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## **Environmental criminal justice: Issuance of a circular on France's criminal policy**

**As people's awareness of global warming is growing and the struggle to preserve the environment and biodiversity is intensifying, the French Minister of Justice has adopted a circular setting out the principles and objectives to be pursued in the prevention and punishment of environmental crimes.**

Following the insertion in the French Civil Code of the principle of reparation of ecological damage, the recognition by the Constitutional Council that environmental protection is an objective with constitutional value, and Law No. 2020-1672 of December 24, 2020 relating to the European Public Prosecutor's Office, environmental justice and specialized criminal justice, this circular<sup>[1]</sup> is attempting, in turn, to strengthen the effectiveness of environmental justice.

### **Specialization of courts in environmental matters**

Given the complexity of environmental litigation and in accordance with Article 43-1 of the French Code of Criminal Procedure, the circular stresses the importance of entrusting primarily the handling of these cases to specialized public prosecutors' offices, in both civil and criminal matters.

In this context, the circular clarifies the role of so-called *pôles régionaux environnementaux* (environmental regional departments or hereinafter "**PRE**") introduced by the Law of December 24, 2020.

On the criminal level, the circular recalls that the PREs have jurisdiction over offences punishable under the French Environmental Code and Forestry Code and offences relating to plant protection products and plants under the French Rural and Maritime Fishing Code.

In particular, it specifies that they should deal with complex cases of environmental offences, which complexity is determined according to the following criteria:

- **The technical nature of the case**, which results from the subject matter requiring the support of specialist players who are familiar with the decision-making circuits and applicable regulations (for example, regulations governing so called classified facilities for the protection of the environment<sup>[2]</sup>), specific procedural mechanisms or even international ramifications (in particular because of the involvement of a foreign company);
- **The scope of the damage** from both an economic and an ecological point of view, it being specified that the value of the ecosystem must also be taken into account; and
- **The geographic remit**, a priori, any case that exceeds the geographical area over which a court has jurisdiction due to the serial nature of the facts or its consequences on the ecosystem will fall under the jurisdiction of PREs.

From a practical point of view, it also specifies the articulation between the sphere of action of PREs and that of pre-existing specialized courts.

Ultimately, PREs will have to relinquish jurisdiction to the so-called *juridictions interrégionales spécialisées* (specialized inter-regional courts or “**JIRS**”) in complex environmental cases where the existence of an offence committed by an organized gang (in particular trafficking in plant protection products, waste trafficking, etc.) is established, and to the so-called *juridictions du littoral spécialisées* (specialized coastal courts or “**JULIS**”) for cases concerning, for example, pollution caused by ship discharges or by discharges of ballast water from ships.

Whenever the case is particularly complex, the circular specifies that PREs should, after an initial analysis of the case, relinquish jurisdiction to the so-called *pôles santé publique et environnement* (public health and environment departments or “**PSPE**”) with which they have concurrent jurisdiction<sup>[3]</sup>.

On the civil level, the circular also specifies that PREs have jurisdiction to hear liability actions listed in Article L. 211-20 of the French Code of Judicial Organization, i.e.: actions relating to ecological damage based on Articles 1246 to 1252 of the French Civil Code, civil liability actions under the French Environmental Code as well as those based on special sets of rules resulting from international or European texts and regulations.

From a practical point of view, in order to facilitate the detection of infringement situations and to improve and accelerate the handling of environmental damage, the circular encourages synergies<sup>[4]</sup>.

#### **The adoption of an effective and clear criminal response**

Until the law of December 24, 2020, the effectiveness of the criminal response to serious environmental offences was rather limited.

Indeed, while the French Environmental Code provided for the possibility of a settlement mechanism, such mechanism was only designed to address minor offenses. Under Article L. 173-12 of said Code, the administrative authorities could only propose a settlement for offenses punishable by less than two years’

imprisonment before prosecution was initiated.

For more serious offences, the length of the legal proceedings – which depends in particular on the intrinsic complexity of environmental litigation – – delayed the reparation of the damage.

In his circular, the French Minister of Justice intends to resolve this difficulty by laying down two principles:

- **On the one hand, the restoration of the environment must be systematically sought.**

In this respect, the circular specifies that this restoration cannot be limited to compensation for the economic damage alone, but must necessarily take into account the ecological damage.

To this end, the French Minister of Justice indicates that it can take the form of environmental criminal summary proceedings allowing the Public Prosecutor's Office to request the imposition of temporary/provisional measures to put an end to the offense or to limit its effects. The circular, however, specifies that this restoration must not unduly delay the initiation of proceedings, which would give the wrongdoer more time to comply.

- **On the other hand, prosecution must be systematic.**

The circular makes this principle conditional on situations in which the perpetrator obstructs the action of the public authorities, has committed repeated offenses or is involved in organized crime (personal criterion) and/or when the damage caused or likely to be caused to the environment presents a certain degree of seriousness, in particular with regard to the lasting nature of the damage or the risk caused to the health or safety of peoples.

Regarding specifically legal entities, the French Minister of Justice also clearly encourages the judicial authority to seek their liability.

In this respect, the circular plays on the obligations imposed on companies in terms of corporate social responsibility (CSR) as well as on the impact that such legal proceedings and possible convictions would have on the image and reputation of legal entities to justify this incitement.

The circular specifies that penalties and fines will be requested by the Public Prosecutor's Office in view of the circumstances of the offence, the legal entity's resources and charges and taking into account the economic gain resulting from the non-compliance with environmental requirements. The French Minister of Justice also specifies that additional penalties may also be required (exclusion from public procurement, prohibition from carrying out a business, confiscation, publication of the decision, etc.).

In a particularly interesting way, the circular underlines the case-law principle according to which in "merger by acquisition" transactions (i.e., when a company is merged into another), the acquiring company may now, under certain conditions, be held criminally liable for an offence committed by the acquired company prior to the merger<sup>[5]</sup>. In the end, the French Minister of Justice encourages acquiring companies to carry out real due

diligence, including in environmental matters, and encourages them, if necessary, to “regularize” their situation within the framework of a deferred prosecution agreement in environment matters (*Convention Judiciaire d’Intérêt en matière d’Environnement*, hereinafter “**CJIPE**”).

**Details on the implementation of CJIPEs are awaited**

Inserted in Article 41-1-3 of the French Code of Criminal Procedure and inspired by the deferred prosecution agreement created by the Sapin II Law with respect to probity and the fight against corruption, the CJIPE is intended to allow for the efficient and rapid handling of serious environmental offenses punishable under the French Environmental Code.

The relevance of implementing a CJIPE will depend on the legal entity’s past records, the spontaneous nature of the disclosure of the facts, and the degree of cooperation with a view to regularizing the situation and/or repairing the ecological damage.

It may be implemented as long as the public prosecutor has not initiated prosecution.

When it is decided to use a CJIPE, the latter must include one or several of the following obligations:

- **payment of a public interest fine to the Public Treasury**, the amount of which will be set proportionally with regard to the benefits derived from the breaches found, up to a limit of 30% of the average annual turnover calculated on the basis of the last three annual turnovers known at the date the breaches were identified;
- **The regularization of the situation of the legal entity with regard to the law and regulations within the framework of a compliance program** with a maximum duration of three years, under the control of the competent services of the Ministry of the Environment;
- **Reparation of the ecological damage** within a maximum of three years and under the supervision of said competent services;
- **Compensation of the victim** within a maximum of one year when he or she is identified and unless the legal entity proves that it has already repaired the damage.

When a CJIPE is concluded and approved, it will form the subject of a press release by the Public Prosecutor. The amount of the fine and the agreement, in particular, will be made public on the websites of the Ministries of Justice and of the Environment. At the local level, these elements will also be published on the website of the municipality where the offence was committed.

While the conclusion of a CJIPE appears particularly interesting for the reparation of environmental damage, its implementation nevertheless raises questions.

In our opinion, it presents the same difficulties as those identified in relation to the CJIP specific to anticorruption, insofar as it presupposes a spirit of cooperation but also a minimum of trust among the

corporate officers / managers of the relevant legal entity.

However, insofar as it can only benefit legal entities and since the involvement of corporate officers / managers in establishing these facts could lead to a form of self-incrimination, it cannot be excluded that the latter will oppose the CJIPE.

Under these conditions, it might be desirable, as is the case in anti-corruption matters, that the implicated corporate officers / managers be able to benefit from a procedure for prior recognition of guilt (*comparution sur reconnaissance préalable de culpabilité* - i.e., a guilty plea - or “**CRPC**”).

In addition, it will be essential for the success of this is new instrument that the Public Prosecutor’s Office not be able to use, against the implicated corporate officers / managers before the investigating judge or the trial court, any statements and information obtained in the framework of the CJIPE.

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[1] Circular to consolidate the role of justice in environmental matters dated May 11, 2021 (JUSD2114982C).

[2] Under French law, an *installation classée pour la protection de l’environnement* (ICPE) (literally a classified facility for the protection of the environment) is an industrial or agricultural facility that is likely to present a risk or cause pollution or nuisance, especially for the safety or health of local residents.

[3] PSPEs are located in Paris and Marseille. Their jurisdiction is conditional on the identification of a product or substance which is regulated because of its effects or dangerousness (in particular, chemical pollution, industrial pollution, phytopharmaceutical products, damage to species by contaminants, etc.). They are in particular competent to handle cases of collective accidents occurring on SEVESO-classified industrial sites.

[4] The circular specifies that the environmental criminal investigation police forces in the broad sense, i.e., both the specialized civil servants and agents with criminal investigation prerogatives and some members of the criminal investigation police and gendarmerie services, must be strengthened, made further aware of, and trained in this specific type of litigation. To this end, the French Minister of Justice has announced the creation of environmental criminal investigation officers to be integrated into the French Office for Biodiversity.

[5] In this respect, please see our article entitled [Transfer of criminal liability in merger transactions: A major reversal of case law](#) published on our Blog in February 2021.

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