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In a two-part series, Dechert LLP's Vince Cohen and Deborah Kemi Martin discuss the implications of *Lagos v. United States* on the course of a corporate investigation. The first part of the series focuses on lower courts' responses to corporations seeking restitution following *Lagos*. The second part will address the questions a corporation must answer during its initial decision-making about the structure of an investigation.

INSIGHT: Corporate Investigations in the Age of *Lagos*: Maximizing Restitution Without Losing Cooperation Credit—Part II

By Vince Cohen and Deborah Kemi Martin

In Part I of our series on structuring corporate investigations, we explored *Lagos v. United States*, a May 2018 Supreme Court decision. In that decision, the Supreme Court unanimously ruled that Section 3663A)(b)(4) of the Mandatory Victims Restitution Act of 1996 (the ''MVRA''), 18 U.S.C. § 3663A, did not require a defendant to reimburse a corporation for the costs it expended to investigate violations for which the defendant was later convicted. Moreover, the Supreme Court held that companies are not entitled to restitution under Section 3663A(b)(4) of the costs of corporate investigations they conduct of their own volition. That, and other broad language in *Lagos*, has resulted in courts denying companies millions of dollars in restitution since May 2018. Currently, in the Eastern District of New York, up to $145 million in restitution hangs in the balance, with Judge Pamela Chen having suggested she will apply *Lagos* to deny restitution under the MVRA to FIFA and other soccer associations. As noted in our previous article, on October 4, 2018, Judge Chen stated during a hearing: ''I can tell you generally speaking that, after Lagos, I think there's not much support for internal investigations undertaken by the victims unless, and even this I think is still questionable, unless invited or requested to do so by the government[.]'' U.S. v. Napout et al., No. 1:15-cr-00252 (E.D.N.Y.)

With so much at stake, companies and counsel must make decisions with an eye to *Lagos* and its progeny in structuring corporate investigations going forward. Below, we provide questions and considerations to guide these *Lagos* analyses.

1. Legal Issues Unresolved After *Lagos*

In offering what it seemed to believe was a bright-line rule, the Supreme Court emphasized clarity and avoidance of ''disputes [that] may become burdensome[.]'' And yet, *Lagos* is hardly a model of clarity and leaves unresolved a number of important questions. These questions are especially crucial in light of the incentives towards strong corporate compliance programs, early detection of wrongdoing, and corporate self-disclosure that the DOJ and its sister agencies have been establishing.

During the Anti-Corruption Compliance panel at the Bloomberg Law Leadership Forum on May 23, 2018, Vince Cohen expanded on these incentives and the policies that have established them. These policies include the DOJ Fraud Section's FCPA Corporate Enforcement Policy, 9-47.120. Under 9-47.120, when a company has voluntarily self-disclosed and remediated an FCPA violation, there will be a presumption that the Fraud Section will recommend a 50 percent fine reduction off the low end of the U.S. Sentencing Guidelines fine range. Moreover, the Fraud Section will not require a monitor, if the company has an effective compliance program. Deputy Attorney General Rosenstein announced 9-47.120 in November 2017. On March 1, 2018, John Cronan, the Acting Assistant Attorney General for the Criminal Division, announced that 9-47.120 would ap-

ply as ''nonbinding guidance'' to all of the Criminal Division's corporate criminal investigations. Clearly, the incentives for corporate self-disclosure of potential violations are strong. Reconciling these governmental incentives with *Lagos* is the challenge, however, as demonstrated by the questions below.

Which is dispositive: the timing or the voluntariness of the corporate investigation?

The Supreme Court's flat statement that Section 3663A(b)(4) does not cover ''preparticipation expenses'' suggests that the temporal relationship of the corporate investigation and the government's investigation is dispositive of reimbursement. But in leaving open the possibility that such ''preparticipation expenses'' incurred at the government's suggestion may be reimbursable, *Lagos* simultaneously calls into question the importance of timing. Indeed, this open question suggests instead that the degree to which a corporate investigation is of the company's initiative, as opposed to the government's, may be a more important consideration. Needless to say, this contradictory guidance is of little utility to a company that has made initial overtures to the government, but is not yet aware of a formal government investigation.

Are voluntary corporate investigations commenced after a government investigation has started reimbursable under Section 3663A(b)(4)?

Post-*Lagos*, it appears clear that a company that commences an investigation of its own volition before a government investigation will bear the costs of that investigation alone. And it seems that a corporate investigation commenced after a government investigation has begun and at the government's express direction will be reimbursable. It is not clear, however, whether a company that commences an investigation entirely of its own volition *after* a government investigation commences will be entitled to reimbursement under Section 3663A(b)(4).

When is a corporate investigation truly voluntary?

Related to the previous question is the issue—unresolved in *Lagos*—of when a company truly ''chooses on its own to conduct [an investigation].'' In theory, until the government expressly directs a company to investigate, the company's investigation could be deemed entirely voluntary. This idea does not comport with on-the-ground realities, however. A company that finds itself or its employees in the middle of a government investigation would be wise to quickly conduct its own investigation. In fact, a company that waits until such a relatively late date is arguably already derelict in its duties. As Rod Rosenstein explained in a recent speech on the DOJ's corporate enforcement policies, the ''culture of compliance'' the government seeks to create ''incentivizes companies to promptly report misconduct[.]'' In this era of corporate self-disclosure, the DOJ and its sister agencies expect companies to detect and disclose violations before government investigations are even on the horizon.

Within this greater context, it would be glib to characterize a company's investigation as entirely voluntary because the government has not yet issued orders in a specific situation. And yet, *Lagos* does not make clear what, shy of a subpoena or other unambiguous government mandate, is required for a company's decision to conduct an investigation not to be ruled entirely voluntary and non-reimbursable.

When can a government investigation be said to have begun?

With its emphasis on ''during'' as used in Section 3663A(b)(4), the Supreme Court tied restitution of internal investigation expenses to the start date of a government investigation. Implicit in this statement are the assumptions that a government investigation has a definite start date and a company can ascertain this at the beginning of its internal investigation. These assumptions are complicated in reality.

Presumably, the start date of the government's investigation should not be difficult to ascertain. The government is best positioned to know this and one would expect courts to credit the government's representations on whether a company's investigation should be considered part of the government's. *Lagos* indicates, however, that courts will not defer to the government's characterization of a corporate investigation. Indeed, the Supreme Court ignored the government's argument in its brief that GECC ''played a critical role in the investigation by preserving crucial evidence and revealing the extent of the fraud. GE Capital's efforts thus were not 'entirely separat[e]' from the criminal investigation, but were instead the first phase of 'the investigation . . . of the offense.' '' (Government's Brief at 27.)

As a result, the onus is really on companies aiming for reimbursement under the MVRA to determine ex ante whether the government's criminal investigation can be said to have begun in earnest. But this is a tall order in most situations. Of course, where a grand jury has returned an indictment or the government has issued a subpoena, there will be little dispute that the government's investigation is underway. Such obvious steps are typically part of, not the beginning of, a government investigation, however. Moreover, when a company has made overtures to the government, there is little doubt that the company is within the government's crosshairs virtually from the moment it initiates contact. Experience dictates that the company assume the government is mobilizing its resources and gathering information very early in the process. Yet, at no point is the company entitled to complete transparency about the government's behind-the-scenes efforts. Indeed, stealth and secrecy are crucial weapons in government agencies' arsenal. In light of these practical difficulties, companies planning their own investigations are often hard pressed to know with certainty whether government investigations are ongoing.

Again, the Supreme Court's decision in *Lagos* leaves companies to choose between acting swiftly and potentially foregoing restitution or jeopardizing cooperation credit by waiting for unambiguous indicia of a government investigation.

When can the criminal component of the government's investigation be said to have begun?

Lagos suggests that it is not just any government investigation, but rather a *criminal* investigation that must be underway at the time the company begins its own investigation. As Justice Breyer wrote, ''the word 'prosecution' must refer to a government's criminal prosecution, which suggests that the word 'investigation' may refer to a government's criminal investigation.'' It is not always easy for companies to determine whether a government investigation is civil or criminal in nature. Indeed, the criminal/civil investigation dichotomy is increasingly of little practical utility because the government fights its battles on multiple fronts and

conducts parallel investigations to obtain civil, criminal, and even administrative penalties.

Indeed, the criminal investigation arising out of the proposed merger of Thai Union Group P.C.L., owner of Tri-Union Seafoods LLC, d/b/a Chicken of the Sea International and Bumble Bee Foods LLC is a good example of this. As the DOJ explained in its Spring 2017 Division Update, civil attorneys in the DOJ's Antitrust Division who were reviewing the proposed merger ''discovered materials that appeared to raise criminal concerns. Recognizing the potential criminal implications of the materials, they reached out to their criminal counterparts in the Division.'' The result was a criminal investigation in which two executives of leading packaged seafood companies have already pleaded guilty. The DOJ praised this ''the ability of both civil and criminal staff to appropriately execute parallel proceedings.'' If either of the companies involved in the initial civil investigation had commenced internal investigations, it is unclear whether *Lagos* would have prohibited restitution of expenses they incurred before the criminal investigation started.

Beyond the antitrust context, the criminal and civil divisions of U.S. Attorney's Offices, too, often engage in the type of information sharing that can lead to parallel investigations. And when the DOJ compels a company to produce documents pursuant to a civil investigative demand (''CID'') in a False Claims Act (''FCA'') case, the investigation is presumably civil in nature. But, under the Fraud Enforcement and Recovery Act of 2009, agencies may share information obtained through CIDs with federal prosecutors without first seeking district courts' approval. In the process, a civil investigation may become part of an ongoing criminal investigation or lead to an entirely new criminal investigation alongside the civil investigation. Investigations conducted by federal agencies' Offices of the Inspector General (''OIG'') are another instance in which the civil/criminal dichotomy can be illusory. At their discretion, OIGs may conduct both criminal and civil investigations to investigate possible fraud, waste, or mismanagement.

In short, if *Lagos* requires companies not only to ascertain that a government investigation is underway, but also to ensure that it is criminal in nature before having comfort that the costs of an internal investigation may be reimbursable under the MVRA, this may prove to be a very complex assessment.

Are any of the costs of a corporate investigation reimbursable under the MVRA?

The Supreme Court in *Lagos* stopped short of categorically stating that none of the costs of a corporate investigation are reimbursable under the MVRA. But, as explained above, applying *Lagos* to real life situations to determine whether specific corporate investigations are reimbursable will be difficult. Unsurprisingly, at least one court has already interpreted *Lagos* as a blanket ban on reimbursing any corporate investigation costs under Section 3663A(b)(4).

In *Zhang*, the District of Kansas acknowledged that Ventria's investigation started only after the company was indicted and ended when the trial was completed. In short, Ventria's investigation began after the government's investigation had started. Moreover, the court did not characterize Ventria's investigation as voluntary. These facts were unavailing, however, because the court interpreted *Lagos* as excluding any costs of private investigations from restitution under Section 3663A(b)(4). Accordingly, the court carefully analyzed the expenses and supporting evidence in order to determine ''how much time was spent on Ventria's internal investigation (which may not be awarded as restitution) and how much was spent participating in the government's investigation and prosecution (which may be awarded).'' As mentioned above, the court settled on restitution of only 60 percent of Ventria's expenses.

Similar to the District of Kansas, the Eastern District of New York has described *Lagos* in sweeping terms that would make any corporate investigation nonreimbursable. In *United States v. Razzouk*, 11-CR-430 (ARR), 2018 BL 263499 (E.D.N.Y. Jul. 25, 2018), the court stated: ''*Lagos* held that, under the MVRA, a defendant cannot be forced to reimburse a victim for expenses incurred during an internal investigation of the defendant's illegal actions, as distinct from a government investigation into or prosecution of those actions.'' Notably, the court made no mention of investigative costs incurred during the government's investigation potentially being reimbursable under the MVRA. Nor did the court suggest that corporate investigations conducted at the government's behest may be reimbursable.

For now, the Sixth Circuit's interpretation of *Lagos* has been narrower. In *United States v. Sexton*, 894 F.3d 787 (6th Cir. 2018), the Sixth Circuit took seriously the timing issue in *Lagos*, explaining that *Lagos* means restitution awards ''cannot include 'expenses incurred *before* the victim's participation in a government's investigation began.'' Time will tell if this distinction will fall by the wayside in the Sixth Circuit as well.

2. Experienced Counsel Is Indispensable

As the questions discussed above show, reconciling *Lagos* with the realities of government investigations and incentives in this era of corporate self-disclosure makes for a very complex analysis. Companies who navigate this confusing legal landscape effectively will be best positioned to negotiate with government agencies and secure cooperation credit while also recouping some of the staggering costs of corporate investigations. Companies who make missteps in this calculus or fail to properly balance any one of the questions set forth in this article, however, may find themselves both excluded from reimbursement under the MVRA and denied full cooperation credit. Thus, *Lagos* and the questions it raises are important considerations in the already complicated process of structuring a corporate investigation.

The guidance of experienced outside counsel with an in-depth knowledge of the legal framework and skill to balance *Lagos* and other considerations is crucial. Moreover, outside counsel must have strong government contacts and credibility with government agencies developed through government experience. Only through such experience can determinations, such as the likelihood that a government investigation has started, be part of a truly calculated analysis, rather than shots in the dark.

3. Caution: The Interplay Between *Lagos* and Defendants' Constitutional Claims

In Part III of our series on structuring corporate investigations, we explore the interplay between *Lagos* and cases in which defendants argue that companies and counsel conducting internal investigations are

agents of the government. In some of these cases, defendants have sought access to the results of corporate investigations as *Brady* materials. In other cases, defendants have sought exclusion of the results of internal investigations at trial under the precedent such as the Supreme Court's *Garrity v. New Jersey* decision. Currently, defendants in *United States v. Connolly, et al.*, No. 1:16-cr-00370 (S.D.N.Y.).an ongoing Libor-rigging trial in the Southern District of New York, are arguing that evidence from an internal investigation Paul Weiss conducted should be excluded as compelled testimony. Thus, even as *Lagos* incentivizes companies to coordinate their investigations with those of government agencies, cases such as *United States v. Connolly* suggest caution.

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