French Court authorises first-ever French deferred prosecution agreement

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Corporate Crime analysis: Kathryn Hughes, a barrister at QEB Hollis Whiteman Chambers, takes a closer look at the circumstances surrounding the first French deferred prosecution agreement (DPA) and considers how the French DPA process compares with that of the UK.

Original news

On 14 November 2017, the Cour D'Appel De Paris approved the first-ever French DPA between HSBC Private Bank (Suisse) SA (PBRS), the Swiss private banking unit of HSBC, and the French National Financial Prosecutor, Parquet National Financier (PNF), to pay €300m to resolve offences related to money laundering and tax evasion.

When the French government passed the so-called 'Loi Sapin II', what was its intended purpose, and what new procedures did the new law create?

Sapin II was passed by the French Parliament on 8 November 2016 to address anti-corruption, transparency and modernisation of economic life. It entered into force in December 2016. Despite a plethora of existing regulations and legislation to tackle corruption in France, Sapin II was introduced to require the implementation of compliance programmes and to increase reporting of offences. It also gives extra-territorial effect to French criminal law as it enables the prosecution of both French citizens and non-French citizens, ordinarily resident in France, who have committed acts of bribery abroad.

Perhaps one of the most significant aspects of Sapin II is the creation of a 'convention judiciaire d'interêt public', the French equivalent of a DPA. As we have already seen in the UK and the US, a DPA can be an effective tool to penalise a corporate entity for its wrongdoing yet avoid a criminal conviction that would automatically debar that entity from participating in public procurement in many jurisdictions.

Under Sapin II, the agreement may impose:

- a fine that is proportionate to the benefits gained from the violations found, up to a maximum of 30% of the company's annual average turnover within the last three years
- implementation of a compliance programme under the control of the French national anti-corruption agency for up to three years

How did the first French DPA under the new anti-corruption legislation come about?

On 23 April 2013, an investigation into PBRS was opened at the request of the Paris Public Prosecutor, who then withdrew from the case in favour of the PNF. The investigation related to allegations of:

- unlawful financial or banking solicitation
- aggravated money laundering of the proceeds of tax evasion

The investigations revealed that between 2006 and 2007, PBRS had offered certain banking services while it had access to information enabling it to know or suspect that certain French clients used those services in order to conceal their assets from the French tax authorities.

Pursuant to the agreement, PBRS undertook to pay a total of €300m, made up of:

- €157,975,422—public interest fine comprised of:
  - €86,400,000 (disgorgement of profits)
  - €71,575,422 (additional penalty)

- €142,024,578—damages

The bank's ultimate parent, HSBC Holdings plc, guaranteed payment of the penalties within ten days.

Do the court's conclusions help predict how future proposed agreements may be handled?

The court's judgment highlights two areas of particular significance for companies who may seek to reach such an agreement in future. Firstly, cooperation is an important factor. It is evident that how a company interacts with the PNF during the investigation will impact upon the penalty it receives. PBRS did not self-report to the French authorties and

only offered ‘minimal cooperation’ during the investigation. Those factors contributed to the additional penalty such that the total fine was equal to the maximum that is permitted under Article 41-1-2 of the Code of Criminal Procedure.

Furthermore, the court appears to be following the example set in the UK by carefully scrutinising the terms of the agreement. It is evident that companies should not expect the court approval process to be merely a ‘rubber-stamping’ exercise; they must carefully negotiate terms that are proportionate, and the agreement must be in the public interest.

How does the French DPA process compare with that of the UK?

A particularly interesting feature of the French DPA model is that it appears to more closely mimic the DPA framework established relatively recently in UK law, than the well-trodden regime in the US. As in the UK, but unlike in the US system, a DPA under Sapin II requires approval by the courts. Furthermore, the French DPA is available only to a legal entity that meets certain criteria; it is not available to individuals implicated in the wrongdoing. In both jurisdictions, prosecutions against those individuals may follow notwithstanding the DPA. For example, in the UK, the individuals implicated in the Rolls-Royce, Tesco and XYZ Ltd DPAs are now facing prosecution.

Although the French DPA is in its infancy, we can already see some differences emerging. For example, a DPA in the UK depends on good cooperation. In Rolls-Royce, the Serious Fraud Office (SFO) was able to overlook the fact that the company did not self-report, and reached an agreement because of the company’s extremely cooperative approach during the SFO investigation. By contrast, although PBRS did not self-report and thereafter offered minimal cooperation, an agreement was nevertheless reached; the conduct impacted instead upon the financial penalty. However, it is important to note that PBRS may turn out to be a rather exceptional case on the basis that the legal framework for cooperation was not in place when the investigation started. Further cases will no doubt provide a clearer insight into the importance of cooperation with the PNF.

What are the lessons to be learnt by UK practitioners from the HSBC case?

The PBRS case demonstrates that the PNF will play a major role in tackling anti-corruption involving French nationals or non-French nationals ordinarily resident in France. It is inevitable that cases will arise where the conduct of a company ticks the jurisdictional boxes under the anti-corruption regimes in several jurisdictions. Practitioners are often asked to advise on cases that cross jurisdictional boundaries and many have experience dealing with the SFO, Department of Justice and the Securities and Exchanges Commission simultaneously. It is going to be important for practitioners and companies to see how the PNF will interact with these bodies and what role they will play in securing global settlements. As of October 2017, the investigation into Airbus which is already under way in the UK and in France has threatened to extend to the US. Perhaps this will give us the first glimpse into how these authorities will interact to reach a global settlement.

Kathryn Hughes is experienced in business criminal matters with a focus on financial crime and bribery and corruption. She has worked on high-profile SFO investigations, acting for the SFO and private companies, and has expertise in DPAs and Legal Professional Privilege. She has an LLM in European law.

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