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Multi-Jurisdictional Criminal Investigations – Emerging Good Practice in Anglo-French Investigations

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1 Introduction

The rise in multi-jurisdictional criminal and regulatory investigations over the last few years has led to improvements in cross-border co-operation with overseas enforcement authorities in corporate investigations and resulted in numerous enforcement proceedings and global settlements.

In France, Sapin II[1] appears to have had an almost immediate effect. On 14 November 2017, the Parquet National Financier ("**PNF**") entered into the first French deferred prosecution agreement/ *convention judiciaire d'intérêt public* ("**CJIP**") with HSBC Private Bank (Suisse) SA.[2] HSBC Private Bank (Suisse) SA agreed to pay €300 million to the French authorities to settle allegations that the bank assisted its clients to evade tax. This landmark settlement marks a distinct break from the past and suggests a future where the French authorities become active enforcers in complex international fraud and bribery cases.

In recent years, the UK has built a good reputation for bringing global enforcement cases for both fraud (LIBOR and FX) and bribery (Rolls-Royce). Recognising the difficulties of working with different justice systems, this article explores whether the UK authorities can build good relationships with their French counterparts following the introduction of Sapin II.

This article covers the likely practical issues, pitfalls and good practices that companies and their advisers need to know about when conducting an internal investigation into suspected economic crime which could be settled in both the UK and France.

2 Securing Evidence – Data Preservation and Collection

Preserving evidence

The first step at the outset of any investigation requires careful action to ensure that all electronic and hard copy materials (collectively referred to as "**Data**") that are potentially relevant to the issues under investigation are preserved. It is imperative for advisers to engage with the company's IT personnel to understand how the company's IT infrastructure and document management systems are organised to determine how and where Data is stored.

It is best practice for the company to disseminate an adequately scoped document retention notice ("**DRN**") and suspend any Data destruction policy in place if it would conflict with the requirements of the DRN. Both UK and French laws contain criminal sanctions for falsifying, concealing or destroying evidence that may be relevant to the investigation.[3]

Advisers need to ensure that the DRN has been sufficiently scoped and disseminated within the company, and that recipients understand what the DRN covers to maximise Data preservation.

Collecting and processing Data

Once potentially relevant Data has been identified and preserved, the investigation team should collect and process the Data. Advisers, investigators or specialist e-discovery/forensic vendors must take care when handling Data and follow practices which meet regulator expectations on evidence integrity. Again, companies are advised to understand that expectations, laws and practices of implicated jurisdictions differ.

When collecting and processing Data, careful consideration should be given to applicable data protection laws and data privacy concerns. Both France and the UK are subject to the EU Data Protection Directive[4] (the "**Directive**"). As directives are required to be implemented into national law, Member States are given some flexibility as to their interpretation and implementation of the Directive, with French national laws supporting an individual's right to privacy. Advisers can anticipate that France will continue to strongly protect an individual's right to privacy under the new EU General Data Protection Regulation ("**GDPR**").[5] The GDPR is designed to strengthen individuals' data protection rights, and its direct applicability in Member States should lead to a more uniform approach to data protection rules in the EU.

In France, particular consideration needs to be given to:

- **Personal or private information** – it is important to ensure that the steps taken are clearly explained to employees and employee representatives of the workers' unions.
- **Involving the Data Protection Officer ("DPO")** – unlike in the US and the UK, Data that is deemed to be personal or private will need to be isolated. Privacy search terms prepared by the investigation team should be applied across the Data, and the investigation team should work with the company's DPO to ensure that employees' privacy rights are appropriately protected.
- **Sensitive information** – for investigations concerning sectors which involve confidential, sensitive or state secrets, similar actions will need to be co-ordinated with the company's security officer or department. As above, specific search terms will be helpful to identify sensitive information.

Transferring Data

Data in an investigation will often need to be moved or consolidated in a third jurisdiction, or company servers may be located

worldwide. Before transferring Data from one jurisdiction to another, the investigation team will need to carefully consider the relevant laws and regulations of the jurisdictions concerned. In France, for example, particular consideration should be given to the French Blocking Statute ("**FBS**"),[6] which prohibits the transfer of certain data out of France for use in foreign judicial or administrative proceedings.[7]

Although there has historically been a lack of enforcement of the FBS, Sapin II has created a new anti-corruption authority, *L'Agence française anti-corruption* (the "**AFA**"), which will monitor compliance with the FBS. As a refusal to disclose certain documents/information to a foreign requesting agency may impact the co-operation credit a company may receive, if the FBS is deemed to be a potential issue, the investigation team should engage with the foreign regulator and seek local advice at an early stage of the investigation.

3 Fact Analysis and Internal Reporting

Document review

For the purpose of conducting an efficient and effective review of the Data, processed Data should be uploaded to an electronic platform. There are different methods to review Data and there is no "one size fits all". For investigations involving large volumes of Data, the investigation team may decide to use algorithm-based software to improve the accuracy and speed within which highly relevant documents are identified.

It is best practice for the investigation team to consolidate review guidelines into a written document review protocol which should be updated regularly to keep the reviewers working in a co-ordinated and efficient manner. The review process should also be used to identify additional individuals who may hold potentially relevant Data and whose Data should be collected in subsequent rounds of collections.

Reporting structure

The company and the investigation team should give thought to and decide on the appropriate individual(s) who will lead the investigation. This role is normally fulfilled by the company's general counsel and the in-house legal team. It may also be appropriate to establish an executive steering/litigation committee comprised of board members, individuals from the legal and compliance teams, and other senior business representatives. It will be important for these individuals to be independent from the investigation, not be implicated in the conduct and to understand the benefits of: (i) constructively engaging with the appropriate regulators; (ii) "ring-fencing" any individuals potentially implicated from evidential findings and from influencing the investigation; and (iii) following international best practices in internal investigations. The committee's mandate would include giving instructions to the company's general counsel and the investigation team.

In the context of an Anglo-French investigation, the company should seek local advice on how best to preserve UK legal professional privilege ("**LPP**") and French "*secret professionnel*", i.e. professional secrecy.[8]

The French law of *secret professionnel* applies to communications between a lawyer and his/her client. The concept is different to legal professional privilege.

Although *secret professionnel* can broadly apply to the whole file, *secret professionnel* does not apply to in-house legal advisers ("*juristes*") or to documents exchanged by clients with third parties. Because of the complexity of and importance of maintaining *secret professionnel*, advisers should assemble a suitably qualified French firm to work alongside a UK firm during the investigation, and seek advice so as to ensure that appropriate protections are maintained in the different jurisdictions.

4 Employee Interviews and Discipline

Interview procedure

When interviewing an employee in the UK or France during an internal investigation that may lead to disciplinary or criminal sanctions, it is good practice for the company's lawyers to:

- ensure that it is legally permissible to conduct the proposed interviews;
- consider offering the employee the opportunity to appoint their own independent legal counsel. Companies may face challenges in finding suitably qualified and "sensitive" legal counsel with the appropriate expertise to advise individuals who need separate representation; and
- ensure that the interviewee understands the role of the lawyer at the outset. In the UK, the warning will inform the employee that the lawyers only represent the company and not the employee, that the privilege attaching to the interview belongs to the company, and that the company may choose to waive privilege and share the transcript of the interview with third parties, including governmental authorities. In France, the warning will inform the employee that the interview is not covered by *secret professionnel*.

Interview practice and procedure in French internal investigations differs from the UK and US approach in a number of respects:

- **Co-operation**: UK executives will generally co-operate with an internal investigation to avoid an adverse disciplinary finding, and obligations to co-operate are generally set forth in employment contracts. In France, the Labour Code and other employment laws provide strong employee protections, and co-operation and discipline issues should be carefully navigated.
- **Timing**: in France, employees will expect to be interviewed during the early stages of the investigation even where a full review of the documents has not been carried out, whereas in the UK and US interviews will most likely only be held once the document review is completed or where substantial review progress has been made.
- **Number of interviews**: French employees may find it unusual or potentially unacceptable to be interviewed multiple times by the investigation team. In US and UK internal investigations, interviewees are often interviewed multiple times.
- **Advance disclosure**: employees being interviewed as part of a French internal investigation (in particular where an accusation is made against the employee) might refuse to co-operate in the absence of receiving advance notice of the topics to be discussed during the interview, and the documents that will be put to them at interview. In UK and US investigations, it is customary to only provide access to documents and topics shortly (if at all) before the interview so as to protect the integrity of the investigation. This ensures that difficult investigative questions are put to employees without giving them the opportunity to prepare rehearsed (and potentially fabricated) answers.

Interview records

Structuring interviews as privileged from the outset of the investigation provides the company with an element of control. The company can then weigh up the risks of disclosing interview records, and consider later disclosure on a limited waiver basis should the company choose to make a self-report.

The UK Serious Fraud Office ("**SFO**") has indicated that the value of first-hand witness accounts is paramount and that companies will be afforded co-operation credit for disclosing interview records which a company believes could be privileged.[9]

Although companies will retain their right to *secret professionnel* when disclosing interview memoranda, the direction of travel for the French under Sapin II remains unclear. Companies face the risk that the French authorities will add interview transcripts to their file, making them potentially disclosable to third parties.

Obvious differences exist between oral testimony in adversarial as opposed to inquisitorial systems. The Paris Bar Council has recommended allowing interviewees to review and sign their statements where a *verbatim* transcript is recorded, but that the interviewee should not be provided with a copy of the transcript where it is necessary to preserve the confidentiality of the investigation (in accordance with French or foreign confidentiality rules).[10]

Disciplinary measures and termination

In France, a company has to work with more restrictive options to suspend potentially implicated employees pending the outcome of an investigation:

- **Dismissal process**: under French employment law, an employer discovering misconduct or gross misconduct is required to start the dismissal process within two months of becoming aware of the misconduct, failing which, the company will be unable to sanction the employee. This period starts from the employer's discovery of the facts, and any further investigation required should be conducted within this two-month period.
- **Gardening leave**: unlike Anglo-Saxon countries, France does not recognise the concept of placing an employee on gardening leave, which can be problematic in lengthy investigations.
- **Settlement**: companies wishing to mutually agree on a separation with the individual may choose to enter into a settlement agreement after notification of the dismissal. Advisers need to carefully consider the optics of how the authorities might view monies paid under settlement agreements with executives implicated in some way in the investigation. The company should maintain a clear audit trail justifying any payments made.

5 Multi-Jurisdictional Reporting and Settlement

Disclosure and reporting

Companies can either decide to take a traditionally adversarial approach with the regulators or co-operate. Prior to Sapin II, the incentives for company co-operation in France were more complex and nuanced.

If a company decides to co-operate with the regulator(s), there are various considerations that should be taken into account:

- **Co-operation**: both UK and US authorities place significant weight on the extent of the company's co-operation in considering settlement options. Corporates should be aware that even in cases where the company is co-operating with enforcement agencies, the French authorities may still carry out dawn raids to collect evidence. It is likely that this practice will become less frequent over time as the French enforcement agencies become more familiar and comfortable with credible lawyer-led investigations.

  The first French CJIP was approved by the French court (*tribunal de grande instance*) on 14 November 2017. The first deputy financial prosecutor of the PNF (*premier vice-procureur financier du PNF*), M. Eric Russo, stated that the HSBC Private Bank (Suisse) SA fine was proportionate due to "*the minimal co-operation of the bank, the seriousness of the facts and the organisational fraud*".[11] The bank's minimal co-operation led to a penalty of *c.* EUR 71.6 million.[12] The first CJIP indicates that a company's failure to co-operate with the French authorities will be penalised and have a monetarised effect on the fine the company is subjected to, but will not necessarily prevent a CJIP.
- **Settlements**: companies subject to multi-agency and multi-jurisdictional investigations are advised to negotiate a co-ordinated settlement to try and obtain a global resolution. The finality of a co-ordinated global settlement should reduce the risk of overlapping penalties or multiple fines arising from parallel enforcement actions, and allow the company to draw a public line under the investigations and get on with its business.

  Sapin II, which has introduced the concept of French DPAs, should facilitate global co-ordinated settlements when enforcement agencies in France, the UK, the US and other jurisdictions which have similar settlement tools are involved.

6 Conclusion

Multi-jurisdictional investigations can raise a number of complex issues that companies and their advisers need to consider at the outset when: (i) structuring a corporate internal investigation; (ii) engaging with different regulators; and (iii) working towards a co-ordinated global resolution. It is important for the different members of the investigation team to think through how the interplay of local laws can impact the overall strategy and outcome of the multi-jurisdictional investigation.

Sapin II brings French anti-corruption law into closer alignment with the corresponding legislation in countries such as the US and the UK. Sapin II will now enable French authorities to exert jurisdictional claims in cases of overseas corruption with a French connection and, of course, to participate in discussions about penalties and disgorgements.

Despite some French opposition to the Sapin II settlement powers, the new legal framework provides a clear, speedy and more certain environment for corporate criminal settlements involving French conduct. The HSBC CJIP is the first practical indication that a new French era of active enforcement is likely to lead to the French authorities bringing multi-jurisdictional criminal cases with other sophisticated enforcement authorities.

Endnotes

1. Law No. 2016-1691 of 9 December 2016.
2. *Convention judiciaire d'intérêt public entre le Procureur de la République Financier et HSBC Private Bank (Suisse) SA*, 14 November 2017, https://www.economie.gouv.fr/afa/publications-legales.

3. Criminal Justice Act 1987, Section 2(16) and *Code pénal* – Article 434-4.
4. Directive 95/46/EC.
5. EU Regulation 2016/679. Note that from May 2018, the GDPR will replace the Directive.
6. Law No. 68-678 of 26 July 1968.
7. *Ibid*., Article 1*bis*. This relates to information of an economic, commercial, industrial, financial or technical nature.
8. For an overview of LPP and maintaining privilege in UK investigations, see Dechert's article on *Maintaining Privilege in UK Regulator-Facing Investigations: Issues for Company Advisers*, *The ICLG to: Corporate Investigations 2017* (1st edition).
9. In the Rolls-Royce case, the company disclosed all interview memoranda to the SFO (on a limited waiver basis), despite Rolls-Royce's belief that the material was capable of resisting an order for disclosure, on the basis that it was privileged. *SFO v Rolls-Royce plc and Rolls-Royce Energy Systems Inc* (Case No.: U20170036), para 20 (ii).
10. *Nouvelle annexe XXIV: Vademecum de l'avocat chargé d'une enquête interne* (13 September 2016), recommendation 2.5.
11. Comments made by M. Eric Russo, PNF: *HSBC Private Bank conclut la première transaction pénale à la françai*se: *Les Echos* (14 November 2017): https://www.lesechos.fr/finance-marches/banque-assurances/030871515318-hsbc-private-bank-conclut-la-premiere-transaction-penale-a-la-francaise-2130061.php#HPL72cO5MzzRpVgg.99.
12. *Convention judiciaire d'intérêt public entre le Procureur de la République Financier et HSBC Private Bank (Suisse) SA*, 14 November 2017, page 8, para 44: https://www.economie.gouv.fr/files/files/directions_services/afa/CJIP_HSBC.pdf.

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