Client Update
France Announces First-Ever Deferred Prosecution Agreement

THE HSBC CASE

The French National Financial Prosecutor's office (*Parquet National Financier*) recently entered into its first deferred prosecution agreement ("DPA") with HSBC Private Bank Swiss (the "Bank"). This agreement resolved a criminal investigation opened in 2009 following the public disclosure of documents by a former Bank employee. As reflected in these documents, the Bank offered wealthy French individuals ways to hide their assets from French tax authorities.

In 2014, the Bank and its ultimate parent, HSBC Holdings PLC, were formally named as targets of a criminal investigation for offenses including aggravated laundering of the proceeds of tax fraud. The Bank's parent was ordered to post a €1 billion bond, an unprecedented amount in French criminal proceedings (later reduced to €100 million by a Paris court).

STATUTORY BACKGROUND: THE 2016 "SAPIN II" LAW

As the case against the Bank was progressing, in December 2016, France adopted the so-called Sapin II Law. This legislation was intended to assist the prosecution of financial crimes. It also sought to address, at least in part, the international perception that France was not doing enough in the area of anti-corruption enforcement. That perception contributed to foreign prosecutions of French-based companies (mainly by the U.S. Department of Justice), in part based on the absence of effective prosecution in France.

For the first time, this law enabled corporations - but not individuals - to enter into deals with prosecutors to resolve cases on agreed-upon terms without a trial or judgment of conviction. Under this law, depending on the stage of the proceedings, the defendant may or may not be required to admit certain facts in the agreement (the sooner the parties agree on a deal, the lighter the requirement). This sort of deal is called a Judicial Agreement in the Public Interest, or CJIP (*Convention Judiciaire d'Intérêt Public*).

A CJIP is available to resolve allegations of corruption, influence peddling, laundering of the proceeds of tax fraud, and "associated offences." This mechanism permits a public prosecutor to propose an agreement whereby the defendant-corporation agrees to pay a fine that may be as high as 30% of its average annual turnover over the previous three years. Where victims exist, the CJIP must also provide for their compensation. In the specific context of corruption and influence peddling, the corporation may also be required to agree to an enhanced compliance program under the supervision of the French Anti-corruption Agency for a maximum 3-year period.

Unlike a U.S. DPA, but similar to its U.K. counterpart, a CJIP can be finalized only following approval by a judge at a public hearing where the judge verifies that the statutory requirements for entering into a CJIP have been met. If the judge approves the CJIP, the approval order does not have the effect of a conviction. If the corporation complies with the CJIP, the charges are dismissed, protecting the corporation against further prosecution in France.

If the judge rejects the CJIP, or if the corporation uses the statutory right to reconsider and opts-out of the deal, the criminal investigation resumes. In that case, the prosecutor has no right to use facts or documents submitted by the corporation during the negotiations. In contrast, if the deal fails because the corporation does not comply with the CJIP, then the criminal investigation resumes with the prosecutor having the right to use those facts and documents.

HSBC'S CJIP

The Bank agreed to pay a €158 million fine, which was the maximum provided for by the law (*i.e.*, 30% of the Bank's average annual turnover over the previous three years). This fine is comprised of (i) €86,4 million relating to illegal profits made by the Bank, and (ii) €71,6 million "additional penalty" due to the exceptional nature of the facts, their recurrent nature over several years and the fact that the Bank did not cooperate fully with French authorities during the investigation.

The Bank also agreed to pay €142 million to be returned to French tax authorities as compensation for their damages related to the laundering of the proceeds of tax fraud.

Since this CJIP was agreed upon at a relatively late stage of the proceedings, there was a statutory requirement that the Bank admit certain facts that had given rise to prosecution. This, however, did not amount to a legal admission of guilt. It is likely that candidates for future CJIPs will see the incentive of working out deals at earlier stages of the proceedings, so they do not have to admit to any specific facts.

In the same criminal case, charges against HSBC Holdings PLC were dismissed. However, the CJIP includes admissions on behalf of HSBC Holdings PLC that its compliance program at the

relevant time was insufficient and that it had not exercised sufficient supervision over its subsidiaries. Two former directors of the Bank are being sent to trial.

THE TAKE AWAY

Positive Aspects

It is encouraging to see the CJIP system put in place by the Sapin II Law actually work in practice, particularly given skepticism that some commentators expressed when this new law came into effect. Significantly, representatives of the French National Financial Prosecutor's office recently stated they intend to use the CJIP as frequently as possible rather than engage in lengthy and unpredictable criminal court proceedings.

Outstanding Questions

This first use of the CJIP leaves open important questions for anyone considering this option for resolving existing proceedings or yet unreported facts that may give rise to prosecution. In particular:

- *To what extent does self-reporting or cooperation pays off in France?* The CJIP states that the Bank did not fully cooperate because it did not self-report the facts to the French authorities. This raises the question of the incentive a corporation would have to self-report potential or existing wrongdoing to French authorities rather than adopt a "wait and see" approach. Unlike in the U.S.,[1] no regulation or official guidelines encourage a corporation's voluntary self-reporting and full cooperation with the French authorities. However, the Bank's resolution illustrates that the absence of such self-reporting may result in a higher fine.
- *How to treat individual co-defendants?* It remains to be seen how a company's admission in a CJIP may impact individuals under investigation for related conduct.
- *Impact on cross-border investigations?* Another question that may arise in future cases is whether foreign prosecutors, especially in the U.S. and U.K. will consider a CJIP reached in France as sufficient to preclude or obviate "me too" proceedings. While each such case will depend on its unique facts, the size of the fine in the HSBC case suggests that the French National Financial Prosecutor's office intends to put itself in a position to argue to its international counterparts that the French system works well and that it will apply French criminal laws to French corporations without needing parallel foreign enforcement.

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Please do not hesitate to contact us with any questions.

[1] See our Client Update of November 30, 2017, "DOJ Announces a Revised FCPA Corporate Enforcement Policy."

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