Global Investigations Review

# The Practitioner's Guide to Global Investigations

## Volume I: Global Investigations in the United Kingdom and the United States

Third Edition

**Editors**
Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

2019

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GIR

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# Publisher's Note

*The Practitioner's Guide to Global Investigations* is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime.

The Guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct such an investigation, and what should one have in mind at various times?

It is published annually as a single volume and is also available online, as an e-book and in PDF format.

## The volumes

This Guide is in two volumes.

Volume I takes the reader through the issues and risks faced at every stage in the life cycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the approach and thought processes of those who are at the cutting edge of this work, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Volume I is then complemented by Volume II's granular look at the detail of various jurisdictions, highlighting, among other things, where they vary from the norm.

## Online

The Guide is available to subscribers at www.globalinvestigationsreview.com. Containing the most up-to-date versions of the chapters in Volume I of the Guide, the website also allows visitors to quickly compare answers to questions in Volume II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy and vision in putting this project together. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at:
co-publishing@globalinvestigationsreview.com.

# Preface

## The history of the global investigation

Over the past decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes corporations and their employees to greater risk of potentially hostile encounters with foreign law enforcement authorities and regulators than ever before. This is partly owing to the continued globalisation of commerce, as well as the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to extract exorbitant penalties against corporations as a deterrent, and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement, of course, has also spawned greater coordination between law enforcement agencies domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, both direct and collateral, for individuals and businesses are of unprecedented magnitude.

## The Guide

To aid practitioners faced with the myriad and often unexpected challenges of navigating a cross-border investigation, this book brings together for the first time the perspectives of leading experts from across the globe.

The chapters that follow in Volume I of the Guide cover in depth the broad spectrum of the law, practice and procedure applicable to cross-border investigations in both the United Kingdom and United States. Volume I tracks the development of a serious allegation (whether originating from an internal or external source) through its stages of development, considering the key risks and challenges as matters progress; it provides expert insight into the fact-gathering stage, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; and it discusses strategies to successfully resolve cross-border probes and manage corporate reputation throughout an investigation.

In Volume II, local experts from national jurisdictions respond to a common set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation.

In the first edition we signalled our intention to update and expand both parts of the book as the law and practice evolved. The Guide continues to expand and extend its reach, in both substantive and jurisdictional terms. For this hardback edition, it has even outgrown its original single-book format; the two original parts of the Guide now have separate covers, although the hard copy of the Guide should still be viewed – and used – as a single reference work. All chapters are, of course, made available online and in other digital formats.

In this third edition, we have revised extant chapters to reflect recent developments. Following the global trend of data privacy law considerations becoming weightier in corporate and government investigations – not least after the EU General Data Protection Regulation became directly applicable in all Member States – we have added a chapter on data protection for Volume I, and we have expanded the scope and number data protection questions in Volume II.

In the United Kingdom, an eagerly awaited Court of Appeal reversal has clarified English law on legal privilege, although it remains out of step with other common law jurisdictions in this regard. In the United States, the Department of Justice modified and permanently adopted its enhanced enforcement FCPA Pilot Program, in the form of the Corporate Enforcement Policy, offering a presumption of significant co-operation credit for companies that self-report, remediate and co-operate. In both the United States and the United Kingdom, the enforcement agencies have experienced significant turnover in senior staff, which will no doubt influence enforcement priorities and activity.

Volume II now covers 21 jurisdictions, including Australia, Canada and Mexico, and we expect subsequent editions to have an even broader jurisdictional scope. As corporate investigations and enforcer co-operation crosses more borders – witness the recent Petrobras, Rolls-Royce and Keppel Offshore international, 'global' settlements – we anticipate Volume II will become an increasingly valuable resource for our readers: the external and in-house legal counsel; compliance officers and accounting practitioners; and prosecutors, regulators and advisers operating in this complex environment.

Finally, *The Practitioner's Guide to Global Investigations* has welcomed Ama A Adams and Tara McGrath to the team of eminent editors who have reviewed the content for this edition.

**Acknowledgements**

The Editors gratefully acknowledge the insightful contributions of the following lawyers from Clifford Chance: Zoe Osborne and Oliver Pegden in London, Amy Montour and Mary Jane Yoon in New York, and Hena Schommer and Michelle Williams in Washington, DC. The Editors would also especially like to thank Clifford Chance associate Kaitlyn Ferguson in Washington, DC, and Chris Stott, senior attorney at Ropes & Gray in London.

**Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath**
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# 1

# Introduction

**Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams and Tara McGrath**[1]

As an introduction to Volume I of the Guide, this chapter addresses UK and US law regarding two critical concepts that a corporate facing an investigation in either or both jurisdictions will need to consider at the outset: corporate criminal liability and double jeopardy. This chapter also sets forth in summary the priorities and challenges corporations face at each stage of an investigation – topics that are explored in more detail in the chapters that follow. One topic not explored, but likely to affect chapters in this guide with a European dimension, is the United Kingdom's decision to leave the European Union, scheduled for 29 March 2019. Considerable uncertainty remains surrounding the consequences, legal and otherwise, of that decision, which we hope will have become clearer by the next edition.

## Bases of corporate criminal liability 1.1

When corporate misconduct that potentially implicates multiple jurisdictions is uncovered, a critical preliminary question is: what is the test, in each jurisdiction, for corporate criminal liability? Not all countries have corporate criminal liability, but for those jurisdictions that do, it typically rests on the premise that the acts of certain employees can be attributed to the corporation. However, the category of employees that can trigger corporate liability differs between jurisdictions – in some, it is limited to those with management responsibilities, whereas in others the category of employees who can trigger corporate liability is much broader. Generally speaking, the act triggering corporate liability must occur within the

1 Judith Seddon and Ama A Adams are partners at Ropes & Gray International LLP; Christopher J Morvillo and Luke Tolaini are partners, and Tara McGrath is a senior associate, at Clifford Chance; Eleanor Davison is a barrister at Fountain Court Chambers; and Michael Bowes QC is a barrister at Outer Temple Chambers.

scope of the employee's employment activities. The act must also generally be done in the interest of, or for the benefit of, the corporation. The difference between theories of liability across jurisdictions inevitably poses challenges and complicates a company's strategy for dealing with a global investigation, and in some instances can determine the outcome.

### 1.1.1 Corporate criminal liability in the United Kingdom

In the United Kingdom, there are two main techniques to attribute to a corporate the acts and states of mind of the individuals it employs.

The first is by use of the 'identification principle' whereby, subject to some limited exceptions, a corporate may be held liable for the criminal acts of those who represent its directing mind and will and who control what it does. The relevant test is set out in the leading case of *Tesco Ltd v. Nattrass*:

> *Where a limited company is the employer difficult questions do arise in a wide variety of circumstances in deciding which of its officers or servants is to be identified with the company so that his guilt is the guilt of the company. I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent.*[2]

2 *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153; reaffirmed in *Attorney General's Reference (No. 2 of 1999)* [2000] 2 Cr App R 207 at 217-218 in which Rose LJ stated: '*Tesco v. Nattrass* is still authoritative … and it is impossible to find a company guilty unless its alter ego is identified. None of the authorities since *Tesco v. Nattrass* … supports the demise of the doctrine of identification: all are concerned with statutory construction of different substantive offences and the appropriate rule of attribution was decided having regard to the legislative intent, namely whether Parliament intended companies to be liable. There is a sound reason for a special rule of attribution in relation to statutory offences rather than common law offences, namely there is, subject to a defence of reasonable practicability, an absolute duty imposed by the statutes. The authorities on statutory offences do not bear on the common law principle in relation to manslaughter. Lord Hoffmann's speech in *Meridian* is a re-statement not an abandonment of existing principles … .'; and *Environment Agency v. St Regis Paper Co. Ltd* [2012] 1 Cr App R 177, at paras. 10-12 in which, at para. 12, Moses LJ said: 'It seems to us that as a matter of statutory construction it is impossible to impose criminal liability for a breach of Regulation 32(1)(g) to

It is for the judge to decide, as a matter of law, whether there is evidence on which a jury could be sure that a particular individual was a 'directing mind' within the *Tesco* principles; and, if there is such evidence, the jury must then be sure that the particular individual was in fact a directing mind for the purposes of his or her particular actions. A directing mind is not necessarily limited to board directors; it may also be found in a delegate who has full discretion to act independently of instructions from the directors. In short, under the identification principle, before a corporate can be found guilty of a criminal offence, someone who represents its directing mind and will must also be found guilty. There cannot be an aggregation of acts or omissions to attribute the company with criminal conduct; rather, the criminal act or omission must be performed by a single person who can be identified with the corporate for it to be liable.

The second technique of attributing liability to a corporate under English law is that of vicarious liability. Although, in general, in the United Kingdom a corporate entity may not be convicted for the criminal acts of its inferior employees or agents, there are some exceptions, the most important of which concerns statutory offences that impose an absolute duty on the employer, even where the employer has not authorised or consented to the criminal act.[3]

Most significantly, statutory developments in the United Kingdom, starting with the offence of corporate manslaughter under the Corporate Manslaughter and Homicide Act 2007, but more significantly the introduction of the Bribery Act 2010 and more recently Part 3 of the Criminal Finances Act 2017 (which came into force on 30 September 2017), represent a policy shift by introducing the strict liability offences of failure to prevent by an 'associated person' committed on behalf of the corporate, unless the corporate can demonstrate that it had adequate (or reasonable) procedures in place to prevent such an offence occurring. These statutes have broad jurisdictional reach. Under the Bribery Act for example, a corporate, falling within the definition of a commercial organisation under the Bribery Act, could be guilty even where no conduct occurred in, and where the associated person has no connection with, the United Kingdom.

The policy of the legislation to improve corporate governance is clear: Ministry of Justice guidance for the Bribery Act refers to the need for a corporate to create

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the company in circumstances other than those where an intention to make a false entry can be attributed by operation of the rule in *Tesco Supermarkets*. There is, in our view, no warrant for imposing liability by virtue of the intentions of one who cannot be said to be the directing mind and will of St. Regis Paper Company.' The identification principle was reaffirmed by the Court of Appeal in *R v. A Ltd, X, Y* [2016] EWCA Crim 1469. Most recently the SFO was unsuccessful in having charges against Barclays Bank PLC reinstated through a voluntary bill of indictment, after all charges against the bank were dismissed in the Crown Court. The reasoning behind Lord Justice Davis's decision cannot be reported until the conclusion of the trial of the individuals, including Barclays' former chief executive officer, https://www.sfo.gov.uk/2018/10/26/barclays-plc-and-barclays-bank-plc/.

3 These statutory offences are referred by Rose LJ in *Attorney General's Reference (No. 2 of 1999)* [2000] 2 Cr App R 207 at 217-218, at footnote 2.

an 'anti-bribery culture'.[4] Similarly, a corporate is guilty of the offence of corporate manslaughter under the Corporate Manslaughter and Homicide Act 2007 if the way in which its activities are managed or organised causes a person's death where a duty of care was owed. Guidance issued for the corporate offences of failure to prevent the criminal facilitation of tax evasion, which closely mirrors the Bribery Act guidance, also refers to the culture of the organisation. For example, top level commitment should foster 'a culture within the relevant body in which activity intended to facilitate tax evasion is never acceptable'.[5] Each piece of legislation and accompanying guidance invites consideration of the corporate's culture – its attitudes, policies, systems and practices. The test for liability is closer to the test in the regulatory context where liability is based on broad principles and considers governance, and systems and controls. In respect of the new tax offences, the UK government has stated that it expects 'rapid implementation' with companies expected to have a clear time frame and implementation plan in place by the time the offences came into force.

It may be that this model of corporate criminal liability expands, in due course, to all economic crimes; on 13 January 2017 the government issued a Call for Evidence (which ran until the end of March 2017) to examine whether the law on corporate criminal liability in the United Kingdom needs reform. The government said that it was seeking to establish whether there is evidence of corporate crime going unpunished because of the current impediments presented by the identification doctrine, as well as evidence on the costs and benefits of further reform, bearing in mind the significant changes made in certain sectors to tackle misconduct. This, it indicated, would inform government decisions over whether to make further reforms.[6] It set out five options for reform: amendment of the identification doctrine; a strict (vicarious) liability doctrine; a strict (direct) liability offence – effectively a widening of the current offence under section 7 of the UK Bribery Act (section 7 offence); incorporation of the failure-to-prevent wording into substantive offences, but with the burden on the prosecution to establish that the corporate had not taken adequate steps to prevent the unlawful conduct; and possible sector-by-sector regulatory reform (in the form of implementation in other sectors of similar arrangements to the new individual accountability regimes introduced for financial services in the United Kingdom). It is yet to be seen what impact political uncertainty in the United Kingdom will have on this thinking. In the deferred prosecution agreement (DPA) context, the current high threshold for establishing corporate criminal liability in the United Kingdom is a problem inherent in the DPA regime: to enter into a DPA, a prosecutor must satisfy the evidential test, which requires either that the evidential stage of the

4 Ministry of Justice Guidance on the Bribery Act 2010, issued pursuant to section 9 of the Bribery Act 2010.

5 Tackling tax evasion: Government guidance for the corporate offence of failure to prevent the criminal facilitation of tax evasion, 1 September 2017, at page 25.

6 Ministry of Justice, Corporate Liability for Economic Crime: Call for Evidence, Consultation Document, at p. 4.

Full Code Test in the Code for Crown Prosecutors is satisfied[7] or, that 'there is at least a reasonable suspicion based upon some admissible evidence that [the corporate] has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test'.[8] For that reason many expected DPAs to be used principally for section 7 offences, where the identification principle does not present an obstacle to satisfying the evidential test. The prospect for DPAs to be used for the proposed failure to prevent the facilitation of tax evasion offence is specifically laid out in the government's guidance.[9] Both the first two DPAs in the United Kingdom were for section 7 offences, although XYZ Ltd – anonymised because of ongoing criminal proceedings against individuals – also accepted misconduct in relation to conspiracies to corrupt and to bribe. However, XYZ Ltd was a small company and, as Sir Brian Leveson, President of the Queen's Bench Division, found, 'there is no question but that XYZ spiralled into criminality as a result of the conduct of a small number of senior executives bending to the will of agents'.[10] In other words, the identification principle did not, in that case, present a problem. However, in *Rolls-Royce*, the DPA spanned three decades, and dealt with conduct much of which predated the introduction of the Bribery Act 2010 and which formed the basis of seven counts of conspiracy to corrupt and false accounting. The remaining five counts related to section 7 offences. We can conclude that in that case, despite being considerably larger than XYZ Ltd, the identification principle did not present evidential hurdles in reaching a settlement. At the time of writing, no individual has been charged. The Call for Evidence recognises that 'the effectiveness of the DPA as an alternative disposal is dependent on there being a realistic threat of prosecution', which, they conclude, 'lends weight to the suggestion that the "failure to prevent" model would offer a more realistic threat of successful prosecution than a case built on the application of the identification doctrine.'[11] The failure-to-prevent model as enacted in the Bribery Act and now the Criminal Finances Act is described in the Call for Evidence as having 'some clear advantages'. Apart from being readily applicable to offending by organisations of any size, the government is explicit in the power of the model to effect corporate cultural change by acting as 'an incentive to companies to include the

7 Namely that prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case that does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

8 DPA Code of Practice, at para. 1.2(i)(b) (https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/).

9 Government Guidance, at p. 13. See footnote 5, above.

10 *SFO v. XYZ Ltd* Case No. U20150856, (Preliminary Redacted) Approved Judgment, dated 8 July 2016, at para. 34.

11 Ministry of Justice, Corporate Liability for Economic Crime: Call for Evidence, Consultation Document, at p. 23.

prevention of economic crime as an integral part of corporate governance and, should it afford a more realistic threat of prosecution, it might enhance the effectiveness of DPAs as an alternative to criminal prosecution'.[12]

### 1.1.2 Corporate criminal liability in the United States

The United States has long recognised principles of corporate liability based on common law and statutory bases.[13] The application of these concepts, however, has evolved over time and was most recently shaped by the global financial crisis of 2007–2008, where the spectre of industry and market collapse loomed large. Today, increasing emphasis on individual liability and corporate culture continues to shape and refine this area of law.

In the United States, the common law of agency plays an important role. Specifically, under principles of *respondeat superior*, a company may be held vicariously liable for the illegal acts of any of its agents (including employees and contract personnel) so long as those actions were within the scope of the agents' duties and were intended, even if only in part, to benefit the corporation.[14] An act is considered 'within the scope of an agent's employment' if the individual commits the act as part of his or her general line of work and with at least the partial intent to benefit the corporation.[15] The corporation need not receive an actual benefit and may be liable for these offences even if it directs its agent not to commit the offence.[16]

Moreover, even where no single employee has the requisite intent or knowledge to satisfy the *scienter* element of a crime, courts have recognised a 'collective knowledge doctrine' – where several employees collectively know enough to satisfy the intent or knowledge requirement, courts can impute this collective intent and knowledge to the corporation.[17] While historically courts have used the doctrine to establish knowledge on the part of a corporation, in recent years the doctrine has also been used to establish a corporation's intent (i.e., to establish whether the corporation acted wilfully).[18] This doctrine is not universally accepted and

12 Ibid. at p. 21.

13 Charles Doyle, Congressional Research Service, Corporate Criminal Liability: An Overview of Federal Law 1 (2013).

14 *Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961, 965 (6th Cir. 1998). See also *Hamilton v. Carell,* 243 F.3d 992, 1001 (6th Cir. 2001).

15 *United States v. Singh*, 518 F.3d 236, 249 (4th Cir. 2008) (citing *United States v. Automated Med. Labs.*, 770 F. 2d 399, 406–47 (4th Cir. 1985)).

16 *Automated Med. Labs.*, 770 F.2d at 407.

17 *United States v. Sci. Applications Int'l Corp.*, 555 F. Supp. 2d 40, 55–56 (D.C. Cir. 2008). See also *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738–39 (W.D. Va. 1974).

18 See *United States v. Pac. Gas & Elec. Co.*, No 14-CR-00175-TEH, 2015 WL 9460313 (N.D. Cal. 23 December 2015). There, a grand jury charged the Pacific Gas & Electric Company with violating the Pipeline Safety Act after a gas line erupted causing several deaths and injuries. The company moved to dismiss on the basis that the grand jury received incorrect instructions on, *inter alia*, collective intent. In denying the motion to dismiss, the court held that the collective knowledge of the corporation's employees demonstrated that they wilfully disregarded their legal

some courts have limited it to circumstances where the company was flagrantly indifferent to the offences being committed.[19]

Additionally, beyond the common law principle of *respondeat superior*, some legislation imposes criminal liability for companies, including in the fields of environmental and antitrust law.[20] Such statutes have the dual effects of forcing companies to internalise the costs of their wrongdoing and of increasing the deterrent effect of the law or regulation. For example, in a field such as environmental law, where misconduct can have tremendous collateral and long-term consequences, the imposition of liability on the company acts as a strong incentive for corporate monitoring of employees and thorough due diligence and risk assessment.

Although corporate criminal liability has been a feature of US law since the nineteenth century,[21] the criminal prosecution of corporations slowed abruptly and significantly – although temporarily – following the ill-fated prosecution of Arthur Andersen in 2002; the conviction (subsequently overturned by the US Supreme Court) resulted in the firm's collapse and job losses for many thousands of innocent employees.[22] In the aftermath of the *Arthur Andersen* case, prosecutors became far more hesitant to unleash the brute force of criminal charges against companies.[23] Although limited prosecutions continued following *Arthur Andersen*, they were further reduced in number when, in the wake of the financial meltdown of 2007–2008, many feared that prosecuting big banks and large employers might lead to further economic turmoil.[24] This idea, that an entity might be 'too big to fail', is now widely rejected by both prosecutors and the public, and there has

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duty to abide by the safety standards outlined in the Act. Id. at *3. Following a jury conviction on five counts, the company sought to have the case set aside; however, the court held that a reasonable juror could have found wilfulness beyond a reasonable doubt based on the evidence presented. *United States v. Pac. Gas & Elec. Co.*, No. 14-CR-00175-TEH, 2016 WL 6804575, at *3 (N.D. Cal. 17 November 2016). See also *United States v. FedEx Corp.*, 2016 U.S. Dist LEXIS 52438 (N.D. Cal. 18 April 2016) (denying FedEx's motion to dismiss, which was premised on the ground that the jury received incorrect instructions on collective intent and collective knowledge).

19 *T.I.M.E.-D.C., Inc.*, 381 F. Supp. at 740.

20 See, e.g., *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995) (imposing a strict liability standard for a violation of the Clean Water Act); *United States v. Weitzenhhoff*, 35 F.3d 1275 (9th Cir. 1993). Contra *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996) (suggesting that there is a mens rea requirement for violations of the Clean Water Act). See also James Swann and Alex Ruoff, Self-Referral Law Seen as Barrier to New Provider Agreements, Bloomberg BNA (5 May 2016), http://www.bna.com/selfreferral-law-seen-n57982070764/ (discussing the physician self-referral law's imposition of strict liability).

21 For a discussion of the history and development of corporate criminal liability in the United States, see Kathleen F. Brickey, Corporate Criminal Accountability: A Brief History and an Observation, 60 Wash. U. L.Q. 393, 404–15 (1982).

22 *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). For a complete history of Arthur Andersen LLP, see Susan E. Squires et al., Inside Arthur Andersen: Shifting Values, Unexpected Consequences (2003).

23 See Gabriel Markoff, Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century, 15 U. Pa. J. Bus. L. 797, 805–07 (2013).

24 See Gretchen Morgenson & Louise Story, Behind the Gentler Approach to Banks by US, *N.Y Times*, 7 July 2011, at A1.

since been a marked uptick in prosecutions. Today, prosecutors are generally less willing to accept the prospect of dire collateral consequences as justification for not pursuing criminal charges against corporations and have required guilty pleas from large corporations, previously considered 'too big to jail'. As corporations survive – and even thrive – in the wake of guilty pleas, the spectre of the *Arthur Andersen* case recedes and the rigour with which prosecutors pursue companies continues to increase.[25]

In recent years, the United States has increasingly placed emphasis on an organisation's compliance culture and internal controls. The result is that self-reporting, full acceptance of responsibility and the disclosure of all relevant facts concerning culpable individuals (regardless of seniority) now form the basis on which the government awards co-operation credit. The Department of Justice's (DOJ) Justice Manual, the Security and Exchange Commission's (SEC) Seaboard factors, US Sentencing Guidelines and the 'Yates Memorandum', each of which is discussed in detail in later chapters, all reflect this pronounced shift in enforcement priorities. As a recent example, in late 2017 the DOJ introduced the Corporate Enforcement Policy, which creates a rebuttable presumption that the DOJ will grant a declination to a company in regard to Foreign Corrupt Practice Act (FCPA) violations where the company satisfies the requirements for voluntary self-disclosure, co-operation and remediation. The DOJ has also announced that it will use the Policy as non-binding guidance in criminal cases outside the FCPA context.

Although the price of attaining corporate co-operation credit is often painfully high, most companies have no choice but to tolerate it; co-operation typically provides the best prospect for a company to prevent a criminal charge, minimise financial penalties and avoid other harsh collateral consequences, such as the imposition of a monitor. Still, co-operation is not for the faint of heart, and any company operating in the United States or subject to US jurisdiction should carefully consider the far-reaching consequences – both good and bad – of setting off down the often treacherous path of co-operation. Once a company voluntarily discloses misconduct to the government, the ability to defend the case and control the process is effectively relinquished, and a company will find it very difficult to withhold sensitive, embarrassing or even harmful information. Given the highly uncertain alternative to co-operation, however, most companies accept and embrace this new reality from the start of an internal investigation and understand that factual findings far more often than not – if they involve potential criminal misconduct – will be presented to law enforcement.[26]

25 See, e.g., Peter J. Henning, Seeking Guilty Pleas From Corporations While Limiting the Fallout, N.Y. Times Dealbook (5 May 2014), https://dealbook.nytimes.com/2014/05/05/seeking-guilty-pleas-from-corporations-while-limiting-the-fallout/; Francine McKenna, Why the Ghost of Arthur Andersen No Longer Haunts Corporate Criminals, MarketWatch (21 May 2015), https://www.marketwatch.com/story/why-the-ghost-of-arthur-andersen-no-longer-haunts-corporate-criminals-2015-05-21.

26 U.S. Dep't of Justice, Justice Manual 9-28.700 (2015).

## Double jeopardy 1.2

Another key question in any global investigation – where misconduct crosses borders and where more than one enforcement authority may seek to assert jurisdiction – is the extent to which different authorities can sanction the same or similar conduct. While domestic constitutional provisions on double jeopardy are similar between nation states, no universally accepted international norm exists and the protection afforded by the laws in one country may offer no protection in another. This can present a major difficulty to achieving a satisfactory global settlement for a client.

The doctrine of double jeopardy is that a person should not be tried twice for the same offence.[27] Its underlying objective is to bring finality to criminal proceedings against individuals and companies in specific circumstances. Double jeopardy applies to criminal proceedings, but has been held by the European Court of Human Rights (ECtHR) to encompass an administrative penalty, in circumstances where that penalty was classified as a criminal penalty because of the nature of the charges and the severity of the punishment.[28]

In the United Kingdom, there are two essential conditions for the doctrine to apply. First, the case must be 'finally disposed of' and second, any penalty imposed must actually have been enforced or be in the process of being enforced. The rationale for the doctrine is that it confers protection on the person (individual or corporate) from the risk of repeated prosecution by the State with its greater resources.[29] Reflecting similar concerns, the concept of double jeopardy in the United States is rooted in the Fifth Amendment to the US Constitution, which reads in relevant part: 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb'.[30] These twenty words have generated tens – if not hundreds – of thousands of pages of case law and are worthy of a treatise in themselves. Distilled to its essence, however, double jeopardy in the United States applies to prohibit subsequent prosecution or multiple punishments of an individual or corporation for the same conduct.[31] Nevertheless, the doctrine of double jeopardy is complicated by the question of dual sovereignty, which holds that double jeopardy's bar against successive prosecution for the same conduct does not apply when the prior prosecution was brought by a separate sovereign,

27 The *ne bis in idem* or double jeopardy principle is well established both in EU law and under the European Convention on Human Rights. The phrase is derived from the Roman law maxim *nemo debet bis vexari pro una et eadem causa* (a man shall not be twice vexed or tried for the same cause).

28 *Grande Stevens and Others v. Italy* (4 March 2014) Application Nos. 18640/10, 18647/10, 18668/10 and 18698/10. The judgment is not final.

29 The protection is not absolute. A second trial is permitted in defined circumstances. In the United Kingdom, a prosecutor will seek a retrial if a jury has been unable to reach a verdict in the initial trial. A further trial in murder cases may also be permitted in circumstances where compelling new evidence comes to light.

30 U.S. Const. amend. V.

31 See generally Ernest H. Schopler, Annotation, Supreme Court's Views of Fifth Amendment's Double Jeopardy Clause Pertinent to or Applied in Federal Criminal Cases, 50 L. Ed. 2d 830 (2012).

for example, the US government is not barred from bringing a case where a state or another country has already prosecuted the defendant for the same conduct or *vice versa*.

### 1.2.1 Double jeopardy in the United Kingdom

In England, the principle of double jeopardy is well established and has its origins in 12th-century common law and ecclesiastical law. The modern principle of double jeopardy in English law was set out by the Divisional Court in *Fofana v. Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux, France*:

> *The authorities establish two circumstances in English law that offend the principle of double jeopardy:*
> *(1) Following an acquittal or conviction for an offence, which is the same in fact and law* – autrefois acquit *or* convict*; and*
> *(2) following a trial for any offence which was founded on 'the same or substantially the same facts', where the court would normally consider it right to stay the prosecution as an abuse of process and/or unless the prosecution can show 'special circumstances' why another trial should take place.*[32]

The Divisional Court referred expressly to the United Kingdom's adoption of Article 54 of the Schengen Convention and its underlying rationale.[33] This is particularly important, as Article 54 states that a person (or company) whose case has been 'finally disposed of' by one Contracting Party may not be prosecuted by another for the 'same acts', provided that any penalty imposed has been enforced or is in the process of being enforced.[34]

Throughout the judgment, the Court stressed the need to look at the underlying acts behind each charge, rather than the label of the charge itself. In the event, the Court stayed the extradition proceedings on the basis that, although the extradition offence specified in the warrant was not based exactly, or solely, on the same facts as those charged in the UK indictment, there was such significant overlap between them as to require the proceedings to be stayed.[35]

In the case of DePuy International Limited, the Serious Fraud Office (SFO) applied the double jeopardy principle and confirmed that it will likely arise where there is or has been an investigation into the defendant's conduct by another authority overseas and the essence of a criminal offence in England and Wales is the same offence for which the defendant already faces trial, or has been acquitted or convicted. DePuy was a UK subsidiary of Johnson & Johnson, a US company that self-reported to the DOJ and the SEC bribery of foreign officials by DePuy, as well as other offences that did not involve the company, under the FCPA. Johnson

32 [2006] EWHC 744 (Admin), Judgment, at para. 18.

33 Id. at para. 14.

34 In the United Kingdom, the decision to leave the EU adds further uncertainty to the recognition of double jeopardy principle in its application to convictions in other Member States.

35 *Fofana*, Judgment, at para. 29. See footnote 32, above.

& Johnson agreed to a DPA with the DOJ covering the FCPA violations and a civil sanction with the SEC that encompassed criminal and civil fines amounting to US$70 million.

The DOJ informed the SFO of the criminal conduct and the SFO commenced an investigation into DePuy and Mr Dougall, the company's marketing manager. The SFO took the view that the DPA agreed by the parent company with the DOJ had the legal character of a formally concluded prosecution that punished the same conduct that had formed the basis of the SFO investigation. It determined that the rule against double jeopardy prevented any further criminal sanction being applied in the United Kingdom and instead pursued the company using a civil route to obtain the proceeds of crime. The civil sum obtained by the SFO took into account the global settlement in the United States, including the civil fines paid and recovered of £4.8 million.

Whether a DPA under the United Kingdom's regime would qualify for double jeopardy protection remains an open question. Although entry into a DPA does not constitute a criminal conviction, it does become the final disposal of specific intended criminal proceedings on its expiry and is almost certain to include the enforcement of a fine against the corporate subject. Furthermore, prosecution may follow in the event of a breach of the DPA.

### Double jeopardy in the United States 1.2.2

As noted above, the Fifth Amendment to the US Constitution contains a double jeopardy clause. Generally speaking, the double jeopardy clause prohibits the US federal government, or any individual state, from twice prosecuting someone for the same conduct if that person has already been acquitted or convicted (or after certain mistrials once a jury has been empanelled and 'jeopardy has attached').[36] It also prohibits courts from imposing multiple punishments for the same conduct, which may be covered in multiple charges in an indictment.[37] The double jeopardy clause of the Fifth Amendment – unlike its privilege against self-incrimination – applies to both individuals and corporations.[38]

The US Supreme Court, however, has recognised a significant exception to the double jeopardy clause, known as the 'dual sovereignty' doctrine. Pursuant to this doctrine, double jeopardy does not prohibit the federal government from prosecuting a person previously convicted or acquitted by a state, or *vice versa*, or one state from prosecuting a person convicted or acquitted by another.[39] In other words, under this doctrine the US federal government can prosecute individuals and entities for the exact same conduct that they have previously been tried for in

36 See U.S. Const. amend. V; *Martinez v. Illinois*, 134 S. Ct. 2070, 2074.

37 See *Breed v. Jones*, 421 U.S. 519, 528 (1975).

38 See *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (applying double jeopardy to corporate defendants without discussing their status as corporations); *United States v. Sec. Nat'l Bank*, 546 F.2d 492, 494 (2d Cir. 1976).

39 *United States v. Lanza*, 260 U.S. 377, 385 (1922).

one of the states, regardless of whether they were convicted or acquitted in that prior case.[40]

To blunt the potentially harsh impact of the dual sovereignty exception, the DOJ has adopted a policy that precludes the initiation of federal prosecution following a prior state (or federal) prosecution based on substantially the same facts. The Dual and Successive Prosecution Policy (the Petite Policy) seeks 'to vindicate substantial federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s), to promote efficient utilization of Department resources, and to promote coordination and cooperation between federal and state prosecutors'.[41] To overcome this policy, federal prosecutors must not only comply with the standards applicable for commencing any federal prosecution (i.e., that the defendant's conduct constitutes a federal offence and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact), but they must also obtain the approval of the appropriate Assistant Attorney General and establish that (1) the matter involves a substantial federal interest; and (2) the prior prosecution left that federal interest 'demonstrably unvindicated'. It is the second of these two factors that provides the greatest protection against successive prosecutions, as, under this policy, the DOJ 'will presume that a prior prosecution, regardless of result, has vindicated the relevant federal interest'.[42] While this presumption can, of course, be overcome (and the policy lists the factors relevant to make such an assessment),[43] federal prosecutors traditionally reserve such challenges for those cases where it perceives the preceding result to have been manifestly unjust.

Notably, the Petite Policy does not expressly preclude the DOJ from bringing criminal charges based on the same conduct previously prosecuted by a foreign sovereign. Nevertheless, similar, if not identical, principles are at play whether the prior prosecution was brought by a state or federal government, or a foreign sovereign. Counsel endeavouring to persuade the DOJ to defer to the foreign result certainly should be prepared to demonstrate why a successive prosecution would contravene that policy. The DOJ will, of course, consider if US interests have been sufficiently redressed by the foreign prosecution.[44] And, in the cases of

40 Notably, the Supreme Court very recently declined to extend the dual sovereignty doctrine to successive prosecutions by Puerto Rico and the United States, concluding that the question of separate sovereignty requires an assessment of the source of the power to punish. *Puerto Rico v.* Sanchez Valle, 136 S. Ct. 1863 (2016). There, the Court held that successive prosecutions may be brought only where two prosecuting authorities derive their power to punish from independent sources; if those authorities draw their power from the same ultimate source, successive prosecutions are prohibited.

41 U.S. Dep't of Justice, Justice Manual 9-2.031 (1999).

42 Id.

43 Id.

44 See *Thompson v. United States*, 444 U.S. 248, 248 (1980) (noting that there is an exception to the Petite Policy where US prosecution would serve 'compelling interests of federal law enforcement').

corporate criminal activity, it is likely that the DOJ will seek to extract a penalty based on the harm to its interests.

Still, if a prior prosecution by a foreign sovereign has resulted in adequate penalties proportionate to the conduct, the DOJ may well decline or defer the prosecution or, perhaps, offset any US fines or penalties by the amounts paid abroad, particularly in the corporate context. This is particularly likely in the wake of the DOJ's new policy, announced in May 2018 and since incorporated into the DOJ's Justice Manual, to discourage the 'piling on' of multiple penalties by the DOJ and foreign and domestic agencies when they are investigating the same corporate misconduct.[45] The policy articulates certain factors to be used when determining whether the imposition of multiple penalties would nevertheless serve the interest of justice, and therefore there is no certainty that prior prosecution by a foreign sovereign will result in no or lenient punishment by the United States.

The double jeopardy clause generally does not restrict the ability of the US government to pursue successive criminal and administrative remedies for the same conduct.[46] Indeed, while it is more common for administrative investigations to run in parallel with DOJ investigations, double jeopardy is not offended when a criminal prosecution follows the imposition of an administrative sanction (or *vice versa*). As the Supreme Court held in *Hudson v. United States*, the double jeopardy clause does not apply to non-criminal penalties.[47] Though the Court in *Hudson* recognised that criminal charges following in the wake of stinging administrative penalties could potentially implicate double jeopardy concerns, a defendant mounting such a challenge must establish by the 'clearest proof' that the administrative penalty was so punitive as to render it criminal for double jeopardy purposes – a very high hurdle indeed.[48]

### The application of double jeopardy in the EU and under the ECHR 1.2.3

Increased focus on combating overseas corruption following the signing of the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, has resulted in a rise in multiple prosecutions. A person or company engaging in overseas corruption faces the prospect of prosecution in any signatory country where he, she or the company may have sufficient involvement, either by citizenship or place of incorporation, or as a place where relevant acts took place.

The picture is evolving on both the supranational and national levels, and this is discussed below. The double jeopardy principle is set out in Article 54 of the

45 US Dept. of Justice, Justice Manual §1-12.100; Deputy Att'y Gen. Rod Rosenstein, Remarks to the New York City Bar White Collar Crime Institute (9 May 2018), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

46 See *Hudson v. United States*, 522 U.S. 93, 96 (1997).

47 Id. at 99.

48 See id.

1985 Schengen Agreement.[49] On 29 May 2000 the United Kingdom adopted Article 54 of the Schengen Convention and so it presently forms part of the United Kingdom's domestic law.[50] The rationale for the application of the principle across the European Union was made clear in *R v. Gozutok and Brugge*,[51] as permitting finality in criminal proceedings and also engendering mutual trust in national criminal justice systems by requiring that each Member State recognise the criminal laws in force in the others even when the outcome would be different if its own national law had been applied.

The Council Framework Decision 2009 on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (the EU Framework Decision)[52] sets out measures to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts that might lead to the final disposal of those proceedings in two or more Member States.

The EU Framework Decision is constitutionally binding on the United Kingdom as a Member State and as such must be taken into account by the SFO in its decision whether to open a criminal investigation. The double jeopardy principle is not a bar to a criminal investigation however, and the SFO has very wide discretion in deciding whether to carry out an investigation.[53]

### 1.2.4 European human rights jurisprudence

#### 1.2.4.1 European Court of Human Rights (ECtHR)

Article 4 of Protocol 7 to the European Convention on Human Rights (ECHR) specifically recognises the double jeopardy principle.[54]

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49 Article 54: 'A person whose trial has been finally disposed of in one contracting party may not be prosecuted in another contracting party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing contracting party.'

50 2000/365/EC: Council Decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis.

51 [2003] 2 CMLR 2.

52 2009/948/JHA.

53 Section 1(3) of the Criminal Justice Act 1987; 'The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud.' See also *R (Corner House) v. Director of the SFO* [2008] EWHC 714 (Admin), at para. 51.

54 'Article 4 – Right not to be tried or punished twice

1 No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2 The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3 No derogation from this Article shall be made under Article 15 of the Convention.'

The importance of the principle was emphasised in the ECtHR's Chamber judgment in the case of *Grande Stevens and Others v. Italy*.[55] Here, the applicants received an administrative penalty from Consob, the Italian Companies and Stock Exchange Commission, in respect of providing false or misleading information concerning financial instruments. The penalty took the form of substantial fines and various banning orders. Subsequently, the applicants were committed for trial before the Turin District Court in respect of criminal allegations of market abuse arising out of the same facts.

The applicants argued before the ECtHR that the subsequent criminal proceedings were in breach of Article 4 as the applicants had already been subject to a penalty that was akin to a criminal penalty, even though it was imposed as an administrative penalty. The court accepted their argument and ruled that the administrative penalty should be considered a criminal penalty for the purposes of the ECHR and that Article 4 prevented the criminal proceedings from taking place on the grounds of double jeopardy.[56]

### The Court of Justice of the European Union (CJEU) 1.2.4.2

2018 saw three further cases arising in Italy where the principle of double jeopardy was considered, again in relation to administrative penalties imposed by Consob which were severe enough to be considered criminal in nature. All these cases were referred to the CJEU by Italy's Supreme Court of Cassation for a preliminary ruling considering Article 50 of the Charter of Fundamental Rights of the European Union and Article 4, Protocol 7 ECHR.

In the *Ricucci* matter,[57] the defendant had been fined €10.2 million by Consob, as well as being convicted in criminal proceedings resulting in a sentence of four years' imprisonment for alleged market manipulation. The Rome District Court subsequently pardoned Ricucci in a final judgment.

Ricucci challenged Consob's fine in Rome's Court of Appeal, which reduced it to €5 million in 2009. He then took his appeal to Italy's Supreme Court of Cassation, where he argued that his 2008 criminal conviction and subsequent pardon should negate any Consob proceedings. The Court of Appeal asked the CJEU whether the *ne bis in idem* principle in Article 50 gives individuals a direct right that can be applied to negate dual proceedings. The Court also asked the CJEU whether the *ne bis in idem* principle precludes Italy's law allowing

55 *Grande Stevens and Others v. Italy* (4 March 2014) Application Nos. 18640/10, 18647/10, 18668/10 and 18698/10. The judgment is not final.

56 In March 2015, France's Constitutional Court ruled that Airbus executives could not be prosecuted for insider trading because they had been cleared over similar administrative charges by France's Financial Markets Authority, the AMF. In reaching its decision the Court gave considerable weight to the decision of the ECtHR in the *Grande Stevens* case.

57 Case C-537/16: Judgment of the Court (Grand Chamber) of 20 March 2018 (request for a preliminary ruling from the Corte suprema di cassazione – Italy). See also https://globalinvestigationsreview.com/article/1168169/cjeu-italian-defendants-should-not-face-double-jeopardy.

administrative proceedings to be brought for market manipulation after a defendant has been finally convicted.

The CJEU held that dual proceedings can be pursued if they meet 'an objective of general interest' – in this case, to protect the European Union's financial interests. However, the national legislation must also ensure that proceedings and the severity of penalties are limited to 'what is strictly necessary' where dual proceedings are to be pursued. Italy's market manipulation law did not respect the principle of proportionality, and the CJEU ruled that, if a criminal penalty already punishes misconduct in an 'effective, proportionate and dissuasive manner', administrative proceedings of a criminal nature are gratuitous and so go beyond 'what is strictly necessary'.

In two other cases, *Di Puma* and *Zecca*,[58] appeals were made against Consob fines, with the defendants arguing that they should not face administrative charges for insider trading when a criminal court had found no misconduct. The appeals court asked the CJEU whether, in light of *ne bis in idem*, a court would violate an EU directive that requires Member States to provide 'effective, proportionate and dissuasive penalties' for insider trading if it did not bring administrative sanctions after a criminal court found no wrongdoing.

The CJEU determined in its preliminary ruling that not bringing administrative sanctions after a criminal court has found no misconduct is in accordance with EU law because of the principle of *res judicata*. It ruled that a defendant who is cleared of a criminal charge, should not be the subject of administrative proceedings for the same matter.

The CJEU has considered the application of the double jeopardy principle to the Schengen Agreement in the context of an individual under investigation in Poland and Germany for allegations of extortion.[59] In this case it upheld the German prosecutor's decision that the double jeopardy principle did not apply. The matter had not been finally disposed of as no detailed investigation had taken place.

On 15 November 2016, the CJEU rejected an appeal brought by two applicants who were penalised by the Norwegian Tax Authority for failing to pay tax in 2008 and then convicted of aggravated tax fraud in 2009 by the National Authority for Investigation and Prosecution of Economic Crime. The applicants claimed they were being prosecuted twice for the same misconduct in violation of double jeopardy rules. Rejecting the application, the court held that ECHR double jeopardy rules are not violated where the contracting party could satisfy the court that dual proceedings are sufficiently connected in time and space so as to represent a coherent whole, rather than two sets of proceedings.[60]

58 Joined Cases C-596/16 and C-597/16, *Di Puma and Zecca*.

59 Case C-486/14, *Kossowski*, 29 June 2016.

60 *Case of A and B v. Norway* (Applications nos. 24130/11 and 29758/11) 15 November 2016, lovdata.no/static/EMDN/emd-2011-024130.pdf.

### Double jeopardy in France 1.2.5

Recent developments in France continue to warrant a special mention as the issue of double jeopardy and its application has come before the courts on a number of occasions recently. The appellate courts have recently considered the extent to which domestic law will recognise convictions in the United States as a bar to prosecution, as well as the status of US DPAs in domestic proceedings. On 18 June 2015 a criminal court in Paris acquitted four French corporates that were accused of paying bribes in connection with the United Nations' Oil-for-Food Programme on the grounds that they (or their corporate parents) had already signed DPAs with the DOJ. The rationale given was that it was inconsistent with French international obligations to prosecute the companies for a second time on what the Court found to be the same facts. The prosecutor's appeal against the acquittal was successful and in February 2016 a Paris court fined Total SA €750,000 for corrupting foreign officials.

At the time of writing, criminal proceedings in France against Total are being pursued in relation to separate Iranian corruption conduct that allegedly occurred in 2013. In relation to the same matters, Total entered into a US$245.2 million, three-year deferred prosecution agreement with the DOJ and disgorged US$153 million in an SEC cease-and-desist order. The DPA expired in November 2016.[61]

On 26 February 2018, the Court of Cassation in Paris upheld a decision to fine Swiss energy company Vitol €300,000 for making corrupt payments to the Iraq government as part of the United Nations Oil-For-Food programme.[62] The Court rejected Vitol's argument that it was protected from criminal proceedings in France because it had already been punished in the US. The Court found that double jeopardy did not apply because the company had pleaded guilty to a different charge in US proceedings[63] and stated that France must maintain its right to punish companies that break French law. In its ruling, the Court of Cassation considered double jeopardy protections enshrined in both France's Penal Code and the Charter of Fundamental Rights of the European Union. It concluded that both those protections fail to immunise a company from being prosecuted twice if part of the offence occurred within France and if the misconduct is prosecuted

61 The Court of Cassation will hear appeals from another 14 companies accused of wrongdoing as part of the UN Oil for Food scheme, with more double jeopardy arguments likely to feature in 2019. See https://globalinvestigationsreview.com/article/1168159/vitol-decision-shakes-double-jeopardy-defence-in-france.

62 The fine was in addition to a US$17.5 million sanction Vitol received in the United States in 2007 as part of a plea agreement entered to resolve identical allegations.

63 The company pleaded guilty to a single count of grand larceny in the New York State Supreme Court and paid a US$17.5 million fine, US$4.5 million of which was donated to the state of New York. Vitol admitted in the US plea deal that corrupt payments were made through its employees in France. In total, the company said it paid US$13 million to Iraqi officials between 2001 and 2002 hidden in oil contracts awarded to the company as part of the Oil-For-Food programme.

by a country that is not bound by French or EU law, such as the United States.[64] This significantly weakens the double jeopardy defence, in circumstances where some of the misconduct occurred in France.

These cases demonstrate the potential unfairness to a corporate that has effectively admitted the offence in another jurisdiction to obtain a DPA and then finds those admissions being used against it in a jurisdiction that does not recognise the DPA under the double jeopardy doctrine.

### 1.2.6 Conclusion

At first sight, the doctrine of double jeopardy appears to be a substantial protection against repeated prosecution in respect of the same conduct. However, although the doctrine may in some circumstances protect against a similar prosecution within the state, or member group such as the European Union, it may well fail to protect against a prosecution brought by a separate state. France's decision not to apply the principle in circumstances where part of the offence occurred within its sovereign territory is a significant restriction on its scope.

As many countries do not recognise a foreign conviction for the purposes of double jeopardy, it is not possible to reassure a corporate client that a criminal settlement in one jurisdiction will qualify as a settlement in others as well. Further, entering into a DPA in one jurisdiction may risk damaging the client's interests in another if the DPA is not recognised as a bar to prosecution, but the admissions it made to secure the DPA are admissible against it in other jurisdictions.

The picture is uncertain and many questions remain unanswered. These include:

- Should there be international recognition of criminal convictions for the purposes of double jeopardy, to encourage global settlements?
- Should DPAs be given the status of a criminal conviction for the purposes of double jeopardy?
- Should regulatory sanctions qualify for the purposes of double jeopardy?

Until these issues are resolved, a corporate client will only be able to place very limited reliance on the double jeopardy principle as a bar to further prosecution in respect of the same conduct. At present, the only safe course will be to seek to negotiate a global settlement with all the states most likely to take an interest in the conduct, before admitting guilt in any state. Whether this is practicable will vary from case to case.

In relation to individuals, an issue of note was recently referred to the CJEU stemming from a dispute between Hungary and Croatia in the case of *AY*.[65] The

64 Note that as France is a civil law jurisdiction, lower courts are not strictly bound to follow the Court of Cassation's decision.

65 Judgment in Case C-268/17 *AY (Arrest warrant — witness)*. The Court analysed whether any of the grounds for optional non-execution provided for in Article 4(3) of the framework decision applied in the *AY* case and concluded they did not. Those grounds relate to: (1) the decision of the executing judicial authority not to prosecute for the offence on which the European arrest warrant is based; (2) the fact that, in the executing Member State, the judicial authorities have decided to

Croatian court had sought a preliminary ruling on whether the double jeopardy principle under EU law means Member States may refuse to enforce European arrest warrant (EAW) requests in cases where its investigations treated individuals as witnesses and not suspects. Specifically, Croatia asked whether Hungary could refuse to enforce two EAW requests it issued for an individual, named only as AY to prevent damage to reputation, after AY was treated as a witness rather than a suspect in an investigation conducted by the Hungarian prosecutor's office. In its judgment of July 2018, the CJEU stated that execution of an EAW cannot be refused on the ground that a prosecutor had closed a criminal investigation where during that investigation, the requested person was interviewed as a witness only. The Court stated that the judicial authorities of the Member States must adopt a decision on any EAW communicated to them.

## The stages of an investigation 1.3

Issues that at first glance may appear to be isolated or technical can quickly spread across borders and escalate into multifaceted threats to businesses, reputations and careers. Even within jurisdictions, different enforcement authorities operate within their own, often complex, legal and technical frameworks. Any investigation, whether an internal fact-finding inquiry aimed at establishing the size and nature of a problem or one commenced by an enforcement authority, is inevitably a dynamic process. There can be no 'one-size-fits-all' approach and the scope of an investigation can change significantly as it progresses.

Nonetheless, it is possible to identify three broad, and often overlapping, phases to an investigation, namely the commencement, information-gathering and disposal phases. Particular challenges arise, and sometimes recur, at each of these.

Conducting and handling investigations, limiting the damage they cause and bringing them to as swift and efficient a conclusion as possible is an art rather than a science. It requires advisers to anticipate, balance and respond to a wide variety of challenges, and to appreciate the potential ramifications of every interaction with a diverse cast of characters.

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halt proceedings in respect of the offence on which the warrant is based; and (3) the fact that a final judgment has been passed on the requested person in a Member State, in respect of the same acts, which prevents further proceedings. The Court determined the first and third grounds were irrelevant in the case. The Court concluded that an interpretation according to which the execution of a European arrest warrant could be refused where that warrant concerns the same acts as those that have already been the subject of a previous decision, without the identity of the person against whom criminal proceedings are brought being considered relevant, would be manifestly too broad and would entail a risk that the obligation to execute the warrant could be circumvented. As that ground for non-execution constitutes an exception, it must be interpreted strictly and in the light of the need to promote the prevention of crime. The investigation by the Hungarian authorities was conducted, not against AY, but against an unknown person, and the decision that closed that investigation was not taken in respect of AY. The Court concludes from this that the second ground for non-execution does not apply either. See also https://globalinvestigationsreview.com/article/1166589/croatian-case-to-clarify-eaw-double-jeopardy-rules.

### 1.3.1 Commencement

When deciding whether or how to commence an investigation, or how best to respond to one already commenced by an enforcement authority, it is axiomatic that the very first task to be carried out must be to establish as precisely as possible the size and shape of the problem. Which corporate entities and individuals are regarded as subjects of the investigation? Which offences are they thought to have committed, and which regulatory provisions might they have infringed? Are any other local or foreign agencies investigating (or likely to investigate) this misconduct?

In some cases (typically those involving alleged breaches of regulatory requirements), the answers will be self-evident from notices confirming the commencement of an investigation or the appointment of investigators, and there may be opportunities to seek to establish more detail through scoping discussions. However, in other cases (typically those involving alleged criminal misconduct), the investigators will not necessarily provide details or opportunities for discussions. In some cases, the first indication an individual or entity receives of an investigation by an enforcement authority will be a requirement to attend an interview or provide documents, or, worse still, a knock at the door from investigating officers. In all cases – whether or not enforcement authorities are already aware of alleged misconduct – steps must be taken immediately upon discovery of the alleged misconduct to preserve and to avoid the destruction or deletion (inadvertent or otherwise) of documents that are, or could become, relevant. In large multinational organisations, identifying the custodians of these documents, drafting and disseminating appropriately inclusive document-retention notices, gathering the material and suspending automatic deletion policies is a substantial undertaking in itself.

Where authorities are not already aware of apparent misconduct, considering whether, when and how to disclose matters to them will be an immediate priority. In some cases, specific regulatory obligations will require disclosures. In others, it may be appropriate to voluntarily report matters to maximise the prospects of a consensual resolution on favourable terms. Both types of disclosures require careful handling. Consideration must be given to potential consequences, both for those individuals or corporates already implicated in alleged misconduct, and for those that may become so. Where information is disclosed voluntarily, wider considerations about whether co-operation will be appropriate and would be likely to encourage the relevant enforcement authority to curtail its investigation (and on which terms) should be borne in mind. Identifying the potential risks and benefits will typically involve assessing the enforcement policy and posture of each agency involved (and often of individual investigators) and its ability and propensity to pass information to other investigating or prosecuting authorities (both within and between jurisdictions).

These assessments will inform the answers to a number of practical questions:

- Should an initial notification be made before a full internal investigation has been undertaken?
- What should be disclosed at the end of the internal investigation and to whom?
- Should information be disclosed to the authorities orally rather than in writing?
- Will investigators regard anything less than unfettered access to witnesses' first accounts and other underlying documents as true co-operation enabling them to contemplate a negotiated outcome?
- Is it feasible to maintain claims to legal professional privilege or challenge investigators' actions or demands while still seeking to claim that the subjects of the investigation are co-operating?

Choices made at this stage about how much information and control to relinquish over the investigative process and the robustness of the line to be taken with investigators in relation to issues such as privilege can be crucial in setting the tone for the rest of the investigation, and any proceedings that flow from it.

Since the second edition of this text, the Court of Appeal has allowed ENRC's appeal against the first instance decision, upholding its claim to litigation privilege over the disputed documents, including notes of witness interviews.[66] Under the leadership of the new Director of the SFO, Lisa Osofsky, the SFO decided not to appeal that decision. Given the importance of privilege in the context of global investigations, the decision has been welcomed by lawyers across the globe – the Court of Appeal's judgment aligns the law more closely with the law of privilege in the United States and its clear articulation of the applicability of litigation privilege in the context of a criminal investigation is likely to mean that the SFO will be less aggressive in making assertions that privilege claims by companies over documents created during the course of internal investigations are ill-founded. However, it is unlikely that the SFO will be any less willing to request waivers of privilege, particularly since the Court of Appeal judgment was clear that its decision should not 'impact adversely' on the deferred prosecution regime in the United Kingdom, and emphasising the relevance of waiver to an assessment of a corporate's co-operation in reaching resolutions.[67] Therefore, decisions as to the approach taken by a company to privilege, regardless of whether privilege can properly be asserted or not, will continue to be crucial decisions that set the tone and, possibly, direction of an investigation.

In cases involving allegations made by or against directors or employees, early determinations need to be made as to whether any specific whistleblower

66 *SFO v. ENRC* 2018 EWCA Civ 2006.

67 See *SFO v. ENRC* 2018 EWCA Civ 2006 at paras. 115–117, in particular: 'In any event, to determine whether a DPA is in the interests of justice, and whether the terms of the particular DPA are fair, reasonable and proportionate, the court must examine the company's conduct and the extent to which it cooperated with the SFO. Such an examination will consider whether the company was willing to waive any privilege attaching to documents produced during internal investigations, so that it could share those documents with the SFO . . .'

protection legislation or rules have been engaged and whether action should be taken to suspend or dismiss those individuals.

### 1.3.2 Information gathering

Once the scope of an investigation has been determined, the process of gathering and analysing relevant information, whether in documentary or electronic form or in the form of witnesses' accounts, commences. Since the advent of the European investigation order (introduced in England and Wales from 31 July 2017), the process of gathering information across borders will be a much simpler and quicker process for enforcement authorities in Europe.[68]

In substantial cross-border investigations, the task of collating relevant material, ascertaining whether it is responsive to requirements to produce documents or provide information (or whether it should otherwise be produced to demonstrate a co-operative stance), and filtering it to remove material exempt from disclosure is time- and resource-intensive. It often requires specialist technical input and expertise. Information should not be treated as a readily portable commodity, and careful consideration should be given to applicable data protection and other confidentiality constraints before information is transferred between jurisdictions or produced to investigating authorities.[69]

Witness interviews during internal investigations raise no fewer questions. When should interviews take place? Who should be present? What material and questions is it appropriate to put to them during such interviews? Should they be represented (and, if so, at whose expense)? Taking a wider view across all jurisdictions in which action could be taken, and from the individual's perspective, is it in the interests of subjects of the investigation to provide information voluntarily, or should they insist on being compelled to do so?

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68 See Criminal Justice (European Investigation Order) Regulations 2017. There are at the time of writing proposals for European production and preservation orders that would, respectively, allow electronic evidence to be requested directly from a service provider in the European Union or oblige a service provider to preserve specific data. In the United Kingdom, the Crime (Overseas Production Orders) Bill is making its way through Parliament, which would, if enacted, allow a UK court, subject to certain requirements, on the application of an appropriate officer (which would include, among others, a police officer, a member of the SFO or a person appointed by the FCA) and provided that an international co-operation agreement were in place, to make an order against a person in that jurisdiction.

69 Recent developments in the United Kingdom and United States are relevant. In the United Kingdom, a decision by the Administrative Court in September 2018 *R (on the Application of KBR Inc) v. The Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin) extended section 2 notices, served in the United Kingdom, extraterritorially to foreign companies in respect of documents held outside the jurisdiction when there is a sufficient connection between the company and the jurisdiction. In the United States, following the successful appeal by Microsoft of orders holding it in contempt for failure to comply with a warrant requiring it to produce the contents of a customer's email account stored on a server outside the United States, Congress enacted on 23 March 2018 the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), providing expressly for extraterritorial application and thereafter the United States obtained a fresh warrant against Microsoft.

Of course, where investigations by the authorities have already begun, investigating authorities will be keen to interview individuals who are suspects. Depending on the nature of the investigation and the allegations against them, it may be open to individuals to remain silent in response to questions (although this course of action may limit their options in any proceedings flowing from the investigation). Conversely, it may serve such individuals' interests to proactively volunteer information to secure more lenient treatment by authorities, or ultimately the courts.

### Disposal 1.3.3

As the information gathering progresses, and evidence is assimilated and understood, a decision will need to be reached as to whether this may be resolved through negotiation, or whether the individual or corporate disputes the allegations entirely or is unprepared to reach any resolution or enter into any settlement that requires admissions of misconduct.

Where settlement is an option, from economic, commercial and reputational standpoints, settling with as many investigating authorities as quickly and on the most favourable terms possible is likely to be preferable. Particularly in regulatory enforcement investigations involving corporates, it is often clear from the commencement phase that this will be the most likely outcome, and dialogue throughout the investigation will have to be directed towards this outcome.

It should not be assumed that the process leading to a negotiated disposal is a smooth or simple one. Even in cases involving only one enforcement authority, the legislation and rules governing settlement and the calculation of penalties are complex. Although the discounts available for early settlement are potentially significant, the processes leading to them can involve successive rounds of proposals, counterproposals, representations and negotiations. In criminal investigations, in jurisdictions where it is possible to achieve negotiated outcomes as an alternative to prosecution, although the degree of scrutiny varies depending on which jurisdiction is concerned, such settlements will also be examined by a judge.

Complexity is multiplied where multiple authorities or jurisdictions are involved, or where it is possible that a finding, even if it does not involve any admission of liability, may fuel subsequent litigation from third parties such as erstwhile customers, employees or shareholders.

Although major investigations are unlikely to have progressed to the disposal stage without attracting at least some publicity, it is at this stage that press and political interest will peak. Enforcement authorities usually must make the outcomes of investigations public (and indeed corporate entities themselves may be obliged to do so if their securities are listed).

Other difficult questions arise with negotiated disposals. What will be the size of the fines, if any? For individuals, is there the prospect of imprisonment or other career-threatening penalties? Will it be possible to settle with all interested investigating authorities? For the corporate to bring matters to a close, will it be necessary to assist authorities in their pursuit of individuals? Will the disposal of

the investigations mark the end of the matter, or simply the start of a new phase of litigation or the commencement of a long process of reporting to a monitor and heightened levels of regulatory scrutiny or supervision? What can be said publicly by the subjects of the investigations?

With these themes in mind, we turn now to a detailed consideration of each stage in the chapters that follow.

# 10

# Co-operating with the Authorities: The US Perspective

**F Joseph Warin, Winston Y Chan, Pedro G Soto and Kevin Yeh**[1]

## To co-operate or not to co-operate? 10.1

After a company learns that a government authority has begun an investigation into it, the company must decide whether to co-operate. That decision is laden with numerous considerations, and a decision either way involves many potential benefits, drawbacks and implications.

### Defining co-operation: the Filip Factors, Yates Memorandum, Seaboard Factors and Sentencing Guidelines 10.1.1

The standards that guide the US Department of Justice's (DOJ) civil and criminal prosecution of companies are set out in the United States Attorneys' Manual's (USAM) Principles of Federal Prosecution of Business Organizations. That section of the USAM lists 10 factors – often called the 'Filip Factors', named after former Deputy Attorney General Mark Filip – that DOJ attorneys consider in determining whether to charge a company. These factors include the company's 'willingness to cooperate in the investigation' and its 'efforts . . . to cooperate with the relevant government agencies'.[2] In other words, whether and the extent to which a company co-operates with the government directly affects the DOJ's leniency considerations.

The potential benefits of co-operation are palpable. The USAM explains that '[c]ooperation is a mitigating factor, by which a corporation . . . can gain credit in

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2 U.S. Dep't of Justice, United States Attorneys' Manual (USAM) § 9-28.300.

a case that otherwise is appropriate for indictment and prosecution.'[3] Such credit can lead to reduced charges and penalties, or avoidance of charges altogether.

Although the USAM does not formally define 'co-operation', it identifies how a company can be eligible for co-operation credit. Of utmost importance, 'the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct.'[4] These relevant facts include how and when the alleged misconduct occurred, who promoted or approved it, and who was responsible for committing it.[5]

Previously, companies could become eligible for co-operation credit by voluntarily disclosing misconduct even without identifying the individuals engaged in the wrongdoing or their specific misconduct. Although such efforts would not garner full credit, the partial credit companies received could be enough to avoid charges.[6]

This changed in September 2015, when Sally Yates, then Deputy Attorney General, announced a 'substantial shift' from the DOJ's prior practice through the issuance of a DOJ-wide memorandum regarding 'Individual Accountability for Corporate Wrongdoing'.[7] The 'Yates Memorandum' states that '[i]n order for a company to receive *any* consideration for cooperation under the [Filip Factors], the company must completely disclose to the Department all relevant facts about individual misconduct.'[8] In other words, '[c]ompanies cannot pick and choose what facts to disclose . . . the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct' to be eligible for any co-operation credit.[9] Though individual responsibility has always been a priority for the DOJ, the Yates Memorandum has more keenly focused prosecutorial efforts against responsible individuals. Moreover, it makes clear that no co-operation credit will be given if a company 'declines to learn' and share all relevant information available to it regarding individual misconduct.

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3 USAM § 9-28.700.

4 Id.

5 USAM § 9-28.720.

6 Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (10 September 2015), available at https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

7 Memorandum from the Deputy Att'y Gen. to the U.S. Dep't of Justice (9 September 2015), available at https://www.justice.gov/dag/file/769036/download.

8 Id. at 3 (original emphasis).

9 Id.; see also Marshall L. Miller, Principal Deputy Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice, Remarks before Global Investigations Review conference (17 September 2014), available at https://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller ('Voluntary disclosure of corporate misconduct does not constitute true cooperation, if the company avoids identifying the individuals who are criminally responsible. Even the identification of culpable individuals is not true cooperation, if the company fails to locate and provide facts and evidence at their disposal that implicate those individuals.').

The principles articulated in the Yates Memorandum have not been changed, although there are efforts to 'streamline it, clarify it, and codify it'[10] under the Trump administration. The former Attorney General, Jefferson B Sessions III, made clear that '[t]he Department of Justice will continue to emphasize the importance of holding individuals accountable for corporate misconduct.'[11] Specifically with regard to co-operation, the Attorney General noted that the DOJ, in making charging decisions, 'will continue to take into account whether companies . . . cooperate and self-disclose their wrongdoing.'[12]

Co-operation can take many forms, including producing relevant documents, making employees available for interviews, proffering findings from internal investigations, and assisting in the analysis and synthesising of potentially voluminous evidence. Of course, under the Yates Memorandum, corporations must also attempt to identify all culpable individuals, timely produce all relevant information about individual misconduct and agree to continued co-operation even after resolving any charges against the company. The amount of credit earned will depend on the proactive nature of the co-operation, and the diligence, thoroughness and speed of any internal investigation. But the USAM also reiterates existing DOJ policy that waiver of attorney–client privilege or work-product protection is not required for credit so long as the relevant facts concerning misconduct are disclosed. Even so, this policy shift raises substantial issues about the extent to which the privilege or work-product protection can be preserved while satisfying the DOJ's demand for all relevant information.

Paradoxically, in practice, the Yates Memorandum may make it harder for the DOJ to pursue individuals, since the policy may impede companies' ability to identify the source of any misconduct. Given that companies must identify culpable individuals to receive any co-operation credit, the interests of employees with relevant information may not be aligned with those of the company. Whereas before, employees might have been willing to identify themselves or others as perpetrators of wrongdoing in return for assurances that the company will not name them to authorities, now the company must turn over any employees allegedly engaged in misconduct. This policy may affect workplace morale and loyalty if employees believe that their company will likely hand them over to authorities at the first sign of trouble. This is especially true if, pursuant to *Upjohn Co v. United States*,[13] employees are advised during interviews by company counsel that anything inculpatory the employees reveal could be disclosed to the DOJ. As a result, employees may be less willing to reveal misconduct, potentially diminishing the

10 Kelly Swanson, 'DOJ looking to clarify Yates Memo ambiguities', Global Investigations Review (27 February 2018), available at https://globalinvestigationsreview.com/article/jac/1166160/doj-looking-to-clarify-yates-memo-ambiguities.

11 Jefferson B. Sessions III, Att'y Gen., U.S. Dep't of Justice, Remarks as prepared for delivery at Ethics and Compliance Initiative Annual Conference (24 April 2017), available at https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual.

12 Id.

13 *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

effectiveness of compliance and self-disclosure programmes, even as companies now carry greater responsibility to ferret out and report wrongdoing. As James Cole, Yates's predecessor at the DOJ, has noted: 'When you play it out, [the Yates Memorandum] is not necessarily better for the government and it's certainly not better for corporations and counsel.'[14]

Despite this greater responsibility on the part of companies to make 'extensive efforts' in their internal investigations, the DOJ will often conduct its own parallel investigation 'to pressure test' a company's efforts, and if the DOJ concludes through its own investigation that the internal investigation's efforts 'spread corporate talking points rather than secure facts related to individual culpability the company will pay a price when they ask for cooperation credit.'[15] Any attempt to co-operate and seek credit should be taken on diligently and with the full commitment of all involved.

Like the DOJ, the US Securities and Exchange Commission (SEC) also offers corporate co-operation credit. In October 2001, the SEC issued a report of investigation and statement – popularly called the 'Seaboard Report' after the company that was the subject of the report and whose co-operation in an SEC investigation led to its not being charged – articulating a framework for evaluating co-operation and determining whether, and to what extent, companies should receive leniency. The SEC considers four 'Seaboard factors' in determining the appropriate amount of credit: (1) self-policing, (2) self-reporting, (3) remediation and (4) co-operation. To the SEC, co-operation entails 'providing the Commission staff with all information relevant to the underlying violations and the company's remedial efforts.'[16] As with the DOJ's Filip Factors, co-operation is but one consideration among others that the SEC considers in determining the appropriate disposition in a case, and it echoes the DOJ's requirement of providing the agency with all facts relevant to the alleged misconduct. Depending on the extent to which the company meets the Seaboard factors, it may be eligible to receive a co-operation agreement, deferred prosecution agreement or non-prosecution agreement.[17]

Finally, the US Sentencing Guidelines, which set forth recommended sentencing ranges for federal offences, also provide credit for companies that co-operate with authorities, in the form of recommended reductions in monetary penalties. A business that has 'fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct' can receive a partial reduction; a company that has self-reported within a reasonable time after becoming aware of misconduct, but before the government learns

14 Former deputy AG James Cole says DOJ's new white-collar crime policy is 'impractical', Am. Bar Ass'n (November 2015), available at www.americanbar.org/news/abanews/aba-news-archives/2015/11/former_deputy_agjam.html.

15 Miller, above at footnote 9.

16 Enforcement Cooperation Program, U.S. Securities & Exch. Comm'n (20 September 2016), available at https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml.

17 Id.

of it or has begun investigating, and that has fully co-operated in the investigation can potentially eliminate all penalties.[18] The penalties avoided in exchange for co-operation can be significant.

The Sentencing Guidelines make clear, however, that 'cooperation must be both timely and thorough': to be timely, the company must co-operate as soon as it is notified of an investigation, and to be thorough, the company must disclose 'all pertinent information' sufficient for authorities to identify the nature and extent of the offence, and the responsible individuals.[19]

While he was in office, former Attorney General Sessions revised the DOJ's charging and sentencing policy, and directed federal prosecutors to 'charge and pursue the most serious, readily provable offense,' which '[b]y definition . . . are those that carry the most substantial guidelines sentence, including mandatory minimum sentences.'[20] Any exception to the policy must be approved by a United States Attorney or Assistant Attorney General (or his or her designate) and the reasons documented.[21] The policy notes that '[i]n most cases, recommending a sentence within the advisory guideline range will be appropriate,' but departures and variances must also be approved and the reasons documented.[22] Whereas previous policy emphasised that charging decisions 'must always be made in the context of "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case . . . and due consideration should be given to the defendant's substantial assistance in an investigation or prosecution,"'[23] the new policy makes no mention of these factors. It remains to be seen how this policy revision will affect corporate investigations, but, as with the Yates Memorandum, this change may make it harder for the DOJ to pursue wrongdoing and secure co-operation from companies and individuals by dramatically increasing the stakes of self-disclosure and co-operation.

Cutting against this recent trend in favour of aggressive enforcement is a new DOJ policy against 'piling on'. On 9 May 2018, Deputy Attorney General Rod Rosenstein announced changes in the coordination of corporate resolution penalties. Rosenstein stated that the government should 'discourage disproportionate enforcement of laws by multiple authorities'.[24] Through amendments to the

18 U.S.S.G. § 8C2.5(g)(2). There is no reduction, however, for a company that co-operates but does not accept its responsibility for criminal conduct.

19 U.S.S.G. § 8C2.5 application note 13.

20 Memorandum from the Att'y Gen. for All Federal Prosecutors (10 May 2017), available at https://www.justice.gov/opa/press-release/file/965896/download.

21 Id.

22 Id.

23 Memorandum from the Att'y Gen. to All Federal Prosecutors (19 May 2010), available at http://courthousenews.com/wp-content/uploads/2017/01/holdermemo.pdf.

24 Rod J. Rosenstein, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks to the New York City Bar White Collar Crime Institute (9 May 2018), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

USAM,[25] the DOJ now expressly discourages the 'piling on' of penalties relating to the same misconduct by 'instructing [DOJ] components to appropriately coordinate with one another and with other enforcement agencies in imposing' any penalties.[26] Rosenstein focused on the concept of 'fairness' and acknowledged that 'piling on' can deprive a corporation of certainty and finality, as well as negatively affect employees, investors and customers. In determining whether the policy should apply to particular misconduct, the DOJ will consider the 'egregiousness of the wrongdoing; statutory mandates regarding penalties; the risk of delay in finalizing a resolution; and the adequacy and timeliness of a company's disclosures and cooperation with the Department.'[27]

In reaching a resolution, the DOJ now considers 'the totality of fines, penalties, and/or forfeiture imposed by' all enforcement agencies and regulators to achieve a just and fair result.[28] Rosenstein highlighted four key features of the new policy. First, the policy reinforces that the federal government should not use its criminal enforcement authority 'for purposes unrelated to the investigation and prosecution of a possible crime'.[29] For example, the government should not threaten 'criminal prosecution solely to persuade a company to pay a larger settlement in a civil case.'[30] Second, the policy directs DOJ officials to coordinate among themselves to 'achieve an overall equitable result'.[31] Rosenstein specified that such coordination 'may include crediting and apportionment of financial penalties, fines, and forfeitures'.[32] Third, the policy instructs DOJ attorneys 'to coordinate with other federal, state, local, and foreign enforcement authorities seeking to resolve a case with a company for the same misconduct'.[33] Finally, the policy identifies factors that the DOJ may use to determine 'whether multiple penalties serve the interests of justice', such as 'egregiousness of the wrongdoing; statutory mandates regarding penalties; the risk of delay in finalizing a resolution; and the adequacy and timeliness of a company's disclosures and cooperation'.[34] The policy largely reflects pre-existing DOJ practice in certain areas, including FCPA enforcement, where the DOJ routinely coordinates resolutions with the SEC and, increasingly, participates in cross-border resolutions by, among other things, crediting a company's foreign penalties in calculating the US criminal fine. But the policy's formalisation is encouraging insofar as the DOJ will avoid

25 Memorandum from the Deputy Att'y Gen. to the U.S. Dep't of Justice (9 May 2018), available at https://www.justice.gov/opa/speech/file/1061186/download (Rosenstein Memorandum); USAM §§ 1-12.100, 9-28.1200.

26 Rosenstein, above at note 24.

27 Id.

28 Rosenstein Memorandum, above at note 25.

29 Rosenstein, above at note 24.

30 Id.

31 Id.

32 Id.

33 Id.

34 Id.

unduly harsh and duplicative fines and attempt to achieve more efficient and just penalties.

### Vicarious liability 10.1.2

In the United States, in accordance with traditional principles of *respondeat superior*, a company is generally liable for the acts of its agents, including its employees, officers and directors, if such acts were undertaken within the scope of their employment and intended, at least in part, to benefit the company.[35] Companies may also be liable for the conduct of certain affiliates, business partners and third parties acting on the company's behalf. Importantly, when a company merges with or acquires another company, as a general matter, the successor company assumes its predecessor company's civil and criminal liability.

In principle, the DOJ has made clear that the *respondeat superior* standard ought not to impose strict liability on companies for an individual's behaviour. The USAM states that 'it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. . . . [A] prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.'[36]

In practice, however, US authorities have made sweeping assertions of liability under *respondeat superior* and other theories of corporate responsibility, such as the so-called *Park* or collective-knowledge doctrines.[37] Indeed, in some instances, the government has pursued investigations against, and has imposed significant penalties on, corporations for the behaviour of their affiliates or agents without asserting that the parent company authorised, directed or controlled the corrupt conduct, nor that it even had knowledge of such conduct.

### Status of the parties involved in the investigation 10.1.3

A company's status in an investigation is one of the critical considerations in determining whether it should co-operate with enforcement authorities and, if so, the proper nature and degree of such co-operation. There are four statuses of persons (companies and individuals) that enforcement authorities typically request co-operation from: victim, witness, subject and target.

35 See, e.g., *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962).

36 USAM § 9-28.500.

37 Under the *Park* doctrine, which has generally been applied only in cases involving the U.S. Federal Food, Drug, and Cosmetic Act (FDCA), the government may charge a company official for alleged violations of the FDCA without having to prove that the official participated in or was even aware of the alleged violations if the official was in a position of authority to prevent or correct them but failed to do so. See *United States v. Park*, 421 U.S. 658, 671–72 (1975). Under the 'collective knowledge' doctrine, some courts have held that a company's knowledge is the totality of what all of its employees knew within the scope of their employment – so the knowledge of one employee, or the combined knowledge of multiple employees, can be imputed to the entire company. See *United States v. Bank of New England*, 821 F.2d 844, 855 (1st Cir. 1987).

Victims are ordinarily those who have been harmed by the conduct being investigated and face little, if any, legal exposure.

Witnesses are those who may have information that enforcement authorities believe might be relevant to establishing facts regarding the alleged misconduct or implicating particular individuals or entities. Witnesses are seldom exposed to liability arising from their testimony, but an important exception applies for issues of perjury or obstruction of justice if a witness knowingly provides incorrect information during an investigation.

Subjects comprise the first status that may involve a significant risk of being implicated. The subject of an investigation is 'a person whose conduct is within the scope of [a] grand jury's investigation'.[38] Typically falling somewhere between a target and a witness, a subject is someone or some entity that enforcement authorities are unwilling to rule out as potentially culpable, even if the authorities have not yet decided as much.

The fourth status corresponds to targets. Designation as a target provides a clear warning of a company or individual's legal exposure. Under the USAM, a target is 'a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.'[39]

Each status triggers different initial concerns regarding the potential exposure and relative burdens of co-operation. The status can help companies or individuals anticipate the extent to, and manner in which, they co-operate, taking into account the various theories of corporate or vicarious liability that may create legal exposure. For instance, while it is generally advisable for victims or witnesses to do so as well, companies or individuals that are subjects or targets of investigations should always seek the advice of counsel before co-operating with, or speaking to, enforcement authorities.

Importantly, while these statuses may inform the decision of whether to co-operate, they do not provide legal protection to their holders – a seemingly innocent status such as that of victim or witness is not determinative with regard to possible liability for misconduct. There is little, for instance, to preclude an enforcement authority from using a company's statements offered in a witness capacity against the company in a future prosecution should additional evidence uncover misconduct by that company that shifts its status from witness to subject.

In addition to the issue of potential liability, there can be other significant costs to co-operation. Co-operation may be burdensome for both corporate witnesses and victims, as it may entail production of confidential documents, making employees available for interviews or as witnesses in potentially lengthy legal proceedings. Once a complaint is brought to the attention of the authorities, control over the course of the investigation and resulting litigation is largely lost. Similarly, co-operation by a victim may lead to negative publicity. For example, the victim of a fraud by another company – if it co-operates and testifies to its victimisation

38 USAM § 9-11.151.

39 Id.

– may be viewed as having inadequate internal controls or auditing, harming its reputation with customers and investors. Furthermore, a company that is otherwise a victim of wrongdoing might nevertheless be subject to shareholder lawsuits if there is an allegation that the harm suffered by the company was due to management or board negligence.

For these reasons, regardless of their perceived status, companies should consult with counsel to assess whether co-operation is in their best interest and, if so, how to go about it. In the case of witnesses in particular, counsel should determine whether a limited internal investigation should be conducted to ensure that co-operation will not result in disclosure of incriminating or otherwise sensitive or embarrassing information.

## Key benefits and drawbacks to co-operation 10.1.4

Co-operation frequently entails significant resource expenditures for companies, and though co-operation has real benefits, these must be balanced against its demands, as well the possibility that the government may not unearth sufficient evidence to establish misconduct without the company's co-operation.[40]

### Reduced or no charges and penalties 10.1.4.1

The single most compelling reason that companies (and individuals) co-operate with the government is to obtain leniency, namely, to reduce or escape entirely potential charges and penalties. At least one study has found that co-operating with the government results in lower penalties.[41] And companies that do not co-operate have received significantly harsher treatment by enforcement authorities.[42]

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40 See USAM § 9-28.720 ('If there is insufficient evidence to warrant indictment, after appropriate investigation has been completed, . . . then the corporation should not be indicted, irrespective of whether it has earned cooperation credit.').

41 See, e.g., Alan Crawford, Research Shows It Pays To Cooperate With Financial Investigations, Impact (June 2014), available at http://pac.org/wp-content/uploads/Impact_06_2014.pdf. For instance, the Dutch telecommunications company VimpelCom Ltd paid US$460 million to the DOJ to settle alleged FCPA violations, instead of the suggested guideline range of US$836 million to US$1.67 billion, due to the company's full co-operation with the DOJ. U.S. Dep't of Justice, 'VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme', Press Release (18 February 2016), available at https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million. Similarly, the DOJ gave American software company PTC Inc. partial co-operation credit for disclosing all known relevant facts regarding alleged FCPA violations by its employees, but did not extend it full credit because 'at the time of its initial disclosure, [PTC] failed to disclose relevant facts that it had learned.' U.S. Dep't of Justice, 'PTC Inc. Subsidiaries Agree to Pay More Than $14 Million to Resolve Foreign Bribery Charges', Press Release (16 February 2016), available at https://www.justice.gov/opa/pr/ptc-inc-subsidiaries-agree-pay-more-14-million-resolve-foreign-bribery-charges.

42 For instance, French power and transportation company Alstom S.A. was sentenced in 2015 to pay a criminal fine in excess of $772 million for FCPA violations. The DOJ noted that the sentence – which was then the largest criminal fine ever imposed in an FCPA case – 'reflects a

Equally important, co-operation that results in reduced or no charges may also avoid the collateral consequences of an adjudged violation. Collateral consequences from admitting to wrongdoing, such as administrative bars or suspension from public procurement programmes, can be especially damaging in certain industries – such as healthcare, defence and construction – in which government contracts may account for a significant portion of a company's revenues. For example, federal procurement rules provide for debarment or suspension of a company from contracting with the US government upon a conviction of or a civil judgment for a number of offences, including bribery, or any offence 'indicating a lack of business integrity or business honesty. . . .'[43] Moreover, federal disbarment or suspension may trigger a cascade of similar consequences at the state or local,[44] and international,[45] levels, and can lead to follow-on private litigation. Successful co-operation can therefore help companies avoid these possible domino effects.

### 10.1.4.2 Shaping the government's investigation

Co-operation affords the company greater control over any investigation into its alleged misconduct. As an initial matter, the enforcement agency may be inclined to delay or forgo its own investigation in favour of an internal investigation if the company credibly conducts a thorough internal investigation and fully reports its findings to the agency. But even if the agency conducts its own separate investigation, through co-operation, the corporation can more easily learn what the

number of factors, including: Alstom's failure to voluntarily disclose the misconduct . . . [and] Alstom's refusal to fully cooperate with the department's investigation for several years . . . .' U.S. Dep't of Justice, 'Alstom Sentenced to Pay $772 Million Criminal Fine to Resolve Foreign Bribery Charges', Press Release (13 November 2015), available at https://www.justice.gov/opa/pr/alstom-sentenced-pay-772-million-criminal-fine-resolve-foreign-bribery-charges.

43 2 C.F.R. § 180.800 (2005).

44 See, e.g., Mass. Gen. Laws Ann. ch. 29, § 29F(c)(2) ('Notwithstanding any other provision of this section, any contractor debarred or suspended by any agency of the United States shall by reason of such debarment or suspension be simultaneously debarred or suspended under this section, with respect to non-federally aided contracts; the secretary or the commissioner may determine in writing that special circumstances exist which justify contracting with the affected contractor.'); Md. Code Ann., State Fin. & Proc. § 16-203(c) ('A person may be debarred from entering into a contract with the State if the person, an officer, partner, controlling stockholder or principal of that person, or any other person substantially involved in that person's contracting activities has been debarred from federal contracts under the Federal Acquisition Regulations, as provided in 48 C.F.R. Chapter 1.'); 62 Pa. Cons. Stat. Ann. § 531(b)(9) ('Debarment by any agency or department of the Federal Government or by any other state.'); N.J. Admin. Code § 17:19- 4.3(a)(2) ('Where an agency of government, other than the DPMC, has imposed debarment upon a firm or an individual, the DPMC may also impose a similar debarment without affording an opportunity for a hearing . . . .').

45 See, e.g., The World Bank, Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers § 1.16 (January 2011), available at http://documents.worldbank.org/curated/en/634571468152711050/pdf/586680BR0procu0IC0dislosed010170110.pdf (explaining the World Bank's disbarment guidelines).

agency has discovered, shape the way the agency views evidence as part of an ongoing dialogue, and develop a rapport with investigators. This affords the company greater certainty about and influence over the government's investigation and any subsequent negotiation to resolve the allegations. The company effectively becomes a participant in the investigation, hopefully allowing it to have meaningful input into the speed and extent of the process, as well as to shape its resolution.

Conversely, declining to co-operate may increase uncertainty and render the company unable to influence the government's investigation and, ultimately, charges. Deciding against co-operation creates information asymmetry with the agency because the corporation has more limited insight into whom or what the agency is actually investigating, or the scope of any such investigation. By co-operating, however, the company is also placing itself at the mercy of the government: the company cannot selectively disclose or hide certain information because, once detected, the company loses credibility and may even face obstruction of justice charges, undermining efforts to achieve a favourable resolution. A company that opts to self-report a potential violation effectively has committed itself to a path of robust co-operation, on an extended timeline that may require it to agree to the lengthy tolling of applicable statutes of limitation.

### Financial cost 10.1.4.3

Co-operation – with an attendant internal investigation that is thorough, whose results are reported to the government – may result in less investigation on the government's part, potentially saving costs and penalties for a company over the long term. Under the Yates Memorandum, a company must conduct some level of internal investigation if it wishes to receive any co-operation credit. Because a company is generally better placed to quickly identify the source of any alleged misconduct, conducting a targeted internal investigation will likely be more cost-efficient than refusing to co-operate, which could result in the government's engaging in an unfocused fishing expedition. Furthermore, if the company is performing poorly financially, co-operation, coupled with an 'inability to pay' argument,[46] can increase the government's willingness to minimise fines, avoiding putting the company out of business.

But the financial costs of co-operation can often be substantial. Co-operation will require proactive internal investigations, and the DOJ's heavy focus on individual culpability may also require earlier involvement of separate counsel for individual employees and officers, whose fees may need to be indemnified by the corporation. In addition, as former Deputy Attorney General Yates explained,

> *a company should not assume that its cooperation ends as soon as it settles its case with the government. . . . [C]orporate plea agreements and settlement agreements will include a provision that requires the companies to continue*

46 U.S.S.G. § 8C3.3.

> *providing relevant information to the government about any individuals implicated in the wrongdoing. A company's failure to continue cooperating against individuals will be considered a material breach of the agreement and grounds for revocation or stipulated penalties.*[47]

In other words, a co-operating company has effectively committed itself to being at the government's disposal for an indeterminate period and for whatever needs it may have, including for separate but derivative investigations.

#### 10.1.4.4 Disruption to business

Any government investigation is likely to be disruptive to a company's operations and can even affect its share price.[48] Working under the glare of an investigation can cause severe and prolonged uncertainty, especially if high-ranking executives are targets. Investigations can also be damaging for public relations, and failure to co-operate may lead to loss of investor and consumer confidence. This issue is especially significant for companies that particularly rely on customers' trust for business success. Despite an ongoing investigation, taking a co-operative posture may mitigate public relations or market impacts by conveying a strong message that the company has a corporate culture of compliance, does not tolerate misconduct, and plays by the rules.

Of course, refusing to co-operate with the government is unlikely to avoid the business disruption of an investigation. The USAM does make it clear that 'the decision not to co-operate by a corporation . . . is not itself evidence of misconduct at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt.'[49] But if a company is unwilling to assist the government, the government is likely to use its subpoena power anyway. The pall of the investigation would remain, but employees, investors and the public may speculate about why the company refuses to co-operate, potentially causing uncertainty about the company's culpability and the ramifications of the investigation. Refusing to co-operate may also increase the likelihood of talent fleeing the company because of the insecurity of employees' positions, as well as potential decreases in morale and productivity.

#### 10.1.4.5 Exposure to civil litigation

Co-operation and any attendant admission of wrongdoing may expose the company, directors and officers to the risk of follow-on civil litigation. First, because a company must reveal all facts concerning misconduct to the government, co-operation may result in disclosure and a general waiver of otherwise privileged information. Second, depending on the particular circumstances, even after

47 Yates, above at footnote 6.

48 See, e.g., USAM § 9-28.700 ('a protracted government investigation . . . could disrupt the corporation's business operations or even depress its stock price').

49 Id.

co-operation, a company may still need to accept lesser charges or admit to certain facts as a condition to settlement.

Co-operating companies thus become exposed to follow-on actions because plaintiffs – whether through class actions or derivative actions – can piggyback on the findings from government investigations and company admissions. In certain types of cases, for example antitrust cases that provide for treble civil damages and joint and several liability, the cost of co-operating and admitting any facts or guilt may greatly outweigh any benefits from reduced fines. Indeed, given the proliferation of cross-border investigations, the costs of co-operation are magnified by the likelihood of liability across multiple jurisdictions, both from penalties imposed by regulators and from separate private litigation in those jurisdictions. In other words, it may make financial sense to refuse to co-operate, deny liability and hold on to the possibility that the company may be absolved at trial.

## Authority programmes to encourage and reward co-operation 10.2

### The antitrust leniency programme 10.2.1

A number of US agencies have special policies with regard to co-operation and self-disclosure. A notable example is the DOJ Antitrust Division's corporate leniency programme, under which a company that engaged in cartel conduct that is the first to self-report and fully co-operate with the DOJ's investigation will receive full leniency and avoid any charges against it and any co-operating employees, assuming other criteria are met.[50] Additionally, leniency applicants are only liable for actual damages in follow-on civil litigation instead of the usual treble damages and joint-and-several liability imposed under the antitrust laws. The programme has been immensely successful, in large part because it has unambiguous benefits and requirements, and gives assurances to any potential applicants. Indeed, Antitrust Division officials have attributed the programme's success to the transparency and predictability of its implementation.[51] Recent changes to policy guidelines, however, have created some uncertainty about which current and former employees of leniency applicants may be included in a grant of leniency, thereby potentially undermining the effectiveness of the programme.[52]

50 Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters (26 January 2017), available at https://www.justice.gov/atr/page/file/926521/download.

51 Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Cracking Cartels with Leniency Programs (18 October 2005), available at https://www.justice.gov/atr/speech/cracking-cartels-leniency-programs.

52 Ron Knox, Former DOJ officials worry about US leniency changes, Global Competition Review (29 March 2017), available at https://globalcompetitionreview.com/article/usa/1138710/former-doj-officials-worry-about-us-leniency-changes.

### 10.2.2 The FCPA Pilot Program and Corporate Enforcement Policy

In the same spirit, in April 2016, the DOJ announced a new pilot programme for Foreign Corrupt Practices Act (FCPA) enforcement.[53] While the original programme was designed to last only one year, in November 2017 – after a brief extension – Deputy Attorney General Rosenstein announced that the programme would become permanent and incorporated into the USAM as the FCPA Corporate Enforcement Policy.[54] The aim of the programme was – and that of the new policy is – to encourage companies to voluntarily self-disclose potential FCPA violations, increase co-operation with the DOJ, and remediate flaws in the companies' internal controls and compliance programmes.[55]

To be eligible for credit under the Corporate Enforcement Policy, a company must satisfy three elements. First, the company must voluntarily report all relevant facts regarding the misconduct 'within a reasonably prompt time after becoming aware' of the offence and 'prior to any imminent threat of disclosure or government investigation.'[56] Second, the company must offer 'full cooperation', which includes, among other things, disclosing all relevant facts and the identity of the individuals involved (as per the Yates Memorandum), and providing timely updates on the results of the internal investigation.[57] Third, the company must undertake timely and appropriate remediation, including through implementation of an ethics and compliance programme and discipline of employees responsible for the misconduct.[58] If a company meets all three requirements and disgorges all profits received from the alleged violation, it may receive up to a 50 per cent reduction off the applicable minimum fines under the Sentencing Guidelines, no monitor may need to be appointed if an effective compliance programme has been implemented,[59] and the DOJ will consider a declination of prosecution.[60] For companies that fully co-operate and effectively remediate but failed to self-disclose the violation voluntarily, the maximum credit will be up to 25 per cent.[61]

Notably, the Corporate Enforcement Policy does not provide the same degree of certainty regarding the benefits of co-operation as other programmes, such as the antitrust leniency programme. In Rosenstein's own words, '[t]he new

53 U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (5 April 2016), at 2.

54 Rod J. Rosenstein, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (29 November 2017), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign; see also USAM § 9-47.120.

55 USAM § 9-47.120.

56 Id. (quoting U.S.S.G. § 8C2.5(g)(1)).

57 Id.

58 Id.

59 Id.

60 Id. ('there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender').

61 Id.

policy does not provide a guarantee' and 'cannot eliminate all uncertainty'.[62] For instance, the Corporate Enforcement Policy provides that companies that meet all criteria will receive a recommendation of a 50 per cent 'reduction off the low end of the U.S. Sentencing Guidelines . . . fine range, except in the case of a criminal recidivist'.[63] Likewise, there is only a 'presumption that the company will receive a declination absent aggravating circumstances'.[64] By contrast, full co-operation in the antitrust realm for the first to self-report participation in a conspiracy will generally result in full leniency and avoidance of all charges.

To date, the DOJ has announced 10 declinations since the FCPA Pilot Program began.[65] In one such declination involving Nortek, Inc, the DOJ noted that it had 'closed [its] inquiry into this matter. . . . despite the bribery by employees of the Company's subsidiary in China'.[66] In outlining the reasons for its declination, the DOJ highlighted 'the fact that Nortek's internal audit function identified the misconduct, Nortek's prompt voluntary self-disclosure, the thorough investigation undertaken by the Company, its fulsome cooperation in this matter (including by identifying all individuals involved in or responsible for the misconduct and by providing all facts relating to that misconduct to the Department) and its agreement to continue to cooperate in any ongoing investigation of individuals . . . .'[67] The DOJ also highlighted 'the steps that the Company has taken to enhance its compliance program and its internal accounting controls, [and] the Company's full remediation (including terminating the employment of all five individuals involved in the China misconduct, which included two high-level executives of the China subsidiary) . . . .'[68] Finally, the DOJ noted that Nortek 'will be disgorging to the SEC the full amount of disgorgement as determined by the SEC.'[69]

On 1 March 2018, the DOJ's Criminal Division announced that it would use the FCPA Corporate Enforcement Policy as non-binding guidance in criminal cases outside the FCPA context.[70] In announcing this policy change, then Acting Assistant Attorney General John Cronan and then Chief of the Securities

62 Rosenstein, above at footnote 54.

63 USAM § 9-47.120.

64 Id.

65 As of 8 November 2018, the DOJ had reported declinations in relation to: Nortek, Inc., Akamai Technologies, Inc., Johnson Controls, Inc., HMT LLC, NCH Corporation, Linde North America Inc., CDM Smith, Inc.; Dun & Bradstreet Corporation; Guralp Systems Limited; and Insurance Corporation of Barbados Limited. See Declinations, U.S. Dep't of Justice, available at https://www.justice.gov/criminal-fraud/pilot-program/declinations (last accessed 8 November 2018).

66 Letter from Daniel Kahn, Deputy Chief, Fraud Section, Crim. Div., U.S. Dep't of Justice to Luke Cadigan (3 June 2016), available at https://www.justice.gov/criminal-fraud/file/865406/download.

67 Id.

68 Id.

69 Id.

70 Remarks by John Cronan, Acting Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice, and Benjamin Singer, Chief, Securities and Financial Fraud Unit, Fraud Section, Crim. Div., U.S. Dep't of Justice, at the American Bar Association's 32nd Annual National Institute on White Collar Crime (1 March 2018).

and Financial Fraud unit, Benjamin Singer, touted the example of a recent settlement with Barclays PLC in which they applied the principles of the Policy. As the DOJ explained, Barclays self-reported that, 'through its employees and agents, [it had] misappropriated confidential information provided to Barclays by HP [Hewlett-Packard Company] in regard to FX options and spot transactions, and deceived HP about the nature of its trading, in violation of duties to HP'.[71] The DOJ noted that, among other things, Barclays made a 'timely, voluntary self-disclosure', conducted a 'thorough and comprehensive investigation', offered its 'full cooperation', including providing 'all known relevant facts about the individuals involved in or responsible for the misconduct', made enhancements to its compliance programme, and fully remediated the issues.[72] As a result, the DOJ declined to prosecute Barclays, although the bank had to pay approximately US$12.9 million in restitution to HP and disgorgement of its profits from the alleged scheme. Singer contrasted the settlement with HSBC Holdings PLC, which paid approximately US$101.5 million in penalties and disgorgement after a similar front-running investigation. According to Singer, HSBC failed to self-report the misconduct and, at least initially, did not fully co-operate with the DOJ.

The FCPA Corporate Enforcement Policy has since been extended to the M&A context. On 25 July 2018, Matthew Miner, Deputy Assistant Attorney General in charge of the DOJ's Fraud Section, announced that the Policy would now apply to successor companies that uncover wrongdoing in connection with mergers and acquisitions and thereafter disclose that wrongdoing and provide co-operation.[73] Miner noted that 'in some instances an acquiring company has limited access to a target company's data and records, perhaps even more so when the target company is in a high risk jurisdiction.'[74] Therefore, 'if an acquiring company unearths wrongdoing subsequent to the acquisition,' the DOJ will 'reward them, accordingly for stepping up, being transparent, and reporting and remediating the problems they inherited.'[75]

71 See Letter from Benjamin D. Singer, Chief, Securities and Financial Fraud Unit, Fraud Section, Crim. Div., U.S. Dep't of Justice, to Alexander J. Willscher & Joel S. Green, Counsel for Barclays PLC (28 February 2018), available at https://www.justice.gov/criminal-fraud/file/1039791/download.

72 Id.

73 Matthew S. Miner, Deputy Ass't Att'y Gen., Fraud Section, Crim. Div., U.S. Dep't of Justice, Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets (25 July 2018), available at https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th.

74 Id.

75 Id.

## Special challenges with cross-border investigations 10.3

A noteworthy trend with regard to large-scale investigations of corporate wrongdoing is the significant increase in coordination between law enforcement authorities across different jurisdictions. This co-operation has traditionally occurred through a variety of formal channels such as mutual legal assistance treaties, memoranda of understanding, or subject-specific agreements between countries.[76] Yet, these formal channels are by no means the exclusive method of collaboration between governments. International enforcement authorities are increasingly sharing relevant information with their foreign counterparts through more informal channels of communication. Governments are not only sharing leads on potential misconduct, they are also sharing investigative strategies, offering each other wider access to individuals and evidence within their borders, and coordinating their enforcement efforts.[77]

Indeed, governments are touting this collaboration. As the then Joint Head of Bribery and Corruption at the United Kingdom's Serious Fraud Office noted: '[W]e have excellent links with our US colleagues so are very likely to hear about anything that touches our jurisdiction that emerges from that route too.'[78] Similarly, a former DOJ official explained: '[W]e are capitalizing on the cooperative relationships we have developed with foreign prosecutors, law enforcement and regulatory agencies to better access evidence and individuals located overseas. Even more significantly, we have dramatically increased our coordination with foreign partners when they are looking at similar or overlapping criminal conduct – so that when we engage in parallel investigations, they complement, rather than compete with, each other.'[79] One manifestation of the level of co-operation between the

76 See, e.g., U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations § 4.2 (April 1995), available at https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations; American Bar Association, International Antitrust Cooperation Handbook 37 (2004) (discussing antitrust co-operation agreements between the United States and other countries).

77 See, e.g., Miller, above at footnote 9. See also U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (5 April 2016) ("The Department is strengthening its coordination with foreign counterparts in the effort to hold corrupt individuals and companies accountable. Law enforcement around the globe has increasingly been working collaboratively . . . . We are sharing leads with our international law enforcement counterparts, and they are sharing them with us. We are also coordinating to more effectively share documents and witnesses.')

78 Ben Morgan, Joint Head of Bribery and Corruption, Serious Fraud Office, Remarks at the Annual Anti Bribery & Corruption Forum (19 October 2015).

79 Miller, above at footnote 9. See also Jeremy P. Evans & Andrew R. Booth, What Price Cooperation? The Ever Increasing Cost of Global Antitrust Cases, Bloomberg Law Reports 2 (2010), available at https://www.paulhastings.com/docs/default-source/PDFs/1772.pdf. ('Enforcement agencies cooperate with one another and admissions, testimony, and documents produced to one will be shared across borders.')

DOJ and its UK counterparts is the recent detailing of a DOJ prosecutor to the UK's Financial Conduct Authority and Serious Fraud Office.[80]

One of the key advantages of informal co-operation from the enforcement authorities' perspective is that they can dispense with costly and burdensome bureaucratic processes, such as letters rogatory, which typically require involvement of various ministries and courts. At the same time, this growth in informal co-operation between international authorities poses an additional challenge to companies that may be considering whether to co-operate with authorities: depending on their confidentiality policies, co-operation in one country may mean unwittingly sharing information with authorities elsewhere, though authorities may nevertheless have to grapple with their ability to use such information depending on any legal limitations with respect to their admissibility before an adjudicatory body.[81]

Companies under investigation in one country for conduct that has a reasonable nexus to another should evaluate whether to co-operate, and if appropriate, co-operate, on the understanding that the relevant governments may be sharing information or coordinating their investigations, even covertly. Proceeding under this assumption should trigger several precautionary steps. To begin, companies should assess the confidentiality policies in, and level of co-operation (formal or informal) between, the relevant jurisdictions with regard to investigating misconduct. Then companies must keep in mind that waiver of privilege in response to one government's inquiry may result in waiver regarding the same subject matter in an investigation by another. Moreover, companies should consider whether certain foreign regulators may be more interested in related but not identical issues than their counterparts. It may be, for instance, that whereas a particular regulator is interested in the bribery component of particular conduct, another is more interested in the competition aspect. Importantly, companies should be aware of the differing investigative timelines and burdens of co-operation across various jurisdictions to the extent these may increase the total cost or legal exposure from co-operation. For these reasons, companies should calibrate their co-operation accordingly.

The increase in multi-jurisdictional investigations and international law enforcement collaboration suggests that companies should consider retaining local counsel in each jurisdiction where they know or suspect that regulators are likely to share information and could coordinate their respective investigations. Companies should also retain global counsel with experience in multi-jurisdictional investigations to coordinate with the various local counsel, and ensure a consistent, coherent defence that does not create additional exposure abroad or as to other sets of issues.

80 Trevor N. McFadden, Acting Principal Deputy Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice, Remarks as prepared for delivery at American Conference Institute's 7th Brazil Summit on Anti-Corruption (24 May 2017), available at https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american.

81 See, e.g., *United States v. Allen*, 864 F.3d 63, 101 (2d Cir. 2017). ("The Fifth Amendment's prohibition on the use of compelled testimony in American criminal proceedings applies even when a foreign sovereign has compelled the testimony.')

## Other options besides co-operation 10.4

Companies that decide not to co-operate will very likely forgo the leniency that enforcement authorities typically offer co-operating entities. Yet, there may be circumstances in which co-operation is not likely to prevent prosecution or significantly reduce the applicable penalty. Indeed, the DOJ has made clear that '[t]he government may charge even the most cooperative corporation . . . if . . . the prosecutor determines that a charge is required in the interests of justice. Put differently, even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that has . . . engaged in an egregious, orchestrated, and widespread fraud.'[82]

In those instances where the prospect of co-operation appears fruitless or when co-operation and the attendant consequences effectively may threaten the viability of the company, the best strategy may be not to co-operate. Declining to co-operate may also curb other adverse consequences of co-operation, such as the possibility of debarment, suspension or exclusion, and the risk of follow-on private litigation. Where the allegations are particularly egregious but the company vehemently denies them, refusing to co-operate and forcing the government to prove its case in court can preserve employee morale and secure the benefit of the doubt from customers and investors.

If a company opts not to co-operate, it retains a few options with regard to the ongoing investigation and possible prosecution.

First, the company may request a meeting with enforcement authorities to explain why particular conduct is outside their jurisdiction, or why the allegations, even if true, do not amount to a violation of law. This may require sharing some information, but is well short of full co-operation.

Second, depending on the particular circumstances, if the enforcement authorities were to pursue charges, the putative defendant could challenge the jurisdiction of the court or regulator to address the matter. Indeed, a number of defendants charged with FCPA violations have successfully mounted such challenges.[83]

Third, and finally, companies may always contest the charges on their merits – by providing alternative explanations of the relevant facts or challenging the adequacy of the evidence. One particularly dramatic example is the DOJ's prosecution of FedEx Corporation for purportedly conspiring to ship illegal prescription drugs for online pharmacies. Two years after the indictment was filed, FedEx refused to settle the charges and went to trial – and the DOJ voluntarily dismissed its charges just four days into what should have been a seven-week trial, apparently owing to insufficient evidence. In contrast, a number of other companies facing similar charges settled for various large sums: United Parcel Service said it 'made a business decision' to end the government investigation by making

82 USAM § 9-28.720.

83 See, e.g., *United States v. Sidorenko*, 102 F. Supp. 3d 1124 (N.D. Cal. 2015); *U.S. S.E.C. v. Sharef*, 924 F. Supp. 2d. 539 (S.D.N.Y. 2013).

a US$40 million forfeiture payment, and Google, Walgreens Company and CVS Caremark Corporation have paid fines up to US$500 million.[84]

Similarly, in 2014, the DOJ charged Pacific Gas and Electric Company (PG&E) with 12 criminal counts arising out of the investigation that followed a 2010 gas pipeline explosion that killed eight people and caused substantial property damage. PG&E refused to plead guilty, and in August 2016, the trial jury returned a guilty verdict as to half of the charges, subjecting the company to a potential fine of US$3 million – far less than the US$562 million in penalties sought by the DOJ at the start of the trial.[85]

84 Dan Levine & David Ingram, U.S. prosecutors launch review of failed FedEx drug case, Reuters (15 July 2016), available at www.reuters.com/article/us-fedex-doj-idUSKCN0ZV0GO; FedEx stresses record of co-operating with feds in lawsuit, Bloomberg News (15 May 2015); Thomas Catan, Google Forks Over Settlement On Rx Ads, Wall St. J. (25 August 2011), available at www.wsj.com/articles/SB10001424053111904787404576528332418595052.

85 Richard Gonzales, Utility Giant PG&E Convicted of Violating Gas Pipeline Safety Laws, NPR (9 August 2016), available at www.npr.org/sections/thetwo-way/2016/08/09/489401025/utility-giant-pg-e-convicted-of-violating-gas-pipeline-safety-laws. At sentencing, the court imposed on PG&E the maximum fine of US$3 million, five years of probation, submission to a corporate compliance and ethics monitorship, 10,000 hours of community service, and the requirement to spend up to US$3 million to inform the public about PG&E's misconduct in print and television advertisements. Press Release, U.S. Dep't of Justice, 'PG&E Ordered To Develop Compliance And Ethics Program As Part Of Its Sentence For Engaging In Criminal Conduct' (26 January 2017), available at https://www.justice.gov/usao-ndca/pr/pge-ordered-develop-compliance-and-ethics-program-part-its-sentence-engaging-criminal.

# Appendix 1

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