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FRENCH ANTI-CORRUPTION LAW

Lessons Learned From the First-Ever French *Convention Judiciaire d'Intérêt Public* Concluded With HSBC

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HSBC seems no stranger to regulatory news in the United States recently. On January 17, 2018, HSBC signed a deferred prosecution agreement (DPA) with the U.S. Department of Justice (DOJ) in connection with a criminal investigation into rigged currency transactions, approximately one month after it finished a five-year DPA with the DOJ in connection with anti-money laundering failures and sanctions violations. Perhaps most notable, however, is a recent agreement reached by the group's Swiss affiliate with French prosecutors.

On October 30, 2017, less than a year after the enactment of France's new anti-corruption law known as Sapin II, which created a new settlement tool for use in connection with certain corporate criminal investigations, HSBC Private Bank Suisse SA (HSBC PRBA) entered into a convention judiciaire d'intérêt public (CJIP), France's first-ever corporate resolution mechanism. In its CJIP, HSBC PRBA agreed to pay a €157,975,422 "public interest fine" (amende d'intérêt public) and €142,024,578 in damages, to resolve a four-year criminal investigation into the bank's assistance in helping French clients conceal their assets from the French tax administration. As described in this article, although questions remain regarding certain CJIP-related provisions of Sapin II, the resolution with HSBC PRBA provides a helpful starting point to assess how such agreements will be structured in light of Sapin II's statutory framework and the procedural requirements of the French legal system.

See "Despite Anemic Prosecutions, France Moves Toward Increased Anti-Corruption Enforcement" (Oct. 26, 2016).

Development and Introduction of the CJIP Into French Law

In December 2016, France introduced sweeping and widely publicized anti-corruption legislation referred to as Sapin II (named after then-Minister of Finance, Michel Sapin).

As one of the principal elements of Sapin II, France created the CJIP as a corporate resolution mechanism between the public prosecutor (procureur de la République) and a company, with the goal of resolving criminal proceedings against a corporate entity without the company being convicted or admitting guilt. The CJIP was heavily debated during the Sapin II legislative process. After having been removed from the draft bill by the French Conseil d'Etat, which opined that this kind of settlement would "prevent justice from fulfilling its mission, which is to help restore public peace and prevent relapse"[1] and despite a fear shared by several legislators that the tool would lead to a "commercialization" of justice, the CJIP was reintroduced and finally adopted.

Two of the driving forces behind its entry into law appear to have been (i) previous criticism by the OECD and other non-governmental organizations that France was not doing enough in terms of anti-corruption enforcement and (ii) increased penalties imposed by foreign authorities, especially the DOJ, on French companies in recent years. Thus, Sapin II was intended to "bring France into line with the highest international standards in the area of transparency and the fight against corruption."[2] One step in doing so was to introduce the CJIP as a mechanism roughly akin to the DPA used in the United States, so that companies could resolve corporate misconduct in a manner that balances (i) the public goal of sanctioning such misconduct with (ii) the company's need for certainty, clarity, and the ability to remain a viable entity.

See "Recordbreaking Alstom Criminal FCPA Settlement Results From Wide-Ranging Bribery Scheme and Lack of Cooperation" (Jan. 7, 2015).

Mechanisms of a CJIP

Scope of Offenses Covered

Pursuant to Article 41-1-2 of the French Code of Criminal Procedure, a CJIP can be used to address a limited number of offenses: corruption, influence peddling, laundering of the proceeds of tax fraud offenses and offenses "connected" to the aforementioned offenses.[3] Under French law, offenses are deemed to be "connected" when the guilty party commits a specific offense to obtain the means to commit another offense.[4]

In HSBC PRBA's situation, the "connected offense" extension was applied. HSBC PRBA had been indicted[5] for:

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(i) unlawful banking and financial solicitation of prospective French clients committed by unauthorized persons; and

(ii) laundering the proceeds of tax evasion, the latter offense being explicitly eligible for the CJIP and the former offense being considered "connected" to the latter.

However, it is yet to be determined how French prosecutors will handle situations where a defendant is charged with both an offense for which a CJIP may be used and an offense that does not qualify as being "connected to" the CJIP offense.[6]

Offer to Resolve the Case Through a CJIP

Pursuant to Sapin II, the decision to enter into negotiations for the purpose of agreeing to a CJIP lies only with the prosecutor. Nonetheless, it appears that in practice, such an option might also be suggested by the implicated company even though the decision will ultimately rest with the government. This is demonstrated by statements made by the judge in connection with the HSBC PRBA CJIP, which noted that the CJIP resulted from HSBC PRBA's counsel's "clear and unequivocal" request to enter into negotiations with the prosecutor.[7]

Review and Approval Process

Pursuant to Sapin II, a CJIP must be validated by a judge who confirms its legality during a public hearing. The company maintains the right to withdraw from the settlement within 10 days of the judge's acceptance. Once the CJIP becomes effective, the company is required to comply with the obligations set forth in the agreement. Should the company fail to do so, the criminal proceedings can be re-opened.

In the HSBC PRBA settlement, the judge noted that the CJIP sufficiently described:

(i) the summary of the investigation;

(ii) the amount of French assets managed by HSBC PRBA in 2006 and 2007; and

(iii) the fine calculation based on the applicable legal requirements.

In his validation order, the judge also noted that during the public hearing, HSBC PRBA, the prosecutor and the victim each helped establish the CJIP's merits by respectively:

(i) confirming the acknowledgement of the facts and presenting the preventive measures implemented;

(ii) explaining why the CJIP resolution is suitable to the HSBC PRBA case and how the fine was calculated so that it would not exceed the legal ceiling; and

(iii) providing details on the damages.

Following the court's approval, the criminal prosecution against HSBC PRBA was formally terminated on November 28, 2017, when the bank complied with the requirements set forth in the CJIP to pay €300 million (covering the fine and the damages) to the French Ministry of Finance within a 10-day period following HSBC PRBA's execution of the settlement agreement.

The HSBC PRBA resolution illustrates one notable difference between a CJIP and a DPA in the United States. Whereas DPAs systematically defer prosecution for a certain period of time pending satisfactory conclusion of whatever terms the DPA sets forth, proceedings against a company entering into a CJIP are formally terminated on the date on which its obligations are met. When obligations are imposed that can last several years (like the imposition of a compliance program), a CJIP is more akin to a U.S.-style DPA; as was the case with HSBC PRBA, however, the conditions of certain CJIPs (such as the payment of financial obligations) can be satisfied in a period of days.

See "Comparing and Contrasting Three FCPA Experts' Advice on Negotiating FCPA Settlements" (Aug. 20, 2014).

Legal Implications of Entering Into a CJIP

Concluding a CJIP Under Indictment Means an Admission of Wrongdoing

Although CJIPs must always include a statement of facts as well as the legal significance of such facts, the extent to which the company must acknowledge such elements differs depending on the stage to which the prosecution has advanced when the CJIP is entered.

The law does not require a company that has not been formally charged (in French, "avant mise en movement de l'action publique") to take a position as to whether it acknowledges facts that have given rise to the prosecution and/or their legal significance. It is reasonable to assume that the way facts will be presented within the CJIP will be subject to negotiations between the prosecutor and the company, and that the latter will refuse to accept a CJIP referring to facts and/or offenses that it challenges. By contrast, if a company is indicted (in French, "mise en examen"),[8] Sapin II requires that it acknowledge the facts and accept their legal significance in order to receive a CJIP.

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What is not provided by the law, but was nonetheless included in HSBC PRBA's CJIP, is an explicit mention of the company's concession of the legal significance of the acknowledged facts. Even though such a concession can be easily inferred from the description of the company's prosecution status, the fact that it will end up being explicitly mentioned in the public CJIP document should be part of the calculus companies must consider if they are offered the opportunity to conclude a CJIP. All the more because pursuant to Sapin II, CJIPs will be systematically published on the French anti-corruption agency website and available to the public.

Negotiation of the CJIP and Confidentiality

To the extent that negotiation of a CJIP breaks down and a prosecution resumes, the possibility for the prosecutor to use information provided by the company in the context of such negotiations may vary based on the reason why prosecution was resumed. If this results from (i) the judge's rejection of the CJIP or (ii) the company's use of its statutory right to opt-out of the deal within 10 days of the judge's acceptance (see above), Sapin II explicitly provides that the prosecutor cannot use the statements made and the documents provided by the company in the course of the CJIP negotiations in support of its case before an investigative magistrate and/or the court.

By contrast, the law does not guarantee confidentiality in the situation where the prosecution resumes because the company failed to comply with the requirements imposed by the CJIP. While it is possible to infer from such silence that the prosecutor will be able to use information provided by the company in the context of a CJIP proceeding if the company fails to comply with the terms of the CJIP, it is regrettable that the law did not explicitly clarify this possible aftereffect. It is also unfortunate that the prosecutor did not take the occasion of this first CJIP to shed light on the consequences of a breach of the terms of the agreement by companies.

Financial Consequences of Entering Into a CJIP

Under Article 41-1-2 of the French Code of Criminal Procedure, the maximum amount of a public interest fine is capped at the average of 30 percent of the average of the company's revenues over the last three years. The amount of the public interest fine is to be established in proportion to "the advantages" (i.e., the ill-gotten gains) derived from the offenses. Apart from these requirements, no details are provided by law as to what considerations may be taken into account that would cause a prosecutor to increase or decrease the amount of the public interest fine demanded. The first CJIP with HSBC PRBA provides some hints (but not full clarity) on this issue.

The Components of the Public Interest Fine

By indicating that the public interest fine is to be established in proportion to the improper advantages gained, Article 41-1-2 of the French Code of Criminal Procedure suggests that only a portion of such advantages will be included within the public interest fine component. The HSBC PRBA CJIP illustrates, however, that the entirety of the ill-gotten gains at issue may be included in the public interest fine. After valuing its illicit profit at €86,400,000, the prosecutor included the entire amount as part of the public interest fine of €157,975,422.

The HSBC PRBA CJIP illustrates that other elements may also be factored into the public interest fine and lead the authorities to impose additional financial penalties. In the case of HSBC PRBA, such additional penalties amounted to €71,575,422 (€157,975,422 minus €86,400,000), and were aimed at sanctioning the "seriousness of the facts (. . .) as well as their continuing nature," and (potentially) the company's behavior during the proceedings. With respect to the seriousness of the facts cited by the authorities, such gravity was derived from the circumstances surrounding the conduct, notably (i) the "organized" nature of money-laundering as well as (ii) the offense's "continuing" nature.[9]

Lack of Clarity as to How the Fine is Calculated

The HSBC PRBA CJIP does not disclose any arithmetic formula used to calculate the amount of the disgorgement, nor do the figures referred to in the CJIP provide clarity as to how the amount of the disgorgement was calculated by the authorities. In fact, noting that HSBC PRBA earned €401.9 million in profits out of its management of a total of €112 billion assets in 2007, the prosecutor observed that the overall amount of the French assets in HSBC PRBA's financials was valued at €6 billion and deduced that "the profit resulting from the management of the overall assets of French tax payers is valued for the purposes of the present Convention judiciaire d'intérêt public at €86,400,000 for the years 2006 to 2009." Despite noting these amounts, it is unclear from the CJIP how exactly the disgorgement amount was derived. One could presume, however, that – like the other components of the CJIP – the methodology for calculating disgorgement and what constituted ill-gotten gains was the subject of discussion and negotiation between the parties

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The Implications of the Legal Public Interest Fine Ceiling Amount

In HSBC PRBA's situation, the inclusion of the full disgorgement amount and an additional penalty helped the authorities reach the maximum public interest fine allowed under Sapin II, which is capped at 30 percent of the average of the company's last three annual turnovers.

It is yet to be known how the authorities will handle situations if the disgorgement amount alone is equivalent to the 30 percent limit: will the company's cooperation – if positively taken into account – reduce the disgorgement amount used by the authorities (as opposed to the amount of the penalty) or will the authorities refrain from offering a CJIP if they are not able to impose a penalty even though aggravating factors exist? The inclusion of disgorgement in the public interest fine component could result in a paradoxical situation where a company that made substantial illicit profits avoids an additional penalty because imposing such a penalty would make the public interest fine component greater than the 30 percent yearly revenue threshold established by French law. Such a result would seem contrary to the public interest in seeking to impose penalties based on the gravity of the offenses.

Compensation for the Victim's Loss

In addition to the public interest fine, HSBC PRBA had to pay for the loss caused to the French State, which was assessed at €142,024,578. Once again, the CJIP is not explicit on how authorities evaluated the amount of the loss suffered by the taxing authority, and the basis to come up with such an amount. In cases involving non-State victims, it will be interesting to see if future CJIPs will be more detailed with regards to the calculation of damages granted to such victims.

Practical Takeaways

The Absence of the Imposition of a Compliance Program

While some commentators noted that the CJIP did not require HSBC PRBA to implement an effective compliance program under the supervision of the new French Anti-corruption Agency (Agence française anticorruption or AFA), this likely results from the fact that this CJIP was concluded for offenses related to the laundering of tax evasion profits, activities which neither fall within the competences of the AFA nor are the primary focus of Sapin II-required compliance programs.

Nonetheless, the CJIP refers to HSBC PRBA's poor internal control systems at the time of the offenses and improvements made to such controls since 2011 (it being noted that the investigation started in 2013). Although the primary focus of Sapin II compliance programs is on preventing and detecting corruption (as opposed to tax offenses), prosecutors may have made explicit reference to HSBC PRBA's compliance program improvements as a means of demonstrating that this is an element they will evaluate in all matters subject to a CJIP, even if the nature of the underlying offense is not related to corruption.

Cooperation Credit?

In the absence of a statutory requirement (or publicly available enforcement guideline) for prosecutors to assess cooperation in the negotiation of a CJIP, it was unclear whether cooperation would be taken into account in the determination of the amount of the fine. The HSBC PRBA CJIP shows that cooperation, and potentially self-disclosure, do matter. Indeed, the settlement refers to the fact that the bank "neither voluntarily disclosed the facts to the French criminal authorities, nor acknowledged its criminal liability during the course of the investigation" and "only offered minimal cooperation in the investigation."

Lack of cooperation during the proceedings might thus contribute to the imposition of a substantial penalty. That being said, it is not yet possible to assess whether, on the contrary, voluntary disclosure and complete cooperation would contribute to the reduction of the fine, as is the case in negotiating a DPA in the U.S. However, the HSBC PRBA CJIP also noted that from the time the investigation was launched until December 2016 when Sapin II came into force, the French legal system did not provide for a legal mechanism that encouraged full cooperation. By including such a statement within the CJIP, prosecutors may have been signaling that a company's cooperation will be a factor in future CJIPs.

See "DOJ's FCPA Corporate Enforcement Policy: What's New and What's Not (Part One of Two)" (Jan. 10, 2018).

Conclusion

As with any new and significant legal development, jurisprudence and best practices surrounding CJIPs will play out in France over the years to come, and the extent to which the HSBC PRBA CJIP heralds a new era of enforcement (and, more specifically, anti-corruption enforcement), remains to be seen. Nonetheless, by concluding the first-ever CJIP within

a year of having the legal basis for doing so through Sapin II, French prosecutors have crossed a significant threshold and appear to signal their willingness to use the prosecutorial tools at their disposal to hold companies subject to French jurisdiction accountable in a way not possible in the past.

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[1] Conseil d'Etat, avis, 24 mars 2016, n° 391262. The settlement mechanism as originally proposed was later modified during the parliamentary discussion to become CJIP as enacted.

[2] "Sapin II Law: transparency, the fight against corruption, modernization of the economy," April 6, 2016.

[3] Except for tax evasion.

[4] Article 203 of the French Code of Criminal Procedure.

[5] Under French criminal law, if a formal investigation (instruction) has proceeded to a point where the investigative magistrate considers that there are serious and consistent indications that the suspect participated in the alleged infraction, the suspect is summoned before the magistrate and formally indicted. At that stage of the process, the suspect is formally charged (mise en examen) with a view to prosecution but also benefits from stronger procedural rights, such as the right to have access to the file through his/her/its lawyer.

[6] For instance, in the HSBC case, although the bank was indicted for the two aforementioned offenses only, the investigation initially also covered the laundering of proceeds of unlawful banking and financial solicitation committed by unauthorized persons, which does not fall within the CJIP's direct scope and might not be considered a connected offense to one of the offenses that are eligible for a CJIP resolution. Given that the indictment occurred in 2014, before the adoption of Sapin II and the introduction of the CJIP tool, it appears that the third charge was abandoned without considering the implications for a CJIP resolution.

[7] See HSBC's CJIP validating order rendered on November 14, 2017.

[8] See footnote 5 above.

[9] Which are aggravating factors pursuant to Article 324-2 of the French Penal Code.