TRANSPARENCY INTERNATIONAL FRANCE

NON TRIAL RESOLUTIONS IN FRANCE: WHAT PLACE FOR VICTIMS?

Transparency International France (TI-France) is the French chapter of Transparency International, a global movement with one vision: a world in which government, business, civil society and the daily lives of people are free of corruption. With more than 100 chapters worldwide and an international secretariat in Berlin, we are leading the fight against corruption to turn this vision into reality.

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EXECUTIVE SUMMARY

Over the past decades, there have been significant progress in fighting international corruption. Victims, however, in their vast majority, have not benefited from these global awakening and have remained absent from most of international corruption cases.

France is no exception. Corruption has long been perceived by French courts as an offense with no harm other than the violation of public order. The recognition of the harm done to victims of corruption and their need for redress has thus appeared only in the past twenty years, and even then sporadically and in a limited manner.

In this context, France's legislation granting anti-corruption associations legal standing in corruption cases was a significant advancement[1]. However, in retrospect, this progress has mainly served to circumvent potential inertia from public prosecutors, rather than to compensate the victims of corruption.

An illustration of this is the decision of the Paris Criminal Court on October 27, 2017, which convicted Teodorin Obiang, Vice President of Equatorial Guinea, for laundering embezzled public funds[2]. This case, initiated by a series of complaints filed by several French civil society organizations, including Transparency International France (TI-France), led the court to recognize that TI-France suffered moral and material harm. However, the court reminded that "in the context of laundering illicit assets, the financial penalty cannot be considered solely in terms of repressive efficiency, which does not take into account the victims of corruption." In other words, the awarding of damages to the recognized victim, TI-France, is not sufficient, in the eyes of the court, to repair the harm suffered by the primary victims: the Equatoguinean population.

Identifying corruption victims, calculating their damages, and compensating them presents a dual challenge: firstly, to ensure that the committed acts are judged by considering all generated damages, and secondly, to ensure that the anticipated non-recurrence of the acts implies that the company fully understands, including financially, the extent of the damage caused by the condemned behaviours.

Addressing those challenges escapes the tools of criminal procedure, despite the significant progress made in recent years in combating corruption and the creation of a new non-trial resolution tool in corruption cases: *the Convention Judiciaire d'Intérêt Public* (CJIP), the French equivalent of the US and UK Deferred Prosecution Agreement (DPA).

In the CJIPs, are the victims of corruption better identified? Is their damage better compensated? What is the profile of the victims? Are some victims overrepresented compared to others? How are the victims identified and, if applicable, compensated?

To answer these questions, TI-France studied the fifty-four CJIPs concluded in France since their creation in 2016. Based on the results of this analysis, as well as doctrinal reflections and examples from comparative law, Transparency International France makes a series of recommendations aimed at strengthening the position of the victim in non-trial resolutions.

KEY FINDINGS

- Most victims are identified through their own initiative.
- Nearly 45% of CJIPs provide compensation for victims, with half of these CJIPs involving environmental issues.
- Nearly 40% of identified victims are ultimately not compensated, while two-thirds of companies identified as victims do receive compensation.
- CJIPs concluded in corruption-related cases represent the majority of cases where no damages were claimed by the victims.
- Just over 40% of CJIPs explicitly state the amount or method for calculating the amount of compensation sought.

[1] Cour de cassation, Chambre criminelle, 9 novembre 2010, 09-88.272
[2] TGI de Paris, Jugement du 27 octobre 2017, 32ème chambre correctionnelle

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INTRODUCTION

THE CJIP LEGAL FRAMEWORK

The *convention judiciaire d'intérêt public*, or "CJIP" is a non-trial resolution that may be offered to legal entities. Initially introduced by Article 22 of Law No. 2016-1691 of 9 December 2016 (the "Sapin II Law"), it is enshrined in Articles 41-1-2 and 41-1-3 of the French Code of Criminal Procedure. Drawing inspiration from the American and British "deferred prosecution agreement" (DPA) models, the CJIP constitutes an alternative to prosecution. The CJIP may be proposed by the public prosecutor to any company involved in a preliminary investigation *("enquête préliminaire")* or judicial investigation *("information judiciaire")* for one of the offenses outlines in the aforementioned articles. The CJIP may involve one or more of the following obligations:

- Payment of a fine calculated in proportion to the benefits derived from the breaches, up to a limit of 30% of the average annual turnover calculated on the basis of the last three known annual turnovers at the date on which the breaches were observed and taking into account factors that may increase and/or reduce the fine;
- The implementation, at the legal entity's expense, of a compliance programme under the supervision of:
  - The French Anti-Corruption Agency *("Agence française anticorruption")* when the CJIP relates to breaches of integrity or tax law;
  - The relevant departments of the Ministry of Environment and the French Biodiversity Office (*"Office français de la biodiversité"*, or "OFB") when the CJIP relates to environmental offences;
- Compensation for identified victims who have not already received compensation for the harm they suffered as a result of the offences committed. Compensation for environmental damage is also possible in environmental cases.

A specific feature of the CJIP is that victim compensation that occurs prior to a CJIP may be counted as a factor that reduces the amount of the fine.

When the legal entity agrees to the conclusion of the CJIP, the public prosecutor refers the matter to the president of the judicial court. After hearing the legal entity and, where applicable, the victim, the president of the court validates or rejects the proposed agreement. As part of this process, the president checks that recourse to the CJIP procedure is justified, that it is properly conducted, that the amount of the fine abides by the prescribed limits and that the measures provided for are proportionate to the benefits derived from the breaches.

The court's decision is not subject to appeal. Validation of the CJIP does not entail a finding of guilt and has neither the nature nor the effects of a conviction. Fulfilment of the obligations under the CJIP extinguishes the judicial proceedings, but the legal remedy of civil action may still be brought by persons who have suffered loss as a result of the breaches observed. On the other hand, refusal by the court's president to validate the CJIP or failure by the legal entity to fulfil its obligations necessarily entails prosecution.

THE CJIP'S MATERIAL SCOPE

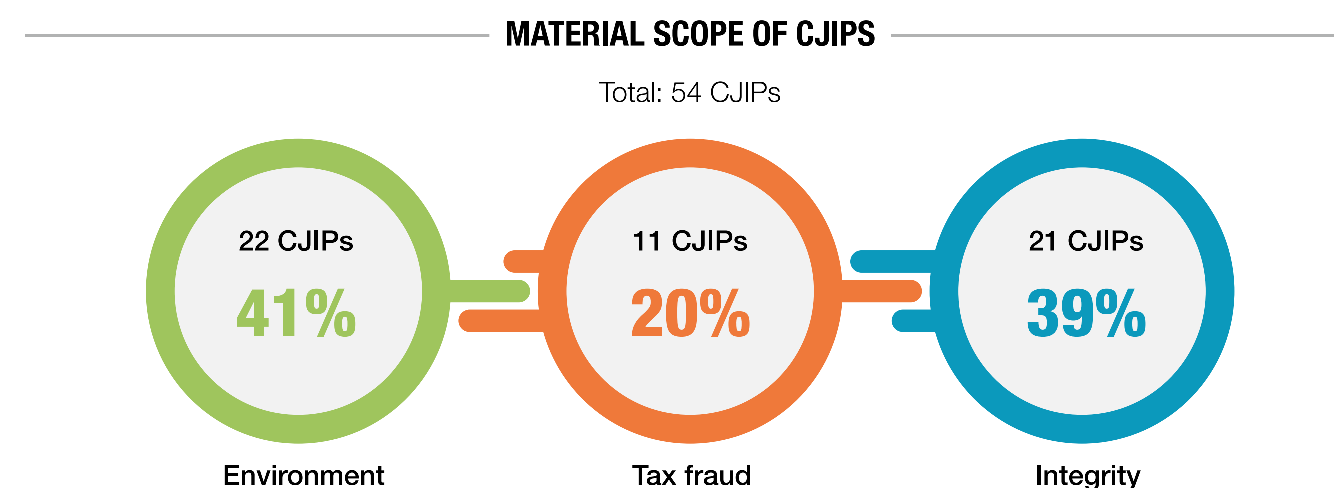
The material scope of the CJIP was initially confined to certain offences relating to **integrity**: bribery and influence peddling, both active and passive, provided for in articles 433-1, 433-2, 435-3, 435-4, 435-9, 435-10, 445-1, 445-1-1, 445-2 and 445-2-1, the penultimate paragraph of article 434-9 and the second paragraph of article 434-9-1 of the Criminal Code ("Code penal"). It also applied to the laundering of offences related to tax fraud provided for in articles 1741 and 1743 of the General Tax Code ("Code général des impôts"), as well as related offences.

Its scope has gradually been extended to the predicate offences of **tax fraud** set out in Articles 1741 and 1743 of the General Tax Code (Act No. 2018-898 of 23 October 2018) and the offences set out in the **Environmental Code** ("Code de l'environnement"), related offences (Act No. 2020-1672 of 24 December 2020, creating Article 41-1-3 of the CPC), as well as the **laundering** of any offence set out in Article 41-1-2 of the CPP.

We will therefore refer to the "integrity", "tax fraud" and "environment" CJIPs.

MATERIAL SCOPE OF CJIPS

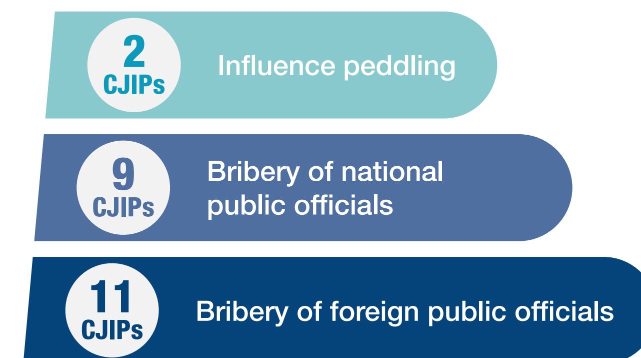
Total: 54 CJIPs



To date, 54 CJIPs have been signed. Although the "integrity CJIP" has been implemented since 2018 and the "environment CJIP" since 2021, the number of CJIPs concluded in environmental cases exceeds the number of CJIPs in integrity cases, thus revealing the extensive use of this legal mechanism by the public prosecutors.

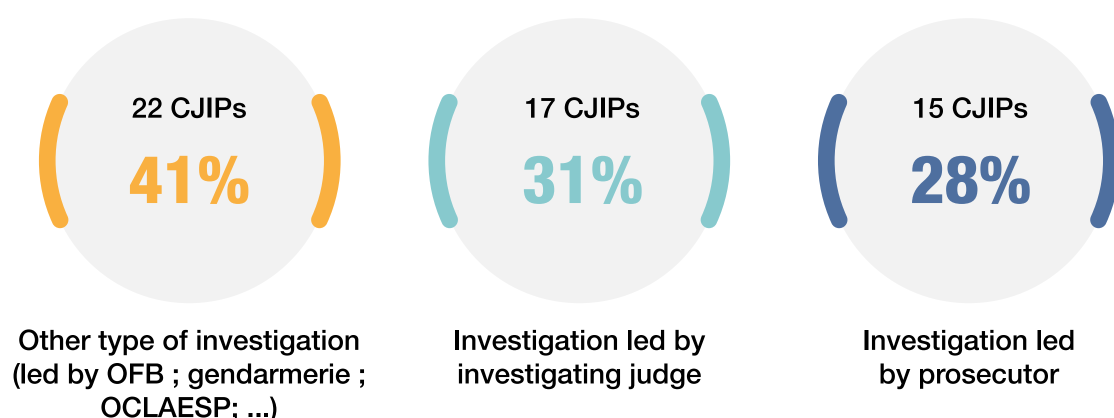
MAIN OFFENCES COVERED BY INTEGRITY CJIPS

As regards integrity, 3 main offences have been punished to date. Bribery of public officials, whether national or foreign, predominates. Nota bene: this graph shows 22 offences rather than 21, as the CJIP concluded with Airbus in 2022 covered both bribery of a national public official and bribery of a foreign public official.



The negotiation of a CJIP may be triggered by any type of investigation:

TYPE OF INVESTIGATION LEADING TO A CJIP



Other type of investigation (led by OFB ; gendarmerie ; OCLAESP; ...) — Investigation led by investigating judge — Investigation led by prosecutor

The number of 22 CJIPs concluded following another type of investigation corresponds exactly to the number of **environment** CJIPs. Most of these were indeed opened following an investigation by the OFB, sometimes in coordination with the *"Office central de lutte contre les atteintes à l'environnement et à la santé publique"* (OCLAESP) or the gendarmerie, and some following an investigation by the gendarmerie maritime. In the areas of **tax fraud** and **integrity**, the CJIPs were concluded, in almost equal proportions, following investigations led by investigating judges and by prosecutors.

VICTIMS' COMPENSATION

Transparency International France pays particular attention to the role and place of victims in the CJIP procedure, as the recognition and compensation of their loss are essential aspects to the balance and public acceptability of this mechanism.

It should be reminded that France's highest public law court, the *"Conseil d'Etat"*, ruled against the initial bill proposing the creation of CJIPs, which failed to take into account the victim. The court considered that the victim was thereby *"deprived of personal participation in the criminal trial"*.[3]

Article 41-1-2, paragraphs 5 and 6, of the Criminal Procedure Code provides that *"[if] the victim is identified, and unless the accused legal entity can prove that it has made reparation for the loss suffered, the agreement also stipulates the amount and terms of reparation for the damage caused by the offence within a period that may not exceed one year. The victim is informed of the public prosecutor's decision to propose the conclusion of a judicial public interest agreement to the accused legal entity. The victim must provide the public prosecutor with any evidence that may help to establish the reality and extent of the harm suffered."*

In addition, if a victim is identified and/or compensated under the CJIP, the public prosecutor informs the victim that the case has been referred to the president of the court for validation of the CJIP. The victim is also invited to comment on the amount of compensation awarded at the public hearing and is notified of the court president's decision.

[3] Association des professionnels du contentieux économique et financier, La réparation du préjudice économique et financier par les juridictions pénales, 2019, p. 51.

In the following analysis, a distinction will be made between:

- Victims who have merely been **identified** in the CJIP, without receiving compensation.
- Victims who have **received compensation** under the CJIP.

Also illustrated in the following analysis are:

- Compensation of the victim by the legal entity, prior to the conclusion of the CJIP.
- Additional compensation for the victim after the CJIP has been approved, which to date concerns only one CJIP. It is worth noting that the national financial prosecutor ("*parquet national financier*", or "PNF") has asserted that validation of the CJIP *"does not preclude the victim's right to have recourse to the civil courts"*.[4] Indeed, the French energy provider, EDF, obtained compensation both through the CJIP *and* through the courts:

BOX 1

The obligation to compensate under the CJIP does not preclude obtaining additional compensation before civil courts

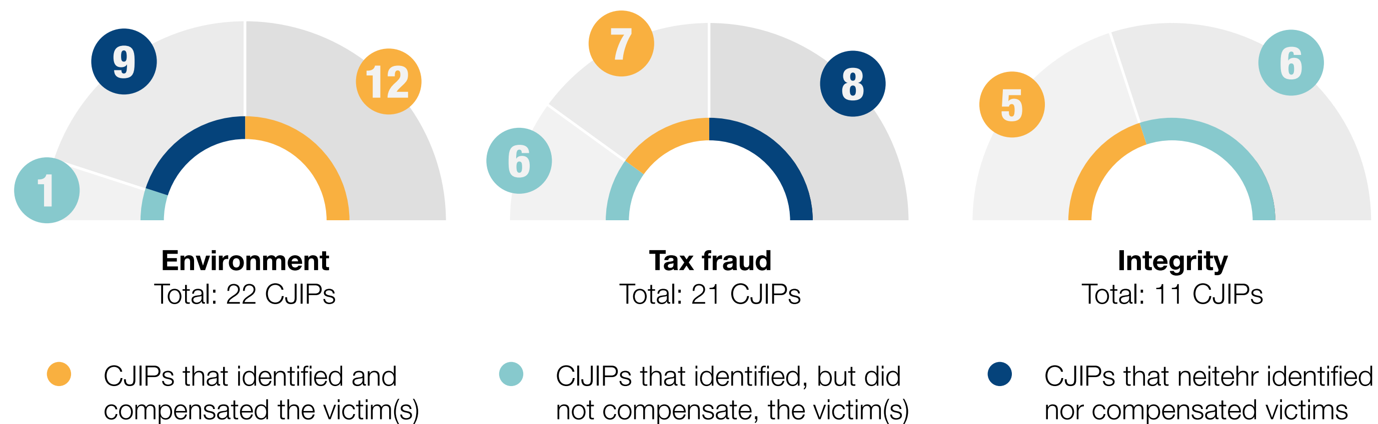
On 18 September 2019, the Nanterre's Judicial Court convicted 38 individuals of bribery. In this case, an employee of EDF requested the payment of bribes by 9 SMEs in the insulation, asbestos removal and industrial maintenance sectors, in order to award them works contracts. The employee was convicted of active bribery and the managers of the 9 companies were convicted of passive bribery and misuse of corporate assets. In 2018, three of these companies (SAS Set Environnement, SAS Kaefer Wanner and SAS Poujaud) signed CJIPs with the public prosecutor's office of Nanterre's Judicial Court. The total amount of the public interest fines reached 3,930,000 euros and each company was required to pay EDF 30,000 euros in compensation.

However, the Nanterre Judicial Court declared EDF's civil action admissible in the lawsuit against the 38 individuals, including the three companies that had entered into the CJIPs. The court ruled that the CJIP had no res judicata effect on the civil action, with particular consideration to the fact that the victim did not take part in any adversarial debate during the negotiation of the CJIP and had no recourse to challenge, neither the decision whether to grant compensation or not, nor the amount of compensation provided for in the CJIP. The victim therefore continues to be entitled to full compensation for her loss. As a result, the Nanterre Judicial Court recognised EDF's loss arising from the amount of the bribes as well as its non-material loss equal to 20,000 euros.[5]

[4] Parquet national financier, Lignes directrices sur la mise en œuvre de la convention judiciaire d'intérêt public, 16 January 2023, p. 21.
[5] *See* Ghislain Poissonnier, Procès au fond et convention judiciaire d'intérêt public : quelle coexistence possible ? Judgment of the Tribunal de grande instance de Nanterre 15e ch. corr, Recueil Dalloz 2019, p. 2137; Bruno Quentin, François Voiron, La victime dans la procédure de CJIP : entre strapontin et siège éjectable ?, AJ Pénal 2021, p. 15.

VICTIM COMPENSATION WITH REFERENCE TO THE MATERIAL SCOPE OF THE CJIP

PROPORTION OF CJIPS THAT IDENTIFIED, COMPENSATED OR NEITHER IDENTIFIED NOR COMPENSATED THE VICTIM(S)



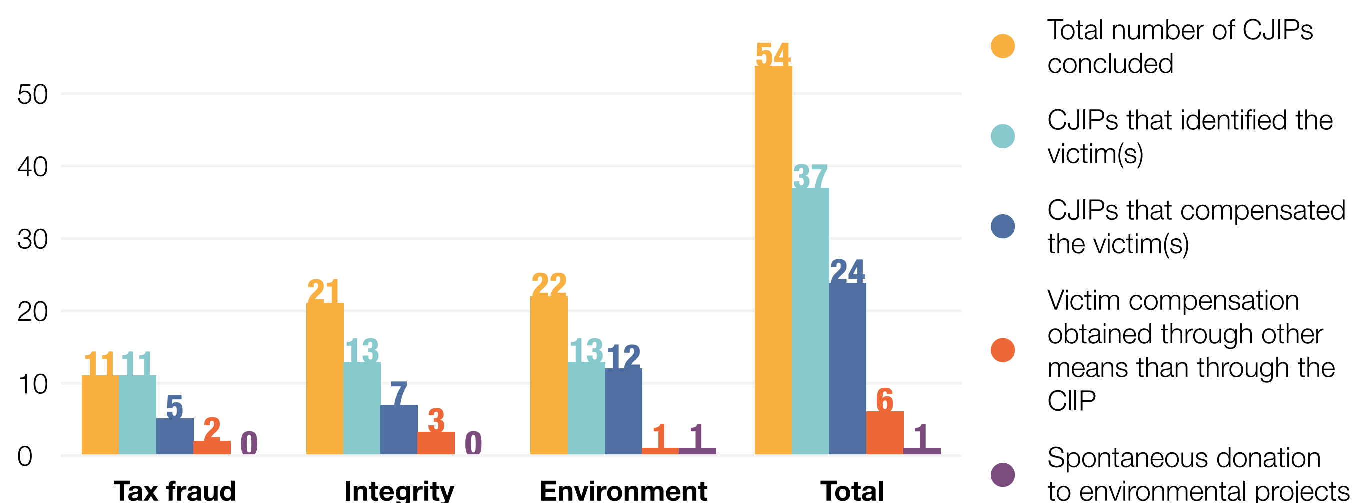
In total, 24 out of 54 CJIPs provide for victim compensation, which amounts to a percentage of 44.44%, half of which are concluded in environmental matters. More specifically, 12 out of 22 environment-related CJIPs provide for victim compensation, compared with 5 out of 11 for tax fraud and 7 out of 21 for probity. These amount, respectively, to a percentage of 54.54% of environmental CJIPs providing victim compensation compared with 45.45% of tax fraud CJIPs and 33.3%, i.e. 1 out of 3, integrity CJIPs.

The precise typology of victims identified and compensated will be discussed in section C.

However, it is already worth noting that the systematic identification of victims in the context of tax fraud related CJIPs stems mainly from the fact that in such cases, the victim is easily identifiable: it is the French State. As a result, the public prosecutor almost systematically notifies the State of the decision to propose a CJIP in tax matters, enabling it to sue for damages.[6]

Furthermore, the relatively low proportion of victims compensated under the integrity CJIP procedure may be explained by the difficulty that practitioners have faced in identifying the victims of corruption and quantifying their losses *(see Box 3)*.

OVERVIEW OF VICTIM COMPENSATION



[6] Parquet national financier, Lignes directrices sur la mise en œuvre de la convention judiciaire d'intérêt public, 16 January 2023, p. 21.

A total of 37 CJIPs identified victims, 24 of which eventually ordered compensation. Some CJIPs did not provide for compensation because the victim had already received compensation. In one such case, this compensation was obtained by decision of a foreign court *(see Box 7)*; in the case of the remaining five, compensation was received through a settlement agreement between the company and the victim(s) *(see, for instance, Box 5)*. Singularly, in the case of TUI CRUISES GmbH, the company's voluntary donation to environmental projects was taken into account as a mitigating factor for the fine *(see Box 2 below)*.

BOX 2

CJIP TUI CRUISES GmbH - Voluntary donations in support of environmental projects considered to offset environmental impact

On 27 October 2018, an inspection by Marseille's Ship Safety Centre ("*Centre de sécurité des navires de Marseille*") led to checks of sulphur emissions released by the cruise ship MEIN SCHIFF 2 upon its arrival in the port of Marseille from the port of La Spezia (Italy). It was found that the ship sailing in an Exclusive Economic Zone in the Mediterranean had used fuel with a sulphur content of 3.5% weight per weight. Yet, article L. 218-2 of the Environmental Code set the maximum sulphur content in this zone at 1.5%.

An investigation was launched by the Mediterranean Maritime Gendarmerie Group in Marseille ("*Groupement de Gendarmerie Maritime Méditerranée de Marseille*") on the basis of the offence of using fuel with a sulphur content in excess of authorised standards by a vessel beyond the territorial sea, which constitutes air pollution and is punishable under the Environmental Code. TUI CRUISES, a German company, was the owner and commercial operator of the vessel MEIN SCHIFF 2. The company explained that it had misinterpreted the applicable standards.

On 17 May 2022, the President of the Marseille's Judicial Court validated the CJIP entered into on 15 April 2022, under which TUI CRUISES undertook to pay a public interest fine of 60,000 euros. The amount was set taking into account the application of aggravating factors (the harmfulness of sulphur oxide discharges into the atmosphere) as well as mitigating factors (the quick regularisation to comply with the applicable legislation and the commitment and concrete actions taken in terms of environmental protection). As part of **the concrete measures TUI CRUISES had taken, it made donations totalling 194,820 euros in 2019 to support environmental projects. The CJIP considered that these actions "could be assessed as partially compensating for the environmental impact of their activity."**

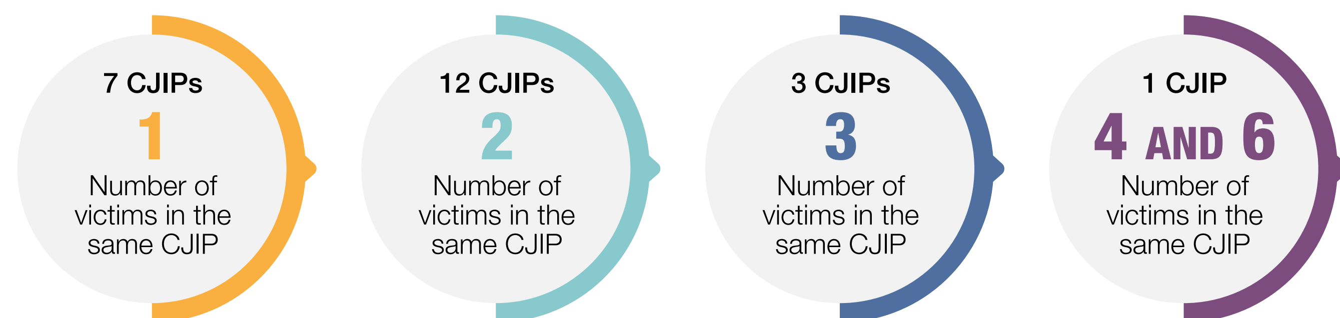
VICTIM COMPENSATION WITH REFERENCE TO THE NUMBER OF VICTIMS

The chart below shows victim compensation in two different forms. The top line shows the number of CJIPs that made an order for compensation, while the bottom line shows the actual number of victims compensated, taking all CJIPs together. This visual presentation illustrates that a single CJIP may provide compensation for several victims.

COMPARATIVE CHART: NUMBER OF COMPENSATED VICTIMS/ NUMBER OF CJIPS ORDERING VICTIM COMPENSATION

A total of 50 victims were compensated in 24 CJIPs, while 81 victims had been identified in 37 CJIPs. **This entails that 61.7% of the victims identified were compensated.**

PROPORTION OF VICTIMS COMPENSATED IN A SINGLE CJIP



As indicated above, a single CJIP may order compensation to the benefit of multiple victims. Most notably, environmental CJIPs are most likely to compensate several victims under a single CJIP. In fact, to date no environmental CJIP has compensated less than two victims. The average of victims compensated per environmental CJIP is thus 2.75, compared with 1.57 in integrity cases and 1.2 in tax fraud cases – bearing in mind that in tax fraud cases, a single victim (the State) is usually identified. Overall, the average stands at 2.08 victims per CJIP.

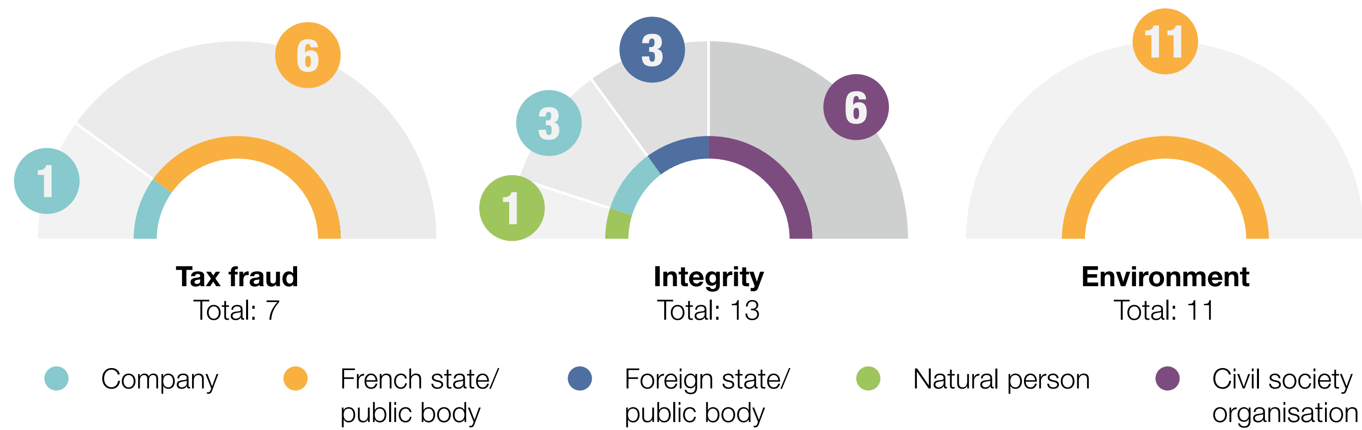
CATEGORIES OF VICTIMS

The identity of the victim is a useful parameter to assess the suitability of the CJIP procedure in compensating victims for the loss suffered. The chart below shows 5 main categories of victim:

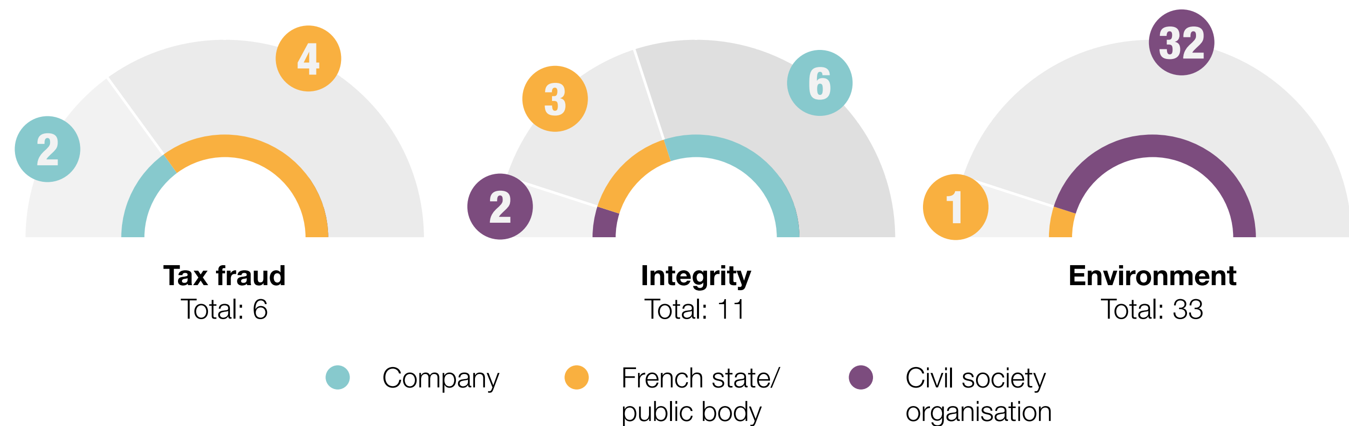
COMPARATIVE CHART: NUMBER OF VICTIMS COMPENSATED/ NUMBER OF VICTIMS IDENTIFIED

However, these figures should be examined in conjunction with the detailed charts by material scope presented below. The French State seems to make up a significant part of the overall victims, but it is mostly recognised as such in the context of tax-related CJIPs. Similarly, civil society organisations (CSOs) are the most frequently identified and compensated victims. However, this is mainly so in environmental matters.

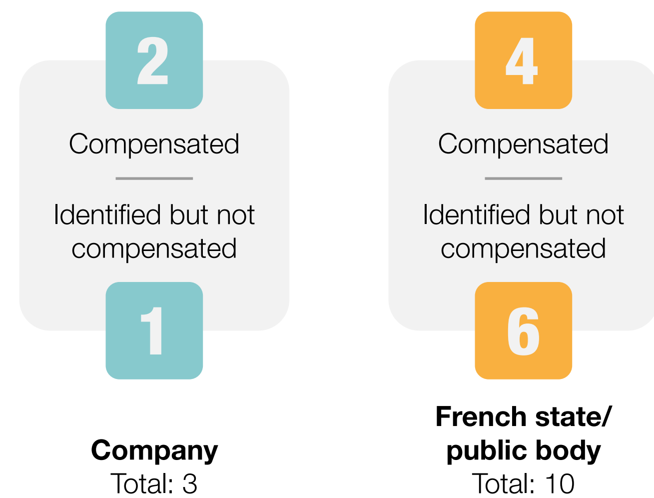
VICTIMS IDENTIFIED, BUT NOT COMPENSATED



VICTIMS COMPENSATED



CATEGORIES OF VICTIMS IN TAX RELATED CJIPS

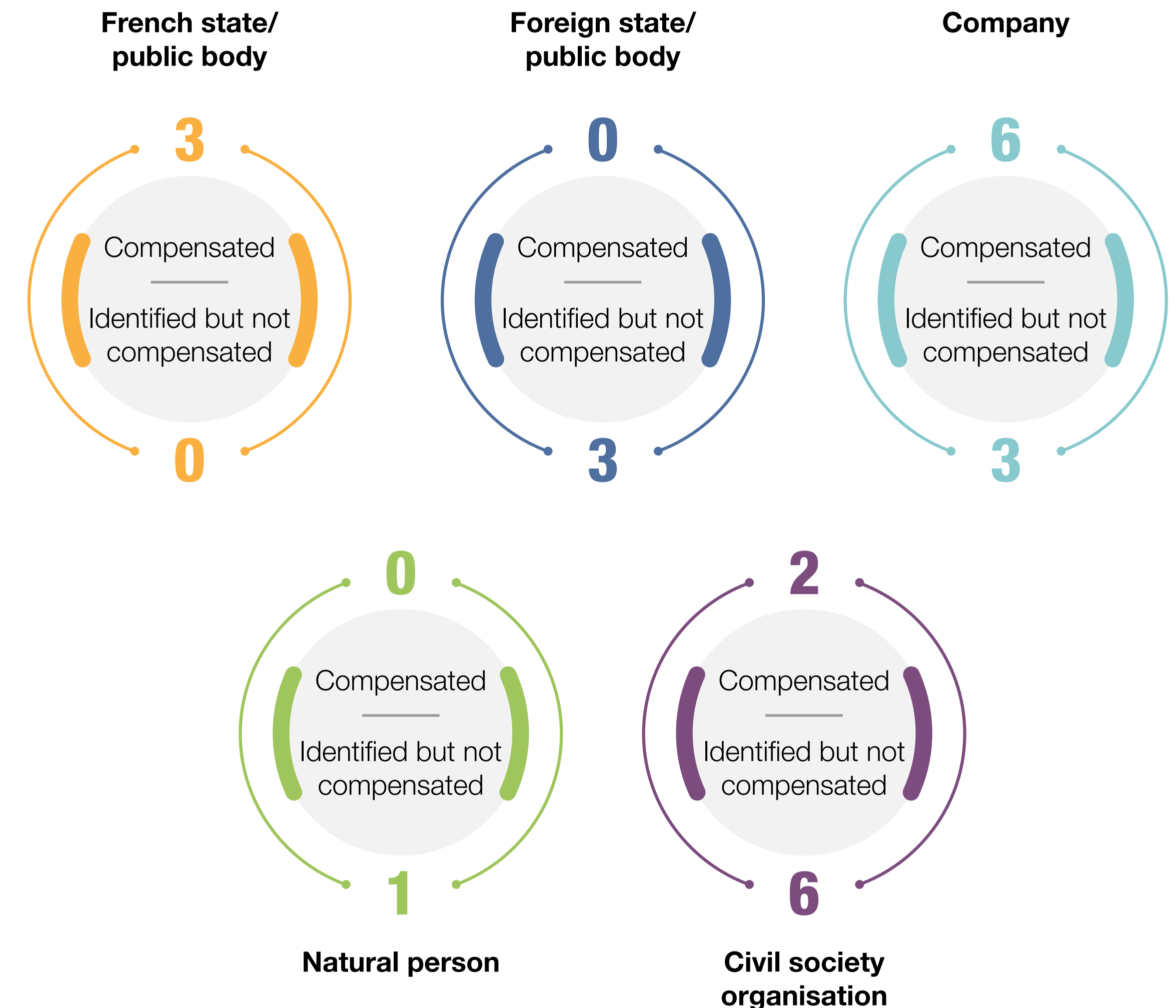


In the case of tax related CJIPs, the French tax authorities are most often identified as the victim. In fact, 10 of the 11 CJIPs identify the tax authorities, or the French State, as the victim. However, the PNF's Guidelines state that compensation for the damage caused to the Treasury is generally provided by tax surcharges and fines. As a result, "*there is generally no provision for compensation in this respect in the CJIP*",[7] which justifies the identification, without compensation, of the French State in the majority of cases.

Only one tax-related CJIP identifies other victims: the CJIP concluded with La Financière Atalian (LFA), which identifies VINCI ENERGIES France, VINCI SA and CAP VERT as victims. In this case, subsidiaries of LFA had issued false invoices that had enabled the sale or attempted sale of some of the group's companies at an inflated price. Although the CJIP was primarily a response to the offence of tax fraud laundering, the related offences of swindling and attempted swindling committed by an organised group, which caused damage to the three victim companies, were also included. Under the terms of the CJIP, only VINCI ENERGIES France and VINCA SA were compensated, as CAP VERT did not respond to the public prosecutor's notice to victims and, in any event, suffered no apparent loss in its capacity as a potential buyer.

[7] Parquet national financier, Lignes directrices sur la mise en œuvre de la convention judiciaire d'intérêt public, 16 January 2023, p. 21.

CATEGORIES OF VICTIMS IN INTEGRITY RELATED CJIPS



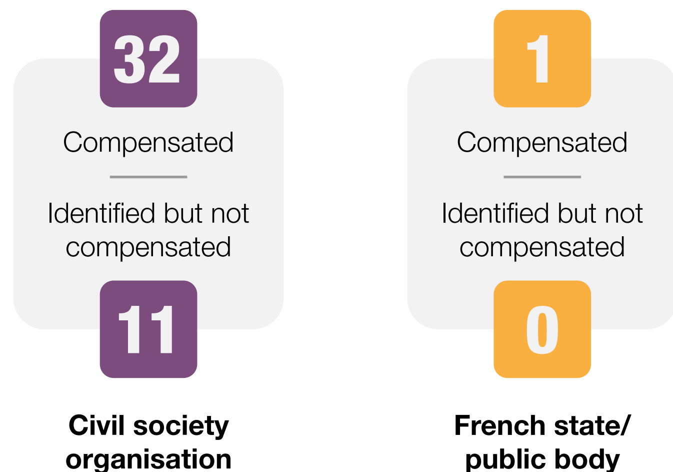
In the case of integrity related CJIPs, the three legal entities governed by French public law are in fact the same municipality. It received compensation under 3 separate CJIPs, but which were all concerned with the same factual situation. As far as the foreign public entities are concerned, the victims are the Libyan Investment Authority, Libya and the Democratic Republic of Congo. None of them has been compensated: the former and latter were compensated prior to the CJIP, while the Libyan State had not followed through on its initial willingness to bring a civil action.

In addition, a quarter of the CSOs recognised as victims received compensation (2 out of 8): these were the anti-corruption organisations SHERPA and ANTICOR *(see box 8 below)*. ANTICOR also joined as a civil party in 3 other CJIPs – all linked by the same factual situation - but did not provide any evidence of its loss.

On the other hand, two-thirds of the companies recognised as victims were compensated (6 out of 9): these are in fact 2 companies – EDF and SEMIVIM – each having been compensated through 3 different

CJIPs concerning the same set of facts. In both cases, an employee of the company was involved in corruption schemes *(see Box 1 for EDF)*. In the case of the three other victim companies, one was a subsidiary of the group that had undertaken the bribery schemes, one was a client of the accused company, and one had filed a complaint against the accused company, which thereafter attempted to obtain information on such complaint *(see Box 4)*. The latter two did not claim any damage, while in the case of the subsidiary the CJIP does not mention how it was identified as a victim nor the reasons for refusing to grant compensation.

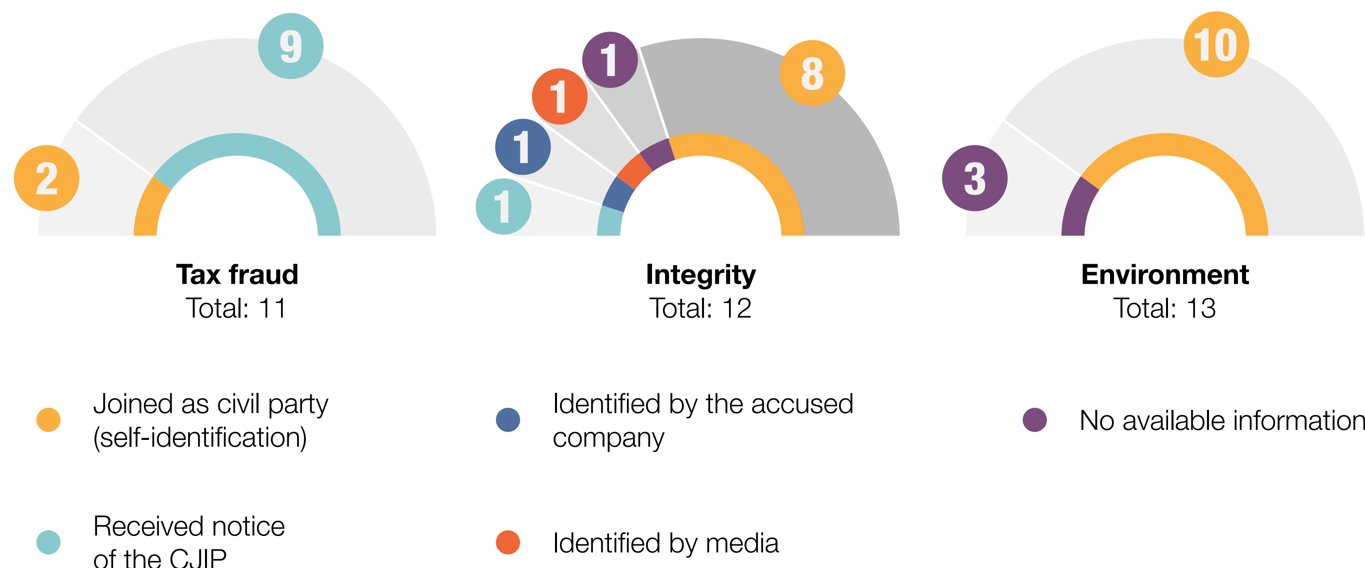
CATEGORIES OF VICTIMS IN ENVIRONMENT RELATED CJIPS



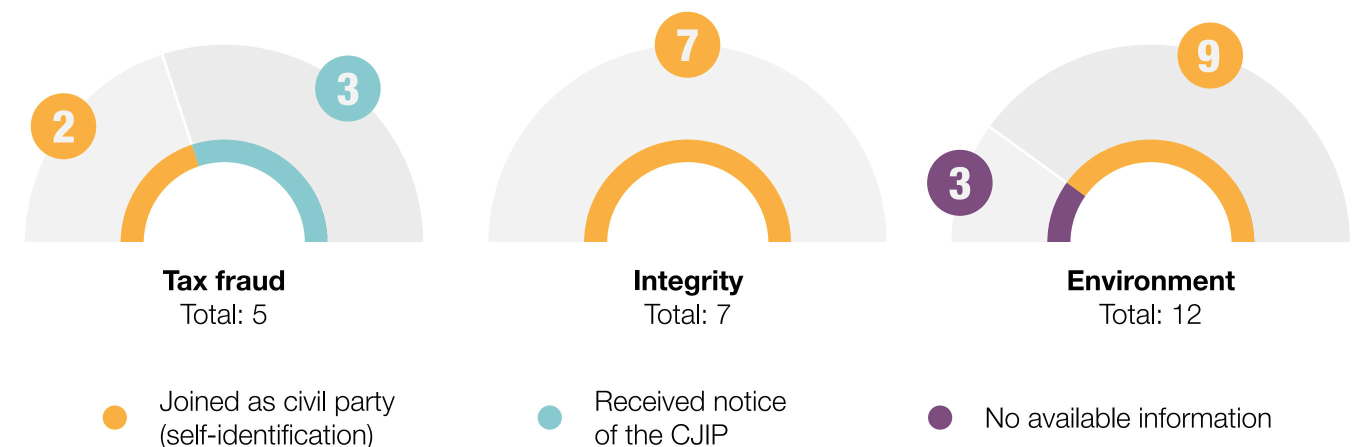
The environment related CJIP is notable for the fact that it compensates more victims than the tax and integrity related CJIPs. The victims compensated – as well as those merely identified – are mostly CSOs. They include departmental federations and approved organisations for fishing, protection of the aquatic environment and animal protection, as well as local sections of *France Nature Environnement* – a French coalition of CSOs for the protection of nature and the environment. In one case, a municipality was also compensated for the damage caused by discharges from a wood treatment plant into the stream located on its territory.

VICTIM IDENTIFICATION AND THE REFUSAL TO GRANT COMPENSATION

METHODS OF VICTIM IDENTIFICATION (WHETHER THE VICTIM WAS ULTIMATELY COMPENSATED OR NOT)

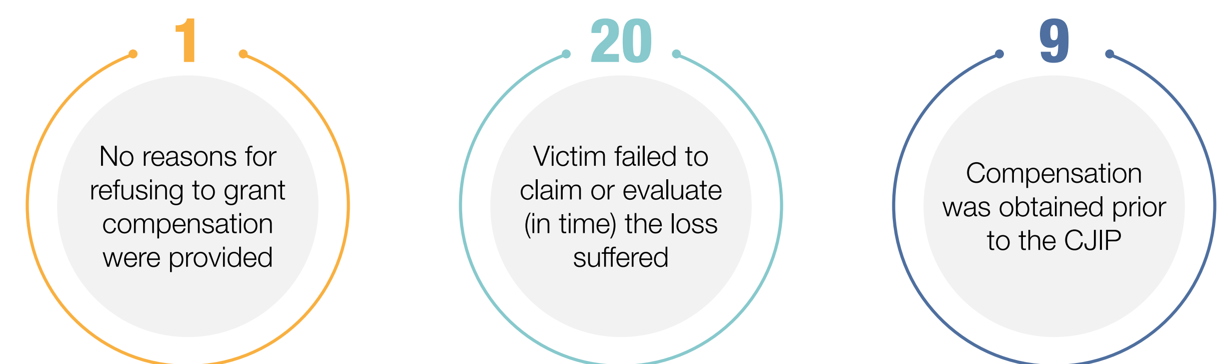


METHODS OF VICTIM IDENTIFICATION (VICTIM WAS ULTIMATELY COMPENSATED)



The issue of victim compensation cannot be addressed in depth without raising the question of how victims are effectively identified. Despite the opacity of the process, which gives rise to an incomplete statistical analysis, the history of the CJIPs concluded to date shows that most victims are identified on their own initiative. Of the 36 CJIPs that identified victims, 20 were the result of victims joining the criminal proceedings as a civil party, i.e. 55.55%. Of the 24 CJIPs that compensated victims, 18 involved a victim joining the criminal proceedings as a civil party, i.e. 75%. These percentages are, to some degree, unrepresentative, given that in tax related matters the public prosecutor almost systematically notifies the State of the decision to negotiate a CJIP – a victim that is easily identifiable in this context.[8] In view of the foregoing, it appears that, in the vast majority of CJIPs, prosecutors and companies do not assume their shared role in identifying victims.

REASONS PROVIDED FOR REFUSAL TO GRANT COMPENSATION (BASED ON NUMBER OF VICTIMS IDENTIFIED BUT NOT COMPENSATED)



[8] Parquet national financier, Lignes directrices sur la mise en œuvre de la convention judiciaire d'intérêt public, 16 January 2023, p. 21.

Integrity related CJIPs account for the majority of cases in which damage was not claimed: 8 victims of bribery or influence peddling did not claim or properly assess their loss or failed to indicate this in time. Once again, this raises the question of the complexity of identifying reparable losses in corruption cases:

BOX 3

The difficulty with victim compensation in corruption cases

Domestic legislations generally require a direct nexus between the offense and the damage suffered by a person to grant him/her the victim status in legal proceedings. France is no exception[9].

For some victims, establishing such a direct nexus is an insurmountable obstacle that prevents them from obtaining reparation for their harm. The United Nations Office on Drugs and Crime (UNODC) notes that some groups of persons may not be readily considered victims and their legal standing may be denied when they do not have a direct and specific interest[10]. It echoes the Office of the United Nations High Commissioner for Human Rights (OHCHR) observations that tracing the damage caused by the theft of public assets to a particular victim, a group of victims, or to a specific entity, represents an obstacle in some instances[11].

Experience shows that not all victims of corruption face these obstacles. Among victims of corruption, disparities exist in terms of redress and compensation. Depending on several factors such as the type of damage they are claiming redress for, their financial and legal capacity and the jurisdiction where they submit their complaint, victims of corruption face more or fewer difficulties to obtain compensation.

In this context, economic players such as the company whose employee allegedly paid a bribe, shareholders whose shares lost value because of their company's misconduct, investors whose funds were used improperly to pay bribes or unsuccessful bidders who may have lost out on business by failing to make corrupt payments to foreign public officials, are in a better position to be aware of the corruption schemes and to gather evidence enabling them to subsequently claim compensation.

Common to all these actors is claiming redress for material and tangible individual or collective damages. It makes it easier to draw a direct nexus between corporate misconduct and their harm and to estimate with precision the cost of their material damages. As a result, economic and financial players have a greater likelihood of being recognized as victims and obtaining compensation for their losses.

Corruption impacts, however, are not limited to economic loss and financial damages.

The predominantly economic lens through which the damage caused by corruption is assessed, coupled with the technical difficulties in identifying the victims and establishing a direct link between their damage and the corruption offense, often excludes many actors from being recognized as victims of corruption. This is particularly true in international corruption cases, such as foreign bribery or transnational money laundering. In these instances, foreign populations suffer a double penalty: not only are their fundamental rights violated and public resources plundered as a direct consequence of their leaders' corrupt practices, but they are also deprived of judicial remedies.

It also appears that compensation obtained through other means – for instance, through the signing of settlement agreements *(see Boxes 5 and 6)* or litigation brought before foreign civil courts *(see Box 7)* – still constitutes a safety net insofar as the victim has the means and the ability to demand it. Thus, in the context of 6 CJIPs, 9 victims obtained compensation prior to the conclusion of the CJIP, including 4 in matters of integrity *(see Boxes 5, 6 and 7)*. It is therefore regrettable that the obligation to compensate victims, one of the three levers of the CJIP, still fails to find its right place in practice.

[9] In French criminal proceedings, only those who suffer a direct and personal loss due to the offense are recognized as victims (Article 2 of the French Criminal Procedural Code).
[10] Good Practices in Identifying the Victims of Corruption and Parameters for their Compensation, §12
[11] OHCHR recommended principles on Human Rights and Asset Recovery, March 2022, §57 p.30

Lastly, **the time period provided to victims in order for them to assess and quantify their loss appears to be insufficient given the practical obstacles to establishing proof of victimhood and damage.** Only 3 CJIPs explicitly state the exact timeline provided in this regard: the victims were respectively given, from the date the victim was notified by the public prosecutor, 10 days *(see Box 4 below)*, 14 days and 20 days – with an additional 40 days in the latter case – to state their losses and/or the amount sought.

BOX 4

LVMH CJIP – Victims given 10 days to claim damages

In February 2011, a criminal investigation was opened following a report by TRACFIN, France's financial intelligence unit. It concerned influence peddling perpetrated by LVMH, a French multinational holding and conglomerate specializing in luxury goods, headquartered in Paris, with public institutions and authorities from 2008 onwards. At the heart of this case was Bernard Squarcini, former Director of the Domestic Intelligence Service, who had become a consultant and provided advice and assistance to LVMH. In particular, Squarcini illegally obtained information on legal proceedings initiated on the basis of complaints lodged by HERMES against LVMH, as well as information on the FAKIR, a left-wing independent newspaper, and its members, including their personal data, collected through organised surveillance by unauthorised persons.

On 17 December 2021, the Paris judicial court validated the CJIP concluded between the Paris public prosecutor's office and LVMH. It provides for the payment of a public interest fine of 10,000,000 euros to the Treasury.

Three victims identified by the CJIP were notified of the opportunity to submit any evidence likely to establish the "reality" and extent of their loss: HERMES INTERNATIONAL, the newspaper FAKIR, and its founder, François Ruffin. However, HERMES INTERNATIONAL did not claim any loss "likely to be compensated", and the other two victims let the ten-day period allotted to them for formulating their claims expire.

This raises the question of the delicate balance that must be struck between the predominant interest in ensuring a speedy CJIP procedure and the victims' right to reparation. However, it should be noted that, in this case, the victims did not request an extension of the deadline and were notified of the hearing.

THE AMOUNT OF COMPENSATION AND THE PUNITIVE PART OF THE FINE

Of the 24 CJIPs that compensated victims (and, *a fortiori*, the 37 that identified victims), only 10 explicitly state the amount of compensation sought or how this amount was calculated – a percentage of around 42%. This lack of clarity makes it difficult for victims to understand the CJIP's parameters and its predictability as a legal tool.

When a CJIP comes after victims have been granted prior compensation, the PNF has decided to include it as a mitigating factor in the punitive part of the fine. The fine is first calculated on the basis of the benefits derived from the company's failure to comply with its legal obligations. Once this amount has been calculated, a percentage is added to or deducted from it, based on aggravating and mitigating factors.

The PNF's most recent Guidelines on the implementation of the CJIP, published on 16 January 2023, thus consider that prior victim compensation may produce a mitigating factor of up to 40% as regards the punitive part of the fine. The Guidelines further elaborate a mathematic formula for the overall calculation of the fine, along with its punitive aspects. Accordingly, the sum of the aggravating factors (AF) and the mitigating factors (MF) creates a coefficient that determines the punitive part of the public interest fine based on the amount of the benefits derived from the breaches (BDB) as follows: *Punitive part of the fine = BDB * (1+ AF - MF).*[12]

[12] Parquet national financier, Lignes directrices sur la mise en œuvre de la convention judiciaire d'intérêt public, 16 January 2023, p. 16.

BOX 5

CJIP GUY DAUPHIN ENVIRONNEMENT – Prior victim compensation significantly reduces the amount of the public interest fine

Complaints lodged in 2014 by two local environmental organisations led to the opening of a preliminary investigation by the Central Office for Combating Corruption and Financial and Tax Offences (OCLCIFF). The investigation focused on influence peddling perpetrated by GUY DAUPHIN ENVIRONNEMENT (GDE) in order to obtain a permit to build a landfill for automobile shredder residue in the Orne department.

On 17 May 2023, the President of the Paris Judicial Court validated the CJIP entered into between the PNF and GDE, under which the company undertook to:

- Pay a public interest fine of 1,230,000 euros to the French Treasury; and
- Implement a 3-year compliance programme under the supervision of the AFA, the costs of which, amounting to 922,599.78 euros, would be borne by the company.

No compensation was provided for, as the PNF ensured that the two organisations behind the complaint, SAUVEGARDE DES TERRES D'ELEVAGE and NONANT-ENVIRONNEMENT, had already been compensated for their financial loss. Such reparation resulted from a settlement agreement signed in 2019, under the terms of which GDE would pay 500,000 euros to the organisation SAUVEGARDE DES TERRES D'ELEVAGE in return for the withdrawal by both CSOs of the legal actions brought against the company. The CJIP also fails to reveal another aspect of this settlement: the environmental organisations obtained the sale of the landfill site by GDE to a real estate company made up of the main founding members of the CSOs.[13]

In this case, the PNF counted the prior compensation as a mitigating factor of the fine. According to the coefficients set out in the PNF's Guidelines, the inclusion of this compensation as a mitigating factor meant that GDE saved money on the punitive part of the fine. The benefits derived from the breaches were estimated at 1,100,000 euros. Given that prior compensation to victims may reduce this amount by up to 40%, this amounted to a saving of approximately 440,000 euros.

Sidenote: Further proof that the CJIP can be combined with criminal proceedings against the implicated individuals: the chairman of the Orne departmental council from 2007 to 2017 and his chief of staff will be tried in the criminal court from 16 to 23 October 2024 for influence peddling in this same case.[14]

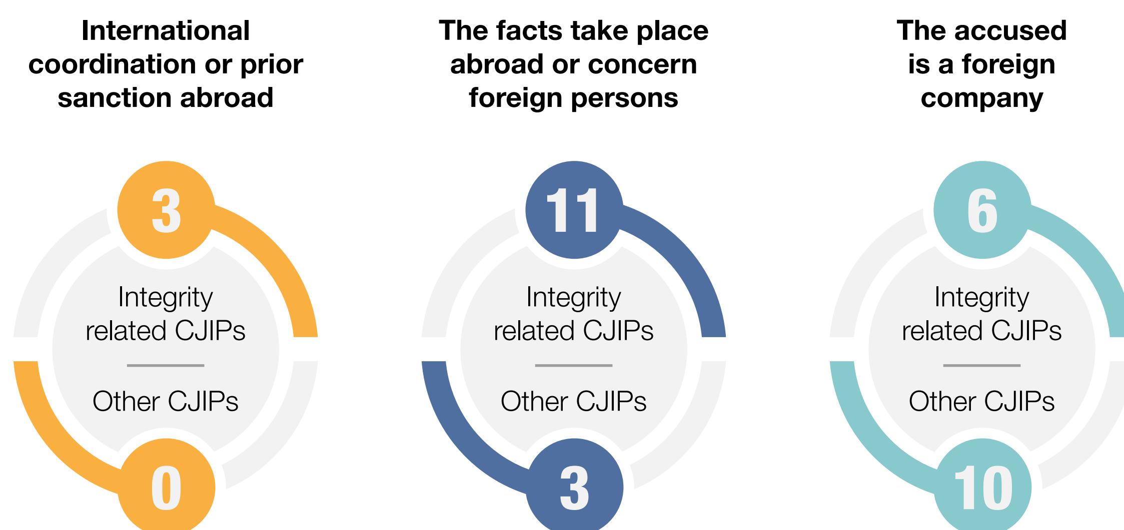
The inclusion of prior compensation to victims as a mitigating factor in the amount of the fine is overall puzzling. In the event that the company has not previously compensated the identified victims, and that the victims can prove that they have suffered an actual loss, the amount of the compensation is added to the amount of the public interest fine, which is therefore not affected by a mitigating factor. On the other hand, when the company has previously compensated the victims, this parameter is taken into account as a reducing factor in the public interest fine. As an apparent reward for the company, the amount of its fine can thus be reduced by up to 40%.

[13] Alexandra Huctin, *"GDE lâche prise à Nonant-Le-Pin et s'apprête à vendre les terrains du centre d'enfouissement aux éleveurs de la région"*, France 3 Région Normandie, 26 juin 2019, disponible ici : https://france3-regions.francetvinfo.fr/normandie/orne/gde-lache-prise-nonant-pin-s-apprete-vendre-terrains-du-centre-enfouissement-aux-eleveurs-region-1691158.html ; Eric Mas, *"Nonant-le-Pin. Rachat du site GDE : c'est signé !"*, Tendance Ouest, 17 décembre 2019, disponible ici : https://www.tendanceouest.com/actualite-345139-nonant-le-pin-rachat-du-site-gde-c-est-signe ; Marie Lenglet, *"GDE dans l'Orne. L'ex- centre d'enfouissement vendu à ses opposants"*, Ouest France, 17 décembre 2019, disponible ici : https://www.ouest-france.fr/normandie/nonant-le-pin-61240/gde-dans-l-orne-l-ex-centre-d-enfouissement-vendu-une-association-d-opposants-6658861
[14] Marie Dumesnil Adelée et David Frotté, *"Plongée inédite au cœur de la lutte des anti-GDE à Nonant-le-Pin"*, France 3 Région Normandie, 10 janvier 2024, disponible ici : https://france3-regions.francetvinfo.fr/normandie/orne/alencon/video-plongee-inedite-au-c-ur-de-la-lutte-des-anti-gde-a-nonant-le-pin-2903687.html.

This practice is surprising in that victim compensation and the public interest fine are different matters in nature and serve distinct interests: the fine is inflicted in the public interest whereas victim compensation protects the victim's private, personal interest. This raises the question of whether such flexibility in calculating the amount of the fine is justified: why should the funds obtained by the *victim* by way of prior compensation justify the payment of a smaller fine *to the Treasury?* Should, then, the fact that the victim has not received prior compensation be an aggravating factor, resulting in an increased fine? It seems to us that victim compensation should, on the contrary, be entirely separate from the question of the amount of the fine, in order to preserve the difference in essence of both obligations. The risk posed by this practice, whereby the fine is significantly reduced if victims have been compensated in advance, is that victims' prospects of having a seat – albeit a small one – at the table of the CJIP procedure will dwindle and may eventually disappear.

VICTIM COMPENSATION AND THE INTERNATIONAL DIMENSION OF CJIPS

THE INTERNATIONAL DIMENSION OF CJIPS



Unsurprisingly, integrity related proceedings have a strong international dimension: by definition, bribery of foreign public officials has an international dimension. In such cases, it is often difficult to determine whether the countries concerned have initiated proceedings regarding the offences committed on their territory or against their own nationals involved in the scheme.

On the basis of the analysed data, no criminal proceedings were found to have occurred in the countries of foreign public officials implicated in the cases of internationally oriented CJIPs. This raises the question of the possible linkages of justice mechanisms between States, such as emerged in the context of Indonesia's recriminations in the Airbus case. In this case, Jakarta, despite having contributed to the investigation carried out by the British authorities against the European aircraft manufacturer, denounced the fact that it had not been invited[15] to the tripartite negotiations between Paris, Washington and London, which resulted in Airbus paying the largest public interest fine ever paid by a company for bribery of a foreign public official.

[15] P. Hollinger, The fight against global corporate graft needs to aim higher, The Financial Times, 28 February 2023

VICTIM COMPENSATION IN INTEGRITY RELATED CJIPS WITH AN INTERNATIONAL ANGLE

The low rate of compensation shown in this chart demonstrates the limits of the CJIP system in the context of integrity related proceedings with an international dimension. In the case of bribery of foreign public officials, there are several categories of potential victims, such as competing companies, foreign States or public bodies *(see Boxes 6 and 7 below)*, nationals or residents of a foreign State and anti-corruption associations *(see Box 8 below)*.

BOX 6

CJIP SEVES, SEDIVER – Foreign State obtains indirect compensation for its loss prior to the CJIP's conclusion

In April 2017, SEDIVER's external auditor sent a disclosure to the public prosecutor in Nanterre, having discovered that the company had been investigated by the World Bank in connection with a World Bank-funded power line rehabilitation contract in the Democratic Republic of Congo (DRC), on which it had bid and then been selected as an insulator supplier.

In October 2018, a preliminary investigation into the bribery of a foreign public official was initiated by French law enforcement authorities. The investigation revealed that SEDIVER had paid commissions intended, at least in part, for Congolese public officials via intermediaries in order to influence the selection process for the insulator manufacturer in its favour. Extended investigations established similar factual patterns in Algeria, Libya and Nigeria.

On 4 December 2023, the President of the Paris Judicial Court validated the CJIP entered into on 28 November 2023 between the Financial Public Prosecutor's Office ("*Parquet National Financier* – PNF") and the companies SEVES GROUP and SEDIVER. The CJIP provided for the implementation, within the SEVES group, of a three-year compliance programme under the supervision of the French Anti-Corruption Agency, the cost of which would be borne by SEDIVER in the amount of 500,000 euros. It also inflicted a public interest fine totalling 13,373,000 euros, the fine having been increased due to the systemic nature of the behaviour and the involvement of a public official, but also reduced due to the spontaneous disclosure of the facts, the active cooperation of the company and the relevance of the internal investigations carried out, as well as the unequivocal acknowledgement of the facts.

BOX 6 (SUITE)

Among the mitigating factors that reduced the amount of the fine, account was also taken of compensation for the loss suffered by the DRC under the terms of a settlement agreement. The CJIP stated, without further clarification, that the DRC was compensated for its loss "through the compensation received by the World Bank from two subsidiaries of the SEVES Group" in the amount of 6.8 million euros.

In addition, the scope of the CJIP was particularly broad in this case: it covered "acts of bribery of foreign public officials of the same nature that may have occurred in Albania, Algeria, Ethiopia, Georgia, Kenya, Libya, Macedonia, Mozambique, Nigeria, Democratic Republic of Congo, Senegal, Serbia, Slovenia, South Africa, Sudan, Tanzania, Ukraine, Uzbekistan, and Yemen between 2009 and 2015 and that [were] alleged against SEDIVER, provided that these acts were not knowingly concealed from the PNF [...]." **It is therefore surprising that the events, covering 19 different States, did not lead to the identification of many more victims.**

BOX 7

CJIP SOCIETE GENERALE – Prior victim compensation exonerates the company from the obligation to make reparations in the context of CJIP

On 18 November 2016, the PNF opened a preliminary investigation on charges of bribery of foreign public officials in relation to business relationships established between SOCIETE GENERALE S.A and the Libyan Investment Authority (LIA) between 2007 and 2010. The investigation was opened on the basis of press articles published in 2014 that reported on a commercial dispute between the LIA and Société Générale brought before the High Court of Justice of England and Wales, according to which several investments made in financial products offered by the bank resulted from acts of corruption.

On 4 June 2018, the President of the Paris Judicial Court validated the CJIP signed on 24 May 2018 by the PNF and Société Générale. It provided for a public interest fine totalling 250,150,755 euros and a two-year compliance programme under the supervision of the French Anti-Corruption Agency. The CJIP was concluded in coordination with the United States' Department of Justice (DOJ), which also conducted an investigation, that led to the conclusion of a deferred prosecution agreement (DPA) inflicting a fine of the same amount as the CJIP, payable to the US Treasury.

The CJIP also found that the damage caused to LIA, the victim, in the above-mentioned commercial dispute in London had been compensated. The CJIP therefore stated that "there is no need to provide in the present agreement for an obligation to compensate the LIA". Indeed, it appears from the litigation that Société Générale agreed to pay the sum of 963 million euros to the LIA and issued a press release in which it apologised to the LIA and expressed "its regrets regarding the lack of caution observed by some of its employees".

BOX 8

AIRBUS SE CJIP – Anti-corruption organisations may be considered victims

In this case, the CJIP was prompted by three judicial investigations opened between 2007 and 2013 against AIRBUS SE: they concerned bribery of public officials and bribery of foreign public officials in connection with contracts concluded between 2006 and 2011, that involved the payment of intermediaries and related to the sale of commercial aircraft, helicopters and satellites to Libya and Kazakhstan.

On 30 November 2022, the President of the Paris Judicial Court validated the CJIP concluded on 17 November 2022 between the PNF and AIRBUS, under which the company undertook to pay a public interest fine of 15,856,044 euros and to compensate two victims.

Specifically, ANTICOR and SHERPA, both French anti-corruption civil society organisations, joined the criminal proceedings as civil parties in two separate judicial investigations. They received a notice informing them of the decision of the PNF to propose the conclusion of a CJIP to AIRBUS and inviting them to put forward any evidence likely to establish the reality and extent of their loss. The CJIP explicitly specifies the sums sought by the organisations: 20,000 euros for ANTICOR in compensation for its (unspecified) losses – as well as 5,000 euros for its procedural costs – and 1 euro for SHERPA for its non-material losses.

In addition, the Libyan State had informed the investigating judge of its willingness to act as a civil party in one of the proceedings and specified that it would appoint a lawyer in France to represent its interests. However, no lawyer or representative of the Libyan State subsequently came forward, even after a notice had been sent by the PNF to Tripoli's public prosecutor.

Note: this agreement follows on from a first CJIP concluded with AIRBUS in 2020, in that the facts here fell "within the same temporal context, the same decision-making logic and the same organisational and infringement pattern, carried out by the same individuals within AIRBUS as those targeted by the first CJIP". Under the first CJIP, AIRBUS undertook to pay a public interest fine of 2.083 billion euros and to submit to a 3-year compliance programme under the supervision of the French Anti-Corruption Agency.

Beyond the pursuit of an ideal of justice, the prior identification of the victim and the redress of their harm provide a guarantee of predictability, particularly valued by companies negotiating a CJIP. Initial examples from US jurisdictions demonstrate the backlash that can result from legal action initiated by victims excluded from previously negotiated justice agreements:

BOX 9

The Och-Ziff Case – Shareholders' Compensation Four Years After the Settlement with the US Department of Justice: a setback for non-trial resolutions' predictability

In September 2016, Och-Ziff Capital Management Group LLC (Och-Ziff), a New York-based hedge fund and alternative investment manager, and its subsidiary, OZ Africa Management GP LLC (OZ Africa), entered into a deferred prosecution agreement (DPA) with the US Department of Justice (DoJ). As part of this agreement, they acknowledged their involvement in a vast corruption scheme involving public officials in the Democratic Republic of Congo (DRC) and agreed to pay a criminal fine of over $213 million[16].

As part of this corruption pact, the Congolese government withdrew in 2009 a copper mining license from Canadian mining company Africo Resources, and then granted it to Och-Ziff's African subsidiary, OZ Africa.

In 2020, almost four years after the conclusion of the DPA, a US court ordered Och-Ziff's African subsidiary to pay $138 million in compensation to the former shareholders of Canadian mining company Africo Resources. According to experts and practitioners, this decision is a setback for Och-Ziff, which not only fails to purge this litigation, but is also forced to pay far more than was agreed in the 2016 settlement with the DoJ[17].

Throughout these proceedings, RAID UK, a London-based non-governmental organization (NGO) that fights for victims of economic crime, has been trying to convince the International Finance Corporation (IFC), the World Bank Group's private sector organization and one of Africo Resources' shareholders, to join the legal action and join the other shareholders. According to the British NGO, recognition of IFC's status as a victim and compensation for its loss could have helped combat poverty and corruption in the DRC by reallocating the compensation obtained to social investment in the affected communities[18].

[16] US Department of Justice, *"Och-Ziff Capital Management Admits To Role In Africa Bribery Conspiracies And Agrees To Pay $213 Million Criminal Fine"*, September 29th 2016, available here: https://www.justice.gov/usao-edny/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213

[17] Dylan Tokar, *"Restitution Battle Throws Three-Year-Old Och-Ziff Settlement Into Limbo"*, The Wall Street Journal, September 7th 2019, available here: https://www.wsj.com/articles/restitution-battle-throws-three-year-old-och-ziff-settlement-into-limbo-11567810832

[18] RAID UK, *"US court orders $135 million for shareholders of stolen DR Congo mine, but local communities left out"*, November 2020, available here: https://raid-uk.org/us-court-orders-135-million-for-shareholders-of-stolen-dr-congo-mine-but-local-communities-left-out/

CONCLUSION AND RECOMMENDATIONS

The CJIP mechanism as it is currently conceived and implemented is failing to achieve one of its principal objectives: compensating the victims of corruption.

PROPOSALS FROM ACADEMIA AND PRACTICE:

Judge Ghislain Poissonnier finds that several reasons explain the limited role of the victim in the CJIP: "inertia on the part of public prosecutors and investigating departments in this respect, difficulties in identifying victims of offences that are by definition fairly technical, insufficient information for potential victims [and] the excessively short time between the proposed conclusion of the CJIP and its conclusion and between its conclusion and validation".[19] On these first and third aspects, Astrid Mignon-Colombet and Lola Elbaz, both lawyers at the Paris Bar, add: "the failure to solicit CSOs is likely to make the [environmental CJIP] less attractive. [...] The key challenge for the new [environmental CJIP] is to better inform CSOs about this new mechanism".[20]

A number of practitioners also point to the lack of an adversarial process in the CJIP procedure. This is reflected in the content of the CJIPs, which often do not specify the amount requested by the victim or the difference between such requested amount and the amount ultimately obtained, nor the reasons why it is concluded in some cases that the victim has not claimed "any loss likely to be compensated". Does this mean that the victim did not make a reparation claim at all or that the loss alleged was not considered to be valid for, or worthy of, compensation?

To remedy these shortcomings, the *Association des professionnels du contentieux économique et financier* (Association of Economic and Financial Litigation Professionals) recommends transposing to the CJIP the framework applied in the case of guilty pleas *("comparution avec reconnaissance préalable de culpabilité", or "CRPC")*. In this case, an adversarial debate takes place before a judge tasked with validating – or not – the CRPC, and whose decision has the force of *res judicata*. This in turn allows the victim to appeal the judge's decision and provides greater legal foreseeability for the company, which no longer has to fear a civil action for damages.[21]

Bruno Quentin and François Voiron, both lawyers at the Paris Bar, go even further, advocating for a dual system that would see the emergence of a tripartite CJIP in which the victim would be invited to the negotiations and could sign a settlement agreement relating to their civil action. In that hypothesis, if the victim and the company were not to reach an agreement, the victim would retain their civil action and the CJIP could still be signed between the public prosecutor and the company. This solution would promote greater legal foreseeability for all parties and a better balance in terms of the victim's place in criminal proceedings.[22]

[19] Ghislain Poissonnier, La convention judiciaire d'intérêt public, état des lieux d'une alternative aux poursuites pénales en développement, AJ Collectivités Territoriales 2022, p. 497.

[20] Astrid Mignon Colombet, Lola Elbaz, Feu vert pour la convention judiciaire d'intérêt public environnementale. Réparer, surveiller, punir", La semaine juridique, Edition générale, No. 30-34, 31 July 2023, p. 1479.

[21] Association des professionnels du contentieux économique et financier, La réparation du préjudice économique et financier par les juridictions pénales, 2019, p. 56.

[22] Bruno Quentin, François Voiron, La victime dans la procédure de CJIP : entre strapontin et siège éjectable, AJ Pénal 2021, p. 15.

PROPOSALS FROM INTERNATIONAL ORGANISATIONS AND INSPIRATIONS FROM FOREIGN PRACTICE:

1. Practices the UK:

In order to strengthen the CJIP mechanism, the methods adopted in England and Wales by the Serious Fraud Office, or "SFO", deserve to be studied. In the spring of 2019, the SFO issued "General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases".[23] According to these Principles, the appropriateness and possible modalities of compensation for victims should be assessed at an early stage of investigations or prosecutions. The role of the SFO is thus to ensure that the issue of compensation is systematically examined and to use "all available legal mechanisms" to guarantee its effective implementation.

When foreign victims are identified in a case, the Strategy and Policy Division must be notified in order to decide on the involvement of other government departments and to consider how to measure the loss suffered by the victims and how best to present this information to the court. For example, the SFO may need to work with the Department for International Development (DFID), the Foreign and Commonwealth Office (FCO), the Home Office (HO) and the HM Treasury in relevant cases to:

- Identify who should be regarded as potential victims overseas. This may be in the form of an affected state.
- Assess the case for compensation.
- Obtain evidence which may include statements in support of compensation claims.
- Ensure the process for the payment of compensation is transparent, accountable and fair.
- Identify a suitable means by which compensation can be paid to avoid the risk of further corruption. For example, the UK Government and relevant departments may voluntarily decide to seek agreement with overseas government partners for funds received under a confiscation order to be paid in lieu of compensation to the victim.

In practice, it remains difficult to identify foreign victims. For example, in its decision to validate the DPA entered into by the SFO with Airbus, the President of the King's Bench Division of the High Court determined that victims were not eligible for compensation through the criminal court, mainly because it was not possible to identify a quantifiable loss for the victims resulting from the payment of bribes.[24]

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2. International organisations' proposals:

a. Stolen Asset Recovery Initiative's proposals:

What happens to the money associated with non-trial resolutions? Is it being returned to those most directly harmed by the corrupt practices? In a report published in 2014, titled "Left Out of the Bargain", the Stolen Asset Recovery Initiative (StAR) investigated these questions[25]. The report examined 395 settlements in foreign bribery cases that took place between 1999 and mid-2012.

These cases resulted in a total of $6.9 billion in monetary sanctions. Nearly $6 billion of this amount resulted from monetary sanctions imposed by a country different from the one that employed the bribed or allegedly bribed official. Most of the monetary sanctions were imposed by the countries where the corrupt companies are headquartered or otherwise operate. Of the nearly $6 billion imposed, only about $197 million, or 3.3 percent, has been returned or ordered returned to the countries whose officials were bribed or allegedly bribed.

Based on these findings, StAR made the following recommendations:

- Countries should develop a clear legal framework regulating the conditions and process of settlements.
- Countries pursuing settlements should, wherever possible, transmit information spontaneously to other affected countries concerning basic facts of the case, in line with Article 46, paragraph 4 and Article 56 of the United Nations Convention Against Corruption (UNCAC).

[23] SFO, Compensation Principles to Victims Outside the UK, April 2019, available here: https://www.sfo.gov.uk/download/general-principles-to-compensate-overseas-victims-including-affected-states-in-bribery-corruption-and-economic-crime-cases/ and here: https://www.sfo.gov.uk/download/general-principles-to-compensate-overseas-victims-including-affected-states-in-bribery-corruption-and-economic-crime-cases/.
[24] SFO v. Airbus SE, Approved Judgment, January 31st, 2020, §96, available here: https://www.judiciary.uk/wp-content/uploads/2020/01/Director-of-the-Serious-Fraud-Office-v-Airbus-SE-1.pdf
[25] Oduor, Jacinta Anyango, Francisca M. U. Fernando, Agustin Flah, Dorothee Gottwald, Jeanne M. Hauch, Marianne Mathias, Ji Won Park, and Oliver Stolpe, *"Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery"*, 2014, World Bank.

- Where applicable, countries pursuing corruption cases should inform other potentially affected countries of the legal avenues available to participate in the investigation and/or claim damages suffered as a result of the corruption.
- Countries should consider permitting their courts or other competent authorities to recognize the claims of other affected countries when deciding on confiscations in the context of settlements, consistent with Article 53 (c) of UNCAC
- Countries should further proactively share information on concluded settlements with other potentially affected countries. Such information could include the exact terms of the settlement, the underlying facts of the case, the content of any self-disclosure, and any evidence gathered by the investigation.

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b. The OECD Working Group on Bribery:

In foreign bribery cases, when bribing companies are sanctioned by their home countries, are the public officials also sanctioned or otherwise disciplined by their own countries? The OECD Working Group on Bribery addressed this question in a report published in 2018 titled *"Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?"*[26].

This study explores whether there is a "flip side" to enforcement actions that ended in sanctions for the supply-side of a foreign bribery transaction. It focuses on what happened on the receiving end of this transaction.

Based on a questionnaire sent to the member states of the OECD Working Group on Bribery, this study observes that:

- **Enforcement actions do take place on the demand side, but public officials are known to have been sanctioned in only one fifth of the 55 schemes covered by the survey.** Public officials are subjected to law enforcement actions in a considerable number of cases. Of the 33 cases for which information was provided, 30 cases were investigated in the demand-side countries. Enforcement actions such as prosecutions were then undertaken in 20 of these cases and criminal sanctions are known to have been imposed on at least one public official in 11 cases. In addition, 11 actions are still pending at either the investigative or prosecutorial stages.
- **The information flow between demand-side and supply-side enforcement authorities is often slow.** The survey generated information about the dates when the demand-side countries became aware of the case for 28 cases. In 11 of the 28 cases, the demand-side country reports becoming aware of the case almost simultaneously (within one month) with the supply-side sanction being imposed. However, this information flow is sporadic. For the 5 cases where the demand-side country learned of the supply-side sanction after it was imposed, it took an average of 25 months for the demand-side country to become aware of the case. In 12 cases, the demand-side country was aware of the case before the supply-side sanction was imposed. In such cases, the average time between the demand-side country detecting the case and the supply-side jurisdiction imposing sanctions was 45 months.
- **Exchange of information between demand-side and supply-side enforcement authorities was not a source of detection in this sample of cases.** None of the demand-side countries detected the bribes involving their public officials through formal or informal communications with the supply-side enforcement authorities.
- **The media plays a major role in international information flow.** The media were the most important source of detection for the demand-side authorities, having been a source in 14 cases. Other sources of detection on the demand side were: reports by government institutions (4 cases); self-reporting by the offender (2 cases) and whistleblowers (2 cases).

[26] OECD, *"Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?"*, 2018, available here: www.oecd.org/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm

TRANSPARENCY INTERNATIONAL FRANCE'S PROPOSALS

In order to take proper account of the loss suffered by victims as a result of corruption, the CJIP mechanism could be improved as follows:

1 Publicise and raise public awareness of the existence of this mechanism and the remedies available to victims under it.

2 Following the example of the SFO, establish guidelines for compensating victims in foreign bribery cases, whether in the context of ordinary criminal proceedings or of the CJIP. These should envision the prompt information to victims, the recognition of numerous categories of victims and a wide range of losses, the opening of compensation claims to private individuals and their representatives, and specific rules on the restitution of assets in a transparent and accountable manner.

3 Ensure a more transparent method for victim identification, especially where victims do not come forward as civil parties. Better publicity is also required regarding the amounts requested by victims, the number of victims who have come forward and the method used to assess their losses.

4 Finally, the role of the victim in the CJIP must be strengthened:

- At each stage of the process: ensure that victims of integrity breaches are systematically identified and effectively compensated, paying special attention to this issue from the outset of negotiations with the company.
- At the stage of notifying victims of the negotiation of a CJIP: provide sufficient time to victims to assess their losses.
- Ensure wide publicity of the CJIP's approval decision to allow unidentified victims during the investigation and negotiation process to seek compensation before civil courts.

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