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This section edited by Margot Seve in Paris and Michel Perez in New York aims at presenting and analyzing legal developments related to cross-border enforcement actions in financial and white collar crime cases. It also focuses on the growth of compliance and corporate governance regulatory standards. Comments and suggestions are welcomed, including articles proposals.
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Transatlantic Approach on Corporate Cooperation: How Newly Issued French and UK Guidance Compare to US Practices

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As widely anticipated, French and U.K. regulators recently published guidance detailing their expectations for corporate cooperation in enforcement investigations. Both sets of guidance demonstrate further alignment of those jurisdictions' deferred prosecution agreement (DPA) regimes with long-standing practices in the U.S., albeit with some notable areas of divergence.

New French and UK Cooperation Guidance

On June 27, 2019, the French Financial Prosecutor (PNF) and the French Anticorruption Agency (AFA) published joint guidelines regarding the legal framework governing French DPAs (judicial public interest agreements or CJIPs) that address the conditions necessary for companies to be considered for a CJIP, including expectations for cooperation during an investigation (French CJIP Guidance).[1] On August 6, 2019, the U.K. Serious Fraud Office (SFO) published Corporate Co-operation Guidance (U.K. Co-operation Guidance) as part of the "SFO Operational Handbook," detailing the steps companies are expected to undertake to obtain cooperation credit. The French and U.K. releases are similar in form and style to U.S. authorities' practice of providing intermittent guidance on their expectations for companies seeking to resolve corporate enforcement investigations. However, the French and U.K. guidance both stop short of providing a framework for specific mitigation credit available to reduce enforcement sanctions where a company meets those standards for cooperation.

We compare the key areas of the U.S., French and U.K. approaches below.

Background

Evolving Guidance on Resolving Enforcement Investigations

Since the early 2000s, the U.S. Securities and Exchange Commission and the U.S. Department of Justice (DOJ) have issued a series of guidance documents outlining their approach to corporate prosecutions (referred to collectively herein as U.S. Guidance).[2] These documents, and the evolving standards they have defined, have provided critical guidance for companies navigating investigations by U.S. regulators. The U.S. Guidance is particularly important because DPAs and non-prosecution agreements are subject to little judicial oversight through which precedent can be established. While the DPA regimes that have developed in recent years in France and the U.K. have included a larger role for the judiciary than in the U.S. (See our September 20, 2017, client alert "Second Circuit Upholds Prosecutorial Discretion in Deferred Prosecution Agreements."), there have been only eight DPAs in France and five in the U.K. since their introduction. Both jurisdictions previously have published instructions on implementing their respective DPA legislation,[3] but until these recent releases, no de-

1 - While the French CJIP Guidance was published by the PNF and the AFA, they are not binding on other French prosecutor offices. Of the eight CJIPs signed in France to date, three of them were entered by the prosecutor of Nanterre.

2 - Examples include the Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (known as the Seaboard Report), The Principles of Federal Prosecution of Business Organizations; and the recent Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy (the DOJ FCPA Corporate Enforcement Policy), which also serves as guidance to federal prosecutors outside of the FCPA context.

3 - Deferred Prosecution Agreements Code of Practice, Serious Fraud Office and Crown Prosecution Service (Feb. 14, 2014); Circular of the French Ministry of Justice on the Presentation and Implementation of the Criminal Provisions Provided in Law n°2016-1691 of December 9,

tailed guidance on the agencies' expectations for cooperation by companies existed. Particularly from the U.K. perspective, this is unsurprising because the judiciary has a more independent role in the U.K. DPA system, and it is ultimately for a court to decide whether to grant a DPA.

To a large extent, the French CJIP Guidance restates existing French law, namely the so-called Sapin II law.[4] However, the guidance expands on the statutory language and discusses how a company can meet the conditions for obtaining a CJIP, including standards for adequate cooperation. Importantly, the PNF and AFA acknowledge, for the first time, the importance of internal investigations as a potential prerequisite to securing a CJIP. Indeed, much as U.S. Guidance encourages voluntary self-disclosures and cooperation with authorities, the French CJIP Guidance encourages companies to self-report and, thereafter, to "*have itself actively taken part in revealing the truth by means of an internal investigation or an in-depth audit on the offenses and the malfunctioning of the compliance system that facilitated offenses*." Companies must then submit the results of the investigation in a report to the PNF, which must "*describ[e] the offenses with the greatest possible accuracy*."

The U.K. Co-operation Guidance outlines the steps that the SFO expects companies to undertake in order to be eligible for cooperation credit. The guidance, which marks a shift away from the previous SFO director's reluctance to provide formal written guidance, is split into two main sections: (i) preserving and providing material, and (ii) witness accounts and waiving privilege. Despite the move to a more formal cooperation framework in the U.K., the SFO's Co-operation Guidance largely reiterates best practices that have been articulated in previous SFO statements, the Deferred Prosecution Agreements Code of Practice and the approaches adopted in the DPAs reached to date.

While recent U.S. Guidance and the French CJIP Guidance examine self-disclosure, cooperation and the remediation of misconduct,[5] the SFO Co-operation Guidance focuses solely on the cooperation phase of an enforcement matter, as the title of the document suggests. In contrast with recent DOJ guidance that has evolved to specify the benefits companies can expect to receive based on whether they self-disclose, fully cooperate and timely remediate any misconduct (i.e., declinations, penalty reductions and avoidance of monitors),[6] neither the French nor the U.K. guidance goes this far. The SFO Co-operation Guidance emphasizes that "*[e]ach case will turn on its own facts*" and that even "*full, robust co-operation – does not guarantee any particular outcome*" for a company seeking leniency in punishment for its criminal conduct. The French CJIP Guidance provides specific factors that should be considered in determining whether to reduce a fine, including spontaneous disclosure before the opening of any criminal investigation, corporate cooperation and implementation of corrective measures, but does not set out specifics on the potential reductions available.

2016, on Transparency, Fight Against Corruption and Modernization of Economic Life (Jan. 31, 2018).

4 - Law n°2016-1691 of December 9, 2016, on Transparency, Fight Against Corruption and Modernization of Economic Life.

5 - In particular, the French CJIP Guidance, consistent with the 2018 Ministry of Justice circular, stresses the importance of taking measures to remediate shortcomings and prevent similar misconduct from occurring.

6 - Justice Manual § 9-47.120.

Key Areas of Comparison

Privilege

U.S. Guidance has evolved over the past 20 years to a clear position that "*[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection*."[7] In stark contrast, SFO officials have suggested on numerous occasions that waiving privilege would be considered an important factor in determining eligibility for consideration for a DPA as well as cooperation credit. For example, Rolls Royce was described by the court as providing "extraordinary cooperation," which included the waiver of any claim for legal professional privilege on a limited basis and, similarly, the DPAs reached with Tesco in 2017 and Serco Geografix in 2019 included limited waivers of privilege over relevant material. Through the U.K. Co-operation Guidance, the SFO has sought to formalize its position and states that, when necessary or appropriate, it will challenge assertions of legal privilege over material such as first accounts, internal investigation interview notes or other documents. Furthermore, for companies seeking to claim privilege, the U.K. Co-operation Guidance places the onus on the company, stating that the "*existence of a valid privilege claim must be properly established*" and where a company claims privilege, the SFO expects it to provide certification by independent counsel that the material in question is privileged.

The French CJIP Guidance also appears to suggest that turning over potentially privileged material to the PNF (at least that which is arguably subject to U.S. work-product protection, which has no legal equivalent in France) will affect how the agencies view a company's cooperation. Indeed, the French CJIP Guidance invites companies to identify documents from internal investigations conducted by counsel that they wish to provide to the PNF and reminds readers that (i) not all material from internal investigations will be privileged and (ii) companies are not bound by professional secrecy, only attorneys. The guidance expressly states that refusing to produce certain documents will negatively impact their view of a company's cooperation if the PNF judges that such refusal is not justified by the rules of professional secrecy. This approach will certainly create difficult decisions for companies seeking to cooperate with French prosecutors while also seeking to withhold certain types of materials routinely generated by internal investigations, such as interview notes, and could act as a deterrent to companies hoping to self-report without turning over potentially privileged material.

Companies navigating multijurisdictional investigations with multiple regulators will need to be particularly cognizant of regulators' differing expectations with respect to waiving privilege.

Information on Individual Conduct

The 2015 release of the DOJ's policy on Individual Accountability for Corporate Wrongdoing (known as the Yates Memo) signaled a renewed focus in the U.S. on

7 - Justice Manual § 9-28.710; see also 9-47.120(4) ("As set forth in JM 9-28.720, eligibility for cooperation or voluntary self-disclosure credit is not in any way predicated upon waiver of the attorney-client privilege or work product protection, and none of the requirements above require such waiver.").

individual prosecutions for corporate crimes. DOJ's current guidance, revised in November 2018, requires companies to provide information about the "*individuals substantially involved in or responsible for the misconduct*" in order to receive cooperation credit.[8] The revised policy departs from the original Yates Memo, which had required companies to identify "all" individuals involved to receive cooperation credit (See our December 10, 2018, client alert "*DOJ Announces Revisions to Yates Memorandum Policy*").

While neither the French nor the U.K. guidance make such a granular distinction, they both similarly emphasize the importance of identifying individuals suspected of wrongdoing.

The French CJIP Guidance states that "*the initial investigations carried out by the company must also help establish individual liabilities*." The guidance requires that companies identify the main witnesses in the matter and produce to the PNF all relevant documentation, including employee interview memoranda, unless protected by privilege.[9] In the same vein, the U.K. Co-operation Guidance states that cooperation includes "*identifying suspected wrongdoing and criminal conduct together with the people responsible, regardless of their seniority of position in the organization*" and requires companies to "*[a]ssist in identifying material that might reasonably be considered capable of assisting any accused or potential accused of undermining the case for the prosecution.*"

The U.S. and U.K. guidance also both make clear that companies are expected to provide information as to conduct of third parties, whereas the French CJIP Guidance is silent on this issue. The DOJ FCPA Corporate Enforcement Policy is explicit in requiring "*all facts known or that become known to the company regarding potential criminal conduct by all third-party companies (including their officers, employees, or agents)*."[10] And the U.K. Co-operation Guidance similarly provides that a company should "*provide information on other actors in the relevant market*," identify potential witnesses, including third parties, and, where possible, make agents available for SFO interview.

De-Confliction

In all three jurisdictions, as enforcement agencies have continued to incentivize cooperation, concerns have been raised regarding companies' internal investigations getting in the way of the government's own investigation, particularly with respect to interviewing witnesses prior to the government. The DOJ FCPA Corporate Enforcement Policy makes clear that "'*[d]e-confliction' is one factor that the Department may consider in appropriate cases in evaluating whether and how much credit a company will receive for cooperation*" [11] and while the DOJ has clarified that it will not direct a company's investigation, the company should ensure that witness interviews and other steps do not impede the DOJ's own investigation.

The French and U.K. publications provide similar guidance. The French CJIP Guidance provides that "*[t]he legal person must take measures necessary for its internal investigations not to hinder the progress of the criminal investigation*" and "*[s]hould the internal investigations precede the disclosure of the offenses to prosecutors and the initiation of a criminal investigation, these investigations must be carried out so as to ensure preservation of the evidence and in particular the authenticity of witness accounts*." Similarly, the U.K. Co-operation Guidance reiterates the SFO's warnings on how a company should conduct an internal investigation, and companies are advised to "*consult in a timely way with the SFO before interviewing potential witnesses ... or taking other overt steps*," in order "*[t]o avoid prejudice to the investigation.*" As with other U.K. issues noted above, this simply formalizes the approach adopted in previous DPAs. For example, in the Tesco DPA, at the SFO's request, Tesco refrained from interviewing witnesses or taking statements during the course of the criminal investigation.

Access to Overseas Records

In terms of documents located outside of a company's home jurisdiction, the U.S. and U.K. guidance each make clear that companies seeking cooperation credit will be expected to produce overseas documents wherever possible, while the French guidance does not squarely address the issue. The U.K. Co-operation Guidance requires that companies provide "*relevant material that is held abroad where it is in the possession or under the control of the organization.*" Going further, the DOJ FCPA Corporate Enforcement Policy states that where disclosure of overseas documents is prohibited for reasons such as data privacy or blocking statutes, the company bears the burden of establishing this and must also "*work diligently to identify all available legal bases to provide such documents.*"[12] In contrast with the U.S. and U.K. approaches to overseas records, there are no formal requirements in the French CJIP Guidance to seek evidence abroad. Rather, the French CJIP Guidance focuses on reminding French companies that they must comply with the French blocking statute when providing information to foreign authorities.

Use of Evidence While Cooperating

In pursuing a cooperation strategy during an enforcement matter, companies also should be mindful about the potential use of information provided to the government during the course of the proceeding. The French CJIP Guidance explicitly states that, should the CJIP process fail, any information and documents shared by the company or its counsel before a CJIP offer officially has been formalized can later be used by the prosecutor in a subsequent prosecution of the company. This is a similar risk in the U.S. and U.K., subject to certain rules of evidence.

Piling On

While not directly addressing steps a company can take to meet expectations for cooperation, guidance and practice regarding increased coordination between enforcement agencies across jurisdictions has implications for how com-

8 - Justice Manual § 9-28.700.

9 - While the French CJIP Guidance does not list disciplinary actions as potential mitigating factors, the three CJIPs entered into by the prosecutor of Nanterre considered as mitigating factors the disciplinary actions taken against relevant employees and/or the renewal of the management team.

10 - Justice Manual § 9-47.120(3.b).

11 - Justice Manual § 9-47.120(4).

12 - Justice Manual § 9-47.120(3.b).

panies can efficiently qualify for cooperation credit in parallel investigations.

In order to alleviate the overlapping demands that multiple investigations can place on companies, the DOJ's "Policy on Coordination of Corporate Resolution Penalties," introduced in May 2018, encourages DOJ attorneys to coordinate, where possible, both within the department (where multiple components are investigating the same corporate entity) and with other federal, state, local and foreign investigating authorities to avoid "*the unnecessary imposition of duplicative fines, penalties and/ or forfeiture against the company*."[13] Similarly, the French CJIP Guidance states that *"[t]he CJIP allows the prosecution authorities of different countries, dealing with the same offenses, to coordinate their desired penal response*." In such cases, the guidance states that "*the determination of the amount of the public interest fine may be discussed with the foreign prosecuting authorities in order to allow an assessment of the fines and penalties paid by par [sic] the legal person*."[14] The head of the AFA recently stated that this was the case with the Société Générale CJIP, which involved "*the sharing of monetary penalties*" between DOJ and the PNF, as well as "*a single measure for monitoring the company's compliance system, entrusted to the AFA*."[15] And, while the U.K. Co-operation Guidance is focused on the steps companies need to take in order to be eligible for cooperation credit (rather than on how the SFO should conduct and resolve its investigations), the SFO has, in recent statements, emphasized the need to cooperate effectively with regulators across jurisdictions. Indeed the SFO did so in the Rolls Royce investigation and is reportedly cooperating with U.S. and French agencies in several parallel investigations, such as Airbus.

Taken together, the guidance and recent practice in all three jurisdictions demonstrate how a coordinated strategy is essential for responding to parallel investigations. Companies should ensure that the issues above, such as deconfliction and access to overseas records, are discussed and reconciled with each investigating agency to avoid, to the extent possible, duplicative efforts while ensuring maximum cooperation credit.

Conclusion

The publication of written guidance in France and the U.K. represents an important development in those jurisdictions' practices for resolving corporate enforcement investigations with DPAs. Companies should be mindful of the evolving expectations in these jurisdictions that will result from the application of this guidance to future DPAs, as well as possibility for further publication of more detailed guidance similar to what has been issued in the U.S.

13 - Justice Manual § 1-12.100.

14 - The PNF also relied in its tax fraud-related CJIPs on the French legal principle pursuant to which when criminal sanctions and administrative sanctions are imposed in the same tax matter, the total penalty imposed cannot exceed the amount of the highest of the two sanctions.

15 - Charles Duchaine, "Proposal for a coordinated resolution of transnational corruption cases," Revue Trimestrielle de Droit Financier, N°2-2019, June 2019.