Business Crime **Quarterly**

Welcome

The extent to which international regulators and prosecutors are increasingly working together to tackle economic crime, with joint investigations and synchronised enforcement action, is the overriding theme of this issue of *Business Crime Quarterly*. The OECD's report, marking 20 years since the signing of its Anti-Bribery Convention, notes how, in 2016, the two main enforcement bodies in the U.S., the Department of Justice ("**DOJ**") and the Securities and Exchange Commission ("**SEC**") worked with a foreign law enforcement agency in over 40% of their resolutions. In a recent settlement of allegations against a Swedish company, the DOJ credited 13 other jurisdictions for assistance in its investigation. It is likely that this trend will only continue, with senior officials at both U.S. agencies expecting increased collaboration with overseas authorities in the future.

Moreover, the tools being used by national enforcement authorities are increasingly aligned. We report on the first deferred prosecution to be agreed under France's new procedure, which resulted in a considerable fine for the bank concerned but did not include settlement for the individuals involved. A similar outcome was reached in the UK earlier this year in the Rolls-Royce plc investigation – three executives have separately now admitted related corruption. Anti-corruption drives in central and eastern Europe have had mixed results, but draft laws currently under discussion in Russia, Croatia and Poland will seek to reinforce anti-corruption legislation and safeguards for whistle-blowers. Strengthening whistle-blower protection is recurring theme, with an extensive reform of whistle-blowing law under consideration in Australia, which would put it on a par with the U.S. and UK. Meanwhile, a new German law has introduced significant changes to the treatment of proceeds of crime, which may result in a greater number of confiscation proceedings being commenced there.

We include our usual round up of recent significant decisions in the U.S., UK, Australia, Hong Kong and Singapore and showcase our new publication, "*Taking Stock*", which assesses anti-bribery and corruption law and enforcement in 24 key jurisdictions across the globe.

Global news

43
Convention countries

500
investigations ongoing in 29 party states

Prosecutions proceeding against
- **125** individuals
- **19** entities

20 years of the OECD Convention highlights increasing international co-operation in anti-bribery law enforcement

The OECD Convention on Combating Bribery of Public Officials in International Business Transactions ("**Convention**") was signed 20 years ago this month, on 17 December 1997 and entered into force on 15 February 1999. The number of signatory states has grown from the initial 12 in 1997 to 43 countries across the globe, with the most recent two, Costa Rica and Lithuania, only becoming parties in May this year. Together the 43 party states account for 64% of global outbound foreign direct investment and over 50% of the world's exports. Party states are now home to 95 of the largest 100 non-financial multinational enterprises and to all of the top 50 financial multinationals.

All the parties to the Convention commit themselves to ensuring that their national parliaments approve the Convention and pass legislation necessary for its ratification and implementation into national law. According to latest figures by the OECD's Working Group on Bribery ("**WGB**"), bribery is now a crime in all 43 Convention states. 41 countries have strengthened or created corporate liability laws allowing them to hold not just individuals but companies liable for foreign bribery. 18 countries have introduced or strengthened whistleblower protection.

A report by the WGB, 2016 Data on enforcement of the Anti-Bribery Convention, published in November 2017, reveals that between the entry into force of the Convention in 1999 and the end of 2016, 496 individuals and 253 entities had been sanctioned in criminal, administrative and civil proceedings for foreign bribery, while a further 121 individuals and 235 entities had been sanctioned for other criminal, administrative and civil offences, such as money laundering or false accounting. Currently, over 500 investigations are ongoing in 29 party states, with prosecutions proceeding against 125 individuals and 19 entities. However, it is notable that, as at the end of 2016, 22 party states had never imposed a sanction for foreign bribery. These include several at the very top of Transparency International's Corruption Perceptions Index 2016 ("**CPI**"), including Denmark, New Zealand, Australia and Iceland. However, they also include other states listed in the lower half of the CPI, such as Colombia and Argentina.

Of particular interest is the considerable increase in the number of investigations and enforcement actions which involve co-operation between the law enforcement agencies of more than one country. This is particularly the case in the U.S., with 42% of the resolutions described on the websites of the Department of Justice ("**DOJ**") and Securities and Exchange Commission ("**SEC**") as involving cooperation with the agencies of other countries. In 2006 only 1 of 13 foreign bribery schemes sanctioned by the DOJ and SEC acknowledged the input of a foreign law enforcement agency.

Cooperation is through both formal channels, such as mutual legal assistance agreements, or as a result of more informal personal connections between individuals at the respective agencies. However, several complex issues arise when investigations and prosecutions have cross-border elements, including the rules relating to information sharing and the treatment of privileged information, and how financial and non-financial sanctions are determined and shared between the authorities involved. The WGB report suggests that such considerations may currently be being determined in "a spirit of cooperation and existing legal principles". However, it is possible that a more legalistic and certain approach may be sought as cooperation between countries and agencies increases.

Anti-corruption drives in central and eastern Europe

Governments across central and eastern Europe have been active in recent years, strengthening their domestic anti-bribery and corruption regulation and taking increased action against both corrupt public officials and crooked companies. However, enforcement remains inconsistent. We consider four jurisdictions taking differing approaches.

After over a decade of successful corruption prosecutions through its National Anti-Corruption Directorate ("**DNA**"), the Romanian parliament is debating a draft law which could limit the powers of the prosecuting body. The DNA seized assets worth €263 million in abuse of office cases in 2016 and political tensions have been growing between the DNA and the government. On 21 November 2017, the leader of Romania's Social Democrat party, Liviu Dragnea, was charged with fraudulently extracting state and EU-funded assets in November. Mr Dragnea has had €27 million in personal assets frozen.

In Croatia, a similar run of successful prosecutions, including the conviction and imprisonment of former Prime Minister Ivo Sanader on corruption charges, has foundered since the country joined the EU in 2013. Earlier this year, one of Croatia's largest companies, Agrokor, was rescued from failure by hastily passed legislation, followed by accusations of close connections between Finance Minister Zdravko Marić and Ivica Todoric, the majority shareholder of Agrokor. More recently, the Croatian government has said it is beginning work on a draft law giving greater protection to whistle-blowers, expected to be approved by December 2018.

By contrast, Poland has established a consistently downward trend in corruption compared to its eastern Europe counterparts. The Polish government is currently debating a draft law which will make internal anti-corruption measures mandatory for large and mid-size companies, and increase protections for whistle-blowers. The law, expected to come into force in 2018, will impose a maximum penalty of up to €2.3 million and a five-year ban on public procurement processes.

The Russian Supreme Court is currently working on a new draft ruling on court practice in fraud and embezzlement matters. The new ruling is based on a similar ruling adopted in 2007 and currently in force.

The purpose of the update is to reflect the changes in legislation that have taken place over the past ten years (including the introduction of new provisions regarding specific types of fraud in 2012, such as fraud in obtaining loans, fraud in the use of credit cards, fraud in the insurance field and so on) and to address the needs of the constantly developing environment around these types of crimes (such as fraud using cyber tools). Among other things, the draft ruling specifies that fraud in obtaining a loan includes providing a creditor with deliberately false or misrepresented information about circumstances which are relevant conditions for the provision of a loan (information about place of work, income, financial state, existence of pledge etc).

The following issues in the draft ruling remain to be decided upon: (i) when the theft of non-cash money should be considered as completed (when the money is credited to the destination account or when it is debited from the target account) and (ii) what should be considered as the place of the commission of cashless money-related fraud for the purposes of determining a court's territorial jurisdiction (the place of the criminal's location or the place of the victim's financial institution).

Cases and investigations

Australia: judgment handed down in relation to record $45 million civil penalty imposed on Tabcorp for AML/CTF Act violations

On 17 March 2017, the Australian Federal Court imposed a record $45 million civil penalty on three companies in the Tabcorp group for repeated non-compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007* (No.1) ("**AML/CTF Regime**"). This is the first civil penalty imposed for breach of the AML/CTF Regime.

On 10 November 2017, Perram J published his judgment in relation to the Tabcorp civil penalty. Of particular note are the following findings:

> It is a requirement of the AML/CTF Regime that regulated entities have in place a program to manage money laundering and counter-terrorism risk. The AML/CTF Regime goes on to prescribe requirements for such programs. His Honour found that a program that does not comply with these requirements is, in and of itself, a breach of the AML/CTF Regime and capable of incurring a civil penalty [27].

> The above, combined with the fact that Perram J found that 'even minor breaches of the [AML/CTF Regime] have very serious consequences' (see [17]), highlights the need to ensure the AML/CTF Regime (much of which is open to various interpretations) is complied with in all respects.

> The judgment contains several references to the under-resourcing of AML/CTF compliance and 'insufficient processes for consistent management oversight, assurance and operational execution of the AML/CTF program' (see, for example, [33]). This underlines the importance of ensuring sufficient resource and management scrutiny is devoted to AML/CTF compliance.

"A program that does not comply with these requirements is, in and of itself, a breach of the AML/CTF Regime."

France: First DPA under French law is approved

On 27 November 2017, French authorities published the first deferred prosecution agreement ever entered into in France by a corporation. Pursuant to this agreement dated 30 October 2017 and homologated by a French judge at the Paris First Instance Criminal Court on 14 November 2017, the Swiss company HSBC Private Bank Suisse SA ("**HSBC**") agreed to pay €300 million to the French State, in return for the end of the criminal proceedings against it on charges of illegal bank soliciting and aggravated tax fraud laundering. Prosecution authorities had contended that assets belonging to French tax residents totalling €1,638,723,980 had been hidden by HSBC's intermediary, generating a profit for HSBC of €86,400,000 between 2006 and 2009.

The introduction of deferred prosecution agreements under French law for tax fraud laundering and corruption charges (and, where appropriate, related offences) was one of the flagship measures of the "Sapin 2" Law, published on 9 December 2016, which aimed more generally at ensuring the more efficient prevention, detection and repression of corruption in France. The procedure constitutes a true innovation under French law, to the extent that corporations may now settle certain criminal charges with French prosecution authorities without incurring the same consequences as a criminal conviction.

However, this first example of the procedure in action shows that the French authorities do not intend to be less tough on the repression of corruption and tax fraud laundering. In this case, HSBC was required to admit the relevant facts and accept their criminal status. The amount agreed by way of fine was extremely high, the Attorney General admitting that she would have obtained an "infinitely smaller" amount had she taken the case to Court. In addition, the settlement did not cover the individuals who were prosecuted alongside HSBC (DPAs being reserved to legal entities). Lastly, the procedure is not confidential. On the contrary, the hearing before the judge homologating this settlement was public and the settlement itself has been published on the internet.

Hong Kong: Second hung jury in bribery charge against Hong Kong's former Chief Executive

Following our report of the trial of former Hong Kong Chief Executive Mr Donald Tsang in the Winter 2016/17 edition of Business Crime Quarterly, a second jury has been unable to reach a verdict at his retrial for bribery. The charge relates to free renovation work he allegedly accepted from an applicant for a local radio licence. He was sentenced to 20 months in prison earlier this year for misconduct in public office, but the jury could not reach a verdict on the bribery charge. The prosecution has left the bribery charge on file at the High Court and any further trial would not go ahead unless with court's approval.

Singapore: MAS probed SCB for US$1.4 billion transferred from Isle of Guernsey to Singapore before new tax rules introduced

The Monetary Authority of Singapore ("**MAS**") is reported to be scrutinising Standard Chartered Bank ("**SCB**") for transferring US$1.4 billion of private bank client assets from the English Channel Isle of Guernsey to Singapore before new tax transparency rules were introduced in Guernsey. These assets were mainly held for Indonesian clients and were transferred in late 2015, before Guernsey adopted the Common Reporting Standard at the end of 2016. The MAS has reiterated that it will not tolerate the abuse of the Singapore financial system as a refuge or conduit for tax illicit funds. Indonesia's Financial Transaction Reports and Analysis Centre is also reported to be investigating the issue. SCB said that it has conducted a full review of the transfer and its report has been provided to the regulators.

> "Lawyers had argued that the DOJ was too aggressive in claiming jurisdiction over conduct that took place in the UK."

UK: Court orders ex-HSBC trader to be extradited to U.S. to face forex charges

On 25 October 2017, a judge at Westminster Magistrate's Court ordered the extradition of the former head of cash trading for EMEA at HSBC, Stuart Scott, to the U.S. where he faces charges of wire fraud conspiracy.

Scott was charged in the U.S. in July 2016 along with Mark Johnson, Global Head of HSBC's Foreign Exchange Cash-Trading Desks, of conspiring in a cash swap to defraud Scottish energy company, Cairn Energy, by using insider information to increase the price of the pound to benefit HSBC. Mark Johnson was convicted on 23 October 2017 by a Brooklyn federal jury of eight counts of wire fraud and one of conspiracy. Scott, who lives in London, had been fighting efforts to extradite him to the U.S. on similar charges. The DOJ has claimed that Scott has personally obtained over US$500,000 from the deal.

At Scott's extradition hearing his lawyers had argued that the DOJ was too aggressive in claiming jurisdiction over conduct that took place in the UK. However, the claim was not accepted by the court.

UK: Law on dishonesty redefined after 37 years

The recent Supreme Court decision in *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords)* [2017] UKSC 67 not only gives an insight into the seedy world of big-stakes gambling but has also wiped out 35 years of authority on the meaning of "dishonesty".

The claimant, Ivey, was a professional gambler who won just over £7.7m in two days of gambling at Genting casino. Ivey had used a highly specialist technique called 'edge-sorting' which greatly improving his chances of winning. He had also had the help of another professional gambler. The casino considered that he had cheated and refused to pay his winnings. Both parties agreed that gambling contracts (which are now in principle enforceable under the Gambling Act 2005), include an implied term that neither party will cheat. Ivey argued that he had not cheated as he had not been dishonest, but had deployed clever and perfectly legitimate "gamesmanship".

The case eventually came before the Supreme Court, which had to consider whether dishonesty was necessary to make out a claim of cheating. It held that, in the context of games and gambling, dishonesty is not a necessary element of cheating. The conclusion that Ivey's actions had amounted to cheating was unassailable and his appeal was dismissed. Although unnecessary to resolve the case, the Supreme Court went on to consider the text for dishonesty itself. Under the existing authority, *R v Ghosh* [1982], when considering whether someone was dishonest, the court had first to ask whether the conduct complained of was dishonest by the objective standards of ordinary reasonable and honest people. If yes, the court had then to consider whether the defendant must have realised that ordinary honest people would regard his behaviour as being dishonest. Only if it also answered yes to the second question would dishonesty be made out.

"Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards."

The Supreme Court considered that there were serious problems with the second leg of the *Ghosh* test. The test of dishonesty as explained by Lord Hoffmann in *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] was to be preferred: *"Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards."*

Following this judgment, the test for dishonesty in the UK now requires:

> a subjective assessment of the individual's knowledge or belief as to the facts (rather than just accepting what the defendant said he believed). The belief need not be reasonable but if it is not, that will be a matter of evidence as to whether the belief is genuinely held.

> an objective assessment of whether that conduct was honest or dishonest by the standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.

Implications of the new test

> It is likely now to be easier for a jury to find there was dishonesty objectively, regardless of the defendant's own view. *Ghosh* had been a difficult test for jurors to apply. The concept that conduct, which by ordinary standards would be judged dishonest, can become honest because the perpetrator thinks it is, is a difficult one to grasp.

> The test for dishonesty is now the same in both civil and criminal cases. The Supreme Court considered that "it would be an affront to the law if [the meaning of dishonesty] differed according to the kind of proceedings in which it arose."

> It may make it easier to secure convictions in white collar crimes. The difficulty of assessing and demonstrating dishonesty has led to its absence in the *mens rea* of several key offences. For example, there is no mention of it in the Bribery Act 2010, following extensive discussion of the concept in the Bribery Bill's passage through Parliament. However, it is still necessary to prove dishonest intent in crimes including fraud, conspiracy to defraud, money laundering, cheating the Public Revenue and various theft offences.

The full judgment is available here.

U.S.: Supreme Court to review Microsoft Warrant decision

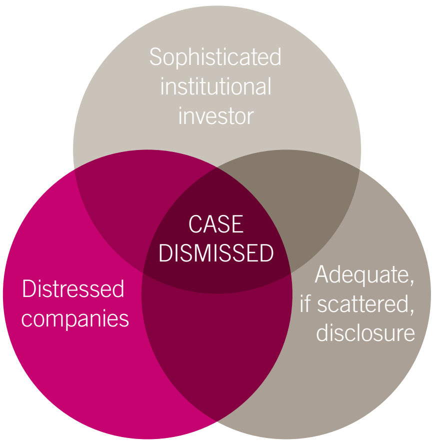
On October 16, 2017, the Supreme Court agreed to review the Second Circuit's decision in *Microsoft Corp. v. United States (In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.)*, 829 F.3d 197, 201 (2d Cir. 2016).

The question presented in the case is whether a U.S. provider of email services must comply with a probable-cause-based warrant issued under 18 U.S.C. § 2703 by making disclosure in the United States of electronic communications within that provider's control, even if the provider has decided to store that material abroad.

The court granted the petition for writ of certiorari filed by the U.S. Department of Justice, which challenged the Second Circuit's decision quashing a warrant issued under the Stored Communications Act that would have forced Microsoft to produce customer email content data that it had housed on a server located in Ireland. For more detail regarding the Second Circuit opinion, please see our client briefing.

U.S.: SEC Administrative Court holds that defendant provided adequate disclosure even when disclosure not obvious

The head of an investment firm and so-called "Diva of Distressed" did not defraud investors, an administrative law judge at the U.S. Securities and Exchange Commission ("**SEC**") has ruled.



The firm managed three funds through its CEO, which issued notes to acquire US$2.5bn in distressed companies. In 2015, the SEC brought civil charges claiming that the firm and its head violated the antifraud provisions of the Investment Advisers Act of 1940. The agency alleged that they did not disclose her conflict of interest in managing the funds, issued financials that did not follow generally accepted accounting principles ("**GAAP**") and overstated the funds' performances. However, in a 57- page opinion on September 27, 2017, an SEC administrative law judge dismissed all three charges. In dismissing the case, the judge found that the deal documents properly disclosed the conflict of interest and that failure to follow GAAP is not, by itself, enough to prove fraud. As for the overstatement charge, the judge concluded that even if the CEO had overstated the funds' performances, the trustee reports provided accurate performance facts. In doing so, the Judge ruled that it did not matter that "investors had to glean these facts from different pages of the trustee reports," because the "total mix of information" was free from material misrepresentations and omissions. "While Respondents did not maximise the ease of finding it," the opinion remarks, "they also did not conceal – omit to state – material information."

The judge also considered the fact that the funds' noteholders were sophisticated institutional investors. The investors knew that the funds were created to invest in distressed companies. Thus, it would be "unreasonable to expect" that those companies perform perfectly. This background knowledge, combined with the adequate (if scattered) disclosure, was enough for the judge to dismiss the charge that the CEO intentionally overstated her funds' performances. While a win for the defendant, the ruling highlights the importance of proper disclosure.

U.S. / UK: Three former Rolls-Royce executives admit corruption and bribery offences in U.S. proceedings

Following parallel investigations by the U.S. Department of Justice ("**DOJ**") and UK Serious Fraud Office ("**SFO**"), three former employees of Rolls-Royce plc ("**R-R**") have admitted bribery and corruption offences in the U.S.. James Finley (a UK citizen), Keith Barnett (of the U.S.) and Louis Zuurhout (a Dutch citizen) were vice-president, regional director and sales manager respectively in R-R's Energy division. They were charged by the U.S. DOJ with conspiracy in relation to an alleged scheme to obtain a contract for Rolls-Royce Energy Systems Inc. ("**RRESI**") to supply equipment and services for a gas pipeline from Central Asia to China. RRESI was a U.S.-based indirect subsidiary of R-R.

An Austrian, Andreas Kohler, who was a former executive at an international engineering consulting firm, also pleaded guilty to conspiracy while a fifth individual, Petros Contoguris, who worked as an intermediary for R-R in Kazakhstan, has been indicted but is believed to be outside the U.S..

The individuals were accused of paying bribes to foreign government officials to secure the contract, worth approximately $145 million. This followed parallel investigations in the U.S. and UK into alleged corruption and failure to prevent bribery by R-R in relation to the sale of energy systems and related services. The three former R-R employees admitted that the misconduct had run from 1999 until 2013. They had participated in the engagement of commercial advisors who would use their commission payments from R-R to bribe foreign officials across the globe to help R-R secure advantages and obtain and retain business with foreign governments.

The SFO's investigation in respect of the conduct of individuals in R-R's Civil, Defence, Marine and former Energy Divisions continues. R-R's corporate conduct in the corruption was dealt with by way of a deferred prosecution agreement between the SFO and R-R on 17 January 2017, under which R-R paid a fine of £671m.

In its press release, the DOJ recognised the SFO's "significant cooperation and assistance" in the case.

The following press releases contain further details of the charges and pleas:

United States DoJ press release. SFO press release.

ROLLS ROYCE

BRIBES

=

£145m

FINE

=

£671m

THREE PLEAD GUILTY

U.S.: Second Circuit refuses to revisit use of foreign compelled testimony in U.S. criminal proceedings

In July 2017, a panel of the U.S. Court of Appeals for the Second Circuit broke new ground in *United States v. Allen*, holding that a defendant's testimony compelled abroad cannot be used against her in U.S. criminal proceedings. On 9 November 2017, the full Second Circuit—which covers New York, among other states—refused to revisit its holding.

In asking the full Second Circuit for a rehearing, the government argued that *Allen* would hinder its ability to prosecute international crimes. "Indeed," it contended, "the government has already elected to forgo worthy cross-border investigations that, absent the panel's decision, it would have vigorously pursued." The Second Circuit's refusal potentially cements this effect.

This effect is a direct result of the U.S. Constitution's Fifth Amendment, which prohibits the use of compelled testimony in American criminal proceedings. Where the government uses compelled testimony to indict or convict someone, that defendant must be cleared of all wrongdoing. The only exception is when a court can conclude, following a hearing, that the use of compelled testimony was harmless beyond a reasonable doubt. And as the chief judge of Manhattan's federal trial court has observed, "[t]he nature of the hearing that must be held is, quite frankly, onerous."

The government's last remaining option is to seek a writ of certiorari to the U.S. Supreme Court, but such requests are infrequently granted. For now, and potentially for the long term, *Allen* is law in New York. It is important to note that *Allen* addresses compelled testimony only, and does not cover other investigatory tactics undertaken by foreign governments that are precluded in the United States – such as unreasonable searches, as defined by the Fourth Amendment – which may still be admissible in U.S. proceedings.

We previously wrote about the *Allen* panel decision in a client alert and in the Summer 2017 issue of Business Crime Quarterly.

> Current Australian whistleblowing laws are seldom used and contain significant gaps in the legal framework.

> If enacted, the Whistleblowers Bill will change the whistleblowing landscape in Australia.

Australia: Strengthened protections for corporate and tax whistleblowers on the horizon

Australian whistleblowing protections in relation to tax and the corporate, financial and credit sectors are expected to be strengthened from 1 July 2018, with an exposure draft of the Treasury Law Amendment (Whistleblowers) Bill 2017 (“**Whistleblowers Bill**”) currently the subject of consultation.

Current Australian whistleblowing laws are seldom used and contain significant gaps in the legal framework, such as restricting eligible whistleblowers to current employees, requiring whistleblowers to demonstrate ‘good faith’ to receive the protections afforded by the law and limiting the type of disclosures that are protected to information around misconduct occurring under specific legislation.

The Whistleblowers Bill creates a single corporate, financial and credit whistleblower protection regime under the Corporations Act 2001 (Cth) and a protection regime in relation to whistleblowing relating to tax matters.

Key aspects of the Whistleblowers Bill include:

> a strict liability offence for public companies and large proprietary companies who do not have a whistleblower policy in place and who do not make that policy available to people who may be eligible whistleblowers; and

> a reverse onus of proof in relation to compensation for victimisation, which means that, so long as the victim can prove that he or she suffered damage because of the first person’s conduct, the person accused of victimisation must prove that a disclosure was not in any part a reason for their conduct.

If enacted, the Whistleblowers Bill will change the whistleblowing landscape in Australia and put it on a par with the UK and U.S..

Germany: Reform of rules on confiscation of profits in criminal proceedings

The rules on confiscation of profits from criminal acts have undergone significant changes following the new Act to Reform the Asset Recovery under Criminal Law (*Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung*) (“**Act**”), which came into effect on 1 July 2017.

The aim of the Act, which also transposes EU Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, is to confiscate illegal profits from the individual perpetrator or any third party beneficiary to whom the benefit might have been passed. Therefore, the law creates a legal obligation for the authorities to confiscate the proceeds of a crime. In calculating the amount to be confiscated, the so-called gross principle (*Bruttoprinzip*) shall apply which means that, in principle, any expenses incurred by the perpetrator cannot be deducted.

One major change is that profits may be confiscated in separate confiscation proceedings even if the underlying criminal offence has become statute-barred. This opens the door for the authorities to pick up cases where the offence of the individual perpetrator could no longer be prosecuted because it had become statute-barred and to initiate separate confiscation proceedings against the beneficiary of the criminal conduct. However, it will still be necessary (apart from in a few limited exceptions) for the authorities to prove the illegal conduct from which the profit derived.

Since the new rules came into effect only recently, there is as yet no case law so it remains to be seen how the rules will be applied in practice by the authorities.

U.S.: DOJ institutionalises FCPA policy against backdrop of continued cross-border enforcement

On November 29, 2017, U.S. Department of Justice ("**DOJ**") Deputy Attorney General Rod Rosenstein announced a new policy that the DOJ indicated would further incentivise companies to self-report violations of the U.S. Foreign Corrupt Practices Act ("**FCPA**"). The policy formalises DOJ's FCPA Pilot Program ("**Pilot**"), introduced in early 2016, with important changes designed to encourage corporate self-disclosure.

> "now is an opportune time for companies to revisit the effectiveness of their anti-corruption compliance programs."

Most noteworthy, under the new policy, "when a company satisfies the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there will be a presumption that the Department will resolve the company's case through a declination," or a decision not to prosecute, combined with the disgorgement of illicit profits. Second, under the Pilot, companies that self-disclosed could receive up to a 50% reduction in the fine that would have been imposed under the U.S. Sentencing Guidelines. Now, companies that qualify under the policy are assured a 50% reduction. By offering these added incentives, DOJ hopes that more companies will self-report suspected FCPA violations than did under the Pilot.

Deputy Attorney General Rosenstein's announcement is significant for FCPA corporate enforcement. While the new policy institutionalises the Pilot, the policy's nuances remain largely undefined and have yet to be fully tested. Only time will tell if DOJ's new FCPA policy is implemented any differently from how the Pilot was applied in practice and to what extent the U.S. Securities and Exchange Commission ("**SEC**") adopts a similar approach in parallel enforcement actions. With DOJ's renewed dedication to encouraging corporate self-disclosure and both DOJ's and SEC's continued focus on coordinated, multijurisdictional investigations and enforcement actions, now is an opportune time for companies to revisit the effectiveness of their anti-corruption compliance programs and think strategically about whether or not to self-report any newly uncovered misconduct.

We have published a client briefing with further details of the new policy, available here.

Policy and practice

Over
50
specialist staff

56
investigations

New powers under
MLD4

UK: FCA continues its crackdown on financial crime

For each of the past three years, the Financial Conduct Authority ("**FCA**") has cited tackling financial crime, and money laundering ("**AML**") in particular, as one of its key priorities. Through the deployment of over 50 specialist staff, the FCA has devoted a great deal of resource to supervising firms' compliance with AML rules: conducting deep dives into major retail and investment banks' AML controls and conducting regular inspections of smaller regulated firms.

Now, as well as using its supervisory tools, the FCA is increasingly bringing enforcement action against firms that fall short of its standards. In February, the FCA imposed a record £163 million penalty on Deutsche Bank for failing to maintain an adequate AML framework. Recently-released figures show that this was not a one-off: at the end of March 2017, the FCA had 56 investigations into financial crime issues ongoing, 43 of which were opened in the preceding year.

The FCA has also shown its willingness not only to impose fines but, in some cases, to demand that firms, (including, most recently, Sonali Bank and Bank of Beruit), stop pursuing certain areas of business until they have sorted out their failing AML systems. This is not an approach we have often seen in other enforcement scenarios but it would seem to confirm the FCA's determination, not only to crack down on inadequate systems, but to ensure they are not permitted to persist.

The FCA's focus on money laundering looks set to continue. In June, the FCA was handed further powers under the UK law implementing the latest EU Money Laundering Directive (commonly known as MLD4). The Treasury has also announced that, by the end of 2018, it intends for the FCA to begin monitoring the AML supervision carried out by professional bodies, such as the Institute of Chartered Accountants and the Law Society. With these new powers and the large number of ongoing investigations, AML promises to be a key area for the FCA over the coming years.

UK: New Anti-Corruption Strategy focusses on economic crime and money laundering

In a statement to both Houses of Parliament on 11 December 2017, the Home Secretary, Amber Rudd, announced plans to review and bolster the UK's response to economic crime and protect the country's financial system and international reputation. The plans include the establishment of a new National Economic Crime Centre ("**NECC**") to "task and coordinate the law enforcement response" to economic crime, which will sit within the National Crime Agency. It will bring together the UK's economic crime-fighting authorities, including government agencies and the City of London Police. The Serious Fraud Office will continue to act as an independent organisation and the NECC will have the power to ask it directly for assistance in appropriate cases.

A particular target of the NECC will be organised money laundering through the City of London. Official figures estimate that proceeds of crime amounting to around £90bn are laundered through the UK each year, with fraud costing a further £6.8bn annually. There have been concerns that the UK's ability to tackle organised corruption will be damaged by Brexit. The government's plans therefore include using powers in the Criminal Finances Act 2017 to forfeit criminal money held in suspended bank accounts and a renewed commitment to introduce a register of the beneficial ownership of overseas companies that own or buy property in the UK or participate in central government procurement, thereby reducing opportunities for criminals to use shell companies to launder illicitly gained wealth through London property. The Law Commission is to carry out a review of the Proceeds of Crime Act 2002 to identify further improvements that could be made to powers to confiscate proceeds of crime.

In addition, the government has published a new Anti-Corruption Strategy following a comprehensive audit of the UK's economic crime-fighting capabilities. The six-priority plan, which provides a framework for government policy until 2022, includes targeting corruption within high risk public sectors (such prisons, policing and defence) and reducing corruption in public procurement and grants. The UK will also continue to work with other countries to tackle corruption.

U.S.: DOJ enforcement practices toward global businesses unlikely to change

In the wake of the most recent United States presidential election, many global clients have been asking what the change in administration will mean for their business. When it comes to government enforcement, clients have inquired whether the Department of Justice ("**DOJ**") will begin to treat overseas businesses differently – that is, more harshly – than their U.S.-based competitors. Another question many clients have posed is whether collaboration between DOJ and foreign regulators is a trend that will continue, or whether we are likely to see a retreat from international engagements. Both questions have roots in the same soil; our clients rightly wonder whether the "America First" slogan of the new administration will result in changes to past DOJ enforcement practices.

> "Our analysis is that the change in administration is unlikely to significantly alter the current trajectory of U.S. criminal enforcement when it comes to global businesses."

Our analysis is that the change in administration is unlikely to significantly alter the current trajectory of U.S. criminal enforcement when it comes to global businesses. First, we expect that DOJ will continue to treat businesses similarly regardless of whether those businesses are foreign or domestic. DOJ is an apolitical body overwhelmingly staffed by career law enforcement professionals. The tenure of these men and women spans political administrations, and their commitment to enforcing the law without regard to political agenda is a foundational part of DOJ's institutional culture. Given that culture, it is hard to imagine that DOJ's political leadership would instruct prosecutors to treat non-U.S.-headquartered companies or financial institutions more severely than U.S.-headquartered ones. Moreover, were such an order to arrive, it would likely be met with resistance from career professionals, who would rightly view such an instruction as counter to DOJ's mission of neutrally enforcing the law based on facts and not ideology.

For further information, please see our client briefing.

U.S.: Top DOJ and SEC officials highlight continued FCPA enforcement and increased international cooperation

On 9 November 2017, Steven Peikin, Co-Director of the U.S. Securities and Exchange Commission's ("**SEC**") Enforcement Division, made clear that the SEC is committed to "robust" enforcement of the Foreign Corrupt Practices Act ("**FCPA**"), and would be "redoubling [its] efforts to bring cases as quickly as possible." Charles Cain, the newly-appointed Chief of the SEC's FCPA Unit, also recently said that he is intent to "level the playing field globally," which some observers have interpreted as a possible signal of increased enforcement against companies headquartered outside of the United States. And Rod Rosenstein, Deputy Attorney General at the U.S. Department of Justice ("**DOJ**"), explained on 8 November 2017 that the DOJ is committed to prosecuting violations of the FCPA and related laws with "renewed vigor" and "increased sophistication."

While Peikin expects the SEC's collaboration with foreign law enforcement and regulators to continue its "upward trajectory," Rosenstein explained that the DOJ is sensitive to concerns about potential "piling on" where multiple authorities pursue a single investigative target. He noted that the DOJ is committed to making an effort to apportion penalties among international and domestic agencies "where appropriate," and is considering proposals for improving coordination.

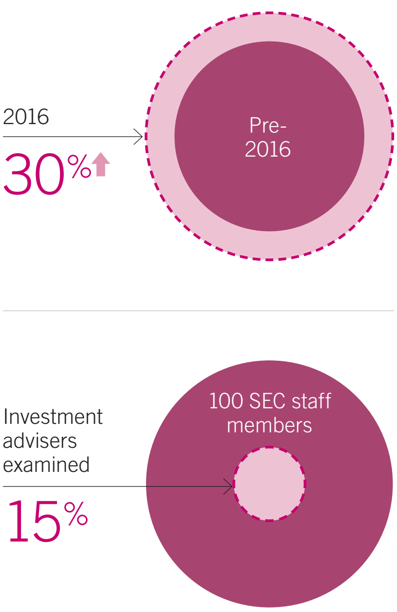
This increased collaboration is evidenced in the record-setting $965 million penalty that Telia Company AB, a Swedish company, agreed to pay to U.S., Dutch, and Swedish authorities in September 2017 for an alleged bribery scheme related to its business in Uzbekistan. In addition to its Dutch and Swedish counterparts as well as the SEC, the DOJ credited 11 other jurisdictions for assistance with its investigation.

In light of these statements and the groundbreaking Telia settlement, companies and their executives should remain committed to strong compliance, and prepared for continued robust enforcement around the world.

For further detail, please see our client briefing.

US: Statements by top SEC officials signal turn away from broken windows prosecutions and towards increased examination of investment advisers

Investment adviser examinations



Recent statements by top officials at the U.S. Securities and Exchange Commission ("**SEC**") signal important shifts in its enforcement priorities. On 26 October 2017, Steven Peikin, Co-Director of the SEC's Enforcement Division, indicated that the SEC would no longer pursue a "broken windows" approach to enforcement actions, which had been a hallmark of previous SEC Chair Mary Jo White's tenure. Under the "broken windows" approach, the SEC conducted industry-wide sweeps and pursued what some viewed as minor or technical infractions in an effort to discourage more serious abuses. Mr. Peikin said the SEC would follow a "more selective approach" to bring fewer cases that would send targeted messages on particular issues, citing reduced SEC resources resulting from natural attrition and its current hiring freeze.

SEC Chair Jay Clayton, in testimony delivered to the Senate Committee on Banking on 26 September 2017, also indicated that the SEC will shift its existing resources toward enhanced investment adviser examinations. He stressed that this increased coverage was necessary due to the tripling of assets managed by investment advisers since 2001. The SEC reassigned 100 staff members to investment adviser examinations in 2016, and is on track to examine 15% of all investment advisers by the end of this fiscal year (a 30% increase from previous years). Mr. Clayton underscored efforts to ensure that this increase in examination coverage would not come at a decrease in quality. He explained that the SEC would further leverage its current risk-based approach to examinations, using enhanced data analytics to hone its choice of firms and refine the scope of each examination.

Other news

Just published: a new and fully updated edition of our review of ABC law and policy across the globe

A new edition of "*Taking Stock*", Linklaters' key review of anti-bribery and corruption law and enforcement in 24 key jurisdictions, has been published and is available to clients on our Knowledge Portal. Commentary includes coverage of new business and legal developments, including the increasing focus on cooperation and alignment of approaches between regulators and prosecutors across jurisdictions and looks forward to likely developments in this area.

An understanding of the global reach of anti-bribery and corruption regulation, as well the application of it within a specific jurisdiction, is key to managing risk for today's international businesses.

Of particular note in the Review are the following findings:

> **Increased cooperation between national regulators and prosecutors**

- Joint and parallel investigations and enforcement action
- Government commitments to transparency, recovery and return of proceeds of crime, supporting whistle-blowers and adoption of similar enforcement mechanisms

> **Alignment of strategies**

- Toughening of statutory basis for enforcement action and increase in penalties
- Increased encouragement of corporate anti-corruption polices, placing onus on companies and employers to prevent wrong doing

> **New legislation and increase in penalties**

- France – obligation on large companies to implement eight-point compliance plan
- Germany –new supervisory duties for companies; increase in penalties
- Italy – enhanced penalties for corruption; increased transparency from authorities
- Japan – revised guidelines on prevention of foreign bribery
- Netherlands – new legislation increasing sanctions
- Portugal – increased pressure to comply with international standards; extension of legislation to bribery of foreign public officials
- Singapore - new Standard on anti-bribery management systems
- South Africa - relevant institutions to maintain AML and CTF risk management and compliance programmes
- South Korea – Anti-Graft Act expanding scope of "public official"
- Spain – increased criminal liability for companies

Linklaters' investigations practice in GIR's top 30 for 2017

Global Investigations Review has published its annual GIR 100, with Linklaters again appearing in the top 30 of the world's leading cross-border investigations practices. GIR highlighted the recent "notable" additions to Linklaters' white-collar practice of Matthew Axelrod and Doug Davison in the U.S. and Elly Proudlock in the UK, and noted that leading global financial institutions have sought our advice in investigations by both prosecutors and regulators.

Linklaters partners speak to the Wall Street Journal about the growing cooperation between global regulators

London partner Satindar Dogra and U.S. partners Matthew Axelrod and Adam Lurie spoke to the Wall Street Journal recently, highlighting current trends in anti-corruption enforcement across the globe. They pointed to the expansion of anti-bribery legislation in the UK and how that had resulted in increased cooperation between UK authorities and those in the U.S. and beyond. This has led to the need for companies to assess their responses to regulators even more carefully. As Matt Axelrod put it, "if one jurisdiction's regulators are aware of the conduct, what are the odds that another jurisdiction's regulators are going to find out about it anyway, and so do you want them to hear about if from you first?"

The full article is available from the Wall Street Journal, here.

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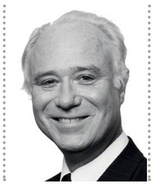

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