

Inside France's 1st Deferred Prosecution Agreement

By **Keith Krakaur, Ryan Junck, Valentin Autret, Jamie Boucher and Khalil Maalouf**

In a move that could signal a new phase of government enforcement in France, on Nov. 27, 2017,[1] French authorities published a Convention judiciaire d'intérêt public, or CJIP, with HSBC Private Bank Suisse SA, the first such agreement under the Sapin II law that was enacted in December 2016 and provided for the use of CJIPs by French prosecutors.[2]

While the terms and structure of a CJIP bear many similarities to deferred prosecution agreements that have been employed in countries such as the U.S. and the U.K., they also differ in certain key respects.

Below we examine the HSBC PB CJIP in light of Sapin II's statutory framework, compare and contrast the key aspects of CJIPs with similar prosecutorial mechanisms used in other jurisdictions, and discuss implications going forward for CJIPs in French prosecutions of domestic and multinational foreign companies.[3]

Overview of the HSBC PB Case

In 2008, Hervé Falciani, a former employee of HSBC PB, allegedly stole client account details from HSBC PB's Geneva office.[4] The files, which were later obtained by French authorities, reportedly contained information about French clients of the bank who concealed their income and assets from French tax authorities.

The investigation was handled for several years by prosecution authorities before it was transferred to an investigating magistrate in April 2013.[5] In 2014, the investigating magistrate placed HSBC PB under formal investigation for allegations of laundering tax fraud proceeds and unlawful banking solicitation.

In April 2015, HSBC PB rejected a settlement offer of €1.4 billion through a Comparution sur reconnaissance préalable de culpabilité (CRPC, a court appearance upon pretrial guilty plea). At the time, CRPCs, which require companies to plead guilty in exchange for terminating a prosecution, were the only type of pretrial settlement available for offenses such as laundering proceeds of tax fraud.

On Nov. 14, 2017, the Parquet National Financier (PNF), a specialized prosecutor's office in



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Paris tasked with prosecuting serious and complex financial crimes, announced that it had settled the case against HSBC PB by entering into the PNF's first CJIP, which was approved by the Paris High Court. The CJIP's statement of facts set forth allegations describing how the bank and its employees assisted the bank's clients in concealing their assets and evading tax payments in France. As part of the CJIP, HSBC PB acknowledged these facts and their legal significance. The HSBC Group acknowledged past weaknesses in controls at its Swiss private bank and stated that it had enhanced its anti-money laundering and tax compliance procedures.

Key Aspects of Sapin II and CJIPs

Sapin II was passed in response to reports by the Organization for Economic Co-operation and Development and certain nongovernmental organizations regarding the need for improvements in France's anti-corruption enforcement, as well as increased penalties imposed by the U.S. Department of Justice on French companies in recent years. Sapin II was thus designed to "bring France into line with the highest international standards in the area of transparency and the fight against corruption."^[6]

The key features of Sapin II include the creation of an anti-corruption agency, Agence française anticorruption (the French Anti-Corruption Agency), under the authority of the French minister of justice and minister of budget, the protection of whistleblowers against retaliation, and requirements for companies to prevent corruption, including the implementation of a compliance program. Importantly, Sapin II also creates a framework for companies to negotiate financial settlements in the form of a CJIP in connection with cases involving corruption, influence peddling and the laundering of tax fraud proceeds.

As set forth in Sapin II, CJIPs function as pretrial settlement agreements between the prosecutor and a company pursuant to which a criminal prosecution is deferred, and ultimately terminated, depending on the fulfillment of certain conditions specified therein.

The key aspects of CJIPs, as discussed in more detail below, are as follows:

- CJIPs do not require companies to plead guilty, although under certain circumstances, companies may be required to acknowledge a statement of facts and their legal significance (i.e., acknowledge that such facts constitute the offense of which the company is accused). Notwithstanding this acknowledgement, the CJIP is not equivalent to a judicial admission of guilt and does not give rise to a criminal record;
- CJIPs can only be entered into by legal entities, not individual defendants;^[7]
- CJIPs are only available for certain specified offenses: corruption, influence peddling and laundering tax fraud proceeds (but not tax fraud);
- CJIPs must specify the company's obligations, including paying fines, implementing or enhancing a compliance program under the supervision of the French Anti-Corruption Agency and paying damages to victims;
- CJIPs must be approved by a judge that reviews both the substantive and procedural aspects of the settlement;
- companies can withdraw from a CJIP within 10 days of the judge's approval;^[8]
- each CJIP order, amount and settlement agreement must be published on the agency's website; and

- if the conditions set forth in the CJIP are not satisfied, the prosecution can resume.
[9]

Key Aspects of the HSBC PB CJIP

Acknowledgment of Facts and Their Legal Significance

Acknowledging a statement of facts carries significant potential collateral consequences because private litigants may be able to assert those facts against the company in subsequent civil litigation.

Pursuant to Sapin II, CJIPs must contain a statement of facts, although the extent to which companies must acknowledge the facts and their legal significance differs based on the prosecutorial stage at which the CJIP is entered. If a CJIP is offered to a company at the preliminary investigation stage (i.e., before public prosecution is initiated), the company is not required to acknowledge the facts or their legal significance. By contrast, a company that is offered a CJIP after it was put under formal investigation by an investigating magistrate must acknowledge the statement of facts and their legal significance.

In the HSBC PB CJIP, because the matter had been referred to an investigating magistrate in 2013, the bank was statutorily obligated to acknowledge the statement of facts set forth in the CJIP and their legal significance, which it did in the CJIP itself and during the CJIP validation hearing.

In the United States, when the DOJ and a defendant enter into a DPA, irrespective of the stage of the investigation at which the DPA is signed, the DOJ files charges against the defendant and the defendant acknowledges facts sufficient to support a conviction.[10] Moreover, DPAs in the United States commonly include terms preventing a company from contradicting the statement of facts. However, neither Sapin II nor the HSBC PB CJIP contains such requirements, and it therefore remains to be seen whether companies in these circumstances will be prevented from denying the factual allegations set forth in a CJIP.

Penalty Calculation and Victim Compensation

Sapin II caps the financial penalty that can be imposed on a company at 30 percent of the company's average annual revenues calculated over the preceding three-year period. DPAs in the United States do not contain any such formal limitation, although pragmatic considerations will sometimes factor into the negotiated terms of a DPA.

The CJIP process also contemplates compensation to victims injured by the conduct underlying the CJIP.[11] The prosecutor is required to consider the harm to victims of the company's conduct and may require the company to compensate the victims as part of the CJIP. But the amount of compensation paid to victims does not factor into the 30 percent cap on the penalty amount.

In the HSBC PB case, the total settlement amount of €300 million consisted of compensation to the French state (€142 million),¹² disgorgement of profits (€86 million) and a financial penalty (€72 million). The last two aspects, totaling €158 million, equal about 30 percent of HSBC PB's average annual revenue over the preceding three-year period, which is the maximum fine allowed under Sapin II. It therefore appears that PNF sought to warn companies that, under circumstances it deems appropriate, it is willing to impose the maximum fine available under the CJIP procedures of Sapin II.

Cooperation

There is no statutory requirement (nor publicly available enforcement guidelines) in France for prosecutors to evaluate cooperation in a CJIP. In contrast, U.S. Department of Justice policy explicitly says that defendants can obtain cooperation credit “in a case that otherwise is appropriate for indictment and prosecution” and sets forth factors for federal prosecutors to consider when evaluating an organization’s cooperation.[13]

While Sapin II is silent regarding cooperation in CJIPs, the PNF noted in the HSBC PB CJIP that the bank’s minimal level of cooperation was a factor considered in assessing the fine. In particular, the CJIP noted that HSBC PB did not reveal misconduct to the authorities, did not acknowledge criminal responsibility during the investigation and offered minimal cooperation to the authorities. But the HSBC PB CJIP also noted that from the time the investigation began until December 2016, when Sapin II took effect, there was no legal framework in France incentivizing companies to cooperate with investigating authorities. By so doing, the PNF may be signaling that a company’s degree of cooperation will be taken into account in future CJIPs.

Compliance Programs, Remediation and Monitors

In addition to penalties, disgorgement and victim compensation, CJIPs also may contain provisions requiring a company to enhance its compliance programs or establish a remediation plan for a maximum period of three years under the supervision of the French Anti-Corruption Agency established by Sapin II. Under the new law, the agency also may be assisted by third-party experts, the cost of which would be borne by the company, although Sapin II dictates that a CJIP must provide for a cap of such costs. The law does not provide guidance as to how the maximum cost of the experts used by the agency will be set.

The HSBC PB CJIP did not include an obligation for the bank to establish or enhance its compliance program. Therefore, it remains to be seen what role the agency will play in supervising remediation programs, what criteria will be used to appoint the experts that assist the agency (and the extent to which companies may be able to weigh in on that selection), how the cost of such experts shall be set and capped, and whether any limitations will be placed on the role the experts can play in assisting the agency to carry out its monitorship.

Judicial Review and Publication

In the United States, a district court has relatively little authority to consider the merits or implementation of a DPA, as the executive branch, which includes federal prosecutors, has the discretion in the first instance to determine whether and how to file criminal charges and to resolve criminal investigations.[14] By contrast, English courts play a significant role in approving pretrial settlements in the U.K. English courts have the power to determine whether entering into a DPA, rather than proceeding with prosecution, is in the interests of justice and whether the proposed terms of the DPA are fair, reasonable and proportionate. English courts also perform a supervisory function after the approval of the DPA, including the ability to amend the terms of the DPA, terminate the DPA upon a breach of its terms, or discontinue the prosecution once the term of the DPA expires.

Similar to the U.K. approach, a CJIP in France must be approved by a judge in order to take effect. The judge will examine (1) whether the use of the CJIP is warranted in light of the facts of each particular case, (2) whether the procedure was properly carried out, (3) whether the penalty imposed was within the legal guidelines and (4) whether the penalty was proportionate to the advantage derived from the alleged misconduct. On the other hand, French courts can only accept or reject the CJIP but cannot amend its terms. Moreover, they do not have a supervisory function after the approval of the CJIP and do not assess whether the CJIP’s terms have been breached. Rather, the agency must provide annual reports to the prosecutor regarding the company’s compliance with the CJIP, and

the prosecutor determines whether the company has remained compliant.

In the HSBC PB case, the judge approved the CJIP, noting that it sufficiently described the investigation and the amount of French assets held and managed by the bank in Switzerland, and that the fine calculation complied with legal requirements. Pursuant to Sapin II, the judge's order, the settlement amount and the settlement agreement were published on the agency's website 10 days after the approval of the CJIP by the judge.[15]

Implications of the HSBC PB CJIP

In light of the factors discussed above, the HSBC PB CJIP does not necessarily provide a clear model for future CJIPs in France. In particular, other CJIPs may differ with respect to the type of misconduct at issue, the investigative stage at which they are offered, and whether they will contain compliance and remediation obligations. But the HSBC PB CJIP does provide an indication of how the PNF may treat corporate cooperation, even though it is not enumerated as a factor prosecutors are obligated to consider.

Additionally, it is worth noting that the CJIP mechanism may be applicable not only to French companies but also to foreign companies conducting business in France. Indeed, pursuant to Sapin II, under certain conditions, French authorities can bring charges of corruption and influence peddling occurring outside of France, not only against French nationals, but also against legal entities that conduct business in France. In light of this significant extension of the extraterritorial application of French criminal law, French authorities can be expected to begin offering CJIPs to multinational companies facing potential government enforcement actions in France.

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[1] The agreement was executed on Oct. 30, 2017, and was announced in a press release on Nov. 14, 2017.

[2] The CJIP procedure is regulated by article 41-1-2 of the French Criminal Procedure Code and by decree n° 2017-660 of 27 April 2017. The key aspects of the Sapin II law were analyzed here.

[3] DPAs in the United States developed on a case-by-case basis — though they have been subsequently recognized by statute, see 18 U.S.C. § 3161(h)(2) — whereas DPAs in the U.K. were initiated by the Crime and Courts Act 2013, similar to the initiation of CJIPs in France by Sapin II.

[4] In November 2015, a Swiss court sentenced Falciani in absentia to five years in prison for industrial espionage.

[5] In France, investigations are initially led by a public prosecutor during an enquête préliminaire (preliminary investigation). Because certain investigative measures are not

available to the prosecutor, the case may be referred to an investigating magistrate who has broader investigative powers.

[6] "Sapin II Law: Transparency, the Fight Against Corruption, Modernisation of the Economy," April 6, 2016, available [here](#).

[7] Individuals involved in the conduct remain subject to prosecution and are not parties to the CJIP. For example, in the HSBC PB case, two former directors are still under investigation.

[8] Upon withdrawal, the CJIP would become null and void, and none of the statements or documents provided by the company to the prosecutor during the CJIP process can be used by the prosecutor as part of subsequent proceedings against the company.

[9] Upon resumption, any fine paid by a company pursuant to the CJIP would be reimbursed, but any amounts paid to compensate victims or to third-party experts who may have assisted the agency in supervising the company's remediation plan would not be reimbursed.

[10] In a standard DPA, the DOJ agrees not to prosecute the case if the defendant complies with the agreed-upon terms.

[11] When victims of the offense underlying the CJIP are identifiable, they are informed by the prosecutor of the decision to offer a CJIP to the company.

[12] The French state was deemed a victim due to the alleged loss of tax revenues.

[13] United States Attorneys' Manual 9-28.700.

[14] Judicial supervision of DPAs was analyzed [here](#).

[15] This corresponds to the 10-day period in which companies may withdraw from the CJIP under Sapin II.