



Lanny Breuer,
US Department
of Justice

Self-reporting requires companies to manage a deft balancing act, says Gibson Dunn's Patrick Doris

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WORK IN TANDEM

International co-operation between white-collar criminal enforcement agencies is an increasing feature of the regulation of global corporate activity. In mid-2010, Lanny Breuer, assistant attorney-general of the criminal division of the US Department of Justice, said: "We are actively working with our foreign counterparts in various areas to ensure that country borders won't limit our ability to fight fraud... US-EU agreements on mutual legal assistance and extradition... offer significant new tools that will streamline cross-border investigations and allow for even greater co-operation with our counterparts abroad."

In the intervening 18 months, cross-border investigative co-operation has intensified, most notably among anti-corruption authorities and financial regulators. This trend, spanning much of the field of corporate criminal enforcement, can only benefit the business community. Exposing investigators in jurisdictions building enforcement capacity to more experienced colleagues overseas raises enforcement standards and fosters compliance.

Similarly, for a company considering pursuing, or that has already embarked upon, a strategy of co-operation, inter-agency collaboration offers great benefits on investigative timing, disclosure logistics and, potentially, co-

ordinated resolution. Pointing to the case of Siemens, Breuer emphasised the benefits that may flow from "truly extraordinary co-operation" in cases with international dimensions, citing a bottom line 67%-84% reduction in that case in fines that might otherwise have been imposed. Yet, too often, patchy co-operation across a group of investigative authorities and variations in applicable laws and investigative timetables lead to stresses emerging in a co-operating company's relationship with investigators.

Self-report in haste, repent at leisure

Where collusive conduct is uncovered, the race to the regulator inevitably requires alacrity in self-reporting. Beyond antitrust, however, the calculation may change, particularly where cross-border co-operation with multiple agencies may be required. In that context, the company should give thought at the outset to the available means of moving forward, with the authorities broadly in step in terms of access to evidence and witnesses. While such a strategy can be departed from later, that should happen by design, and in consultation with the authorities, rather than being driven by variations in applicable legal regimes and the specific priorities of individual agencies.

Attention should also be paid to the feasibility and attractiveness

of multijurisdictional co-operation. Even otherwise broadly similar self-reporting regimes may contain important differences on close scrutiny – by way of example, while some antitrust leniency regimes deny immunity to "instigators", others target "enforcers". The geographical and subject-matter scope of the conduct subject to investigation should be assessed in determining a co-operation strategy. A client encouraged to seek antitrust immunity may be dismayed to find itself rail-roaded into collaboration with a range of sectoral or other prosecutorial agencies, too.

¡Cafe para todos!

A slogan of the architects of the post-Franco democratic Spain, in rejecting the temptation to discriminate between claims for regional autonomy, was "coffee for everyone!" A company co-operating on a multijurisdictional, multiagency basis would do well to ape that wisdom.

One tendency at the outset of an investigation is to favour the home state authorities or the jurisdiction of greatest exposure. Such differentiation can also be driven by legal restrictions on cross-border disclosures. This can lead to one or more investigative agencies, often the ones in countries where key documents are located, being weeks or months ahead of others, and assuming *de facto* lead investigator status, while authorities with arguably greater enforcement

due to home state legal restrictions, the same disclosure from agency to agency using established mutual mechanisms for international mutual assistance can often be made free of such concerns, whether due to explicit statutory exception or the protection of sovereign immunity.

The spectre at the feast

And always in the background is the threat of litigation. A strategy based on open and collaborative co-operation at the outset of an investigation becomes less attractive where it affords plaintiffs easy access to evidence or submissions shared with investigators.

Far-sighted authorities have realised that forcing co-operating companies into written *mea culpas*, while sometimes investigatively expedient, risks a long-term dampening of corporate enthusiasm for self-reporting. The comparative success of the oral proffer system of antitrust leniency regimes, as against the lower uptake of self-reporting regimes in certain other fields, reflects the willingness of companies to engage with systems that value co-operation based on the fulsomeness of evidentiary disclosures, rather than preparedness to create admission-laden paper trails for the increasingly globalised plaintiff Bar to mine at its convenience. In general, those authorities that display appropriate regard for corporate sensitivity to potential future litigation tend to receive more forthcoming co-operation.

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interest or regulatory nexus grow increasingly impatient at being at the back of the disclosure queue.

A co-operating company seeking to prioritise some jurisdictions or some agencies over others, save where unavoidable, makes a rod for his own back as those left behind end up feeling marginalised when cross-border co-operation starts between agencies.

Happily, the very fact of international co-operation may offer its own solution in this regard. While a disclosure made swiftly by the company to authorities where the data is kept may take months to achieve on a cross-border basis

Agency concerns are driven by understandable anxiety to obtain evidence in a meaningful timeframe and to avoid being left behind sister agencies. A strategy based on co-ordinating early document production and managing legal obstacles to evidence-gathering through encouraging mutual assistance can obviate the kinds of concerns and disparities that can threaten wider relationships, and drive authorities down the path of more coercive, confrontational investigative strategies.

Patrick Doris is a partner in the dispute resolution group of Gibson Dunn & Crutcher's London office.