

# French prosecutors reach first ever DPAs settling bribery charges

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March 2018

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In February 2018, the first *Conventions Judiciaire d'Intérêt Public* (“CJIPs”) – or French Deferred Prosecution Agreements (“DPAs”) – were entered into for corruption charges between the Public Prosecutor’s Office of Nanterre and two French companies. Companies should be aware of the importance of initiating a dialogue with French authorities and anticipating the controls undertaken by the French Anticorruption Agency (the “AFA”).

## Background

### Facts

In July 2011, the Chief Security Officer of Electricité de France, a French partly state-owned company, revealed to the French police that one of its employees was requesting commissions in exchange for the allocation or retention of public contracts. The company’s security services themselves had been provided the information through a third-party whistleblower.

The Prosecutors of Nanterre initiated a preliminary enquiry in November 2011, which quickly thereafter led to the case being referred to a French investigative judge for criminal investigation. Following an undercover operation conducted in February 2012, the employee of the partly state-owned company was arrested and formally put under criminal investigation for charges of “passive” corruption (i.e. demanding or accepting a bribe). Subsequently, the investigation established that certain French companies of a relatively small or medium size, including Kaeffer Wanner (“KW”) and Set Environnement (“SE”), agreed to pay bribes to this employee to keep their contracts for the maintenance of thermal power stations. In particular, KW admitted that its employees created an elaborate scheme to finance the bribes, by issuing fake invoices from foreign companies and lodging fraudulent expenses, which enabled them to pay several hundreds of thousands of euros in cash to the corrupt employee between 2004 and 2011.

### Procedure

It should be recalled that a CJIP can be reached either during a preliminary enquiry (i.e. before the initiation of a formal prosecution) or during a criminal investigation conducted by an investigating magistrate (i.e. once a formal prosecution has been initiated). The latter option is only available when the legal entity placed under investigation acknowledges its liability for the charges brought against it, as well as the legal qualification attached to the charges. The two recent CJIPs were reached under this second procedure, which required the two companies to acknowledge their liability for the acts of “active” corruption (i.e. offering or conceding a bribe).

The negotiations allegedly started out with KW and SE approaching the French prosecutors after the start of the criminal investigation. The CJIPs were concluded on February 14 and 15, 2018, and approved by the Vice

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President of the High Court of Nanterre on February 23, 2018. The CJIPs and the High Court's decisions became binding and public on March 7, 2018 after a ten-day opt-out period left to the two companies.

## Settlement

### Financial penalties

Both KW and SE were fined in relation to the amount of benefit resulting from the payment of the bribes, which was calculated based on their respective gross operating surplus and the cap of 30% of average annual turnover over the previous three years (2014-2016), as required by the Sapin II Law.

It is worth noting that the calculation of the fines was adjusted based on several factors:

- Aggravating factors:
  - Duration of the scheme (eight years for KW and four years for SE); and
  - Commission of the offence in the context of a contractual relationship with an operator entrusted with public service tasks.
- Mitigating factors:
  - Cooperation with the investigation;
  - Enhancement of compliance programmes (appointment of ethics officers and managers; creation of an internal website on ethics and compliance; disseminating a whistleblowers' charter; raising awareness of employees on risks of corruption and cartels; keeping the compliance programme up to date with e-learning training, risk mapping, integrity guide, and whistleblowing procedures managed by an independent service provider external to the company); and
  - Implementation of disciplinary, remedial and restorative measures (departure and termination of managers and employees; changes in management and shareholding).

As a result, a fine of €800,000 was imposed on SE (€680,000 as disgorgement of illegal profit and €120,000 as an additional penalty), and a fine of €2,710,000 on KW (€3.3 million calculated as disgorgement of illegal profits having been reduced on the basis of mitigating factors, although there is no indication of the specific credits given for each factor).

### Compliance programmes

SE was ordered to implement an anti-corruption compliance programme under a two-year monitorship of the AFA. As KW had already implemented a compliance programme, it was imposed an eighteen months-monitoring of this programme by the AFA. The costs of such monitorships is to be borne by the companies and will amount up to €290,000 for KW and up to €200,000 for SE.

### Damages to the victim

The partly state-owned company had formally joined the prosecution as a legal entity with the status of *partie civile*. It was awarded €30,000 in both cases, to be paid by KW and SE within a month after the CJIPs became binding. Despite the lack of public information, one can assume that the investigation relating to the behavior of the corrupt employee still continues and may result in a trial.

## Implications

The Sapin II Law, adopted on December 9, 2016 introduced a number of changes to the French anti-corruption framework, one of the most consequential being the CJIP procedure. The first CJIP was concluded by the French National Financial Prosecutor's Office with a major bank in November 2017 in relation to the laundering of proceeds from tax fraud. These two recent CJIPs represent a major breakthrough as they are the first negotiated outcomes reached in the context of an investigation for corruption, which lay behind the adoption of the Sapin II Law.

## **Cooperation and voluntary disclosure**

These two CJIPs shed further light on the weight that the French prosecutors wish to give to cooperation by legal entities eager to negotiate a CJIP in the context of a criminal investigation. The first settlement of November 2017 underlined a lack of voluntary disclosure of facts to the French criminal authorities, and a lack of acknowledgement of criminal liability during the course of the investigation. In the two recent CJIPs, the French prosecutors go a step further by expressly confirming their willingness to sanction companies with lower fines if they agree to cooperate with the French authorities during the criminal investigation. The CJIPs do not specifically list the absence of disclosure of facts as an aggravating factor, but seem to suggest that adequate cooperation by the company could mitigate the lack of self-reporting.

Consequently, these cases have laid down the first milestones of what could become a French standard of cooperation designed for companies interacting with French enforcement authorities. Neither the French code of criminal procedures, nor the Sapin II Law, contain guidelines related to cooperation and voluntary disclosure similar to those described in the U.S. Principles of Federal Prosecutions of Business Organizations and the revised Corporate Enforcement Policy for the U.S. Foreign Corrupt Practices Act, or the U.K. DPA Code of Practice. One can expect the French Prosecutors' offices, or the Criminal Division of the French Ministry of Justice, to issue guidance in the future, either orally or through written guidelines, so as to further clarify the French rules.

## **Prosecution of individuals**

Separate enforcement actions against managers and employees of KW and SE are explicitly mentioned in the two CJIPs. For the future, this confirms that French prosecutors will be engaging in parallel enforcement actions against individuals, although the CJIP will be silent on any potential individual culpability.

## **Compliance programmes and AFA's control**

The importance given to the anti-corruption compliance program in the calculation of the fine, notably the whistleblowing mechanism as well as the disciplinary and remedial measures, shows that French and foreign companies subject to the Sapin II Law need to take further active steps to comply with the requirements set forth in the law. In particular, companies should anticipate controls undertaken by the AFA by making sure that their compliance programme runs effectively, procedures are ready and can be swiftly communicated to the AFA, and employees are properly trained for on-site inspections.

If companies discover any misconduct or any potential criminal offence in the context of their compliance programmes, they would be well advised to carefully assess the situation before eventually starting a dialogue with the AFA and/or initiating a disclosure process with French judicial authorities.

## **Opportunities for future CJIPs**

These two recent CJIPs demonstrate that the French enforcement authorities are effectively starting to enter into CJIP negotiations in relation to acts of corruption that took place before the adoption of the Sapin II Law (i.e. prior to December 2016), even going back before the increase in penalties for corruption (i.e. prior to December 2013). This represents a strong signal given to companies willing to resolve pending charges or clean up internal shortcomings, irrespective of their size or location, that they will be welcome to approach French prosecutors with this objective in mind.

In the context of a surge in cross-border and multi-jurisdictional investigations, the CJIP offers wider strategic choices to French and foreign companies, which require them to thoroughly assess their risks and prepare a tailored defence.

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