



Europe, Middle East and Africa Investigations Review

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**France: Navigating the evolving
investigations ecosystem**

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France: Navigating the evolving investigations ecosystem

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IN SUMMARY

The year 2023 marked the 10th anniversary of the creation of the National Financial Prosecutor's Office (PNF), France's main judicial authority for white-collar crime and investigations. During these 10 years, the French legal and procedural landscape experienced major changes, such as the Sapin II Law and the creation of the French Anti-Corruption Agency (AFA). France is now internationally recognised for its compliance and investigations legislation. There is growing interest in the prosecution of environmental crime and a continued focus on financial misconduct. The judicial authorities are also seeking to clarify this complex landscape by offering more rights to the investigated individuals and guidance on the new procedural tools.

DISCUSSION POINTS

- The PNF and its Guidelines for the Implementation of the French Deferred Prosecution Agreement (CJIP)
 - Guilty plea procedure
 - AFA-PNF guidelines on internal investigations
 - Procedural challenges before the court
 - Police custody
 - Environmental crime
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- Law No. 2016-1691 of 9 December 2016 (Sapin II)
 - Law No. 2023-1059 of 20 November 2023 on the orientation and programming of the Ministry of Justice 2023–2027
 - Laws Nos. 2020-1672 of 24 December 2020 and 2021-1104 of 22 August 2021 (environmental crime)
 - French Supreme Court, Criminal Division, 29 November 2023, No. 23-81.825
 - Constitutional Council, Decision No. 2023-1062 QPC, 28 September 2023
 - AFA-PNF's practical guide on anti-corruption internal investigations, March 2023
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TEN YEARS OF WHITE-COLLAR INVESTIGATIONS BY THE NATIONAL FINANCIAL PROSECUTOR'S OFFICE

The year 2023 marked the 10th anniversary of the creation of the National Financial Prosecutor's Office (PNF), the authority in charge of supervising the investigations and prosecutions of the most important white-collar offences and cases in France.

The PNF's track record is undeniably the sign that it has achieved its mission: to become a major player in the national and international criminal justice landscape and to strengthen the fight against financial crime. It has also participated in a major cultural change in the way financial criminal investigations are handled in France, and its development has reinforced France's authority in the context of international investigations and with regard to other regulators.

In 10 years, the PNF has obtained more than 500 convictions, representing a total value of €12.3 billion for the French state. It is now composed of 20 magistrates and 11 specialised assistants.^[1]

Part of the success of the PNF is based on its procedural efficiency and flexibility. The PNF prefers conducting its investigations under the preliminary investigation regime and to limit the opening of a judicial investigation and the appointment of an investigating judge to complex and sensitive cases. For instance, only 14 per cent of the ongoing procedures conducted by the PNF were judicial investigations in 2023. The PNF also tries to systematically conduct adversarial preliminary investigations by granting the parties access to the case file and allowing them to submit their observations before formal proceedings are initiated. This is different from the practice of most French prosecutor's offices, which continue to consider, based on a strict interpretation of the Code of Criminal Procedure, that preliminary investigations are confidential and non-adversarial by nature (although recent legislative amendments have extended the right of the investigated individual and made the legal framework more flexible).

The PNF has also been at the forefront of the development of new investigative methods based on a more adversarial and transactional approach, involving, where conditions are met, negotiated criminal justice instruments such as the French deferred prosecution agreement (CJIP) and the guilty plea procedure (CRPC).

The creation of the CJIP in 2016 was notably an important step for the PNF. It diversified the criminal response to legal persons' wrongdoings and encouraged cooperation with the judicial authorities, as the conduct of internal investigations and the spontaneous disclosure of the facts by the investigated entity may result in a significant decrease of the incurred fine. The CJIP is now an essential tool for the PNF, which approved 20 CJIPs since 2016, totaling €3.98 billion (for an average fine of €53 million, excluding the three highest fines).

The different subject matter of the PNF's investigations reflects the diversity of the offences over which it may have jurisdiction. Forty-seven per cent of cases involve bribery or bribery-related offences, 44 per cent tax offences and the remaining 9 per cent market abuses, anticompetitive practices (over which the PNF has jurisdiction since 2020) and other offences.

The PNF has established itself as the leading authority for cases involving bribery and related offences (influence peddling, unlawful conflict of interests and misappropriation of public funds, etc). While the PNF has concurrent jurisdiction with other public prosecutors' offices in complex bribery cases, it is the go-to authority for large-scale investigations with a national or international dimension involving bribery of foreign public officials.

NEW IMPETUS FOR NEGOTIATED CRIMINAL JUSTICE

The year 2023 also saw important developments in the field of transactional criminal justice. French courts have rendered several landmark rulings strengthening and clarifying

the rights of individuals and entities prosecuted through alternative criminal resolution procedures. The regulators – namely the PNF and the French Anti-Corruption Agency (AFA) – also participated in this effort by issuing two important sets of guidelines. The first set, Guidelines for the Implementation of the French Deferred Prosecution Agreement (CJIP), details the procedure and rules applicable to the CJIP.^[2] The second set, Anticorruption internal investigations – Practical Guide, issued in March 2023, provides recommendations on the conduct of internal investigations and is the first attempt of the authorities to comprehensively address this topic in France, which is not governed by a specific body of regulations or case law.^[3]

Although these initiatives were welcomed by the practitioners and participate to ensure legal security and foreseeability, the position taken by the authorities on several issues is questionable and should induce corporations, their officers and their counsel to remain cautious and aware of the risks they face when they are investigated. If alternative criminal resolutions imply a certain degree of cooperation, they do not mean that individuals and corporations have to relinquish all of their rights.

New PNF Guidelines On The Implementation Of The CJIP

On 16 January 2023, the PNF presented updated guidelines on the implementation of the CJIP to strengthen the cooperation of companies and their executives in PNF investigations.

The CJIP procedure was introduced by Law No. 2016-1691 of 9 December 2016, known as Sapin II. It allows the public prosecutor, in the context of a criminal investigation, to enter into an agreement with a legal entity that is suspected of specific offences (bribery-related offences, tax fraud and environmental offences). This agreement puts an end to the criminal proceedings against that legal entity, in exchange for the latter's fulfilment of one or more obligations, the main ones being the payment of a public interest fine, the implementation of a compliance programme and compensation for the victim's damages.

The Importance Of Good Faith

In the new Guidelines, the PNF first clarifies the prerequisites for a legal person to benefit from a CJIP. In this respect, the PNF makes the good faith of the legal person an essential criterion for access to the CJIP^[4] and expects that the legal entity will actively participate in the determination of the truth.

Spontaneous disclosure of facts to the public prosecutor's office is considered by the PNF to be one of the most important examples of evidence of this good faith, as well as the conduct of an internal investigation and the submission of the internal investigation report or the detailed disclosure of its findings.^[5] The PNF also expects the legal entity to provide it with the incriminating and exculpatory elements that will enable it to determine whether or not to prosecute the natural persons.^[6]

It should also be noted that the PNF considers that the unequivocal recognition of the facts by the legal entity constitutes another indication of its cooperation. This position goes beyond the requirements of the law. Corporations will have to be careful here, as this recognition may carry a risk of follow-on actions that will have to be assessed in the context of the negotiations, especially since CJIPs are available to the public.

The Calculation Of The Incurred Fine

The Guidelines also responded to criticism regarding the opacity of the PNF's methods to calculate the public interest fine. The PNF took note of this, and the 2023 Guidelines provide a more detailed calculation methodology to meet the concern for legal certainty expressed by economic operators.

The Guidelines indicate that if the accused legal entity belongs to a group of companies, the consolidated turnover of the group will be taken into account to determine the basis for calculating the fine (ie, 30 per cent of the average annual turnover calculated on the basis of the past three consolidated turnovers of the group). This clarification is presented as having the objective of preventing certain groups from concentrating the criminal risk on one subsidiary to reduce the financial penalties incurred.^[7] However, the approach is quite extensive and raises questions as to the principles of legality and of the individual nature of penalties. Its implementation will probably require public prosecutors to show the involvement of the group's mother company in the wrongful conduct.

The Guidelines also detail the method of calculation of the fine by distinguishing two dimensions to the fine: a 'restitutionary' dimension, equal to the amount of the benefits derived from the identified infringements, and an 'afflictive' dimension, calculated on the basis of the amount of the benefits derived from the infringements to which major and minor factors are applied. For instance, the spontaneous disclosure of the facts may lead to a 50 per cent decrease of the punitive part of the fine, while the repeated nature of the settled facts can lead to an increase of 50 per cent.

Confidentiality Of The Negotiation With The PNF

The new Guidelines also formalise the pre-negotiation phase, stating that the PNF welcomes 'informal discussions' on the possibility of a CJIP with the defendant's representative or lawyer, who may approach the PNF on a voluntary basis. No writing is required to initiate these preliminary discussions,^[8] which are confidential since they are covered by the *foi du palais* principle according to the PNF.^[9]

The Guidelines also recall the legal principle that the PNF may not use before an investigating judge or a criminal court statements made or documents submitted by the legal entity during the negotiation phase.^[10] The PNF nevertheless emphasises that documents added to the investigation file with the consent of the legal entity during discussions prior to the formalised CJIP proposal, as well as information obtained by the PNF through judicial investigation acts, are excluded from the scope of this confidentiality. In practice, the PNF explains that it will determine with the legal entity the date from which the CJIP proposal will be formalised.

Update On CJIPs Concluded In 2023

Ten CJIPs were signed in 2023 based on Sapin II for financial matters, a significant increase compared with 2022 (seven CJIPs) and 2021 (four CJIPs). The most significant CJIP of 2023 was concluded by the PNF and companies of an engineering group in June 2023. Covering the offences of bribery of foreign public officials, the fine was calculated according to the methodology explained in the new Guidelines. The PNF applied both reducing factors (spontaneous disclosure of the facts) and aggravating factors (systemic nature of the wrongful conduct in African markets) and decided a fine of €209 million.

Change In The Legal Framework Of The CRPC

The other major instrument of transactional criminal justice, the CRPC, also underwent important changes in 2023.

The CRPC procedure,^[11] sometimes called the guilty plea procedure, allows the public prosecutor to propose one or more of the main penalties incurred for a given offence to a legal or natural person who admits their guilt and do not dispute the facts of the case. The CRPC is sometimes perceived as the equivalent negotiated criminal resolution for natural persons, as they cannot benefit from the settlement negotiated by the legal person in the CJIP (although the CRPC is also open to legal persons).

In a judgment handed down on 29 November 2023,^[12] the Criminal Division of the French Supreme Court ruled that, in the event of failure of the CRPC procedure, information relating to the indicted person's acknowledgement of the facts should be removed from the investigation file. The ruling means that if the CRPC procedure fails – notably if the prosecuted individual or entity ultimately rejects the sentence proposal or if the president of the criminal court refuses to approve it – the investigating judge who will resume the investigation or the criminal court that will hear the case will not have access to the admission of guilt of the accused person. The ruling was notably based on the principle of presumption of innocence and the right not to incriminate oneself, protected by article 6 of the European Convention for the Protection of Human Rights.

The ruling is progress, in terms of the rights of the prosecuted persons in the context of a judicial investigation following the failure of a CRPC procedure, and will make it easier to advocate for an acquittal before the criminal court. However, the new guarantees established by the Supreme Court have certain limits. In fact, as the Supreme Court stated, the investigation file will retain a record of the CRPC through the presence of the order that decided to initiate the CRPC procedure, and judges will be able to infer that the accused person might have accepted the principle of his or her guilt at this time of the procedure.

The attractiveness of the CRCP procedure has also been strengthened by the recent amendment of article 495-12 of the French Code of Criminal Procedure by Law No. 2023-1059 of 20 November 2023 on the orientation and programming of the Ministry of Justice 2023–2027. The new version of the article, which will enter into force on 30 September 2024, provides that the public prosecutor may, after the failure of a first CRCP procedure, submit a second request for approval to the president of the court.

Under the current regime, the public prosecutor has no choice but to refer the matter to the criminal court or to an investigating judge if the approval of the sentence is refused. The possibility to submit a new sentence proposal will thus give a second chance to the parties who have opted for the CRPC procedure, especially when the president of the court considers that the initial sentence is not appropriate.

Regulators' Recommendations On Internal Investigations

On March 2023, the regulators – the AFA and the PNF – issued guidelines on the conduct of internal investigations, outlining their expectations when the investigations relate to anti-corruption matters.

To date, there are no official laws or regulations governing the conduct of internal investigations in France. The relevant rules are to be found in developing case law but also in non-binding guidelines and good practice issued by various organisations, such as the Paris Bar or the National Bars Council, which can be considered as soft law.

The 2023 AFA and PNF guidelines are part of this effort and are therefore not binding. Although the guidelines provide interesting insight into and clarifications as to the authorities'

expectations, their position on two specific issues has raised concern among legal practitioners.

The AFA and the PNF have stated that the lawyer conducting the internal investigation for the company should be different from the lawyer representing the company in any subsequent legal proceedings, because of the conflict of interest. This position is rather surprising, as no regulation, including the ethical rules of the Bar Association, prohibits such representation. Conflicts of interest must be decided on a case-by-case basis by the competent professional authorities, and there should be no general prohibition, especially when practice, whether in France or abroad, has shown that the law firm conducting the internal investigation can also represent the company in proceedings brought by the authorities, without undermining its cooperation.

The second issue relates to the confidentiality and privileged nature of the internal investigation report prepared by the company's lawyers. The AFA and PNF guidelines clearly state that such a report should not be covered by legal privilege. Again, such a statement is quite surprising, as there is a general agreement that work product prepared by French lawyers, especially in the context of an internal investigation aimed at preparing the company's potential defence, should be privileged.

The Paris Bar Association has officially responded to these statements with an official resolution stating that French lawyers can fully assist or represent their client in legal proceedings relating to the internal investigation they have carried out for the same client, and that the internal investigation report prepared by lawyers is privileged.^[13]

Although the authorities have since attempted to nuance their position,^[14] pointing out that their guidelines are not binding, this disagreement highlights the fact that operators and their lawyers should be extremely cautious in their dealings with the authorities and take care not to take any action or make any commitment that would undermine their rights.

ADJUSTMENTS TO CRIMINAL PROCEDURE RULES

In 2023, France continued to adjust criminal procedural rules to better take into account the rights of prosecuted individuals and entities in the context of criminal investigations, notably under the pressure of European law.

The Right To Communicate With Third Parties During Police Custody

On 28 September 2023,^[15] the European Union Commission issued a reasoned opinion considering that France had not correctly transposed certain aspects of the European Directive of 22 October 2023 regarding police custody measures. As a consequence, pursuant to French Law No. 2023-1059 of 20 November 2023, from September 2024, a person in police custody in France will be able to inform 'any other person he or she designates' of his or her situation. The former wording of article 63-2 of the Code of Criminal Procedure provided that a person in police custody could notify only 'a person with whom he or she usually lives, or one of his or her relatives in the direct line, or one of his or her brothers or sisters'.

The Unconstitutionality Of Article 385(§1) Of The French Code Of Criminal Procedure

On 28 September 2023,^[16] the Constitutional Council declared that the purge of procedural errors in criminal cases is unconstitutional. The purging of procedural errors is a rule that

prevents a party from challenging the legality of investigative acts before the criminal court once the investigation phase is over.

In the case decided by the Constitutional Council (the highest constitutional authority in France that rules on the constitutionality of laws), the petitioner was a former French Prime Minister and 2017 presidential candidate, who was sentenced in May 2022 by the Paris Court of Appeal to four years' imprisonment, three of which were suspended, and a fine of €375,000 for embezzlement of public funds. He argued that indications of a serious breach of the principles of impartiality and independence of the criminal justice system in his case had emerged after the end of the criminal investigation and that he should be able to challenge this breach at trial. He considered that the law deprived him of the right to an effective remedy and violated the rights of the defence protected by the French Constitution, and that an exception should be made to allow a procedural challenge to be brought before the court when the cause of that challenge became known only after the end of the investigation.

The Constitutional Council accepted the arguments and ruled that the purging rule was unconstitutional. Parties to criminal proceedings will have the right to invoke this ruling in current and future proceedings, so an increase in procedural challenges before French criminal courts can be expected. As for the former Prime Minister, the French Supreme Court may decide that his case should be heard de novo.

ENVIRONMENTAL CRIMINAL LAW

The year 2023 also confirmed France's willingness to strengthen the prosecution of environmental crimes.

The Directorate of Criminal Affairs and Pardons of the Ministry of Justice issued, in October 2023, a memorandum setting out the government's policy on environmental crime and providing instructions to the judicial authorities. This memorandum is part of the French government's recent efforts to strengthen the prosecution of environmental crimes.

This effort began with the enactment of Laws Nos. 2020-1672 of 24 December 2020 and 2021-1104 of 22 August 2021, which created specialised regional environmental divisions in several French courts with jurisdiction to try the most complex environmental crimes, extended the material scope of the CJIP to environmental offences and created new offences.

The Ministry's 2023 memorandum requires prosecutors to conduct thorough investigations of environmental offences. It recommends relying on the expertise of environment protection agencies and sophisticated investigation methods used for organised crime (wiretapping, video evidence and surveillance, etc). The authorities also emphasise the importance of having a global approach to addressing environmental crime and to prosecute all related misconduct, including white-collar offences such as money laundering and corruption.

This global approach also extends to the reparation of the environmental harm and of the victims, including environmental associations, which are authorised to claim compensation for the damage caused to the environment. The memorandum therefore stresses the importance for criminal authorities to take into account their interest and to order, where applicable, environmental remediation measures.

The memorandum provides that prosecutors should consider concluding CJIPs when the environmental offence is committed by a legal entity. It clarifies that CJIPs can be

signed for all types of environmental offences, from large-scale pollutions to small and localised damage. Since the creation of the environmental CJIP three years ago, most of the concluded CJIPs related to offences with limited environmental impact.

As for the Sapin II CJIP, the memorandum provides that a CJIP should be proposed by prosecutors to companies with no criminal record that spontaneously disclose the facts, cooperate with the authorities and commit to comply with regulations and repair the damage to the environment. Prosecutors should also ensure that identified victims are informed of the CJIP so that they can be indemnified under the CJIP procedure, including approved environmental associations.

In order to raise public awareness on environmental crime and give greater visibility to its action, the Ministry's memorandum also encourages prosecutors to order, as part of the sanctions, the publication of judgments in environmental matters and to communicate about their action in this field.

A New Priority For The Authorities

The fact that environmental crime is now a priority of the judicial authorities and the government is further evidenced by the continued success of the environmental CJIP. In 2023, more than half of the CJIPs concluded related to the commission of environmental offences.

In January 2023,^[17] the Paris Public Prosecutor's Office also announced that a criminal investigation regarding 'greenwashing' allegations had been opened in Nanterre against an oil and gas company, following the filing of a criminal complaint by associations. According to the press, the associations consider that the communication of the group regarding its environmental impact is misleading, given its important investments in fossil fuels.

This investigation is presented as the first criminal case relating to greenwashing allegations. Since 2021, greenwashing has been considered a misleading commercial practice, an offence punished under articles L. 121-2 2°b) and e) and L. 132-2 of the French Consumer Code. These provisions prohibit commercial practices based on claims that are likely to mislead as to the environmental impact of a good or service, as well as the advertiser's environmental commitments. The offence is punished by maximum imprisonment of two years and a fine of €300,000 or €1.5 million. The fine can be extended to 80 per cent of the amount spent to carry out the unlawful commercial practice or up to 10 per cent of the annual turnover of the offender.

These legislative provisions confirm the authorities' determination to address the new form of environmental crime and also strengthen consumer protection and market integrity.

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- [9] [Guidelines for the Implementation of the French Deferred Prosecution Agreement \(CJIP\)](#), issued by the PNF, 16 January 2013, p. 8.
- [10] [In accordance with article 41-1-2, III, paragraph 2 of the Code of Criminal Procedure](#), which provides: 'If the president of the court does not validate the proposed agreement or if the legal entity exercises its right of withdrawal, the public prosecutor may not refer to the statements made or the documents handed over by the legal entity in the course of the proceedings provided for in this article before the investigating judge or the court of first instance.'
- [11] [Article 495-7 et seq. of the French Code of Criminal Procedure](#).
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