Deferred Prosecution Agreements in the French Environment

Summary (English Version)

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In the past three years, major French companies have entered into deferred prosecution agreements ("DPAs") with the United States Department of Justice ("DOJ") in connection with charges relating to the U.S. Foreign Corrupt Practices Act (FCPA). As a result, DPAs have made a noticeable entrance onto the French anti-bribery enforcement landscape.

A DPA involves the simultaneous filing of charges against a company by the DOJ and a request by the DOJ that the prosecution in question be postponed. Charges are dismissed at the end of the period set by the DPA if the company has demonstrated its good conduct by meeting the terms of the agreement. DPAs generally require the company to "agree to pay a monetary penalty, waive the statute of limitations, cooperate with the government, admit the relevant facts, and enter into certain compliance and remediation commitments, potentially including a corporate compliance monitor." [FCPA Guidelines] p. 74). Non prosecution agreements ("NPAs") are a variation of this technique. NPAs are signed before any charging document is filed, and are maintained by the parties rather than the court. If their conditions are met, no formal charges are ever filed against the company. DPAs, which have no real equivalent in French law, have been met with some criticism, such as that expressed by our colleagues Astrid Mignon-Colombet and François Buthiau in a blog posting available here. Some of the criticism concerns DPAs generally, such as the perceived insufficient judicial supervision of the implementation of DPAs; some relates more specifically to the application of DPAs to French companies.

An efficient compromise

Deferred prosecution agreements do raise certain issues, and improvements may be warranted, particularly in a cross-border context. However, they constitute overall an effective enforcement technique that has amply demonstrated its usefulness in complex white-collar crime cases. By creating a compromise between the all-or-nothing alternatives of no enforcement action whatsoever and a full-fledged criminal trial, DPAs and NPAs allow for a pragmatic and swift response to both national and transnational offences. This is particularly true in the field of bribery and corruption. In fact, OECD country reports on the implementation of the OECD Anti-Bribery Convention show that, in terms of enforcement, the United States is well ahead of certain European countries, including France. While numerous factors have led to this situation, the availability of DPAs and NPAs in the U.S. has played a key role.

A clash of judicial cultures

The French criminal justice system, which has a deeply-rooted inquisitorial approach, traditionally views criminal settlements with great caution, if not suspicion. In a landmark 1995 decision, the French *Conseil constitutionnel* (Constitutional Council) established case law that strictly limits the use of settlements in criminal proceedings, based on fair trial constitutional principles. On the contrary, the use of plea bargains and other types of settlements are central to the U.S. criminal justice system, which is adversarial in nature. As stated by

the U.S. Supreme Court in *Lafler v. Cooper*, "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 2012. We do not purport to minimize this clash of judicial cultures and the need to account for the variety of legal traditions. However, global French companies are often exposed to U.S. law, and must therefore be prepared to engage with a more a aggressive and settlement-based enforcement culture as part of their risk assessment processes. Simply hiding behind French law when and if trouble arises in foreign operations is not an option.

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Increased judicial supervision

Commentators on both sides of the Atlantic agree that DPAs may raise certain fairness issues. Astrid Mignon-Colombet and François Buthiau point to a potential imbalance in the relationships between the DOJ and the investigated company, writing that "companies don't really have a choice but to accept the [deferred prosecution] agreement." While we recognize that in certain cases a company will have little choice but to settle, this will often be in situations where the company is faced with strong evidence of misconduct. Where the prosecution does not have a strong case, the company will likely be able to choose whether to enter a DPA or not. By and large, we believe that global companies are generally well-equipped to evaluate the likely outcome and consequences of a potential trial and to negotiate with the DOJ accordingly. Another criticism surrounding DPAs hinges on the weak judicial supervision of their terms. U.S. courts, however, seem to be starting to acknowledge this. A recent ruling suggests that U.S. courts may exert a certain degree of control over DPAs over the lifetime of the agreement. *United States v. HSBC Bank USA, N.A. et al., 12 CR 763—JG (E.D.N.Y. July 1, 2013)*. The sanction for this control lies within the court's inherent supervisory power over criminal proceedings before it. *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980) ("The supervisory power… permits federal courts to supervise 'the administration of criminal justice' among the parties before the bar.").

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Fostering the compliance culture

Rather than undue interference in French company management, we believe that DPAs encourage positive internal change within French companies. Deferred prosecution agreements generally include an obligation to set up or reinforce a compliance program, sometimes under the supervision of an independent monitor. The monitor can help implement policies and procedures designed to efficiently prevent, detect and deter corporate misconduct, and to foster a compliance culture in step with international best practices. In this context, the independence of the monitor is key to the success of his mandate and allows him to play the role of a genuine third-party facilitator.

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Toward a DPA "*à la française*"?

Reconciling the U.S. system of DPAs with other countries' traditional prosecution arrangements remains, however, a challenge. Parallel proceedings in the U.S. and in other countries may raise serious fair trial issues in each country. Total, a French company listed on the NYSE, recently signed a DPA in the U.S. On the very day that the DOJ announced the signing of the DPA, the Paris Prosecutor's Office (*parquet de Paris*) announced that

it had requested that Total SA and its current CEO be tried in France for the same facts. U.S. Acting Assistant Attorney General Raman stated that this was "the first coordinated action by French and U.S. law enforcement in a major bribery case." However, the coordination seems far from perfect. While Total has agreed to settle in the U.S., and has thus acknowledged certain facts, it still faces the prospect of a full-fledged trial in France for the same facts. Coordination between countries would undoubtedly be improved in these types of cases if French prosecuting authorities were granted the legal possibility of entering settlement agreements similar to NPAs or DPAs: this would allow for French and U.S. joint or parallel agreements with transnational offenders. These considerations have recently prompted the UK to introduce DPAs into its legislation. (Crime and court Act 2013, Schedule 17). Failing to do the same in France may put French global companies at risk of becoming entangled in conflicting legal and judicial constraints, and may allow swifter and more pragmatic foreign judicial systems to preempt French criminal justice sovereignty.

For further developments, see our article published in La Semaine juridique, Edition generale, 16 septembre 2013, Libres propos n°954.