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The UBS Conviction: The Dawn of a New Era in France?

By Frederick T. Davis[1]

On February 20, 2019, the Tribunal de Grande Instance sitting in Paris, France, convicted Swiss banking giant UBS AG and its French subsidiary UBS France, as well as five of their officers, of crimes relating to evasion of French taxes. Weighing in at 217 pages,[2] the criminal judgment is a blockbuster in several respects: The total corporate fines and civil damages imposed, of over 4 billion Euros, are by far the largest ever imposed in France on a corporation. The conviction may signal a new era of corporate criminal prosecution in France with far-reaching consequences for transnational law enforcement. And along the way, the Court addressed several procedural issues of interest in France and elsewhere.

The Procedural History

Sometime before 2013, the Public Prosecutor in Paris authorized a formal investigation, known in France as an "*instruction*," of possible facilitation of tax evasion. Under French criminal procedures, the matter was assigned to several investigating magistrates, who in 2013 ruled that UBS AG and UBS France, as well as a number of their officers, were under formal investigation for events between 2004 and 2012 relating to non-declaration of French income or wealth. Under French law, the investigators were tasked with using all means possible to establish whether or not a crime occurred and to identify those responsible, and to assemble all of the evidence relevant to the matter. The investigating magistrates heard many witnesses and reviewed a large number of documents, and in March 2017 they issued a document known as an *ordonnance de renvoi*, which is essentially an opinion summarizing and evaluating the evidence they had reviewed. They concluded that the evidence supported prosecution of the two UBS entities and several of their officers, and bound them over for trial on charges of money laundering to facilitate the evasion of French taxes by encouraging wealthy French taxpayers to deposit funds in Swiss bank accounts of UBS AG under procedures that would render their deposits difficult to detect. In addition, UBS AG was charged with unauthorized "solicitation" of banking in France: unlike UBS France, which was duly authorized to conduct banking activity in France, UBS AG was not.

As an early indication of the gravity of the matter, and the seriousness with which it was taken by French prosecutors and judges, the Public Prosecutor sought the imposition of a "bail" condition from UBS AG, namely, the down payment of a significant sum of money, theoretically in case of a judgment where the corporate defendant would be either unable to pay or not amenable to a court's order. Very unusually, the court imposed such a bail condition which, after an appeal to French courts and review by the European Court of Human Rights, ultimately was paid in the amount of 1.1 billion Euros.[3]

Although not reflected in the February 2019 judgment itself, of great significance is the publicly reported fact that in 2017 UBS entered into discussions with the prosecutor to explore a so-called *Convention Judiciaire dans l'Intérêt Publique*, more familiarly known in France as a CJIP. Loosely but clearly based on the American (and British) Deferred Prosecution Agreement (DPA), the CJIP procedure was introduced into French criminal law in December 2016 by the so-called Loi Sapin II, a major reform of French criminal procedures that permitted the negotiation of outcomes in criminal matters that, like their U.S. and UK counterparts, would avoid a criminal judgment that in some circumstances can have serious effects on corporations, such as being barred from bidding for certain public contracts. Reliable published accounts indicate that the UBS entities were offered CJIPs that would have entailed their paying approximately 1.1 billion Euros in exchange for a period of supervision followed by a dismissal of all charges, and that this offer was

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1 *Of Counsel in the New York and Paris offices of Debevoise & Plimpton LLP, and a member of the New York and Paris Bars. He is also a Lecturer in Law at Columbia Law School where he teaches courses on comparative criminal procedures and cross-border criminal investigations. His book* American Criminal Justice: An Introduction *will be published soon by the Cambridge University Press.*

2 Like most French judgments, this one is not publicly available. A copy of the French original obtained by the author can be found at https://drive.google.com/file/d/1hiJP8LEpFA0nmwKDqZoYV5cmH4mBdRD/view?usp=sharing.

3 See http://en.rfi.fr/economy/20141218-ubs-loses-appeal-against-11-billion-euro-bail-tax-fraud-case.

rejected.[4] (The CJIP procedure is available only for corporate entities, thus no such agreements could have been contemplated by the individual defendants).

The trial and the outcome

A trial took place in October and November 2018. Under French criminal procedures, the entirety of the file assembled by the investigating magistrates – including not only the bank and other documents they had assembled but witness statements from interviews – constituted the fundamental "record" before the three judges conducting the trial; since there is no hearsay rule in French criminal matters, the witness statements could be considered as evidence by the judges. The judges elected to hear a number of key witnesses, including bank personnel, among whom were several who were considered "whistleblowers" because they had alerted regulators to certain of the banks' activities.

The resulting judgment issued on February 20 was a staggering loss for the banks and the individual defendants, all but one of whom were convicted on virtually all of the charges against them.[5] The individuals received significant but suspended sentences, which they will not have to serve if they avoid further trouble, and the imposition of significant fines. The banks were fined a total of 3.7 billion Euros; in addition, the French State, which appeared in the case as a separate party,[6] was awarded 800 million Euros in damages. The banks have indicated that they will appeal the judgment, which would stay their obligation to pay their fines, although the judgment notes that they will benefit from a diminution of 20% of the amount due if paid immediately.

The judgment

Much of the lengthy judgment consists of a detailed recital of the procedural history, a summary of the positions taken by the parties, and summaries of the evidence heard at trial. The judges appeared to have little trouble concluding that the evidence sufficed to convict the principal defendants of the most serious charges against them. In prose that sometimes bordered on scorn, the judgment describes the energetic participation of Swiss officers of UBS AG in actively identifying and pursuing wealthy French clients, including traveling to France to host and participate in sumptuous events to woo them. Internal documents summarized by the opinion indicated that the Swiss entity viewed these French clients as important sources of business and profits. The court also appeared to have little trouble concluding that these French account-holders were motivated by a desire to hide their income and wealth from French authorities, and that their Swiss bankers were not only aware of this but took steps to help them avoid detection. One of their means of doing this was a facility known as "*banque restante*." Taking its name from the French expression "*poste restante,"* which indicates a "general delivery" address where a recipient can arrange to pick up mail at a post office rather than use a postal address for delivery, the *banque restante* permitted favored French clients to arrange to have their account information held for them at a bank facility where it could be picked up discreetly, rather than risking an incriminating record by having them delivered to a home address in France. The banks also used familiar techniques such as accounts identified only by number and intermediate entities to shield the names of true account holders, as well as the use of so-called "milk ledgers," which appeared to be an informal duplicate set of records to keep track of the French accounts. In addition, the fact that a number of account-holders had admitted their non-disclosure of taxable income or wealth was considered by the court. Indeed, the court used the amounts of the late-paid

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4 See https://www.lesechos.fr/08/10/2018/lesechos.fr/0302347126001_proces-ubs---un-enjeu-aussi-pour-la-justice-francaise.htm ; https://www.lesechos.fr/21/03/2017/LesEchos/22408-129-ECH_fraude-fiscale---ubs-et-sa-filiale-francaise-renvoyees-en-correctionnelle.htm.

5 Raoul Weil, UBS's former global head of wealth management, was acquitted of the criminal charges against him. Remarkably, Weil had previously stood trial in federal court in Florida on charges that he had participated in fraudulent evasion of US taxes, and had been acquitted by a jury verdict. https://www.theguardian.com/us-news/2014/nov/03/swiss-banker-acquitted-tax-evasion-trial-raoul-weil-florida.

6 Under French criminal procedures, a person or entity (including, in some instances, an association with an interest in the subject matter such as a Non-Governmental Organization) that claims to have been a victim of the defendants' conduct can ask to appear as a *partie civile*, which permits them to participate in the investigation and trial and seek civil damages to be included in the criminal judgment. Through this procedure, the French State sought repayment of taxes claimed to have been lost.

taxes as its primary basis for evaluating the criminal penalty imposed on the banks.

On the basis of this and other evidence, the judges apparently had little trouble concluding that both banks and their principal officers had engaged in a form of money laundering to facilitate the evasion of French taxes. It also noted that UBS AG had never sought or been given authority to act as a bank in France, which would have subjected it to reporting and supervisory obligations and, by hypothesis, would have made it more difficult for the banks' customers to avoid detection. Noting the frequent visits of UBS AG officers to France to encourage French account holders to deposit their funds in Swiss accounts, the Court concluded that the Swiss entity had in fact been conducting bank activities in France without authority, and that its officers were personally responsible for this.

The procedural decisions

Much of the judgment consisted of a methodical review – and rejection – of an array of procedural arguments presented by the defendants. Some of them were raised by means of a relatively new procedural mechanism in France known as a *"question prioritaire de constituionalité*," or "QPC," which permits parties to raise constitutional defenses prior to a trial. The individual QPC and other procedural rulings would strike an American reader as unexceptional, but several of them had bedeviled prior corporate prosecutions in France, and their emphatic rejection here undoubtedly serves to make such prosecutions easier in the future. Among the procedural issues decided:

- Territoriality. In a statement released by UBS after the judgment, UBS complained that the court "effectively applied French law in Switzerland…."[7] French criminal law distinguishes between "territorial" and "extraterritorial" prosecutions, where the former is based upon activity occurring in whole or in part on French territory, the latter on other bases such as the nationality of the perpetrator or victim. The court had no difficulty in concluding that even though one of the corporate defendants was a non-national, its activities in France sufficed to submit it to French criminal law and prosecution.
- Charging decisions on money laundering. The defendants emphasized they were not charged with facilitating tax evasion as such, but rather with "laundering" (*blanchiment*), defined in the French Criminal Code as "assistance in the investing, concealing or converting the direct or indirect products of a felony or misdemeanor."[8] The court's conclusion that this characterization of the defendants' conduct was supported by the facts – and that the evasion of taxes by account-holders was an appropriate predicate crime -- not only paves the way for future prosecutions, but heightens the stakes in light of the maximum ten year sentence applicable to the crime.
- Corporate criminal responsibility. The criminal liability of corporations in France is governed by Article 121-2 of the French Penal Code, a relatively recent statute that mandates corporate criminal responsibility for the acts done "for its account" by its "organs or representatives." The last phrase, which was introduced into the law in 1994 as part of a widening of corporate criminal responsibility, has been inconsistently interpreted by the courts, and in some notable instances has contributed to the acquittal of corporations for acts by officers or employees that, in the United States, would clearly have bound the corporation. The court here had no problem with this issue, noting that representatives "from top to bottom" of the corporations were involved, and clearly bound their corporate employers.
- Individual admissions. A number of individuals involved in the investigation had made admissions, including through attempted us of a French procedure known as a "*comparution sur reconnaissance préalable de culpabilité,"* or CPRC, which amounts to a form of a guilty plea. The banks contested the presence in the record of documents relating to these events, on the ground that they deprived by defense of defense rights protected by the European Convention on

[7] See https://www.swissinfo.ch/eng/ubs-verdict_french-court-fines-ubs-with-record--3.7-billion-in-tax-fraud-case/44771182.

[8] Article 324-1 of the French Penal Code.

Human Rights. They also contested the use of so-called "anonymous" complaints that had been filed with authorities. Without an extensive discussion of the subject – on which French procedural rules are notably unspecific, in the absence of a comprehensive set of evidentiary rules for criminal cases – the court concluded that these elements had not prejudiced the defense.

- Transfer of regulatory information. During the investigation, French banking regulatory authorities apparently communicated with, and received data and other information from, German and Swiss regulatory authorities pursuant to international agreements with them. The banks' complaint that this process unfairly prejudiced them was summarily rejected.

The importance of the decision

The significance of this outcome must be viewed in the context of France's relative lack of success in prosecuting corporations involved in multinational crimes. In the area of overseas bribery – punishable in the United States under the Foreign Corrupt Practices Act – this failure was, at least until recently, stunning: While France adopted in 2000 laws criminalizing overseas bribery – as required by the recently-signed OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions – until very recently not a single corporation had been convicted under that law. At the same time, a number of large, iconic French companies reached guilty pleas or DPA agreements with the U.S. Department of Justice on FCPA charges in which more than USD 2 billion was paid to U.S. treasuries, and nothing to French ones.[9] These and similar outcomes in other areas (notably French bank BNP Paribas' agreement to plead guilty to trading-with-the-enemy charges that ultimately led to the payment of more than USD 9 billion in fines and other payments to American prosecutors and regulators) caused considerable agitation in France, and risked creating a corrosive counter-reaction that might have included targeting U.S. companies for prosecution in France.

In December 2016, after much debate (and an initial rejection by the *Conseil d'Etat*, an administrative body that advises the government on potential legislation, on the grounds that the proposed procedures were "too American"), the Legislature adopted a law universally called the Loi Sapin II after the former minister of finance who proposed it. Particularly as first adopted, the law was unmistakably intended to provide an alternative, and counter-weight, to the success of the U.S. Department in obtaining negotiated outcomes with large multinational corporations.[10] Among its innovations was the CJIP, which permits corporations to negotiate an outcome that, like a Deferred Prosecution Agreement, would provide for the payment of substantial fines but would avoid a criminal conviction. The Loi Sapin 2 was particularly intended to give greater flexibility, and ultimately greater authority, to the National Financial Prosecutor (*Procureur National Financier*), whose office had been created in December 2013, and who was tasked with leading national efforts to investigate and prosecute a variety of financial crimes, including money laundering, tax evasion, and bribery.

First and foremost, the UBS judgment should be viewed as a dramatic victory for the National Financial Prosecutor, Eliane Houlette, who has served in that position since the post was created, but is said to be retiring later in 2019. Until this judgment, her office had achieved relatively little in terms of judgments against corporate entities. The eye-catching amount of this one will go a long way to meeting the expectations for that office.

More broadly, the court's emphatic judgment (unless, of course, disturbed on appeal) will be viewed as empowering the NFP and other prosecutors in France to move aggressively and decisively, and as being capable of having a real impact on French (and other) corporations that violate French law. French prosecutorial ineffectiveness at bringing corporate malefactors to justice has been much debated, and undoubtedly has had several causes. One of them has been the simple fact that, until recently, the maximum

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9 These outcomes are summarized, and possible explanations for them discussed, in Davis, Where We Are Today in the International Fight Against Overseas Corruption, https://nsuworks.nova.edu/ilsajournal/vol23/iss2/3/.

10 See Davis, France's New Anticorruption Law – What Does it Change?, https://globalanticorruptionblog.com/2017/03/02/frances-new-anticorruption-law-what-does-it-change/#more-8094.

corporate fines applicable in the event of a conviction were, at least by U.S. standards, remarkably low; in one instance where a French corporation was initially convicted of overseas bribery (before it was acquitted on appeal), the trial court imposed the maximum fine possible – which was a small part of the size of an illicitly obtained contract. This was not only unlikely to be an effective deterrent against similar conduct in the future, but would not incentivize corporations to "self report" and seek alternative outcomes. In addition, several procedural impediments detailed above – notably confusion in France about how to impose criminal liability on corporations[11] – have created obstacles to enforcement. And until the adoption of the CJIP procedure, French prosecutors had little to offer that would encourage corporations into negotiations that could end in appropriate but lesser outcomes, at a time when the U.S. Department of Justice was fine-tuning its use of Deferred and Non-Prosecution Agreements. Furthermore, in major international cases prosecutors were obligated to work through investigating magistrates (*juges d'instruction*), who are woefully understaffed and thus often take 10 years or more to complete complex investigations. Corporate criminal enforcement in the United States combines the availability of tempting "carrots" (in the form of negotiated outcomes that avoid conviction) with imposing "sticks" (in the form of rapid and nimble prosecutorial decision-making, almost entirely free of judicial supervision, with virtually no "corporate defense" and the potential application of huge penalties). In contrast, French prosecutors had neither "sticks" capable of frightening corporations into discussions nor "carrots" to offer them if they did.

The UBS case may change that perception.

As noted above, in the UBS case it appears that the corporations had the opportunity to resolve the criminal cases against them on a negotiated basis that would have cost them approximately 20% of their ultimate fines, and would have avoided a criminal judgment. The lesson from that experience will almost certainly be understood by French corporations to give new and added potency to the National Financial Prosecutor and her colleagues. Indeed, in the future she and other prosecutors will have even greater flexibility than they enjoyed in the UBS case: because the investigating magistrates in the UBS case were already in charge of the investigation when the Loi Sapin II went into effect in December 2016, they were necessarily involved in (and in essence held veto power over) CJIP negotiations relating to the UBS cases. In the future, however, corporations will have the option of reaching out to a prosecutor before an "*instruction*" has commenced and be able to negotiate using simpler, more efficient procedures – thereby making the prosecutor's power to engage in them even more effective and attractive.

Perhaps the most important audience of the UBS judgment may not be in France at all, but rather in Washington, D.C. The Department of Justice insists that it has no interest in doing a "me too" investigation or prosecution of companies that violate other countries' laws and reach outcomes in their home countries, but their guidelines on the circumstances where they will find a non-U.S. outcome "adequate" and will refrain from prosecution if they think U.S. interests are even tangentially involved are vague,[12] and their track record sparse. The UBS case did not directly involve U.S. interests (the Department of Justice, of course, had already pursued UBS on similar charges relating to U.S. taxpayers, with noteworthy results)[13], but the same is rarely true when and if French prosecutors may choose to prosecute French and other European companies for violation of laws relating to bribery and money-laundering, which typically take place across borders with sufficient American contacts to justify a parallel or successive American investigation. The clear goal of the Loi Sapin II and other reforms in France was to achieve freedom from the Department of Justice's role as the

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11 See Davis, Corporate Criminal Responsibility in France, Is It Out of Step?, https://www.ethic-intelligence.com/en/experts-corner/international-experts/132-corporate-criminal-responsibility-in-france-is-it-out-of-step.html.

12 See, for example, the Deputy Attorney General's comments on this issue in May 2018. https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

13 U.S. Department of Justice, UBS Enters into Deferred Prosecution Agreement, Press Rel. 99-136, February 18, 2009 https://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement.

"ultimate arbiter"[14] of criminal outcomes around the world by demonstrating that French prosecutors have the procedural tools and the commitment to resolve such disputes on their own. The UBS outcome, if upheld on appeal, may ultimately be viewed as a major step forward in achieving that goal.

Editor's note: One implication of the UBS decision is that financial intermediaries work in a globalized world and must adhere to extraterritorial standards or else they may subject themselves to criminal liability. This is especially relevant in the U.S. where private wealth is arriving in part to benefit from the fact that the U.S. has not reciprocated fully on FATCA Intergovernmental Exchange of Information agreements, has not ratified the protocol to the OECD Convention on Administrative Assistance in Tax Matters, and has not signed the Common Reporting Standard. In addition, since 2006, it has remained non-compliant with FATF standards on entity transparency and gatekeeper regulation. Revenue authorities and regulators worldwide are aware of this non-compliance and the flow of private wealth to the U.S. (BZ)

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14 https://globalinvestigationsreview.com/article/1036139/iba-paris-us-remains-the-%E2%80%9Cultimate-arbiter%E2%80%9D-on-international-enforcement.