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White-Collar Crime 2023

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France: Trends & Developments

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Trends and Developments

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Kiejman & Marembert was founded in Paris in 2000 by Georges Kiejman and Thierry Marembert, and is recognised as a leader in complex international litigation involving major strategic and economic issues, especially in white-collar crime matters, as well as in corporate, financial and intellectual property law. The team currently comprises two additional partners and seven associates. The firm's caseload shows a wide range of sector expertise, including finance and healthcare. Clients include French and international companies, major industry groups and institutions, public officials, corporate executives and prominent personalities. The firm has recently represented first-tier banks from France, Switzerland and the USA, as well as top executive managers, in tax fraud and money laundering proceedings. The firm's strong ties with major US and UK law firms is particularly valued by clients in multi-jurisdictional cases.

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White-Collar Crime in France: An Introduction

The rise of the CJIP

Created in 2016 by a law commonly referred to as "Sapin II", the *Convention judiciaire d'intérêt public* or CJIP (Judicial Public Interest Agreement) is the French equivalent of a deferred prosecution agreement – ie, a settlement whereby companies undertake certain measures in exchange for the absence of a criminal trial and of a sentence or a guilty plea (and therefore of any criminal record). The measures can be a fine not exceeding 30% of the average annual turnover of the company over the previous three financial years and/or the implementation of an anti-corruption compliance programme aimed at preventing and detecting acts of corruption for three years, under the control of the French Anti-Corruption Agency (*Agence française anti-corruption* – AFA). The law also provides for the indemnification of the victim if there is one.

CJIPs were first limited to corruption and probity-related offences, before being extended to tax fraud in 2018, and to environmental crimes in 2020.

The number of CJIPs has increased steadily over the past few years, recently reaching the milestone of 30 agreements signed between prosecutors and legal entities. This can be explained by the extension of its scope to new offences, demonstrating the legislature's willingness to promote negotiated justice for legal entities. Its development is also driven by prosecutors seeking to avoid burdensome or risky trials. In 2021, a CJIP was reached for the alleged accomplice of an offence (all prior CJIPs related to the direct author of the offence), although this has been highly disputed over ten years of investigation and legal challenges.

Practice of the past few years shows that CJIPs are used almost equally in tax fraud and corruption cases, and to a lesser extent for environmental crimes.

This area of French law is still very much a work in progress, with room for improvement, clarification and innovation, as evidenced by the following developments.

In January 2023, the French National Financial Prosecutor's Office (*Parquet national financier* – PNF) published new (and significantly enhanced) guidelines on the CJIP. These guidelines answer questions that were at the centre of discussion between lawyers and prosecutors, as well as questions raised by members of the French Parliament conducting an assessment of the "Sapin II" law pertaining to the calculation of the fine and the confidentiality (or lack thereof) of information exchanged during the negotiation phase between Public Prosecutors and companies seeking to enter into a CJIP.

Regarding the calculation of the fine, the guidelines clarify that it must provide for the disgorgement of profits and an "afflictive part" by which the company is punished in light of mitigating and aggravating factors. In tax fraud cases, because the profits generated by the fraud are recovered separately by the French Tax Administration, the CJIP fine should not provide for the disgorgement of profits.

The guidelines provide further guidance on such aggravating and mitigating factors. Although the guidelines are far from being as precise and detailed as the US sentencing guidelines, this nonetheless came as a pleasant surprise, given that the head of the PNF had stated that he was not in favour of providing such guidance when he was interviewed in 2021 by members of the

French Parliament conducting an assessment of "Sapin II".

The guidelines list nine aggravating factors (ranging from the repeated nature of the offence to the obstruction of the investigation or the insufficiency of the company's compliance programme) and eight mitigating factors (including self-reporting, the implementation of an internal investigation and the implementation of corrective measures). The guidelines also list the "non-ambiguous acknowledgement of facts", which may appear like a less pleasant surprise, especially for companies exposed to risks of class actions in other jurisdictions for the facts for which a CJIP is entered into. For each of these factors, the guidelines provide for the maximum rate of the increase or decrease of the punitive part of the fine.

Regarding the confidentiality of information exchanged during the negotiation phase between companies and Public Prosecutors, the guidelines lay out the following rules:

- oral exchanges are conducted under the general principle of confidentiality that governs exchanges between lawyers, prosecutors and judges under French law;
- evidence obtained through requisition or police searches can still be used in the proceedings; and
- documents that are submitted during the negotiations by the company or its lawyers are not used in the proceedings, unless the company agrees that they are.

In addition, the guidelines provide for an innovative and pragmatic way to tackle situations in corruption cases where not all relevant facts that the company would wish to be covered have been established when entering into a CJIP. In such exceptional circumstances, the guidelines provide that any other potential acts committed in a specific geographic area and during a specific timeframe, if they are similar to those targeted by the CJIP, can be covered by the CJIP if they were not knowingly concealed and if they are immediately reported to the Public Prosecutor.

This novel tool was used for the first time in 2023, in a corruption case pertaining to corruption in various African countries. The CJIP covers any other facts of the same nature that the given companies would have committed anywhere in Africa between 2008 and 2017, provided that such facts were not knowingly concealed during the negotiation.

Extension of the scope of criminal liability for companies

Under French law, corporate criminal liability may arise for any offence that is committed on behalf of one's company by its bodies or representatives. Two recent rulings have significantly extended the ways in which a company's criminal liability can be sought under French law.

The first one deals with the continuation of criminal liability in cases of mergers. In the context of a merger by absorption, the Criminal Division of the French Supreme Court reversed its previous position by holding that the absorbing company may be held criminally liable for offences committed by the absorbed company prior to the operation.

The second one deals with the significant extension of the notion of "bodies or representatives". Precedent case law tended to comprehend the notions of "organ" and "representatives" as being limited to the persons formally designated de jure by the company and only within that

company. In the case at stake, the judges admitted the concept of de facto "bodies" and "representatives", regardless of formal titles and legal ties, even when these bodies would be group bodies rather than limited to a specific entity.

These recent rulings have resulted in the approval of the criminal liability of a holding company for corruption charges based on offences committed not by legal representatives but by employees of a branch – not even undertaking any formal delegations of authority – and by a risk committee of the holding company, considering that, in this case, corruption was "the expression of a group policy determined by the establishment of a complex organisation".

The judges first justified their understanding of the facts by the "matrix-type organisation" of the group. It consisted of two cross-branch bodies, of which the prosecuted employees were part, linking them de facto to the holding company although these bodies had no legal statute. The judges then insisted on the committee's decision-making powers, despite its deliberative appearance.

In doing so, the Supreme Court set particularly broad standards for corporate liability, which could be a major concern for international companies.

New areas for company liability: environment and human rights

In line with increasing interest in environmental and human rights protection issues, the French legislature has progressively bolstered civil and criminal law enforcements and sanctions in these fields.

Enacted in 2017, the Corporate Duty of Vigilance Law essentially compels companies that employ more than 5,000 employees within the company and its French subsidiaries, or 10,000 worldwide within the company and its French or foreign subsidiaries, for two consecutive years, to draft, publish and implement public vigilance plans linked to their own activities, to those of companies under their control, and to those of suppliers and subcontractors. Failure to draft/publish such plans can lead to civil fines of up to EUR10 million, and to civil fines of up to EUR30 million if this failure resulted in damages that would otherwise have been preventable.

This law has led many NGOs to sue a comprehensive number of prominent companies in France – namely oil companies but also companies operating in retail and fashion. Far from slowing down, this trend has only increased since the law was enacted.

Compliance

Compared to common law countries, the development of compliance (or *conformité*) in France is rather recent. However, the current trend demonstrates a willingness to catch up through legislative and regulatory proliferation, to the point where it would be impractical to recount all the changes made in just a few lines.

In addition, the Corporate Duty of Vigilance Law and the "Sapin II" statute have required companies or groups of companies with more than 500 employees and a turnover of more than EUR100 million to implement anti-corruption systems (including a code of practice, internal whistleblowing procedures, risk mapping, third-party risk assessments, accounting controls, training for managers and employees at risk, disciplinary measures, internal controls and evaluation).

The AFA provides guidance by regularly publishing best practices in different areas (such as

recommendations, practical guides and annual reports). The French Transparency Authority (HATVP), which is tasked with monitoring the integrity of elected officials and public servants, also provides such guidance in its field.

According to some global organisations, French efforts seem to have paid off:

- the OECD Phase 4 Assessment Report of 7 December 2021 found that France has made "remarkable progress" in terms of institutional response to corruption and its implementation by the public authorities, but underlined the shortcomings of private actors (lack of compliance); and
- the FATF Mutual Evaluation Report of 17 May 2022 noted that France has a favourable framework for effectively combating money laundering and terrorist financing (although improvements have been proposed, of course).

A new framework means new practices. The evolution of the Compliance Officer role (becoming more professional and more technical, developing sector expertise) shows a new trend in French corporate culture.

Compliance and criminal sanction risks associated with the implementation of sanctions taken against Russia

Although the EU has been implementing its own sanction regimes for the past 25 years (more than 30 sanction regimes are currently enforced in the EU), none has come close to reaching the scale of the sanctions taken against Russia since the beginning of the war in Ukraine in February 2022.

These regulations apply to any legal or natural person within the EU. They also apply anywhere in the world to any EU national or any EU incorporated company.

EU sanctions target legal or natural persons, with an unprecedented number currently being sanctioned (more than 1,800). In such cases, it is forbidden to deal with such persons, or with any entity they might own or control. EU sanctions also target a wide array of sectors of the Russian economy, ranging from oil and gas to luxury goods, with many exceptions and exemptions (which make such prohibitions hard to navigate). EU law further forbids taking part in actions or activities with the object or effect of circumventing such sanctions.

This complex and far-reaching framework entails substantial compliance risks for companies, with new and extensive due diligence requirements.

It further carries risks of criminal sanctions in France. Although sanctions are enacted at the EU level, their implementation is the sole responsibility of each member state. Under French law, sanction violations are a criminal offence, incurring a fine that can reach twice the amount of the operation conducted in violation of said sanctions.

Over the past few months alone, it has been reported that at least two dozen criminal investigations have been opened based on suspicions of sanction violation. This trend is likely to increase in the coming years.

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