

## **Novel Monitorship Agreement Avoids Violations of French Blocking Statute**

**December 30, 2010**

The U.S. Department of Justice (DOJ) on December 27 entered into a deferred prosecution agreement (DPA) with Alcatel-Lucent, S.A. that includes a unique monitorship approach designed to ensure compliance with France's blocking statute. As part of the DPA, a French national will be appointed to monitor the company and will report to French authorities, who, in turn, will report any future infractions to DOJ. The Alcatel-Lucent monitorship approach, which broadens and expands on a similar agreement with Technip reached earlier this year, signals a new trend likely to become the standard monitorship agreement for French companies—and possibly other European companies—entering into deferred or nonprosecution agreements with DOJ.

### **France's Blocking Statute**

The French blocking statute, law No. 80-538, was enacted by France on July 16, 1980 to confirm the exclusivity of the Hague Convention under French law for the gathering of information in France to be used in foreign litigation. Article 1 of the statute applies to the communication of sensitive information to foreign public officials and provides that “[s]ubject to international treaties or conventions, it is forbidden for any individual of French citizenship or usual residence and for any manager, representative, agent or employee of a legal entity having its registered office or a branch in France, to communicate in writing, orally or by any other means, anywhere, documents or information of an economic, commercial, industrial, financial or technical nature to foreign public entities if such communication is capable or likely of harming the sovereignty, security or essential economic interests of France or public order.” Article 1-*bis* of the statute applies when evidence is sought for the purpose of foreign proceedings. It provides that “[s]ubject to international treaties or conventions and applicable laws and regulations, it is forbidden for any person to request, look for or disclose, whether in writing, orally or in any other form, any documents or information of an economic, commercial, industrial, financial or technical nature which are intended to be used as evidence for the purpose of foreign administrative or judicial proceedings or in the context of such proceedings.”

Any violation of the provisions of Article 1 or 1-*bis* is a criminal offense punishable by imprisonment of six months, a fine of €18,000, or by both of these sanctions. France is serious about enforcing this provision; in December 2007, the French Supreme Court upheld the conviction of a U.S. attorney who had been prosecuted criminally for violating this portion of the statute.

## **The Alcatel-Lucent Deferred Prosecution Agreement**

Alcatel-Lucent is a global telecommunications corporation, headquartered in Paris, that provides voice, data, and video services to service providers, enterprisers, and governments around the world. Beginning in October 2004, the DOJ and the Securities Exchange Commission (SEC) began investigations into Alcatel for possible violations of the U.S. Foreign Corrupt Practices Act (FCPA), which makes it unlawful to bribe foreign government officials to obtain or retain business. In connection with that investigation, the DOJ and the SEC requested information from Alcatel-Lucent regarding its operations in Costa Rica, Taiwan, and Kenya to determine if Alcatel-Lucent made payments to foreign officials in exchange for the procurement of several contracts for network equipment and services.

In December 2009, Alcatel-Lucent reached agreements in principle with the DOJ and SEC, which were finalized and made public on December 27, 2010. In connection with the settlement reached with DOJ on December 27, Alcatel-Lucent entered into a three-year DPA in which the agency charged Alcatel-Lucent with violations of the internal controls and books and records provisions of the FCPA in several countries, including Costa Rica, Taiwan, and Kenya, and Alcatel-Lucent agreed to pay a \$92 million criminal fine in four installments over the course of three years. In addition, three Alcatel-Lucent subsidiaries pled guilty to violations of the FCPA antibribery, books and records, and internal controls provisions. Alcatel-Lucent also entered into a consent decree with the SEC pursuant to which it will pay \$45.4 million in disgorgement of profits and prejudgment interest. In its press release the DOJ indicates that the charging documents and penalty reflect that there was “limited and inadequate cooperation for a substantial period of time,” but that after the merger with Lucent, Alcatel-Lucent “substantially improved its cooperation with the Department’s investigation of this matter, as well as the SEC’s investigation.”

One unique aspect of the agreement is the extraordinary remedial measure that Alcatel-Lucent took “on its own initiative and at a substantial financial cost,” to make it the company’s policy to no longer use any third-party sales and marketing agents in conducting its worldwide business.

The most novel aspect of the DPA, however, is the three-year appointment of a French national to monitor and evaluate the effectiveness of Alcatel-Lucent’s internal controls, record-keeping, and financial reporting policies and procedures. The French monitor will be responsible for reviewing Alcatel-Lucent’s financial records and policies and for reporting any future infractions to French authorities who, in turn, will report the infractions to the DOJ. This solution to avoiding violations of the French blocking statute is made possible by the application of the mutual legal assistance treaty (Treaty) in criminal matters between France and the United States signed on December 10, 1998. The Treaty, designed to enable the gathering and sharing of information in an effort to enforce public or criminal laws, entitles the requested party to supply legal assistance to the requesting party, provided the execution of such assistance will not adversely affect its sovereignty, security, public order, or other essential interests.

Briefly stated, the Treaty entitles France to appoint a French monitor for Alcatel-Lucent. This person’s duties will be strictly limited to monitoring the company’s good practices with a view to avoiding violations of U.S. laws. Disclosure of information by a French monitor to French authorities who, in turn, report to the DOJ does not violate the French blocking statute because French authorities are permitted to report violations to the U.S. authorities directly. The French monitor, on the other hand, is not permitted to do so. Without this arrangement, any monitoring or compliance efforts would have violated French law. Accordingly, the appointment of a French monitor is a clever solution to this problem, as this monitor must necessarily report to a magistrate specially appointed to supervise his

activities (in accordance with the French procedure for placing someone under legal surveillance), which excludes any direct communication between the French monitor and the American authorities, and therefore eliminates any possibility of disclosure that would violate French law. In addition, the Treaty entitles the party giving the requested assistance to stipulate conditions for the implementation of a request, which, in practice, means that the French authorities will always be in a position to limit the information transmitted to only information concerning those violations, if any, that are noted, excluding any other quantified or factual clarification.

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