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

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Publisher's Note

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

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

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

The volumes

This Guide is in two volumes.

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

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

Online

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

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

Preface

The history of the global investigation

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

The Guide

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

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

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

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

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

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

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

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

Acknowledgements

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

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

11

Production of Information to the Authorities

Hector Gonzalez, Rebecca Kahan Waldman, Caroline Black and William Fotherby[1]

Introduction 11.1

There are many situations in which a company may face a choice, or a demand, to disclose documents and information to a law enforcement authority or regulator. These range from responding to a raid on corporate and individual premises, to compliance with a subpoena or other compulsory process, to the voluntary provision of information during a self-disclosure. The types of information and the circumstances in which a company is obliged – or even able – to produce relevant documents is circumscribed by various laws. For example, a company must address concerns regarding confidentiality, employee privacy, data protection and legal privilege (and, in certain jurisdictions, bank secrecy restrictions or blocking statutes). This becomes additionally complicated in cross-border cases where multiple legal regimes may apply and may conflict with one another. Add to this the not uncommon scenario of authorities from different countries seeking the same (or slightly different) information and it becomes a legal and practical minefield. This chapter cannot hope to cover the immense number of variables that a company may face in these circumstances, but it does seek to provide practical guidance on some of the most important points.

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11.2 Production of documents to the authorities

11.2.1 Formal requests for disclosure (and related document hold issues)

11.2.1.1 Commonly used powers (UK)

Most regulatory and enforcement authorities have formal powers to compel individuals and companies to produce documents and provide information.

In the area of financial crime and corruption involving the United Kingdom, the most likely authority to be seeking to investigate and prosecute will be the Serious Fraud Office (SFO). It has powers to seek the production of documents and information at both a pre-investigation stage in relation to bribery and corruption cases under section 2A of the Criminal Justice Act 1987, and, once it opens a formal investigation, under section 2 of the same Act. These powers can be exercised against companies and individuals to produce documents and information, including by way of compelled interview where there is no right to silence (although the individual cannot be later prosecuted regarding matters arising from the interview, unless the information is found to be false). A failure to provide the documents and information within the time specified in the production notice is a criminal offence, unless the recipient can show that it had a reasonable excuse not to comply (such as an injunction preventing production).

In the field of financial markets regulation, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) have powers to compel the production of documents, contained in Part 11 of the Financial Services and Markets Act 2000 (FSMA). The key provision is section 165, subsections 1 to 6 of which are set out below as an example of how information-gathering powers are conferred:

> *165 Regulators' power to require information: authorised persons etc.*
> *(1) Either regulator may, by notice in writing given to an authorised person, require him–*
> *(a) to provide specified information or information of a specified description; or*
> *(b) to produce specified documents or documents of a specified description.*
> *(2) The information or documents must be provided or produced–*
> *(a) before the end of such reasonable period as may be specified; and*
> *(b) at such place as may be specified.*
> *(3) An officer who has written authorisation from the regulator to do so may require an authorised person without delay–*
> *(a) to provide the officer with specified information or information of a specified description; or*
> *(b) to produce to him specified documents or documents of a specified description.*
> *(4) This section applies only to–*
> *(a) information and documents reasonably required in connection with the exercise by either regulator of functions conferred on it by or under this Act; and*

(b) in relation to the exercise by the PRA of the powers conferred by subsections (1) and (3), information and documents reasonably required by the Bank of England in connection with the exercise by the Bank of its functions in pursuance of its financial stability objective.

(5) The regulator in question may require any information provided under this section to be provided in such form as it may reasonably require.

(6) The regulator in question may require–

(a) any information provided, whether in a document or otherwise, to be verified in such manner, or

(b) any document produced to be authenticated in such manner,

as it may reasonably require.

'Authorised person' is defined in section 31 of FSMA and means, very broadly, a person providing a regulated financial service.

The FCA has set out its policy in relation to its exercise of enforcement powers under the FSMA (and other legislation) in its Enforcement Guide.[2] The Enforcement Guide is useful as it not only sets out the FCA's approach to its task as the United Kingdom's financial markets regulator, but also it reflects the general approach of UK regulators to their document production powers.

In paragraphs 4.8 and 4.9 of the Enforcement Guide, the FCA states that its standard practice is to use its statutory powers to require the production of documents, the provision of information or the answering of questions in interview. The FCA suggests that this is for reasons of fairness, transparency and efficiency. The Enforcement Guide goes on to suggest, however, that it will sometimes be appropriate to depart from this standard practice, as it relates to document production, in cases:

- involving third parties with no professional connection with the financial services industry, such as the victims of an alleged fraud or misconduct, in which case, the FCA will usually seek information voluntarily;
- where the FCA has been asked by an overseas or EEA regulator to obtain documents on their behalf, in which case the FCA will discuss with the overseas regulator the most appropriate approach.

In the second scenario, it is important to consider the effect of regimes and jurisdictional protections colliding. For example, how might the US right to silence mesh with the UK compelled disclosure regime? The Enforcement Guide states that the FCA will make it clear to the company or individual concerned whether it requires him, her or it to produce information or answer questions under FSMA or whether the provision of information is voluntary.[3]

See Chapters 15 to 16 on representing individuals in interviews and Chapters 17 and 18 on individuals in in cross-border proceedings.

2 Financial Conduct Authority, Enforcement Guide (January 2016).

3 Whether the FCA compels testimony from an individual can have an impact on whether that information can be used in connection with a criminal proceeding in the United States. The Second Circuit Court of Appeals has held that testimony compelled by the FCA cannot

Similar (but unique) powers also lie in the hands of the Competition and Markets Authority, the National Crime Agency, the police, Her Majesty's Revenue and Customs, and the Health and Safety Executive. Many of these authorities may also apply for and obtain search warrants and use these powers more often than their US counterparts do.

See Section 11.3

11.2.1.2 Commonly used powers (US)

In the United States, most federal agencies, including the United States Department of Justice (DOJ), the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC), may issue subpoenas (or administrative orders) and compel individuals and companies to produce documents and testimony.[4] In the case of the DOJ, a subpoena may compel the production of documents in connection with either a civil or criminal investigation.[5] The CFTC's regulations provide that:

> *The Commission or any member of the Commission or of its staff who, by order of the Commission, has been authorized to issue subpoenas in the course of a particular investigation may issue a subpoena directing the person named therein to appear before a designated person at a specified time and place to testify or to produce documentary evidence, or both, relating to any matter under investigation.*[6]

Additionally, state agencies and each state's attorney general can compel the production of documents and testimony. As an example, Section 352 of the New York General Business Law permits the Attorney General to commence an investigation of an individual or corporation and to seek documents and testimony in connection with that investigation. The Securities Act, the Securities Exchange Act, the Investment Advisers Act and the Investment Company Act all permit the SEC to issue subpoenas in connection with an ongoing investigation of misconduct.[7]

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be used against a defendant in a criminal prosecution. See *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017).

4 Other federal agencies such as the Consumer Financial Protection Bureau and the Federal Trade Commission are authorised to issue subpoenas. Other agencies are required to seek the assistance of the United States Attorney's Office in seeking documents and testimony. For a discussion of the use of administrative subpoenas, see https://www.justice.gov/archive/olp/rpt_to_congress.htm#f23.

5 For information regarding criminal matters, see Section 9-13 of the Justice Manual. The Civil Division is authorised to issue subpoenas by a number of statutes.

6 17 C.F.R. § 11.4(a).

7 Section 19(c) of the Securities Act of 1933, 15 U.S.C. § 77s(c); Section 21(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(b); Section 209(b) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b–9(b); and Section 42(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a–41(b).

Before a subpoena can be issued, the staff of the SEC must obtain a formal order of investigation.[8]

Criminal offences for refusing to comply with a request, providing false or misleading statements, or concealing documents, generally supplement such powers.[9]

Scope and timing 11.2.1.3

In practice, a company can do little to resist complying with a formal request for disclosure without resorting to court proceedings to challenge the validity or scope of the request. However, it can likely negotiate with the relevant authority regarding the scope of documents responsive to the request and the production date to limit the scope of the request to what is proportionate and reasonable.

Broadly drawn requests are unfortunately not uncommon, as investigators seek to ensure the requests will capture all relevant information. Early engagement with the relevant authority will typically ensure that both parties can agree on scope and a timetable for production: a request looking back over a long period, or even without any time limit, could involve a time- and resource-intensive review and expensive production exercise. This may not be in the interests of the prosecuting agency or the company if a more targeted request could produce the information. Whether an agreement to narrow the scope of the request is possible is likely to depend, in large part, on factors outside the company's control – such as the nature and scope of the authority's investigation (which the authority may be unwilling to share and is likely to base on information and evidence outside the company's knowledge). However, the company and its legal advisers should nonetheless seek a reasonable, proportionate and practically achievable production: for example, by seeking to agree to produce documents relating to X project, between Y–Z dates and if necessary to produce the documents in tranches.

It becomes increasingly difficult to manage the response to multiple authorities, particularly if they are in different countries and have different areas of focus. **See Section 11.2.3** Similarly, a company must consider whether the production notice extends to materials held overseas. **See Section 11.2.4**

Practical steps on receipt 11.2.1.4

Upon receipt of a document request, a company should – in most cases –immediately issue a document retention (or hold) notice (DRN) (if one is not already in place). A company should take care not inadvertently to tip off data custodians,

8 For information regarding procedures for obtaining a formal order of investigation, see sections 2.2.3-2.3.4 of the Enforcement Manual of the Securities and Exchange Commission Division of Enforcement, available at https://www.sec.gov/divisions/enforce/enforcementmanual.pdf (4 June 2015).

9 18 U.S.C. §§ 401, 1001; see also 7 U.S.C. §§ 9, 13(a)(3). Rule 17 of the Federal Rules of Criminal Procedures, governs subpoenas, including grand jury subpoenas and Rule 17(g) authorises federal courts to exercise its contempt powers for non-compliance. ('The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district.')

who may also be suspects. In some cases, issuing a DRN is not appropriate; for example, where the company is investigating matters outside the public domain and needs to collect documents covertly at the outset. The issuing of a DRN will assist the company to demonstrate that it has taken steps to preserve all potentially relevant documents in existence at the date of the request. The DRN should track the terms of the production notice, and be sent to all personnel who may have responsive documents, including the IT department and records department. The term 'document' should be widely drawn to include any paper or electronic records present on any media belonging to the company or its employees, including corporate information located off-site. The company may also need to manage complicated issues around data privacy and personal media.

See Chapters 13 and 14 on employee rights and Chapter 40 on data protection

The DRN should confirm that employees must not delete, alter, conceal or otherwise destroy company documents. Simultaneously, the company should take steps to secure and preserve all relevant information held on the company's servers and backup tapes, including through external providers. It should also immediately suspend routine document and data destruction processes.

Most authorities will have their own technical standards, which the collection and production of electronically stored information must meet. It is therefore likely that a company seeking to respond to a subpoena or production notice will want to consider instructing a forensic IT specialist company to assist with the collection and production efforts. This will have the added benefit of ensuring that a company can demonstrate the independence of this analysis, that it is taking clear co-operative steps, and protects employees, as far as possible, from having to give evidence in any subsequent proceedings.

11.2.2 Informal requests for disclosure: voluntary production and co-operation

A company may wish to consider voluntarily providing documents to an authority as part of a self-report or to demonstrate its co-operation with an investigation. Government investigators and investigating authorities regularly hold out the possibility of co-operation credit to companies to encourage them to provide information about their own misconduct.

From February 2014, deferred prosecution agreements (DPAs) have been available in the United Kingdom to the SFO and Crown Prosecution Service (CPS) for disposing of corporate criminal conduct relating broadly to economic crime (including, in particular, fraud, corruption and money laundering).[10] The SFO and the English courts have emphasised that one of the most important factors for a DPA is early reporting and co-operation by the company. Co-operation should be 'genuinely proactive'.[11] This includes the voluntary production of relevant doc-

10 DPAs were introduced by s.45 and Sch. 17 of the Crime and Courts Act 2013.

11 Crown Prosecution Service and Serious Fraud Office, Deferred Prosecution Agreements Code of Practice – Crime and Courts Act 2013, 11 February 2014, at para. 2.8.2(i).

uments, the importance of which has been demonstrated in one of the early DPA cases of *SFO v. Rolls-Royce PLC*,[12] discussed later in this chapter.

In the United States, too, the authorities have routinely emphasised that they will consider self-reporting and co-operation with government investigations as a key factor when determining whether to charge a corporation.[13] Under the DOJ's Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy,[14] 'when a company satisfies the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there will be a presumption' that the DOJ will resolve the matter by declining to prosecute the company.[15] The new policy, which has been incorporated into the DOJ's Justice Manual, defines 'Full Cooperation in FCPA Matters' to include, among other things:

> *Timely preservation, collection, and disclosure of relevant documents and information relating to their provenance, including (a) disclosure of overseas documents, the locations in which such documents were found, and who found the documents, (b) facilitation of third-party production of documents, and (c) where requested and appropriate, provision of translations of relevant documents in foreign languages … .*[16]

Importantly, the Corporate Enforcement Policy does provide benefits to a company that does not voluntarily self-disclose misconduct but does fully co-operate with an investigation and implement timely and appropriate remediation.[17]

Timing is important, both for a potential DPA and in relation to anti-cartel regimes, which often provide an amnesty only to the first discloser.[18]

As has been noted above, the FCA's standard practice is to rely on its statutory powers to require the production of documents. While there is merit in adopting

12 *Serious Fraud Office v. Rolls-Royce PLC and Rolls-Royce Energy Systems Inc* (U20170036). Rolls-Royce first came to the attention of the SFO in early 2012, when a whistleblower raised concerns about Rolls-Royce's business in China and Indonesia. After a lengthy investigation, Rolls-Royce accepted responsibility for criminal offending over 24 years, across seven different countries. Ultimately, Rolls-Royce was granted a DPA, and paid approximately £800 million in financial penalties to authorities in the UK, US and Brazil.

13 See e.g. memorandum dated 5 July 2007 from Paul J. McNulty re Principles of Federal Prosecution of Business Organizations available at https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

14 https://www.justice.gov/criminal-fraud/file/838416/download.

15 See https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

16 See the Justice Manual, § 9-47.120 – FCPA Corporate Enforcement Policy, available at https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.

17 See https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign; United States Attorneys' Manual, § 9-47.120 – FCPA Corporate Enforcement Policy, available at https://www.justice.gov/criminal-fraud/file/838416/download.

18 See e.g. European Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, Official Journal C 298, 8 December 2006, p. 17.

this policy, and it does avoid the risks to companies of voluntarily disclosing documents to the FCA set out below, nothing prevents the FCA from seeking voluntary production. Principle 11 of the FCA's Principles for Businesses states that: 'A firm must deal with its regulators in an open and co-operative way, and must disclose to the appropriate regulator appropriately anything relating to the firm of which that regulator would reasonably expect notice.' A materially identical provision is included in the PRA's Rulebook as Fundamental Rule 7. While this chapter focuses on the approach of the FCA, it is worth remembering that the PRA has similar enforcement powers (and is using them with increasing frequency). Both regulators interpret these obligations to proactively bring matters to their attention widely, and are prepared to take enforcement action against firms and individuals for failures to discharge these obligations (even in the absence of other underlying failings). Prudential Group (fined £30 million for failing to inform the FSA of its proposed acquisition of AIA until after it had been leaked to the media), Goldman Sachs (fined £17.5 million for not disclosing an SEC investigation into its staff and members of The Goldman Sachs Group), and the Co-operative Bank (issued a final notice for failing to notify the PRA without delay of two intended personnel changes in senior positions) are recent examples. This places regulated firms in a different position from other corporates: it reduces the scope for the decision whether to self-report or not.

Principle 11 is mainly intended as a supervision tool and sets out a broad duty of co-operation that the FCA often relies on to oblige the production of documents prior to formal investigations being commenced (sometimes, but not always, for the purpose of deciding whether an investigation should be commenced and, if so, in respect of which firms and individuals). The FCA's view of what is meant by being open and co-operative within Principle 11 is set out in the FCA Handbook, in the 'Supervision' section (referred to as SUP). SUP 2.3 provides that 'open and co-operative' includes a regulated entity making itself readily available for meetings with the FCA, giving the FCA reasonable access to records, producing documents as requested, and answering questions truthfully, fully and promptly. Where a formal investigation has been commenced, the FCA would not seek to rely on Principle 11 as a substitute for its other statutory powers that compel production. While it would be a clear breach of Principle 11 to fail to comply with a statutory request for the production of documents, a failure to comply with a voluntary request for the production of documents would not, of itself, result in disciplinary proceedings. The Enforcement Guide does state, in the context of co-operation, that:

> *The FCA will not bring disciplinary proceedings against a person for failing to be open and co-operative with the FCA simply because, during an investigation, they choose not to attend or answer questions at a purely voluntary interview. However, there may be circumstances in which an adverse inference may be drawn from the reluctance of a person (whether or not they are a firm or individual) to participate in a voluntary interview. If a person provides the*

FCA with misleading or untrue information, the FCA may consider taking action against them.[19]

The Enforcement Guide further provides that if a person does not comply with a requirement imposed by the exercise of statutory powers, he or she may be held to be in contempt of court. The FCA may also choose to bring proceedings for breach of Principle 11.[20] Therefore, while there is no guidance indicating that a failure to produce documents voluntarily (as opposed to attending a voluntary interview) would result in an adverse inference being drawn, a decision by a company not to produce documents voluntarily in any particular case should not be made without careful forethought and proper advice on the potential consequences.

As this suggests, the Enforcement Guide recognises the importance of an open and co-operative relationship with the firms it regulates to the effective regulation of the UK financial system. When deciding whether to exercise its enforcement powers, the FCA considers, among a number of factors, the level of co-operation demonstrated by a firm. When weighing the level of co-operation, the FCA considers whether the firm has been open and communicative with it.

Voluntarily disclosing documents carries a risk that the authority may not give any meaningful credit and may nonetheless decide to prosecute or expand an investigation already under way. Therefore, the company should weigh the likelihood of the authority being able to serve a formal request for disclosure in the relevant jurisdiction.

In some instances, a formal notice for disclosure will be preferred: for example, where a company has obligations of confidentiality, preventing voluntary disclosure. The most common examples are lawyers and financial institutions, who could both face an action for breach of confidence for supplying documents or information without a formal regulatory request. In some self-reporting circumstances, it may be appropriate for a company to seek such a notice from the relevant authority to ensure that it does not open itself up to civil action. The notice should be narrowly drawn, in consultation with the regulator, and should not affect the company's co-operation credit. Likewise, in some situations, the company may prefer to ask to be provided with a formal document request to demonstrate that they have been compelled to produce the documents to the authorities and have not done so voluntarily.

See Section 11.2.4.6, and Chapters 35 and 36 on privilege

Production of information to multiple authorities 11.2.3

The increasingly complex and multi-jurisdictional nature of investigations means that a company may face requests for formal disclosure from more than one authority. This could be authorities with different mandates within the same jurisdiction, or authorities with similar mandates from different jurisdictions. In either case, multi-authority investigations demand holistic strategies and systems

19 See Enforcement Guide, at para. 4.7.3.

20 Ibid. at para. 4.7.4.

to allow a company to keep track of evidence disclosed to (or seized by) different authorities. A company may also want to consider if there is any strategic advantage to disclosing to one authority before another. However, recent large-scale global investigations into the manipulation of LIBOR and foreign exchange rates demonstrate the ever increasing levels of intra- and international co-operation between regulators.[21] Practical steps a company can take when faced with multiple requests for formal disclosure include:

- early engagement with each authority, to communicate expectations and practical difficulties of responding to multiple requests;
- identifying and prioritising information that is commonly responsive to the requests rather than focusing on responding to each individual request in isolation;
- maintaining clear production schedules; and
- ensuring a system for Bates numbering[22] for each authority.

11.2.4 Documents and data outside the jurisdiction

11.2.4.1 Voluntary production

In cross-border fraud or corruption cases, not all of a company's documents will be located or even accessible in the same jurisdiction as the investigating authority. A company should consider what documents are stored overseas, and which of these it should provide to investigators. A company in receipt of a formal production notice will need to assess whether the notice extends to documents outside the jurisdiction, and, if so, the extent to which the company has 'custody or control' over documents held by subsidiaries or overseas branches.[23] The board of a parent company will not necessarily control the management of a subsidiary.[24] Where production is voluntary, a company may take a more holistic view of the investigation and production (subject to local law restrictions). The extent to which it may want to voluntarily disclose information may depend on the ability

21 In 2015, Deutsche Bank AG entered into a DPA with the DOJ and settlements with the US Commodity Futures Trading Commission, the Department of Financial Services and the FCA, in connection with its role in manipulating LIBOR rates. DB Group, a subsidiary of Deutsche Bank, also pleaded guilty to wire fraud for its role. Together, Deutsche Bank and its subsidiary agreed to pay over US$2 billion in penalties to US authorities and US$344 million to the FCA – then the second-largest fine in the FCA's history.

22 Bates numbering is a method of indexing legal documents for easy identification and retrieval.

23 Production notices seeking documents held outside the jurisdiction of the investigating authority are complicated. For example, the authors take the view that a request made under s.165 of FSMA captures documents in a company's custody or control outside the United Kingdom. In respect of requests made under s.2 of the Criminal Justice Act, the High Court's decision in *R (on the Application of KBR Inc) v. The Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin) held that, to issue a notice to a non-UK company in respect of documents held outside the United Kingdom, there must be a 'sufficient connection' between the overseas company and the United Kingdom. Overseas companies should assess the factual connection to the United Kingdom (in terms of its connection to the subject matter of the SFO's investigation), rather than how it is connected to the United Kingdom from a business perspective.

24 For the United Kingdom see *Lonrho v. Shell Petroleum* [1980] 1 WLR 627.

of the investigating authority to obtain that information itself. However, given the increasing co-operation between authorities on the international stage, careful voluntary production of material is likely to be preferable, and vital if the company seeks co-operation credit. Importantly, to receive 'full cooperation' under the FCPA Corporate Enforcement Policy where disclosure of data held overseas may be prohibited due to a statute, rule or regulation, 'the company bears the burden of establishing the prohibition. Moreover, a company should work diligently to identify all available legal bases to provide such documents.'[25]

Mutual legal assistance 11.2.4.2

In the United Kingdom, sections 7 to 9 of the Crime (International Co-operation) Act 2003 (CICA) govern requests to obtain evidence from abroad in relation to a prosecution or investigation taking place in the United Kingdom, shaping the mutual legal assistance (MLA) powers of UK authorities. 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 for suspecting that an offence has been committed, and either proceedings in respect of that offence have been instituted or the offence is being investigated.[26] The request must relate to the obtaining of evidence 'for use in the proceedings or investigation'.[27] But, it could allow an investigating agency to have foreign law enforcement officers launch raids, arrest suspects or conduct interviews on its behalf.[28] If the implementation of an MLA request in the requested state requires a court order, then the court in the requested state is likely to apply the relevant principles in its own jurisdiction to satisfy itself that the requested order is justified.

Note that among the vast majority of EU Member States, European investigation orders (EIOs) now allow streamlined access to evidence and information in criminal investigations. EIOs work on the basis of mutual recognition, and judicial authorities can use them to request assistance with 'any investigative measure' (although the EIO itself will identify a number of investigative activities that it does not permit). More specifically, the EIO:

- replaces the previous fragmented legal framework for obtaining evidence within Europe by providing a single instrument;
- imposes a strict 30-day deadline for the Member State to accept the request, and 90 days to comply;
- limits the reasons for which the Member State can refuse the request;
- introduces a standard form; and
- prioritises the necessity and proportionality of the measure as part of the rights of the defence.

25 See United States Attorneys' Manual, § 9-47.120 – FCPA Corporate Enforcement Policy, available at https://www.justice.gov/criminal-fraud/file/838416/download.

26 Crime (International Co-operation) Act 2003, s.7(5).

27 Ibid., s.7(2).

28 See e.g. Reuters, 'Monaco raids Unaoil offices over global oil corruption probe', available at http://uk.reuters.com/article/uk-oil-companies-corruption-idUKKCN0WY3KM.

EIOs were created by EU Directive 2014/41/EU, which came into force in the United Kingdom on 31 July 2017 (transposed through the Criminal Justice (European Investigation Order) Regulations 2017). The United Kingdom has opted into the EIO regime even though it has chosen to exit the European Union. In April 2018, the European Commission issued a proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters.[29] The proposal aims to reform cross-border access to electronic evidence and make mutual legal assistance across Member States more efficient. It would allow Member States to request electronic evidence directly from service providers established or represented in a Member State that provide services in the European Union (regardless of the location of the data requested). The regulation would require the service provider to respond within 10 days, or, in cases of emergency, six hours.

There is currently no timeline for the intended enactment of the regulation, but, most likely, any enactment will follow Brexit; the United Kingdom is therefore unlikely to be part of the new regime unless it opts in.

The MLA process can be cumbersome, but is a very real threat in the event a company does not co-operate. A company should also not overlook the significant scope for informal direct investigator-to-investigator co-operation. Agencies such as Interpol have dedicated programmes to share information between, and support investigations by, investigating agencies in different countries. Communications between the SFO and DOJ are frequent. The FCA, specifically, has a broad discretion to assist foreign regulators. This discretion is set out in section 169 of FSMA. The statutory power is supplemented by relevant FCA policy. Subsection 169(4) sets out the considerations in the FCA's decision as to whether to assist a foreign regulator. It provides:

> *(4) In deciding whether or not to exercise its investigative power, the regulator may take into account in particular:*
>
> *(a) whether in the country or territory of the overseas regulator concerned, corresponding assistance would be given to a United Kingdom regulatory authority;*
>
> *(b) whether the case concerns the breach of a law, or other requirement, which has no close parallel in the United Kingdom or involves the assertion of a jurisdiction not recognised by the United Kingdom;*
>
> *(c) the seriousness of the case and its importance to persons in the United Kingdom;*
>
> *(d) whether it is otherwise appropriate in the public interest to give the assistance sought.*

In an early decision on this section, *Financial Services Authority v. Amro International*,[30] the Court of Appeal held that there was nothing in section 169 that

29 See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A225%3AFIN.

30 *Financial Services Authority v. Amro International* [2010] EWCA Civ 123.

required the FCA's predecessor body to satisfy itself of the correctness of what it was being asked to investigate or gather by way of information. At the SEC's behest, the FCA could seek any document that it reasonably considered relevant to the investigation the SEC was conducting. The Court of Appeal made clear that the only requirements the FCA must meet were contained in the statute. The Court of Appeal also noted that in exercising these powers, the stricter rules attaching to the drafting of a subpoena did not apply and the description of the documents sought would be acceptable provided the recipient could identify the documents he or she was required to produce.

In addition to the FCA's statutory powers, a number of memoranda of understanding are in place between UK regulators and their overseas counterparts (most notably the SEC and other US regulators) concerning co-operation and information sharing. Recent years have seen significant co-operation between the SEC and the FCA and its cognate agencies.

See Section 11.2.3

Similarly, the United States has entered into mutual legal assistance treaties (MLATs) with various countries, which can be used for the sharing of information and taking of evidence abroad.[31] Some US authorities also have memoranda of understanding in place with sister agencies outside the United States, which can allow for inter-agency sharing of documents.

Data protection 11.2.4.3

Responding to an investigation (and conducting an internal investigation) will require data about individuals to be processed. Such an exercise will engage a number of data protection considerations.[32] A company cannot assume that complying with the data protection requirements in the investigated jurisdiction will mean compliance with overseas data protection laws. And local law may restrict a company's ability to transfer individual data overseas. The European Union's General Data Protection Regulation (GDPR) came into force on 25 May 2018 and applies within the EU and to those data controllers and processors outside the EU who offer goods and services to EU consumers. Chapter 5 of the GDPR deals with transfers of data to third countries (and international organisations) and re-enacts existing restrictions on transferring data to countries that do not have adequate privacy protections in circumstances where other 'appropriate safeguards' are not in place. The GDPR introduces a limited derogation to its principles based on 'compelling legitimate interests', which could cover non-repetitive transfers to

31 www.state.gov/j/inl/rls/nrcrpt/2012/vol2/184110.htm.

32 The United States does not have a comprehensive, federal data protection law. There are, however, numerous state and federal laws that govern the treatment of personal data. At the federal level, there are protections for, among other things, data collected from children, from financial institutions and that includes medical information. See, e.g., Federal Trade Commission Act, 15 U.S.C. §§ 41-58; Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506; Financial Services Modernization Act (Gramm-Leach-Bliley Act), 15 U.S.C. §§ 6801-6827; Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1301 et. seq (and the rules and regulations promulgated thereunder); Fair Credit Reporting Act, 15 U.S.C. § 1681.

See chapter X on data protection

foreign regulators, but would require prior notification to the relevant data protection authority.

11.2.4.4 Blocking statutes

Blocking statutes prevent the disclosure of certain documents for the purpose of legal proceedings in a foreign jurisdiction, except pursuant to procedures set out in an international treaty or agreement. Article 1bis of the French Blocking Statute provides:

> *[I]t is prohibited for any person to request, to investigate or to communicate in writing, orally or by any other means, documents or information relating to economic, commercial, industrial, financial or technical matters leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as a part of such proceedings.*

There has historically been very little enforcement of the French Blocking Statute – with some companies choosing to ignore it completely.[33] However, as a consequence of the Sapin II law, which was implemented in June 2017, the Parquet National Financier has begun to lead cases involving the enforcement of the Blocking Statute, signalling that the French authorities are considering the issues raised by the Blocking Statute in more depth. The French authorities have traditionally taken any derogation from the letter of the law seriously and insist on the use of mutual legal assistance requests and inter-agency communications. This can leave companies in the unenviable position of being caught between authorities (if the US authorities, for example, expect production direct from the corporate). In such circumstances, agency-to-agency communications should be encouraged. Similarly, Article 271 of the Swiss Criminal Code prohibits a person performing an 'official act' on behalf of a foreign authority on Swiss soil. This can block the collection of evidence located in Switzerland intended for use in proceedings outside the country.

A decision to refuse to disclose documents or information due to a blocking statute may not be respected by the requesting authority[34] and could affect any co-operation credit available – leaving the company between a rock and a hard place. This demands early and detailed dialogue with the relevant authority alongside expert local counsel advice who can educate the regulators about the relevant laws and any potential workarounds for production of information.

33 Despite its very protective wording, the French Blocking Statute has received a very limited application – only one criminal conviction (under art. 1, bis) has ever been recorded (Cass. Crim, 12 Dec. 2007, n°07-83.228).

34 For an English case dealing with the French Blocking Statute, see *Secretary of State for Health v. Servier Laboratories*; *National Grid Electricity Transmission v. ABB* [2014] WLR 4383.

Bank secrecy 11.2.4.5

Bank secrecy laws prohibit banking officials from releasing confidential information about a customer to third parties outside of financial institutions, unless compelled by law. Sometimes, such a disclosure is criminalised.[35] A bank under investigation may seek to rely on this secrecy. It should also be cautious not to infringe this secrecy inadvertently in providing information to a regulator. Note, though, that a historic deference to the banking secrecy rules of foreign jurisdictions, premised on comity or respect for the acts of foreign governments, may slowly be eroding. Even Switzerland, in recent times, has stripped away a number of its many layers of secrecy through international agreements,[36] and, in our experience, has become, in practice, more willing to co-operate with requests for information.

State secrets 11.2.4.6

Sending data outside a jurisdiction may be contrary to state secrecy laws. Some jurisdictions, such as China, have wide definitions of what amounts to a state secret. The Law of the People's Republic of China on Guarding State Secrets, at Article 8, defines state secrets to include 'secrets in national economic and social development' and 'secrets concerning science and technology'. Similarly, Kazakhstan treats some geological data as a state secret. The consequences of violation can be serious. Article 111 of the Chinese Criminal Law makes violating state secrets a capital crime. In countries such as China, where many companies are state-owned, this is not straightforward. Again, locating expert local counsel is a must.

State secrecy laws may also restrict certain categories of documents to authorised eyes only. This is particularly pertinent for defence companies. Withholding production of such documents will require careful negotiation. Remember that the investigating agency is likely to have authorised persons of its own, who can review the documents. Finding a practical way for these to be produced by external lawyers (where prior authorisation is unlikely) will likely be more difficult and undoubtedly will increase the time it will take to respond to a request for documents and may require the review of documents 'in country' instead of producing the documents to the US authorities. Another potential workaround is production of information through MLATs and MOUs that allow a company to first produce documents to a local authority and thereby comply with the relevant regulations.

Whose rules of privilege apply? 11.2.4.7

It may not be clear whose rules of privilege apply when a company discloses in one jurisdiction documents created in another. English courts will generally apply

35 See most famously Article 47 of the Swiss Federal Act on Banks and Savings Banks (1934).

36 See e.g. Switzerland's entrance, in October 2013, to the Multilateral Convention on Mutual Administrative Assistance on Tax Matters, and agreement to increase transparency and exchange financial information with approximately 60 other countries.

English law to the question: theoretically, an unprivileged document in its country of origin could be privileged in England and *vice versa*. In the United States, there is no general rule, although government agencies will generally apply privilege principles broadly, although subject to certain procedural requirements, such as the production of privilege logs.

Companies should also be aware that some countries do not have developed principles of legal privilege and special care is required in creating or sending otherwise-privileged documents to such jurisdictions. Likewise, in some jurisdictions privilege does not extend to communications with in-house counsel and the role of internal counsel may be held by someone who is not an attorney, and therefore privilege may not be recognised in connection with their communications.

Further complications come when dealing with international regulatory bodies. In *Akzo Nobel*, for example, the European Court of Justice held that the law of the European Union superseded that of the relevant national jurisdictions; therefore, in competition cases internal counsel's advice will not be privileged – nor will that of external legal advisers who are not EU-qualified lawyers.[37]

11.3 Documents obtained through dawn raids, arrest and search

During a raid (or execution of a search warrant) on corporate premises, it is important to seek to obtain and understand the terms of the warrant. Check simple facts such as the premises' address, the date and relevant powers and authorisations. If appropriate, a company may challenge the scope of the warrant (if it is unduly wide or based on erroneous facts or information). Importantly, the company and its advisers should ensure during the raid that documents outside the terms of the warrant are not seized (unless taken under relevant search and sift powers,[38] or as can be justified under ancillary legislation[39]) and take care both during the raid and afterwards to protect legally privileged materials. In the United States, it is nearly impossible to challenge the scope of a warrant that calls for the immediate search of a specific location. More likely, a company would have to seek to suppress evidence obtained pursuant to a warrant in a later proceeding. There may, however, be opportunities to challenge the scope of a warrant seeking electronically stored information before the data is actually collected and produced.[40] As an example, where a company is asked to execute a warrant on behalf of the

37 *Akzo Nobel Chemicals v. European Commission* (Case C-550/07, European Court of Justice, 14 September 2010). Here, the Court held that internal company communications with in-house lawyers subject to a European Commission investigation were not covered by legal professional privilege, as, for the purposes of such an investigation, an in-house lawyer was not sufficiently independent.

38 For the United Kingdom, see s.50 of the Criminal Justice and Police Act 2001.

39 See s.19(5) of the Police and Criminal Evidence Act 1984.

40 See *In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, F893 F.3d 197 (2d Cir. 2016) (finding that the government could not compel Microsoft to collect data held outside of the United States that was requested in a warrant issued pursuant to the Stored Communications Act).

government, such as when a service provider is asked to collect electronic information of a third party, there may be additional opportunities for a company to challenge the scope of a subpoena. It is likely that the vast majority of documents obtained during a search will be electronic. It is important to agree to a process with the authorities for dealing with any electronic media that is privileged. In the United Kingdom, most investigative agencies have developed sophisticated procedures in this area. The SFO's policy and system for dealing with material covered by legal professional privilege (LPP) is explained in its Operational Handbook:

> *When the SFO requires the production of material, or seizes material pursuant to its statutory powers, all material which is potentially protected by LPP must be treated with great care to:*
> - *Minimise the risk that LPP material is seen or seized by an SFO investigator or a lawyer involved in the investigation.*
> - *Ensure that any LPP material which is seized is properly isolated and promptly returned to the owner without having been seen by an SFO investigator or a lawyer involved in the investigation.*
> - *Ensure that any dispute relating to LPP is resolved in advance of the material being seen by an SFO investigator or a lawyer involved in the investigation.*
> - *Ensure that where an SFO investigator or a lawyer involved in the investigation inadvertently sees LPP material, measures are in place to ensure that the investigation and any subsequent prosecution is not adversely affected as a result. Care must always be taken that LPP material is <u>not</u> viewed by the SFO staff involved in the investigation.*[41]

The Operational Handbook then sets out a procedure for dealing specifically with electronic material that may be privileged. Under this procedure, the SFO will first notify the company's lawyers if it believes that IT assets it has seized might contain privileged material (in practice, it is prudent for the company's lawyers to advise the SFO of the potential existence of privileged material at an early stage). A list of search terms should be agreed (including names of lawyers, relevant firms, etc.) to enable the identification and isolation of the material for review by independent counsel. Independent counsel will review the material using search software and return only non-privileged material to the SFO investigative team to examine. It is normally possible to have productive discussions with investigators to determine the relevant search terms that might identify privileged material.

41 Cited in *R (on the application of Colin McKenzie) v. The Director of the Serious Fraud Office* [2016] EWHC 102, at [8] (original emphasis). In this unsuccessful challenge to this procedure the essential question was whether, as a matter of law, the process for isolating files that may contain LPP material into an electronic folder for review by an independent lawyer must itself be carried out by individuals who are independent of the seizing body. The court held that the procedure set out in the SFO's Handbook for isolating material potentially subject to LPP, for the purpose of making it available to an independent lawyer for review, was lawful.

It is then possible to make representations on the client's behalf to independent counsel about the extent of privilege. This procedure updates and works alongside the well-established 'blue-bagging' approach used for hard-copy materials that may be privileged, by which authorities will send seized documents that may be potentially privileged, sealed in an opaque bag, to the custody of an independent legal adviser (usually a barrister) for review.

The DOJ has utilised three different procedures for reviewing potentially privileged information, each of which requires a 'neutral' third party to first review potentially privileged data.[42] In certain instances the court may review the data on its own. A court may also appoint a 'special master' to handle the review of privileged information. In other instances, a team of individuals referred to as a 'taint team' may be used to review the files. When a taint team is used, an ethical wall will be placed between the individuals who review the documents and those who are actually participating in the investigation. Importantly, courts have had differing reactions to the use of taint teams and may not always conclude that the procedures implemented to screen materials were sufficient.

11.4 Disclosure of results of internal investigation

In most instances, a company will have to make expansive disclosures regarding its internal investigations to get full co-operation credit. The DOJ has issued guidance in the Justice Manual[43] that explicitly states that companies will have to self-report on both the results of internal investigations and on individual misconduct to receive any co-operation credit. Whether such thorough disclosures are in the best interest of the company is something that will need to be determined in a timely manner.

11.4.1 Self-reporting of misconduct not yet known to regulators

A company's decision as to whether to self-report is often complicated. There may be opportunities for a company to internally address misconduct without it coming to light. However, it can be very difficult for a company to keep its misdeeds from being disclosed to the relevant authorities. Whistleblower rewards provide incentives for employees to report misconduct. Federal statute provides protections for whistleblowers,[44] and in 2017 the SEC imposed financial penalties

42 See Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations available at https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf.

43 The Value of Cooperation, Justice Manual §9-28.700; Cooperation: Disclosing the Relevant Facts, Justice Manual §9-28.720; FCPA Corporate Enforcement Policy, Justice Manual § 9-47.120, available at https://www.justice.gov/criminal-fraud/file/838416/download (full cooperation requires, among other things, prompt disclosure of 'all facts related to involvement in the criminal activity by the company's officers, employees, or agents; and all facts known or that become known to the company regarding potential criminal conduct by all third-party companies (including their officers, employees, or agents').

44 See Section 922(h) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C.A. § 78u-6(h)(1)(A) (2010).

on financial institutions that attempt to prohibit employees from seeking those bounties.[45] Disgruntled employees can report corporate misconduct as retaliation, to attempt to prevent prosecution of themselves or simply because they do not feel that the corporate is handling the issue appropriately via its internal process. In the United Kingdom, broadly speaking, those working in the field of financial services are subject to suspicious activity reporting obligations. This means that banks, accountants and transactional lawyers must make reports to the authorities of suspicions of money laundering (including acquiring assets which may be tainted by fraud or corruption). A failure to make a report is a criminal offence – as is tipping off the subject of the report (which in some instances may be the individual's own client). Investigative journalism and NGOs also continue to be important sources of information for regulators – as the recent 'Panama Papers' scandal has shown.[46]

A failure to self-report misconduct before it becomes otherwise known to the authorities can have a significant impact on the resolution of the corporate investigation. The Justice Manual (which governs the conduct of assistant US Attorneys during the course of civil and criminal investigations, including FCPA investigations) provides that:

> *Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure, both as an independent factor and in evaluating the company's overall cooperation and the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution may be appropriate notwithstanding a corporation's voluntary disclosure. Such a determination should be based on a consideration of all the factors set forth in these Principles.*[47]

As we have already noted, under the FCPA Corporate Enforcement Policy (which has been incorporated into the Justice Manual), full co-operation requires, among other things, prompt disclosure of 'all facts related to involvement in the criminal activity by the company's officers, employees, or agents; and all facts known or that become known to the company regarding potential criminal conduct by all third-party companies (including their officers, employees, or agents'.[48] Moreover, the company will have to disclose 'on a timely basis of all facts relevant to the wrongdoing at issue, including: all relevant facts gathered during a company's

45 See https://www.sec.gov/news/pressrelease/2017-14.html (announcing penalty imposed on Blackrock Inc. based on its inclusion of language in separation agreements requiring former employees to waive any incentives they might be entitled to for reporting the company's misconduct); https://www.sec.gov/news/pressrelease/2017-24.html (announcing penalty imposed on HomeStreet Inc. for improper accounting and steps taken to impede whistleblowers).

46 The Panama Papers are available through the ICIJ's (The International Consortium of Investigative Journalists) dedicated website: https://panamapapers.icij.org/.

47 Justice Manual 9-28.900 (internal citations omitted).

48 FCPA Corporate Enforcement Policy, United States Attorneys' Manual, § 9-47.120, available at https://www.justice.gov/criminal-fraud/file/838416/download.

independent investigation; attribution of facts to specific sources where such attribution does not violate the attorney–client privilege, rather than a general narrative of the facts; timely updates on a company's internal investigation, including but not limited to rolling disclosures of information'.[49]

The Deferred Prosecution Agreements Code of Practice (DPA Code) issued by the SFO and CPS[50] indicates that, to be eligible for a DPA, a company will likely have to report voluntarily any misconduct within a reasonable time of becoming aware of it – and prior to it becoming known to the authorities. In fact, in both of the previous DPA cases,[51] the companies self-reported their misconduct to the SFO in circumstances where the SFO had no prior knowledge of the misconduct and, in all likelihood, would not have learnt about the misconduct if the company had not self-reported.

But, in the *Rolls-Royce* case, which was concluded by a DPA in January 2017, the company did not self-report to the SFO the conduct that led to the SFO's investigation. Instead, the SFO became aware of the need for an investigation through internet postings by a whistleblower. The fact that Rolls-Royce did not self-report weighed against the SFO offering a DPA; yet, Rolls-Royce chose to co-operate fully with the investigation after the SFO approached the company, and undertook its own internal investigation (in close consultation with the SFO). In total, Rolls-Royce collected over 30 million documents and subjected them to electronic document review as part of this investigation. One of the main features of Rolls-Royce's co-operation was that it provided all materials requested by the SFO voluntarily, without the SFO having to compel it to provide information. Rolls-Royce also chose not to perform any legal professional privilege review over the documents (instead allowing independent counsel to resolve issues of privilege) and worked with the SFO as the SFO used sophisticated artificial intelligence searches to interrogate the data. This process led to the SFO uncovering information that may not have otherwise come to its attention. Ultimately, SFO counsel described the extent of Rolls-Royce's co-operation with the investigation as 'extraordinary'.

While the decision to provide documents voluntarily to the SFO was one of a number of measures taken by Rolls-Royce to demonstrate its co-operation with the investigation, this decision was of fundamental importance to the court when deciding to approve the DPA. Rolls-Royce's voluntary disclosure of investigation documents therefore mitigated its failure to voluntarily disclose misconduct.

11.4.2 Production of reports of investigation

To obtain co-operation credit, prosecuting and government agencies require that companies provide the complete factual findings of an internal investigation, including relevant source documents. The Justice Manual recognises 'the

49 FCPA Corporate Enforcement Policy, United States Attorneys' Manual, § 9-47.120, available at https://www.justice.gov/criminal-fraud/file/838416/download.

50 Para. 2.8.2(i) DPA Code.

51 *SFO v. Standard Bank plc* (U20150854) and *SFO v. XYZ Ltd* (U20150856).

sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct.'[52]

Similarly, the DPA Code provides that co-operation will include 'providing a report in respect of any internal investigation including source documents.'[53]

Careful consideration should be given to the manner of disclosure of information. In the United States, the consideration for credit is that the relevant facts are disclosed. The format of the disclosure is irrelevant. The Justice Manual makes clear that a company does not have to waive privilege to receive co-operation credit.[54] If a company chooses not to waive relevant privileges, it is unlikely to be able to share the investigative reports prepared by counsel conducting the investigation. Instead, it will have to carefully craft presentations that disclose only non-privileged facts. Preparation of such reports can be time-consuming and costly. Further, in preparing any written presentation materials the company will have to ensure that neither the mental impressions nor advice of counsel are included. Because there can be no claim that the materials are privileged, a company should also expect that they will have to produce presentation materials in any related civil litigation.

In the United Kingdom, there is currently much debate over the production of the first accounts of witnesses, which may have been taken by investigating attorneys. The SFO's preference is that these are taken so that legal privilege does not apply. It also indicates that it does not consider all privilege claims over interview materials to be made out under English law and until the Court of Appeal's decision in *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation* (*ENRC*),[55] was actively challenging such assertions. Where a valid claim for privilege exists, co-operation credit will be given for the disclosure of interview memoranda. A failure to disclose will be considered co-operation neutral. As Alun Milford, then SFO General Counsel, has previously said, '[i]f a company's assertion of privilege is well-made out, then we will not hold that against the company: to do otherwise would be inconsistent with the substantive protection privilege offers.'[56] In two of the UK cases in which the court has approved DPAs, the company made oral disclosure only of the content of witness interviews.[57] However, Rolls-Royce chose to provide the interview memoranda to the

52 See Justice Manual 9-28.720 ('Cooperation: Disclosing the Relevant Facts').

53 Para. 2.8.2(i) DPA Code.

54 See Justice Manual 9-28.720. The FCPA Corporate Enforcement Policy, refers to Justice Manual 9-28.720 and states that a company will not have to waive privilege in order to receive full co-operation credit.

55 [2018] EWCA Civ 2006.

56 Alun Milford, then SFO General Counsel, 'Speech to compliance professionals'. (Speech given to the European Compliance and Ethics Institute, Prague, 29 March 2016.)

57 See e.g. *SFO v. XYZ* (Preliminary Judgment) Crown Court, Southwark, U20150856 (20 April 2016): '[C]o-operation includes identifying relevant witnesses, disclosing their accounts and the documents shown to them: see para. 2.8.2(i) of the DPA Code of Practice. Where practicable it will involve making witnesses available for interview when requested. In that regard,

SFO – even though it considered the memoranda to be privileged – on the basis of a limited waiver of privilege. This was another way Rolls-Royce used the voluntary disclosure of documents to counterbalance its failure to voluntarily disclose the misconduct. Other materials voluntarily provided to the SFO by Rolls-Royce included regular reports on the findings of the internal investigations; unfiltered access to the 'digital repositories or email containers' for over 100 past and present employees; general access to hard-copy documents at Rolls-Royce; and key documents identified by the internal investigations. Finally, Rolls-Royce held off interviewing potential witnesses until the SFO had the chance to do so. How a company makes its employees available to investigating authorities is important, and this chapter will now turn to this issue.

11.4.3 Identification of witnesses to authorities

In connection with its initial assessments of whether to co-operate with authorities, companies will have to consider the implications of disclosing information about key employees. As noted above, US and UK authorities have indicated that co-operation will require disclosure of facts relevant to the misconduct of individual employees.

In the United States, authorities have made clear that obtaining facts relevant to individual prosecutions is a top priority. The Justice Manual provides that '[i]n order for a company to receive any consideration for cooperation under this section, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct.'[58]

These principles have been incorporated into the FCPA Corporate Enforcement Policy. Additionally, the 'unequivocal co-operation' necessary to be eligible for a DPA in the United Kingdom includes identifying relevant witnesses, disclosing their accounts of the alleged misconduct and any documents shown to them and, where practicable, making those witnesses available for interviews by investigators[59] – together with ongoing co-operation with the authorities.

When seeking a DPA, a corporate should consider liaising closely with the SFO, which may wish to undertake witness, or interviews, under caution,[60] with

XYZ provided oral summaries of first accounts of interviewees, facilitated the interview of current employees, and provided timely and complete responses to requests for information and material, save for those subject to a proper claim of legal professional privilege.'

58 The Value of Cooperation, Justice Manual §9-28.700; see also Cooperation: Disclosing the Relevant Facts, Justice Manual § 9-28.720.

59 DPA Code, para. 2.8.2(i).

60 Where a defendant in the United Kingdom is suspected of committing a criminal offence, and is questioned in relation to it (whether while under arrest or voluntarily), the questioner must administer a 'caution' for any evidence provided in the interview to be admissible in subsequent proceedings. The caution sets out interviewees' rights and how any evidence they provide at interview may be used against them in a trial. An organisation or company can be interviewed under caution through a nominated spokesperson, who will attend the interview to answer questions on its behalf.

individuals prior to corporate counsel doing so. Once the individuals have been identified to the government or prosecuting authorities it may be difficult, if not impossible, for those individuals to continue working for the company. A company may feel pressure to terminate the employee or place that individual on leave, which could have a significant impact on the operations of a business unit. Even if the company does not terminate an employee under investigation, targets of a government investigation are likely to engage their own counsel who may advise the employee to stop co-operating with its employer – leading to a 'walk or talk' decision. Depending on the nature of any employment agreement, a company may have to advance the individual the fees and costs associated with individual representation. Also, since 2004, the United Kingdom has imposed an extensive Code of Practice for Disciplinary and Grievance Procedures on employers, which sets out standards of procedural fairness that a UK employer should comply with if it takes action that will detrimentally affect an employee's employment.[61]

See Chapters 13 and 14 on employee rights

Privilege considerations 11.5

In the United States, certain portions of internal investigations are protected by the attorney–client privilege and the work-product doctrine, and courts routinely uphold those privileges.[62] This can be true even where the purpose of an investigation is to ensure regulatory compliance, or where non-lawyers are involved in key parts of the investigation.[63]

Generally, the attorney–client privilege entitles a party to withhold from production (1) communications, (2) with an attorney, his or her subordinate or agent, (3) made in confidence, (4) for the primary purpose of securing an opinion of law, legal services or assistance in a legal proceeding. It applies to corporations as well as individuals, and therefore protects communications between corporate employees and a corporation's in-house and external legal counsel on matters within the scope of the employees' corporate responsibilities. Communications between non-legal corporate employees can also be privileged where an attorney neither authors nor receives the communication, if the communication contains or refers to previously transmitted legal advice or identifies specific legal advice that the non-attorneys will seek from attorneys in the near future. Additionally, the work-product doctrine protects documents and tangible things, otherwise discoverable, prepared in anticipation of litigation and in connection with a threatened or pending government investigation. The doctrine can apply to documents prepared by both attorneys and non-attorneys. Attorney notes, research, and

61 ACAS 'Code of Practice on Disciplinary and Grievance Procedures' (2015) available at www.acas.org.uk/media/pdf/f/m/Acas-Code-of-Practice-1-on-disciplinary-and-grievance-procedures.pdf.

62 See *In re Kellogg Brown & Root, Inc.,* 756 F.3d 754 (D.C. Cir. 2014).

63 Id. at 760. ('In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance programme required by statute or regulation, or was otherwise conducted pursuant to company policy.') (Citation omitted.)

compilations of background materials, memoranda, investigative reports, witness statements; and materials prepared by non-legal personnel such as investigators are examples of the types of documents that may be protected. Work-product containing an attorney's mental impressions is referred to as 'opinion' work-product and is afforded greater protection than other 'ordinary' work-product.

In the United Kingdom, privilege attaches to (1) confidential communications between a lawyer and his or her client for the purpose of seeking and receiving legal advice in a relevant legal context, including factual reporting (legal advice privilege), and (2) confidential communications between a lawyer and his or her client and/or a third party or between a client and a third party, provided that such communications have been created for the dominant purpose of obtaining legal advice, evidence or information in preparation for actual litigation, or litigation that is 'reasonably in prospect' (litigation privilege). English case law has traditionally called into question the availability of litigation privilege for documents created during a regulatory investigation, as an investigation alone lacks the adversarial character of litigation. In the recent *ENRC*[64] decision, the Court of Appeal looked at the issue of when a corporate might reasonably contemplate prosecution (and therefore the necessary 'litigation') in the context of a self-reporting process, commenting as follows:

> *[W]e are not sure that every SFO manifestation of concern would properly be regarded as adversarial litigation, but when the SFO specifically makes clear to the company the prospect of its criminal prosecution … and legal advisers are engaged to deal with that situation, as in the present case, there is a clear ground for contending that criminal prosecution is in reasonable contemplation.*[65]

But, the Court went on to say that no particular action in the course of engagement with a regulator will allow a company to say that at a particular date it contemplated a criminal prosecution and privilege crystallised. Every case will turn on its own facts, and the evidence will be assessed in the round.

The corporate must also have created the documents for the dominant purpose of the contemplated litigation. In *ENRC*, even where ENRC might have created documents for the dominant purpose of merely investigating 'the facts to see what had happened and deal with compliance and governance',[66] the Court said this:

> *Although a reputable company will wish to ensure high ethical standards in the conduct of its business for its own sake, it is undeniable that the 'stick' used to enforce appropriate standards is the criminal law and, in some measure, the civil law also. Thus, where there is a clear threat of a criminal investigation, even at one remove from the specific risks posed by the SFO should it start an investigation, the reason for the investigation of whistle-blower allegations*

64 [2018] EWCA Civ 2006.

65 At [96].

66 At [108].

> *must be brought into the zone where the dominant purpose may be to prevent or deal with litigation.*[67]

So, litigation privilege may well cover a significant proportion of documents created in the course of an internal investigation into possible criminal activity after the regulator has made clear there is a prospect of prosecution. Again, though, why the corporate created particular documents is important. If a corporate creates documents specifically to disclose to the regulator, then it seems unlikely that a claim to litigation privilege against that same regulator will succeed: at least in relation to the final versions of these documents.

The Court of Appeal also discussed the policy behind applying litigation privilege in this area:

> *It is, however, obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation. . . . The remedy for the SFO is not to allow prevarication and delay . . . to prevent a timeous investigation, when it becomes clear that the company is not wholeheartedly reporting its own conduct and making appropriate waivers of privilege.*[68]

It went on to make clear that determining the extent of co-operation by a company (in an analysis of whether a DPA was in the public interest) included determining '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'.[69] But, as noted above, past practice in both the United Kingdom and the United States suggests that a corporate does not need to waive privilege over all its investigation documents to receive co-operation credit.

On 2 October 2018, the SFO announced that it would not appeal the *ENRC* decision further to the Supreme Court.[70]

In presenting the underlying facts of an internal investigation, a company must be mindful of the inherent risk that such a presentation will be deemed a privilege waiver in any subsequent proceedings. If a disclosure of privileged information to a federal office or agency is deemed intentional, the privilege will be waived in any federal or state proceeding.[71] However, if a disclosure of privileged information is unintentional, it will not create a broad waiver so long as the holder of the

67 At [109].

68 At [116].

69 At [117].

70 Kirstin Ridley, 'UK fraud office backs down in ENRC privilege battle', Reuters (2 October 2018), available at https://uk.reuters.com/article/uk-britain-enrc-sfo/uk-fraud-office-backs-down-in-enrc-privilege-battle-idUKKCN1MC1N0.

71 See Fed. R. Evid. 502(a).

privilege took steps to prevent the disclosure and then promptly took reasonable steps to seek return of any inadvertently disclosed information.[72] Accordingly, if a company decides that it does not intend to waive privilege, it should devise reasonable steps that highlight the company's decision not to waive privilege, including providing written notice of the intention not to produce privileged materials in any letter or other correspondence that accompanies a document production. Courts in England and Wales have held that a company can share the contents of a privileged communication with a regulator or other third party, keeping the privilege intact, so long as this desire is made clear, the disclosure is confidential, and the communication is not proliferated widely.[73]

See Chapters 35 and 36 on privilege

11.6 Protecting confidential information

Companies producing information to the government should take steps to protect the confidentiality of that information. Although information produced in response to a grand jury subpoena must be kept confidential,[74] in the absence of a formal request, documents and testimony provided to the DOJ, SEC or other government authority can be shared with others. In many instances, documents under the control of a government agency can be subject to requests made pursuant to the Freedom of Information Act (FOIA).[75] Further, documents typically shielded from disclosure by the FOIA and other regulations are not exempt from production to the United States Congress, which can, in turn, make the information public.

The procedures necessary to shield confidential information from disclosure can be quite complex. Each regulatory body has its own procedures for seeking confidential treatment of information. The SEC, for example, requires that each page of a document containing confidential information be stamped with a specific legend and that a request for confidential treatment go to the individual receiving the documents and the Office of Freedom of Information and Privacy Act Operations.[76] Many states have their own versions of the FOIA governing the treatment of information provided to, among others, state attorneys general.[77] Further, while some congressional committees may implement their own procedures for seeking confidential treatment of information, an entity producing documents will have to consider what regulations apply to the information sought and whether the specific regulations prohibit disclosure in response to the request.

In the United Kingdom, the High Court confronted these issues in *Standard Life Assurance v. Topland Col*.[78] The SFO had disclosed information it had obtained through its section 2 powers to a Standard Life employee that it wished

72 See Fed. R. Evid. 502(b).

73 See *Gotha City v. Sotheby's* [1998] 1 WLR 114 (CA).

74 Fed. R. Crim. Pro. 6(e).

75 5 U.S.C. § 552.

76 17 C.F.R. § 200.83

77 See, e.g., New York Freedom of Information Law, Public Officer's Law §§ 84-90.

78 *Standard Life Assurance Ltd v. Topland Col* (Rev 1) [2011] 1 WLR 2162.

to interview. The SFO later discontinued the related investigation. Standard Life then used some of this information as part of civil proceedings against Topland. The court noted that the SFO was not entitled to disclose any material obtained by it during an investigation except for the purpose of its investigation (which was the original purpose of the disclosure in this case). A person who wished to prevent disclosure of genuinely confidential information, either by the SFO or by a person it had disclosed documents to, would need to rely on judicial review proceedings or seek an injunction to prevent a breach of confidence. This suggests that, to avoid relying on these indirect remedies, a company should agree with the SFO before disclosure how the SFO might control the further dissemination of confidential or sensitive documents. Safeguards may include the SFO returning the documents following a short time or notifying a disclosing party before the SFO intended to disseminate documents further. On the other hand, a company may also wish to construct potential safeguards around material produced to it during DPA negotiations and that may otherwise be discoverable in subsequent civil proceedings against it.

Concluding remarks 11.7

Companies have an incentive to co-operate with a government investigation, especially if co-operation credit does not necessarily require self-reporting of the misconduct. But self-reporting will assist companies alongside the voluntary provision of relevant materials. The additional advantages of co-operation – control of the investigation process, orderly production of materials and managing press intrusion – are likely to be great when weighed against the disruption and publicity of formal actions including raids, arrests and prosecutions. In cross-border investigations, companies will need to devise due process safeguards to protect the rights of individuals and respect local law requirements. Ensuring local law specialists are instructed to work as part of a multidisciplinary team will be key.

Appendix 1

About the Authors

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Hector Gonzalez advises corporations and executives on a wide range of matters, with a focus on complex commercial litigation, criminal and related civil and administrative matters, SEC and CFTC enforcement proceedings and internal, grand jury and state attorneys general investigations. In addition, he regularly represents clients in all aspects of Foreign Corrupt Practices Act (FCPA) and Racketeer Influenced and Corrupt Organizations Act (RICO) matters.

Mr Gonzalez has been consistently recognised for his white-collar criminal defence practice and his securities and shareholder litigation practice by *The Legal 500: United States*, which praises him as 'a great lawyer' in commercial litigation, having 'an extraordinary amount of expertise' in securities shareholder litigation, and being 'an excellent trial lawyer and strategic thinker who won't waste clients' time or money.' *Benchmark Litigation 2015* named Mr Gonzalez a Litigation Star for his white-collar defence practice and described him as 'one of the sharpest and most promising talents doing this work right now'.

Mr Gonzalez has significant trial experience, having tried more than 20 federal and state jury trials and argued more than 30 cases before federal and state appellate courts. Mr Gonzalez was previously an Assistant US Attorney in the US Attorney's Office for the Southern District of New York, where he served as Chief of the Narcotics Unit and was twice awarded the Department of Justice's Director's Award for Superior Performance.

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Her significant representations include advising the former chief executive officer of registered futures commission merchant and broker dealer in civil litigations and congressional and regulatory inquiries arising out of bankruptcy of former employer; the former chief risk officer of Fannie Mae against securities fraud charges filed by the SEC in the Southern District of New York; individuals and companies in class action lawsuits alleging violations of federal securities laws; individuals and companies in investigations commenced by the SEC, CFTC, Department of Justice, state attorneys general and Congress; and The Bank of New York Mellon in all aspects of litigation and SEC and CFTC investigations relating to the bankruptcy of Sentinel Management Group.

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Caroline Black is at the forefront of the corporate investigations field, acting as trusted adviser to companies and individuals involved in the world's largest and most complex cases for over a decade. She is a criminal defence and investigations lawyer by background, focused on cross-border regulatory or internal investigations. She advises organisations, boards and audit committees on conducting investigations and interacting with relevant national authorities, including the Serious Fraud Office, HM Revenue and Customs and the police (and their overseas equivalents). Ms Black focuses her practice on the investigation and defence of business crimes, particularly matters involving corruption, money laundering, fraud and tax concerns. She has received awards for training and management and has been recognised by *Global Investigations Review* as part of its 'Women in Investigations' issue, which highlighted 100 remarkable women in this field of law from around the world. Ms Black was named as a 'Rising Star' of litigation by *Legal Week* in 2016. She has also been recognised as a 'Rising Star' by *London Superlawyers*.

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William Fotherby focuses his practice on white-collar and securities matters. He acts for companies and individuals faced with serious criminal allegations, often involving bribery, corruption, or securities fraud. He also provides advice to state governments and private companies about criminal prosecution strategy. Finally, he has significant experience in civil litigation before the English courts.

Before joining the firm, Mr Fotherby worked as a barrister and solicitor at Meredith Connell, the Office of the Crown Solicitor for Auckland, New Zealand. In that role, he conducted numerous jury trials and other criminal hearings.

As part of Dechert's *pro bono* programme, he has helped a number of prisoners convicted of murder to challenge their convictions.

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