

## AIJA CONFERENCE 2014 PRAGUE

### QUESTIONNAIRES OF THE COMMISSIONS ANTITRUST, COMMERCIAL FRAUD AND LITIGATION

To: National Reporters of the Commissions Antitrust, Commercial Fraud and Litigation

Cc: Work coordinators Prague (Martine Hoogendoorn, Justus Jansen)

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Subject: Questionnaire: Settle for less...? Or for more! Tips on timing, confidentiality and strategy in (multijurisdictional) settlement arrangements

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### 3- QUESTIONNAIRE FOR CRIMINAL PROCEDURES (ALEXANDER SAUCKEN)

#### 3.1 General issues

3.1.1 Does your jurisdiction provide for settlement procedures with the prosecution authorities and / or the Courts in criminal procedures?

Article 40-1 of the French code of criminal procedure provides the principle of discretionary prosecution given to the public prosecutor. When he considers that facts brought to his attention constitute an offence, the prosecutor can decide either to:

- initiate a prosecution; or
- implement alternative proceedings to a prosecution; or
- close the case without taking any further action.

The Court cannot propose alternative proceedings. The power to implement alternative proceedings belongs to the public prosecutor.

There are different settlement procedures under the French code of criminal procedure:  
- the ending of the case under conditions<sup>1</sup> ("*classement sous conditions*"): the public prosecutor can decide to:

- bring to the attention of the offender the duties imposed by law;
- direct the offender towards a public health, social or professional organization;
- require the offender to regularize his situation under any law or regulation;
- require the offender to compensate for the damage caused by the offence;

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<sup>1</sup> Article 41-1 of the code of criminal procedure

- initiate mediation between the offender and the victim.
  - the conditional suspension of the prosecution (“*composition pénale*”)<sup>2</sup>.

There is also a hybrid form of settlement procedure, namely the guilty plea (“*Comparution sur Reconnaissance Préalable de Culpabilité*” – hereafter “*CRPC*”)<sup>3</sup>.

3.1.2 Are settlement procedures a well-accepted part of criminal procedures in your jurisdiction or are they considered as being critical with regard to the function of a criminal procedure aiming at the "search for the truth".

The settlement procedures are not always well received, especially by the victims, who criticize those procedures.

Because they are not confronted with the offender during settlement procedures, insofar as there is no contradictory debate on public prosecution, victims do not always understand the proposed sanction.

However these settlement procedures have considerable advantages: they allow to set to a criminal closure within a reasonable time and to relieve the courts.

Moreover, the practice shows that these settlement procedures also contribute to decrease the proportion of cases which are closed without taking any further action, responding to a wish of the legislator and of the executive to always have a criminal response when an offence is committed.

3.1.3 Are settlements commonly used in criminal procedures in your jurisdiction?

According to the French Ministry of Justice, 1.379.086 prosecutable cases were identified in 2012<sup>4</sup>.

Among those cases:

- 65.106 have been subject to a plea of guilty (“*CRPC*”);
- 75.493 have been subject to a conditional suspension of the prosecution (“*composition pénale*”);
- 547.678 have been subject to other alternative proceedings to a prosecution.

With regards to those figures, the settlement procedures are commonly used in criminal proceedings. They represent about half of criminal responses. It should be noted that they are increasingly used over the years.

By way of comparison, in 2006, among 1.526.396 prosecutable cases (50.250 guilty pleas (“*CRPC*”) and 468.045 alternative proceedings to a prosecution<sup>5</sup>).

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<sup>2</sup> Articles 41-2 and 41-3 of the code of criminal procedure

<sup>3</sup> Articles 495 and following of the code of criminal procedure

<sup>4</sup> « Les chiffres clés de la justice 2013 », French Ministry of Justice, Division of the statistics and studies, page 14

## 3.2 Procedural issues

### 3.2.1 What are the conditions for settlements in criminal procedures?

The conditions are not the same depending on whether the settlement procedure is an ending of the case under conditions (“*classement sous conditions*”), a conditional suspension of the prosecution (“*composition pénale*”) or a guilty plea (“*CRPC*”).

#### a/ Ending of the case under conditions (“*classement sous conditions*”)<sup>6</sup>

These measures were created to respond to the development of petty crime. There is no legal restriction on the offences and on the maximum penalties to apply those measures, which can concern both natural persons and legal persons.

#### b/ Conditional suspension of the prosecution (“*composition pénale*”)

This alternative proceeding can only be proposed to a person who admits having committed any misdemeanor(s) for which the main penalty is a fine or prison sentence not exceeding five years, as well as, where appropriate, any connected petty offence(s)<sup>7</sup>.

Are excluded press offences, involuntary homicide offences or political offences<sup>8</sup>.

#### c/ Guilty plea (“*CRPC*”)

It can be proposed for all offences, with certain exceptions like voluntary and involuntary offences against the physical integrity of the persons and sexual aggressions punished by a prison sentence exceeding five years<sup>9</sup>. The guilty plea (“*CRPC*”) can concern both natural persons and legal persons.

Moreover, so that a guilty plea (“*CRPC*”) takes place, the offender must admit having committed the offence<sup>10</sup>.

### 3.2.2 Can a settlement be reached at any time of the procedure (investigation and court proceeding) or is this option restricted to a certain stage (e.g. only in the investigative procedure)?

A settlement cannot be reached at any time of the procedure, but only after the police investigation, when the prosecutor decides whether to initiate a prosecution or to implement alternative proceedings to a prosecution or to close the case without taking any further action.

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<sup>5</sup> « Annuaire statistique de la Justice », édition 2011-2012, French Ministry of Justice, Division of the statistics and studies, page 109

<sup>6</sup> Article 41-1 of the code of criminal procedure

<sup>7</sup> Article 41-2 §1 of the code of criminal procedure

<sup>8</sup> Article 41-2 §11 of the code of criminal procedure

<sup>9</sup> Article 495-7 of the code of criminal procedure

<sup>10</sup> Article 495-7 of the code of criminal procedure

Once the case is brought before the Court, a settlement can no longer be proposed.

3.2.3 Which parties of the criminal procedure have to be involved in the settlement discussions?

Several parties of the criminal procedure have to be involved in the settlement procedures:

- The public prosecutor naturally because he is the one who decides to opt for the settlement procedure;
- The offender;
- His lawyer, if any;
- The victim, if any.

However, the victim does not intervene on the public prosecution, but only on the civil interests.

Moreover, it should be noted that in case of guilty plea (“*CRPC*”), the offender has to be assisted by a lawyer<sup>11</sup>. The assistance by a lawyer is also mandatory for the minors in case of conditional suspension of the prosecution<sup>12</sup> (“*composition pénale*”).

3.2.4 Which party can take the initiative for a settlement: The court / the prosecutor / the accused or all of them?

It belongs to the public prosecutor to decide whether the case can be subject to a conditional suspension of the prosecution (“*composition pénale*”) and to an ending of the case under conditions (“*classement sous conditions*”).

It should be noted that there is an exception for the mediation: the victim can ask for a mediation<sup>13</sup>.

Concerning the guilty plea (“*CRPC*”), the public prosecutor may decide to opt for this procedure, either on his own initiative or at the request of the offender or his lawyer<sup>14</sup>.

3.2.5 Please explain the formalities that have to be met for a valid settlement. What are the consequences of a formally invalid settlement?

The ending of the case under conditions (“*classement sous conditions*”) requires the intervention of the public prosecutor alone.

For the conditional suspension of the prosecution (“*composition pénale*”) and the guilty plea (“*CRPC*”), the initiative belongs to the prosecutor, but the decision must be confirmed by the President of the Court, who decides whether or not to valid the

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<sup>11</sup> Article 495-8 § 4 of the code of criminal procedure

<sup>12</sup> Article 7-2 of the Order of 2 February 1945 on juvenile justice

<sup>13</sup> Article 41-5 5° of the code of criminal procedure

<sup>14</sup> Article 495-7 of the code of criminal procedure

proposal of the public prosecutor. When he decides to approve the measure, the President of the Court issues an order.

It should be noted that, when an investigation is being conducted, the identity of the offender and of the victim, if any, will be kept in a file called “*STIC*” (“*Système de Traitement des Infractions Constatées*”), which corresponds to a processing system that registers personal data.

In addition, any conditional suspensions carried out are recorded on the offender’s criminal record (“*bulletin numéro 1 du casier judiciaire*”)<sup>15</sup>.

Similarly, convictions based on a plea of guilty (“*CRPC*”) appear on the offender’s criminal record insofar as “*the order has the effect of conviction judgment*”<sup>16</sup>.

3.2.6 Will the settlement be executed itself or will the settlement results only become part of the final court judgment?

For the ending of the case under conditions (“*classement sous conditions*”), it does not require the intervention of a judge. It is a decision of the prosecutor. If the offender does not execute, the prosecutor can initiate a prosecution.

For the guilty plea (“*CRPC*”), the approval order of the President of the Court is immediately enforceable<sup>17</sup>. It may in all cases be subject to an appeal by the convicted person, within 10 days of the notification<sup>18</sup>. The prosecutor can cross-appeal which will have the effect of allowing the court of appeal to insure the party.

Absent an appeal, the decision has the effect of a final court judgment.

For the conditional suspension of the prosecution (“*composition pénale*”), the President of the Court validates the agreement and the offender cannot appeal<sup>19</sup>.

3.2.7 Is it possible to settle any relevant question or is the settlement procedure restricted to certain questions only (e.g. settlement only with regard to a minimum / maximum sentence; no settlements with regard to the question of guilt)?

It is possible to settle any relevant question.

The ending of the case under conditions (“*classement sous conditions*”) does not require any specific formality.

For the conditional suspension of the prosecution (“*composition pénale*”) and the guilty plea (“*CRPC*”), the admission of guilt is a condition of the applicability of these procedures.

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<sup>15</sup> Article 41-2 § 10 of the code of criminal procedure

<sup>16</sup> Article 495-11 § 2 of the code of criminal procedure

<sup>17</sup> Article 495-11 of the code of criminal procedure.

<sup>18</sup> Article 498 of the code of criminal procedure.

<sup>19</sup> Article 41-2 of the code of criminal procedure

The question of guilt is quickly raised at the beginning of the interview with the prosecutor or with a person who has been delegated. Then the prosecutor proposes a sentence that the defendant negotiates by arguing, accepts or declines.

For the guilty plea (“*CRPC*”), at the hearing before the court, the plaintiffs can make claims for damages and the judge will rule on these requests.

For the conditional suspension of the prosecution (“*composition pénale*”), the plaintiffs can sue the offender before the *Tribunal correctionnel* to claim for damages or asks the execution of the settlement providing for compensation to the victim.

- 3.2 .8 Is it necessary for reaching a settlement to admit being guilty? If so, will the confession remain valid in case the settlement eventually fails?

The admission of guilt is a condition of the settlement.

For the conditional suspension of the prosecution (“*composition pénale*”) and the guilty plea (“*CRPC*”), the defendant has the right to refuse the sentence.

If the latter arises, neither the prosecutor nor the defendant nor the victims, may reveal content of the failed procedure<sup>20</sup>.

### **3.3 Enforcement of settlement**

- 3.3.1 Is the settlement binding for the criminal court or is it possible - and under which conditions – to deviate from the settlement in its final judgment?

For the conditional suspension of the prosecution (“*composition pénale*”), the offender cannot appeal.

For the guilty plea (“*CRPC*”), absent an appeal, there is no way to deviate from the legally valid settlement.

- 3.3.2 Is a settlement / a court decision based on a settlement always subject to appeal or can the parties agree to waive the right of appeal?

The appeal is possible just for the guilty plea (“*CRPC*”) and parties cannot waive the right of appeal.

### **3.4 Confidentiality and privilege**

- 3.4.1 Does the individual / company being damaged by criminal behavior have a right of access to the criminal files in order to gather evidence for potential damage claims?

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<sup>20</sup> Article 495-14 of the code of criminal procedure.

The victim has access to the criminal files in order to gather evidence for potential damage claims. But the victim is not involved in the negotiation phase of the sentence with the prosecutor.

For the guilty plea (“*CRPC*”), the victim is informed of the proceedings and may claim damages before the judge.

If the decision on damages does not suit the victim, the latter can appeal. The appeal will just concern damages and not the sentence.

3. 4. 2 What impact does the criminal court’s decision that the accused is guilty have on potential damage claims? Will a civil court be bound by the criminal court’s decisions and vice versa?

As the accused recognizes his guilt, the damage claims will be accepted. The claim has to be justified by supporting documents and the amount of damages has to reparable the harm but not more than the actual harm to the victim.