procedures listed are as follows: 1) a code of conduct defining and illustrating the various types of behavior to be prohibited as being likely to characterize acts of corruption or influence peddling; 2) an internal alert system designed to allow the collection of reports from employees concerning the existence of conduct or situations contrary to the code of conduct of the legal person; 3) a risk map in the form of regularly updated documentation designed to identify, analyze and prioritize the risks of exposure of the legal person to external solicitations for the purpose of corruption, in particular as a function of the sectors of activity and geographical areas in which the legal person operates 4) procedures for assessing the situation of customers, first-tier suppliers and intermediaries with regard to risk mapping; 5) internal or external accounting control procedures designed to ensure that books, records and accounts are not used to conceal corruption or influence peddling. These controls may be carried out either by the legal person's own accounting and financial control departments or by using an external auditor when carrying out the audits of the accounts provided for in Article L. 823-9 of the French commercial code; 6) a training system for managers and staff most exposed to the risks of corruption and influence peddling; 7) a disciplinary system allowing the legal person's employees to be sanctioned in the event of a breach of the legal person's code of conduct.

³² Law relating to the communication of documents and information of an economic, commercial, industrial, financial or technical nature to foreign natural or legal persons.

3.2.1 Content and duration

In coordination with the AFA, the PNF appreciates it if the inclusion of a compliance program in the CJIP is appropriate, taking into account among others:

- the conclusions, if any, of spontaneous control recently conducted by the AFA pursuant to Article 17 of the Law of December 9, 2016;
- the execution, if any, of the anti-corruption compliance program requested by foreign authorities or an international financial institutions, provided that its content is close to the requirements of Article 41-1-2 of the code of criminal procedure.

In this context, the AFA is likely to carry out a preliminary examination consisting of an analysis, based on documents transmitted by the public prosecutor's office, of the measures and procedures for preventing and detecting breaches of probity. This may be supplemented, if necessary and with the authorization of the PNF, by an exchange with the company to ensure that it has a good understanding of the file made available to it.

The duration and content of the compliance program shall be determined by the public prosecutor's office in coordination with the AFA.

In accordance with article 41-1-2, the obligation may not exceed three years.

The agreement may provide for a period of three years with a clause reducing the period to two years. In this case, if the PNF considers, on the basis of an AFA report issued during the course of the program, that all obligations have been met in advance, the program may be terminated at the end of the two-year period.

The control carried out by the AFA takes place in five phases, described in the guide published in April 2019 "*the control operations of the execution of judicial measures*³³").

The PNF monitors the execution of the compliance program . It is informed by AFA on a regular basis and at least annually³⁴ of the progress of the program.

The AFA submits a report at the end of the implementation period to the PNF and must inform it of any implementation difficulties.

The PNF will meet with the company at least annually to discuss the status of the compliance program. The company may inform the PNF of any difficulties encountered in implementing the program.

If the compliance program has been determined in coordination with various prosecuting or international financing authorities, the PNF informs those authorities of the progress in accordance with the provisions of law n° 68-678 of July 26, 1968³⁵.

³³ Guide available on the AFA website: <https://www.agence-francaise-anticorruption.gouv.fr>.

³⁴ Ibid.

³⁵ In accordance with Article 3 5° of Law n°2016-1691 of 9 December 2016 on transparency, combating corruption and the modernisation of economic life.

3.2.2 Its costs

During negotiations, the AFA estimates the maximum costs incurred by its use of experts or qualified persons³⁶ based on information received from the company³⁷. The estimate is based on the number of hours required to monitor the compliance program. It distinguishes between the costs of designing the program and those of monitoring its implementation.

It is especially determined by taking into account the following elements:

- the content and duration of the compliance program as defined in the CJIP;
- the existence of the measures already in place within the company;
- the specific characteristics of the company that are likely to affect:
 - the scope of the AFA's supervision, due to the diversity of the businesses carried out, the number of subsidiaries in France and abroad, the nature and number of customers, first-tier suppliers and intermediaries, etc.;
 - the depth of supervision, based on the specific risk profile of the controlled person: business in particularly exposed sectors of activity, its interactions with public authorities, or its international development.

The CJIP stipulates that the company agrees to wire the expert's fees to the account of the ministerial budgetary and accounting controller within a period of time to be determined with the AFA.

The AFA shall inform the National Financial Prosecutor of any difficulty encountered in the payment of the provision intended to cover the expert's fees.

Failure to pay may constitute a cause of non-performance of the agreement, which exposes the company to the risk of a resumption of public proceedings.

3.3 Compensation of the victim

According to the terms of the fifth paragraph of article 41-1-2 of the code of criminal procedure, when a victim is identified, and unless the accused company can prove that it has fully repaired its damages, CJIP shall provide for the amount and the terms of compensation for the damages resulting from the offence within a period of time that may not exceed one year.

The victim cannot oppose a CJIP proposal, nor appeal the decision for validation.

³⁶ Pursuant to the fourth paragraph of article 41-1-2 of the code of criminal procedure.

³⁷ Fee calculation questionnaire, annexes 2 and 2 bis to the DACG circular of January 31, 2018.

3.3.1 Its identification

When deciding to implement a CJIP the PNF may consider the company's diligence in identifying the victims of the misconducts.

Moreover, fair compensation of the victim before concluding a CJIP is considered as a lowering factor, which reduces the fine.³⁸

3.3.2 Prior information

If the PNF and the company come to an agreement to sign a CJIP, the public prosecutor's office will inform the identified victims by any means of its decision³⁹.

This information remains confidential until the CJIP is submitted to the President of the court for validation. It does not constitute a request for approval. It takes place even if the company establishes that it has already fully compensated the victims' losses.

3.3.3 Observations made by the victim and determination of his/her prejudice

In its notice to the victim, the public prosecutor's office invites the latter to send, within a defined timeframe, any element that would enable to establish the reality and extent of his/her harm. If needed, the victim may request an extension of the timeframe from the public prosecutor's office.

It is up to the public prosecutor's office, when drawing up the CJIP proposal, to determine "*the amount and terms of compensation for damages caused by the offence*"⁴⁰ that is paid to the victim by the accused company, which may differ from that initially requested by the victim.

The evaluation of this amount is carried out by the public prosecutor's office in accordance with the civil principle of full reparation of the damages caused by the offence, following, if necessary, discussions with the victim. The damages are assessed at the date the agreement is signed. The amount of damages is not deducted from the maximum fine.

If necessary, the PNF may request the assistance of an expert to quantify the damage.

The agreement shall mention the amount and the terms of payment of the compensation.

3.3.4 Notification of the compensation to the victim and its payment

The victim who has submitted a request for compensation to the public prosecutor's office is notified of the request for validation by registered letter with acknowledgement of receipt⁴¹; he/she is informed of the date, time and address of the validation hearing, is invited to attend and may be assisted by a lawyer. They are given the opportunity to comment on the amount of compensation awarded.

The victim is notified of the decision of the President of the court. It is not subject to appeal.

The validation of the CJIP does not prevent the victim from resorting to the civil courts.

³⁸ See 1.2.3 above.

³⁹ Article 41-1-2 of the code of criminal procedure.

⁴⁰ Ibid.

⁴¹ Under the conditions of article 803-1 of the code of criminal procedure.

The compensation must be paid within one year. The company must justify to the National Financial Prosecutor the payment of the compensation within the timeframe set in the agreement. The victim may request recovery through the injunction to pay procedure ("procédure d'injonction de payer") in accordance with the rules provided in the code of civil procedure.

3.3.5 The case of the tax authorities

As regards the damage to the Public Treasury caused by the offences referred to in the general tax code, compensation being provided for by tax increases and fines, the CJIP usually does not provide for compensation.

As indicated in paragraph 2.1.5 *supra*, prior to or concurrently with the signing of the agreement, the PNF ensures, before concluding a CJIP that a tax solution has been found and that, except in exceptional cases, the avoided duties, interest and penalties charged by the tax authorities have been recovered.

Compensation may be claimed by the State in case of tax fraud laundering.

In any case,

- the tax administration is systematically notified of the decision to sign a CJIP pursuant to article R 15-33-60-1;
- the request for validation of the agreement is sent to the tax authorities in order for them to be represented at the hearing in accordance with the same article.

4 VALIDATION OF THE CJIP AND ITS EFFECTS

4.1 Validation of the CJIP

4.1.1 Acceptance by the company

At the end of the negotiations, a representative of the company is heard and the proposed agreement drawn up by the public prosecutor's office is sent to the company by registered letter with acknowledgement of receipt⁴² for acceptance or refusal within a specified period.

In accordance with article R15-33-60-2 of the code of criminal procedure, it includes:

- a precise statement of the facts as well as the legal qualification likely to be applied to them;
- the nature and the amount of the proposed obligations, the time limits and the modalities under which they must be carried out;
- where applicable, the maximum amount of the costs incurred in monitoring the implementation of the compliance program that are borne by the company ;
- where applicable, the amount and terms of compensation for damages caused by the offence.

The proposed agreement shall be signed by the National Financial Prosecutor and, if the company agrees, by its legal representatives. These signatures are preferably collected during a meeting organized in the premises of the PNF ⁴³ or collected by exchange of letters.

4.1.2 Validation by the judge

The President of the court is then seized by a request to which the signed agreement proposal and the preliminary investigation ("enquête préliminaire") or judicial investigation ("information judiciaire") procedure are attached.

The request contains a precise statement of the facts as well as the legal qualification that may be applied to them.

The company and, if applicable, the victim are informed of this referral by notification of the request by registered letter with acknowledgement of receipt⁴⁴. The date and time of the hearing and the possibility of being assisted by a lawyer are notified in the same conditions.

The judge makes his/her decision following a public hearing during which the company and the victim, assisted, if necessary, by their lawyer, are heard. The public prosecutor may be invited to present his observations at the request of the President.

The legal representatives of the company and the victim, if any, are notified of the validation or refusal order.

⁴² Under the conditions of article 803-1 of the code of criminal procedure.

⁴³ Article R.15-33-60-2 of the code of criminal procedure provides for the possibility for the legal person to state its acceptance by declaration of its legal representatives before the public prosecutor, who will draw up a report.

⁴⁴ Under the conditions of article 803-1 of the code of criminal procedure.

The notification gives the company a 10-day period to withdraw, by registered letter to the public prosecutor with acknowledgement of receipt.

In the absence of withdrawal, the obligations set out in the agreement are implemented.

At any time during this period, the company may waive its right of withdrawal by its legal representative informing the PNF in writing. This writing may be already submitted to the public prosecutor's office at the end of the hearing. It then leads to the implementation of the obligations of the agreement and the immediate publication of the agreement and the validation order.

4.1.3 Refusal of validation, withdrawal, failure to perform

Under Article 41-1-2 of the code of criminal procedure, if the CJIP proposal is not validated by the President of the court, or if the company decides to withdraw from the agreement or if it does not fulfil all its obligations, the public prosecutor "*shall initiate public proceedings, unless there are new elements*". If further investigations are deemed necessary, the public prosecutor's office may initiate a judicial investigation ("information judiciaire"), which is a mode of prosecution.

The public prosecutor's office considers that the discovery of new facts or the disappearance of the company constitutes, for example, a new element that may not lead to the immediate initiation of prosecution⁴⁵.

4.2 Communication

The validation hearing for a CJIP is posted in court no later than the morning of the hearing.

Unless there is a duly justified exception, the public prosecutor's office decides to make public the date of the hearing, its purpose and the identity of the company concerned in the days preceding it.

The PNF issues a press release at the end of the validation hearing. Its content is disclosed to the company in advance.

After the withdrawal period, the agreement and the validation order are published on the websites of both the Ministry of Justice and the Ministry of Budget.

⁴⁵Except in the cases of transfer of criminal liability referred to in the decision of the Criminal Division of the court of Cassation of 25 November 2020 on the liability of the legal person in the event of the merger of one company into another (Cass. Crim., 25 November 2020, n° 18-86.955).

4.3 Extinction of prosecution

The judicial public interest agreement does not entail a declaration of guilt and has neither the nature nor the effects of a conviction. It is therefore not included in the folder nr. 1 ("bulletin n°1") of the company's criminal record.

In the case of a judicial investigation ("information judiciaire"), the termination of the prosecution is noted ("constatée") by the public prosecutor's office, which informs the investigating judge. The latter then issues an order dismissing the case in whole or in part ("une ordonnance de non-lieu ou de non-lieu partiel").

The execution of the agreement only extinguishes prosecution for the facts the agreement describes.

Facts of the same nature not set out in the agreement may accordingly give rise to the opening of a new investigation by the PNF, whether or not they were known to the company's management at the date of signature of the CJIP.

On a very exceptional basis, if, due to systemic behavior, not all the criminal acts of corruption or influence peddling could be precisely circumscribed at the time of the agreement, it may be provided that the agreement shall apply to acts of the same nature committed in a given territory and period discovered subsequently, provided that these acts were not knowingly concealed from the PNF by the company during the negotiations. If necessary, the agreements provides that such facts must be reported to the PNF as soon as the company becomes aware of them for the benefit of this clause to apply.

The introduction of such a clause requires exemplary cooperation and diligence from the company in the identification of misconducts. It requires the submission to the PNF of a detailed internal investigation report. It leads to an increase in the amount of the fine⁴⁶.

4.4 International coordination

The jurisdictional criteria of the French and foreign courts may lead to simultaneous prosecutions or transactions by different national authorities, especially since the *non bis in idem* principle in the international order is not applied uniformly⁴⁷.

During the negotiations, the PNF coordinates⁴⁸ its criminal response with foreign prosecution authorities (e. g. Department of Justice, Serious Fraud Office, etc.) or with international organizations such as the World Bank, which are seized of the same facts.

The determination of the scope of each criminal response (types of acts, places and periods of time) and of the sanctions to be imposed on the company can thus be the subject of a concerted effort allowing for an overall assessment and avoiding to sanction the company twice for the same acts.

The PNF may request AFA's involvement to provide an opinion, in the presence of the various prosecuting authorities, on the existence and quality of the current compliance mechanism,

⁴⁶ See section 3.1.3 *supra*.

⁴⁷ Cass. Crim. March 14, 2018, No. 16-82.117, Oil for Food case.

⁴⁸ In accordance with Article 42 of the 2003 United Nations Convention against Corruption, known as the Merida Convention.

on the relevance of the proposed corrective measures and on the appropriateness of including a compliance program within the agreement.

If a compliance program⁴⁹ is contemplated, the implementation of a single control mechanism is preferred. If the prosecution authorities decide that the compliance program is imposed by the French judicial authority, the AFA must be appointed to monitor the measure pursuant to the third paragraph of article 41-1-2 of the code of criminal procedure. The AFA regularly reports on the measure to the PNF. The latter informs – when foreseen under the agreement – the foreign prosecution authorities of the measure's progress in compliance with French law⁵⁰.

Once the CJIP has been concluded, when it receives requests for international mutual assistance in criminal matters concerning acts included in the agreement, the PNF can decide to execute those requests on the sole condition that the foreign authority does not initiate new prosecutions against the company relating to the same acts.

4.5 The case of individuals

4.5.1 Identification in the investigation and anonymization in the agreement

In accordance with article 41-1-2 of the code of criminal procedure, *"the legal representatives of the company remain liable as individuals. They are informed, as soon as the public prosecutor proposes, that they may be assisted by a lawyer before agreeing to the proposed agreement"*.

When the persons involved in the commission of the acts are still directors of the company at the time of the talks, it may be advisable, in order to avoid any conflict of interest, that an *ad hoc* representative be appointed for the CJIP negotiations. In any event, it is preferable that the company and the individuals potentially involved appoint separate lawyers.

It should be noted that the company's good faith in the CJIP negotiation is assessed in particular on the basis of its ability to conduct an internal investigation to identify the main individuals involved in the facts and to disclose them to the public prosecutor's office during the investigations and negotiations.

In this respect, the internal investigation must endeavor to preserve the evidential elements relating to the individuals, both for the prosecution and the defense, while ensuring that the rights of the persons concerned⁵¹ are granted.

Except in specific cases that would not be unfavorable to them, no individual is named in the text of the CJIP.

⁴⁹ It is useful to refer to the joint AFA - PNF guide on compliance programs (publication 2023).

⁵⁰ In particular law n° 68-678 of July 26, 1968, known as the "blocking status".

⁵¹ It is useful to refer to the AFA - PNF practical guide on internal anti-corruption investigations (2023 publication).

4.5.2 Prosecutions

The issues and procedures relating to individuals and a company are distinct, but a simultaneous and joint settlement of their situations is preferred whenever the evidentiary file and the facts concerned allow it.

The PNF assesses on a case-by-case basis the follow-up likely to be given to the situations of individuals. If necessary, it may use all the methods of prosecution provided for in the code of criminal procedure. In addition to the summons to appear before the Criminal court ("citation devant le tribunal correctionnel"), it may in particular resort to a plea bargain ("comparution sur reconnaissance préalable de culpabilité" or "CRPC")⁵².

⁵² Appearance with admission of guilt