

Airbus Enters into a Coordinated Resolution of Foreign Bribery Investigation with U.S., U.K. and French Authorities for a Total of €3.6 Billion

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On January 29, 2020, Airbus SE (“Airbus”) agreed to pay over €3.6 billion (\$4 billion) in total penalties to the French, British and U.S. authorities to resolve a joint investigation by those authorities into bribery and corruption relating to both foreign public officials and private customers, as well as U.S. arms trafficking violations.

The resolution is the first coordinated settlement between these three anti-corruption enforcement authorities, resulting in one of the world’s largest corporate fines for bribery and corruption.

As a result of the joint investigation, Airbus simultaneously entered into a *Convention Judiciaire d’Intérêt Public* (“CJIP”) with the French authorities and deferred prosecution agreements (“DPAs”) with the Serious Fraud Office (the “SFO”) in the U.K. and the Department of Justice (the “DOJ”) in the U.S. The allegations include that several divisions of the Airbus Group engaged in bribery and corruption through the use of third-party consultants in connection with contracts for the sale of civil aircraft and satellites. On January 31, 2020, the CJIP and the two DPAs received judicial approvals in their respective countries.

This case highlights, yet again, the increasing focus on and cooperation in international anti-corruption enforcement, as evidenced by the joint efforts carried out by the three authorities in connection with the underlying investigation and the resolution itself, as well as the increasing similarities among the different enforcement regimes and the investigative tools they employ. The case also shows the potential benefits for large multinational companies of reaching a joint resolution with multiple authorities, as enforcement authorities increasingly take into account foreign authorities’ enforcement actions and penalties in their own settlements.

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Background

The Underlying Conduct

Between 2008 and 2015, Airbus engaged and paid several commercial intermediaries to assist the company in its commercial negotiations with various countries and private customers. Although Airbus's internal policies required approval by an internal committee and monitoring to ensure commercial intermediaries were independent, the investigations revealed that in a number of cases, the information provided to the committee was incomplete, misleading or inaccurate, in particular with respect to: (i) the process by which the commercial intermediary was identified; (ii) the amount of compensation promised to the intermediaries; and (iii) the identity of the ultimate beneficiary. Moreover, the investigation also revealed that "some commercial intermediaries were fictitiously engaged on sales campaigns in which they were not involved, or were engaged via shell companies, in order either to conceal their involvement in other campaigns, or to circumvent the maximum compensation amounts [that could be paid to intermediaries pursuant to Airbus' own guidelines], or because their engagement was motivated solely by their ability to transmit funds to third parties in complete secrecy," including public officials and private individuals, in order to secure aircraft sales in various countries.¹

A Joint Investigative Effort

The French, U.K. and U.S. authorities divided their investigative work so that each would focus on a particular area of potential misconduct.

The investigations began after Airbus had disclosed to the SFO on April 1, 2016 that it had identified issues in its U.K. Export Finance ("UKEF") applications. On June 6, 2016, the French National Financial Prosecutor ("*Parquet National Financier*" or "PNF") received an alert from the French Treasury, transferring the information that the UKEF had brought to the attention of the French authorities. This led the PNF, on July 20, 2016, to open a preliminary investigation with the assistance of the French "*Office central de lutte contre la corruption et les infractions financières et fiscales*"

("OCLCIFF") on charges of bribery of foreign public officials, forgery and use of forged documents, conspiracy to defraud, breach of trust, money laundering of the proceeds of this offence, and misuse of corporate assets, committed between 2004 and 2016. In the U.K., the SFO prosecuted Airbus on five counts of failing to prevent bribery.

On January 30, 2017, the U.K and France signed a Joint Investigation Team Agreement ("JIT"), a procedure set up in the context of the European Union to facilitate international criminal investigations. It covered all of the business partners engaged by the Airbus divisions until 2016, focusing particularly on about 110 business partners for which red flags had been identified. The JIT resulted in a division of these investigation priorities between the PNF and the SFO, looking at different areas of misconduct.

The PNF focused its investigations on the conduct of Airbus, its divisions and/or subsidiaries in the United Arab Emirates, China, South Korea, Nepal, India, Taiwan, Russia, Saudi Arabia, Vietnam, Japan, Turkey, Mexico, Thailand, Brazil, Kuwait and Colombia, while the SFO focused its investigations on the conduct of Airbus, its division and/or subsidiaries in South Korea, Indonesia, Sri Lanka, Malaysia, Taiwan, Ghana and Mexico.² Within this scope, the PNF and SFO selected a representative sample of the markets and concerns involved.

The DOJ in the U.S. conducted a parallel investigation into violations of the Foreign Corrupt Practices Act ("FCPA") and the International Traffic in Arms Regulations ("ITAR"). The settlement entered into with the DOJ, as discussed below, relates to conduct that took place during the group's sales campaign in China, certain aircraft component parts that were exported from the U.S. to Spain, and Airbus' sale of aircrafts to Ghana, Vietnam, Indonesia, and Austria.

¹ CJIP between the PNF and Airbus SE (Jan. 29, 2020), ¶ 28.

² CJIP between the PNF and Airbus SE (Jan. 29, 2020), ¶¶ 39-46.

The Settlement

French CJIP

As indicated in previous analysis on these matters,³ the purpose of the CJIP under French law 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.

Pursuant to the terms of the CJIP signed with Airbus on January 29, 2020, Airbus agreed to pay a public interest fine of €2,083,137,455, and will also undergo a three-year assessment by the French Anti-Corruption Agency (“AFA”) regarding the effectiveness of its compliance program, akin to a monitorship in the United States.

Under article 41-1-2 of the French Code of Criminal Procedure, the amount of the public interest fine is determined in proportion to the benefits derived from the wrongdoing, capped at 30% of the company’s average annual turnover, calculated on the basis of the turnover of the last three years available as of the date the wrongdoing is identified.

In 2019, the AFA and the PNF published guidance on aggravating and mitigating factors to calculate the amount of the public interest fine.⁴ In the Airbus case, to calculate the amount of the sanction, the PNF considered the following aggravating factors, resulting in a 275% multiplier: (i) the repeated nature of the wrongdoing over a very long period of time; (ii) the fact that the wrongdoing concerned separate agreements; (iii) the gravity of the offence of bribery of public officials; and (iv) the use of Airbus’ resources to conceal the wrongdoing.⁵

On the other hand, the authorities took into account, as mitigating factors, the fact that Airbus fully

cooperated during the investigations, even though it did not self-report to the PNF the facts which led to an internal investigation,⁶ and implemented remedial measures designed to prevent reoccurrence of the conduct at the outset of the investigations, which resulted in a 50% discount rate.⁷

In France, a blocking statute may limit foreign discovery with respect to information located in France.⁸ Violations of this statute carry a maximum penalty of 6 months of imprisonment and/or a company fine of up to €90,000. While that statute was until now very seldom applied, recent developments point to a renewal of interest, in a context where the new anticorruption law (“Sapin II”) designated the AFA to ensure the observance of the French blocking statute. Here, however, the CJIP mentions that Airbus communicated the documents resulting from its internal investigation only to the PNF, in order to ensure compliance with this statute. Going forward, the PNF, not the AFA, will continue to fulfil that role.

U.K. DPA

Pursuant to the U.K. DPA, Airbus agreed to pay a financial penalty of €398,034,571 for violations of the Bribery Act 2010, in addition to €85,939,740 in disgorgement of profits.⁹ The total penalty of €90,963,712 (including costs) is the largest imposed to date in the U.K. under a DPA.

The penalty reflects a 50% discount on the punitive element for Airbus entering into the DPA, which took into account the likely reduction that a court would have granted for an early guilty plea and a further discount reflecting Airbus’ “exemplary” cooperation and remedial measures. The DPA includes provisions requiring Airbus to continue to review and enhance its compliance programs, to fully cooperate with the SFO in any future

³ See our alert memorandum, [French Criminal Court Orders UBS to Pay a Record EUR 4.5 Billion in Tax Fraud Case](#) (Feb. 28, 2019).

⁴ AFA and PNF, « Lignes directrices sur la mise en œuvre de la Convention judiciaire d’intérêt public » (June 26, 2019).

⁵ CJIP between the PNF and Airbus SE (Jan. 29, 2020), ¶¶ 157-159.

⁶ CJIP between the PNF and Airbus SE (Jan. 29, 2020), ¶ 52.

⁷ CJIP between the PNF and Airbus SE (Jan. 29, 2020), ¶¶ 160-161.

⁸ Law 68-678 of 26 July 1968 modified by Law 80-538 of 16 July 1980, Articles 1 and 1 *bis*.

⁹ See SFO Press Release, [“SFO enters into €91m Deferred Prosecution Agreement with Airbus as part of a €3.6bn global resolution”](#) (Jan. 31, 2020).

investigations, and promptly report to the SFO any evidence or allegation of fraud of which it becomes aware. The DPA also provides that Airbus shall continue to cooperate with the SFO and other agencies for the duration of the agreement, in force until January 31, 2023. In particular, the DPA refers to the appointment of the AFA to act as a monitor of Airbus' compliance for the duration of the agreement and indicates that the SFO will rely on the AFA's monitoring and findings.

U.S. DPA

Pursuant to the U.S. DPA, Airbus was assessed an approximately \$2.3 billion criminal fine for violating the FCPA and ITAR. Despite imposing this significant criminal fine, the DOJ reduced the overall amount to approximately \$527 million; \$294.5 million for the FCPA violations and \$232.7 million for the ITAR violations. Airbus will also have to transfer its interest in a €50,000,000 bond, which is traceable to the proceeds of Airbus' ITAR violations, to the U.S.

The DOJ reduced its criminal fine in light of the fine the PNF levied against Airbus, which is consistent with the DOJ's "piling on" policy¹⁰ that limits duplicative penalties for the same conduct. Additionally, even though the company has subsidiaries and affiliates that operate in the U.S., the DPA concedes that: (i) Airbus is neither a U.S. issuer nor a domestic concern; (ii) the DOJ's territorial jurisdiction over Airbus' corrupt conduct is limited; and (iii) France and the U.K. have stronger jurisdictional bases for sanctioning the conduct related to Airbus' FCPA violations.

Airbus' FCPA violations relate to its use of third-party business partners to bribe airline executives and Chinese government officials in connection with certain aircraft contracts that Airbus was seeking to obtain. Airbus also set up a monetary fund to pay costs associated with entertainment events for Chinese government officials.

Airbus did not receive credit for self-reporting its FCPA violations because it only disclosed them after the SFO's investigation was made public. Airbus

did, however, receive full credit for cooperating with the DOJ's FCPA investigation. Airbus also received credit for disciplining employees who participated in FCPA violations and ceasing relationships with business partners involved in the company's bribery scheme.

Airbus' ITAR violations relate to its failure to report to the U.S. State Department political contributions, commissions, and fees the company paid its business partners in relation to the sale and export of defense articles or services, and to keep records related to those sales and exports. Airbus also retained business partners who failed to register as defense articles or services as required by the ITAR.

Regarding its ITAR violations, Airbus received credit for: (i) self-reporting the violations to the State Department; (ii) cooperating with the subsequent investigation; (iii) implementing corrective actions to remediate past conduct; and (iv) implementing enhanced compliance mechanisms.

As part of the DPA, Airbus is required to improve its compliance program and internal controls, conduct a global-risk assessment, and apply enhanced diligence procedures when screening potential business partners. The DOJ determined that it was not necessary to appoint an independent compliance monitor given the company's substantial cooperation, its significant remediation, and its ongoing monitoring by the AFA.

Takeaways

There are several important takeaways from the Airbus case:

- *First*, this case evidences the stronger and closer coordination between prosecuting authorities in multiple jurisdictions. Investigations were conducted by the PNF and the SFO under the framework of a Joint Investigation Team Agreement, in parallel with the investigations initiated by the DOJ and U.S. Attorney's Office for the District of Columbia. Following the first coordinated resolution by U.S. and French authorities

¹⁰ U.S. Department of Justice, Justice Manual, [Title 1.1-12.100 Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings](#) (May 2018).

involving foreign bribery against Société Générale S.A on June 4, 2018, the Airbus case highlights the increasing potential legal exposure for multinationals based on violations of the FCPA and anticorruption laws in other jurisdictions. It also demonstrates the increasing cooperation between anticorruption authorities, which extends beyond conducting investigations and imposing fines. For example, the DOJ's and SFO's decisions to not appoint independent monitors reflected their deference to the and confidence in the AFA's ability to appropriately monitor Airbus' future conduct.

- *Second*, this cooperation also confirms the potential benefits of a joint resolution among multiple authorities if companies decide to cooperate in the course of the investigation. Such cooperation can strengthen the likelihood of: (i) a coordinated, simultaneous resolution in situations where authorities in different jurisdictions are investigating the same conduct; (ii) reduced fines, as reflected by the DOJ's decision to reduce Airbus' criminal fine in light of the fine levied by the PNF; and (iii) reduced monitoring, as reflected by the DOJ and SOF deferring to the AFA and deciding not to appoint independent compliance monitors for the company.
- *Third*, the various national anticorruption authorities confirmed the approach set forth in their guidelines with regard to potential violations of the FCPA, the Bribery Act 2010, and the French anticorruption law ("*Sapin II*"), and a comparative analysis shows that they are increasingly convergent. This convergence is reflected in various ways, including: (i) the size of the fines – increasingly it is not just the DOJ that is imposing significant fines; and (ii) the nature of the remediation requirements imposed by

authorities from different jurisdictions are increasingly similar.

This may not be the end of the story. While it appears that Airbus engaged in remedial measures, including separating from and taking disciplinary action against former employees, criminal charges may also be initiated against such individuals in the various jurisdictions. While the U.S. DPA concedes that the French and U.K. authorities have stronger jurisdictional bases for sanctioning the conduct relating to Airbus' FCPA violations, it is not inconceivable that the DOJ will want to pursue individual prosecutions relating to the FCPA or ITAR violations. The DPA requires Airbus to fully cooperate with any DOJ investigations and prosecutions arising out of the conduct referenced in the DPA,¹¹ and the DOJ recently has affirmed its "continued dedication to holding individual wrongdoers accountable across the board," including for FCPA violations."

In the U.K., the SFO has come under scrutiny as a result of unsuccessful prosecutions of individuals involved in bribery and corruption cases, and has made clear that it intends to pursue prosecutions of individuals in appropriate cases. The U.K. judgment notes that there are ongoing investigations into individuals in the U.K. and other jurisdictions, and does not identify the individuals alleged to have been involved in order to protect the rights of suspects to a fair trial and also because some individuals are based in jurisdictions where there are human rights concerns and the death penalty exists for corruption. In common with past practice in the U.K., the DPA imposes obligations on Airbus to cooperate with investigations into officers, directors or employees, as well as agents, third parties and consultants.

It remains to be seen whether criminal charges will be brought against individuals in relation to the facts at issue.

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¹¹ Assistant Attorney Gen. Brian A. Benczkowski, DOJ, Address at the Am. Conference Inst.'s 36th Int'l Conference on the FCPA (Dec. 4, 2019).