The first step towards implementing DPAs in France

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Under the influence of the governments of the United Kingdom and the United States, the adoption of the Sapin II law on 9 December 2016 was a landmark in the modernisation of French criminal law. This law implemented the French equivalent of the deferred prosecution agreement (DPA) in the form of the Convention judiciaire d'intérêt public (CJIP). It was not until late 2017 and early 2018, however, that the first CJIPs were signed, enabling us to assess the value of this new tool.

How does the CJIP work?

Article 41-1-2 of the Criminal Procedure Code[1] allows the Public Prosecutor to propose a CJIP to legal entities prosecuted for a limited list of probity offences such as corruption, influence peddling and money laundering of tax fraud. The CJIP may also target other related offences.

The Public Prosecutor can impose three kinds of obligations on the entity:

1. the payment of a fine of public interest of which the amount cannot exceed 30 per cent of the company's average yearly turnover which must be calculated on the basis of the three yearly turnovers available at the time the offenses are found;
2. the obligation to implement a compliance programme under the control of the French anticorruption agency (AFA); and
3. the obligation to compensate victims.

The CJIP takes the form of an agreement signed by both parties, together with a validation order from a judge which controls whether it was relevant to use this process, the regularity of the proceedings, whether the amount of the fine complies with the requirements of Article 41-1-2 and the proportionality of the fine compared to the profits made. The agreement contains a statement of facts, a description of the calculation method of the fine, a section dealing with the potential implementation of a compliance programme, a section on victims' compensation and a description of the terms of the agreement. Lastly, this agreement and the validation order are published on the AFA website.

One of the most significant aspects of this new mechanism is the lack of guilt admission. Therefore, when the convention is not validated by a magistrate or in the event of a breach, the company can still defend itself at trial. Moreover, to ensure equal treatment, the content of the CJIP cannot be used by the Public Prosecutor for further prosecutions.[2] However, the investigating magistrate is not bound by this obligation and might rely on facts or confessions contained in the aborted CJIP.

Recent developments

For the first time on 30 October 30 2017,[3] HSBC Private Bank (Suisse) (PBRS) signed a CJIP with the National Financial Public Prosecutor (PNF)'s office on charges of aggravated laundering of the proceeds of tax fraud and unlawful banking and financial solicitation of French prospects or those residing on national territory by unauthorised persons (as a related offence). PBRS accepted to pay €86.4m in profit restitutions and €71,575,422 as a penalty. The Prosecution added €142,023,578 as compensation for the victims to reach the total amount of €300m.

On 14 February 2018[4] and 15 February 2018,[5] two other CJIPs were signed by the French companies, SET Environnement and SAS Kaeffer Wanner (KW), with the Public Prosecutor of Nanterre. Both companies were prosecuted on charges of corruption.

SET Environnement was sentenced to pay an €800,000 fine including €680,000 in profit restitution and a €120,000 penalty – mitigating factors having been considered. The company was also compelled to implement a compliance programme for a two-year period under the control of the AFA, the cost of which is borne by SET Environnement within the limit of €200,000.

For its part, KW agreed to pay a €2.71m fine, including profit restitution, a penalty and the consideration of cooperation efforts, which led to a reduction of the amount of the fine. The company also has to implement a compliance programme for an 18-month period under the supervision of the AFA, the cost of which is supported by KW within the limit of €290,000.

Lastly, Société Générale – besides several deferred prosecution agreements with the Department of Justice (DOJ) and the Commodity Futures Trading Commission (CFTC) – has signed a CJIP on 24 May 2018 with the PNF to resolve the investigations relating to certain transactions involving Libyan counterparties, including the Libyan Investment Authority (LIA), and the suspicion of corruption of foreign public officials. This CJIP provides the payment of a €250m fine to the PNF and has been approved by the Paris Judge on 4 June 2018.

This last CJIP illustrates the French authorities' new conception of the legal framework in the fight against corruption and the legal entities' new tool to settle various cross-border investigations.

What makes the CJIP attractive?

The CJIP is, in this way, a new instrument for the French authorities to participate in the worldwide fight against white collar crime. It sends a clear message to foreign authorities and companies with interests vested in France: they now must face the involvement of the French authorities in the signing of such agreements.

The perks of entering into a CJIP for a legal entity are completely different. It is a liability mitigation tool and a way to control the criminal proceedings. As such, the CJIP aims at establishing a real cooperation culture in French criminal law.

This is particularly significant in the recently signed CJIPs, as SET Environnement and KW were granted cooperation credits (which are not provided by Article 41-1-2 of the Criminal Procedure Code) which led to a reduction of the amount of their fines. Elements taken into account include measures taken by the company in response to the misconduct, voluntary disclosure and cooperation to the investigation.

However, cooperation cannot be automatic and legal entities have to weigh the pros and cons in considering self-reporting or accepting to sign a CJIP. Indeed, earlier in 2017, it was suggested that UBS sign a CJIP. The company refused however, realising that it would be difficult for the prosecution to prove the commission of the alleged offence.

Another major advantage of the CJIP is that the lack of guilt admission leads to the absence of any mention to the criminal record of the legal entity. Therefore, a company cannot be excluded from public procurement proceedings. This argument is strong for companies entering such agreements as the offences targeted for the CJIP tend to be committed by entities applying for public contracts. The impact on the company's activities and financing, therefore, is somehow limited.

Flaws of the CJIPs

First, the limitation of the CJIPs to legal entities may raise some issues. From the obligation to implement a compliance programme to the payment of a fine, the amount of which is not clearly determined, the obligations imposed within the scope of a CJIP appear to be uncertain.

The Sapin II law implemented what the US call monitoring programmes, in the form of an obligation to implement a compliance programme under the supervision of the AFA.

The scope of this measure is not clearly defined and seems to depend on the will of the magistrates. As a matter of fact, in the first CJIP, although the amount of the fine was particularly important for a French sentence, the Public Prosecutor did not use the faculty to impose the implementation of a compliance programme to PBRS.

This decision might be based upon the fact that the HSBC group had already implemented compliance measures in order to avoid further misconduct and comply with international standards as improving control over the activities of its subsidiaries, or instituting a tax transparency policy.

On the contrary, SET Environnement, KW and Société Générale were compelled to implement a compliance programme under the control of the AFA.

Here, it appears that only the foreign company has not been compelled to implement such a compliance programme. The argument of an existing compliance programme and the list of measures implemented can be welcomed to justify the absence of such an obligation. However, this raises the question of the extra-territorial application of this obligation. How will the AFA monitor the implementation of a compliance programme and ensure that a foreign company really does apply it? This question remains unanswered but will surely represent a challenge both for the AFA and more generally for the territorial application of French criminal law.

Moreover, when a company benefits from this mechanism, the employees of the entity involved in the misconduct cannot sign a CJIP and thus are likely to be prosecuted and sentenced by a court. While this new mechanism represents a significant advantage for legal entities, it creates a burden over individuals who incur greater criminal liability than their employers.

Another point in this uncertainty lies in the additional penalty imposed by the case law. Reading the PBRS CJIP raised some preliminary concerns as it clearly appears that a special penalty was applied to PBRS to punish the company's behaviour. The CJIP states that the exceptional seriousness and the traditional character of the facts alleged against the company justified the application of an additional penalty. Taking a closer look at this deal, it appears that the amount of the additional penalty enabled the prosecution to reach the amount of €157,975,422, which was the maximum possible under the calculation method provided by Article 41-1-2. The two following CJIP confirmed this creation as an additional penalty was applied and showed that this is consistently imposed.

In this way, companies could feel insecure in signing CJIPS as they cannot precisely assess the amount of the fine they could be compelled to pay.

The trap of the capped fine and the ne bis in idem defence

The CJIP signed by PBRS in October 2017 shows how relatively low the amount of the fine of public interest can be. With a €6bn estimated fraud, PBRS was sentenced to pay a mere €300m fine. This is explained by the cap provided by Article 41-1-2 of the Criminal Procedure Code which provides that the amount of the fine cannot exceed 30 per cent of the company's average yearly turnover and which must be calculated on the basis of the three yearly turnovers available at the time the offences are found.

In this regard, the PBRS CJIP is very instructive as it clearly appears that the maximum amount of the fine within the scope of the CJIP could only be €157,975,422 (without any compensation for victims), while the maximum amount of fine incurred at trial would have been €15bn.[6]

Consequently, it is crystal clear that there is a poor correlation between the penalty incurred with the CJIP mechanism and the sentence provided by the criminal code.

The amount of this fine also has to be compared to the amount of the fines pronounced in the UK and US legal systems to realise that these prosecuting authorities will be likely to consider that the sentences were too low to prevent them from prosecuting the targeted entities after the conclusion of a CJIP.

In addition, one has to bear in mind the recent decision issued by the French Supreme Court in the *Oil for Food Case,*[7] by which the magistrates found that the *ne bis in idem* principle did not have extraterritorial application. Therefore, a company signing a DPA with the US Department of Justice can still be prosecuted under French jurisdiction.

This latest position of the French Supreme Court matches the position of the US Courts which consider that they are not bound by a foreign decision for the application of the *ne bis in idem* principle.

As a result, while France wants to affirm its position in the prosecution of cross-border crimes, in the cases where there is no cooperation between French and foreign authorities as in the Société Générale's CJIP, the efforts made are still weak and may encourage foreign authorities to prosecute offences that they know about from the publicity of the CJIP.

Conclusion

The new CJIP mechanism is a major step forward towards the implementation of negotiated justice and a form of affirmation of the French position in the landscape of international prosecutions.

This intent to compete and cooperate with foreign prosecuting authorities is a strong signal for French and foreign companies which are now warned of the risks incurred. In this regard, they will be able to establish better strategic plans in order to resolve potential misconduct.

Lastly, the development of new provision in cross-border litigation renews the necessity of the construction of global cooperation and global settlement mechanisms in order to have more effective and fair sentences.

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[1] Created by Article 22 of the Sapin II Law No 2016-1691 of 9 December 2016.

[2] Article 41-1-2 of the Criminal Procedure Code.

[3] *Convention judiciaire d'intérêt public* between the National Financial Prosecutor of the Paris first instance court and HSBC Private Bank (Suisse) SA 'PBRS', 30 October 2017.

[4] *Convention judiciaire d'intérêt public* between the Public Prosecutor of the Nanterre Tribunal and SAS SET ENVIRONNEMENT, 14 February 2018.

[5] *Convention judiciaire d'intérêt public* between the Public Prosecutor of the Nanterre Tribunal and SAS KAEFER WANNER, 15 February 2018.

[6] Article L353-2 of the Financial and monetary Code and Articles 313-1 and 131-38 of the Criminal Code for unauthorised solicitation. Articles 324-1, 324-2, 1 and 324-3 of the Criminal Code for aggravated money laundering.

[7] *Vitol decision*, Cass Crim, 14 March 2018, no 16-82.117.