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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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.globalinvestigationsreview.com

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Enquiries concerning editorial content should be directed to the Publisher:
david.samuels@lbresearch.com

ISBN 978-1-78915-111-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

ALLEN & OVERY LLP

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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
November 2018
London, New York and Washington, DC

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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.

17

Individuals in Cross-Border Investigations or Proceedings: The UK Perspective

Richard Sallybanks, Ami Amin and Jonathan Flynn[1]

17.1 Introduction

In any cross-border investigation, invariably suspects will either be located in different jurisdictions, or subject to investigation by authorities from different jurisdictions, or both.

This chapter looks at the key issues that can arise when acting for an individual who is present in the United Kingdom and subject to a criminal investigation or proceedings here or in one or more overseas jurisdictions.[2]

17.2 Cross-border co-operation

See Chapter 9 on Co-operating with Authorities

There are various ways in which the United Kingdom might co-operate with overseas agencies or regulators when investigating or prosecuting an individual, ranging from informal 'intelligence sharing' to mutual legal assistance (MLA).

In the United Kingdom, the framework governing MLA requests is contained, primarily, in the Crime (International Co-operation) Act 2003 (CICA), Part 1 of which deals with criminal cases. Under CICA, an MLA request can only be made if it appears to the investigating authority that an offence has been committed (or there are reasonable grounds to suspect that an offence has been committed), and proceedings have been initiated or an investigation has begun.[3] MLA requests are

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2 Whereas England and Wales have a common legal system, there are certain substantive and procedural differences in the Scottish and Northern Irish systems. This chapter focuses on the English and Welsh legal system.

3 Section 7, Crime (International Co-operation) Act 2003.

made to the UK Central Authority (UKCA)[4] through a formal international letter of request, known as a *commission rogatoire* in civil law jurisdictions. The UK Home Office has published detailed guidance on how authorities outside the United Kingdom can make such requests.[5] MLA requests will only be considered appropriate, however, when the request is for evidence (and not intelligence).[6]

Where overseas police and other law enforcement agencies request assistance directly from a UK law enforcement agency, a formal MLA request is not required. A number of UK law enforcement agencies[7] can receive direct requests, and often this form of co-operation is governed by data sharing agreements or memoranda of understanding.

In some instances, cross-border co-operation may extend to the establishment of a joint investigation team (JIT) between investigating agencies in more than one country.[8] The establishment of a JIT is another means by which information or evidence gathered in one country can be shared with another without the need for MLA.

Practical issues 17.3

Asset freezing and restraint 17.3.1

During a cross-border investigation, an overseas authority may seek to freeze or restrain an individual's assets in the United Kingdom. The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (the 2005 Order) sets out the provisions for the United Kingdom to respond to and co-operate with other countries in freezing and confiscating assets.[9] Under section 444(1)(a) of the Proceeds of Crime Act 2002 (POCA), property in the United Kingdom can be frozen in accordance with an external request relating to proceedings for the recovery of criminal proceeds.[10]

In the first instance, external requests will be addressed to the Secretary of State for the Home Department (SSHD), who will in turn refer the matter to the relevant UK authority.[11] The relevant authority will then apply to the Crown Court

4 The UKCA is the Home Office department responsible for receiving, acceding to and ensuring the execution of MLA requests in England, Wales and Northern Ireland. Her Majesty's Revenue and Customs (HMRC) is responsible for MLA requests in England, Wales and Northern Ireland relating to tax and fiscal customs matters. The Crown Office is responsible for MLA requests in Scotland, including devolved Scottish matters.

5 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415038/MLA_Guidelines_2015.pdf.

6 Section 7(2), Crime (International Co-operation) Act 2003.

7 These are: the UK Liaison Bureau at Europol via the National Crime Agency, Interpol via the National Crime Agency, UK Visas & Immigration; HMRC; Police Services; Financial Intelligence Units; Asset Recovery Offices.

8 Sections 103 and 104 of the Police Reform Act 2002.

9 The Order is made in exercise of the powers conferred under section 444 and 459(2) POCA.

10 An external request is a request by an overseas authority to prohibit dealing with property identified in the request. Section 447(1) POCA.

11 The relevant authority will be the Director of the National Crime Agency or the Director of Public Prosecutions and, in respect of offences involving serious or complex fraud, the Director of the

for the assets to be restrained. For the Crown Court to give effect to an external request: the property in England and Wales must be identified; a criminal investigation or proceedings relating to the relevant offence must have commenced in the requesting state; and there must be reasonable cause to believe that the alleged offender has benefited from his or her criminal conduct.[12] Furthermore, under section 447(8) of POCA, the criminal conduct must meet the dual criminality requirement, in that it must also amount to an offence in the United Kingdom, or would do so if it occurred there.

Where the Crown Court is satisfied that these conditions are met, it may make a restraint order prohibiting a person from dealing with the property identified in the external request, subject to certain exceptions.[13] A restraint order must be served on the suspect and any other person affected by it, and the UK courts will require confirmation this has been done. Failure to do so could result in the order being discharged.

Where a restraint order is obtained, it is likely that any banks or financial institutions to which the individual is connected will be served with a copy of the order in order to freeze any assets (ensuring that they remain available for confiscation).

The provisions of the 2005 Order correspond to provisions in Parts 2 to 4 and Part 5 of POCA (excluding Chapter 3), applicable to UK investigations. As with Parts 2 to 4 of POCA, section 444 enables restraint orders to be granted from the outset of a criminal investigation.

17.3.2 Account monitoring orders

CICA implements the 2001 Protocol to the Convention on Mutual Assistance in Criminal Matters (the 2001 Protocol), which creates obligations for participating countries to respond to requests from overseas authorities for assistance locating bank accounts or to provide banking information relating to criminal investigations.[14] Account monitoring orders under CICA only apply to an investigation by a 'participating country' into serious criminal conduct.[15]

Account monitoring procedures were first introduced in the United Kingdom under POCA. However, separate provisions have been created under CICA to ensure that the United Kingdom can meet the requirements of the 2001 Protocol, which has a wider scope than POCA.

Where the SSHD receives a request from the relevant overseas authority, he or she may direct a senior police officer to apply, or arrange for a constable to apply, for an account monitoring order.[16] A judge can make an account monitoring

Serious Fraud Office (article 6, the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005).

12 Article 7, The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005.

13 Ibid., article 8.

14 Sections 36-42, Crime (International Co-operation) Act 2003.

15 The request must be from an EU Member State, Iceland, Japan, Switzerland or the United States.

16 Section 35, Crime (International Co-operation) Act 2003. An account monitoring order is an order made by a judge to enable transactions on a particular account to be monitored for a specified period.

order where he or she is satisfied that there is an investigation into criminal conduct in the country in question and the order is sought for the purposes of that investigation.[17] Applications can be made, without notice, to a judge in chambers.[18] The court may discharge or vary an account monitoring order, but not on an application by the account holder.[19]

An account monitoring order can also be requested under Part 5 of the Proceeds of Crime (External Investigations) Order 2014 for the purposes of a criminal investigation[20] or criminal proceedings.[21] The request must demonstrate reasonable grounds for believing that the account information requested is of substantial value to the overseas investigation, and that it is in the public interest for it to be provided.[22]

Under POCA, account monitoring orders may be made for up to 90 days and the same restrictions apply to requests under the 2001 Protocol. Arrangements will be made between the relevant authorities case by case.[23]

Asset tracing 17.3.3

All asset tracing should be conducted via law enforcement co-operation through financial intelligence units. The United Kingdom has no central record for bank accounts. Therefore, any information should be sought via police co-operation before an MLA request is made.

In the United Kingdom, property or a sum of money is recoverable if it has been specified in an external order.[24] However, if the property (including money) specified in the external order has been disposed of, it is only recoverable if it is held by a person into whose hands it may be followed.[25]

Under the 2005 Order, any property deemed to represent the original recoverable property is also recoverable.[26] If a person disposes of recoverable property that represents the original property, the property may be followed into the hands of the person who obtains it (and it continues to represent the original property).[27]

17 Section 36, Crime (International Co-operation) Act 2003.
18 Ibid.
19 Ibid.
20 Provided that the investigation falls within a confiscation investigation or a civil recovery investigation.
21 Part 8, POCA.
22 Article 30, Proceeds of Crime (External Investigations) Order 2014.
23 Article 3(4) of the 2001 Protocol to the Convention on Mutual Assistance in Criminal Matters.
24 Article 202, the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005.
25 Ibid.
26 Ibid., Article 203.
27 Ibid.

17.3.4 Confiscation and forfeiture

Under the 2005 Order, property within the United Kingdom may be subject to confiscation proceedings following the receipt of an external order.[28]

Upon receipt of an authenticated external order, the SSHD may refer it to the relevant UK authority to process.[29] Only the relevant Director (as defined in article 18 of the 2005 Order) may then make an application to the Crown Court to give effect to it.[30] The Crown Court must decide to give effect to an external order by registering it where certain conditions are met. Those conditions are that: (1) the external order was made following a conviction of the person named in the order, and no appeal is outstanding; (2) the external order is in force and there is no appeal outstanding in respect of it; (3) giving effect to the order would not be incompatible with the Convention rights[31] of the individual concerned; and (4) that the property is not subject to charges under the provisions set out in article 21(6) of the 2005 Order.[32]

Where the Crown Court decides to give effect to an external order, it must register it and provide for notice of the registration to be given to any person affected by it,[33] who may apply to vary the property to which it applies.[34]

Under article 26 of the 2005 Order, the amount ordered to be paid is due on the date notice is given to the affected person. The Crown Court has discretion to allow for more time to pay.[35] Where the external order specifies a sum of money in another currency, the sterling equivalent in accordance with the exchange rate prevailing at the end of the working day immediately preceding the day of registration of that order will be sought.[36]

17.3.5 Interviews

See Chapter 15 on representing individuals in interviews

An individual suspected of criminal activity who is resident or temporarily present in the United Kingdom and whom the UK authorities wish to question will be interviewed 'under caution'. This is usually done voluntarily unless it is

28 An external order is made by an overseas court where property is found, or believed to have been obtained, as a result of, or in connection with, criminal conduct. Section 447(2)(b) POCA.

29 The relevant authority will be the Director of the National Crime Agency or the Director of Public Prosecutions, and, in respect of offences involving serious or complex fraud, the Director of the Serious Fraud Office (article 18, the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005).

30 Article 20, the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005

31 Rights under the European Convention on Human Rights.

32 The fourth condition is that the specified property must not be subject to a charge under: (a) section 9 of the Drug Trafficking Offences Act 1986(2); (b) section 78 of the Criminal Justice Act 1988(3); (c) article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990(4); (d) section 27 of the Drug Trafficking Act 1994(5); (e) article 32 of the Proceeds of Crime (Northern Ireland) Order 1996(6) (article 21, the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005).

33 Ibid., article 22.

34 Ibid., article 22.

35 Ibid., article 26.

36 Ibid., article 25.

considered necessary to arrest the individual and there are legitimate reasons for doing so, such as a reasonable belief that, unless placed under arrest, the suspect will abscond from the jurisdiction or will somehow attempt to improperly interfere with the investigation.[37]

Either way, the interview will be conducted in accordance with the procedures laid down in the Police and Criminal Evidence Act 1984 (PACE) and the accompanying Code C. The suspect has a number of rights, including the right to have a lawyer present.[38] A lawyer is defined as a UK solicitor holding a current practising certificate or an accredited or probationary representative.[39] This means that the suspect cannot be represented during the interview by an overseas lawyer. However, the suspect may have an approved interpreter present if he or she does not speak, or has only limited, English.[40]

The question of whether the interview is admissible in proceedings in any other jurisdiction will depend on the laws of that country. This means that, in cross-border investigations, serious consideration must be given by all the suspect's legal advisers prior to any interview in the United Kingdom as to whether his or her answers (or silence) may be admissible in any other investigating jurisdiction and, if so, the resulting potential benefits or disadvantages of the strategy adopted.

When a suspect is resident in the United Kingdom, but is wanted for questioning by an overseas authority, the individual (or his or her legal advisers) may be approached with a request that the suspect travel to the country of the requesting authority for interview voluntarily.

In the absence of any such request, or if it is refused, the requesting authority may be able to gain evidence from the suspect in the United Kingdom through MLA. In brief, an overseas authority can request that a statement be taken from the suspect on a voluntary basis. Alternatively, where the evidence needs to be taken on oath or where the suspect refuses to co-operate, the request can be for the suspect to be compelled to attend court for questioning.

Once before the court, the suspect can then be questioned under oath (although an oath need not be administered if this is allowed under the laws of the requesting state). The suspect retains the right against self-incrimination and may refuse to answer any question.

If a suspect consents to giving the overseas authority a statement voluntarily, or answers questions in court, this is likely to be admissible in any future proceedings in the requesting jurisdiction (subject to the applicable law in that jurisdiction). Again, the question of whether statements are also admissible in proceedings in any other jurisdiction will depend on local laws, and serious consideration must be given by all the suspect's lawyers of the implications.

37 Section 24 and Code G Police and Criminal Evidence Act 1984 (PACE).

38 Paragraph 6, Code C PACE.

39 Paragraph 6.12, Code C PACE.

40 Paragraph 13, Code C PACE.

Often the requesting state seeks to obtain evidence from an individual who is not a suspect, but who is a witness, in the investigation. In such situations, the same MLA procedures can be used to obtain evidence.

However, if it is believed that the non-suspect individual will be unco-operative or unwilling to assist in any circumstances other than by compulsion, and assuming that the investigation is into a serious or complex fraud of the type that would fall under the remit of the Serious Fraud Office (SFO), a MLA request can be made to direct the SFO to obtain such evidence from the individual using its compulsory section 2 powers.[41] Answers obtained via this process are not generally admissible as evidence against the interviewee in criminal proceedings,[42] although they will inform the rest of the investigation.

Before granting the request, the requesting authority will be expected to provide an undertaking that any statement, or the contents of any interview, made by an individual pursuant to a compulsory section 2 notice will not be used in evidence against that person in any subsequent prosecution.[43]

17.3.6 Search and seizure

Under section 16 of CICA, an overseas authority can request the search or seizure of property in the United Kingdom. However, a request will not be granted automatically, even in circumstances where a search warrant has been issued in the requesting country.

In the first instance, the UK authorities may choose to implement the request in less invasively, such as by seeking the production of documents (see section 29.3.7). Moreover, even if the UK authorities accede to the request they do not have the power to grant the search warrant themselves, but must apply to a UK court.

Under section 17 of CICA, a court in England, Wales or Northern Ireland[44] may only issue a warrant at the request of an overseas authority where they are satisfied that the following three conditions are met: first, that criminal proceedings have been instituted, or a person has been arrested during the course of a criminal investigation, outside the United Kingdom; second, that the offence at issue would constitute an indictable offence in England or Wales (or an arrestable offence in Northern Ireland); and third, that there are reasonable grounds to suspect that the premises in question are occupied or controlled by that person and contain evidence relating to the offence.[45]

An application for a search warrant must be supported by a written document, known as an information, setting out the factual basis on which the warrant is

41 Section 2 of the Criminal Justice Act 1987 (CJA). The Financial Conduct Authority has a similar power under section 171 of the Financial Services and Markets Act 2000 (FSMA).

42 Answers given in compelled interviews will, however, be admissible against the interviewee in most types of non-criminal proceedings.

43 *Saunders v. The United Kingdom* [1996] ECHR 65, para. 68 in particular.

44 Different conditions apply to warrants issued in Scotland (see section 18 CICA).

45 Section 17(3) CICA.

sought. Since search warrant applications are made *ex parte*, the officer making the application must furnish the court with the full facts at their disposal (including those that militate against the granting of a warrant).[46]

Where a warrant is granted under section 17 of CICA, an officer from the executing UK authority may enter the property to seize and retain evidence relating to the offence. All search warrants executed in the United Kingdom must comply with the requirements of PACE and Code B.[47] This includes a requirement to provide the occupier of the premises with a copy of the warrant.

Where evidence is seized under CICA, either the original or a copy will be sent via the UKCA to the court in the territory that requested the seizure.[48] However, further considerations will apply in the event that the material seized is subject to legal professional privilege or constitutes 'special procedure material'.[49]

See Chapter 35 on privilege

In this regard, it is worth noting that an individual may hold privileged material belonging not only to themselves, but also to their current or former employer (such as legal advice given to the company or material generated during the course of an internal investigation).[50] In the event of seizure of such material, the company that has the benefit of the privilege may itself wish to make representations to the authority receiving the material.

Production of documents 17.3.7

In cross-border investigations involving financial crime, the most common mechanism to compel individuals to produce information, whether by answering questions in interview or by producing documents, is through the SFO's powers under section 2 of the Criminal Justice Act 1987 (CJA) (or the FCA's equivalent powers under Part XI of the Financial Services and Markets Act 2000).[51]

See Chapter 11 on production of information to authorities

The territorial scope of the SFO's powers under section 2 is not defined by the CJA. However, in the recent case of *R (KBR Inc) v. Serious Fraud Office*,[52] it was determined that section 2 powers can, in certain circumstances, have extraterritorial effect (circumventing the requirements of MLA). Accordingly, consideration should be given early in any cross-border investigation to what documents an individual has in their possession (whether in hard copy or electronically) and where they are held.

46 *R (Energy Financing Team) v. Bow Street Magistrates' Court* [2006] 1 WLR 1317.

47 Section 15(6) PACE specifies what a warrant should contain.

48 Section 9 CICA.

49 Special procedure material includes journalistic material, or material acquired or created in the course of any trade, business, profession or other occupation, which is held subject to a duty of confidentiality (section 14 PACE 1984).

50 The recent decision in *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation* [2018] EWCA Civ 2006 has broadened the scope of material that might arguably be subject to legal professional privilege.

51 Section 2(3) Criminal Justice Act 1987.

52 [2018] EWHC 2012 (Admin).

In addition, under section 20 of CICA, a participating country[53] may request a freezing order in relation to evidence (this does not extend to property or money). Requests would be made to the Home Office and must relate to a listed offence.[54] Once evidence has been frozen it must be retained until instructions have been received to transfer that evidence to the requesting state, or to release it.[55]

17.4 Extradition

In cross-border criminal investigations, suspects are often resident outside the jurisdiction conducting the investigation.[56] As such, a critical question will be whether, and how, they may be subjected to extradition.

The answer lies in the legislation of, and arrangements between, the requesting and requested states.

The UK position is governed by the EU Framework Decision[57] and its obligations are implemented through the Extradition Act 2003 (the 2003 Act).

The 2003 Act is divided into two parts. Part 1 applies to requests made by 'category 1 territories' (European Union countries and Gibraltar) through the European arrest warrant (EAW) procedure.[58] Part 2 applies to requests made by 'category 2 territories', namely those other countries with which the United Kingdom has extradition relations.[59]

It is not yet clear what impact the United Kingdom's decision to leave the EU will have, but it is likely that legislators will be revisiting this sometimes controversial area of law.

17.4.1 Extradition from the UK – category 1 territories: the EAW

The EAW is a fast-track procedure that allows the requesting state to secure the return of a requested person quickly and effectively.

The National Crime Agency certifies the EAW on receipt from the requesting state before liaising with the Crown Prosecution Service (CPS) for advice on the validity and content of the request.

The requesting state must identify the offence of which the requested person is accused and confirm that the EAW is issued with a view to his or her arrest and

53 One of the EU Member States, Iceland, Japan, Switzerland and the Unietd States.

54 Article 3, Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

55 Section 24 CICA.

56 The focus of this chapter is on extradition from the United Kingdom. However individuals wanted by overseas authorities may be the subject of an Interpol red notice. Red notices can be issued on the basis that the individual is sought for prosecution or to serve a sentence. Once issued, a red notice alerts police and border officials around the world, and therefore affected individuals may encounter difficulties when travelling internationally, even if they are not subject to an investigation or arrest warrant in the jurisdiction they are travelling from or to. For more information see: https://www.interpol.int/INTERPOL-expertise/Notices/Red-Notices.

57 2002/584/JHA.

58 Extradition Act 2003 (Designation of Part 1 Territories) Order (SI 2003/3333).

59 Extradition Act 2003 (Designation of Part 2 Territories) Order (SI 2003/3334).

extradition for the purpose of prosecution or, where the requested person has been convicted, for the purpose of being sentenced or to serve a sentence already passed. The information must include details such as the requested person's identity and particulars of the alleged offence or conviction. Failure to comply with these requirements invalidates the EAW.[60]

Following the certification of the EAW, a warrant for the requested person's arrest is issued. On arrest, the individual will initially be taken to a police station and held there under the provisions of PACE and the accompanying Code C. The individual has various rights, including the right to have someone informed of the arrest; the right to free independent legal advice; and the right to consult privately with a solicitor. A formal custody record will be opened, detailing key aspects of the detention, but the individual will not be interviewed as it is not the role of the police to investigate the offence. However, given the significance of identification to the extradition process, fingerprints, non-intimate samples and photographs may be obtained from the individual in accordance with PACE Code D.[61]

Following the requested person's arrest and initial detention, he or she must be brought before a court[62] 'as soon as practicable' for an initial hearing and fixing of the extradition hearing within the next 21 days.[63] Depending on the day and time of the arrest, this requirement can mean that the individual spends only hours in police detention before being brought before the court although, if arrested at the weekend, it can mean spending up to two nights in police custody.

At the extradition hearing, the judge must be satisfied that the alleged conduct constitutes an extraditable offence[64] and that no bar to extradition applies. If the judge orders extradition, and in the absence of any appeal, the requested person must be extradited within 10 days of the order, or later if agreed with the requesting state.

Either party may appeal the judge's decision to the High Court.[65] Thereafter, an appeal may be made to the Supreme Court if the matter concerns a point of law of general public importance.[66]

Extradition from the UK – category 2 territories 17.4.2

Part 2 of the 2003 Act provides for the extradition to those non-EAW territories with which the United Kingdom has bilateral or multilateral extradition treaties.[67]

60 Section 2, the 2003 Act.

61 Sections 166 to 168, the 2003 Act.

62 In England and Wales, cases are heard at Westminster Magistrates' Court; in Scotland, cases are heard at the Edinburgh Sheriff Court; and in Northern Ireland, cases are heard by designated county courts or resident magistrates.

63 Sections 3 and 4, the 2003 Act.

64 Sections 64 and 65, the 2003 Act.

65 Sections 26 to 29, the 2003 Act.

66 Section 32, the 2003 Act.

67 A list of category 2 territories is provided here: https://www.gov.uk/guidance/extradition-processes-and-review.

Such territories are usually required to provide *prima facie* evidence of the case against the requested person unless they are signatories to the European Convention on Extradition,[68] or the United States, New Zealand, Australia or Canada.

Requests must be certified by the Home Secretary as being valid before being sent to the appropriate judge.[69] The judge then considers whether there are reasonable grounds to issue an arrest warrant,[70] which include that the evidence produced would justify the issue of a warrant for the individual's arrest if it was a domestic case.[71]

Once an arrest warrant has been issued and executed, the requested person must be brought before the magistrates' court as soon as practicable. Unless the requested person consents to extradition, the court will fix a date for the extradition hearing, usually within the next two months, and decide whether to grant bail.

At the extradition hearing, the judge must first consider the sufficiency of the extradition request and supporting documentation. If the documents do not meet the requirements set out in section 78(2) of the 2003 Act, the judge must discharge the person whose extradition is sought (the requested person).[72] Where the judge is satisfied that the requirements have been met, he or she will then go on to consider whether the person before the court is the requested person, the offences specified are extraditable and copies of the documents have been served on the person.[73]

In cases where *prima facie* evidence must be provided, the judge must then decide if the evidence supporting the request is 'sufficient to make a case'. This is the same test that applies in domestic UK criminal proceedings in determining whether a criminal prosecution should be allowed to continue.

If the judge is satisfied that all the conditions have been met, and that no bars to extradition exist, the matter is referred to the SSHD for his or her decision whether to extradite. Representations may be made by the requested person to the SSHD for consideration when deciding whether to extradite.

See Section 17.4.4

The judge's decision to refer may be appealed within 14 days of the date of the decision and thereafter appeals may be lodged with the High Court or, if appropriate, the Supreme Court.

17.4.3 Extradition from the UK – other territories

For countries that are neither category 1 nor category 2 territories, section 194 of the 2003 Act allows the SSHD to certify that 'special extradition' arrangements

68 http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024/signatures?p_auth=4WJ8nibX.

69 Sections 69 and 70, the 2003 Act.

70 Sections 137 and 138, the 2003 Act.

71 Section 71, the 2003 Act.

72 Section 78, the 2003 Act.

73 Ibid.

have been made between the United Kingdom and that country for the extradition of a person.

These special arrangements must comply with the 2003 Act's Part 2 procedures, and the procedure is then as for a category 2 territory.

In addition, a territory party to an international convention to which the United Kingdom is also a party may, under section 193 of the 2003 Act, be designated a territory to which Part 2 of the 2003 Act applies.[74]

Bars to extradition 17.4.4

Under the 2003 Act a properly issued extradition request will be honoured, unless one of the bars to extradition applies.

Sections 11 and 79 of the 2003 Act set out specific bars to extradition for Part 1 and Part 2 requests respectively. These include but are not limited to the rule against double jeopardy, extraneous considerations and the passage of time.

In addition to the specific bars, there are a number of general bars as detailed below.

The human rights bar

Under sections 21, 21A (Part 1 cases) and 87 (Part 2 cases) the judge must determine 'whether extradition would be compatible with the [requested person's] Convention rights' within the meaning of the Human Rights Act 1998.[75] A request may be refused where it is shown that there are substantial grounds to believe that the requested person, if extradited, faces a 'real risk of exposure to inhuman or degrading treatment or punishment'[76] contrary to Article 3 of the European Convention on Human Rights (ECHR) (for example, in relation to prison conditions in the requesting state); or that the interference with the private and family lives of the requested person, and members of his or her family, contrary to Article 8 of the ECHR, outweighs the public interest in extradition.[77] Arguments under Article 5 of the ECHR (the right to liberty and security)[78] and Article 6 of the ECHR (right to a fair trial)[79] can also be invoked under the human rights bar.

74 SI 2005 No. 46, the Extradition Act 2003 (Parties to International Conventions) Order 2005: provides that a state will only be designated a category 2 territory in this way in relation to conduct to which the convention applies, e.g., drug trafficking offences in contravention of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

75 Sections 21(1), 21A(1)(a) (Part 1 cases) and 87(1) (Part 2 cases), the 2003 Act.

76 *Soering v. United Kingdom* (1989) 11 EHRR 439.

77 *HH v. Deputy Prosecutor of the Italian Republic, Genoa* (2012) 3 WLR 90 – summarised conclusions of Baroness Hale re: case law interpreting Article 8.

78 *Shankaran v. India* (2014) EWHC 957 (Admin).

79 *Vincent Brown aka Vincent Bajinja, et al. v. The Government of Rwanda, The Secretary of State for the Home Department* (2009) EWHC 770 (Admin).

The proportionality bar

This bar applies to EAW cases only.[80] When considering a request, the judge may consider the seriousness of the alleged conduct, the likely penalty to be imposed and whether there are alternatives to extradition.

The forum bar

The forum bar provides that extradition may be barred if it would not be in the interests of justice.[81] This will be considered where the nature of the criminal conduct means that the alleged offence could potentially be prosecuted in more than one country, and is particularly relevant to parallel or cross-border investigations. It was introduced into the 2003 Act by the Crime and Courts Act 2013 as a result of concern in particular in the context of extraditions to the United States and has been in force as a bar to extradition since October 2013.

Extradition would not be in the interests of justice if the judge decides that a substantial measure of the criminal activity took place in the United Kingdom and, having regard to 'specified matters', the judge decides extradition should not take place.[82] The specified matters include consideration of where most of the loss or harm occurred or was intended to occur; the interests of any victims; any belief of a prosecutor that the United Kingdom is not the most appropriate jurisdiction in which to prosecute; desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction and [the requested person's] connections with the United Kingdom.

The forum bar was successfully invoked in two recent cases concerning extradition to the United States (*Love* and *Scott*) albeit that Scott is understood to be subject to appeal by the US government.[83]

17.5 Settlement considerations

The scope for an individual to settle cross-border investigations or proceedings is in practice limited and will realistically arise either in circumstances where the individual can obtain an immunity from prosecution or where his or her co-operation in one jurisdiction (whether or not involving a guilty plea) effectively resolves the investigations in other jurisdictions.

Sections 71 to 75 of the Serious Organised Crime and Police Act 2005 (SOCPA) set out the statutory framework in which an individual may enter into such an agreement with a UK prosecutor.[84]

80 Section 21A, the 2003 Act.

81 Sections 19B (Part 1 cases) and 83A (Part 2 cases), the 2003 Act; not in force in Scotland.

82 Section 19B(2), the 2003 Act.

83 *Love v. Government of the United States and another* [2018] EWHC 172 (Admin) and *Scott v. Government of the United States of America* [2018] EWHC 2021 (Admin).

84 In this context, the UK refers to England, Wales and Northern Ireland.

Under section 71, a designated prosecutor[85] may grant a suspect immunity from prosecution subject to certain conditions. These conditions invariably require a suspect's full co-operation with the prosecuting authority in the United Kingdom (and, in the context of cross-border investigations, with all relevant overseas authorities). The section 71 notice, which is prepared in writing, also specifies the offences for which the individual cannot be prosecuted. If, however, the conditions of the notice are breached, the immunity will ordinarily be revoked.

Whereas section 71 grants immunity from prosecution, section 73 requires an individual to plead guilty to the offence, but enables the court to take into consideration the assistance the individual has provided to the authorities. This will often result in a substantial reduction in sentence.[86] For this reason a section 73 agreement is often referred to as a 'co-operating defendant' agreement and, in practice, in cross-border investigations will require the individual to co-operate not only with the UK authorities (which can extend to giving evidence, if required, in any UK proceedings against other suspects) but also with overseas investigating authorities.

Therefore, when advising an individual in a cross-border investigation about the possibility of either form of SOCPA agreement, it will be necessary simultaneously to engage with the other investigating authorities so that, for example, a resolution in the United Kingdom through a section 73 agreement will be reflected by equivalent action by the other investigating authorities (such as a non-prosecution agreement in the United States).

Note also that during parallel and cross-border investigations and proceedings a corporate entity will sometimes commence settlement discussions with the authorities (be they regulators or criminal enforcement agencies).

Within the United Kingdom, such discussions are most likely to be with the SFO, or the FCA, or both, and, as regards criminal investigations, they are most likely to be centred on the possibility of the authorities agreeing to a deferred prosecution agreement (DPA).[87]

A DPA can only be concluded between the authority (usually the SFO) and the suspect corporate entity; there is no provision for an individual to enter into a DPA. The use to which the authority can put the information it obtains during the DPA negotiations in criminal proceedings against others, including individuals employed by the corporate entity, is unrestricted.[88] This means that an employee suspect is at great risk of having his or her position seriously compromised, including a heightened risk of criminal prosecution, as a result of the co-operation the employer must demonstrate as a prerequisite to being invited by the authority to enter into DPA negotiations.

85 Defined by section 71(4) of SOCPA as a prosecutor from the CPS, HMRC, SFO or the DPP of Northern Ireland.

86 *R v. Dougall* [2010] EWCA Crim 1048.

87 Schedule 17, Crime and Courts Act 2013.

88 Paragraph 13(6), Schedule 17, Crime and Courts Act 2013.

If a corporate with which the client is connected enters into a DPA, the client may be named in the statement of facts. The current state of the law is unsatisfactory in that a third party does not have to be notified that he or she may be so named. However, if there are extant criminal proceedings against individuals, or the possibility of such proceedings, protection will be put in place to seek to avoid the risk of the DPA causing prejudice to the individuals facing those proceedings. This will be either by anonymising the name of the entity entering into the DPA and the individuals referred to in the statement of facts[89] or by imposing reporting restrictions on the publication of the statement of facts until the conclusion of the associated proceedings.[90]

In all likelihood, the corporate entity will enter (and conclude) settlement negotiations with the authorities without the knowledge of the individuals involved, let alone their input. In trying to put itself into a position where it can reach a DPA, the corporate entity will be anxious to demonstrate its co-operation with the authority, an obligation under the joint SFO and CPS Code of Practice,[91] and that it has severed its links with those individuals responsible for the misconduct. To allow those individuals to participate in the negotiations, or to be seen to be seeking to protect their position, would be likely to prejudice the position of the corporate entity in the eyes of the authority.

17.6 Reputational considerations

Throughout any parallel or cross-border investigation or proceeding, those representing an individual must always consider the potential impact on their client's reputation. Reputation may include the client's professional reputation among his or her peers or wider public reputation, particularly if the client is a well-known figure. Matters are further complicated because the individual may have a low profile in one jurisdiction, but a high profile in another, or, despite having a low media profile, may have become embroiled in a high-profile investigation.

An associated issue that can often arise in practice is when the details surrounding the criminal investigation or proceedings are in the public domain and the individual is included in a due diligence database, such as World Check or World Compliance. Entry in these databases, which are largely based on open source (and sometimes unreliable) material, can have a profound effect on an individual's ability to access financial services.

As regards criminal investigations, the case of *Richard v. The BBC* affirmed that, as a starting point, a suspect should not be named by the press.[92] Although this position had already, in effect, been adopted following the Leveson Inquiry in

89 For example the DPA in *SFO v. XYZ Limited* (U20150856).

90 As happened in relation to the DPA between the SFO and Tesco Stores Limited.

91 Paragraph 2.8.2(i), DPA Code of Practice, Crime and Courts Act 2013.

92 *Richard v. The British Broadcasting Corporation (BBC) & Anor* [2018] EWHC 1837 (Ch), paras. 248-251.

2012 and the College of Policing's Guidance on the Relationships with the Media in 2013, it was the first time that the UK courts had ruled on the issue.[93]

Although this is undoubtedly a positive step for suspect anonymity in the United Kingdom, there is an obvious caveat in the context of cross-border investigations; namely, that since different jurisdictions have different rules on publishing a suspect's identity, an individual who avoids having their details published by the UK press may nevertheless find themselves named overseas. Furthermore, different considerations will apply where, for example, an individual is charged in a criminal investigation or, in the context of FCA proceedings, 'identified' in corporate decision notices.[94]

Recently in the United Kingdom, reputation management has been seen as a distinct professional discipline, with a number of lawyers specialising in the field. They often work together with, rather than in competition with, those from the more traditional public relations firms and consultancies. In any event, those acting for individuals who have reputational considerations, but who lack their own specialised in-house resource, are best advised to turn to one or more of these specialists at as early a stage as possible and integrate them in to the client's team of professional advisers. Only through mutual work as part of an integrated team can properly informed consideration be given on the key issues of whether the client's reputation is at risk and, if so, how it can be best protected without adversely affecting his or her position in the ongoing investigation or proceedings.

93 Ibid., para. 234.

94 *Financial Conduct Authority v. Macris* [2017] UKSC 19.

Appendix 1

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ISBN 978-1-912377-34-3