

Comparing French and U.K. Guidance on Corporate Cooperation to U.S. Practices

by **Keith D. Krakaur, Ryan D. Junck, Gary DiBianco, Elizabeth Robertson, Christopher Bolyai, Margot Sève, Vanessa K. McGoldrick, and Molly Brien**

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 (“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.

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.

Key Areas of Comparison

Self-Disclosure, Investigations and Cooperation Credit

While France and the U.K. had previously published instructions on implementing their respective DPA legislation,^[2] until these recent releases, no detailed guidance on the enforcement agencies’ expectations for cooperation by companies existed.

To a large extent, the French CJIP Guidance restates existing French law, namely, the so-called Sapin II law. The guidance discusses how a company can meet the conditions for obtaining a CJIP, including standards for adequate cooperation. Much as U.S. guidance encourages voluntary self-disclosures and cooperation with authorities, the PNF and AFA acknowledge, for the first time, the importance of internal investigations as a potential prerequisite to securing a CJIP.^[3]

The U.K. Co-operation Guidance, while shifting away from the previous SFO director’s reluctance to provide formal written 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 previous DPAs. It is split into two main sections: (i) preserving and providing material, and (ii) witness accounts and waiving privilege. The SFO Co-operation Guidance focuses solely on the cooperation phase of an enforcement investigation, which contrasts with recent U.S. Guidance and the French CJIP Guidance, which more broadly examine self-disclosure, cooperation and the remediation of misconduct.[4]

While the French and U.K. Guidance provide helpful guidance on corporate cooperation, unlike recent DOJ guidance,[5] they do not 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]

Privilege

The U.S. Guidance has evolved 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 contrast, the U.K. Co-operation Guidance formalizes the position previously taken by the SFO[8] 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. The U.K. guidance also places the onus on the company seeking to claim privilege, stating that the SFO expects it to provide certification by independent counsel that the material is privileged.

Similarly, the French CJIP Guidance expressly states that refusing to produce certain documents will negatively affect the view of a company’s cooperation if the PNF judges decide that such refusal is not justified by the rules of professional secrecy.[9] This approach is likely to create difficult decisions for companies seeking to cooperate with criminal authorities, and could act as a deterrent to companies hoping to self-report without turning over potentially privileged material.

Information on Individual and Third-Party Conduct

DOJ’s current guidance, as 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.[10] Both the French[11] and U.K. [12] guidance similarly emphasize the importance of identifying individuals suspected of wrongdoing.

The U.S.[13] and U.K.[14] guidance both make clear that companies are expected to provide information about the conduct of third parties, whereas the French CJIP Guidance is silent on this issue.

“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.” The French^[15] and U.K. publications provide similar guidance.^[16]

Access to Overseas Records

With respect to documents located outside a company's home jurisdiction, the U.S. and U.K. guidance each makes 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.^[17] 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 due to 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.”^[18]

Use of Evidence While Cooperating

When cooperating during an enforcement matter, companies 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 has been formalized can later be used by the prosecutor in a subsequent prosecution of the company. There is a similar risk in the U.S. and U.K., subject to certain rules of evidence.

“Piling On”

Guidance and practice regarding increased coordination among enforcement agencies across jurisdictions has implications for how companies can maximize cooperation credit in parallel investigations.

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 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."^[19] The French CJIP Guidance contains similar guidelines^[20] while the U.K. Co-operation Guidance, which is focused on the cooperation phase of an investigation, is silent on the topic.^[21]

Conclusion

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, including de-confliction, privilege and access to overseas records, are discussed and reconciled with each investigating agency to avoid duplicative efforts, navigate compliance with local laws, and ensure maximum cooperation credit.

Footnotes

[1] The French CJIP Guidance was published jointly by the PNF and the AFA and is not binding on other French prosecutor offices. Of the eight CJIPs signed in France to date, three were entered into by the prosecutor of Nanterre, which is not part of the PNF or the AFA.

[2] 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, 2016, on Transparency, Fight Against Corruption and Modernization of Economic Life (Jan. 31, 2018).

[3] Indeed, 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 . . ." Companies must then submit the results of the investigation in a detailed report to the PNF.

[4] 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.

[5] Justice Manual § 9-47.120.

[6] The SFO Co-operation Guidance emphasizes that even "full, robust co-operation" does not guarantee any particular outcome for a company seeking leniency. 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.

[7] [Justice Manual § 9-28.710](#); *see also* [§ 9-47.120\(4\)](#).

[8] 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.

[9] The French CJIP Guidance reminds readers that (i) not all material from internal investigations is privileged and (ii) only attorneys are bound by professional secrecy, not companies.

[10] [Justice Manual § 9-28.700](#).

[11] The French CJIP Guidance states that “the initial investigations carried out by the company must also help establish individual liabilities.” Companies must identify the main witnesses in the matter and produce to the PNF all relevant documentation, including employee interview memoranda, unless protected by privilege.

[12] 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.”

[13] The DOJ FCPA Corporate Enforcement Policy requires disclosure of “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).” [Justice Manual § 9-47.120\(3.b\)](#).

[14] The U.K. Co-operation Guidance 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.

[15] 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.”

[16] The U.K. Co-operation Guidance advises companies 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.” 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.

[17] 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.

[18] Justice Manual § 9-47.120(3.b).

[19] Justice Manual § 1-12.100.

[20] 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.”

[21] The SFO has, however, emphasized in recent statements (e.g., in the Rolls Royce investigation) the need to cooperate effectively with regulators across jurisdictions.

Keith D. Krakaur is of counsel, **Ryan D. Junck**, **Gary DiBianco**, and **Elizabeth Robertson** are partners, and **Christopher Bolyai**, **Margot Sève**, **Vanessa K. McGoldrick**, and **Molly Brien** are associates at Skadden, Arps, Slate, Meagher & Flom LLP.

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