

French Criminal Court Orders UBS to Pay a Record EUR 4.5 Billion in Tax Fraud Case

February 28, 2019

On February 20, 2019, the Paris criminal court found Swiss bank UBS guilty of illegally soliciting French clients and laundering the proceeds of tax fraud, and imposed a record fine of EUR 3.7 billion.

The Paris criminal court (32nd chamber of the *Tribunal de grande instance*) followed the prosecution's case, which had requested a fine of EUR 3.7 billion against UBS AG – the highest amount ever imposed by French courts. In addition, UBS AG's French subsidiary was fined EUR 15 million (again, following the amount requested by the prosecution), and five out of the six former executives or managers of UBS who were charged were sentenced to suspended prison terms ranging from 6 to 18 months and fines ranging from EUR 50,000 to EUR 300,000. Finally, the court ordered UBS AG and its French subsidiary to pay EUR 800 million in damages to the French State, which had joined the criminal proceedings as a civil party.

This decision sheds further light on the heightened scrutiny that French criminal authorities impose on actors of the financial sector with respect to suspicions of financial misconduct.

The amount of the fine imposed on UBS is a strong signal to the market that corporations charged with financial misconduct should seriously consider making use of the settlement mechanism introduced by the Sapin II law, namely, the *convention judiciaire d'intérêt public* ("CJIP").

UBS announced that it would lodge an appeal, and issued a detailed press release criticizing what it calls the judgment's "major deficiencies" and maintaining its confidence in its factual and legal position."

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Takeways

The Paris Court held that “the aggravated laundering of tax fraud attributable to UBS AG is the result of the implementation of a systematic policy in various countries that led to criminal proceedings by the judicial authorities of several states.” The Court also noted a “high level of similarity” between the actions it found UBS had committed and those described in the deferred prosecution agreement signed in 2009 with the U.S. Department of Justice (the “DOJ”).

The Court found UBS guilty of money laundering as defined in Articles 324-1 2° of the French Criminal Code, i.e., “contributing to the placement, dissimulation or conversion of the direct or indirect proceeds of a crime or misdemeanor,” with the aggravated factor defined in Article 324-2 of the French Criminal Code, i.e., that it was “committed in a habitual matter or using the means available as a result of a professional activity”.

Aggravated money laundering is punished by up to 10 years of imprisonment and a EUR 375 000 fine (EUR 1 875 000 for legal entities). However, the amount of the fine may be increased to up to half the value of the assets or funds that were the object of the laundering activities (five times that amount for legal entities).

Here, the Court found that “[m]oney laundering is a consequential offence, which implies proving that the property or funds in question originate from an underlying crime or misdemeanor, in this case, tax fraud.”

The Court found that for a French resident to hold an account at UBS without having declared the existence of this account to the French tax authorities in accordance with Article 1649 A of the French tax code constituted tax fraud as defined in Article 1741 of the French tax code.

Concerning the calculation of the fine, the Court found that in the framework of the so-called “sobering up cell” (i.e., the program under which French tax residents can under certain conditions regularize their tax situation), 3 983 French tax residents filed amended tax forms in respect of their undeclared accounts at UBS, for a total undeclared amount of EUR 3 773 008 769, which gave rise to fines and penalties.

The Court notes that it has taken into account the total amount that was regularized (as opposed to the total amount placed on the accounts), since this is the amount with respect to which the Court considers that tax fraud is established.

The Court found that this undeclared amount of EUR 3 773 008 769 was the amount of funds that were the object of money laundering activities, as a result of which the maximum amount of the fine incurred by UBS was EUR 9.25 billion (3.7 billion divided by two and multiplied by five). The Court set the amount of the fine at EUR 3.7 billion “in view of the structured organization of the fraud, its duration and its extent.”

By comparison, UBS paid USD 780 million in the United States in 2009 and EUR 300 million in Germany in 2014, in order to settle comparable charges.

The case for settling

This judgment should be read in the broader context of a recent and significant tightening of French practices concerning the fight against tax fraud, money laundering and transnational corruption.

Since 2013, the French Criminal Code includes a presumption as a result of which it is no longer necessary, in order to establish the offense of money laundering, to prove the existence of the underlying offense. Article 324-1-1 of the French Criminal Code now states: “assets and funds are presumed to be the direct or indirect product of a crime or misdemeanor if the material, legal or financial conditions of the placement, dissimulation or conversion cannot have any justification other than hiding the origin or effective beneficiary of these assets or funds”.

While this provision was not applicable at the time of the facts of the UBS case, it has since then substantially facilitated the prosecution of money laundering offenses.

In addition, before 2017, there was little incentive for companies to come forward and cooperate with the French criminal authorities in the context of tax fraud investigations, because there was no efficient legal mechanism to settle. UBS reportedly attempted to settle the charges, but the mechanism then in place required the bank to plead guilty, an

admission that it was not prepared to give. This changed with the enactment of the so-called *Sapin II law* of 9 December 2016¹: a legal entity (but not an individual) can now settle allegations of corruption, bribery and laundering of the proceeds of tax fraud with the National Financial Prosecutor (the *Parquet National Financier* or “PNF”), by negotiating a *convention judiciaire d’intérêt public* (“CJIP”), i.e., the French version of the U.S. deferred prosecution agreement. In a CJIP, the company acknowledges certain facts and agrees to pay penalties and take remedial action, including (i) disgorgement, (ii) a fine (in proportion to the advantages drawn from the offenses, up to 30% of the average yearly turnover of the company, calculated on the basis of the three last yearly turnovers available at the time the offenses have been discovered), (iii) damages to any victim and (iv) a strengthening of its compliance program. In exchange, the criminal proceedings are terminated without the company being convicted, or having admitted wrongdoing.

The purpose of this mechanism is to incentivize companies to come forward, with respect to offenses that are difficult to detect, while allowing them to continue to qualify for public tenders and other forms of licenses in jurisdictions where applicable laws provide for automatic disqualification in the event of criminal conviction.

Even though the cases are factually different, commentators compare the EUR 4.5 billion in total sanctions imposed by the Paris Court on UBS with those that HSBC Private Bank Suisse SA agreed to pay in October 2017, when it signed the first CJIP to settle similar charges of laundering of the proceeds of tax fraud.² The CJIP between HSBC Private Bank Suisse SA and the PNF resulted in a fine of EUR 300 million, out of a total amount of concealed assets held by French tax payers estimated at EUR 1,6 billion.

¹ See our alert memorandum at <https://www.clearygotlieb.com/news-and-insights/publication-listing/france-implements-sweeping-anti-corruption-reform>

² The CJIP and its English translation are available here: <https://www.economie.gouv.fr/afa/publications-legales>.

³ In addition to the CJIP between the PNF and Société Générale, the company entered into a deferred prosecution

More recently, in a seminal case of transatlantic cooperation, French bank Société Générale agreed to settle charges of corruption in connection with bribe payments to Libyan officials with both the U.S. and French criminal authorities. This was the first coordinated resolution by U.S. and French authorities of a foreign bribery case, for a total penalty of USD 585 million, split equally between the U.S. DOJ and the French PNF.³ In this respect, the Paris criminal court noted in its decision the increasing “strengthening of international cooperation.”

Michel Sapin, the sponsor of the law that bears his name, commented that the UBS verdict “lends credibility” to the CJIP mechanism, adding that it sends the message to the US authorities that “we do the job in France,” so that “they don’t need to do it in the USA.”

It remains to be seen whether the record sanctions imposed on UBS will withstand appeal.

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agreement with the U.S. Department of Justice. For more details on this resolution, see <https://www.clearygotlieb.com/-/media/files/alert-memos-2018/societe-generale-enters-into-first-coordinated-resolution-of-foreign-bribery-case.pdf>.