

FCPA Update

A Global Anti-Corruption Newsletter



Also in this issue:

9 France Announces its
First DPA with HSBC
Private Bank Swiss

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U.S. Department of Justice Announces a Revised FCPA Corporate Enforcement Policy

On November 29, 2017, the U.S. Department of Justice (“DOJ”) announced a revised Policy on Corporate Enforcement of the Foreign Corrupt Practices Act (“FCPA”). The revised Policy – now memorialized in the United States Attorneys’ Manual¹ – closely tracks the DOJ’s April 2016 Pilot Program,² including the incentives for self-disclosure and cooperation with DOJ’s investigations.

Most significantly, the Policy introduces a presumption that DOJ will offer declinations (albeit with mandatory disgorgement) to companies that self-disclose, fully cooperate, and timely and appropriately remediate the underlying issues.

[Continued on page 2](#)

1. United States Department of Justice, “United States Attorneys’ Manual” § 9-47.120, <https://www.justice.gov/criminal-fraud/file/838416/download> [hereinafter “United States Attorneys’ Manual”].
2. United States Department of Justice, “The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance,” (Apr. 5, 2016), <https://www.justice.gov/archives/opa/blog-entry/file/838386/download> [hereinafter “Pilot Program”].

U.S. Department of
Justice Announces a
Revised FCPA Corporate
Enforcement Policy
Continued from page 1

According to the Policy, this presumption will be operative absent certain aggravating circumstances, including involvement by executive management in the misconduct, a significant profit obtained from the misconduct, and pervasiveness of the misconduct within the company. Recidivists are ineligible for the program. The Policy also explicitly requires a company to prevent employees from using self-destructing software in order to obtain remediation credit.

Although the Policy provides welcome guidance and greater certainty about how DOJ will reward self-disclosure, it will be important to monitor carefully how DOJ actually applies this presumption of a declination and the extent to which the presumption ultimately trumps aggravating circumstances. The Policy likely improves predictability of outcome when reporting smaller matters to DOJ, but without materially changing the self-reporting calculus as to more significant matters. For issuers of U.S. securities, the likelihood of a parallel investigation by the U.S. Securities and Exchange Commission (“SEC”) persists. Additionally, with enhanced anti-corruption enforcement worldwide, companies must consider how such declinations by DOJ may trigger or influence anti-corruption investigations abroad, especially given the extent of international coordination and cooperation.

Self-Disclosure Incentives

Under the new Policy, even where a declination is not appropriate, DOJ will recommend a reduction of 50% off the low end of the U.S. Sentencing Guidelines’ fine range for companies that voluntarily self-disclose, fully cooperate, and remediate. This is slightly different than the Pilot Program, which gave DOJ staff greater discretion, since it provided for “*up to*” a 50% reduction.

DOJ also will generally not require appointment of a monitor for a self-disclosing and cooperating company, as long as the company, at the time of resolution, has implemented an effective compliance program. The Policy makes clear that neither a declination nor a 50% discount will be available to repeat offenders.

Consistent with DOJ’s prior positions, it is not enough for a company merely to inform DOJ of misconduct to obtain self-reporting credit. Rather, for companies to receive credit, self-disclosure has to be voluntary and must: (i) occur “prior to an imminent threat of disclosure or government investigation;” (ii) be made “within a reasonably prompt time after becoming aware of the offense,” with the burden being on the company to demonstrate timeliness; and (iii) involve disclosure of “all relevant facts,” including about all individuals involved in the potential violation.

Continued on page 3

U.S. Department of
Justice Announces a
Revised FCPA Corporate
Enforcement Policy
Continued from page 2

The Policy states unequivocally that any company receiving a declination under the Policy must pay all disgorgement, forfeiture, or restitution resulting from the misconduct. This may be through a parallel SEC action or separately. Significantly, this indicates that the “declination with disgorgement” resolutions introduced with the Pilot Program are here to stay.

A review of resolutions under the Pilot Program shows results strikingly similar to what the new Policy proposes. For example, of the eight companies that received full credit for voluntarily self-disclosing, fully cooperating, and appropriately remediating under the Pilot Program, all but one received declinations. More specifically:

- Three were credited with disgorgement already imposed by the SEC.
- Four were required to disgorge to the DOJ itself, as there was no SEC resolution.
- The final company received a 50% reduction off the bottom of the Guidelines’ fine range instead of a declination, a resolution consistent with the new Policy given that the company had several aggravating circumstances – including high-level failure to act, geographic pervasiveness over a decade, and significant profits from the wrongdoing – that DOJ concluded warranted a criminal resolution.³

“Most significantly, the Policy introduces a presumption that DOJ will offer declinations (albeit with mandatory disgorgement) to companies that self-disclose, fully cooperate, and timely and appropriately remediate the underlying issues.”

Similarly, all the companies that did not self-disclose, but still fully cooperated and remediated under the Pilot Program, received 25% reductions off the bottom of the Guidelines fine range, though in some cases corporate affiliates took guilty pleas.

One issue not addressed under the new Policy is *partial* credit. Under the Pilot Program, partial credit – in the form of reductions between 15% and 30% off the bottom of the Guidelines range – was given where there was partial fulfillment of

Continued on page 4

3. See United States Department of Justice, Press Release No. 16-1522, “General Cable Corporation Agrees to Pay \$20 Million Penalty for Foreign Bribery Schemes in Asia and Africa,” (Dec. 29, 2016), <https://www.justice.gov/opa/pr/general-cable-corporation-agrees-pay-20-million-penalty-foreign-bribery-schemes-asia-and>.

U.S. Department of
Justice Announces a
Revised FCPA Corporate
Enforcement Policy
Continued from page 3

each of self-reporting, cooperation and remediation.⁴ DOJ's new Policy calls for "full credit for timely and appropriate remediation" and credit for "full cooperation," but is silent on whether partial credit is still available.⁵ The extent to which partial credit will be given in practice (if at all) remains to be seen and likely will become clearer when a number of anticipated settlements are made public at the end of this year or the beginning of next.

Self-Destructing Apps and Services

In order to receive full credit for timely and appropriate remediation under the new Policy, the company must "prohibit the improper destruction or deletion" of business records.⁶ The Policy explicitly specifies that this includes "prohibiting employees from using software that generates but does not appropriately retain business records or communications"⁷ in an apparent effort to ensure that company employees are not using internal or external messaging or email apps and platforms that offer self-deleting capabilities (e.g., Snapchat, Telegram, or Whatsapp) to discuss company-related business. Such apps and services can thwart evidence-retention by either fully encrypting data (i.e., making it inaccessible to the government) or by not storing the data at all (i.e., allowing it to self-destruct).

Although this is the first time that DOJ has explicitly addressed the issue of self-destructing apps in the FCPA area, the prohibition is consistent with DOJ's stepped up efforts to address the difficulties posed by self-destructing software and encryption. Deputy Attorney General Rod J. Rosenstein recently commented that "[t]he advent of 'warrant-proof encryption,'" designed specifically with "no means of lawful access" and incorporated in mass-market products and services, "is a serious problem."⁸

As reflected in the Policy, DOJ's approach to such apps places companies in a challenging position. Many companies have been slow to address their employees' use of text messaging and similar apps. The use of such applications often is not contemplated or addressed by companies' compliance or document retention policies.

Continued on page 5

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4. See, e.g., United States Department of Justice, Press Release No. 16-1522, "Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than \$283 Million to Resolve Foreign Corrupt Practices Act Charges," (Dec. 22, 2016), <https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt> (giving Teva credit for remediation and partial cooperation, and 20% off bottom of Guidelines range); In re BK Medical ApS, Non-Prosecution Agreement (June 21, 2016), <https://www.justice.gov/criminal-fraud/file/869661/download> (giving Analogic 30% discount for self-reporting and remediation, but not full cooperation). The SEC, too, has distinguished between cooperation credit and *significant* cooperation credit in determining appropriate resolutions. See Andrew Ceresney, Former Director of the SEC's Division of Enforcement, Keynote Address at the ACI's 33rd International Conference on the FCPA (Nov. 30, 2016), <https://www.sec.gov/news/speech/speech-ceresney-113016.html>.
 5. United States Attorneys' Manual § 9-47.120(3)(c) (emphasis added).
 6. *Id.*
 7. *Id.*
 8. Deputy Attorney General Rod J. Rosenstein, Remarks on Encryption at the United States Naval Academy, (Oct. 10, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-encryption-united-states-naval>.

U.S. Department of
Justice Announces a
Revised FCPA Corporate
Enforcement Policy
Continued from page 4

De-Confliction Implications At Home and Abroad

To receive credit for full cooperation under the new Policy, a company also must, upon request, “de-conflict” witness interviews and other internal investigative steps.⁹ Under “de-confliction,” DOJ asks a company to defer taking certain investigative steps to allow the DOJ to act first (e.g., be the first to interview a witness).

The Pilot Program first raised the issue of de-confliction, but did not provide much guidance. It simply stated that one requirement for a company to receive full credit for cooperation was “[w]here requested, de-confliction of an internal investigation with the government investigation.”¹⁰ The new Policy clarifies that DOJ’s de-confliction requests will be:

made for a limited period of time and will be narrowly tailored to a legitimate investigative purpose (e.g., to prevent the impeding of a specified aspect of the Department’s investigation). Once the justification dissipates, the Department will notify the company that the Department is lifting its request.¹¹

Full cooperation credit under the new Policy, as under the Pilot Program, requires a company conducting an internal investigation concurrently with a government investigation to not only, where requested, make company officers and employees available for DOJ interviews, but to give the first opportunity to interview these individuals to DOJ where DOJ has requested such deference.¹²

Although some U.S. practitioners expressed concern when DOJ first began requiring “de-confliction,” it is worth noting that the United States is still often less restrictive in this regard than countries in Europe, as discussed below.

United Kingdom

The U.K.’s Serious Fraud Office (“SFO”) places a high level of emphasis on the importance of witnesses’ first accounts.¹³ The SFO will consider that a company has shown a particularly high level of cooperation if it will delay its own interviews to allow the SFO to secure the first account itself.¹⁴ If the company has already carried out witness interviews, the SFO generally will expect the company to produce

Continued on page 6

9. United States Attorneys’ Manual § 9-47.120(3)(b).

10. Pilot Program at A.2.

11. United States Attorneys’ Manual § 9-47.120(4).

12. *Id.* at § 9-47.120(3)(b); Pilot Program at 5, §A.2.

13. Ben Morgan, Former Joint Head of Bribery and Corruption, Address at a Bird and Bird Seminar: “DPAs and the UK Aerospace and Defence Industry,” (July 1, 2014), <https://www.sfo.gov.uk/2014/07/01/deferred-prosecution-agreements-what-do-we-know-so-far/>.

14. See *Serious Fraud Office v. Rolls-Royce Plc*, 2017 WL 00219524, at ¶ 20(i).

U.S. Department of
Justice Announces a
Revised FCPA Corporate
Enforcement Policy
Continued from page 5

accurate, contemporaneous notes of those interviews,¹⁵ although it is possible to achieve a DPA by providing only summaries of the interviews.¹⁶ The importance placed on first accounts is consistent with the SFO's view that the "crime scene can be churned up" by internal investigations carried out by external counsel.¹⁷

Germany

In Germany, the concept of receiving a reduced penalty in return for assisting the public prosecutor with a public investigation does not form part of statutory law. In particular, there is nothing like the new DOJ Policy setting forth structured principles and rewards for certain forms of cooperation by defendants. A German prosecutor cannot issue directions or provide expectations of certain cooperation by a company. However, cooperation generally with a public investigation is considered positively as "behavior after the deed" and may have a mitigating effect in the judge's exercise of discretion in setting a penalty against the company. Within this framework, complying with a prosecutor's request to give it a first opportunity to interview key witnesses is one element of effective cooperation. And in a few cases, prosecutors in Germany have issued successfully such a request even though there is no legal requirement to comply.

France

In France, no regulation or guideline provides official support for a corporation's voluntary self-reporting and full cooperation with the French authorities,¹⁸ though a recent decision by the Paris Court approving the first "French DPA" suggests in the future that cooperation may be taken into account.¹⁹

For the moment, cooperation of the sort incentivized under DOJ's Policy is not an element of France's anti-corruption law.²⁰ Before an official criminal investigation begins, the company may meet with witnesses when conducting an

Continued on page 7

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15. See *supra* note 13.
 16. See *Serious Fraud Office v. Standard Bank Plc*, [2016] Lloyd's Rep F.C. 102, ¶ 30.
 17. Harry Wilson, *Fraud Office Attacks Flawed Crime Reports*, SUNDAY TIMES (Aug. 27, 2014), <https://www.thetimes.co.uk/article/fraud-office-attacks-flawed-crime-reports-jj6x827q5c6> (interviewing SFO Director, Sir David Green).
 18. Client Update, "France Announces First-Ever Deferred Prosecution Agreement," (Dec. 11, 2017), https://www.debevoise.com/~media/files/insights/publications/2017/12/20171211%20france_announces_firstever_deferred_prosecution_agreement.pdf; see also Antoine Kirry, Frederick T. Davis, and Alexandre Bisch, "France Announces its First DPA with HSBC Private Bank Swiss" FCPA Update Vol. 9, No. 5 (Dec. 2017), *infra*.
 19. See Antoine Kirry, Frederick T. Davis, and Alexandre Bisch, "France Announces its First DPA with HSBC Private Bank Swiss" FCPA Update Vol. 9, No. 5 (Dec. 2017), *infra*.
 20. Frederick T. Davis, "France's New Anticorruption Law—What Does it Change?" The Global Anticorruption Blog (Mar 2, 2017), <https://globalanticorruptionblog.com/2017/03/02/frances-new-anticorruption-law-what-does-it-change/#more-8094>; see also Client Update, "France Announces First-Ever Deferred Prosecution Agreement" (Dec. 11, 2017), https://www.debevoise.com/~media/files/insights/publications/2017/12/20171211%20france_announces_firstever_deferred_prosecution_agreement.pdf.

U.S. Department of
Justice Announces a
Revised FCPA Corporate
Enforcement Policy
Continued from page 6

internal investigation. In September 2016, the Paris Bar issued guidelines indicating that attorneys can conduct such investigations, subject to professional rules concerning their conduct, and that doing so is covered by the *secret professionnel*, the rough equivalent of the attorney-client privilege. The *secret professionnel*, however, prohibits members of a French Bar from sharing the results of their internal investigation with a third party, even with client approval, though the client can do so.²¹

Once a formal criminal investigation begins in France, it is unlikely that a lawyer will meet with witnesses. Traditionally, “any contact with a potential witness by a target or potential target (or counsel) . . . will almost inevitably be viewed as an attempt to influence that person’s testimony.”²²

“To receive credit for full cooperation under the new Policy, a company also must, upon request, ‘de-conflict’ witness interviews and other internal investigative steps. Under ‘de-confliction,’ DOJ asks a company to defer taking certain investigative steps to allow the DOJ to act first . . .”

Implications of the Policy for Future FCPA Enforcement

The new Policy takes the Pilot Program’s attempt to incentivize self-disclosure one step further by more clearly delineating the benefits of self-reporting and creating the presumption of a declination for such companies barring aggravating factors. As discussed above, de-confliction may play a larger role in earning cooperation credit, and evidence-retention policies likely will be more closely examined in awarding remediation credit. Both of these developments and the formal introduction of presumed declinations highlight an increased emphasis on the actions of the individuals within companies.²³

Continued on page 8

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21. Antoine Kirry & Frederick T. Davis, *France*, in *THE INTERNATIONAL INVESTIGATIONS REVIEW* 119, 127 (Nicolas Bourtin ed., 2016), <https://www.debevoise.com/insights/publications/2016/09/the-intern-investigate-review-edition>.
 22. *Id.* at 122. Where an investigating magistrate is appointed to lead the criminal investigation – which is normally the case in corruption cases – he or she is the one conducting an impartial investigation in search of incriminating and exculpatory evidence in order to establish the truth. *Id.*
 23. See, e.g., Deputy Attorney General Rod J. Rosenstein, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act, (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign> (noting that “[i]t makes sense to treat corporations differently than individuals, because corporate liability is vicarious; it is only derivative of individual liability.”).

**U.S. Department of
Justice Announces a
Revised FCPA Corporate
Enforcement Policy**
Continued from page 7

The inclusion of the revised Policy in the U.S. Attorneys' Manual highlights an effort to "strike the balance in favor of greater clarity about [DOJ's] decision-making process" and undoubtedly brings some added comfort that the Policy will be implemented more consistently across DOJ.²⁴ How the policy plays out in practice should become apparent soon. DOJ announced that the new Policy is immediately in effect, and a handful of cases traditionally has come out right before year's end.

Kara Brockmeyer

Andrew M. Levine

Andreas A. Glimenakis

Ryan M. Kusmin

Jil Simon

Kara Brockmeyer is a partner in the Washington, D.C. office. Andrew M. Levine is a partner in the New York office. Andreas A. Glimenakis, Ryan M. Kusmin, and Jil Simon are associates in the Washington, D.C. office. The authors may be reached at amlevine@debevoise.com, kbrockmeyer@debevoise.com, aaglimes@debevoise.com, rmkusmin@debevoise.com, and jsimon@debevoise.com. Thomas Schürle, Jane Shvets, Frederick T. Davis, and Thomas Jenkins contributed to the preparation of this article. Full contact details for each author are available at www.debevoise.com.

Continued on page 9

24. *Id.*

France Announces its First DPA with HSBC Private Bank Swiss

On November 14, 2017, the President of the Paris criminal court approved the first-ever French-style deferred prosecution agreement (“DPA”) under a new procedure included in the so-called Sapin II Law, which the French legislature adopted in December 2016. The DPA was the result of an agreement between the National Financial Prosecutor’s office and HSBC Private Bank Swiss (“HSBC”), whereby HSBC agreed to pay €300 million to settle criminal charges relating to laundering the proceeds of tax fraud, with neither an admission of guilt nor a conviction.

This is an important development in the evolution of French law and practices relating to overseas bribery. This article will explain the background of the relevant procedures and their use in this case, and will explore their potential significance for the future.

I. Background

A. France’s Ineffectiveness in Prosecuting International Corruption

The Sapin II Law and in particular its much-debated DPA procedure were adopted in response to widespread criticism that French authorities had not achieved acceptable results in the fight against international corruption, notwithstanding significant pressure from the world community.

In 1997, the Organization of Economic Cooperation and Development (“OECD”) promulgated the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”). The OECD Convention obligated its signatories to adopt legislation criminalizing foreign corruption, essentially along the lines of the Foreign Corrupt Practices Act (“FCPA”), which the United States had enacted twenty years earlier. The OECD Convention sought to create a “level playing field” where common rules would be applied on a common basis by authorities in all the major industrialized nations whose companies might be tempted to engage in overseas bribery. Forty-two nations have now signed the OECD Convention.

In 2000, in anticipation of ratifying the OECD Convention later that year, France passed laws criminalizing active¹ and passive² corruption of foreign officials. In its Phase 1 Report issued in 2000, the OECD Working Group on Bribery acknowledged

Continued on page 10

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1. Active corruption refers to circumstances in which a bribe-giver initiates a bribe.
 2. Passive corruption refers to circumstances in which a bribe-giver merely “consents” to an official’s request.

**France Announces its
First DPA with HSBC
Private Bank Swiss**

Continued from page 9

that the new French laws satisfied the OECD Convention requirements to adopt laws outlawing such conduct.

However, the OECD Convention obligated its signatories not only to adopt essentially similar laws, but to enforce them on an energetic and comparable basis. On this, France was found to fall short. In 2012, the OECD Working Group issued a Phase 3 Report that was sharply critical of France's efforts and urged that French authorities review their enforcement efforts. To this day, not a single French corporation has been convicted of classic overseas bribery under the 2000 law.³ During this same time period, several large, iconic French companies have entered into DPAs or guilty pleas negotiated with U.S. prosecutors and regulatory authorities relating to bribery payments made abroad in violation of the FCPA, pursuant to which they have paid well over US\$2 billion in fines and other payments. U.S. authorities may have felt impelled to pursue these French entities in part because French authorities – which clearly were competent to do so – had not.⁴

B. France's Earlier Attempts to Address These Issues

In 2011, the French legislature amended a pre-trial guilty-plea procedure to make it applicable to cases involving overseas corruption. Under this procedure, known as a CRPC (which essentially stands for “an appearance based on an acceptance of culpability”), a person or a corporation may plead guilty to a particular charge in return for a more lenient sentence, not exceeding one year and a fine not exceeding the maximum amount faced before the criminal court. Such a guilty plea must be approved by a judge, whose decision has the effect of a criminal conviction. This provision was used very sparingly by corporations. The only significant use took place in January 2016 when a non-French bank used it to settle charges of tax evasion laundering. It has never been used by corporations in the context of foreign corruption.⁵

In December 2013, France further addressed the OECD recommendations by significantly raising penalties for the offence of bribing a foreign public official, for individuals to €1 million or double the proceeds of the offence and for

Continued on page 11

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3. In September 2012, the French aerospace company Safran was convicted of having obtained a sizable contract in Nigeria through bribery. But in January 2015, the Paris Court of Appeal overturned the company's conviction for lack of sufficient evidence. In another case, in February 2016, the Paris Court of Appeal entered a criminal conviction against oil giant Total for illegal contracts to import oil from Iraq (of which review is pending before the French Supreme Court), but the case involved violation of United Nations regulations related to its Oil-For-Food Program rather than classic bribery.
 4. For a discussion of these cases, see Frederick T. Davis, “Where Are We Today in the International Fight Against Overseas Corruption: An Historical Perspective, and Two Problems Going Forward,” 23 *ILSA Journal of International & Comparative Law* 1 (2017), available at <http://nsuworks.nova.edu/ilsajournal/vol23/iss2/3/>
 5. See Frederick T. Davis, “First Corporate Guilty Plea in France – Will There Be More?” (Feb. 2016), available at <http://www.ethic-intelligence.com/experts/11539-first-corporate-guilty-plea-france-will>.

**France Announces its
First DPA with HSBC
Private Bank Swiss**

Continued from page 10

corporate entities to €5 million or ten times the proceeds of the offense. This law also created a new prosecutor's office with specific jurisdiction over economic and financial crimes (the National Financial Prosecutor's office) and opened the possibility for anti-corruption organizations to bring claims as private parties.⁶

None of these efforts effected real change in the prosecutorial environment in France. In 2014, the OECD Working Group on Bribery reported continuing serious concerns regarding the lack of foreign bribery convictions in France.⁷

C. The Sapin II Law: Adoption of a French-Style DPA

On December 9, 2016, in response to these criticisms, France finally passed a "Law Regarding Transparency, the Fight Against Corruption and the Modernization of Economic Life," known as the Sapin II Law.

“One of the most noteworthy and controversial features of the Sapin II Law is its DPA procedure (known as *convention judiciaire d'intérêt public*, or ‘CJIP’), which permits disposing of claims of corruption, influence peddling, laundering of the proceeds of tax fraud, and ‘associated offences,’ without a criminal conviction.”

The principal components of the Sapin II Law are: the establishment of a new French Anticorruption Agency (“AFA”); the expansion of the extraterritorial application of French criminal law in relation to certain corruption-related offenses; an obligation of medium and large companies to adopt internal compliance programs reflecting certain standards; and enhanced status and protection of whistleblowers. One of the most noteworthy and controversial features of the Sapin II Law is its DPA procedure (known as *convention judiciaire d'intérêt public*, or “CJIP”), which permits disposing of claims of corruption, influence peddling, laundering of the proceeds of tax fraud, and “associated offences,” without a criminal conviction.

Continued on page 12

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6. French criminal law permits individuals who are victims of a criminal act to instigate a criminal investigation. In 2010, the French Supreme Court held that organizations with a genuine interest in the subject matter may have standing to act under these provisions. As we have noted in a previous issue, these procedures have been used to prosecute overseas bribery recipients in France. See “The Obiang Trial Suggests Innovative Approaches to Fighting International Corruption,” FCPA Update Vol. 9, No. 1 (Aug. 2017), available at <https://www.debevoise.com/insights/publications/2017/08/fcpa-update-august-2017>.
 7. See OECD Working Group on Bribery, France: Follow-Up to the Phase 3 Report and Recommendations, available at <http://www.oecd.org/daf/anti-bribery/France-Phase-3-Written-Follow-up-ENG.pdf>.

**France Announces its
First DPA with HSBC
Private Bank Swiss**

Continued from page 11

A CJIP is available only for corporations and other legal entities, not for individuals. Its main characteristics are the following:

- A CJIP may be negotiated with the prosecutor at either of two stages of a criminal investigation.
 - At the prosecutor’s initiative, a CJIP may be negotiated prior to the commencement of the so-called “public action” – that is, prior to the prosecutor referring a case to trial or to an investigating magistrate to lead a criminal investigation.⁸ At this point, the procedures are relatively flexible, and there is no legal requirement that the corporation expressly acknowledge specific facts (although the prosecutor can insist that such be done in the agreement).
 - In cases referred to an investigating magistrate, the parties may engage in discussions once the corporation has been placed under formal examination (a status known in France as the “*mise en examen*”). In that instance, the defendant corporation can get the benefit of a CJIP only upon a formal acknowledgement of the facts and their legal qualification as a crime – still without making a legal admission of guilt or submitting to a criminal conviction.
- The prosecutor proposes an agreement whereby the defendant corporation agrees to the payment of a fine proportionate to the benefit secured through the illicit activity, up to 30% of the company’s average annual turnover over the previous three years. In the specific context of corruption and influence peddling, the corporation may also agree to an enhanced compliance program under the supervision of the AFA or its delegate for a maximum period of three years.
- Where victims have been identified, the CJIP must also provide for their compensation for the losses resulting from the wrongdoing, to be paid within a year.
- Unlike a U.S. DPA, but similar to its U.K. counterpart, a CJIP may be finalized only following approval by a judge at a public hearing at which a judge is asked to review the validity and regularity of the procedure as well as the conformity of the amount of the fine to the statutory limit and the proportionality of the agreed measures in relation to the benefits resulting from the breaches. The decision cannot be appealed.

Continued on page 13

8. Under French criminal procedures, complex cases such international corruption matters are referred to an investigating magistrate. See Antoine Kirry & Frederick T. Davis, *France*, in *THE INTERNATIONAL INVESTIGATIONS REVIEW* (Nicolas Bourtin ed., 2016), <https://www.debevoise.com/insights/publications/2016/09/the-intern-investigate-review-edition>. In simpler matters, no investigating magistrate need be involved, in which case the prosecutor may initiate discussions at any time prior to referring the case to trial.

**France Announces its
First DPA with HSBC
Private Bank Swiss**

Continued from page 12

- If the judge approves the CJIP, the corporation is granted a ten-day statutory right to reconsider and opt out of the deal. If the company does not opt out, the CJIP and the judge's order will be published on the AFA's website. The approval order does not have the effect of a conviction. If the corporation respects the terms of the CJIP, the charges will be dismissed, protecting the corporation against further prosecution in France.
- If the judge rejects the CJIP, or if the corporation exercises its statutory right to reconsider and opts out of the deal, the criminal investigation resumes. In that case, the prosecutor cannot use any of the facts or documents submitted by the corporation during the failed negotiations. In contrast, if the deal is approved by the judge and goes into effect but later fails because the corporation does not respect the terms of the CJIP, then the criminal investigation resumes with the prosecutor having the right to use those facts and documents.

II. The CJIP with HSBC**A. The Underlying Criminal Investigation**

In 2009, documents leaked by a former employee revealed HSBC's role in offering wealthy, well-connected French individuals ways to hide their assets from the French tax authority, which led to a highly publicized investigation of the individuals involved. On November 18, 2014, HSBC itself was formally put under criminal investigation by a French investigating magistrate for several offenses, including aggravated laundering of the proceeds of tax fraud. In 2015, in a highly unusual development showing the importance of the investigation, the parent company HSBC Holdings PLC, which also had been put under criminal investigation, was ordered to pay a "bail" amount of €1 billion – later reduced to €100 million by a Paris court – pending the resolution of the investigation.

It was reported that, during the criminal investigation, HSBC refused a €1.4 billion pre-trial plea bargain that would have had the effect of a criminal conviction.⁹

B. The Settlement

On November 14, 2017, the National Financial Prosecutor's office announced the approval by the President of the Paris Court of the first-ever CJIP, whereby HSBC agreed to pay €300 million to settle criminal charges relating to laundering of the proceeds of tax fraud, with neither an admission of guilt nor a conviction.

Continued on page 14

9. See "Les régularisations d'avoirs à l'étranger gérées par le service de traitement des déclarations rectificatives (STDR)", Cour des comptes, October 2017, <http://www2.assemblee-nationale.fr/static/15/commissions/CFinances/rapport-cdc-stdr.pdf>.

**France Announces its
First DPA with HSBC
Private Bank Swiss***Continued from page 13*

On November 27, 2017, after the expiration of the statutory ten-day opt-out period, the CJIP and the approval order became final and were published on the AFA's website, where an English version of the CJIP is also available.¹⁰

1. Acknowledgement of Facts

The CJIP lists the facts that HSBC acknowledged and the legal characterization of those to which HSBC agreed.

As noted above, such an acknowledgement and agreement were required because the prosecution had been referred to an investigating magistrate.

2. Settlement Payments and Other Obligations

HSBC agreed to pay a total €300 million to settle the criminal charges. This amount includes a fine and restitution.

(a) Fine

HSBC agreed to pay a €158 million fine, based on the maximum provided by the law (*i.e.*, 30% of HSBC's average annual turnover over the previous three years). It is comprised of two elements:

- €86.4 million relating to illegal profits obtained; and
- An "additional penalty" of €71.6 million which – according to the CJIP – was justified by the exceptional nature of the facts and their recurrence over several years. With regard to this additional penalty, the CJIP states that HSBC "neither voluntarily disclosed the facts to the French criminal authorities, nor acknowledged its criminal liability during the course of the investigation, only offered minimal cooperation in the investigation. However, one must recognize that when the investigation started and until December 2016, the French legal system did not provide for a legal mechanism encouraging full cooperation."

(b) Restitution

HSBC also agreed to pay an amount of €142 million to the French tax authorities as compensation for damages related to the laundering of the proceeds of tax fraud.

3. No Requirement of Compliance Program Enhancement

The HSBC CJIP contains no provision requiring an enhanced compliance program, though HSBC of course will need to align itself with the compliance requirements of the Sapin II Law, to the extent that they apply to HSBC's operations. While the Sapin II Law is not clear on this point, we understand these requirements apply only

Continued on page 15

10. See <https://www.economie.gouv.fr/afa/publications-legales>.

**France Announces its
First DPA with HSBC
Private Bank Swiss**

Continued from page 14

in the specific context of corruption and influence-peddling, and not in the context of laundering the proceeds of tax fraud.

Also, the CJIP indicates that HSBC already had implemented internal compliance measures. Given that the amount of the fine was the maximum provided for by the law, the existence of such a compliance program does not appear to have been treated as a mitigating factor.

4. Judicial Approval

The judge's review, as expressed in his short opinion, sheds relatively little light. It merely verifies HSBC's acknowledgement to the facts and to their legal categories, the conformity of the €158 million fine to the statutory limit, and the amount of compensation sought by the French state (€142 million). There is no analysis, for example, of whether the agreement in fact is in "the public interest."

“On November 14, 2017, the National Financial Prosecutor's office announced the approval by the President of the Paris Court of the first-ever CJIP, whereby HSBC agreed to pay €300 million to settle criminal charges relating to laundering of the proceeds of tax fraud, with neither an admission of guilt nor a conviction.”

5. Related Criminal Proceedings

In its press release of November 14, 2017, the National Financial Prosecutor's office announced that charges against HSBC Holdings PLC – the parent company – were dismissed. That is so even though 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.

The National Financial Prosecutor's office also announced that two former directors of HSBC are being sent to trial. Because the CJIP is not available for individuals, they were not parties to it. A pre-trial guilty plea under the CRPC procedure described above was available to them before they were sent to trial, but unlike a CJIP, it would have resulted in a criminal conviction. It will be important to see what role the corporate CJIP (and admission of facts) will have at the individuals' trial. In the absence of a jury trial and U.S.-style hearsay rules, the fact of the CJIP will not be strictly excluded, though the prosecutors still must satisfy the conditions for individual criminal responsibility.

Continued on page 16

France Announces its
First DPA with HSBC
Private Bank Swiss

Continued from page 15

III. Considerations for Future CJIPs

As noted, the Sapin II Law helped French prosecuting authorities respond to criticism from the OECD and others in the area of overseas bribery, and it aspirationally provides a counterbalance to U.S. prosecutors' pursuit of French companies for corruption (and other) violations.

The HSBC CJIP is unusual in several ways. First, it does not involve overseas bribery, but rather laundering of the proceeds of tax fraud. Second, because it is focused on French tax issues, there does not appear to be any possible U.S. or U.K. interest in the matter and thus no likelihood of a parallel or successive U.S. or U.K. prosecution, such as would often be the case in overseas bribery investigations. Third, the company involved was not French, but rather a large international bank with a significant presence in France. Finally, the CJIP agreement was reached at a relatively late stage in the criminal proceeding, after the "public action" had commenced and after the possibility of using somewhat more flexible procedures had lapsed.

At a minimum, it is encouraging to see that the CJIP system put in place under the Sapin II Law actually works, notwithstanding skepticism some expressed when this new law came into effect. It was clearly important for the National Financial Prosecutor's office to "break the ice" in this way, and the office has publicly emphasized that it intends to use the CJIP as frequently as possible, rather than engaging in lengthy and unpredictable criminal court proceedings.

A key question may be whether the new procedure offers sufficient advantages to French corporate entities to incentivize them to engage such negotiated outcomes in the future, in particular in the context of overseas bribery matters. A definitive answer to this question may not be possible without more insight into the procedure through its future uses.

At a minimum, the HSBC outcome suggests the following questions:

Does the size of the negotiated outcome suggest a sufficient "discount" to appeal to future targets of investigations?

The CJIP differs from a U.S. DPA, in which the written agreement between the U.S. Department of Justice and a corporate defendant typically outlines in some detail the so-called "Guidelines Analysis" under the U.S. Sentencing Guidelines that would show the likely sentencing range had the case proceeded to trial and a conviction, and which thus clearly indicates the apparent "discount" the company has obtained by reaching the agreement. The calculation of the maximum fine under a CJIP (30% of the legal entity's average annual turnover over the previous three years) is

Continued on page 17

**France Announces its
First DPA with HSBC
Private Bank Swiss**

Continued from page 16

done differently from the calculation of the maximum sentence imposed after a trial.¹¹ Depending on the offence and the facts, companies that go to trial may face maximum fines higher than maximum fine under a CJIP, although this is not systematically the case. In addition, of course, convicted companies may also face the risk of debarment.

On the other hand, even assuming that the new provision offers an attractive “discount,” the Sapin II Law does not address at least two other possible disincentives to an early negotiated outcome.

First, unlike in the U.S., and to a limited degree unlike in the U.K., a corporation accused of a crime under French law may have a significant defense under Article 121-2 of the French Criminal Code¹² that it is not responsible for the acts of its officers and employees. For example, in the Safran case noted above, the company was convicted at trial, but on appeal the prosecutor himself took the position that while the individuals should be held criminally responsible, the corporation should not.¹³ Negotiating an early outcome would thus require a French corporation in essence to give up any defense it may have under the still-evolving interpretations of Article 121-2.

Second, a corporation facing a criminal investigation in France has the relative luxury of knowing that it may take ten years or even more for the prosecutor to arrive at a definitive conviction. An investigation by an investigating magistrate may itself take many years and is followed by a trial and then an appeal (which under French procedures amounts almost to a second trial and reviews both the facts and the law), as well as the possible review of legal issues by the French Supreme Court.

What does this CJIP tell us about corporate “cooperation” and “self-reporting” obligations?

In order for corporations to benefit fully from the DPA procedures of the U.S. Department of Justice and the U.K. Serious Fraud Office, both authorities have emphasized the importance of bringing the matter to the attention of the

Continued on page 18

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11. The maximum financial penalty faced by corporations for corruption offenses is €5 million or double the proceeds of the offence. For laundering of the proceeds of tax fraud, the penalty can be as high as €3,750,000 or half the value of the funds in respect of which the alleged laundering operations were carried out.
 12. Article 121-2 of the French Criminal Code provides that a corporation or other corporate entity may be criminally responsible only for the acts committed “on its behalf” by an “organ or representative” of the corporation.
 13. For a brief discussion of this issue, see Frederick T. Davis, “Limited Corporate Criminal Liability Impedes French Enforcement of Foreign Bribery Laws,” (Sept. 1, 2016) available at <https://globalanticorruptionblog.com/2016/09/01/guest-post-unduly-limited-corporate-criminal-liability-impedes-french-enforcement-of-foreign-bribery-laws>. As noted there, in the U.S., corporations are almost automatically responsible, under the principle of *respondeat superior*, for the acts of officers and employees. In the U.K., a fairly restrictive test is applied to corporate criminal responsibility for criminal acts of its employees, but the legislature has created a new “corporate crime,” under Section 7 of the U.K. Bribery Act, that holds corporations strictly responsible for the absence of a compliance program that could have prevented bribery.

**France Announces its
First DPA with HSBC
Private Bank Swiss***Continued from page 17*

prosecutor before the prosecutor discovers it (*i.e.*, “self-report”) and cooperating with the prosecutor in identifying culpable individuals, including officers and employees of the corporation, by sharing evidence that may be incriminating of them. Judge Leveson, the High Court of London judge who has ruled on the four U.K. DPAs made public to date, has thoroughly scrutinized the presentations in each case to determine if, in fact, the corporate cooperation was sufficient.

In France, for the moment, it is hard to tell whether, and the degree to which, self-reporting and other forms of corporate cooperation will have an effect on future outcomes. The Sapin II Law is notably silent on these issues. At a seminar on November 30, 2017, representatives of the National Financial Prosecutor’s office public agreed, in response to a question, that they see no statutory incentive for a company to self-report and thus they are not promising any specific benefit

“A key question may be whether the new procedure offers sufficient advantages to French corporate entities to incentivize them to engage such negotiated outcomes in the future, in particular in the context of overseas bribery matters.”

from doing so, leaving it up to each company to decide this “ethical” issue. In the section of the HSBC CJIP discussing the amount of the fine, it was noted somewhat cryptically that the bank had not self-reported the events in question nor fully cooperated with French authorities, which may suggest that self-reporting and cooperation may be taken into account when negotiating the amount of a future fine.

What does this CJIP tell us about the next steps of the National Financial Prosecutor’s office?

The National Financial Prosecutor’s office has indicated on a number of occasions that it intends to use the CJIP procedure frequently and in particular in cases involving overseas corruption. The National Financial Prosecutor is almost certainly intending to initiate such discussions earlier in the investigative process than was the case in the HSBC matter. Such discussions therefore will occur without the participation of an investigating magistrate, and without the legal requirement that the corporation expressly acknowledge specific facts, which will give the prosecutor considerably greater flexibility as well as the possibility of earlier outcomes.

Continued on page 19

**France Announces its
First DPA with HSBC
Private Bank Swiss***Continued from page 18*What will be the likely reaction of the U.S. Department of Justice and the U.K. Serious Fraud Office to future French CJIPs?

As noted, the HSBC case focused on French tax issues and did not appear to involve the interests of the U.S. or the U.K. In contrast, overseas bribery investigations very often do involve at least the potential interest of either the U.S. Department of Justice or the U.K. Serious Fraud Office. Both authorities benefit from (and aggressively use) expansive principles of jurisdiction concerning the territorial reach of their powers to enforce their overseas bribery laws. It is clearly the intent of the Sapin II Law that in the future French corporations will choose to resolve their overseas bribery issues with the National Financial Prosecutor's office rather than with its U.S. or U.K. counterparts, and further that non-French prosecutors will respect French enforcement by electing not to engage in parallel or successive prosecutions of the same corporations for the same conduct.¹⁴

The HSBC case appears to be a cautious first step in giving French prosecutors a greater role in resolving international enforcement matters involving French corporations. With future French DPAs involving overseas bribery, U.S. and U.K. prosecutors likely will consider factors such as the sufficiency of the total penalty relative to the underlying activity, as well as the effective pursuit of individuals responsible for a company's wrongdoing. In that context, the absence of a clear provision for international cooperation may interfere with how U.S. and U.K. authorities analyze the sufficiency of a French outcome. Additionally, the apparent absence of a "self-reporting" incentive may impede the French prosecutors from being the "first mover" in a position to play a leadership role in multinational negotiations seeking to resolve potential wrongdoing by a French company.

Antoine Kirry**Frederick T. Davis****Alexandre Bisch**

Antoine Kirry is a partner in the Paris office. Frederick T. Davis is of counsel in the New York and Paris offices. Alexandre Bisch is an associate in the Paris office. The authors may be reached at akirry@debevoise.com, ftdavis@debevoise.com, and abisch@debevoise.com. Full contact details for each author are available at www.debevoise.com.

14. See, for example, the French Senate Report N°712 of June 22, 2016 on the Sapin II Law, <http://www.senat.fr/rap/l15-712-1/l15-712-11.pdf>, and the French National Assembly Report N°4082 of October 5, 2016 on "The Extra-territoriality of American Laws," <http://www.assemblee-nationale.fr/14/rap-info/i4082.asp>.

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Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Tokyo
+81 3 4570 6680

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Andrew J. Ceresney
Co-Editor-in-Chief
+1 212 909 6947
aceresney@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

Erich O. Grosz
Co-Executive Editor
+1 212 909 6808
eogrosz@debevoise.com

Jil Simon
Associate Editor
+1 202 383 8227
jsimon@debevoise.com

Kara Brockmeyer
Co-Editor-in-Chief
+1 202 383 8120
kbrockmeyer@debevoise.com

Sean Hecker
Co-Editor-in-Chief
+1 212 909 6052
shecker@debevoise.com

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Jane Shvets
Co-Editor-in-Chief
+44 20 7786 9163
jshvets@debevoise.com

Philip Rohlik
Co-Executive Editor
+852 2160 9856
prohlik@debevoise.com

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