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ALERT MEMORANDUM

France Revises Internal Investigation and Corporate Enforcement Guidelines

April 13, 2023

On March 14, 2023, the French Anticorruption Agency ("AFA") and the National Financial Prosecutor's office ("*Parquet National Financier*" or "PNF") jointly issued updated guidance about anticorruption internal investigations (*Les enquêtes internes anticorruption – Guide pratique,* the "Guide").[1] This follows the announcement earlier this year of important revisions to the PNF's corporate enforcement guidelines (*Lignes directrices sur la mise en œuvre de la convention judiciaire d'intérêt public*, the "Guidelines").[2]

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I. Updated Guide on Anticorruption Internal Investigations

The purpose of the Guide is to educate companies about best practices on how to conduct an anticorruption internal investigation while respecting the rights of all parties involved.[3] It is structured around three sections.

Events that may prompt the opening of an internal investigation

The first part discusses the various events that may prompt a company to open an internal investigation. These may be internal (e.g., whistleblowing coming from an employee, a potentially abnormal situation revealed by internal controls and internal audits) or external (e.g., whistleblowing coming from a co-contractor,[4] opening of proceedings by French or foreign

[1] *Les enquêtes internes anticorruption -- Guide pratique*.
[2] *Lignes directrices sur la mise en œuvre de la convention judiciaire d'intérêt public* (the "Guidelines"), available in French and in English.
[3] Although the Guide applies to anticorruption internal investigations, it is meant as a tool for internal investigations into other potential misconduct (Guide, p. 4).
[4] The Guide takes into account whistleblowing legislation that was not enacted one year ago, when the first version was released. This includes in particular law No. 2022-401 of March 21, 2022 (which came into force in September 2022) and Decree No 2022-1284 of October 3, 2022, both aiming at strengthening the protection of whistleblowers. The former made it mandatory for companies to open their whistleblowing lines to third parties, including co-contractors and subcontractors.

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authorities, or a potentially abnormal situation revealed in the context of an audit by a regulator).

Of note, the Guide advises companies to inform the criminal authorities of any serious suspicion of corruption "*as soon as possible*" and to take the necessary steps to preserve evidence.[5] Where the previous iteration of the guide indicated that failing to self-disclose early could expose the company to liability if evidence was lost,[6] the new version deleted that language, and states instead that self-disclosure could be taken into account by the prosecutor when deciding how to resolve the matter.[7]

Points to bear in mind when conducting an internal investigation

The second parts deals with the internal investigation protocol, the persons involved in the internal investigation and how it should be conducted.

The Guide recommends that before carrying out an internal investigation, companies should draft and adopt as part of their policies and procedures an internal investigation protocol.[8] This recommendation serves several purposes, including safeguarding the rights of the individuals targeted by the investigation, securing the integrity and admissibility of the evidence collected, and ensuring consistency of methodology across internal investigations. The latter is an important point for the company to demonstrate if the AFA audits their compliance program.

The composition of the team to be assembled may vary depending on the facts under investigation. If the matter is handled internally, the investigators should be independent and free of conflicts of interest.[9] Also, the resources allocated to the investigation should be proportionate to the seriousness and the potential consequences of the facts under investigation.

The Guide states that if external lawyers are involved, they should not be the same as those handling "*the criminal defense of the company or the employees targeted by the investigation*."[10] As to the former, we do not believe that this is the case. The company may choose under certain circumstances to have different lawyers handle the internal investigation on the one hand, and the criminal defense of the company on the other, but this is by no means an obligation: it is entirely a matter of strategic choice for the client to decide. This is why companies should exercise caution before implementing what is only a recommendation from the Guide into their policies and procedures. It seems more prudent for the company to keep its options open as to their choice of external counsel.

Companies should remember that communications with in-house counsel[11] and outside investigators who are not lawyers (including forensic consultants) are not privileged. Of note, the Guide considers that what it calls "*the document drafted at the end of the internal investigation*" is not privileged, even if it was drafted by lawyers.[12] Again, we do not see why this would be the case. It is true that the company, which is not bound by professional secrecy obligations, may choose to disclose the internal investigation report as it sees fit, as a matter of strategic choice. But the report itself, which is a document drafted by a lawyer for their client, remains privileged. In other words, "*whether it be the minutes of interviews, the analyses made or the* [internal investigation] *report, all these documents are drafted by the lawyer for their client. They are therefore covered by professional secrecy*."[13] We are not aware of case law contradicting this position.

The Guide cautions international groups conducting internal investigations in France to be "*extra vigilant*" as to the "*the lawfulness, fairness and proportionality of*

[5] Guide, p. 9.
[6] First version of the Guide issued in March 2022, p. 7.
[7] As discussed in more detail in section II.
[8] Guide, p. 14.
[9] Guide, pp. 17-18.
[10] Guide, p. 18.
[11] There is an exception to this principle: since an important French Supreme Court decision of 2022, internal documents summarizing and/or forwarding outside counsel's advice in connection with anticipated litigation are protected. *See* our alert memorandum, *French Cour de Cassation Expands the Scope of the "Secret Professionnel" to Certain In-House Communications* (Jan. 31, 2022).
[12] Guide, p. 18.
[13] *Rapport sur les problématiques et les enjeux liés au statut et au rôle de l'avocat* "*enquêteur*" (Report to the Paris bar on issues related to the status and role of the "investigating lawyer") (Dec. 10, 2019), ¶ 16.

the means of investigation used."[14] For example, e-discovery measures should respect the E.U. General Data Protection Regulation as interpreted by French data protection law,[15] and the persons targeted by the investigation should be afforded certain procedural rights, including before their data are reviewed and before they are interviewed.[16]

Drafting a comprehensive investigation report is "*highly recommended*," and, if the internal investigation is conducted in parallel to a criminal investigation, making the report available to the prosecutor may be viewed as evidence both of the company's willingness to cooperate and of the strength of its compliance program.[17]

What to do after the internal investigation

The steps to take after the internal investigation depend on its results.

If the internal investigation does not confirm the suspicion of misconduct, the case is closed and the investigation report is archived under conditions that respect data protection law. Also, if the investigation was prompted by an internal whistleblowing, the whistleblower is advised in writing that the case was closed.[18]

If the internal investigation confirms the suspicion of misconduct, proportionate disciplinary action should be taken against those involved.[19] If circumstances so warrant, the company may consider self-reporting to the criminal authorities, for reasons and under conditions outlined in the updated corporate enforcement guidance (discussed in the next section), to which the Guide makes explicit reference.[20]

In any event, an internal investigation that identifies shortcomings in the anticorruption compliance program should be followed by corrective measures.

Finally, any internal communication by the company regarding the internal investigation or its results should be anonymized in order to respect the privacy and presumption of innocence of the individuals involved.

As the press release accompanying the Guide makes clear, the PNF and the AFA view the opening of an internal investigation in case of suspected misconduct as "*a sound management reflex*."[21] If facts indicative of a criminal offense are unearthed, then having conducted an internal investigation in a "*loyal and structured*" fashion is helpful if the company wants to negotiate a so-called *convention judiciaire d'intérêt public* ("CJIP"), i.e., a non-trial resolution mechanism akin to the U.S. deferred prosecution agreement. The criminal corporate enforcement guidelines applicable to such negotiated resolutions were also recently updated in important respects.

II. Updated Criminal Corporate Enforcement Guidelines

Under a CJIP, legal entities (but not individuals) may sign with the prosecutor a settlement agreement which mandates one or more of the following: (i) the payment of a fine, (ii) the compensation of damages suffered by any identified victim of the suspected misconduct and (iii) if necessary, the implementation of a compliance program under the supervision of the AFA, at the expense of the company.[22]

This mechanism is available only to settle allegations of corruption, influence peddling, tax fraud, and the laundering of the proceeds of these offenses.[23]

According to the PNF, the updated Guidelines, published on January 16, 2023, aim at providing "*more transparency, clarity and predictability*"[24] regarding the use of these settlements.

[14] Guide, p. 18.
[15] Guide, p. 21.
[16] Guide, pp. 23-29.
[17] Guide, p. 29.
[18] Guide, p. 32.
[19] Guide, p. 34.
[20] Guide, p. 34.
[21] Press release accompanying the Guide.

[22] *See* our alert memorandum, *France Implements Sweeping Anti-Corruption Reform* (Mar. 22, 2017).
[23] CJIPs are also available for offenses related to ("*connexes*") the ones listed, and for environmental offenses. The Guidelines apply only to the CJIPs pertaining to so-called "*ethical breaches*," not environmental breaches.
[24] *See* interview given by the head of the PNF to *Dalloz Actualité* on January 18, 2023.

Good faith

The only situation that will disqualify a company from this negotiated path is if the misconduct caused serious harm to individuals.[25] Other than that, the PNF stated during the conference organized to announce the Guidelines that its door was "*wide open*."

The Guidelines emphasize that in order to obtain a CJIP, the company's "*good faith*" is paramount. The company can demonstrate good faith by promptly self-disclosing the relevant facts, fully cooperating with the PNF, and appropriately remediating the misconduct.

Prior compensation of any victims and change in the company's management, as appropriate, are also listed as positive factors.

Conversely, failure to implement an effective compliance program or to take corrective measures may preclude the company from being offered a CJIP, or will count as aggravating factors in the calculation of the fine, as explained below.

Confidentiality

The Guidelines make clear that exchanges during the negotiations are protected by the so-called "*foi du palais*," a time-honored, unwritten French usage which ensures confidentiality between judicial professionals.

Confidentially is also safeguarded for all documents transmitted by the company after the settlement proposal, whereas documents obtained following subpoenas or dawn raids can still be used if an agreement is not reached.

Computation of the fine

French law mandates that the sanction be "*proportionate to the benefits derived from the offenses*" and capped at 30% of the average annual turnover for the last three years.[26] It does not otherwise explain the calculation of the sanction.

In this respect, the Guidelines indicate that the turnover to be taken into account is the one recorded in the consolidated accounts, if such accounts have been established pursuant to the relevant regulations.[27] Whether this interpretation is in line with the law is debatable, and this new position is a departure from previous guidance issued in 2018, which only took into account the turnover of the entity signing the CJIP.[28]

The Guidelines offer substantial clarification as to how the final amount of the fine is to be determined.

The fine is composed of two parts, namely the disgorgement, which is equal to the undue benefits derived from the misconduct, and a "*punitive part*," which is based on the amount of undue benefits obtained, adjusted by aggravating and mitigating factors.

The amount of the undue benefits derived from the misconduct is the result of an assessment discussed with the PNF at the date of the agreement. It is established in cooperation with the company, with which the PNF will agree on a list of all direct and indirect benefits to be taken into account and principles for assessing the undue benefits, on the basis of accounting information provided by the company, which may be certified by its auditors.[29]

Nine aggravating factors and eight mitigating factors are listed – compared to a total of nine factors in the previous version of the Guidelines – as well as their impact on the amount of the fine's "*punitive part*." For instance, the size of the company may now be considered to increase the "*punitive part*" of the fine up to a maximum of 20%, and prior compensation of the victims by the company may reduce it up to a maximum of 40%.

The list of all seventeen factors can be summarized as follows, in ascending order of importance:

[25] Guidelines, p. 8.
[26] Code of Criminal Procedure, Article 41-1-2.
[27] Guidelines, p. 13.
[28] Circular No. 2016/F/FA/0138/FA1, p. 17, which states that "*the turnover taken into account is the worldwide turnover of the sole entity subject to the proposed settlement agreement. For example, if the entity that may enter into the CJIP is a subsidiary of a large group, only the turnover of that subsidiary will be taken into account*."
[29] Guidelines, pp. 14-16.

Cap	Aggravating factors	Mitigating factors
10%	-	- Misconduct was an isolated incident - Effectiveness of the internal whistleblowing system
20%	- Large size company[30] - Shortcomings in the compliance program (for companies that must implement one) - Judicial, fiscal, or regulatory track record of the company - Use of corporate resources to conceal misconduct	- Relevance of the internal investigation conducted - Corrective measures implemented - "Unambiguous" acknowledgement of the facts by the company
30%	- Any form of obstruction to the investigation - Creation of means to conceal misconduct - Involvement of public officials	- Active cooperation
40%	-	- Prior compensation of the victims
50%	- Recurrent nature of misconduct - Serious disturbance of public order	- Voluntary self-disclosure

It will be up to the company and the PNF to negotiate, on a case-by-case basis, the precise impact of each of these factors on the "*punitive part*" of the fine.

Of note, the factors that were not mentioned in the 2019 Guidelines now include the "*judicial, fiscal, or regulatory track record of the company*" (20%). This is of interest to regulated entities such as financial institutions, which may have been sanctioned by their relevant regulators, including the ACPR.

[30] According to the PNF, a company is to be considered of "*large size*" if it employs at least 5,000 employees or if its turnover and total assets exceeds €1,5 billion and €2 billion, respectively. This interpretation is consistent with the definition given by the relevant French decree (No. 2008-1354), although the PNF also states that other criteria may be taken into account on a case-by-case basis.

Scope of the settlement

One of the main benefits of the CJIP once validated by the judge is that it allows the company to turn the page on the misconduct described in the statement of facts, without a criminal conviction and without an admission of guilt.[31]

In principle, only the facts described in the CJIP are covered. Nonetheless, the Guidelines provide that in "*very exceptional circumstances*," when systemic misconduct makes it difficult to ascertain all the facts, it is possible to provide that all facts of a similar nature (e.g., corruption) that occurred within a certain period on a certain territory will be covered as well, provided that they were not concealed from the PNF.[32] In that case, the amount to be paid will be higher, and the aggravating factor for repeated misconduct will outweigh the mitigating factor for active cooperation (30%), and can even exceed 50%.[33]

Compliance program

The CJIP may also provide for an obligation to implement a compliance program supervised by the AFA, whose costs are borne by the company, during a maximum of three years.[34]

To assess if this monitoring obligation is warranted, the PNF and the AFA take into account (i) the result of any recent audit conducted by the AFA and (ii) the implementation of a compliance program under the aegis of a foreign authority (such as the U.S. Department of Justice) or an international financial institution (such as the World Bank).

In practice, the implementation of this additional obligation in the CJIP is subject to the quality of the company's current compliance program.

International cooperation

The Guidelines recognize that the *ne bis in idem* principle is of little practical value to corporations:[35] a

[31] Code of Criminal Procedure, Article 41-1-2, II.
[32] Guidelines, p. 24.
[33] Guidelines, p. 17.
[34] Code of Criminal Procedure, Article 41-1-2, I., 2.
[35] Guidelines, p. 24.

corporation that settles allegations of misconduct with the authorities of one country cannot claim that it should not pay a second time for the same facts if authorities of another country decide to investigate.

The Guidelines endeavor to mitigate this risk. First, during the negotiations with the company, the PNF coordinates its investigation with that of foreign criminal authorities (such as the U.S. Department of Justice or the U.K. Serious Fraud Office) or international organizations (such as the World Bank). Second, in order to avoid paying twice for the same underlying misconduct, the company may seek a joint resolution with all authorities concerned.[36] Third, following the conclusion of a CJIP, the PNF may condition its cooperation with requests for international mutual assistance to an undertaking from the foreign authority not to initiate new proceedings against the company for the same facts.

Individuals

Individuals will not be identified by name in the CJIPs,[37] which are published on the website on the Ministry of Justice. Other than that, the Guidelines offer little comfort for individuals potentially involved in the misconduct. Unlike legal entities, they cannot enter into a CJIP, and their only option to avoid a trial is to sign a guilty plea. Corporate officers and employees should be aware that their criminal exposure remains[38] and may even be increased following a CJIP entered by the company, given that the PNF expects companies to name names in order to reduce the amount of the fine.[39]

The Guidelines state that whenever possible, the PNF "*favors*" a joint resolution of the matter, with a CJIP for the company and a guilty plea for individuals.[40] But individuals should know that this joint resolution is ultimately in the hands of the judge, and that in one corruption matter in 2021, the judge approved the CJIP but refused to validate the guilty pleas agreed between the PNF and the individuals.

Comparison with Revised U.S. Corporate Criminal Enforcement Guidelines

By happenstance, the U.S. Department of Justice ("DOJ"), through the voice of Assistant Attorney General Kenneth A. Polite, announced revisions to its corporate enforcement policy the day after the updated French Guidelines were published.[41] The announcement was accompanied by the release of a revised and renamed "Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy" (the "U.S. Policy").[42]

Both share common features, such as an insistence on individual accountability: AAG Polite's speech announcing the U.S. Policy emphasized that DOJ's "*number one goal in this area*" was holding accountable the individuals who are criminally culpable, no matter their seniority[43], while the French Guidelines insist that "*the good faith of the corporation in negotiating a CJIP is assessed in part in light of its capacity to conduct an internal investigation sufficient to identify the main individuals involved in the underlying facts, and to disclose them to the prosecutor during the investigations and the negotiations*."[44]

They also share the same stated aims, i.e., incentivizing voluntary self-disclosure and corporate cooperation and remediation.

[36] The first example of such a coordinated resolution of a foreign bribery case by the U.S. and French authorities occurred in June 2018, and others have followed since then. *See* our alert memorandum, *Société Générale Enters Into First Coordinated Resolution of Foreign Bribery Case by U.S. and French Authorities* (Jun. 6, 2018).
[37] Guidelines, p. 25.
[38] Code of Criminal Procedure, Article 41-1-2.
[39] Guidelines, p. 25.
[40] Guidelines, p. 26
[41] *See* Speech, "Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy" (Jan. 17, 2023) ("Polite Speech"). *See* our alert memorandum, *U.S. Department of Justice Announces Revisions to Corporate Criminal Enforcement Policy* (Jan. 23, 2023).
[42] *See* Dep't of Just., Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy.
[43] *See* AAG Polite Speech; *see also* our alert memorandum on this topic, *U.S. Department of Justice Announces Changes to Corporate Criminal Enforcement Policies* (Sept. 19, 2022).
[44] Guidelines, p. 25.

Nonetheless, the updated policies differ in several important respects, including the way in which self-disclosure, cooperation and remediation are valued.

Under the U.S. Policy, a company that timely and appropriately self-reports, cooperates, and remediates is now eligible for a 50% to 75% reduction off the low end of the U.S. Sentencing Guidelines fine range. Under the French Guidelines, the mitigating factors listed only include a ceiling, with no guarantee regarding the minimum fine reduction that a company may obtain. And the ceiling for self-disclosure is 50%, i.e., the floor under the revised U.S. Policy.

Also, unlike the U.S. Policy,[45] the French Guidelines do not provide for a declination, let alone a "presumption of declination" in case of voluntary self-disclosure, full cooperation, and timely and appropriate remediation. Those may only be rewarded by mitigating factors, allowing a reduction of the "*punitive part*" of the fine.

In sum, the U.S. Policy goes much further seeking to provide concrete incentives for companies to voluntarily self-report potential misconduct. Still, the French Guidelines offer welcome clarifications, predictability and transparency for companies on how to handle suspicions of misconduct in their midst.

Looking ahead, additional guidance on French compliance programs is expected later this year.

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[45] Under the U.S. Policy, a company that voluntarily self-discloses, fully cooperates and appropriately remediates is entitled to a "*presumption of declination*" with disgorgement of ill-gotten gains, absent aggravating circumstances. What is more, a company is eligible for a declination even when the misconduct involves aggravating circumstances if it voluntarily self-reports as soon as it uncovers misconduct and engages in "*extraordinary*" cooperation and remediation. *See* our alert memorandum, *U.S. Department of Justice Announces Revisions to Corporate Criminal Enforcement Policy* (Jan. 23, 2023).