Key Takeaways

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The Sapin II Act: New Perspectives on Cross-Border Investigations

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On November 30, 2017, the Institut des Hautes Etudes sur la Justice (IHEJ) and Skadden hosted a roundtable at the Cercle de l'Union Interalliée in Paris to discuss new perspectives on the Sapin II Act and cross-border investigations. The panelists included Charles Duchaine, head of the French Anti-Corruption Agency (the AFA or the Agency); Eliane Houlette and Eric Russo, head and deputy head of the Parquet National Financier (PNF); and Keith Krakaur, head of Skadden's European Government Enforcement and White Collar Crime Group. Antoine Garapon, magistrate and secretary general of the IHEJ, led the conversation, and Jean-Claude Brunet, ambassador-at-large overseeing transnational criminal threats, provided opening remarks. The panelists shared their views on several topics, including the implications of the Sapin II Act (Sapin II), the AFA's enforcement policy, self-reporting, the first Convention Judiciaire d'Intérêt Public (CJIP) under Sapin II, corporate cooperation in enforcement cases, compliance programs and cross-border investigations. The summary below reflects the collective comments of the panelists.

Impact of Sapin II

Sapin II significantly strengthened the anti-corruption framework and enforcement powers in France. The act aims to improve France's attractiveness and competitiveness, credibility vis-a-vis compliance matters, and rankings on international anti-corruption benchmarks. Sapin II also levels the playing field between France and global anti-corruption enforcement players such as the U.S. and the U.K., and could potentially reduce the risk of foreign authorities bringing enforcement actions against French companies. Moreover, by creating the CJIP, Sapin II incentivized companies to self-report and cooperate with French enforcement authorities, in view of allowing the French Treasury — rather than other countries — to collect substantial fines. In sum, Sapin II likely will become a key component of France's "diplomacy of influence."

Prevention and Enforcement Policy of the AFA

The AFA assists companies in solving their internal compliance difficulties and therefore focuses on prevention more than on punishment. The AFA also may encourage and facilitate dialogues between market players and French authorities. Last fall, the AFA published a preliminary set of guidelines, which it submitted to public consultation in order to issue recommendations that are as efficient as possible. These guidelines aim at helping companies understand and implement their compliance requirements, avoiding potential administrative sanctions and, importantly, preventing corruption misconduct. The AFA currently is conducting six audit missions, which have involved off-site

documentary audits and will soon involve on-site controls. No cases have been referred to the Agency's sanctions commission yet and, in the short term, it appears that the AFA may favor issuing warnings against audited companies rather than imposing administrative fines.

The AFA has an obligation to refer violations that are brought to its attention to the prosecutors. In this context, in order to encourage companies to consider the Agency as a day-to-day interlocutor for compliance-related matters, the AFA could work as an intermediary between the prosecution office and companies that report corruption-related misconduct to the Agency.

Self-Reporting

There is no legal obligation for companies to self-report in France or the U.S. The decision whether to approach prosecutors and invite a government investigation should be based on the strategy, risks and benefits of self-reporting, in light of the companies' best interests. For instance, following the discovery of potential violations by employees, a company may balance the risk of the authorities finding out about the misconduct from other sources, such as press reports, whistleblowers and auditors, against the benefits the company may receive at the end of a government investigation if it were to cooperate. From the perspective of French enforcement authorities, managers who want to act in their company's best interest should not cover up misconduct.

In light of this cost/benefit analysis, certain agencies in the U.S. have implemented programs to incentivize companies to self-report and cooperate. For example, during the Obama administration, the United States Department of Justice (DOJ) implemented a temporary Foreign Corrupt Practices Act (FCPA) pilot program that encouraged companies to voluntarily notify the DOJ of corruption issues in exchange for potentially avoiding prosecution. On November 29, 2017, Rod Rosenstein, the DOJ's deputy attorney general, announced that this program would become a permanent component of DOJ policy. The enhanced program creates a presumption that companies that self-report will not, in the absence of aggravating circumstances or a repeat violation, be prosecuted. Although companies will still have to disgorge any inappropriately obtained profits, this new policy could scale back the frequency and severity of corporate penalties. This change in the guidance could therefore become a significant factor for companies in deciding whether to self-disclose corruption-related misconduct to the U.S. authorities, and it ultimately might result in more companies reporting violations to the U.S. authorities and fewer corporate corruption prosecutions.

Importantly, once a company commits to self-reporting and cooperating with the authorities, it is critical for the company and its lawyers to cooperate with the prosecutors to the fullest extent. In the U.S., the Yates memorandum and FCPA guidelines state that cooperation credit will be based on whether a company provides all relevant facts to the authorities. This does not mean that the company and its lawyers are working for the prosecutors: They remain on the opposite side of the table from the agencies. It is however imperative that companies be transparent and not cooperate "half way" with the authorities by selecting the facts they want to disclose. Indeed, nontransparent cooperation can be expected to backfire and can put a company at risk of losing any prospect of cooperation credit.

The HSBC PB CJIP

The PNF was a pioneer — as an institution — in promoting criminal settlement mechanisms. Treating financial crimes differently than others appeared as necessary in light of the fact that companies require clear rules as well as procedural efficiency, as opposed to the pace at which criminal law usually works.

On October 30, 2017, the PNF signed the first CJIP since Sapin II came into force with HSBC Private Bank Suisse SA (HSBC PB). In signing this CJIP, the PNF resolved the matter in a timely manner while preserving the exemplary virtue of the sanction.

Importantly, as part of the settlement, HSBC PB acknowledged the facts of the case and their legal consequences as set forth in the CJIP. Under Sapin II, cases that are no longer at the preliminary investigation stage (enquete préliminaire) but that have been referred by the prosecutors to an investigating magistrate, may only be resolved through a CJIP if the signatory company agrees to recognize the facts at stake and their legal consequences. That was the case for HSBC PB, which had been put under formal investigation in 2014. In contrast, companies that are offered CJIPs at the preliminary investigation stage are not required to acknowledge the facts in the case. Therefore, the HSBC PB CJIP is not necessarily representative of future CJIPs, especially if they are signed at the preliminary investigation stage. Since its creation in 2014, the PNF has shown a preference for conducting long preliminary investigations over quickly referring cases to an investigating magistrate.

The HSBC PB CJIP was further notable because the alleged misconduct related to laundering tax fraud proceeds — an offense that was only included in the scope of CJIPs near the end of the Sapin II legislative process. Because Sapin II was created initially to address corruption-related offenses, future CJIPs may predominantly be used to settle corruption-related cases.

The panelists noted that the CJIP is a change in culture and a paradigm for white collar crime enforcement in France, as it opens the door to cooperation, dialogue and negotiation between the authorities and company counsel.

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Corporate Cooperation in Enforcement Cases

French prosecutors are not statutorily required to consider the extent to which companies cooperate during investigations. However, the HSBC PB CJIP did refer to the bank's cooperation during its investigation. The panelists agreed that corporate cooperation would likely become the norm in CJIP cases and that companies should be prepared to conduct internal investigations and provide satisfactory evidence to the prosecutors. Regardless of corporate cooperation, the PNF might still conduct its own investigations if it appears necessary.

In the U.S., corporate cooperation with enforcement authorities is predicated on the notion that agencies do not have adequate resources to investigate all white collar crime cases. As a matter of efficiency and resource allocation, relying on a model whereby companies — with the assistance of counsel — conduct their own internal investigation ultimately increases the number of cases the U.S. government can resolve. Moreover, cooperation is encouraged in the U.S. because enforcement authorities bear the burden of proof, and in a court of law, prosecutors must demonstrate beyond a reasonable doubt that a crime occurred. In practice, prosecutors rarely go to trial against corporate entities and instead the process favors out-of-court settlement agreements such as NPAs, DPAs and guilty pleas.

Compliance Programs as Components of Settlement Agreements

The first draft of the Sapin II bill provided that companies could use the existence of a compliance program as a mitigating circumstance in negotiating CJIPs, but this provision was removed from the final version of the law. The panelists discussed to what extent, if any, prosecutors should consider the absence or quality of a company's compliance program in calculating CJIP fines. Because CJIPs can require companies to implement or enhance their compliance programs under the supervision of the AFA, French authorities may be mindful of the existence and efficiency of the company's compliance program, both at the time of the misconduct and at the time of any CJIP resolution.

In the U.S., a strong compliance program is a central component of resolving government enforcement cases. During an enforcement investigation, the DOJ will seek to determine whether companies have allocated adequate resources to their compliance functions and implemented robust training and policies. The DOJ also will seek to determine whether companies have regularly audited and tested their compliance programs, and retained data to demonstrate their programs' efficiency and treatment of whistleblower concerns. If a company did not have an adequate compliance program at the time of the misconduct, the DOJ will be interested in whether the company enhanced its program as part of its remediation process. In this regard, until earlier this year, the DOJ's Fraud Section had employed a "compliance consultant" to focus specifically on these issues.

Cross-Border Investigation Considerations

Cross-border enforcement cases raise strategic issues for companies and their external counsel with respect to sharing information with authorities across jurisdictions. Key components of cross-border investigations include how information is shared between countries taking into account data protection, bank secrecy and blocking statutes concerns.

One other issue that often arises in managing and resolving cross-border investigations — such as U.S. enforcement actions involving French companies — is the extent to which companies are able to discipline employees involved in the misconduct. For instance, U.S. prosecutors often examine whether any disciplinary action was taken by a company against relevant employees in order to assess the extent to which the company adequately remediated for any misconduct. However, French companies may not have the same flexibility as U.S. companies to discipline employees in light of French fiduciary obligations and labor law constraints.

The panelists concluded the roundtable with a reminder that CJIPs are only available to legal entities, not to individuals, and that individuals implicated in the misconduct reflected in a CJIP may still face prosecution.

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