

DEFERRED PROSECUTION AGREEMENTS: A FRENCH APPROACH TO CONSIDERING THE PUBLIC INTEREST

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Overview

Deferred Prosecution Agreements (“DPAs”) became household conversation in 2018 when Canada’s Director of Public Prosecutions (the “DPP”) declined to pursue a DPA in the SNC-Lavalin prosecution.^[1] DPAs continued to be the subject of national discussion in 2019 when allegations of political intervention in the SNC-Lavalin prosecution arose.

A DPA, or “remediation agreement,” is a prosecutorial tool used to combat economic crimes. DPAs are formal agreements entered into between prosecutors and corporate wrongdoers whereby charges are laid, stayed, and ultimately dropped if the offending party meets agreed-upon conditions by the end of the DPA term. However, prosecution can resume, if any DPA conditions are not met.^[2]

In our last bulletin, we canvassed the recent use of DPAs in the United States, and observed that many questions remain about how and when DPAs might be offered in Canada.^[3] In this bulletin, we look across the Atlantic to see how the French experience with DPAs may provide insight into the development of the Canadian regime going forward.

Approach in France to Deferred Prosecution

France’s National Financial Prosecutor’s Office (“PRF”) and the French Anticorruption Agency (“AFA”) introduced anti-corruption law “Sapin II” in 2016. Sapin II created Conventions Judiciaire d’Intérêt Public (“CJIPs”) – or Judicial Public Interest Agreements – as an alternative to prosecution. ^[4] The CJIP model draws heavily on the approaches of the United States and the United Kingdom, and allows eligible legal entities the option of entering into a CJIP prior to public prosecution.^[5] CJIPs are only available for specific corruption and influence peddling offences relating to corporate wrongdoing, such as corruption of foreign officials and other related offences. In addition, the legal entity cannot have been previously convicted for such offences in order for a CJIP to be available.^[6]

Only the PRF can initiate a CJIP, but in practice, any legal entity may reach out to the PRF to commence

settlement negotiations if the entity has committed an offence.^[7] Once negotiations are underway, the legal entity must internally investigate why its compliance system failed and produce a confidential report detailing this failure. From there, the PRF has discretion to accept the CJIP, which must also be validated by a judge in a public hearing.^[8]

Sapin II was enacted in response to criticism that France was not doing enough in terms of anti-corruption efforts.^[9] The regime was intended to bring landmark change to France's anti-corruption landscape – and by certain accounts it has.^[10]

To date, the CJIP regime has proven efficient, with six CJIPs since 2016 totaling \$1.3 billion USD in fines.^[11] CJIPs allow for rapid settlement of criminal matters and coordination of transnational investigations. The PRF and AFA have also issued uniform guidelines to ensure a harmonized approach for the legal entities concerned.^[12]

The Canadian DPA and French CJIP share some fundamental qualities; namely, both regimes require that only legal entities (i.e., not individuals) may enter into the agreements, the agreements are only available for specified offences, and prosecution is suspended provided that the terms of the agreement are met. Both the Canadian and French regimes also require an agreed statement of facts relating to the alleged offences. However, French companies are only required to acknowledge the agreed facts and their legal significance, if the CJIP is agreed to after the commencement of a public prosecution.^[13]

There are some notable differences between the regimes as well. Perhaps the most significant, is that Sapin II was enacted with the specific aim of combatting complex corruption crimes, such as those relating to the corruption of foreign officials.^[14] In contrast, Canadian prosecutors are expressly barred from considering the national economic interest when negotiating a DPA for offences relating to the corruption of foreign officials. As such, the purpose underlying Sapin II directly conflicts with Canada's DPA regime. ^[15]

In addition, while both French and Canadian prosecutors must consider the public interest when negotiating a remediation agreement,^[16] the jurisdictions' respective definitions of "public interest" are quite distinct. The French public interest will be satisfied if a CJIP fulfills four objectives: reduction of the investigative period, effective judicial response, victim compensation, and implementation of compliance programs to prevent recidivism. By contrast, Canadian prosecutors are obligated to consider more detailed public interest considerations when negotiating a DPA. Factors to be considered include, but are not limited to: the nature and gravity of the offence, the degree of involvement of senior officers, and whether the legal entity has taken any disciplinary action against persons involved.^[17]

New Guidelines for CJIPs

In June 2019, the French authorities issued guidelines to assist companies in considering whether a CJIP would

be appropriate in the circumstances.^[18] These guidelines are not binding and simply reflect the joint PRF-AFA position on certain elements of Sapin II. The stated purpose of the guidelines is to encourage cooperation of corporate wrongdoers with clear, reliable CJIP procedures.^[19]

The joint PRF-AFA guidelines are split into six categories: (1) the CJIP regime generally, (2) conditions required to enter a CJIP, (3) assessment of fines, (4) compliance programs, (5) international coordination, and (6) compliance with the French “blocking statute” – a criminal law that prohibits discovery under a foreign legal system unless such discovery complies with The Hague Evidence Convention.^[20]

The guidelines notably provide that before discussing a potential CJIP, the PRF must have sufficient evidence indicating that a criminal act has been committed.^[21] They similarly provide that a company must cooperate fully with the PRF investigation into the alleged wrongdoing.^[22] In doing so, the guidelines explain that it is expected that the company will begin an internal investigation and will need to share the conclusions without delay. The confidential report resulting from the company’s internal investigation should establish individual responsibilities, identify key witnesses, and attach any relevant documents in possession of the company.

The clear PRF-AFA direction on fine assessment is of particular note for the Canadian audience.^[23] The guidelines specify that CJIP fines have two purposes: disgorgement of ill-gotten gains and deterrence. When quantifying disgorgement, the PNF considers the financial advantage received by the entity as a result of its corrupt acts. More specifically, profit is calculated from the value of the contract less the expenses directly relating to that contract. Notably, excluded from the deduction are the costs not exclusively related to the contract as well as the bribes granted by the company. The entity is expected to produce all relevant financial documents to help quantify this advantage. The PNF also factors in any gains in market share or business visibility. Deterrence is quantified with reference to specific aggravating and mitigating factors. The maximum fine under a CJIP is 30% of the legal entity’s turnover, calculated with reference to the three most recent fiscal years.

Conclusion

As with any significant legal development, Sapin II’s long-run impact is hard to predict. Compared to Canada’s DPA regime, however, the quick movement of French prosecutors in entering CJIPs indicates a strong willingness to use the prosecutorial tool to hold companies accountable in a way not previously possible.^[24] The PRF appears willing and able to engage in CJIP negotiations with offenders even in cases where the magnitude of foreign bribery is significant. For example, a 2018 CJIP entered into between the PRF and Société Générale S.A. bank was valued at more than \$292 million USD.^[25] Between 2004 and 2009, Société Générale S.A. paid bribes over \$90 million through a Libyan “broker” to secure 14 investments made by Libyan state-owned financial institutions earning profits of more than \$500 million USD. Contrary to the DPP, the PRF

negotiated a CJIP with Société Générale S.A despite the amount of the bribes being close to double the amount of the bribes alleged to have been paid by SNC-Lavalin in Libya.

As highlighted in our June 2019 bulletin,^[26] one significant challenge faced by Canadian DPAs is a lack of clear statutory guidelines. Although the French and Canadian legal systems differ in many ways, the PRF-AFA guidelines provide a particularly helpful template for how Canada might clarify DPA penalty assessment with reference to volume of commerce and punitive components.

Indeed, the French guidelines were specifically issued to promote predictability and legal certainty around the CJIP regime.^[27] Canada may consider following the French example by issuing guidelines to ensure a clear, predictable approach for future DPAs.

by Guy Pinsonnault, Jamieson Virgin and Eleanor Rock, Articled Student

[1] [*Notice to Neighbours: Canada's DPA Regime*](#), Lexpert (2019).^[ps2id id='1' target='']

[2] For more information on DPAs more generally, see:^[ps2id id='2' target='']

1. [*Deferred Prosecution Agreements - A New Canadian Regime*](#), McMillan Litigation Bulletin (2018).
2. [*Deferred Prosecution Agreements and the "National Economic Interest,"*](#) McMillan Litigation Bulletin (2019).

[3] [*Deferred Prosecution Agreements and the "National Economic Interest,"*](#) McMillan Litigation Bulletin (2019).^[ps2id id='3' target='']

[4] [*French Authorities Release New Guidelines for Settlement Agreements in Corporate Prosecutions*](#), FCPA Professor (2019).^[ps2id id='4' target='']

[5] [*French Authorities Release New Guidelines for Settlement Agreements in Corporate Prosecutions*](#), FCPA Professor (2019).^[ps2id id='5' target='']

[6] [*French Authorities Release New Guidelines for Settlement Agreements in Corporate Prosecutions*](#), FCPA Professor (2019).^[ps2id id='6' target='']

[7] [*French Authorities Release New Guidelines for Settlement Agreements in Corporate Prosecutions*](#), FCPA Professor (2019).^[ps2id id='7' target='']

[8] [*French Authorities Release New Guidelines for Settlement Agreements in Corporate Prosecutions*](#), FCPA Professor (2019).^[ps2id id='8' target='']

[9] [*French Anti-Corruption Law: Lessons Learned From the First-Ever French Convention Judiciaire D'Intérêt Public Concluded With HSBC*](#), the Anti-Corruption Report (2018).^[ps2id id='9' target='']

[10] See, e.g., [*France Moves Toward U.S. Model By Endorsing Corporate-Led Investigations*](#), The Wall Street Journal (2019).^[ps2id id='10' target='']

- [11] [*French Authorities Release New Guidelines for Settlement Agreements in Corporate Prosecutions*](#), FCPA Professor (2019).[ps2id id='11' target='']
- [12] [*Lignes Directrices sur la Mise en Œuvre de la Convention Judiciaire d'Intérêt Public*](#), Agence Française Anticorruption et Le Procureur de la République Financier (2019).[ps2id id='12' target='']
- [13] See, e.g. [*Convention judiciaire d'intérêt public entre le Procureur de la République Financier près le tribunal de grande instance de Paris et HSBC Private Bank \(Suisse\) S.A.*](#), Cour d'Appel de Paris, Tribunal de Grande Instance de Paris, Parquet National Financier (2017) at para 27.[ps2id id='13' target='']
- [14] [*Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*](#), Organisation for Economic Co-operation and Development (2019), at page 29.[ps2id id='14' target='']
- [15] Criminal Code, RSC 1985, c C-46, [*s 715.32\(3\)*](#).[ps2id id='15' target='']
- [16] Criminal Code, RSC 1985, c C-46, [*s 715.32\(1\)\(c\)*](#); see also [*Lignes Directrices sur la Mise en Œuvre de la Convention Judiciaire d'Intérêt Public*](#), Agence Française Anticorruption et Le Procureur de la République Financier (2019) at page 6.[ps2id id='16' target='']
- [17] Criminal Code, RSC 1985, c C-46, [*s 715.32\(2\)*](#).[ps2id id='17' target='']
- [18] [*French Authorities Release New Guidelines for Settlement Agreements in Corporate Prosecutions*](#), FCPA Professor (2019).[ps2id id='18' target='']
- [19] [*Lignes Directrices sur la Mise en Œuvre de la Convention Judiciaire d'Intérêt Public*](#), Agence Française Anticorruption et Le Procureur de la République Financier (2019) at page 2.[ps2id id='19' target='']
- [20] [*Lignes Directrices sur la Mise en Œuvre de la Convention Judiciaire d'Intérêt Public*](#), Agence Française Anticorruption et Le Procureur de la République Financier (2019).[ps2id id='20' target='']
- [21] [*Lignes Directrices sur la Mise en Œuvre de la Convention Judiciaire d'Intérêt Public*](#), Agence Française Anticorruption et Le Procureur de la République Financier (2019) at page 7.[ps2id id='21' target='']
- [22] [*Lignes Directrices sur la Mise en Œuvre de la Convention Judiciaire d'Intérêt Public*](#), Agence Française Anticorruption et Le Procureur de la République Financier (2019) at page 8.[ps2id id='22' target='']
- [23] [*Lignes Directrices sur la Mise en Œuvre de la Convention Judiciaire d'Intérêt Public*](#), Agence Française Anticorruption et Le Procureur de la République Financier (2019) at page 13.[ps2id id='23' target='']
- [24] [*French Anti-Corruption Law: Lessons Learned From the First-Ever French Convention Judiciaire d'Intérêt Public Concluded With HSBC*](#), The Anti-Corruption Report (2018).[ps2id id='24' target='']
- [25] [*Société Générale S.A. Agrees to Pay \\$860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate*](#), United States Department of Justice (2018).[ps2id id='25' target='']
- [26] [*Deferred Prosecution Agreements and the "National Economic Interest,"*](#) McMillan Litigation Bulletin (2019).[ps2id id='26' target='']
- [27] [*Lignes Directrices sur la Mise en Œuvre de la Convention Judiciaire d'Intérêt Public*](#), Agence Française

Anticorruption et Le Procureur de la République Financier (2019) at page 2.[ps2id id='27' target=""]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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