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International Financial and White Collar Crime, Corporate Malfeasance and Compliance

This new section edited by Margot Seve in Paris and Michel Perez in New York aims at presenting and analyzing legal developments related to cross boarder enforcement actions in financial and white collar crime cases, as well as the growth of compliance and corporate governance legal standards. In this issue we present two articles on related topics "Is the French Approach to International Financial Crime Enforcement on the Verge of a Paradigm Shift?" and "The Rise of the American DPA Procedure and its European Avatars". We welcome comments and suggestions, including proposals for future articles. Your consideration and support will be much appreciated.

Margot Sève & Michel Perez

Is the French Approach to International Financial Crime Enforcement on the verge of a paradigm shift ?

by Margot Sève, Ph.D.¹

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During the first half of 2016, one case and one draft bill have marked an evolution in France's approach to international financial crime. In January 2016, France entered its first corporate plea deal with a Swiss Bank for laundering of tax fraud proceeds. In March 2016, French Finance Minister Michel Sapin submitted to the French Parliament a draft bill on Transparency, Fight against Corruption and Modernization of the Economy (the "Sapin II Bill").³ Both instances mark a substantial shift in how France addresses white collar crimes, in particular as France seems to be moving towards a more Anglo-Saxon model of enforcement.

I. The Guilty Plea Deal of Swiss Bank Reyl & Cie S.A.

On January 5, 2016, the Paris Court of Justice (*Tribunal de Grande Instance* – "TGI") approved a plea deal between Swiss bank Reyl & Cie S.A. and France's financial prosecutor (the "Parquet National Financier" or PNF), whereby the bank agreed to pay a €2.8 million fine and to plead guilty to laundering of tax fraud proceeds. As required by law, the plea deal was reviewed and approved by a judge of the TGI so that

it would become legally binding and terminate prosecution (*action publique*).⁴ While judicial review occurred during a public hearing, the settlement documentation was not published.⁵

1. The Reyl settlement is the direct result of recent changes in France's management of financial crimes

France's criminal investigation into Reyl's conduct was prompted after the French Minister of Budget was accused of holding undeclared accounts in Switzerland in violation of French tax laws. Reyl had been under investigation by an investigative judge ("*juge d'instruction*") since 2013, when it eventually entered into a guilty plea agreement using the "*Comparution sur Reconnaissance Préalable de Culpabilité*" (CRPC) procedure, roughly translated as "court appearance upon pretrial guilty plea."

CRPC settlements were initially introduced in 2004⁶ to address minor and non-complex offenses, mostly those committed by individuals⁷ – although corporations were never legally prevented from entering into CRPC plea deals⁸.

1.1. The expansion of the CRPC to Financial Crime Cases

In 2011, CRPCs were expanded to all criminal offenses (*délits*),⁹ including cases managed by an investigating judge, *i.e.* when a magistrate investigates the facts of a case before sending it to court. CRPCs were nonetheless not expanded to certain type of offenses, such as tax fraud, which, in contrast to laundering offenses, are prosecuted using a specific procedure.

Investigating judges are therefore authorized, in order to avoid lengthy trials, to offer plea deals to defendants through the figure of the prosecutor. This procedure is favored in particular when the facts of the case are straightforward enough that they clearly meet the elements of the criminal

4 See Article 495-9 of the French Code of criminal procedure.

5 While providing that a judicial review shall take place during a public hearing, Article 495-9 of the French Code of criminal procedure does not require the publication of the settlement documentation.

6 Law n°2004-204 dated 9 March 2004 on the adaptation of the judicial system to developments in criminality (*loi portant adaptation de la justice aux évolutions de la criminalité*) known as "Perben II Law".

7 The CRPC circular dated 2 September 2004 restricted recourse to CRPCs to mass claims cases (*e.g.* road traffic offenses) and to "non-complex" offenses (*e.g.* urban violence, common crimes against property, and family disputes).

8 Provided that the corporations are represented by a natural person pursuant to Article 706-43 of the French Code of criminal procedure.

9 Law n°2011-1862 dated 13 December 2011 on the allocation of litigation claims and streamlining certain court proceedings (*loi relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles*).

1 L'auteur souhaite remercier Diane Ngouadje Maliendji pour la qualité de ses recherches.

2 The views expressed in this article are those of the author alone.

3 *Projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.*

offense at stake.¹⁰ Other parties to the case, such as the prosecutor, the defendant or the victim may also request that the criminal procedure be settled using a CRPC.

All defendants taking CRPC deals from the prosecutor must (i) recognize the criminal offense at hand, (ii) plead guilty, and (iii) agree to the penalty offered by the prosecutor.¹¹ CRPCs allegedly do not leave room for the defendant to negotiate with the prosecutor the terms of the CRPC.

1.2. The creation of the PNF to Enforce White-Collar Cases

In 2013, in reaction to the above-mentioned tax fraud scandal involving the former French Minister of Budget, the French legislator created the PNF, so that complex financial and economic matters would be enforced by a specialized prosecution office.¹²

The PNF focuses on cases such as tax fraud, money laundering, market abuse and corruption, including cases involving a strong international nexus.¹³ The introduction of the PNF was introduced as a landmark in France's management of serious financial crimes. Since becoming operational in 2014, the PNF has prosecuted over 475 cases¹⁴.

In 2015, the Paris TGI, where the PNF is situated, recommended that the PNF resort to CRPCs to settle economic and financial cases within the PNF's competence, in order to improve the timely and efficient enforcement of cases prosecuted by the PNF.¹⁵ Less than a year later, Reyl was taking the first CRPC deal the PNF had offered in a corporate case.

2. Financial crime enforcement in France remains one step removed from U.S. and U.K. systems

While the creation of the PNF and the expansion of CRPCs to financial crime cases have certainly marked a positive evolution in France's management of white collar crimes, CRPCs are different and appear less adapted to financial cases than U.S. Deferred Prosecution Agreements ("DPAs") or Non-Prosecution Agreements ("NPAs").

10 The CRPC circular dated 2 September 2004 specified that the alleged offense shall present "a relative simplicity" allowing to assess its severity in a precise way without the need for lengthy discussions. Such understanding of the applicability of CRPCs to non-complex offenses only was confirmed by a circular dated 20 March 2012 providing that the prosecutor shall not resort to CRPCs where the complexity of facts, among others, mandate a public trial before the criminal court (*tribunal correctionnel*).

11 See Article 495-7 and Article 495-11 of the French Code of criminal procedure.

12 Law n°2013-1117 dated 6 December 2013 on the fight against tax fraud and serious economic and financial crime (*loi relative à la lutte contre la fraude fiscale et à la grande délinquance économique et financière*).

13 See the circular on criminal law policy dated 31 January 2014 (*Circulaire de politique pénale relative au procureur de la République financier*).

14 During a parliamentary hearing dated 18 May 2016, the magistrate supervising the PNF indicated that the PNF is currently working on 353 cases.

15 Such recommendation was made during the solemn ceremony marking the opening of the Paris TGI's judicial year. See, Coustet (Thomas), « Le plaider coupable: une révolution culturelle ? », *Recueil Dalloz* 2015, p. 672.

As explained below in more detail,¹⁶ CRPC agreements differ from DPAs and NPAs in many ways. In particular, in contrast to DPAs, CRPCs do not extinguish criminal liability until the end of the agreement's term; and in contrast to NPAs, CRPCs are not an alternative to criminal charges. Moreover, practically speaking, investigating and gathering the facts and elements of proof of a CRPC case remains the responsibility of the judiciary; in contrast, in most instances, companies that entered DPAs with U.S. authorities conducted the historical review of their transactions and/or conduct themselves.

More importantly, defendants entering into CRPC settlements in France have to plead guilty, as opposed to most DPAs and NPAs. Because of the commercial, reputational and contractual repercussions that guilty pleas can have on the business of companies present on various international markets, CRPC deals may appear less attractive to multinationals, and therefore less adapted to international white collar crime enforcement.

In light of this regulatory competition, France is currently contemplating the implementation of a settlement mechanism for international corruption cases, which could lead France to even the level playing field with respect to international financial crime enforcement.

II. The Sapin II Bill: One Step Closer to U.S. and U.K. Enforcement Cases ?

On March 30, 2016, Michel Sapin submitted for review to the French Parliament his draft anti-corruption bill that is expected to bring landmark changes to France's anti-corruption system, previously criticized by academics and the international community as lacking efficient prevention, detection and enforcement mechanisms. In many ways, the bill will bring France one step closer to the Anglo-Saxon approach to international financial crime enforcement.

1. The Extraterritoriality of France's New Anti-Corruption Requirements

The Sapin II Bill provides that companies or groups above certain thresholds of employees and turnover (the "In-Scope Entities")¹⁷ will be required to implement internal anti-corruption programs, including codes of conduct, training sessions, due diligence procedures for clients, suppliers and intermediaries, and a whistleblower escalation program.

All subsidiaries of In-Scope Entities, whether French or foreign, that publish consolidated financial statements, will be required to comply with these obligations. Furthermore, French authorities will be able to investigate corruption offenses committed either by French nationals abroad as well as accomplices (acting in France) for the same infractions.

16 See below contribution: "The Rise of the American Deferred Prosecution Agreement ("DPA") and its European Avatars."

17 Companies bound by this requirement are those with at least 500 employees, or those belonging to a group with at least 500 employees, and with a turnover or consolidated turnover exceeding EUR 100 million.

2. The Creation of an Anti-Corruption Agency

Compliance with the aforementioned obligations will be supervised by the newly created French Anti-Corruption Agency. To that effect, and unlike its predecessor,¹⁸ the Agency will have broad enforcement powers, including the authority to investigate and impose administrative fines.¹⁹ The Agency will also ensure that French companies under foreign investigation comply with the provisions of the French "Blocking Statute" of July 1968.²⁰

3. Introducing Remediation Measures

Similar to the remediation measures and monitorship system imposed on entities entering into DPAs with U.S. authorities, the Sapin II Bill introduces the concept of remediation, whereby companies found liable of corruption by a judge would receive a complementary penalty to implement, at their own expense and within five years, internal measures remediating to the internal failures identified during the criminal proceeding. The Anti-Corruption Agency would be responsible for monitoring the implementation of said remedial measures.

4. Towards the French DPA ?

If voted, the most innovating provision of the Sapin II Bill will be the possibility for companies to enter with financial prosecutors into a settlement procedure more closely aligned with the U.S. and U.K. models than the above mentioned CRP-C. As described below,²¹ the "Convention judiciaire d'intérêt public" ("CJIP" – "Judicial Agreement of Public Interest") would be proposed to defendants either during the course of criminal proceedings, in which case defendants would have to plead guilty, or before criminal proceeding are initiated, in which case defendants would not need to acknowledge guilt. Terms of CJIPs could include imposing a fine of up to 30 % of a company's average turnover from the past three years, as well as remediation measures. All CJIPs would be made public and would suspend prosecution until the measures it provides for are complied with. Similar to the current CRPC procedure, all CJIPs would still be reviewed and approved by a judge to guarantee judicial review.

Although the CJIP is currently only foreseen to apply to corruption cases, this new transaction mechanism, as well as the increased specialization of French prosecutors in white collar crimes, represent a significant evolution in how France approaches international financial crime enforcement. The final version of the Sapin II Bill, which is expected to be voted before the end of the year,²² will be further commented in this Review under this column following its implementation. ■

18 The French Anti-Corruption Agency will replace the French Central Service for the Prevention of Corruption (*Service central de la prévention de la corruption*) which was created in 1993 with no investigative or prosecutorial powers.

19 Up to EUR 200,000 for individuals and up to EUR 1 million for companies.

20 Under the current version of the Sapin II Bill, the French Anti-Corruption Agency shall assume this function at the request of the Prime Minister.

21 See below contribution: "The Rise of the American Deferred Prosecution Agreement ("DPA") and its European Avatars."

22 The Sapin II Bill is subject to a fast parliamentary track ("*procédure accélérée*") whereby a preliminary version of the text tabled at the lower house of the French Parliament (*Assemblée nationale*) was adopted at first reading on 14 June 2016. The legislative procedure is continuing before the upper house of the French Parliament (*Sénat*).

The Rise of the American Deferred Prosecution Agreement ("DPA") and its European Avatars

by Michel Perez¹ and Alizee Dill²

"DPAs have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe." Lanny A. Breuer, US Assistant Attorney General³

« La raison du plus fort est toujours la meilleure; Nous l'allons montrer tout à l'heure. » Jean de la Fontaine, 1621-1695⁴

Introduction

In the United States, the concept of corporate criminal liability was established more than a century ago by the Supreme Court, in particular in the case of *New York Central Railroad Company vs United States* decided on February 23, 1909. It established that "*corporations can commit crimes which consist in purposely doing things prohibited by statute, and in such case they can be charged with knowledge of acts of their agents who act within the authority conferred upon them.*"⁵ A number of well publicized cases were successfully prosecuted by American authorities during the 20th century,⁶ but a sea change in the enforcement of corporate criminal law occurred when the Department of Justice ("DOJ") and other agencies started to use extensively pretrial diversion procedures. Pretrial diversion is defined by the DOJ Offices of Attorneys as "*an alternative to prosecution which seeks to divert certain offenders from traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service... In the majority of cases, offenders are diverted at the pre-charge stage. Participants who successfully complete the program will not be charged or, if charged, will have the charges against them dismissed; unsuccessful participants are returned for prosecution.*"⁷ DPAs and NPAs are the most frequently used forms of pretrial diversion.

In Europe, each Member State defines corporate liability. Some jurisdictions like the UK are governed by a Common

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3 Speech at the New York Bar Association, September 13, 2012. See: <https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association>.

4 Jean de la Fontaine, *Le Loup et l'Agneau*.

5 See: <https://supreme.justia.com/cases/federal/us/212/481/>.

6 Some of the best known cases were Standard Oil and, more recently, AT&T, the tobacco companies, General Motors and Microsoft.

7 See: <https://www.justice.gov/usam/usam-9-22000-pretrial-diversion-program>.

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