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Navigating French Internal Investigations and Self-Reporting Post-Sapin II

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In the less than two years since its new anti-corruption legislation came into force, France has demonstrated its clear intention to become a key anti-corruption enforcer alongside the U.S. Department of Justice (DOJ) and the U.K. Serious Fraud Office (SFO). Since the enactment of Sapin II, the Parquet National Financier (PNF), the lead French investigating and prosecuting agency, has entered into five French deferred prosecution agreements, called *Convention Judiciaire d'Intérêt Public* (CJIPs), with companies. The French authorities have levied corporate fines comparable to, or in excess of, mature Western regulators and totalling €554,170,755[1] since November 2017.

The Sapin II reforms have been grafted on to a legal system somewhat resistant to internal investigations carried out by company lawyers into suspected economic crime. As part of their efforts, French authorities are now working hand-in-hand with foreign authorities investigating cases of global significance. We anticipate that the French will continue to develop strong relationships with foreign enforcement authorities and will act in partnership with them in the post-Sapin II environment. But, despite some converging trends with the U.S. and the U.K., France has a unique approach to prosecuting bribery, corruption and other financial crime and these particularities should be taken seriously to avoid common pitfalls when navigating the French enforcement environment.

In this article, we examine the benefits and the difficulties of cooperating with French authorities with a view to obtaining a CJIP. Our article will include a critical analysis of issues faced by foreign advisors when working in a French environment, considerations for self-reporting in France and an examination of how France's new approach to anti-corruption has led to French prosecutors working with other enforcement agencies in multi-jurisdictional cases.

Investigating With an Eye Toward a CJIP

French involvement in international anti-corruption enforcement has shifted how French authorities are approaching corruption investigations.

Under Sapin II, CJIPs are available for specific offences of corruption, influence peddling and laundering of the proceeds of tax fraud or related or "connected" offences. CJIPs must be "validated" by a judge during a public hearing. If the judge approves the CJIP, the validation order does not amount to an admission of guilt and does not have the effect of a conviction.

To date, the level of scrutiny exercised by the French judges during the validation hearings appears reasonable and similar to the U.S. approach – DPAs are negotiated by prosecutors with little judicial involvement and the court approves the terms of the DPA without significant amendments before the terms are made public. The PNF has moved quickly and finalised CJIPs with a number of high-profile French and multinational firms. This nimble approach is speedy and is considerably more streamlined than the approach in the U.K., where a judge has to independently assess the appropriateness of the DPA and ensure that its terms are fair, reasonable and proportionate.

The PNF has entered into five CJIPs with companies since November 2017 and all five have followed company internal investigations led by outside lawyers. Having seen how credibly and speedily complex lawyer-led cases can be resolved, we predict that the French authorities will be more inclined to promote company cooperation and self-reporting in the years to come.

Traditionally, French companies have taken a passive approach to criminal defense. However, given that French authorities seem to be increasingly willing to rely on lawyer-led internal investigations when negotiating with companies, that approach may no longer serve a company's interests. Nonetheless, advisors must take into account particulars of French law which could render U.S.-centric or "model" investigation approaches inappropriate in France, particularly if the company hopes to cooperate with French authorities later on.

Collecting Data

All lawyer-led investigations typically start with the collection and processing of data.

Because expectations, laws and practices differ in different jurisdictions, careful consideration should be given to applicable data protection laws and data privacy concerns. France strongly protects an individual's right to privacy and requires a company to obtain informed consent from relevant implicated custodians in order to process their data in an investigation. Unlike in the U.S. and the U.K., data that is deemed to be personal or private will need to be isolated and the company's lawyers will need to work with the company's data protection officer to ensure that employees' privacy rights are appropriately protected.

A failure to recognise the French and European limitations imposed by local laws and the E.U.'s GDPR will be serious as regulators can impose fines of up to 4 percent of annual worldwide turnover for breaches of the GDPR.

See "Analyzing Early GDPR Enforcement: France" (Mar. 6, 2019).

Conducting Interviews

Most authorities expect company counsel to interview relevant company employees after collecting their data. Even though documentary evidence can provide the underlying facts of a case, witness accounts often provide the context and detail of what has happened. Witness interviews are, therefore, an important part of most lawyer-led investigations. However, advisors must be cognisant of cultural and legal nuance in the French interview environment and advisors will likely not be able to adopt U.S.-style approaches to interviews because of the high value placed in France on due process and the rights of employees.

French employees approach interviews differently than U.S. employees. For instance, employees in France will expect to be interviewed during the early stages of an investigation. Early interview of important employees may compromise the quality of the investigative interviews and may not be acceptable to prosecutors in the U.S. and the U.K., who will expect that interviews be carried out once the document review is completed or where substantial review progress has been made.

Employees who are being interviewed as part of a French investigation may also refuse to cooperate if they do not receive advance notice of the topics to be discussed during their interview and will often expect to have access to the documents that will be shown to them during an interview. Under French law, an accused employee may request access to all his relevant documents and can raise arguments to obtain his documents that the company's lawyers intend to use in the interview. This right persists even after employees have been separated or terminated by the company. The challenge faced by companies and their advisors is that if advance notice of interview topics is given to an interviewee, the interviewee will have the opportunity to prepare rehearsed answers.

Employees may also refuse to, or find reasons not to, attend an interview. In such a circumstance, the company and its advisors are advised to keep an audit trail of the request made for the interview and the employee's refusal to attend the interview.

Additionally, when interviewing an employee during an internal investigation that may lead to disciplinary or criminal sanctions, it is good practice for the company's lawyers to offer the employee the opportunity to appoint their own independent counsel. But, many companies may face challenges in finding suitably qualified and "sensitive" legal counsel with the appropriate expertise to advise individuals who need separate representation.

See "Crafting and Delivering Effective *Upjohn* Warnings" (Apr. 18, 2018).

Disciplinary Measures

Restrictions imposed by the French Labour Code continue to baffle foreign lawyers. Employees with French employment contracts enjoy significant protections. Early in an investigation, companies and their advisors will need to understand how the French Labour Code works in order to best find the balance between following international best practices in internal investigations and working with the French disciplinary timetable.

In France, the Labour Code and other employment laws impose a number of restrictions on suspending potentially implicated employees pending the outcome of an investigation. An employer discovering criminal acts or gross misconduct in France 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 limitation period starts from the employer's discovery of the facts. Necessary further investigation should be conducted within this two-month period.

France does not recognise the concept of placing an employee on gardening leave – an employee is either employed or separated. The inability to suspend a person can be problematic in lengthy investigations. The

clock therefore begins to tick as soon as the company investigation finds bad conduct.

Because a complex fact investigation is never resolved within two months, advisors face a difficult choice between two less-than-perfect options: firstly, the company can continue the investigation and keep the employee beyond the two-month limitation period in breach of French employment laws, but in line with international best practices in internal investigations. Alternatively, the company can start the French dismissal process without any real likelihood that the dismissal process will be successful unless firm and verifiable evidence of misconduct can be put forward within the limitation period.

If a company goes ahead with the dismissal process and the Labour Court determines that the dismissal lacks "genuine and substantive grounds," the employee will be awarded punitive damages on top of the mandatory severance package. In some cases involving senior or long-serving executives, this package can be substantial (possibly multiple millions of euros) which may be difficult to explain to non-French regulators.

Typically, companies in long and complex investigations make the pragmatic decision to settle with employees after notification of the dismissal. Advisors should carefully consider the optics of such settlements. The French position may appear to non-French observers as counter-intuitive because substantial money sums could end up being paid to implicated employees, creating a perception of "rewarding" unlawful conduct. This is very different to the position in the U.K. or U.S., where employees involved in wrongdoing would not receive money or the sum would be capped at a modest amount when leaving the company. Some authorities might view monies paid under settlement agreements with executives implicated in some way in the investigation as "hush money." To avoid such assumptions, a company should maintain a clear audit trail to justify payments and should also consider ways to explain French restrictions to foreign regulators involved.

See "Common Hang-Ups in Cross-Border Due Diligence and Investigations" (Jul. 11, 2018).

Cooperating with French Authorities

Cooperating with the French authorities is a recent trend in France. Prior to Sapin II, French companies and their advisors did not commonly cooperate with the authorities and the French authorities did not tend to rely upon lawyer-led investigations. Instead, companies would often adopt an adversarial approach where they would wait for, and draw out, proceedings until trial. However, Sapin II has significantly changed relevant considerations for companies considering a self-report of wrongdoing uncovered during a lawyer-led internal investigation.

France's New Approach

Prior to Sapin II, French cross-border enforcement of corporate fraud and corruption was somewhat dormant. The U.S. DOJ and other U.S. regulators, however, actively pursued high-profile French companies. Sapin II was, in part, a response to international criticism that France was not enforcing international bribery laws and also a response to domestic concerns that substantial fines were being paid to U.S. regulators.

In the new Sapin II era, France's ambition is to effectively enforce international bribery laws and assert French sovereignty. Michael Sapin, the author of the legislation, stated "we do the job in France." Sapin clearly intends his law to ensure that French companies pay fines to French authorities rather than to U.K. or U.S. regulators. This must be kept top of mind when a company that may be liable in France is also facing charges in other jurisdictions. However, foreign lawyers will need to navigate specific French law issues in order to best advise clients.

French Blocking Statute

The French Blocking Statute (FBS) applies to any communication of information that is intended to be used for prosecution by foreign authorities and prevents French companies from disclosing French commercial information to overseas prosecuting authorities. Companies would be well advised to take the FBS seriously.

Historically, foreign authorities have found ways to narrowly interpret or circumvent the FBS to effectively neutralise its purpose and effect. Companies had to choose between possibly exposing themselves to prosecution and fines in France, or to comply with the FBS and jeopardise their cooperation with a foreign regulator. As prosecutions based on FBS violations were very rare, companies tended to take the risk of prosecution to protect their status in foreign enforcement proceedings.

Since Sapin II, France and the PNF have highlighted that the FBS is to be respected. The expectation is that circumvention of the FBS will not be tolerated. A current violation of the FBS is sanctioned by six months imprisonment and/or a fine of €18,000 for an individual and €90,000 for a company. The French prime minister has also been working with a member of parliament (Raphael Gauvain), and the Ministries of Finance, Foreign Affairs and Justice (collectively the FBS Working Group) to reform the FBS to ensure that it can be used by French companies to reassert French sovereignty. The FBS Working Group proposes to increase sanctions against individuals (fines of up to €2 million and two years in prison) and companies (fines of up to €10 million) for non-compliance with the FBS.

Even where a company applies the FBS in a lawyer-led investigation, advisors in multi-jurisdictional cases involving France will have to disclose certain documents and information. As different agencies work at different speeds and have inherent expectations of co-operation in turning over evidence, the FBS could adversely impact the cooperation credit a company may receive from a non-French regulator.

Is Self-Reporting and Cooperation Rewarded?

The new framework in France has demonstrated the advantages to a company of self-reporting wrongdoing to the PNF although it is currently unclear what weight is given to cooperation and self-reporting in the overall CJIP offer. For instance, Société Générale SA (Société Générale) received substantial credit for cooperating with the PNF. On the other hand, HSBC Private Bank (Suisse) SA (HSBC) failed to self-report and only offered "minimal cooperation in the investigation" but the company was still offered a CJIP, though a substantial penalty was imposed on the company for its lack of cooperation.

U.K. and U.S. authorities have issued guidelines for self-reporting that encourage companies to fully cooperate with investigations and self-report wrongdoing. However, recent cases in the U.S. and the U.K., such as Rolls Royce PLC and Panasonic Avionics Corporation, indicate that a failure to self-report wrongdoing is not fatal to DPA prospects where a company proactively cooperates with the U.K. or U.S. authorities.

Currently, there is no such guidance in France, but the PNF and the Agence Française Anti-Corruption (AFA) have indicated that they are working on joint guidance that should be released soon. It is anticipated that the French guidance will set out the criteria that will be taken into account to assess whether a company is eligible to be offered a CJIP.

Whilst waiting for French guidance, a company should be aware that under the French system, a cooperating company will obtain a reduced fine. Fines imposed under the CJIP framework are capped at 30 percent of the annual turnover of a company over a three-year period. When the judge validates a CJIP, he or she must assess the fine's proportionality to the gains derived from the company's wrongdoing. This cap is a genuine incentive for companies to settle with the PNF.

Conversely, it has become clear in recent enforcement proceedings that the French authorities will penalise companies for failing to take a settlement offer and for failing to cooperate by levying punitive fines. Trials can lead to substantial fines well beyond the 30-percent cap.

New Era of Collaboration Between France and the U.S. and U.K.

As the Société Générale CJIP demonstrates, the French authorities are working hand-in-hand with other authorities such as the DOJ. This rapprochement from U.S. heavy enforcement could be influenced by the reputed work flow of 90 ongoing cases between the two authorities, which was reported by an AFA representative at the Global Anti-Corruption and Compliance Summit in Paris in March 2019. Further, the U.S. has signaled a more equitable approach when working with multiple authorities by adopting a "no-piling-on" policy regarding penalties that explicitly includes cooperation with foreign agencies within its framework. The post-Sapin II is a very different era to when the DOJ actively pursued French companies without the assistance of the French authorities. Foreign lawyers in regulator-facing investigations will need to learn and understand what is old and what is new in the French legal system in order to best serve their clients.

See "What SocGen and Legg Mason Say About French and American Enforcement" (Jul. 11, 2018).

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[1] The public interest fines were levied against HSBC Private Bank (Suisse) SA, SET Environnement SAS, Kaeffer Wanner SAS, Poujaud SAS and Société Générale SA, and include damages to the victims